



Instructor Guidance Note— Instrument issues for Bills

1 A legislative scheme often comprises an Act and instruments made under the Act (such as regulations, rules or determinations). This guidance covers considerations when drafting a Bill that authorises the making of such instruments. OPC's *Instructor Guidance Note—Key considerations in drafting instruments* relates to considerations when drafting the instruments themselves.

Planning the legislative scheme

2 When a Bill is being drafted, it is helpful to understand the kinds of issues that will need to be dealt with in subordinate legislation. This approach helps to ensure that enabling provisions are drafted in appropriate terms. For example, a head of power in an enabling Act authorising a legislative instrument to specify *an amount* is unlikely to cover an instrument that specifies a *way of working* out an amount. Similarly, an enabling provision that allows an instrument to *regulate* a specified activity is unlikely to extend to *prohibiting* that activity.

Rules or regulations?

3 Regulations are made by the Governor-General, but other legislative instruments (such as rules) can be made by whoever the Act specifies as the rule-maker (this will often be a Minister, a statutory body or officer).

4 OPC's starting point is that subordinate legislation should *not* be made in the form of regulations unless there is a good reason to do so. However, the following kinds of provisions *should* be included in regulations unless there is a strong justification for prescribing those provisions in another type of legislative instrument:

- offence or civil penalty provisions;
- powers of arrest or detention;
- entry, search or seizure provisions;
- impositions of taxes;
- provisions setting the amount to be appropriated, where the Act provides the appropriation and authority to set the amount;
- direct amendments of the text of an Act (as opposed to modifying the operation of an Act).

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5 It is possible for an Act to include 2 (or possibly more) general instrument-making powers (for example, a regulation-making power and a rule-making power). In such a case, a provision will be required to clarify which instrument prevails in the event of an inconsistency.

Usual form of instrument-making power

6 The standard, general instrument-making power authorises the making of legislative instruments prescribing matters that are:

- “required or permitted” to be prescribed by the enabling Act; or
- “necessary or convenient” to be prescribed for carrying out or giving effect to the enabling Act.

7 The “required or permitted” aspect of the instrument-making power operates in conjunction with other provisions in the enabling Act that provide for matters to be prescribed by legislative instrument. For example, a section dealing with the grant of a licence might contain a provision saying that the licensee must comply with any conditions on the licence specified by the rules.

8 The “necessary or convenient” aspect of the instrument-making power allows a legislative instrument to provide for matters that might not be expressly “required or permitted” by a particular provision of the enabling Act but which are otherwise incidental or ancillary to the scheme established by the enabling Act. However, it cannot be used to extend the scope or general operation of the enabling Act. It is essentially a power to make a legislative instrument that complements, but does not supplement, the enabling Act. Its scope is typically narrower than might be presumed.

Statements about character of instrument

9 When drafting a stand-alone provision that empowers the making of an instrument (i.e. a provision that does not rely upon the general instrument-making power), it is usual drafting practice to state the character of the instrument made under the power (e.g. whether or not it is a legislative instrument or a notifiable instrument).

10 If an instrument-making power in a Bill contains a statement that an instrument made under the power is *not* a legislative instrument, there are 2 possible explanations:

- the instrument is not of a legislative character (see paragraph 8(4)(b) of the *Legislation Act 2003*); or
- the instrument is of a legislative character but it is intended to exempt the instrument from the requirements of the *Legislation Act 2003* that would otherwise apply to it as a legislative instrument.

11 If the instrument is of a legislative character, but it is intended to exempt the instrument from the requirements of the *Legislation Act 2003*, the approval of the

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responsible Minister and the Attorney-General is required. Exceptional policy reasons will be required to exempt a kind of instrument that is otherwise likely to be of legislative character.

12 In either case, the explanatory memorandum should expressly clarify why the Bill says that the instrument is not a legislative instrument.

Instrument content that must be permitted by Act

13 If it is intended that an instrument contain any of the following provisions, it is sound practice to include a provision in the Bill that expressly permits it:

- a provision with retrospective operation;
- a provision imposing a penalty or civil liability;
- a provision imposing a fee;
- a provision conferring jurisdiction on a court;
- a provision prohibiting conduct or an activity (as opposed to a provision authorising regulation of conduct or an activity);
- a provision interfering with fundamental common law rights (which covers things like the presumption of innocence, the privilege against self-incrimination, legal professional privilege, access to courts and procedural fairness);
- a provisions that directly amends, or modifies the operation of, the enabling Act (often called “Henry VIII clauses”).

14 In the absence of an express provision, it is possible that the text, context and purpose of an Act will be construed as permitting an instrument to contain a provision doing one of the things above in particular circumstances, but this is by no means certain.

Conditions on the exercise of instrument-making power

15 The enabling Act may specify conditions that must be met, or processes that must be followed, before a legislative instrument can be made. For example, an enabling Act might require a specified group of people to be consulted, or for a report to be obtained and considered, before a legislative instrument is made.

16 If such conditions are included, consider how they interact with the general power to amend or revoke instruments in subsection 33(3) of the *Acts Interpretation Act 1901*. It may be preferable to include specific powers of amendment or revocation that are not subject to any conditions, or that are subject to different conditions.

Subdelegation of legislative power

17 A rule-maker who makes a legislative instrument under a head of power in enabling legislation is exercising delegated legislative power. Issues about validity may arise if the instrument purports to further delegate legislative power to a person or body. This issue is commonly called “subdelegation of legislative power”. The basic principle is that subdelegation is not permitted unless the enabling legislation expressly permits it.

18 For example, an enabling Act conferred a power on the Governor-General to list “prohibited goods” by regulation. A regulation was made under this power and it defined “prohibited goods” as “goods which, in the opinion of the Minister, are of a dangerous character”. This regulation was found by a court to be an invalid subdelegation because it resulted in the Minister, not the Governor-General, determining what was a prohibited good.

19 The principle against subdelegation is subject to a contrary intention. Accordingly, if it is intended that a person who is given power to make a legislative instrument under the enabling Act should be able to further delegate the making of the instrument, or it is intended that the instrument allow another person to determine or specify a matter, then a provision expressly permitting the subdelegation should be included in the enabling Act.

Incorporation by reference

20 Under section 14 of the *Legislation Act 2003*, a legislative or notifiable instrument may apply, adopt or incorporate some or all of another document, with or without modification. This is commonly called “incorporation by reference”.

21 The other document may be applied, adopted or incorporated as it is in force or existing at the time the instrument commences or at a time before the instrument commences. However, *future versions* of the other document can be applied, adopted or incorporated only if:

- (a) the other document is a Commonwealth Act, disallowable legislative instrument or rules of court; or
- (b) the enabling legislation authorises incorporation of the other document as in force or existing from time to time.

22 Accordingly, if it is intended that an instrument incorporate another document that is not a Commonwealth Act, disallowable legislative instrument or rules of court as in force from time to time, it is necessary to include an express provision authorising such incorporation by reference.

23 There are similar rules relating to incorporation by reference by instruments *other* than legislative instruments, notifiable instruments or rules of court in section 46AA of the *Acts Interpretation Act 1901*.

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The purpose of Instructor Guidance Notes is to assist agencies with general legislative drafting issues and preparing drafting instructions for Bills and instruments. The series is intended to be a starting point for instructors' own engagement with the matters covered. Instructor Guidance Notes are not statements of official policy and are not intended to be a comprehensive statement of the law. This Instructor Guidance Note should not be relied on as a substitute for legal advice.