

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.8 Subordinate instruments

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Part 1—Introduction

1 This Drafting Direction notes some considerations, and sets out some standard forms, for drafting provisions of Bills dealing with subordinate instruments.

Part 2—Power to make subordinate legislation

Standard form of regulation-making power

2 The standard provision authorising the making of regulations should be as follows:

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

3 The paragraphing of the provision is to make it clear that the words “for carrying out or giving effect to this Act” do not qualify the words “required or permitted by this Act to be prescribed”.

4 There is no need to specify that the regulations are not to be inconsistent with the Act concerned (or any other Act), as courts will find invalid subordinate legislation that is inconsistent with the Act under which it is made (or other Acts or the common law).

Preconditions for the Governor-General making subordinate legislation

5 Provisions setting out a precondition for the exercise of a power for the Governor-General to make subordinate legislation should be drafted to make clear who has the responsibility for forming the opinion, or doing the thing, that is the precondition (see Drafting Direction 3.4).

Provisions for subordinate legislation to be made to do certain things

Provisions for subordinate legislation to modify, prevail over or amend an Act

6 If you are considering drafting a provision allowing subordinate legislation to make direct amendments or notional modifications of an Act, you must discuss the matter first with First Parliamentary Counsel. This is because such provisions can cause practical problems in accessing the current text of the law.

7 To avoid doubt whether subordinate legislation modifying an Act can add new provisions to the Act, omit provisions from the Act and substitute provisions of the Act, a provision for an Act to apply with modifications made by subordinate legislation should include a definition of *modifications* in the following form:

modifications includes additions, omissions and substitutions.

8 Although a provision in an Act authorising the modification of the Act by subordinate legislation would not ordinarily be construed as authorising an increase in a penalty, it should be made clear in such a provision that it does not extend to a modification by way of increasing a penalty provided for in the Act. Any such provision should be discussed with the Criminal Law Branch of the Attorney-General's Department (*AGD*).

Provisions for subordinate legislation to specify things by reference to classes

9 There is no need to state expressly that subordinate legislation may specify things by reference to a class of things (see section 46 of the *Acts Interpretation Act 1901* for non-legislative instruments and section 13 of the *Legislative Instruments Act 2003* (the *LIA*) for legislative instruments).

Scope of provisions

10 If you are not sure whether your provisions for making subordinate legislation are appropriate to allow subordinate legislation to be made to achieve the result that you understand that your instructors want, you should discuss the matter with the Office of Legislative Drafting and Publishing (*OLDP*) in AGD. This does not limit the requirement (under Drafting Direction 4.2) to refer to AGD provisions conferring or affecting a power to make subordinate instruments.

Part 3—The *Legislative Instruments Act 2003*

Determining whether an instrument is to be a legislative instrument

11 The *LIA* contains rules dealing with various matters (including disallowance and sunseting) relating to all instruments that fall within the definition of *legislative instrument* in the *LIA* (see sections 5, 6, 7, 9, 10 and 11 of the *LIA*).

12 Section 5 sets out a general definition of a legislative instrument. The issue of whether an instrument is a legislative instrument under that section is determined by *OLDP*. The issue of whether an instrument that would otherwise be a legislative instrument should be exempted from the *LIA* is determined by the Administrative Law and Civil Procedure Branch in the Civil Justice Division (*CJD*).

13 The *LIA* has lists of exemptions from the Act in its totality and from the disallowance and sunseting regimes in particular. (Some of these exemptions depend on the regulations.) However, there is still an expectation that all instruments that fall within the definition of a legislative instrument under section 5 will be subject to the full requirements of the Act unless there is a special reason that justifies a full or partial exemption.

Application of this Part of the Drafting Direction to certain subordinate instruments

14 This Part of the Drafting Direction applies to subordinate instruments that can only be made by a person in an official Commonwealth capacity. (A person may make an instrument in an official Commonwealth capacity even if the person is, or is acting on behalf of, a regulatory or other body that is legally separate from the Commonwealth.) For example, an application made by a private individual, or an election made by a taxpayer, would not be a subordinate instrument for the purposes of this Part of the Drafting Direction.

15 However, if you are in doubt as to whether this Part of the Drafting Direction should apply to a particular kind of instrument, then you should treat the kind of instrument as a subordinate instrument for the purposes of this Part of the Drafting Direction.

Generally the status of instruments to be expressly dealt with

The general rule

16 In future, subject to the comments in paragraphs 20 and 21, when you provide a power in a Bill to make a subordinate instrument, the status of an instrument made under that power as a legislative instrument, or not a legislative instrument, must be expressly dealt with. There are 4 main ways in which this might happen:

- (a) an instrument might be stated to be a legislative instrument under section 6 of the LIA;
- (b) an instrument might be stated not to be a legislative instrument under section 7 of the LIA (including by reason of regulations made for the purposes of that section);
- (c) an instrument might be stated to be a legislative instrument in a provision of the Bill you are drafting;
- (d) an instrument might be stated not to be a legislative instrument in a provision in the Bill you are drafting (either because it is not a legislative instrument under section 5 of the LIA, or because the instrument, despite being a legislative instrument under that section, is to be totally exempted from the LIA).

17 Rules of Court are stated under section 9 of the LIA not to be legislative instruments. However, under the enabling legislation providing the power to make the Rules, they are treated as if they were legislative instruments.

18 Because of the rule in paragraph 16, the mechanism in sections 10 and 11 of the LIA for the Attorney-General to certify whether an instrument is a legislative instrument should not be needed for instruments made under powers drafted in accordance with this Drafting Direction.

19 Generally, if you are amending an Act that already contains powers to make subordinate instruments, you do not need to clarify by express provision whether those

instruments are legislative instruments. However, you may do so if it would be appropriate to do so taking into account the amendments you are making, or if you are given instructions to do so.

The exception to the general rule

20 There is one exception to the rule that, when you provide a power to make a subordinate instrument, the status of every instrument made under that power must be expressly dealt with.

21 Some of the kinds of instruments specified in the regulations must relate to particular individuals to be covered by the regulations. For example, item 29 of Part 1 of Schedule 1 to the regulations clarifies that “an instrument remitting or waiving a penalty ... *in relation to a particular person*” [emphasis mine] is not a legislative instrument. Obviously, instruments that remit or waive a penalty in relation to a class of persons are not covered by the regulations and so their status would normally need to be expressly dealt with. However, if we did this, the benefit of including instruments that remit or waive penalties in the regulations would be lost.

22 Consequently, if a kind of instrument specified in the regulations is only covered by the regulations if it relates to a particular individual, you do not need to state expressly that an instrument of that kind that relates to a class of persons is or is not a legislative instrument. Instead, section 5 of the LIA will be relied on to determine the status of the instrument. (However, remember to check with your instructors that they are happy for the LIA to apply if that kind of instrument is a legislative instrument when it relates to a class of persons. If they are not happy with this outcome then you will need to include an express partial or total exemption from the LIA in one of the forms set out below.)

Whether an instrument is to be a legislative instrument

Referral of Bills to AGD

23 As mentioned in paragraph 12, the issue of whether an instrument is or is not a legislative instrument, or is to be exempted from all or part of the LIA, is ultimately a decision for either OLDP or CJD. Consequently, Bills should be referred to AGD in accordance with Drafting Direction 4.2.

Instruments that are already dealt with by the LIA or regulations

24 No further statement about the status of an instrument needs to be included in the Bill if the instrument is covered by either or both of the following paragraphs:

- (a) the instrument is expressly stated to be a legislative instrument under section 6 of the LIA;
- (b) the instrument is expressly stated not to be a legislative instrument under section 7 or 9 of the LIA (including by reason of regulations made for the purposes of section 7).

25 In addition, as mentioned in paragraphs 20 to 22, if regulations made for the purposes of section 7 of the LIA include an instrument of a kind that is only covered by the regulations

if it relates to a particular individual, then no further statement about the status of an instrument of that kind that relates to a class of persons need be included in the Bill (unless an exemption is required for the instrument).

26 A list of the regulations made for the purposes of section 7 of the LIA can be found in FOLIO Office Documents under Legislative Instruments Documents.

Instruments that are to be legislative instruments

27 If an instrument (other than one covered by paragraph 24 or 25) is to be a legislative instrument, and the entire LIA is to apply to the instrument, then you will need to state expressly in the Bill that the instrument is a legislative instrument. This can be done by using the expression “by legislative instrument” in the provision that gives the power to make the instrument. For example:

The Minister may, by legislative instrument, determine guidelines relating to ...

The use of this expression will ensure, because of section 15AE of the *Acts Interpretation Act 1901*, that the instrument is a legislative instrument for the purposes of the LIA.

28 If it is not possible to use the expression “by legislative instrument”, then the following form should be used:

A *[insert description of instrument]* made under *[insert enabling provision]* is a legislative instrument.

29 Sometimes a draft of an instrument is prepared by a body or person, but the instrument does not become a legislative instrument until another person or body approves or accepts the instrument. In this case, it is important to make clear, for the purposes of the LIA, who makes the instrument, and when the instrument is made. To do so, the following form should be used:

A *[insert description of instrument]* prepared by the *[insert preparer]* and approved by the *[insert approver or acceptor]* is a legislative instrument made by the *[insert approver or acceptor]* on the day on which the *[insert description of instrument]* is *[approved or accepted]*.

30 The statement that an instrument is a legislative instrument should be in a substantive provision in the Bill and not in a note.

31 Section 15AE of the *Acts Interpretation Act 1901* provides that if an instrument is described as a legislative instrument, then the instrument must be in writing

Instruments that are not to be legislative instruments

Express statement that instrument is not a legislative instrument

32 If an instrument (other than one covered by paragraph 24 or 25) is not to be a legislative instrument, then you will need to state expressly that the instrument is not a legislative instrument.

33 An instrument might not be a legislative instrument for 2 reasons. Firstly, the instrument might clearly not fall within the definition of *legislative instrument* in section 5 of the LIA. Secondly, although the instrument falls within this definition, the policy might be for the instrument to be wholly exempted from the LIA.

34 In either case, the standard form for dealing with such an instrument is as follows:

A [insert description of instrument] made under [insert enabling provision] is not a legislative instrument.

35 If you are providing a power to do something that, if done in writing, would not be a legislative instrument, and your instructors do not want to require the action to be done in writing, then you should include a provision like:

If the [insert description of instrument] is made in writing, the [insert description of instrument] is not a legislative instrument.

36 The statement that an instrument is not a legislative instrument should be in a substantive provision in the Bill and not in a note.

37 (As mentioned in paragraph 12, if your instructors are wanting to exempt an instrument from the LIA, they should discuss this with the Administrative Law and Civil Procedure Branch.)

Explanatory drafting notes

38 To assist the Senate Scrutiny of Bills Committee to understand the reasons for an instrument not being a legislative instrument, you should provide some guidance to your instructors about including an appropriate explanation in the explanatory memorandum.

39 For instruments that are not legislative instruments within the meaning of *legislative instrument* in section 5 of the LIA, you should include a drafting note under the relevant provision in the Bill along the following lines (which can be inserted using Alt + I):

[: You should explain in the explanatory memorandum that this provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003. If you do not do so, the Senate Scrutiny of Bills Committee is likely to query whether this provision is merely declaratory of the law or an actual exemption from the Legislative Instruments Act.]

40 For instruments that are being exempted from the LIA, you should include a drafting note under the relevant provision in the Bill along the following lines (which can be inserted using Alt + I):

[: You should explain in the explanatory memorandum that this provision is exempting the instrument from being a legislative instrument and give a detailed explanation of the justification for that exemption. If you do not do so, the Senate Scrutiny of Bills Committee is likely to query whether this provision is merely declaratory of the law or an actual exemption from the Legislative Instruments Act. In addition, the Civil Justice Division of the Attorney-General's Department must be consulted to ensure that they agree to the exemption.]

41 The Administrative Law and Civil Procedure Branch are happy to assist instructors to draft their Explanatory Memorandum in relation to issues raised by the LIA.

Powers to create some legislative instruments and some instruments that are not legislative instruments

42 In a certain small number of cases, there might need to be power to make some instruments that are legislative and some instruments that are not legislative. In these cases, you should create 2 separate enabling powers: one to enable the making of legislative instruments, and the other to enable the making of non-legislative instruments. You must also describe the tests that are to be used to determine which of the 2 powers to use. OLDP or CJD will give you advice on the nature of the tests.

43 For example:

- (1) The *[insert name of rule-maker]* may make a *[insert description of instrument]* that *[insert condition eg applies to a specified person or a specified entity]*.
- (2) A *[insert description of instrument]* made under subsection (1) is not a legislative instrument.
- (3) The *[insert name of rule-maker]* may, by legislative instrument, make a *[insert description of instrument]* that *[insert condition eg applies to a class of persons or entities]*.

44 If you are drafting a provision of this kind, you should ask your instructors whether they need the ability to make a non-legislative instrument that covers more than one individual or entity. If this is intended, you should tailor your provision to achieve this.

45 Although, the nature of the tests will be advised on by OLDP or CJD, you should ensure that it will be easy to apply the tests and determine under which power an instrument is to be made. If you do not think that the tests meet this requirement, then you should speak to First Parliamentary Counsel.

46 As discussed in paragraphs 20 to 22, some kinds of instruments specified in the regulations must relate to particular individuals in order to be covered by the regulations. Unless your instructors envisage that instruments of those kinds could be made in relation to classes of persons, you do not need to comply with paragraphs 42 to 45 in relation to those kinds of instruments.

Partial exemptions from the LIA

Exemptions from the disallowance regime

47 If:

- (a) an instrument (other than one covered by paragraph 24 or 25) is to be a legislative instrument; and
- (b) the policy is that the disallowance regime should not apply to the instrument;

then you will need to state this expressly. The standard form in such a case is as follows:

A *[insert description of instrument]* made under *[insert enabling provision]* is a legislative instrument, but section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to the *[instrument]*.

48 This form of provision (with appropriate modifications) can also be used in the cases described in paragraph **Error! Reference source not found.**

49 There are a number of generically-described instruments included in a table in subsection 44(2) of the LIA that are exempt from disallowance. However, you should not rely on the table to exempt an instrument from disallowance (as it is often difficult to determine whether a particular instrument is an instrument of a kind mentioned in the table), nor should new disallowance exemptions be included by amending the table in that section.

50 If an instructing department wants to provide for a different means of disallowance (for example, by shortening the period for disallowance), then you would exempt the legislative instrument from the disallowance regime and provide for the alternative regime. (However, any alternative regime must be discussed with the Administrative Law and Civil Procedure Branch as their preference is not to allow alternative regimes.)

Exemptions from the sunseting regime

51 If:

- (a) an instrument (other than one covered by paragraph 24 or 25) is to be a legislative instrument; and
- (b) the policy is that the sunseting regime should not apply to the instrument;

then you will need to state this expressly. The standard form in such a case is as follows:

A *[insert description of instrument]* made under *[insert enabling provision]* is a legislative instrument, but Part 6 (sunseting) of the *Legislative Instruments Act 2003* does not apply to the *[instrument]*.

52 This form of provision (with appropriate modifications) can also be used in the cases described in paragraph **Error! Reference source not found.**

53 Again, there are a number of generically-described instruments included in the table in subsection 54(2) of the LIA that are exempt from sunseting. For the same reasons as mentioned above, you should not rely on the table to exempt an instrument from disallowance, nor should new sunseting exemptions be included by amending the table in that section.

54 Any exemption from the sunseting regime should be discussed with the Administrative Law and Civil Procedure Branch.

Exemptions from both the disallowance and the sunseting regimes

55 If:

- (a) an instrument (other than one covered by paragraph 24 or 25) is to be a legislative instrument; and

- (b) the policy is that neither the disallowance nor the sunseting regime should apply to the instrument;

then you will need to state this expressly. The standard form in such a case is as follows:

A [insert description of instrument] made under [insert enabling provision] is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunseting) of the Legislative Instruments Act 2003 applies to the [instrument].

56 This form of provision (with appropriate modifications) can also be used in the cases described in paragraph **Error! Reference source not found.**

Explanatory drafting notes

57 To assist the Senate Scrutiny of Bills Committee to understand the reasons for an instrument being exempted from either or both the disallowance or the sunseting regimes, you should provide some guidance to your instructors about including an appropriate explanation in the explanatory memorandum.

58 You should include a drafting note along the following lines (as the case requires) under the relevant provision in the Bill. (The drafting note can be inserted using Alt + I):

[You should explain in the explanatory memorandum the reason why this instrument is being exempted from the disallowance regime/the sunseting regime/the disallowance and sunseting regime.]

Providing for other requirements for legislative instruments

Publication and delivery requirements

59 You may require a legislative instrument to be published or delivered. These requirements are additional to the requirement to register a legislative instrument (see subsection 56(2) of the LIA).

60 If you do require a legislative instrument to be published or delivered, you should be aware that **making**, in relation to a proposed or actual legislative instrument, is defined in section 4 of the LIA to mean “the signing, sealing or other endorsement of the instrument by the person or body empowered to make it whereby it becomes or became that legislative instrument”. Therefore, any publication or delivery requirements should occur *after* a legislative instrument is made (rather than being the process by which the instrument is made). One way of doing this is to require a *copy* of the instrument, once made, to be published or delivered.

61 As all legislative instruments are required to be registered on the Federal Register of Legislative Instruments, the need for legislative instruments to be published in future should be less common (and the need for legislative instruments to be published in the *Gazette* in future should be very unusual). However, if you are required to include a requirement that a copy of a legislative instrument be published in the *Gazette*, then you should use the following form:

The Minister may, by legislative instrument, make a *[insert description of instrument]*.

In addition to the requirement under the *Legislative Instruments Act 2003* for the [instrument] to be registered, a copy of the [instrument] must be published in the *Gazette*.

62 The reason for the form of words in paragraph 54 is to make it clear on the face of the statute book that the particular Gazettal requirement is covered by subsection 56(2) of the LIA (which states that certain Gazettal requirements are additional to registration requirements) and not subsection 56(1) of the LIA (which states that certain Gazettal requirements are taken to be satisfied by registration). You should also adopt a similar form of words (as appropriate) in the case of other methods of publication (such as publication in a newspaper) for consistency.

63 You might also need to consider whether a failure to publish the instrument as required affects the validity of the instrument.

Tabling requirements

64 The obligation to table a legislative instrument always lies on AGD (although that obligation only arises once the instrument is lodged with them for registration). There should not be any need to provide for any different tabling requirements for legislative instruments.

Part 4—Instruments that are not legislative instruments and the *Acts Interpretation Act 1901*

65 The *Acts Interpretation Act 1901* contains provisions relating to instruments that are not legislative instruments: see sections 46, 46AA and 46B of that Act.

66 In particular, section 46B provides for disallowable (non-legislative) instruments. An instrument is only a disallowable (non-legislative) instrument if it is expressly stated to be so. The form of provision for providing for such an instrument is the following:

An [insert description of instrument] made under [insert enabling provision] is not a legislative instrument, but is a disallowable instrument for the purposes of section 46B of the *Acts Interpretation Act 1901*.

Part 5—Other provisions of Bills dealing with or affecting regulations

Provisions referring to regulations

67 It is generally undesirable to refer in an Act to a particular set of regulations or a particular numbered provision of a set of regulations, because the reference could easily be made incorrect. However, if you must include such a reference, it should be in the form provided by the regulations as the name or citation of the regulations (see Word Note 4).

Provisions amending regulations

68 Acts should not amend regulations except for compelling reasons (e.g. a need to amend a regulation retrospectively in a way that adversely affects a person's rights or imposes new liabilities contrary to the *Acts Interpretation Act 1901* or the LIA). If you are

instructed to draft a provision amending regulations, you should discuss the matter with First Parliamentary Counsel.

69 If it is decided that an Act must amend regulations, you should take care to ensure that:

- (a) any amending regulations with suspended commencements will not affect the amendments to be made by the Act (and OLDP is aware of the proposed amendments and the instructing Department is aware of the need not to make amending regulations that could affect the amendments to be made by the Act); and
- (b) the standard form of the clause “activating” amending Schedule(s) is changed to reflect the fact that regulations are being amended; and
- (c) the regulations that are amended by the Act can be further amended or repealed by regulations.

70 The usual form of the clause to achieve this is as follows:

3 Schedule(s)

- (1) Each Act, and each set of regulations, that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
- (2) The amendment of any regulation under subsection (1) does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General.

71 The following subsection is considered unnecessary and should not be included:

- (3) To avoid doubt, regulations amended under subsection (1) are taken to still be regulations.

Amendments of definitions in enabling Act relied on in regulations

72 Although there is conflicting jurisprudence on the effect of an amendment of a definition in an Act on existing regulations or other instruments (compare *Birch v Allen* [1942] 65 CLR 621 with *Kostrzewa v Southern Electricity Authority of Queensland* [1970] 120 CLR 653), AGS favours the view that the meaning of a term in regulations is the meaning that the term has from time to time in the empowering Act (see Opinions, Vol. 100, 6826, and opinion reference 2001020519 dated 31 May 2001, and DC Pearce and RS Geddes *Statutory Interpretation in Australia*, 5th edition, paragraphs 6.32 to 6.35). Accordingly, you should draft on the assumption that changes in definitions in a principal Act will flow through to the regulations.

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