

PARLIAMENTARY COUNSEL

Drafting Direction No. 1.5 Definitions

Note: This Drafting Direction contains references to the “head drafter”. It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC.

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Part 1—Introduction

- 1 This Drafting Direction deals with the form of definitions.
- 2 Other matters relating to definitions are dealt with in other Drafting Directions and office documents.
- 3 Those other matters are noted in the table in Attachment A.

Part 2—One expression, one meaning

The principles

- 4 Legislation will tend to be easier to understand if a reader:
 - (a) can easily find whether a particular expression is defined; and
 - (b) can be confident that an expression has the same meaning throughout the legislation.
- 5 For this reason, drafters should (subject to the exceptions mentioned below):
 - (a) ensure that there is a general definitions section that contains definitions of all expressions defined in the legislation; and
 - (b) avoid defining an expression to have different meanings in different provisions of the same legislation; and
 - (c) avoid defining, in one provision of legislation, an expression that is used in its ordinary meaning in another provision of the legislation.

If you intend to depart from these principles in relation to new principal legislation, you should raise this with the head drafter.

- 6 A general definitions section should go near the start of the legislation, and for each expression that is defined in the legislation, contain:
 - (a) a full definition of the expression for the legislation; or
 - (b) a “signpost definition” of the expression, indicating the provision where the expression is defined fully.

7 The heading to the general definitions section should be “Definitions” (plural), even if there is only one definition in the section.

8 The general definitions section in an instrument will often include a note referring to expressions defined in the parent Act. If such a note is included, it should be positioned directly under the section heading and formatted in note(text),n style. It should be drafted in line with the following example:

Note: A number of expressions used in this instrument are defined in the Act, including the following:
(a) curfew period;

- (b) curfew shoulder period;
- (c) the Annex.

9 Generally, it should not be necessary to include more than about 5 defined terms from the Act.

10 Occasionally (particularly for large, complex legislation), it is useful to be able to define an expression differently in relation to different things. For example, in the *Fair Work Act 2009* there is the following definition:

covers:

- (a) in relation to a modern award: see section 48; and
- (b) in relation to an enterprise agreement: see section 53; and
- (c) in relation to a workplace determination: see section 277.

This approach can be a powerful tool when used appropriately. You should discuss the use of this approach with the head drafter.

11 Similarly, it may very occasionally be necessary to define a term to have different meanings for different Parts of legislation. However, this should be most uncommon and the agreement of the head drafter is required for this to occur.

12 An implication of the principles in paragraph 5 is that it should generally not be necessary to indicate the scope of a definition outside the general definitions section (along the lines of “In this Part/Division/Subdivision/[*provision*]”). This is because the scope of each definition should ordinarily be the whole of the particular legislation (and so the general definitions section should start “In this [*legislation*]:”).

13 Paragraph 12 does not stop drafters using “just in time” definitions. An expression may still be defined in the provision to which it is most relevant. However, the definition should be one that applies throughout the legislation (even if the expression is not currently used elsewhere). If an expression is defined in the provision to which it is most relevant, rather than in the general definitions section, a signpost definition should be included in the general definitions section.

14 When using a “just in time” definition, the defined term should be formatted with bold and italics. If the definition is set out using multiple subsections, the defined term should be formatted in bold and italics in each subsection that forms part of the definition.

The exceptions

General exception

15 There are circumstances in which it is better not to apply the principles in paragraphs 5 and 12.

16 The most common of these circumstances is when a drafting precedent requires an expression to be defined for the purposes of a particular provision, such as a precedent that provides for an expression in a particular provision to have the same meaning as in other legislation or in the Constitution.

Example: In an “Historic Shipwrecks” clause, the expression ***acquisition of property*** is given the same meaning as in paragraph 51(xxxi) of the Constitution. When used elsewhere in the same Act in relation to a statutory authority’s powers, ***acquire property*** has its ordinary meaning.

17 In other cases, where a defined term is particular to the single section in which it is used, it may be less confusing for readers if the term is defined in that section exclusively for the purposes of that section (and consequently not signposted in the general definitions section). Drafters should use their judgement in deciding whether an exception to the principles in paragraphs 5 and 12 on this basis is warranted and discuss difficult cases with the head drafter. In judging whether to take this approach, the following principles should be applied:

- (a) consistency throughout the legislation is desirable;
- (b) it is generally desirable not to clutter the general definitions section with signposts to labels for concepts that are only used in a single context;
- (c) if a defined term is generic, it may be useful to be able to use the same term again in an obviously different context for a different concept without needing to include a relational definition in the general definitions section as mentioned in paragraph 10.

Formulas

18 A term may be defined for a limited purpose where the term is a component of a formula and the term is only defined for the purposes of the formula. Before doing this, the drafter should consider whether it would be better to define the term for broader use, particularly if the same component with the same definition is used in more than one formula.

Transitional, savings or application provision

19 In Acts or instruments containing a Part or a Schedule that contains transitional, savings or application provisions, terms may be defined for the purposes of that Part or Schedule or for particular sections or clauses of the Schedule. This is because these terms are often very specific to those provisions.

Applying the principles to existing legislation

20 Drafters should apply the principles in paragraphs 5, 6 and 12 (subject to the exceptions) in drafting new legislation.

21 In drafting provisions for existing legislation, drafters should apply the principles in paragraphs 5 and 12 if doing so is consistent with the legislation's existing structure. If the legislation already contains separate "definition" provisions for particular Parts etc., drafters should continue to observe that structure. However, drafters should still avoid defining an expression that is already defined elsewhere in the legislation if it is possible to come up with another reasonably appropriate expression.

"Tags" not required to be treated as definitions

22 A provision that "tags" a concept with a label does not need to be treated as a "just in time" definition for the purposes of this Part if:

- (a) the concept is not used outside of the narrative of that provision in a way that requires the tag to have a meaning independent of that narrative; and

- (b) the provision does more than just tag the concept (i.e. the provision is not just a definition).

Examples

23 In the following example, subsection 10(1) tags “initial decision” only for the purposes of the narrative that runs through subsections 10(1) and (2). As such, it is not necessary to treat subsection 10(1) as a definition of “initial decision”.

10 Reconsideration of other decisions

- (1) A person who makes a decision (the *initial decision*) under this Act other than a reviewable decision may reconsider the decision if the person is satisfied that there is sufficient reason to do so.
- (2) After reconsidering the initial decision, the decision maker must:
 - (a) confirm the initial decision; or
 - (b) vary the initial decision; or
 - (c) set the initial decision aside and substitute a new decision.

24 If the legislation contained the following section, subsection 10(1) would need to be treated as a definition of “initial decision” and a signpost to that definition included in the general definitions section. This is because section 11 uses “initial decision” outside of the narrative of section 10.

11 Notice of initial decisions

A person who makes an initial decision under this Act must, as soon as practicable and in writing, notify the person to whom the decision relates of the following matters:

- (a) the decision;
- (b) the effect of section 10;

...

25 In the following example sections 392-35 and 392-70 are not required to be treated as definitions, because although subsection 392-75(1) uses the terms “basic amount” and “notional amount” outside of the narrative of sections 392-35 and 392-70, the subsection does not treat those terms as having a meaning independent of that narrative.

392-35 Stage 1—working out your basic amount

Work out the amount (the *basic amount*) of tax that would be payable on your *basic taxable income for the *current year if ...

...

392-70 Working out your tax at the notional rate

Work out the amount (the *notional amount*) of tax that would be payable on your *basic taxable income for the *current year if ...

...

392-75 Working out the kind of adjustment and making it

- (1) Compare your basic amount worked out under section 392-35 with your notional amount worked out under section 392-70. ...

Part 3—Qualifying definitions (“unless the contrary intention appears”)

No qualifying

26 In the past, drafters have often qualified the opening words of a definition provision with a phrase along the lines of “unless the contrary intention appears” or “except so far as the contrary intention appears”.

27 This qualification is not to be used in drafting new principal legislation.

28 This applies to all kinds of definitions (including referential definitions—“A reference to X is taken to be a reference to Y”—which for some reason were rarely qualified in this way in any case).

29 It is a matter for the drafter’s discretion whether an unqualified definition can be incorporated into existing legislation, or whether amending provisions should be drafted in a manner consistent with the existing provisions of the legislation. Generally, drafters should try to avoid qualifying new definitions if possible.

Reasons to avoid qualifying

30 The qualification should be avoided:

- (a) because it is unnecessary; and
- (b) because it is unhelpful.

31 Express qualification is unnecessary as it is likely that the qualification is implied in any case.

32 Pearce and Geddes: *Statutory Interpretation in Australia* (7th ed) includes the following comments:

...all definitions of the meaning of words or phrases used in legislation are to be read either expressly or impliedly as subject to the qualification “unless the contrary intention appears”: *Hall v Jones* (1942) 42 SR (NSW) 203;...
Transport Accident Commn v Treloar [1992] 1 VR 447 at 449

.....

the context in which defined words are used will dictate their meaning. So it can be that the context in which a defined term is used will indicate that the definition is not intended to apply: *Palos Verdes Estates Pty Ltd v Carbon* (1991) 72 LGRA 414 at 442; *Gidaro v Secretary, Department of Social Security* (1998) 154 ALR 550 at 561; *Repatriation Commn v Vietnam Veterans’ Association of Australia NSW Branch Inc* (2000) 171 ALR 523 at 548.

(page 254-256)

33 The qualification is unhelpful because it does not tell the reader *where* a contrary intention exists. It may instead sow doubt in the reader’s mind as to whether he or she can ordinarily rely on defined terms having their defined meaning.

Part 4—Defining acronyms and initialisms

Avoid using acronyms

34 This Part deals with definitions for terms that are expressed as acronyms or initialisms (e.g. “PPO” for “Private Postal Officer”). In this Part, *acronym* includes initialism.

35 The usual argument for using an acronym is to reduce the length of provisions. However, an acronym can often be meaningless to those who have not been involved in the development of the provisions. For this reason, acronyms should generally be avoided.

Acceptable acronyms

36 However, there are a number of acronyms that are used in multiple places across the statute book. These kinds of acronyms are usually the name of a body having functions under a range of legislation. Examples include AAT, ACCC and ASIC. Use of acronyms of this kind is acceptable, and the acronym should be defined along the lines of:

AAT means the Administrative Appeals Tribunal.

ASIC means the Australian Securities and Investments Commission.

37 In general it will not be necessary to go on and say “...established under section 6 of the *Administrative Appeals Tribunal Act 1975*” etc. However, there are a range of factors to consider (see Drafting Direction 3.6).

38 Another acceptable acronym is *ADI* (see Drafting Direction 2.2 for the definition).

Using legislation-specific acronyms: 2 approaches to defining

39 You may use an acronym that is specific to particular legislation (rather than an acronym of the kind mentioned in paragraph 30), if you consider that:

- (a) there is a strong case for using the acronym (e.g. there was a strong case for using the acronym “GST” rather than the full term “goods and services tax” when drafting the GST Bill because, at the time of drafting, GST was a commonly used and understood term); and
- (b) there is no effective, alternative drafting approach that could be used to avoid using the acronym (e.g. drafting the provisions in the narrative style).

40 If you decide to use an acronym that is specific to particular legislation, there are 2 approaches to use when defining it. Which of the 2 approaches is to be used depends on whether only the acronym is used (outside the definition of the acronym), or whether both the acronym and the full term are used outside the definition of the acronym.

First approach—only the acronym is used

41 If only the acronym is used (i.e. there are no references to the full term, except for the initial reference to the full term for the purpose of setting up the acronym), then only the acronym is to be defined in the definition provision, with a reference to the full term of that acronym included in that definition. For example:

PPO (short for Private Postal Operator) means an entity (other than Australia Post) that provides a postal or similar service, whether or not that entity also provides other services.

Second approach—both the acronym and full term are used

42 If both the acronym and the full term are used outside the definition of the acronym, then both the full term and the acronym should be defined in the definition provision as one definition (with the full term placed before the acronym), and the acronym should also be listed in the definition provision with a signpost to the full term. For example:

PPO: see *Private Postal Officer*.

Private Postal Officer or *PPO* means an entity (other than Australia Post) that provides a postal or similar service, whether or not that entity also provides other services.

Defined terms that include an acronym

43 If a defined term includes an acronym (for example, *AFP member* or *APRA member*), the definition may refer only to the acronym if the acronym is not legislation-specific, or only the acronym is used in the provisions. For example:

APRA member means a member of APRA, including the Chair and Deputy Chair [where “APRA” is defined in the legislation].

44 However, if the acronym is not used in the provisions, or the full term is also used, the definition should refer to the full term. For example:

AFP member means a member or special member of the Australian Federal Police [where “AFP” is not used in the legislation].

Part 5—Using definitions instead of incorporating other legislation

Background

45 In the past, a technique has been used of providing that legislation is taken to be “incorporated” with other legislation. The main purpose of the incorporation provision was to ensure that definitions included in one piece of legislation would also apply in the other. The technique was commonly used in tax legislation which had to be split into several separate Bills to satisfy section 55 of the Constitution. For instance, section 4 of the *Medicare Levy Act 1986*, which imposes medicare levy, provides for the incorporation of the *Income Tax Assessment Act 1936*.

Problems with “incorporation” approach

46 However, incorporation provisions have been found to “muddy the waters” in the section 55 context. As well, of course, they are a fairly indirect and obscure way of achieving the relevant aim, and are therefore unlikely to be helpful for readers.

Using definitions instead of incorporation

47 For these reasons, incorporation provisions should not be used. Instead, you should include, in the legislation that does not contain the definitions, a provision to the effect that expressions used in specified legislation have the same meaning in the first-mentioned legislation as they do in the specified legislation. For instance:

An expression used in this Act [an Act imposing long service leave payroll levy] has the same meaning as in the *Coal Mining Industry (Long Service Leave) Levy Collection Act 1992*.

48 You should take care if you are using this form to adopt expressions used in the *Income Tax Assessment Act 1936*, or any legislation in which a single expression is given different meanings for different parts of the legislation. In such cases, you will need to ensure that the appropriate definition is adopted.

Part 6—Referring to existing definitions or meanings

Background

49 When drafting a provision that uses an expression that is intended to have the same meaning as it has in another provision, it is common not to include an expanded definition of that term for the new provision, but rather:

- (a) to include a signpost definition that refers to the other provision where it is in the same legislation; or
- (b) to include a provision stating that the expression has the same meaning as in another piece of legislation.

50 This Part sets out a number of factors that drafters should consider before using this technique.

Consider repeating the definition

51 Generally, if a particular expression is defined in an existing provision and you want to use that same expression with that defined meaning in another provision of the same legislation or of other legislation, you should consider repeating the whole of that definition rather than referring to the existing provision (even if this involves repeating large amounts of text). This approach avoids the need for the reader to access another provision in order to find out the meaning of that expression.

52 However, if you want to use an expression that is (or is intended to be) consistently used across the statute book with the same meaning, it may be preferable for the new provision to refer to the existing provision in which that expression is defined. This provides for greater consistency across the statute book by ensuring that the expression will always

have the same meaning when used in various provisions. If the meaning of that expression needs to be changed across the statute book, it is easier to do so by amending a single definition to which all other provisions refer.

53 If you are considering including a definition in draft legislation that is intended to have the same meaning as it is given by other legislation, you should consider whether the other legislation has any provisions that might cause confusion about the intended meaning of the term in your draft legislation. If it might, avoid drafting in a way that could cause any confusion. For example, if the other legislation defines the relevant expression in a definitions section but also contains provisions that limit operation or make exclusions this can cause confusion as to whether the occurrences of the expression in your legislation are intended to simply have the meaning given by the definitions section as opposed to the meaning given by the definitions section as read down in accordance with all of the provisions in the other Act. (For more information see *New South Wales v Williamson* [2012] HCA 57 and *Certain Lloyd's Underwriters Subscribing to Contract No IHOOAAQS v Cross* [2012] HCA 56, both decided by a 3:2 majority.)

Definitions that rely on the making of a decision, judgement or legislative instrument

54 Drafters should be careful when referring in a new provision to an existing definition that relies on the making of a decision, judgement or legislative instrument. This is because there could be confusion about who the decision or judgement-maker will be in the context of the new provision, or because a legislative instrument made for the purposes of the existing definition may not make sense for the new provision.

55 Consider, for example, an existing definition that relies on “the Secretary” forming an opinion. If a new provision refers to that existing definition but is to be administered by a different Department, then, for the purposes of the new provision, it could be unclear which Secretary is to form that opinion.

56 If the whole of the definition were repeated, it would be clear that the Secretary of the Department that administers the new provision would need to form that opinion. However, if the expression is to be used consistently across the statute book, it may be preferable to refer to the existing definition. If this approach is adopted, the new provision should make it clear which Secretary is to form the relevant opinion for the purposes of the new provision.

Signpost definitions—attracting a meaning that a term has in another provision or other legislation

57 There is a variety of expressions that may be used in signpost definitions to attract a meaning that a term has in another provision. You should be aware that these terms are not always interchangeable. You should consider whether it is appropriate to include a signpost definition for a term in the definitions provision for the entire legislation if the full definition of the term in the same legislation only has effect for a Part, Division or other provision of that legislation. Having regard to the “one expression, one meaning” principle, it would be unusual, at least for new principal legislation, for definitions to only have effect for a Part, Division or Subdivision.

58 If you are amending legislation that defines a term for the purposes of a Part, Division or other provision of that legislation (and does not define that term in any other way) and you

want to use that term outside of that Part, Division or other provision, you may include a signpost definition of that term in the definitions provision for the entire legislation in the form:

[term] has the meaning given by provision *[insert reference]*.

Before doing so, you should check whether that term is used in any other provision of that legislation and, if so, whether it is appropriate for the signpost definition of that term to apply for the purposes of that provision. You should also consider whether it would be more appropriate to move the content of the definition to the definitions provision for the entire legislation. If it is not appropriate to move the content of the definition, you should, if possible, amend the provision defining that term to make it clear that the provision is defining that term for the entire legislation.

“: see [provision]” definitions

59 Sometimes a definitions provision in legislation may include a “: see [provision]” definition for a term. That definition must refer to another provision of the same legislation that defines the term. For example:

4 Definitions

(1) In this *[legislation]*:

carer: see section 5.

5 Definition of *carer*

[Content of definition].

“Within the meaning of” and “Has the same meaning as in”

60 The expressions “within the meaning of” and “has the same meaning as in” may be used any time you want to attract the meaning that a term has in another provision.

Example 1:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

Example 2:

(1) This Act is not a taxation law within the meaning of the *Taxation Administration Act 1953*.

“As defined in” and “As defined by”

61 The expressions “as defined in” and “as defined by” may be used to attract the meaning that a term has in another provision if that provision contains a definition of that term (including a definition that extends the ordinary meaning of that term or a definition that excludes something from the ordinary meaning of that term).

“Has the meaning given by”

62 The expression “has the meaning given by” may be used to attract the meaning that a term has in another provision if that provision gives that term a meaning other than by way of a definition that extends the ordinary meaning of that term or a definition that excludes something from the ordinary meaning of that term.

63 For example, it would be correct to say “*citrus* has the meaning given by the XYZ Act” if the XYZ Act contained a definition of “citrus” in the form “*citrus* means...”. However it would be incorrect to use the expression “has the meaning given by” if the XYZ Act contained a definition of “citrus” in the forms of “*citrus* includes an apple” or “*citrus* does not include an orange”.

“Has a meaning affected by”

64 The expression “has a meaning affected by” may be used in a signpost definition to refer to another provision that affects the meaning of a term in circumstances where it would be inappropriate to use the expression “has the meaning given by”. This might be because the provision:

- (a) defines the term by way of an inclusive or exclusive definition; or
- (b) provides that a reference to the term includes a reference to some other term; or
- (c) allows another instrument to affect the meaning of the term; or
- (d) contains a deeming rule and it would help to make readers aware of that rule by including a signpost definition.

“Within the meaning given by”

65 You should not use the expression “within the meaning given by”. This is because there are very few occurrences of this expression on the statute book and drafters should be able to achieve the same outcome using one of the other expressions mentioned above.

Part 7—Other matters

Conjunction use in definitions

66 If a definition is set out using paragraphs, use the conjunction “or” if the definition is in the form “*x* means” but use “and” if the definition is in the form “*x* includes”. Alternatively, you can avoid the use of conjunctions in many cases by using “any of the following” (for “means” definitions) or “the following” (for “includes” definitions).

67 For example:

domestic animal means:

- (a) a cat; or
- (b) a dog; or
- (c) an alpaca.

domestic animal means any of the following:

- (a) a cat;
- (b) a dog;
- (c) an alpaca.

domestic animal includes:

- (a) a cat; and
- (b) a dog; and
- (c) an alpaca.

domestic animal includes the following:

- (a) a cat;
- (b) a dog;
- (c) an alpaca.

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First Parliamentary Counsel
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| Document History | | |
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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 5 of 2005.

Attachment A—Other matters relating to definitions

| Other matters relating to definitions dealt with in other Drafting Directions | | |
|---|---|--|
| Item | Matter | Office document(s) |
| 1 | Amendment of definitions, defined terms and lists of defined terms | Word Notes 4.2 and 4.6 Amending Forms Manual |
| 2 | Asterisking defined terms | Drafting Direction 1.6 |
| 3 | Asterisking defined terms in the Tax Code | Drafting Direction 1.8 |
| 4 | Commencement tables using defined terms | Drafting Direction 1.3 |
| 5 | Definition of <i>ADI</i> | Drafting Direction 2.2 |
| 6 | Definitions of <i>Australia</i> (in geographical sense) | Drafting Direction 3.10 |
| 7 | Definition of <i>contiguous zone</i> | Drafting Direction 3.3 |
| 8 | Definition of <i>continental shelf</i> | Drafting Direction 3.3 |
| 9 | Definition of <i>exclusive economic zone</i> | Drafting Direction 3.3 |
| 10 | Definition of <i>insolvent under administration</i> | Drafting Direction 2.2 |
| 11 | Definition of <i>minerals</i> | Drafting Direction 2.2 |
| 12 | Definition of <i>modifications</i> (of an Act by subordinate legislation) | Drafting Direction 3.8 |
| 13 | Definition of <i>oath</i> (to include affirmation) | Drafting Direction 3.9 |
| 14 | Definition of <i>offence against this</i> [<i>Legislation/Part/Division/provision</i> etc.] | Drafting Direction 3.5 |
| 15 | Definition of <i>swear</i> (to include affirm) | Drafting Direction 3.9 |
| 16 | Definition of <i>territorial sea</i> | Drafting Direction 3.3 |
| 17 | Definitions relevant to statutory and other bodies (e.g. <i>member, relevant money, relevant property, accountable authority, Commonwealth company, control, paid work, borrowing</i> and references to bodies or offices created by other legislation) | Drafting Direction 3.6 |
| 18 | Matters relating to subordinate legislation (e.g. effect of amending definitions in Acts on subordinate instruments and definitions of legislative instruments covered by general powers) | Drafting Direction 3.8 |
| 19 | Format of definitions and cross-references to definitions | Word Notes 4.1, 4.2 and 4.6 |
| 20 | Headings to definitions sections | Plain English Manual, paras 148 and 149 |
| 21 | Lists of defined terms (Dictionaries) | Word Note 4.2 |
| 22 | Location of definitions | Plain English Manual, paras 139 to 142 |
| 23 | Order of definitions starting with numbers | Word Note 4.2 |
| 24 | Power not to be conferred by definition | Drafting Direction 3.4 |
| 25 | Referential definitions | Plain English Manual, paras 151 to 153 Drafting Direction 1.8 |
| 26 | Signposts to definitions | Plain English Manual, para. 143 |
| 27 | Changes to definitions using FPC's editorial powers and via statute law revision amendments | Drafting Direction 4.4 |
| 28 | Tax Code rules about use of definitions | Drafting Direction 1.8 |
| 29 | Use of definition of <i>fringe benefit</i> from the <i>Fringe Benefits Tax Assessment Act 1986</i> | Drafting Direction 2.2 |
| 30 | Use of various other definitions and expressions in draft legislation | Drafting Direction 2.2 |

Other matters relating to definitions dealt with in other Drafting Directions

| Item | Matter | Office document(s) |
|-------------|---|---------------------------|
| 31 | Defined terms and simplified outlines | Drafting Direction 1.3A |
| 32 | Defining <i>related</i> provision and other terms relevant to implementing the Regulatory Powers Act in relation to legislative schemes | Drafting Direction 3.5A |

68 Note that the Plain English Manual is given the status of a Drafting Direction by Drafting Direction 2.1.