

Drafting instructions template (Instruments)

Instructing agency:

Instructing agencies must use this template unless otherwise agreed with the Instrument Team Leader for your portfolio.

Refer to the Attachment for additional guidance on how to use this template.

Summary for executive review

Proposed name	<i>What is the proposed name of the instrument? For ExCo instruments, note if it is different to the name used in the bid for the instrument.</i>	
Kind of instrument	<input type="checkbox"/> ExCo instrument <input type="checkbox"/> non-tied instrument <i>An ExCo instrument is made by the Governor-General and must be drafted by OPC under the Legal Services Directions. A non-tied instrument is not required to be drafted by OPC under the Legal Services Directions.</i>	<input type="checkbox"/> amending instrument <input type="checkbox"/> new principal instrument <input type="checkbox"/> sunseting remake
Scope of instructions	Are these instructions for the whole of an instrument or one or more measures for an instrument? <input type="checkbox"/> whole instrument <input type="checkbox"/> one or more measures <i>Choose whole instrument if the instructions cover everything to be included in the instrument. Choose one or more measures if the instructions:</i> <ul style="list-style-type: none">• <i>cover one or more measures to be included in an instrument with other measures not covered by the instructions; or</i>• <i>supplement instructions already provided on a measure.</i>	
Date of issue	<i>Note the date you are issuing the instructions to OPC. If you are reissuing previous instructions, note the date the previous instructions were issued to OPC.</i>	
Priority	<i>For ExCo instruments, note the priority category included in the bid for the instrument and which bidding cycle it relates to. If a bid variation request has been made for the instrument, state the priority category included in the variation and which bidding cycle it relates to.</i>	
Policy authority	Does the instrument, or measure, have policy authority from the Cabinet or the Minister? <input type="checkbox"/> yes <input type="checkbox"/> no <i>If yes, provide details of the policy authority. If no, include reasons why it has not been possible to obtain the policy authority and when the policy authority will be obtained.</i>	
Size	<input type="checkbox"/> small <input type="checkbox"/> medium <input type="checkbox"/> large <i>As determined by Instrument Drafting Guidance Note No. 1.3.</i>	

Complexity	<input type="checkbox"/> low <input type="checkbox"/> moderate <input type="checkbox"/> high <i>As determined by Instrument Drafting Guidance Note No. 1.3.</i>
Exposure draft	Is an exposure draft required? <input type="checkbox"/> yes <input type="checkbox"/> no
Timeframes	Date by which instrument is to be made: <i>For ExCo instruments, indicate any Federal Executive Council meeting target dates.</i> Date by which final instrument is needed: <i>This should take into account, for example, the time needed to obtain agency and Ministerial clearances and any applicable ExCo cut-off dates.</i> Other critical dates and why: • <i>For sunseting remakes, also indicate the sunseting date.</i> <i>Refer to Instrument Drafting Guidance Note No. 1.4.</i>
Signatory details	<i>For ExCo instruments, note which Minister will counter-sign the instrument.</i> <i>For non-tied instruments, note the person or body who will make the instrument.</i>

Details of instructing team

Lead instructor	Name: Position/level: Branch/division: Email: Phone: Availability (note part-time hours or upcoming leave):
Secondary instructor	Name: Position/level: Branch/division: Email: Phone: Availability (note part-time hours or upcoming leave):
Responsible SES officer	Name: Position/level: Division/group: Email: Phone:

Note: The instructors nominated should be able to explain and discuss the detail of the instructions with the drafter (even if the instructions originate from another area of the agency). If there are both legal and policy instructors, please indicate who the drafter should contact in the first instance. Initial instructions should be cleared at SES level unless otherwise agreed with the Instrument Team Leader for your portfolio. For urgent

ExCo instruments that do not have general policy authority, initial instructions should be sent by an SES officer in the instructing agency.

Quotes and billing (for non-tied instruments only)

Quote	<p>Is a quote required?</p> <p><input type="checkbox"/> yes <input type="checkbox"/> no</p> <p><i>OPC generally does not provide fixed quotes but an estimate of the likely cost for OPC to draft a non-tied instrument can be provided.</i></p> <p>If no, is the instrument covered by an existing quote or standing billing arrangement with OPC?</p> <p><input type="checkbox"/> yes <input type="checkbox"/> no</p> <p><i>Provide details of the existing quote or standing arrangement.</i></p>
Contact for quotes and billing	<p>Name:</p> <p>Position/level:</p> <p>Branch/division:</p> <p>Email:</p> <p>Phone:</p>
Preferred payment method and other details (if applicable)	<p><i>Provide details of the instructing agency's preferred payment method and any other details relevant to the billing process (for example, any applicable purchase order or purchase request number to be included in invoices).</i></p>

Part A. Core matters

The drafter needs to understand the policy objectives of the instrument or measure and why legislation is needed to achieve them. This includes understanding how the instrument fits into the scheme set up by the enabling legislation and what the source of power is for each element of the instrument.

Please help your drafter by:

- *numbering your paragraphs;*
- *succinctly summarising any background information;*
- *identifying all enabling provisions that are being relied on;*
- *using plain language, explaining any technical terms and using terms from the enabling legislation or from the instrument to be amended (where applicable);*
- *including examples and real-life scenarios where applicable;*
- *specifying any precedent provisions or legislative schemes used as a model when developing the instructions;*
- *not providing instructions in the form of pre-written draft legislation (instructions proposing exact words don't give the drafter the necessary information and context to help them understand why particular wording is being suggested);*
- *if the instructions are a reissue of previous instructions, making clear what the differences are between the reissued instructions and the previous instructions.*

Instructions should generally only be sent once they have been settled. If any aspects of your policy are still under consideration or subject to change, these aspects should be clearly identified, including what needs to occur before they will be settled and how long this will take.

Overview

1. Source of power

Identify the enabling legislation that authorises the making of the instrument or measure.

The enabling legislation will generally be an Act that authorises an instrument to be made via one or more enabling provisions.

Identify all of the enabling provisions that are being relied on for the instrument or measure.

If a general instrument-making power in an Act (e.g. a power for the Minister to make rules prescribing matters required or permitted by the Act to be prescribed) is being relied on for the instrument or measure, you should identify not only the general instrument-making power as an enabling provision but also each provision of the Act that requires or permits the prescribing of the particular matters the instrument or measure will deal with.

If different enabling provisions are being relied on for different aspects of the instructions, identify which enabling provisions relate to which aspects of the instructions.

Note: You may choose to identify the relevant enabling provisions and which aspects of the instructions they relate to as part of the detailed instructions below, depending on what makes most sense for your project.

Identify any conditions that apply to the exercise of power under the enabling provisions (eg. any preconditions that must be satisfied) and how those conditions will be satisfied.

2. Key policy objectives

Briefly outline the key policy objectives that will be achieved by making the instrument.

For amending instruments, describe:

- *how the current instrument operates;*
- *the policy problem (i.e. why the amendments are needed);*
- *the policy solution (i.e. what the amendments will achieve).*

For new principal instruments, describe:

- *the policy objectives of the instrument, in a big picture sense and in relation to each element of the proposal;*
- *how the instrument will interact with the policy implemented by the enabling legislation.*

For instruments that are sunseting rewrites:

- *provide a policy overview of the existing instrument that will be replaced;*
- *describe any policy changes that will be implemented as part of the sunseting rewrite and the reasons those changes are needed.*

Instructions

3. Detailed instructions

This is where you provide detailed instructions, including instructions covering any relevant matters from the checklist in Part D.

Detailed instructions should address what is to be done and why:

- *If a single detail is to be prescribed, what is to be prescribed?*
- *Who will the new legislation apply to?*
- *When will it apply and what will it apply in relation to? (time, circumstances or conditions)*
- *What must or must not be done?*
- *How will any legal obligations imposed by the new legislation be enforced?*

Identify the provisions to be amended (if applicable).

Note: If the instrument will implement more than one measure, you should provide detailed instructions and consider the checklist for each measure separately. You may choose to provide one general overview or a general overview for each measure, depending on what makes most sense for your project.

It may be helpful to add your own subheadings and group the information relevant to each measure according to topic or theme.

Where individual measures are not closely interlinked or are being progressed separately (e.g. by different instructing teams), you may choose to provide instructions for each measure in separate templates.

4. Consequential amendments

Consider whether consequential amendments of any existing Acts or instruments will be needed, including those administered by other agencies.

Consequential amendments are additional amendments required as a result of the main changes being made. Consequential amendments may range from purely technical changes to substantial changes required by creating or changing concepts or rules, or by abandoning old ones.

As instructors, it is important to conduct a thorough search of all Acts and instruments, so all necessary consequential amendments are identified. This will ensure other legislation is updated to reflect the main changes being made.

To help identify consequential amendments, search the [Federal Register of Legislation](#) or other online databases for references to relevant provisions, concepts or rules. These searches are a good starting point but also consider any consequential amendments that are of a policy or legal nature and cannot be identified by textual searches.

5. Commencement

State when the proposed instrument should commence. Note that different provisions or parts of the proposed instrument can commence at different times.

A number of factors may need to be considered in deciding what commencement will be appropriate, such as whether:

- the proposed instrument needs to commence as soon as possible;*
- the proposed instrument needs to commence at the same time as another piece of legislation or the occurrence of some other event;*
- the proposed instrument will be made under a provision of an Act that has received Royal Assent but has not yet commenced (see section 4 of the Acts Interpretation Act 1991).*

[OPC's Drafting Direction 1.3 – commencement provisions](#) discusses these considerations in more detail. You may also wish to discuss these considerations with the drafter.

6. Application and transitional matters

What arrangements are needed to transition from the current law to the new law? When do the changes need to apply?

Are there any circumstances where the current law should continue to apply? (e.g., to a process that has begun, but not yet been finalised, or to an offence committed before commencement).

7. Related projects (if applicable)

Identify any Bills, other instruments or measures that are related to this one. This provides drafters with visibility so they can consult with each other.

A Bill may be related to your instrument or measure because it contains, or amends, an enabling provision relied on by your instrument or measure or because it amends an Act, or provides for a new principal Act, that requires consequential changes to be made to subordinate legislation.

Another instrument or measure might be related to your instrument or measure because it will make changes consequential to your instrument or measure, or implement another aspect or tranche of the same policy.

Part B. Legal advices

Note any relevant legal advices and attach copies – e.g., from your agency’s legal area or the Australian Government Solicitor. OPC will respect the confidentiality of all legal advices provided.

Part C. Consultation with other agencies

Note any consultations with other agencies that you have had or intend to have.

It is your responsibility to consult agencies who have whole-of-government responsibility for a matter your instrument or measure deals with or who administer the legislation being amended, particularly if they might have their own views on policy matters dealt with in the Bill.

OPC will refer drafts of ExCo instruments (and, with the agreement of instructors, drafts of non-tied instruments) to other agencies in accordance with [Drafting Direction 4.2](#) (see Attachments A and B of that direction for a detailed list of referrals), but this is generally done towards the end of a project and should not be viewed as a substitute for instructor consultation at an early stage.

If further guidance is needed, refer to [OPC’s drafting services: a guide for clients](#) and Drafting Direction 4.2.

Note that the Legislation Act 2003 also requires a rule-maker, before making a legislative instrument, to be satisfied that any consultation the rule-maker considers to be appropriate and reasonably practicable has been undertaken. This requirement applies to all legislative instruments. For further information, see Chapter 7 of OPC’s [Instruments Handbook](#).

Part D. Checklist

This checklist is a prompt for you to check whether the detailed instructions provided above cover the relevant matters. You must consider each item below. If the item is relevant, you must check the box and provide details in the instructions at point 3 above. Refer to the Attachment for further guidance on each item.

Check the box if this item is relevant, and details are provided in the instructions:

- ☐ **Retrospectivity**
- ☐ **Reliance on necessary or convenient power**
- ☐ **Incorporation of other documents by reference**
- ☐ **Compliance with obligations**
- ☐ **Review of administrative decisions**
- ☐ **Subdelegation of legislative power**
- ☐ **Delegation of administrative powers and functions**
- ☐ **Matters requiring express authorisation**
- ☐ **Matters relating to sunseting remakes**

Submitting this template

When this template has been completed, email it in Word format to instrument.instructions@opc.gov.au with the appropriate security markings.

Attachment: Guidance on this template

About this template

This template has been designed to help instructors from Australian Public Service agencies provide OPC drafters with the information needed to produce clear and legally effective legislation.

As instructors, you are the subject matter experts and the experts in your portfolio's legislation. As drafters, we need you to provide us with all relevant information. We're especially interested in understanding the policy – its objectives, rationale and impact on existing legislation – what changes are required and why?

The instructing and drafting process is very much a team effort. It is also iterative, so your drafter will most likely reach out to you with questions.

Completing this template

To help you complete this template, explanatory text is provided below.

Further information is available in [OPC's drafting services: a guide for clients](#). You can also phone OPC's instrument client advisers on (02) 6120 1390.

Guidance on specific questions

Proposed name

What is the proposed name of the instrument? For ExCo instruments, note if it is different to the name used in the bid for the instrument. Information on the rules that OPC applies when naming instruments can be found in [Drafting Direction 1.1A](#). Your drafter can also advise on a suitable name.

Kind of instrument

See [Instrument Drafting Guidance Note No. 1.1](#) for information about deciding if a non-tied instrument should be drafted by OPC.

An amending instrument repeals or amends one or more existing instruments.

A new principal instrument sets up, or is part of setting up, a new legislative scheme.

A sunseting remake replaces an existing instrument that is due to sunset.

Scope of instructions

A measure is a particular policy proposal or decision (e.g. a policy decision to prescribe new functions for dog inspectors), under which there may be several more detailed policy decisions (eg. what limits should apply to the new functions).

A measure may relate to an enabling provision that is a hook for a single detail or to one element of a scheme that relies on an enabling provision that is a coat hanger for the whole scheme.

A measure may be included in an instrument with one or more other measures (sometimes referred to as an omnibus instrument). Some agencies instruct on measures in an instrument together, while some instruct on individual measures and combine them into a single (omnibus) instrument before finalisation. OPC can work with either approach, but it is useful to know up-front what the instructions cover.

Date of issue

Note the date you are issuing the instructions to OPC. If you are reissuing previous instructions, also note the date the previous instructions were issued to OPC and briefly state the effect of any changes that have been made since the instructions were previously issued. Any changes should also be clearly outlined in the reissued instructions (including at Part A as applicable) to help ensure the

drafter understands what has changed.

Priority

For ExCo instruments, OPC has a prioritisation system similar to that for Bills. For non-tied instruments, there is no formal priority system.

For further information on priority for instruments, see [OPC's drafting services: a guide for clients](#).

Policy authority

For ExCo instruments, OPC requires instructing agencies to obtain general policy authority from the Minister (or the Cabinet) before sending drafting instructions to OPC. Instructions will generally not be allocated to a drafter until a copy of the authority from the Minister (or the Cabinet Minute number and date) is provided to OPC.

For urgent ExCo instruments that do not have general policy authority, drafting instructions may be sent to OPC by an SES officer in the instructing agency. The instructions should explain the reasons for the urgency, why it has not been possible to obtain the policy authority and when the policy authority will be obtained.

For non-tied instruments, to ensure resources of the instructing agency and OPC are efficiently used, it is advisable to ensure that the Minister or other rule-maker has approved the general policy to be implemented in the instrument.

Size

Very few instruments or measures are actually small. The size of the project may be larger than you realise.

Refer to [Instrument Drafting Guidance Note No. 1.3](#).

Please note that Instrument Team Leaders review all instructions before allocating them to an appropriate drafter. It is important to accurately assess the size of your project so that OPC can deal with the instructions appropriately.

Complexity

Very few instruments or measures are actually simple. The project may be more complex than you realise.

Refer to [Instrument Drafting Guidance Note No. 1.3](#).

Please note that Instrument Teams Leaders review all instructions before allocating them to an appropriate drafter. It is important to accurately assess the complexity of your project so that OPC can deal with the instructions appropriately.

Exposure draft

Producing exposure draft legislation generally takes the same amount of time as producing final legislation.

If an exposure draft is to be released, in planning your legislative project, you will also need to consider the time needed to consult on an exposure draft and address any feedback. This includes the time needed to obtain appropriate authorisation to release the exposure draft and the time needed for OPC to draft any changes following consultation.

Timeframes

Include all critical dates, including interim ones. For ExCo instruments, indicate any Federal Executive Council meeting target dates. For sunseting remakes, indicate the date when the existing instrument will sunset. Other critical dates may include the date by which an exposure draft is needed and any internal deadlines in your agency, such as for agency and Ministerial clearances.

If further guidance is needed, refer to [Instrument Drafting Guidance Note No. 1.4](#).

Also note that the ability to meet deadlines will depend on when drafting resources are allocated. This will depend on when drafting instructions are issued, the priority of the instrument and other whole-of-government priorities.

Details of instructing team

As the key policy and/or legal instructors from your agency, provide your contact details, including availability.

In addition to being able to explain and discuss the detail of the instructions with the drafter, the instructors will need to be able to check whether drafts meet the agency's requirements and fulfil the policy intent. The lead instructor need not be the person with the highest level on the project.

Quotes and billing (for non-tied instruments only)

The drafting of non-tied instruments is billable work for OPC. Instructing agencies can ask OPC to provide an estimate of the likely cost for OPC to draft a particular instrument. OPC generally does not provide fixed quotes and will need to see the drafting instructions before a quote can be given.

You should let OPC know of any particular billing arrangements for your agency.

Core matters

If further guidance is needed, refer to [OPC's drafting services: a guide for clients](#).

About each question in the checklist

Retrospectivity

Will the instrument be expressed to commence retrospectively (that is, before it is registered)?

Will any aspect of the instrument apply retrospectively?

If yes, have you considered the application of subsections 12(1A) and (2) of the *Legislation Act 2003*?

Does the enabling Act for the instrument expressly exclude the application of those subsections?

Have you obtained any legal advice about the application of those subsections?

See also Chapter 3 of [OPC's Instruments Handbook](#) and Division 2 of Part 1 of [OPC's Drafting Direction 1.3](#).

Reliance on necessary or convenient power

Will any provisions in the instrument rely, for their source of power, on the necessary or convenient power?

Have you obtained legal advice confirming that the necessary or convenient power authorises the proposed provisions?

Further information about the necessary or convenient power is available in [OPC's Drafting Direction 3.8](#).

Incorporation of other documents by reference

Will the instrument apply, adopt or incorporate some or all of another document, with or without modification (for example, to require compliance with an industry code or standard as in force from time to time)?

If yes, have you considered the application of section 14 of the *Legislation Act 2003*, or does the enabling Act for the instrument expressly override the application of that section?

See also, [OPC's drafting services: a guide for clients](#).

Compliance with obligations

If the instrument will impose obligations, what will the consequences of non-compliance be?

If the instrument will contain criminal offences, civil penalties or other infringement and enforcement provisions, is this authorised by the enabling legislation?

Are the amounts of any penalties authorised by the enabling legislation?

See also, [OPC's drafting services: a guide for clients](#) and [AGD's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#).

Review of administrative decisions

If the instrument will confer a power to make administrative decisions, should merits review, judicial review or both be available?

Merits review should generally be made available where a decision will or could detrimentally affect the rights and interests of individuals.

Judicial review will generally be available unless an express exemption applies.

If a decision will be discretionary, consider whether to include criteria to guide the decision-maker in the exercise of the power.

Information about different kinds of review, and other issues to consider when creating a new decision-making power, is available in the [Australian Administrative Law Policy Guide](#).

Subdelegation of legislative power

Will the instrument confer power to make another instrument? (This is commonly referred to as "subdelegation" because the making of the instrument is itself an exercise of delegated legislative power).

Is this subdelegation expressly authorised by the enabling legislation? If not, have you obtained legal advice as to whether it will be a valid subdelegation of legislative power?

See also, [OPC's drafting services: a guide for clients](#)

Delegation of administrative functions and powers

If the instrument will confer administrative functions or powers on a person or body, should they be able to delegate those functions or powers, and if so, to whom?

The range of functions or powers to be delegated, and the class of persons to whom they may be delegated, should be specified and as limited as practicable.

Note that the Senate Scrutiny of Delegated Legislation Committee expects delegations to members of the Australian Public Service to be limited to members of the SES or equivalent.

Matters requiring express authorisation

Will the instrument contain provisions that do any of the following:

- impose a tax, determine the tax base or rate of a tax (or an aspect of the tax base or rate);
- determine the amount of money to be appropriated by a standing appropriation;
- modify an Act;
- confer judicial power;
- confer power to charge fees;
- prohibit conduct or an activity (as opposed to regulating the conduct or activity);
- interfere with a fundamental common law right?

If yes, is this expressly authorised by the enabling legislation?

See also, [OPC's drafting services: a guide for clients](#).

Matters relating to sunseting remakes

If the instrument is a sunseting remake, have you considered the matters raised in [Instrument Drafting Guidance Note No. 1.2](#)?