The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

The *Delegated legislation monitor* (the monitor) is the regular report of the Senate Standing Committee on Regulations and Ordinances (the committee). The monitor is published at the conclusion of each sitting week of the Parliament, and provides an overview of the committee's scrutiny of instruments of delegated legislation for the preceding period.[1]

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information. Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown after the name of each instrument).

The committee's terms of reference

Senate Standing Order 23 contains a general statement of the committee's terms of reference:

> (1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.
>
> (2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.
>
> The committee shall scrutinise each instrument to ensure:
>
> (a) that it is in accordance with the statute;
>
> (b) that it does not trespass unduly on personal rights and liberties;
>
> (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
>
> (d) that it does not contain matter more appropriate for parliamentary enactment.

Work of the committee

The committee scrutinises all disallowable instruments of delegated legislation, such as regulations and ordinances, to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

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1 Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period or year. This information is now most easily accessed via the authoritative Federal Register of Legislative Instruments (FRLI), at www.comlaw.gov.au

The committee's longstanding practice is to interpret its scrutiny principles broadly, but as relating primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments, which are established by the *Legislative Instruments Act 2003*.[2]

Structure of the report

The report is comprised of the following parts:

- Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;
- Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date;
- Appendix 1 contains correspondence relating to concluded matters.
- Appendix 2 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this report.

Senator John Williams

Chair

2 For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15.

Chapter 1

New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **3 December 2014**, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers in relation to substantive matters seeking further information or an appropriate undertaking within the disallowance period.

Matters which the committee draws to the attention of the relevant minister or instrument maker are raised on an advice-only basis and do not require a response.

This report considers all disallowable instruments tabled between 30 October 2014 and 6 November 2014. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.[1]

New matters

Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 1) Regulation 2014 [F2014L01464]

Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending on certain activities administered by the Australian Customs and Border Protection Service, the Department of Education and the Department of Industry
Last day to disallow[2]	2 March 2015
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance

Background:

The committee has previously determined to examine certain regulations made under the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), on the

1 Senate Disallowable Instruments List, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List

2 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate.

basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to the authorising of expenditure.[3]

Issue:

Addition of matters to Schedule 1AB of the FF(SP) Regulations—previously unauthorised expenditure

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

The instrument adds two items to Part 3 (Grants of financial assistance to persons other than a State or Territory) of Schedule 1AB and one item to Part 4 (Programs) of Schedule 1AB, to establish legislative authority for three activities across three portfolios.

The committee has examined the three items in the regulation. The first two items appear to authorise the redirection of existing funding to new programs. The third item appears to be expenditure not previously authorised by legislation:

- New table item 4 of Part 3 of Schedule 1AB establishes legislative authority for the Commonwealth government to contribute towards the financing of the Information Sharing Centre established by the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia. The program is to be administered by the Australian Customs and Border Protection Service as part of the Immigration and Border Protection portfolio. There is currently no assessed financial contribution, and future contributions will be assessed annually on an 'as needs' basis.

- New table item 5 of Part 3 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the operational costs of the National Office of Life Education Australia associated with the ongoing development and implementation of school-based student resilience and wellbeing programs and resources for schools. The program is to be administered by the Department of Education. The funding amount is not specified in the explanatory statement (ES).

- New table item 63 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to establish and fund the Australian Government Innovation and Investment Fund—Tasmania to support new projects that create sustainable business growth and job opportunities in Tasmania. The program is to be administered by AusIndustry, a division of the Department of Industry. Funding of $11.0 million for three years from

3 For background to this issue, see *Delegated legislation monitor*, No. 5 of 2014 (14 May 2014) 16–17.

2014–15 to 2016–17 is outlined in the *Portfolio Budget Statements 2014-15*, Industry Portfolio, at page 54.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No 3) 2012*, the schemes outlined above would properly have been contained within an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw these matters to the attention of the relevant portfolio committee.

The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the schemes listed below:

- **Information Sharing Centre;**
- **Grants to Life Education Australia; and**
- **Australian Government Innovation and Investment Fund.**

Issue:

Addition of matters to Schedule 1AB of the FF(SP) Regulations—authority for expenditure

Scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle is interpreted broadly as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The committee notes that in *Williams No. 1*,[4] the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. The committee further notes that, as a result of the High Court decision in *Williams No. 2*,[5] a question arises as to whether all the items of expenditure provided for by this instrument are supported by a head of power under the Constitution. The committee considers that, in light of *Williams No.2*, the ES for all instruments specifying programs for the purposes of section 32B of the FF(SP) Act should explicitly state, for each new program, the constitutional authority for the expenditure.

In this regard, the committee notes that the ES identifies the constitutional basis for expenditure in relation to the Information Sharing Centre (being the treaty-making power under Chapter II of the Constitution with respect to the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia).

4 *Williams v Commonwealth* [2012] 248 CLR 156.

5 *Williams v Commonwealth* [2014] HCA 23 (19 June 2014).

The committee therefore requests further information from the minister in relation to the constitutional authority for Life Education Australia and the Australian Government Innovation and Investment Fund.

Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation 2014 [F2014L01453]

Purpose	Amends the Health Insurance (General Medical Services Table) Regulation 2014 to restrict certain consultation items from being claimed with certain chronic disease management items by the same provider, for the same patient, on the same day
Last day to disallow	2 March 2015
Authorising legislation	*Health Insurance Act 1973*
Department	Health

Issue:

No description regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument provides no description of the nature of the consultation undertaken. **The committee therefore requests further information from the minister; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003***.

Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation 2014 [F2014L01475]

Purpose	Amends the Renewable Energy (Electricity) Regulations 2001 to update solar zones and update references to documentation and definitions following the passage of the *Clean Energy Legislation (Carbon Tax Repeal) Act 2014*
Last day to disallow	2 March 2015
Authorising legislation	*Renewable Energy (Electricity) Act 2000*
Department	Environment

Issue:

No description regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument provides no description of the nature of the consultation undertaken. **The committee therefore requests further information from the minister; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003***.

ASIC Class Order [CO 14/1118] [F2014L01484]

Purpose	Amends the ASIC Class Order [CO 12/749] by extending the relief from the shorter PDS regime, that was due to expire on 30 June 2015, to 30 June 2016 pending the outcome of the Financial System Inquiry and further work by the Government on the shorter PDS regime
Last day to disallow	2 March 2015
Authorising legislation	*Corporations Act 2001*
Department	Treasury

Issue:

Timetable for making of substantive amendments to principal legislation

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which extend relief from compliance with principal legislation.

The Corporations Amendment Regulations 2010 (No 5) established a new shorter Product Disclosure Statement (PDS) regime under Subdivision 4.2B (for superannuation products) and Subdivision 4.2C (for simple managed investment schemes) of Division 4 of Part 7.9 of the Corporations Regulations 2001. The shorter PDS regime commenced in full on 22 June 2012. ASIC Class Order [CO 12/749] provided interim relief, until 30 June 2015, excluding multi-funds, superannuation platforms and hedge funds from the shorter PDS regime.

This instrument extends, until 30 June 2016, the relief provided by Class Order [CO 12/749], pending the outcome of the Financial System Inquiry and further work by government on the application of the shorter PDS regime to superannuation platforms, multi-funds and hedge funds.

The committee notes the instrument extends the previous three years of relief by a further 12 months. The committee generally prefers that relief from compliance with an Act effected via legislative instrument does not operate as a de facto amendment to primary legislation.

Noting the final report of the Financial System Inquiry was to be provided to the Treasurer by November 2014,[6] the committee therefore seeks the minister's advice as to the progress of the further work by government on the application of the shorter PDS regime to superannuation platforms, multi-funds and hedge funds; and the appropriateness of continuing to provide relief via legislative instrument in this case.

Continuing matters

Implementation of a general instrument-making power (previously 'Prescribing of matters by legislative rules')

Introduction

The appropriateness and consequences of prescribing matters by instruments under a general instrument-making power recently introduced by the Office of Parliamentary

6 Commonwealth of Australia, Financial system inquiry, Terms of reference, http://fsi.gov.au/terms-of-reference/ (accessed 26 November 2014).

Counsel (OPC) goes to the heart of the committee's institutional role and the principles which inform its operation.

As noted in *Odgers' Australian Senate Practice*, the delegation of the Parliament's legislative power to executive government 'has the appearance of a considerable violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.[7] This principle is effectively preserved through the committee's work scrutinising delegated legislation, and the Parliament's power to disallow delegated legislation.

In accordance with this critical role, the committee interprets its scrutiny principles 'broadly to include every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights'.[8]

The matters raised by the general instrument-making power are significant and the scope of the change is likely to involve a wide range of legislative instruments. It is important to note therefore that, any one instrument aside, it is the principles engaged by the new power that are of concern to the committee. The issues raised so far have been canvassed through a series of instrument-based entries spread over numerous committee reports, and were also discussed at a private briefing with OPC (see the next section on 'background').

Background

The committee first raised concerns about prescribing matters by instruments under a general instrument-making power in relation to the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] (industry rules) in *Delegated legislation monitor* No. 2 of 2014.[9] The committee noted the instrument relied on section 128 of the *Australian Jobs Act 2013*, which allowed for various matters in relation to that Act to be prescribed, by the minister, by legislative rules.

In its initial comment, the committee noted the industry rules were made on the basis of a general instrument-making power not previously seen by the committee. Subsequent inquiries to the Minister for Industry and First Parliamentary Counsel (FPC) established that OPC had been implementing the general instrument-making power in Acts since 2013.[10] As other delegated legislation made under the general instrument-making power came to light, the committee reported on a range of matters

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7 *Odgers' Australian Senate Practice*, 13th edn (2012) 413.

8 *Odgers' Australian Senate Practice*, 13th edn (2012) 438.

9 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 2 of 2014 (5 March 2014) 1–2.

10 The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of delegated legislation.

arising from the introduction of the general instrument-making power in *Delegated legislation monitors* Nos 5, 6, 8, 9 10, 12 and 13 of 2014.[11]

To support consideration of the matter, the committee, in collaboration with the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), convened a briefing on 3 September with two officers from OPC, Mr Peter Quiggin PSM, FPC, and Mr John Leahy SC PSM, Principal Legislative Counsel. Matters still outstanding from the briefing were placed as questions on notice by the committees.[12]

The general instrument-making power

Prior to 2013, the general instrument-making power under an Act was usually confined to regulations. The general power to make regulations is a broad delegation of the Parliament's law-making power. For example, section 62 of the *Legislative Instruments Act 2003* provides:

> The Governor-General may make regulations prescribing all 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.

Since 2013, however, a new general instrument-making power has been introduced that allows the instrument-maker to make instruments in relation to any matter as long as that matter is 'required or permitted' by the relevant provisions in the Act, or 'necessary or convenient' for carrying out or giving effect to the Act. For example, section 128 of the *Australian Jobs Act 2013* provides:

> The Minister may, by legislative instrument, make rules (***legislative rules***) prescribing matters:
>
> (a) required or permitted by this Act to be prescribed by the legislative rules; or

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11 In the course of its inquiries into the general instrument-making power, the committee has twice given notices of motion to disallow an instrument (see Senate Standing Committee on Regulations and Ordinances, Disallowance Alert 2014, Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] and Farm Household Support Secretary's Rule 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 20 October 2014)). Giving such a notice within the prescribed period for disallowance indicates committee concern about the instrument and is commonly referred to as a 'protective' notice. It preserves the right of the committee to move disallowance if the committee subsequently decides this is appropriate, and extends for a further 15 sitting days the period during which the committee has to resolve outstanding matters to its satisfaction (see *Odgers' Australian Senate Practice*,13th edn (2012) 432).

12 Correspondence from FPC including letters and answers to questions on notice is included in Appendix 1.

> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

It can be seen, therefore, that the general instrument-making power was created by simply substituting the making of 'rules' rather than 'regulations' within the standard form of the general power.

General instrument-making power as a new form of delegated legislation

In light of the above, the committee sought the advice of the minister as to the use of the general instrument-making power, noting that it appeared to be a new or 'novel' type of delegated legislation.

In correspondence on 13 March 2014, FPC stated that 'the approach taken in section 128 of the *Australian Jobs Act 2013* is not novel'. FPC provided several examples to support the claim that 'Commonwealth Acts have provided for the making of instruments rather than regulations for many years'.[13]

However, FPC's response appeared to misunderstand the essential distinction in classifying the general power to make 'legislative rules' as 'novel', insofar as it addressed generally the ability to make instruments other than regulations under Acts, rather than the particular case of providing for general instrument-making powers other than as a general power to make regulations. The committee noted that the examples cited by FPC in fact confirmed that the general instrument-making power was an innovation implemented only since 2013. This was also confirmed by revised Drafting Direction 3.8 (circulated on 6 March 2014 subsequent to the committee's inquiry), which stated:

> It has long been the practice to include general regulation making powers in Acts.
>
> More recently, an approach has been taken to adapt that practice for other legislative instruments.[14]

A further essential distinction in relation to the committee's inquiries on the matter is between this general power to make instruments (previously as regulations and now as rules) and the longstanding use of powers to make legislative instruments under Acts (usually) for more narrow specified purposes. The following are examples of such specific powers:

> The Minister may, by legislative instrument, determine vehicle standards for road vehicles or vehicle components;[15]

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13 First Parliamentary Counsel, letter (13 March 2014).

14 Office of Parliamentary Counsel, Drafting Direction No. 3.8 (6 March 2014) 4, http://www.opc.gov.au/about/docs/drafting_series/DD3.8.pdf (accessed 14 November 2014).

15 *Motor Vehicle Standards Act 1989*, section 7.

> The respite supplement for a particular day is the amount determined by the Minister by legislative instrument;[16]
>
> The Minister may, by legislative instrument, determine the weighted average disclosed price of a brand of a pharmaceutical item in accordance with the regulations.[17]

The general power to make instruments may also be distinguished from powers to make legislative instruments in relation to a subdivision or a part of an Act:

> The Minister may, by legislative instrument, make rules (the infrastructure project designation rules) prescribing matters:
>
> required or permitted by this Subdivision to be prescribed by the rules; or
>
> necessary or convenient to be prescribed for carrying out or giving effect to this Subdivision.[18]
>
> The Minister may, by legislative instrument, make Orders prescribing matters required or permitted by this Part to be prescribed.[19]

Consequences of providing for a general instrument-making power

The committee notes that regulations are subject to a number of requirements which effectively provide a higher level of executive oversight than applies to the making of other types of delegated legislation. These are:

- regulations must be made by the Governor-General;
- regulations must be approved by the Executive Council (ExCo); and
- regulations must be drafted cost-free by the OPC (referred to as 'tied work').

These requirements do not apply to the making of rules and other types of delegated legislation, including any that are made under the new general instrument-making power, which means:

- such instruments may be made by ministers, secretaries and other designated persons;
- such instruments do not need to be approved by ExCo (or any other body); and

16 *Aged Care Act 1997*, subsection 44-12(3).

17 *National Health Act 1953*, subsection 99ADB(4).

18 *Income Tax Assessment Act 1997*, section 415-100.

19 *Superannuation Act 1976*, section 146MH.

- departments and agencies have responsibility for drafting such instruments (and may choose to draft them in-house or pay to have them drafted by OPC or another professional drafter).

In answer to the committee's specific inquiries as to the fundamental or original reason for requiring regulations to be drafted by OPC and made by the Governor-General, FPC responded as follows:

> The reason that the drafting of these instruments is tied to OPC under the Legal Services Direction is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.[20]

By contrast, the committee considers that, given the broad delegation on which the general regulation-making is usually based, and the critical role of regulations in fleshing out the operation of primary legislation, the longstanding procedural and drafting arrangements that apply to regulations may be seen (from a parliamentary scrutiny perspective) as a necessary accompaniment to the exercise of Parliament's broadly delegated legislative power.

The committee regards it as significant that, up until the implementation of a general instrument-making power in 2013, the executive exercise of the Parliament's delegated legislative power via a broadly expressed regulation-making power has been accompanied by the concomitant responsibility of close executive oversight. The requirements for such instruments to be made by the Governor-General, and the tying of the drafting of such instruments to OPC, may be seen as a necessary accompaniment to the exercise of a broadly expressed delegated power to make legislation, taking into account its nature, critical role in informing the operation of primary legislation and potential to include material that of itself or cumulatively may be both important and complex.

The committee's view stands in contrast to the proposition that the requirement for OPC to draft regulations is a mere consequence of their being made by the Governor-General.

Reasons for implementing the general instrument-making power

In simple terms, the general instrument-making power has been implemented to be used in place of regulations, so that OPC is required to draft fewer regulations. FPC provided the following justifications for implementing the general instrument-making power:

- OPC does not have the resources to draft all Commonwealth legislation, nor is it appropriate to do so; OPC should therefore concentrate its resources on drafting only a narrow band of regulations, being those with (a) particular

20 First Parliamentary Counsel, letter (23 May 2014) 3.

sensitivities or risks and (b) that are especially 'bound to the work of the executive'; and

- the general instrument-making power will enable a rationalisation of the many different types of delegated legislation made under Acts.[21]

In correspondence to the committee dated 2 July 2014, FPC noted his view that the use of regulations for the prescribing of matters has previously been done without consideration of the nature of the material itself, with the result that OPC has been required to draft regulations dealing with 'less important matters':

> In the past there has been no clear guidance about the appropriate division of material between regulations and other legislative instruments. As a result, material seems to have been allocated between regulations and other legislative instruments without any consideration of the nature of the material itself. Less important matters of detail have sometimes been included in regulations while more important matters have been included in a wide range of other types of legislative instruments.[22]

Issues

The committee's inquiries into the use of the general instrument-making power have focused on the following general and more specific issues:

- scope of the general power;
- consequences of the general instrument-making power for the quality of drafting;
- assessing whether instruments contain matters more appropriate for regulations;
- regulations to prevail in the event of conflict;
- delegation of the general instrument-making power; and
- consultation over the implementation of the general instrument-making power.

Scope of the general power

In his responses, FPC generally characterised the general instrument-making power as typically constrained in its application by the authorising provisions in the Act.

In particular, FPC observed that the "required or permitted' instrument-making power in an Act gives no power to make rules beyond that authorised by the other provisions

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21 First Parliamentary Counsel, letters (13 March 2014) 3 and (23 May 2014) 3.

22 First Parliamentary Counsel, letter (2 July 2014) 3.

of the Act', and therefore it 'does not add to the powers provided by other provisions of the Act, but merely provides a single source for the exercise of those powers'.[23]

Regarding the 'necessary or convenient' limb of the general power, FPC observed:

> A 'necessary or convenient' power is a limited power. It is not an open-ended power nor necessarily an extensive power. The rules for the interpretation of a 'necessary or convenient' power are well established. In particular, the fact that a matter might be regarded as necessary or convenient does not necessarily mean that provision can be made about the matter under the power. A rule cannot *supplement* the Act. It can only *complement* the Act and prescribe matters that are confined to the same field of operation of the Act.[24]

FPC noted that only a very small percentage of delegated legislation (less than one per cent) relies on the 'necessary or convenient' limb of the broadly expressed power.[25] By extension, this means that the vast majority of the prescribing of matters relies on the 'required or permitted' limb of the power, which operates in conjunction with the provisions in the enabling Act. He concluded:

> It follows that I do not agree there is anything intrinsic in the standard general rulemaking power that represents a real threat to the quality of Commonwealth subordinate legislation.

However, the committee considers that by making provision for non-professional drafters to draft instruments in reliance on the 'necessary or convenient' power represents a risk that misjudgements about whether matters specified in an instrument are in fact complementary and confined to the same field of operation as the Act under which they are made. The committee therefore intends to closely monitor this particular aspect of drafting of instruments and, accordingly, expects that ESs will henceforth indicate where an instrument is made in reliance on the 'necessary or convenient' power.

In this respect, the committee notes OPC's view that:

> …it would be appropriate for the Regulations and Ordinances Committee to require that the explanatory statement should state when the necessary or convenient power has been relied on for the making of an instrument.[26]

The committee therefore notes its expectation that ESs indicate when the 'necessary or convenient' power has been relied on for the making of an instrument.

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23 First Parliamentary Counsel, letter (6 August 2014) 3.

24 First Parliamentary Counsel, letter (6 August 2014) 3.

25 First Parliamentary Counsel, answer to question on notice no. 21 (23 September 2014).

26 First Parliamentary Counsel, answer to question on notice no. 22 (23 September 2014).

Consequences of the general instrument-making power for the quality of drafting

The committee's key concern throughout its inquiries has been the potential for the general instrument-making power to adversely impact on drafting quality, due to the lower level of executive oversight (compared to regulations), and the absence of a requirement that such instruments be drafted by OPC (meaning that departments and agencies may elect to have drafting performed by non-expert drafters).

The committee's concern arises from the fact that, as with regulations previously, the general instrument-making power will be used to provide much of the legislative detail for the operation of Acts. Such instruments may therefore be lengthy and complex, covering all manner of subject matter within the field of operation of an Act (for example, Acts often provide the skeleton of a legislative scheme that is then substantially 'fleshed out' by regulations)

Any appreciable lowering of drafting standards arising from more widespread non-expert drafting of instruments could impact adversely on the committee, particularly to the extent that this would effectively transfer the task of policing drafting standards from OPC to the committee (in respect of those instruments). In this regard, the committee does not have sufficient expertise and resources to perform this task as effectively as the expert and professional drafters and officers in OPC.

Further, because the committee only examines instruments that are already in force, the committee has only limited options for dealing with problematic instruments, which is to either request they be remade or to disallow them.

Given the above, the committee regards it as unclear whether and how the high standards achieved by OPC drafters will be maintained in the drafting of instruments based on the general power, where departments and agencies elect to draft these in-house.

In response to the committee's concerns regarding drafting quality, FPC submitted that OPC did not foresee particular risks in legislative schemes being filled out by rules rather than regulations.[27] In his letter of 23 May 2014, FPC stated that the innovation would 'contribute to raise the standards of legislative instruments overall' through departments and agencies recognising the quality of OPC's drafting work, and therefore electing to pay OPC for the drafting of work that would previously have been included in regulations (and thus drafted by OPC on a cost-free basis).

FPC further submitted that the anticipated increase in billable work would put 'OPC…in a better position to increase its overall drafting resources and to take further steps to raise the standards of instruments that it does not draft'.[28]

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27 First Parliamentary Counsel, answer to question on notice no. 3 (23 September 2014).

28 First Parliamentary Counsel, letter (23 May 2014) 4.

Beyond this, the committee notes OPC's advice that it was 'not planning to systematically monitor the quality of rules drafted by departments or agencies' to assess the impacts of the general instrument-making power.

However, OPC submitted that it had 'commenced substantial work to try to improve the general standard of legislative instruments',[29] including the reissued Legislative Instruments Handbook, an increase in billable settling services provided on request to agencies, and an increase in the drafting of untied instruments (including rules) for other agencies.[30] In a document provided subsequent to the briefing, FPC listed the following measures taken to enhance the quality of legislative instruments and the Commonwealth statute book generally:

- harmonisation of drafting standards and style;
- development of broader instrument drafting expertise and active engagement with agencies in relation to untied instruments;
- development of further guidance to agencies in relation to managing and drafting legislative instruments;
- rationalisation of legislative instrument making powers and limiting the proliferation of the types of legislative instruments;
- rationalisation of legislative instruments and working with agencies to manage sunsetting; and
- legislative instrument framework reform.[31]

In the committee's view, the question of OPC's efforts to monitor the impact of the general instrument-making power on the quality of drafting of instruments, and more generally to promote higher standards of drafting in instruments, is best viewed through the prism of FPC's responsibility under section 16 of the *Legislative Instruments Act 2003*,[32] which provides:

> To encourage high standards in the drafting of legislative instruments, the First Parliamentary Counsel must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments.

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29 First Parliamentary Counsel, answers to questions on notice, nos 9 and 23 (23 September 2014).

30 First Parliamentary Counsel, answers to questions on notice, nos 23 and 24 (23 September 2014).

31 Office of Parliamentary Counsel, Measures taken to enhance the quality of legislative instruments (23 September 2014).

32 These responsibilities remain effectively unchanged by the Acts and Instruments (Framework Reform) Bill 2014.

In light of FPC's obligations in this regard, the committee is concerned that it is unable, on the basis of the information provided, to properly assess what impacts the general instrument-making power may have on drafting quality overall. In particular, the committee notes that the apparent mechanism by which OPC hopes for increased billable work to fund its drafting and drafting support services will fundamentally rely on decisions of departments and agencies as to whether to use OPC's drafting services. Given that such decisions may be influenced by factors outside of OPC's control (such as budgetary considerations), the committee remains concerned that drafting standards will suffer under the move to the general instrument-making power.

More generally, the committee notes that the furtherance of FPC's obligations under section 16 of the LIA is important to ensure that any potential adverse impacts on implementing the general instrument-making power are avoided.

The committee therefore recommends that OPC annual reports include reporting on the steps that FPC has taken to fulfil his statutory obligations under section 16 of the *Legislative Instruments Act 2003*.

The committee considers that the effectiveness of OPC's intended mechanism for achieving higher drafting standards following the implementation of the general instrument making power is likely to be highly contingent on the effectiveness of OPC in presenting itself as an engaged, responsive and competitive provider of drafting services. The committee's remarks below in relation to consultation are relevant in this regard.

Assessing whether instruments contain matters more appropriate for regulations

As noted above, FPC's justification for the implementation of the general instrument-making power includes the view that, as many regulations contain matters that do not have particular sensitivities or risks, they should not be required to be drafted by OPC (known as 'tied work').

The committee's inquiries have clarified that the use of the general instrument-making power is dependent on the initial assessment of the character or quality of matters to be prescribed. This is because, as confirmed by FPC in his letter of 13 March 2014, certain matters are not, without 'strong justification', regarded as appropriate for inclusion in instruments and should therefore be included in regulations and drafted by OPC (that is, should be subject to the higher level of executive oversight). These matters were set out as follows in Drafting Direction 3.8 (dated 6 March 2014):

- offence provisions;
- powers of arrest or detention;
- entry provisions;
- search provisions; and

- seizure provisions.[33]

In addition, Drafting Direction 3.8 advises that drafters should 'see FPC to discuss whether any of the following matters should also be dealt with by regulation or another type of instrument':

- civil penalties;
- imposition of taxes;
- setting the amount to be appropriated where the Act provides the appropriation and authority to set the amount; and
- politically sensitive provisions.[34]

In this regard, it is important to note that Drafting Direction 3.8 is a policy statement and not a mandatory requirement. The committee therefore sought clarification from OPC as to who will make decisions about whether there is a 'strong justification' to include such matters in rules; whether consultation with OPC will be mandatory or at the discretion of departments; and whether OPC's view in such cases will be decisive or merely advisory.

In response, FPC advised that OPC will initially make the decision about the inclusion of significant matters in regulations. Further, 'OPC would be closely involved' given that the matter would generally 'be determined at the time of drafting the Bill'.[35] However, in the event of an unresolved difference of view between a department or agency and OPC as to whether there is a 'strong justification' for including significant matters in rules, 'the Government (generally through the Prime Minister) would need to decide the matter'.[36]

In light of FPC's advice that certain provisions (noted above) should be included in regulations and drafted by OPC unless there is a strong justification for prescribing those provisions in another type of instrument, the committee questioned how those provisions would be introduced in the absence of a regulation-making power. This question appears particularly pertinent given that several recent Acts that have the general instrument-making power do not actually contain a regulation-making power. FPC advised:

33 Office of Parliamentary Counsel, Drafting Direction 3.8 (6 March 2014) 3.

34 Office of Parliamentary Counsel, Drafting Direction 3.8 (6 March 2014) 3–4.

35 First Parliamentary Counsel, answer to question on notice no. 13 (23 September 2014).

36 First Parliamentary Counsel, answer to question on notice no. 14 (23 September 2014).

> If such provisions are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions.[37]

In light of these matters, the committee's consideration of the Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443] and the Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533] is instructive.[38] The ordinance contained the standard form of the new general instrument-making power (in this case, 'rules'), and provided for the prescribing of offences by rule in subsection 98(3). Noting that the ESs for the ordinance and the rule contained no justification for the authorising of offence provisions via rules rather than regulation, the committee sought further information from the minister.[39] The Assistant Minister for Infrastructure and Regional Development subsequently advised that the drafting of the ordinance:

> …ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.
>
> The Department of Infrastructure and Regional Development will work with the Office of Parliamentary Counsel to address the comments made by the Committee, including amending the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions.[40]

The committee concluded its examination of the instruments on the basis of the information provided. However, the committee noted that the assistant minister's advice raised a number of questions in relation to the committee's inquiries into the new approach:

> In particular, the committee notes the assistant minister's advice that the drafting of the Ordinance, and the inclusion of offences in the rules (authorised by express provision), ran 'in parallel' to OPC's development of its formal policy on the appropriateness of offence provisions to be included under a rule-making power.
>
> As the committee has previously noted, on 6 March 2014 (subsequent to the committee's initial comments on the matter), OPC circulated revised Drafting Direction No. 3.8, which included the addition of extensive instruction on the use of 'general instrument-making powers' of this kind. The direction included the guidance that 'some types of provisions should

37 First Parliamentary Counsel, letter (23 May 2014) 7.

38 See *Delegated legislation monitor* No. 6 of 2014.

39 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 6 of 2014 (18 June 2014) 22–24.

40 The Hon Jamie Briggs MP, Assistant Minister for Infrastructure and Regional Development, letter (2 July 2014).

> be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument'. The committee understood this to be a settled statement of the policy on the use of the general rule-making power.
>
> With reference to these points, the committee notes that the assistant minister's undertaking appears to suggest that, while the inclusion of offence provisions in the rules satisfied legal criteria for validity, there was not a sufficiently 'strong justification' for making provision for the prescribing of offences by rules in this case. This is of particular interest to the committee because, as noted above, the committee's inquiries to date have shed little light on what would constitute a 'strong justification' for the inclusion of such matters in rules or, indeed, who will be responsible for the making of such judgements.
>
> The assistant minister's advice also gives rise to questions regarding the policy development process in relation to the general-rule making power, and whether the implementation of the power has been done on the basis of a sufficiently well developed and articulated policy on its use.[41]

FPC also responded to this particular matter in his letter of 6 August 2014:

> Instructions for the drafting of this Ordinance were received in April 2013. By the time DD3.8 was reissued in March 2014 the then draft Ordinance had been the subject of extensive consultation by the administering Department and the drafting of the Ordinance was substantially complete. The Ordinance was made on 24 April 2014. In this case, I agree that it may have been better to have applied DD3.8 to the Ordinance before it was made, even though drafting of the Ordinance started before, and was substantially complete, when DD3.8 was reissued. This will be done if any similar transitional cases arise in the future.[42]

The committee thanked FPC for his response and concluded its interest in the ordinance and the rule subject to the undertakings given by the assistant minister.[43]

In response to the committee's further inquiries as to whether other Acts should be amended to reflect the policy statement that certain provisions (such as civil penalties) should not be included in instruments other than regulations without strong justification, FPC advised:

> As Drafting Direction 3.8 states, OPC believes that this part of the Drafting Direction reflects the law. That is, without an explicit power to include such

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41 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 9 of 2014 (16 July 2014) 26–27.

42 First Parliamentary Counsel, letter (6 August 2014) 5.

43 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 10 of 2014 (27 August 2014) 55–60.

> provisions, they could not be included in a legislative instrument (including a rule or a regulation).
>
> OPC is currently working with the Attorney-General's Department on the best way of implementing the position set out in the Drafting Direction.
>
> As mentioned above, it is a matter for Government whether to amend existing legislation. However, once the long term approach that will be adopted to this issue is completely settled, OPC will discuss with agencies who are responsible for recent legislation whether they would support amending the legislation to bring it into line.[44]

The committee acknowledges that any new policy may have unintended consequences. Nevertheless, in light of the above, the committee is concerned that it has been unable, on the basis of the information provided, to reach a definitive understanding of the basis on which matters which would otherwise be considered suitable only for regulations are able to be included in other types of instruments—that is, what factors or criteria are or may be relevant to establishing that there is a 'strong justification' for not prescribing certain matters in regulations.

The committee therefore intends to closely monitor this particular aspect of drafting of instruments and, accordingly, expects that ESs will henceforth indicate what is considered to be the 'strong justification' in support of such an approach.

The committee therefore notes its expectation that ESs identify a 'strong justification' for not prescribing certain matters in regulations, and set out the factors or criteria relevant to that justification.

The committee's consideration of this aspect of the implementation of the general instrument-making power draws into particular focus significant concerns over the timing and implementation of the new policy direction, and particularly the apparent implantation of the general instrument-making power in the absence of any policy statement governing its use.

As noted above, revised Drafting Direction 3.8 (containing guidance on the new general instrument-making power) was reissued in March 2014 subsequent to the committee's initial inquiries on the matter,[45] and approximately 12 months after the new general instrument-making power had already been implemented in numerous Acts made in 2013.

Indeed, notwithstanding the committee's inquiries, the committee notes that the policy guidance on the use of the general instrument-making power remains unsettled nearly two years since OPC commenced its implementation.

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44 First Parliamentary Counsel, answer to question on notice no. 20 (23 September 2014).

45 First Parliamentary Counsel, letter (6 August 2014) 5.

The committee's concerns about the implementation of an innovation of this kind in the absence of any settled policy or policy guidance aside, the committee has significant concerns about whether and how Acts containing the general instrument-making power will be reviewed to ensure consistency with the policy guidance once it is settled. Where Acts or instruments (such as the Jervis Bay Territory Rural Fires Ordinance 2014 discussed above) are not in accordance with the policy guidance (once settled), the committee considers that such Acts and instruments should be brought into conformity with that guidance.

The committee therefore recommends that the Attorney-General take steps to ensure that Drafting Direction 3.8 be settled as soon as possible; and subsequently to identify and correct any instances of legislation inconsistent with the settled statement of policy on the use of the general instrument-making power.

Regulations to prevail in the event of conflict

The Scrutiny of Bills committee raised a question as to which instrument would prevail in the event of a conflict between a rule and an instrument made on the basis of the general instrument-making power. The committee notes that FPC indicated at the briefing that OPC was considering whether to amend Drafting Direction 3.8 to require that instruments include a provision to specify that, in the event of a conflict, regulations will prevail over rules.

The committee seeks the advice of FPC as to the progress of consideration of whether to amend Drafting Direction 3.8 to require that instruments include a provision to specify that, in the event of a conflict, regulations will prevail over rules.

Delegation of the general instrument-making power

In *Delegated legislation monitor* No. 8 of 2014 the committee drew attention to a potential delegation of the general instrument-making power (in this case a general power to make 'rules') with regard to the Farm Household Support Secretary's Rule 2014 [F2014L00614].

The committee noted that section 101 of the *Farm Household Support Act 2014* provided for the secretary to delegate their powers to officers below the Senior Executive Officer level. The committee also noted that the EM for the Farm Household Support Bill 2014 stated that the delegation powers were 'intentionally broad' for operational reasons. Noting the operational reasons cited in the EM, the committee questioned whether the secretary's general rule-making powers under section 106(2) may be delegated under section 101 and, if so, what considerations might apply in that case.[46]

46 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 8 of 2014 (9 July 2014) 1–4.

The Minister for Agriculture confirmed there was 'no legal impediment' to the secretary delegating their general rule-making power, but noted that he did not 'foresee any circumstances' where this might be necessary.[47]

The Minister for Infrastructure and Regional Development subsequently advised that the departmental secretary had 'no intention of delegating his rule making powers' and did not consider it to be necessary at present.[48]

The committee noted the minister's advice that the delegation of the general rule-making power was neither intended nor necessary. The committee also pointed to the scrutiny preference, as expressed by the Scrutiny of Bills committee, that the delegation of legislative power be only as broad as strictly required. The committee therefore requested that the *Farm Household Support Act 2014* be amended to specifically exclude the delegation of the general rule-making power.[49]

The Minister for Agriculture advised that the *Farm Household Support Act 2014* would be amended 'as the opportunity arises' to specifically exclude the delegation of the secretary's general rule-making power.[50] The committee thanked the minister for his undertaking to amend the legislation[51] (and accordingly withdrew the notice of motion to disallow the instrument).[52]

The committee notes that other recent Acts might have unnecessarily authorised the broad delegation of the general instrument-making power. Accordingly, the committee sought clarification as to whether those Acts should also be amended. FPC advised:

> It is a matter for Government whether to amend existing legislation. However, once the long term approach that will be adopted to this issue is completely settled, OPC will discuss with agencies who are responsible for recent legislation whether they would support amending the legislation to bring it into line.
>
> It is however noted that there are a very large number of existing Acts, many of which have been in force for many years, which provide for the

47 The Hon Barnaby Joyce MP, Minister for Agriculture, letter (5 August 2014) 3.

48 The Hon Warren Truss MP, Minister for Infrastructure and Regional Development, letter (16 September 2014) 2.

49 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 12 of 2014 (24 September 2014) 16.

50 The Hon Barnaby Joyce MP, Minister for Agriculture, letter (30 September) 1.

51 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 13 of 2014 (1 October 2014) 6–14.

52 Senate Standing Committee on Regulations and Ordinances, Disallowance Alert 2014, Farm Household Support Secretary's Rule 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 20 October 2014).

> making of instruments and provisions in these limiting delegation are rare (assuming that there are any). It is not proposed to address this at this time.[53]

The committee is concerned by this response because it appears recent Acts may have been drafted in a manner that does not prevent the inappropriate delegation of the general rule-making power, thereby offending against the scrutiny principle that the delegation of power be only as broad as strictly required.

The committee therefore notes its expectation that the delegation of power provided for in instruments be only as broad as strictly required.

The committee notes that the above recommendation is also relevant to addressing this concern, insofar as it asks the Attorney-General to take steps to ensure that Drafting Direction 3.8 be settled as soon as possible, and to subsequently identify and correct any instances of legislation inconsistent with the settled statement of policy on the use of the general instrument-making power.

Consultation over the implementation of the general instrument-making power

The committee thanks FPC and the responsible ministers for their engagement and cooperation on this issue, and notes the various ministerial undertakings to amend Acts, ordinances and rules. These positive developments are to be understood as, in one sense, a corrective to the severe shortcomings of the policy development and implementation process of the general instrument-making power.

The committee considers that significant changes in agency policy regarding the making of primary and delegated legislation should be the subject of substantial consultation with the Parliament. In this regard, the committee notes that consultation did not occur in this instance and, further, that the treatment of the legislative changes in various EMs was either absent or inadequate.[54]

The committee's inquiries into this matter have revealed the apparently inappropriate inclusion of significant matters in rules, and the potential for the inappropriate delegation of a broad power, and both cases strongly suggest that the general instrument-making power was implemented at a time prior to the settling of established policy guidance on the new power. The committee considers that, had appropriate consultation been undertaken early in the development of the new policy, matters of particular concern could have been discussed, and potentially inconsistent practices could have been avoided.

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53 First Parliamentary Counsel, answer to question on notice no. 18 (23 September 2014).

54 For a full discussion of the identification of the general instrument-making power in EMs, see Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) 4.

In light of the outstanding matters of concern identified above, the committee notes its intention to continue to monitor the general instrument-making power and the settling of the policy guidance on its use.

Multiple instruments that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*

The committee has identified a number of instruments that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, the committee considers it would be preferable for the ES for any such instrument to identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the *Acts Interpretation Act 1901* is relevant:**

> Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[55]

The committee therefore draws this issue to the attention of ministers and instrument-makers responsible for the following instruments:

ASIC Class Order [CO 14/1106] [F2014L01483]

ASIC Class Order [CO 14/1118] [F2014L01484]

ASIC Class Order [CO 14/977] [F2014L01442]

Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426]

Health Insurance (Allied Health Services) Amendment Determination 2014 (No. 2) [F2014L01447]

Health Insurance (Cone Beam Computed Tomography) Revocation Determination 2014 F2014L01435]

Health Insurance (Gippsland, Rockhampton and Gladstone Mobile MRI Service) Amendment Determination 2014 [F2014L01454]

Health Insurance (Pathologist-determinable Services) Amendment Determination 2014 (No.

55 For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511.

2) [F2014L01437]

Health Insurance (Pharmacogenetic Testing - Epidermal Growth Factor Receptor) Revocation Determination 2014 [F2014L01438]

Health Insurance (Pharmacogenetic Testing) Revocation Determination 2014 [F2014L01436]

Private Health Insurance (Benefit Requirements) Amendment Rules 2014 (No. 5) [F2014L01434]

Water and Sewerage Services Fees and Charges (Christmas Island) Determination No 2 No 2 [F2014L01459]

Water and Sewerage Services Fees and Charges (Cocos (Keeling) Islands) Determination 2014 No 2 No 2 [F2014L01458]

Chapter 2
Concluded matters

There are no concluded matters arising from the committee's meeting on **3 December 2014**.

Appendix 1
Correspondence

Australian Government

Office of Parliamentary Counsel

First Parliamentary Counsel

The Hon. Ian MacFarlane MP
Minister for Industry
Parliament House
CANBERRA ACT 2600

Dear Minister

***Australian Jobs (Australian Industry Participation) Rule 2014*—Request for information from Senate Standing Committee on Regulations and Ordinances**

1 The Senate Standing Committee on Regulations and Ordinances has asked you for further information in relation to the *Australian Jobs (Australian Industry Participation) Rule 2014*. This letter sets out the views of the Office of Parliamentary Counsel (OPC) on the matters raised by the Committee.

2 The issue raised by the Committee was as follows:

> *Prescribing of matters by 'legislative rules'*
>
> The committee notes that this instrument relies on section 128 of the *Australian Jobs Act 2013*, which allows for various matters in relation to that Act to be prescribed, by the minister, by 'legislative rules'. While the explanatory statement (ES) for the instrument does not address the issue, as far as the committee can ascertain this is a novel approach to the prescribing of matters in Commonwealth legislation, insofar as Acts usually provide for matters to be prescribed, by the Governor-General, by 'regulation'. The committee notes that the latter approach to prescribing matters is consistent with the definition in section 2B of the *Acts Interpretation Act 1901*, which provides that, in any Act, 'prescribed' means 'prescribed by the Act or by regulations under the Act'. This being so, the committee is uncertain as to whether the prescription of matters by 'legislative rules' is also consistent with the *Acts Interpretation Act 1901*.
>
> More generally, the committee notes that the making of regulations is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel and Executive Council, respectively. To the extent that these requirements may be taken as an additional layer of scrutiny in the prescribing of matters by regulation, it is not clear whether these requirements will also apply to legislative rules and, if not, what the ramifications may be for both the quality of, and level of scrutiny applied to, such instruments. **The committee therefore requests further information from the Minister for Industry**.

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Are the use of "legislative rules" to prescribe matters novel?

3 Commonwealth Acts have provided for the making of instruments rather than regulations for many years. These have included rules (sometimes more recently tagged as "legislative rules"). For example, the following Acts provide for the prescribing of matters by rules:

- *Financial Sector (Business Transfer and Group Restructure) Act 1999*, section 46 (rules made by APRA)
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, section 229 (rules made by the AUSTRAC CEO)
- *Stronger Futures in the Northern Territory Act 2012*, section 119 (rules made by the Minister).

4 Similarly, the following Acts provide for matters to be prescribed by orders and by-laws:

- *Customs Act 1901*, section 271 (by-laws made by the Customs CEO)
- *Excise Act 1901*, section 165 (by-laws made by CEO (the Commissioner of Taxation))
- *Superannuation Act 1922*, section 93DE (orders made by the Minister)
- *Defence Forces Retirement Benefits Act 1948*, section 80E (orders made by the Minister)
- *Parliamentary Contributory Superannuation Act 1948*, section 22CK (orders made by the Minister)
- *Defence Force Retirement and Death Benefits Act 1973*, section 49F (orders made by the Minister)
- *Superannuation Act 1976*, section 146MH (orders made by the Minister).

5 Commonly, instrument-making powers are in the form of (or include) a power to "prescribe" particular matters. For example, the rule-making power in subsection 59(1) of the *Federal Court of Australia Act 1976* (which was included when that Act was enacted in 1976) provides as follows:

> (1) The Judges of the Court or a majority of them may make Rules of Court, not inconsistent with this Act, making provision for or in relation to the practice and procedure to be followed in the Court (including the practice and procedure to be followed in Registries of the Court) and for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court.
>
> *(underlining added)*

6 Thus, the approach taken in section 128 of the *Australian Jobs Act 2013* is not novel. (See also the examples in paragraph 12.)

Is prescribing matters by legislative rules consistent with the definition of "prescribed" in section 2B of the Acts Interpretation Act 1901?

7 There is no legislative principle or practice that requires the word "prescribe" to be used only in relation to regulations. The definition of "prescribed" in section 2B of the *Acts Interpretation Act 1901* (the AIA) is a facilitative definition that was intended to assist in the shortening of Acts. However, current legislative drafting practice is to rely on the definition sparingly (even for regulations) because the definition appears not to be widely known by users of legislation, it has no application to the making of instruments apart from regulations and can be uncertain in its application. Under the definition matters can be prescribed by the Act itself or by regulations under the Act.

8 Thus, prescription of matters by legislative rules is not inconsistent with the AIA. The definition simply does not apply to rules or other types of instruments other than regulations.

What are the ramifications for quality and scrutiny of legislative rules?

9 Since the transfer of a subordinate legislation drafting function from the Attorney-General's Department to OPC in 2012, OPC has reviewed the cases in which it is appropriate to use legislative instruments (as distinct from regulations). OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

10 OPC's view is that some types of provisions should be included in regulations and be drafted by OPC as the Commonwealth's principal drafting office, unless there is a strong justification for prescribing those provisions in another type of legislative instrument. These include the following types of provisions:

(a) offence provisions;

(b) powers of arrest or detention;

(c) entry provisions;

(d) search provisions;

(e) seizure provisions.

11 OPC's view is that it should use its limited resources to best effect and focus its resources in drafting subordinate legislation that would most benefit from its drafting expertise. Further details about OPC's approach are set out in Drafting Direction 3.8, which is available on OPC's website at http://www.opc.gov.au/about/draft_directions.htm.

12 Since the transfer of the subordinate legislation drafting function to OPC in 2012, the power to prescribe legislative rules has been included in the following Acts:

- *Income Tax Assessment Act 1997*, section 415-100 (rules made by the Minister)
- *Asbestos Safety and Eradication Agency Act 2013*, section 48 (rules made by the Minister)
- *Australia Council Act 2013*, section 52 (rules made by the Minister)
- *Australian Jobs Act 2013*, section 128 (rules made by the Minister)
- *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*, section 10 (rules made by the Minister)
- *National Disability Insurance Scheme Act 2013*, section 209 (rules made by the Minister)
- *Public Governance, Performance and Accountability Act 2013*, section 101 (rules made by the Finance Minister)
- *Public Interest Disclosure Act 2013*, section 83 (rules made by the Minister)
- *Sugar Research and Development Services Act 2013*, section 14 (rules made by the Minister).

13 OPC's approach is consistent with the *Legislative Instruments Act 2003* (the LIA) and the First Parliamentary Counsel's functions and responsibilities under the LIA. Under the LIA all disallowable legislative instruments are subject to the same high-level Parliamentary scrutiny. Also, under the LIA the First Parliamentary Counsel's responsibility to encourage high standards in drafting of legislative instruments applies to all legislative instruments and not just regulations.

14 Whether particular legislative rules are drafted by OPC is a matter for agencies to choose. OPC will continue to be available, within the limits of its available resources, to draft (or assist in the drafting of) legislative rules for agencies as required. In this respect legislative rules are in no different position to the other legislative instruments that are not required to be drafted by OPC.

15 I would be happy to provide further information if that would be of assistance.

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel
13 March 2014

Australian Government

Office of Parliamentary Counsel

First Parliamentary Counsel

The Hon. Ian MacFarlane MP
Minister for Industry
Parliament House
CANBERRA ACT 2600

Dear Minister

Australian Jobs (Australian Industry Participation) Rule 2014—Further request for information from Senate Standing Committee on Regulations and Ordinances

1 The Senate Standing Committee on Regulations and Ordinances has requested your further advice on issues identified in the *Delegated Legislation Monitor* No. 5 of 2014 published on 14 May 2014 in relation to the *Australian Jobs (Australian Industry Participation) Rule 2014* (the Rule).

2 The Committee gave a notice of motion to disallow the Rule on 13 May 2014 and seeks your advice by 11 June 2014. This letter sets out the views of the Office of Parliamentary Counsel (OPC) on the matters raised by the Committee.

Prescribing of matters by "legislative rules"

3 As discussed in my previous letter, Commonwealth Acts have provided for the making of instruments rather than regulations for many years. The use of a general rule-making power in place of a general regulation-making power is a development of this long-standing approach, and has been adopted by OPC for the reasons discussed below. In my view, over time this approach will enhance, and not diminish, the overall quality of legislative instruments (in particular, the quality of instruments that have the most significant impacts on the community) and will accordingly facilitate the Committee's scrutiny role.

Ramifications for the quality and scrutiny of legislative rules

4 Before turning to the particular questions raised by the Committee, it may be helpful to deal with some general issues.

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1. OPC's drafting functions

(a) OPC's drafting functions generally

5 The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of subordinate legislation. Subordinate legislation is broadly defined in the Act and includes all legislative instruments.

(b) Who may provide drafting services for Government?

6 The fact that an activity is within the functions of OPC does not itself exclude other persons or bodies from engaging in the activity. However, the *Legal Services Directions 2005* made under section 55ZF of the *Judiciary Act 1903* provide for the extent to which other persons or bodies may engage in drafting work.

7 The Legal Services Directions provide that certain drafting work is tied so that only OPC is to undertake the work (or arrange for it to be undertaken). This work consists of the drafting of government Bills, government amendments of Bills, regulations, Ordinances and regulations of non-self-governing Territories, and other legislative instruments made or approved by the Governor-General.

8 The explanatory statement for the Legal Services Directions provides the following general policy background to the Directions:

> The Directions offer important tools to manage, in a whole-of-government manner, legal, financial and reputational risks to the Commonwealth's interests. They give agencies the freedom to manage their particular risks, which agencies are in the best position to judge, while providing a supportive framework of good practice.

9 In relation to the provision of the Directions providing for tied work, the explanatory statement provides the following explanation:

> This paragraph creates categories of Commonwealth legal work that must be carried out by one of a limited group of legal services providers, namely the Attorney-General's Department, the Australian Government Solicitor, the Department of Foreign Affairs and Trade, and the Office of Parliamentary Counsel, depending on the category of work. These areas of legal work are known as 'tied work'. The provision recognises that certain kinds of work have particular sensitivities, create particular risks or are otherwise so bound to the work of the executive that it is appropriate that they be subject to centralised legal service provision.

10 Outside these tied areas of legal work the Directions give agencies the responsibility of managing the risks involved in their legal work and, in the case of their drafting work, the freedom to choose whether their legislative instruments will be drafted in-house or will be drafted by OPC or another legal services provider.

(c) Basis for tying instrument drafting work to OPC

11 The drafting of legislative instruments to be made or approved by the Governor-General is an important function of OPC. However, even a cursory examination of the Select Legislative Instruments series (in which most of these instruments are published)

makes it clear that many provisions of legislative instruments presently made by the Governor-General do not have particular sensitivities, or create particular risks for the Commonwealth, such that it could be said that it is appropriate that their drafting should be subject to centralised legal service provision and thus tied to OPC. The reason that the drafting of these instruments is tied to OPC under the Legal Services Directions is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.

12 Under section 61 of the Constitution the Governor-General exercises the executive power of the Commonwealth. It seems reasonable that the drafting of legislative instruments to be made or approved by the Governor-General is "otherwise so bound to the work of the executive" that it should be subject to centralised legal service provision and thus tied to OPC. The special constitutional status of the Governor-General as a rule-maker of legislative instruments is recognised in the *Legislative Instruments Act 2003* (see paragraph 4(3)(a)).

2. Rationalisation of instrument-making powers

13 *Drafting Direction No.3.8—Subordinate Legislation* (DD3.8) sets out OPC's approach to instrument-making powers, including the cases in which it is appropriate to use legislative instruments (as distinct from regulations). The development of DD3.8 involved consideration of the following matters.

(a) First Parliamentary Counsel's statutory responsibilities

14 Under section 16 of the *Legislative Instruments Act 2003*, I have a responsibility to take steps to promote the legal effectiveness, clarity, and intelligibility to anticipated users of legislative instruments.

15 I am also required to manage the affairs of OPC in a way that promotes proper use of the Commonwealth resources that OPC is allocated (see section 44 of the *Financial Management and Accountability Act 1997*), including resources allocated for the drafting of subordinate legislation.

16 I consider that DD3.8 is an appropriate response to these responsibilities in relation to the drafting of Commonwealth subordinate legislation.

(b) Volume of legislative instruments

17 In 2012 and 2013, Federal Executive Council (ExCo) legislative instruments drafted by OPC (or OLDP before the transfer of functions to OPC in 2012) made up approximately 14% of all instruments registered on the Federal Register of Legislative Instruments (FRLI) and 25% to 30% of the number of pages of instruments registered. In addition, in 2013 OPC drafted approximately 4% of all non-ExCo legislative instruments registered and 13% of the number of pages of non-ExCo legislative instruments registered. This meant that in 2013 OPC drafted approximately 35% of all the pages of legislative instruments registered on FRLI.

18 As mentioned in my previous letter, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

19 The question of the centralisation of drafting of all Commonwealth subordinate legislation was considered by the Administrative Review Council in its 1992 report "Rule Making by Commonwealth Agencies" . The Council stated that:

> 4.10. The Council does not believe that the drafting of all delegated legislative instruments can be centralised in the Office of Legislative Drafting. The resources are not presently available to cope with such a drafting load, although they could be developed in time. Nor is it necessarily desirable that drafting be centralised. Delegated instruments are not uniform. They comprise a diverse range of instruments covering subject matters of widely differing kinds. Their preparation needs an extensive contribution from the agencies themselves.

20 In my view, the Council's statement is still accurate today.

21 It is correct that departments and agencies have a choice under the Legal Services Directions to draft untied instruments in-house or to engage OPC or another legal service provider to draft them. This is consistent with departments and agencies managing their risks, including in relation to the drafting of their legislative instruments, except in areas where for policy reasons it is appropriate to tie the work to OPC. OPC has no difficulty with having to compete for untied instrument drafting work in accordance with the Legal Services Directions and the Competitive Neutrality Principles.

22 My view is that OPC should use its limited resources to draft the subordinate legislation that will have the most significant impacts on the community. This would comprise the narrower band of regulations as specified in DD3.8, which only OPC could draft and which would also receive the highest level of executive scrutiny because of the special nature of the matters dealt with, as well as a range of other more significant instruments. The narrowing of the band of regulations will mean that OPC resources do not have to be committed to drafting instruments dealing with matters that have in the past often been included in regulations but that are of no great significance. Drafting resources will therefore be freed up to work on other more significant instruments, or to assist agencies to draft them.

23 OPC has a strong reputation among Commonwealth Departments and agencies, and I strongly believe that they will recognise the benefits of having significant instruments drafted by OPC and will direct a greater proportion of this work to OPC, or will at least seek OPC's assistance. OPC will also actively seek more of this work. Because this work is billable, OPC will be in a better position to increase its overall drafting resources and to take further steps to raise the standard of instruments that it does not draft. All this will contribute to raise the standard of legislative instruments overall.

(c) Division of material between regulations and legislative instruments

24 Before the issue of DD3.8, the division of material between regulations and other legislative instruments seems largely to have been decided without consideration of the nature of the material itself. This has resulted in the inclusion of inappropriate material in regulations and the inclusion of material that should have been professionally drafted in other instruments. This in turn has meant that the resources of OPC and the Federal Executive Council have been taken up with matters that are presently inappropriately included in regulations, while more significant matters have been drafted in other instruments outside of OPC.

25 DD3.8 addresses this matter by outlining the material that should (in the absence of a strong justification to the contrary) be included in regulations and so be drafted by OPC and considered by the Federal Executive Council. I would welcome any views that the Committee may have on the appropriate division of material between regulations and other legislative instruments and would be happy to review DD3.8 to take account of any views the Committee may have.

(d) Proliferation of number and kinds of legislative instruments

26 As long ago as 1992, the Administrative Review Council, in its report "Rule Making by Commonwealth Agencies", stated:

> The Council is concerned at the astonishing range of classes of legislative instruments presently in use, apparently without any particular rationale.

27 To address this the Council recommended:

> The Office of Parliamentary Counsel, in consultation with the Office of Legislative Drafting, should seek to reduce the number of classes of legislative instruments authorised by statute and to establish consistency in nomenclature.

28 The Council also suggested the use of "rule" as an appropriate description for delegated legislative instruments.

29 Before the issue of DD3.8, it was not unusual for Acts to contain a number of specific instrument-making powers (in addition to a general regulation-making power). These may have resulted in a number of separate instruments of different kinds being made under an Act (for example determinations, declarations and directions, as well as regulations).

30 DD3.8 notes that the inclusion of a general instrument-making power in an Act means that it is not then necessary to include specific provisions conferring the power to make particular instruments covered by the general power. DD3.8 notes that the approach of providing for legislative instruments has a number of advantages including:

(a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for an Act; and

(b) it enables the number and content of the legislative instruments under the Act to be rationalised; and

(c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and

(d) it shortens the Act.

31 In my view, a general instrument-making power also simplifies the task of drafting instruments under the power. Instruments drafted under a general instrument-making power will not necessarily be complex or lengthy. Nor will a general instrument-making power necessarily broaden substantially the power to make instruments under an Act. The power given by a general instrument-making power in an Act is shaped and constrained by the other provisions of the Act and is not a power at large. A general instrument-making power in an

Act may add little to the power to make instruments under the Act, but will add substantially to the ability to rationalise the number and type of instruments under an Act.

(e) OPC's aim is to raise legislative instrument standards and support Parliamentary scrutiny

32 In response to the material in my previous letter the Committee has stated:

> While the committee acknowledges that agencies must seek to best use often limited resources, the committee considers that what appears to be a potentially significant change or addition to the use of the general regulation-making power should not be effected solely through agency policy.

33 I remain of the view that OPC's drafting approach to instrument-making powers is measured and appropriate and will, over time, raise standards in the drafting of legislative instruments and support the ability of the executive and Parliament to scrutinise instruments appropriately.

34 I should also emphasise that I would be happy to consider any views that the Committee has in relation to the material that should (or should not) be included in regulations, or any alternative approach the Committee may have in mind.

3. Drafting quality and executive and Parliamentary scrutiny of legislative instruments

35 The Committee has stated:

> The committee notes that the broader thrust of its comments on the prescribing of matters by the general instrument-making power relate to the ramifications of this approach for the quality and level of executive and Parliamentary scrutiny applied to such instruments.

(a) Drafting quality and executive and Parliamentary scrutiny of the Rule

36 The Committee has not raised any issues with the content of the Rule. The Rule was drafted by OPC and deals only with matters for which there are specific authorising powers in the *Australian Jobs Act 2013*.

37 There appears to be nothing in the content of the Rule that would suggest that a higher level of executive scrutiny should have been applied to its making, nor that the Rule should have been made by the Governor-General rather than the Minister. The Rule is subject to Parliamentary scrutiny in the same way as any other disallowable legislative instrument. In short, in this case I do not see any adverse effects on the quality of drafting or the level of executive or Parliamentary scrutiny flowing from this instrument being a Rule rather than a regulation.

(b) Particular questions raised by the Committee

- **Regarding the FPC's advice that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument', in the event that such provisions are required for the Acts listed on page 3 above, how will the required measures be introduced in the absence of a regulation-making power?**

38 The types of provisions referred to above that should be included in regulations include provisions dealing with offences and powers of arrest, detention, entry, search or seizure. Such provisions are not authorised by a general rule-making power (or a general regulation-making power). If such provisions are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions.

- **Will the drafting of complex and lengthy instruments by departments and agencies based on the general instrument-making power achieve the same levels of quality and accuracy as achieved by OPC in its drafting of regulations?**

39 The quality and accuracy of the drafting of an instrument not tied to OPC under the Legal Services Directions is a matter for the responsible agency (and the rule-maker). As discussed above, in my view, the approach taken in DD3.8 will contribute to raise the standard of legislative instruments overall.

- **What is the minister's understanding of the fundamental or original reason for requiring regulations to be drafted by OPC and made by the Governor-General? Do such requirements ensure higher standards in such instruments by mandating greater executive responsibility and scrutiny?**

40 Regulations are required to be drafted by OPC because they are made by the Governor-General: see paragraphs 11 and 12. Commonwealth Acts have traditionally provided for regulations to be made by the Governor-General and not any other rule-maker.

41 In relation to the second part of the question, requiring regulations to be drafted by OPC and made by the Governor-General provides for higher drafting standards and an additional level of executive scrutiny. However, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so, and the approach taken in DD3.8 ensures that the resources of OPC and the Federal Executive Council Secretariat are directed at the matters that most warrant the application of OPC's drafting expertise and the Council's attention.

Prescribing matters by legislative rules and the definition of "prescribed" in the *Acts Interpretation Act 1901*

42 The Committee sought advice on three matters.

- **The specific meaning and import of the term 'facilitative definition', and the legal or policy considerations that guide the interpretation of specific definitions as being facilitative as opposed to, for example, restrictive.**

43 In my previous letter I said that the definition of "prescribed" in section 2B of the *Acts Interpretation Act 1901* (the AIA) is "a facilitative definition that was intended to assist in the shortening of Acts". To explain this further it may be helpful to say something about the history of the definition and the various meanings that the term "prescribed" has in Commonwealth legislation.

44 In Attachment A, I have set out the history of the definition of "prescribed". From this history, the following points can be drawn.

45 First, the definition was intended as a definition to facilitate the shortening of Acts. It was in this sense that I said that the definition was facilitative. Second, the definition was always able to be displaced by a contrary intention. Third, from the early years of Federation, the definition does not seem to have been regarded as limiting the instruments that could prescribe matters. In particular, it does not appear to have been regarded as inappropriate in legislation to talk of instruments other than regulations (or indeed Acts themselves) prescribing matters.

46 The legislative history, therefore, supports my view that there is no legislative principle or practice that requires the word "prescribe" to be used only in relation to regulations. The purpose of the definition is to enable the language of Acts to be shortened in appropriate cases. Commonwealth legislative drafting practice has always recognised that there will be cases in which it is inappropriate for the definition of "prescribed" to be applied. I am not aware of any specific legal or policy considerations that would lead to the definition being applied or displaced as a general rule. Brevity is, of course, desirable in legislative drafting, but not necessarily desirable at the expense of clarity. The definition of "prescribed" is intended to aid brevity, but there is no justification for its application in inappropriate cases or limiting its use in accordance with its ordinary meaning.

- **Specific cases in which the definition is uncertain in its application.**

- **Specific cases which demonstrate that the definition is not widely known by identified classes of 'users of legislation', and the specific consequences of such cases.**

47 In my previous letter I mentioned that the definition "can be uncertain in its application" (emphasis added). I pointed to the fact that under the definition matters can be prescribed by the Act itself or by regulations. I also mentioned that the definition appears not to be widely known to users of legislation.

48 There are a number of difficulties with the definition that are likely to cause uncertainty to readers of legislation even if they are aware of the definition. Drafters are generally aware of these difficulties and, as I explained in my previous letter, current legislative drafting practice is to rely on the definition sparingly (even for regulations). There are, therefore, not likely to be a large number of specific cases in which the application of the definition is uncertain.

49 Nevertheless, it may be helpful for me to explain the main difficulties that I see with the definition. First, "prescribe" has an ordinary meaning that is picked up through the definition if the definition applies in a particular case or through the direct application of the ordinary meaning if the definition does not apply. The *Macquarie Dictionary* (6th ed) defines "prescribe" as follows:

> –*verb* (*t*) **1.** to lay down, in writing or otherwise, as a rule or a course to be followed; appoint, ordain, or enjoin.

50 This ordinary meaning could, of course, be displaced in a particular case, but this is likely to be rare. There are examples of the application of the ordinary meaning of "prescribe" in the following provisions of the AIA where the definition does not apply: section 25C, paragraph 33(3AB)(a) and subsection 33(5). The use of a word like "prescribe", which has an ordinary, readily understood meaning, in a restrictive sense through a general

definition in the AIA is, in my view, a likely cause of uncertainty for many users of legislation. For example, what would a non-expert reader of legislation make of a provision in an Act that, without any contextual material, required the payment of the "prescribed fee" for an application?

51 Second, "prescribe" is sometimes used in the sense of prescribed (in the ordinary sense of the word) by an Act or instrument (or a particular Act or instrument or particular type of instrument). This is the way in which the definition of "prescribed" in section 2B of the AIA operates.

52 If the definition applies to a general reference to "prescribe" in an Act, the reference will mean prescribed by the Act itself or by regulations made under the Act. The reader will need to read the Act and the regulations made under the Act to work out where the relevant provision is made.

53 If the definition applies to a general reference to "prescribe" in a legislative instrument made under an Act, the reference will mean prescribed by the Act or by regulations made under the Act. If the legislative instrument is not a regulation, the reference cannot mean prescribed by the legislative instrument itself. Again, the reader will need to read the Act and the regulations made under the Act to work out where the relevant provision is made. (Under paragraph 13(1)(a) of the *Legislative Instruments Act 2003* (the LIA), the AIA applies to a legislative instrument if it were an Act.)

54 To me, good drafting practice requires that the reader not be left to work these matters out unaided, but at least be told whether the provision is made in the Act itself (preferably by an appropriate cross-reference to the provision), or in a particular type of instrument made under the Act. This is why current drafting practice is to rely on the definition of "prescribed" sparingly and to spell out, at least in general terms, where the relevant provision is made. There are examples of this approach in the following provisions of the LIA, where the definition could be relied on, but in fact is not relied on: paragraph (b) of the definition of "original legislative instrument" in subsection 4(1), subsection 7(1) table item 24, paragraph 26(1A)(g), subsection 44(2) table item 44, subsection 54(2) table item 51. This approach is common in recent legislation and is, in my view, usually the appropriate one.

Further information

55 If the Committee would like any further information in relation to these matters, I would be happy to meet with them to discuss the matter.

Yours sincerely

Peter Quiggin PSM

First Parliamentary Counsel
23 May 2014

Australian Government
Office of Parliamentary Counsel

First Parliamentary Counsel

Our ref: C14/21

Senator Gavin Marshall
Deputy Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
Canberra ACT 2600

Dear Senator Marshall

Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]

1 I refer to the Committee Secretary's letter of 20 June 2014 about this rule and note that a meeting has been arranged for Tuesday 8 July 2014 to brief the Committee on the prescribing of matters by legislative rules. To assist the Committee in advance of the meeting this letter responds briefly to issues raised in *Delegated Legislation Monitor No. 6 of 2014* concerning the rule.

2 I would be happy to respond further to these issues and any other issues the Committee wishes to raise at the briefing.

Basis for tying drafting of regulations to OPC

General regulation and rule-making powers

3 It may be helpful if I were to make some brief comments on the form and breadth of the standard general rule-making power set out in Drafting Direction 3.8 (DD3.8). The power follows the standard general regulation-making power that has been used for some time. The principles applying to its interpretation are, therefore, well established.

4 The standard general rule-making power is as follows:

> The *[maker, e.g. Minister]* may, by legislative instrument, make [*name of legislative instrument (e.g. rules)*] prescribing matters:
>
> (a) required or permitted by this [*Act/Ordinance*] to be prescribed by the [*name of legislative instrument (e.g. rules)*]; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this [*Act/Ordinance*].

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Paragraph (a) is commonly called the "required or permitted" power and paragraph (b) is commonly called the "necessary or convenient" power.

5 It is important to stress that the scope of each of these powers in the general rule-making power is dependent on the other provisions of the Act.

6 This point is perhaps clearest in relation to the "required or permitted" power. The scope of this power depends on the existence and terms of other provisions of the Act that require or permit the making of rules. Put simply, the "required or permitted" power gives no power to make rules beyond that authorised by the other provisions of the Act. If there is no other provision of the Act that requires or permits the making of rules, the "required or permitted" power does not authorise the making of rules.

7 Again, the "necessary or convenient" power is not a power at large. The scope of the power varies according to the content of the other provisions of the Act. To be valid, a rule (or regulation) made under the power must "complement" rather than "supplement" the other provisions of the Act. "(A)n examination of the Act…will usually indicate whether an attempt is being made to add something to the operation of the Act which cannot be related to the specific provisions of the Act, or whether the regulation-making power has been used merely to fill out the framework of the Act in such a way as to enable the legislative intention to operate effectively." (Pearce, D and Argument, S *Delegated Legislation in Australia, 4th Edition*, 2012 at 14.5). Only a provision of the latter kind is valid.

8 Thus, the form of a general rule-making power of an Act is not conclusive of the scope of the power. In my view it is, therefore, not correct to suggest that it is the form of the power itself that enables the making of laws "covering a range of matters". For what is commonly called "skeleton legislation", it is also not correct to suggest that a general rule-making power can necessarily be relied on to provide for "a vast range of matters" required to effectively implement and support the operation of the Act. In each case the scope of the power conferred by a general rule-making power depends on the exact terms of the other provisions of the Act. In some cases the power may be extensive. In other cases the power will be limited.

9 In my view, it is not appropriate to focus solely (or unduly) on the form of any power in deciding its scope. For a general rule-making power this is particularly the case because the scope of the power can be decided only in the context of the other provisions of the Act.

Tying of drafting work to OPC not dependent on the form of the power or type of instrument

10 There is, in my view, no basis for suggesting that it is the form of the general regulation-making power that is the basis for tying regulation drafting work to OPC. First, as I have explained, the form of the power is not conclusive of its scope. A general regulation-making power may give only a limited power to make regulations. Second, broad non-regulation subordinate legislation-making powers have existed in the Commonwealth for many years and these instruments are not tied to OPC. Finally, the drafting of all legislative instruments (not just regulations) made or approved by the Governor-General is tied to OPC. The tying of these instruments to OPC is not dependent on the form of the power under which the legislative instruments are made nor indeed the type of legislative instrument concerned. They are tied to OPC because they are legislative instruments made or approved by the Governor-General.

Drafting quality and executive and parliamentary scrutiny of legislative instruments

Drafting standards

11 As mentioned in my previous letters, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

12 In my view, the approach set out in DD3.8 will allow OPC to ensure that it has the capacity to draft the instruments that have the most significant impacts on the community. It will enable OPC to draft the most significant instruments itself and allow it either to draft or assist agencies to draft other instruments. OPC can provide a range of services to assist agencies in drafting instruments. These services include instrument design and template development, editing, commenting on draft instruments and providing advice. In my view this approach will enhance, and not diminish, the overall quality of legislative instruments and ensure that the most significant matters receive the highest level of drafting expertise and executive scrutiny.

Division of material between regulations and other legislative instruments

13 In the past there has been no clear guidance about the appropriate division of material between regulations and other legislative instruments. As a result, material seems to have been allocated between regulations and other legislative instruments without any consideration of the nature of the material itself. Less important matters of detail have sometimes been included in regulations while more important matters have been included in a wide range of other types of legislative instruments. DD3.8 deals with this lack of guidance as well as the previous proliferation of the number and kinds of legislative instruments.

14 DD3.8 outlines the material that should, in OPC's view, be included in regulations (in the absence of a strong justification to the contrary) and so be drafted by OPC and considered by the Federal Executive Council. However, any decision in a particular case is, of course, a decision for the Government, and ultimately the Parliament, to make.

15 I would welcome any views that the Committee (or the Senate Standing Committee on the Scrutiny of Bills) may have on the appropriate division of material between regulations and other legislative instruments and would be happy to review DD3.8 to take account of them.

Scope of general rule-making power and likelihood of matters being inappropriately included in rules

16 I note that in *Alert Digest No. 6 of 2014* the Senate Standing Committee on the Scrutiny of Bills has queried whether a general rule-making power would permit a rule-maker to make the following types of provisions:

- offence provisions
- powers of arrest or detention
- entry provisions
- search provisions

- seizure provisions
- provisions which make textual modifications to Acts
- provisions where the operation of an Act is modified
- civil penalty provisions
- provisions which impose (or set or amend the rate) of taxes
- provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation.

17 I note that this list differs only slightly from the list in DD3.8 and is substantially similar to the list included by the Australian Government Solicitor in Legal Briefing Number 102 dated 26 February 2014 (http://www.ags.gov.au/publications/legal-briefing/br102.html).

18 In my view, and taking into account the view expressed in that Legal Briefing, none of the kinds of provisions mentioned in the list would be authorised by either a general regulation-making power or a general rule-making power. Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

19 However, it may be possible to make the matter even more certain. For example, the standard form of rule-making power (as set out in paragraph 4) could be revised so that it expressly provides that the power does not enable the making of rules dealing with provisions of these kinds. This would ensure that the scope of rule-making powers in relation to these kinds of provisions was clear on the face of the provisions themselves, regardless of whether the resulting rule were to be drafted by OPC, in-house or by another legal services provider.

20 Depending on the Committee's views on the matters that should be included in regulations rather than other types of legislative instruments, other measures may also be appropriate. For example, if any of the matters were inappropriate to be dealt with in express provisions of the kind that I have outlined, it may be possible to deal with them through the issue of drafting standards under the *Legislative Instruments Act 2003* and the introduction of a requirement for explanatory statements to include a statement about compliance with the standards. This would achieve a high level of transparency and should facilitate the Committee's scrutiny function.

21 I would be happy to consider any views that the Committee has about this or other measures the Committee may have in mind.

Volume of OPC drafted instruments

22 I note that the Committee seems to assume that the approach in DD3.8 will lead to OPC drafting fewer instruments. I do not think that this will be the case (see paragraph 17 of my letter of 23 May 2014 on the volume of OPC drafted instruments). OPC will continue to be available to draft, and assist agencies to draft, instruments that are not tied to OPC. OPC will be actively seeking more of this work and I expect that it will continue to draft a

substantial proportion of all legislative instruments, including the most significant and sensitive of them.

23 I look forward to discussing these issues with the Committee next Tuesday.

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel

2 July 2014

Australian Government

Office of Parliamentary Counsel

First Parliamentary Counsel

Our ref: C14/21

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
Canberra ACT 2600

Dear Senator Williams

Prescribing of matters by legislative rules

1 In Delegated Legislation Monitor No. 9 of 2014 the Committee sought my written response to matters outlined in the Committee's response to my letter of 2 July 2014 and to comments of the Committee in relation to the *Jervis Bay Territory Rural Fires Ordinance 2014*. I note the foreshadowed briefing for the Committee has now been rescheduled for 3 September 2014. I will, therefore, keep my response relatively brief. However, I would be happy to provide any additional information or explanation at the briefing.

Division of material between regulations and other legislative instruments

2 The majority of Commonwealth subordinate legislation is not made by the Governor-General or drafted by the Office of Parliamentary Counsel (OPC). Given existing limited resources it would not be possible, nor in my view would it be appropriate anyway, to have all subordinate legislation made by the Governor-General or drafted by OPC. OPC agrees that it should draft all legislative instruments made by the Governor-General, but does not agree that all material presently required to be in legislative instruments made by the Governor-General needs to be in instruments made by the Governor-General or drafted by OPC. The question then is what legislative instruments should be required to be made by the Governor-General and drafted by OPC.

3 OPC *Drafting Direction No.3.8 Subordinate legislation* (DD3.8) addresses this question by setting out a list of matters that should be included in regulations and not another type of legislative instrument. If these matters are included in regulations, they will be required to be drafted by OPC, subject to Executive Council processes and made by the Governor-General. In my view, DD3.8 represents a significant improvement over the previous practice of including material in different types of legislative instruments without a systematic consideration of the nature of the material and the consequences of using different types of instruments for different types of material.

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4 The previous practice has led to the inclusion of material in regulations that, having regard to the nature of the material, does not need to be drafted by OPC, subject to Executive Council processes or made by the Governor-General. Conversely the previous practice has led to the inclusion of material in other types of instruments that, having regard to the nature of the material, should perhaps have been included in regulations.

5 The previous practice has also contributed to the fragmentation of the Commonwealth's statute book by encouraging an unnecessary proliferation in the number and types of legislative instruments (see paragraphs 26 to 31 of my letter of 23 May 2014 attached to the letter from the Minister for Industry to the Chair of the Committee on 5 June 2014). The approach in DD3.8 will address these issues and, over time, ensure that a core of material (listed in DD3.8) is drafted by OPC, subject to Executive Council processes and made by the Governor-General unless there is a strong justification to the contrary. This will support the ability of the Executive and the Parliament to ensure that instruments dealing with this important core material are scrutinised appropriately.

6 DD3.8 focuses on nature of the matters to be dealt with in subordinate legislation (that is, the content or substance of the subordinate legislation), rather than the form (that is, the type) of the subordinate legislation or the form of the power under which it is made. In my view, this is the correct approach. The treatment of delegated legislation should reflect matters of substance and not just matters of form.

7 The form of a general power under which material is prescribed is an inappropriate basis for deciding the type of instrument in which the material should be included because the form of the power may give no real indication of the nature of the material itself. Taken by itself the form of the power also gives no real indication of the scope of the power nor the difficulty in drafting instruments under it.

8 As I explained in my letter of 2 July 2014 to the Committee, the scope of a necessary or convenient power in an Act can only be decided in the context of the other provisions of that Act. It seems to me illogical to suggest then that, because the scope of the power may in some cases be "extensive", all exercises of the power are treated in the same way and required to be subject to the same drafting processes and the same "close executive oversight". Such a mechanical approach ignores not just the nature of the material itself, but also the actual scope to the power in the particular case.

9 I accept, however, that there could be differing views about details of the matters that should, either generally or in particular cases, be included in regulations and so drafted by OPC, subject to Executive Council processes and made by the Governor-General. As I mentioned in my letter of 23 May 2014, I would welcome any views the Committee may have on the appropriate division of material between regulations and other types of legislative instrument and would be happy to review DD3.8 to take account of any views the Committee may have.

Quality of legislative instruments

10 As I also explained in my letter of 2 July 2014, the standard general rule-making power consists of 2 powers: a "required or permitted" power and a "necessary or convenient" power.

11 A "required or permitted" rule-making power in an Act gives no power to make rules beyond that authorised by the other provisions of the Act. This power would not, therefore, seem to be relevant to the Committee's inquiries about drafting quality and executive and Parliamentary scrutiny under general rule-making powers. It does not add to the powers provided by other provisions of the Act, but merely provides a single source for the exercise of those powers.

12 A "necessary or convenient" power is a limited power. It is not an open-ended power nor necessarily an extensive power. The rules for the interpretation of a "necessary or convenient" power are well established. In particular, the fact that a matter might be regarded as necessary or convenient does not necessarily mean that provision can be made about the matter under the power. A rule cannot *supplement* the Act. It can only *complement* the Act and prescribe matters that are confined to the same field of operation of the Act.

13 It follows that I do not agree there is anything intrinsic in the standard general rule-making power that represents a real threat to the quality of Commonwealth subordinate legislation. My view seems to be supported by the Committee's own inquiries. In the rules commented on to date by the Committee, these inquiries do not seem to have established any diminution in drafting quality or lack of executive oversight. In fact all the rules commented on by the Committee were drafted by OPC and relied on the "necessary or convenient" power in a very limited way (if at all).

14 Since the function of drafting subordinate legislation was transferred to OPC some 2 years ago, OPC has taken a broad range of measures to promote high drafting standards for all legislative instruments. I would be happy to brief the Committee on these measures.

15 Although substantial progress has already been made, more can be done to promote high drafting standards for legislative instruments. However, this will take resources and time and perhaps legislative changes. DD3.8 is only a relatively small, but nevertheless important, part of the measures that OPC is already pursuing. If the use of general rule-making powers raises any risks to drafting standards at all, these risks are likely to be minimal and substantially outweighed by the benefits. The risks can, in any event, be effectively mitigated by other strategies to promote high drafting standards that OPC is already pursuing.

16 In short, my view remains that the use of general rule-making powers, taken with the other measures OPC is already pursuing, will enhance, and not diminish, the overall quality of legislative instruments and support the scrutiny of legislative instruments by the Parliament.

Volume of instruments drafted by OPC

17 In developing the current version of DD3.8 OPC took into account the need to ensure that OPC's limited budget-funded drafting resources are appropriately managed and applied and, in particular, remain sufficient to draft the Government's legislative program as well as drafting the subordinate legislation that will have the most significant impacts on the community. However, this does not mean that DD3.8 will lead to OPC drafting fewer instruments. In my view, the opposite will be the case.

18 OPC will continue actively seeking drafting and publishing work that is not tied to it. OPC competes and charges for this work in accordance with the Competitive Neutrality Principles. Because the work is billable, OPC will be in a better position to increase its

drafting resources, increase the number of instruments that it drafts and further develop its services to assist agencies to draft the instruments drafted by them. This will contribute to raising the standard of all legislative instruments, not just those drafted under a general rule-making power.

Monitoring the quality of legislative instruments

19 It follows from what I have already said that I do not agree that the use of general rule-making powers raises risks that require special monitoring. Nevertheless, monitoring mechanisms are already available and could be extended if necessary.

20 OPC is responsible for maintaining the Federal Register of Legislative Instruments. (FRLI). All legislative instruments, explanatory statements and legislative instrument compilations are required to be registered on FRLI. Legislative instruments, explanatory statements and legislative instrument compilations are already checked for compliance with registration requirements. As part of these checks, issues of a drafting or formal nature are frequently detected and pointed out to the rule-making agency.

21 For example, the Committee would be aware that issues with the drafting of the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014* discussed in Delegated Legislation Monitor No. 9 had already been detected by OPC and drafting advice provided to the administering Department by the relevant OPC client adviser. OPC client advisers are Parliamentary Counsel from whom agencies can obtain quick, informal advice about matters in which OPC has expertise that may not be readily available in an agency. These matters include matters necessary, desirable or acceptable for inclusion in instruments and options for improving the standard of instruments.

Decisions about inclusion of listed material in instruments other than regulations

22 DD3.8 represents a statement of the policy followed by OPC in the drafting of Bills and subordinate legislation. It is not directly binding on other agencies, but OPC's advice on drafting matters is generally accepted by the Government and departments and agencies. In this regard DD3.8 is no different to the numerous other policies and practices followed by OPC in the drafting and publishing of Commonwealth legislation. These policies and practices are documented in Drafting Directions and other documents published by OPC and are available on OPC's website.

23 DD3.8 requires OPC drafters to include certain listed matters in regulations unless there is a strong justification for prescribing them in another type of instrument. From OPC's point of view, decisions about whether a strong justification exists would be made personally by me as First Parliamentary Counsel. To date, I have not found a case in which I consider that a sufficiently strong justification exists for an exception to be made. If such a case exists, it is likely to be highly unusual.

24 In drafting legislation OPC acts on the instructions of its clients and it is, of course, open to the Government and OPC's other clients to instruct it to follow a drafting approach that is different to OPC's usual drafting policies and practices. OPC may, for example, be instructed to provide for matters listed in DD3.8 to be prescribed by an instrument other than a regulation. Parliament may agree or disagree with the approach taken in a particular case

and in making such a decision may choose to apply a "strong justification" exception or some other approach. DD3.8 has no direct application to the making of decisions of that kind.

25 In my view, the "strong justification" exception in DD3.8 is likely to have limited application. Nevertheless, I would welcome any views the Committee may have on the exception.

Jervis Bay Territory Rural Fires Ordinance 2014

26 Instructions for the drafting of this Ordinance were received in April 2013. By the time DD3.8 was reissued in March 2014 the then draft Ordinance had been the subject of extensive consultation by the administering Department and the drafting of the Ordinance was substantially complete. The Ordinance was made on 24 April 2014. In this case, I agree that it may have been better to have applied DD3.8 to the Ordinance before it was made, even though drafting of the Ordinance started before, and was substantially complete, when DD3.8 was reissued. This will be done if any similar transitional cases arise in the future.

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel
6 August 2014

Australian Government
Office of Parliamentary Counsel

First Parliamentary Counsel

Our ref:
Your ref:

Mr Ivan Powell
Committee Secretary
Senate Regulations and Ordinances Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Powell

Questions on notice from Senate scrutiny committees

1 Thank you for your email of 15 September 2014 setting out the questions on notice from the Regulations and Ordinances committee and the Scrutiny of Bills committee that followed our recent meeting. Could I also take this opportunity to thank the committees for the opportunity to meet with them.

2 I have set out the questions below with our responses below each question.

3 As a preliminary point, I would like to reiterate the point that Mr John Leahy PSM SC made at the meeting with the committee. This is that the use of legislative instruments other than regulations is not new and that over 85% of legislative instruments made in each of the last 3 years are not regulations.

4 While some of the things that will now be dealt with by rules may have previously been done by regulations, many of the things would previously have been done by some other form of legislative instrument.

1. Regulations are defined as disallowable instruments in the *Legislative Instruments Act 2003*. Is this the approach that will be taken with rules made under the general rule-making power?

   All of the rules that will be covered by the general rule making power will be legislative instruments. They will all be subject to disallowance. Any legislative instruments (however described) that are excluded from the disallowance provisions of the *Legislative Instruments Act 2003* will be authorised under specific provisions.

We are currently discussing with the Attorney-General's Department the best way of making the status of legislative rules clear in the *Legislative Instruments Act 2003*.

2. OPC has advised that it does not have the resources to draft all Commonwealth legislation, and that it should concentrate on work that has particular risks or sensitivities, or is particularly bound to the work of the executive. Is this a distinction that could or should be applied to the drafting of bills?

   OPC does not consider that this should be applied to the drafting of Bills. There is substantially less straightforward material included in Bills and the volume of Bills each year is such that OPC is able to draft those Bills that are required for the Government.

   There is also substantially more interaction, including cross references, between different Bills. This would add to the complexity of having these drafted in different places.

   It would require a change to the Legal Services Direction for someone other than OPC to draft Bills.

3. Increasingly, Acts provide a skeleton of a legislative scheme that is then substantially 'fleshed out' by the regulations. This will now be largely able to be done by the rules. Should such cases be regarded as being particularly risky or sensitive, or as 'particularly bound to the work of the executive', such that they should be drafted by OPC?

   OPC does not agree that there has been an increase in this type of legislation. It appears that 1% or less of Acts made over the last 10 years have provided for such schemes (and a substantial proportion of these were to allow schemes to fill in small gaps for one off social security etc. payments). It is also noted that about half of these Acts already allow for the schemes to be done by legislative instruments other than regulations.

   OPC does not consider that these would necessarily be particularly risky or sensitive. However, regulations would be used if they contained the sort of matters mentioned in Drafting Direction 3.8 as those that should be reserved for regulations.

4. Who will be making judgements that proposed rules do or do not contain particular risks or sensitivities, or are not particularly bound to the work of the executive? How will OPC be involved in these judgements, if at all?

   This judgement will need to be made at the time that the Bill is drafted. This is because the type of instrument making power, or powers, that are included in the Act will depend on this judgement. This judgement will be made by OPC drafters using the instructions set out in Drafting Direction 3.8. For cases where an Act provides a rule making power and a regulation making power that overlap, the matter would be determined in particular cases when the rules or regulations are required. OPC would often be involved in this.

It should be noted that in all cases it is the prerogative of the Government, and the Parliament, to decide to take a different approach. In such cases, OPC would provide advice about the options that we consider would be most appropriate.

5. What criteria will be applied to judgements that proposed rules do not contain particular risks or sensitivities, or are not particularly bound to the work of the executive?

   In many cases this judgement will have been made at the time that the Bill is drafted. This is because the instrument making power will usually be limited to exclude the matters set out in Drafting Direction 3.8.

   Where the Act permits the rules to contain those matters (either because the power predates OPC's current policy or because there was a deliberate decision to include the powers) the matters would generally be included in the rules unless there was also a power to make regulations covering the same matters. In those cases, OPC would recommend that those matters be contained in the regulations.

6. What happens if there is a difference of view between a department and OPC as to whether proposed rules contain particular risks or sensitivities, or are particularly bound to the work of the executive?

   OPC would push for Drafting Direction 3.8 to be followed. In such cases, OPC would provide advice about the options that we consider would be most appropriate. However, it is the prerogative of the Government, and the Parliament, to decide to take a different approach.

7. On the information received to date, it remains unclear whether OPC's expectation is that the implementation of the general rule-making power will result in OPC drafting more or fewer instruments than previously. Could you please clarify what the expected outcome is, and how it will be achieved?

   OPC considers that we will draft more instruments than previously and have a greater involvement in those that we do not actually draft. This is because we will have access to greater resources through the income that is generated by drafting instruments on a billable basis.

   Since the instrument drafting function was transferred to OPC 2 years ago, the percentage of rules and other untied instruments that has been done by OPC has doubled. We expect this to continue to increase.

8. Will OPC review rules drafted by departments as a matter of course?

   OPC will not review rules drafted by departments as a matter of course. As far as we are aware OPC, and its predecessors, have never done this.

9. Does OPC have any strategies or processes in place to systematically monitor the quality of rules drafted by departments or agencies following the implementation of the general rule-making power in 2013? If not, has any

consideration been given to this since the scrutiny committees began raising concerns over the potential for a decline in drafting standards?

OPC is not planning to systematically monitor the quality of rules drafted by departments or agencies (other than by administrative staff as part of the registration process). As mentioned above, this has not been done in the past for the vast range of instruments that are drafted outside OPC. OPC has commenced substantial work to try to improve the general standard of the drafting of instruments. A paper is attached outlining some of the work that has been done in this area.

As far as we are aware, the scrutiny committees have not recently raised issues about the quality of rules. In fact, most of the rules that have been the subject of scrutiny comment recently have been drafted by OPC.

10. Does OPC have any strategies or systems in place to advise the Parliament as to the performance of departments in their drafting of rules?

OPC is not planning to systematically monitor the quality of rules drafted by departments or agencies. Therefore, OPC will not be reporting to Parliament on this matter (other than to the extent required by subsection 16(3) of the *Legislative Instruments Act 2003* which relates to gender specific language).

11. If OPC or the committees become aware that there is a decline in the standards of rules being drafted by departments, what powers does OPC have to address this decline in standards? For example, is OPC able to decline registration of an instrument on the basis of drafting quality, or as result of inconsistency with Drafting Direction 3.8 (DD 3.8)?

OPC examines all of the material produced by the scrutiny committees. If the committee raises comments about the standards of a particular instrument, or the general quality of instruments drafted by a particular agency, OPC would take up that issue with the agency. OPC would also do this if OPC became aware of the issue in some other way.

OPC would offer a range of services to address this issue—including suggesting that it may be best for OPC to draft future instruments.

OPC is not able to decline the registration of an instrument that has been properly made. However, the relevant scrutiny committee could move the disallowance of an instrument that the committee considers to be poorly drafted.

12. In relation to the identification of significant matters that should still only be provided for in regulations, unless there is 'strong justification' for allowing them to be included in rules, who will be making ultimate decisions about this?

Initially, this decision would be made within OPC.

If an instructing agency disagreed with OPC's approach, the Government would have the prerogative to make this decision. This generally would be done through a

Cabinet decision or a decision of the Prime Minister (or a Minister or Parliamentary Secretary acting on behalf of the Prime Minister).

13. Noting the advice in DD 3.8, is consultation with OPC mandatory in all cases where significant matters may need to be prescribed in rules?

Generally the issue will be determined at the time of the drafting of the Bill. As OPC drafts all Bills for the Government, OPC would be closely involved at that time.

14. What if there is a difference of view between a department or agency and OPC as to whether there is a 'strong justification' for including significant matters in rules?

If the matter could not be resolved between OPC and the Department, the Government (generally through the Prime Minister) would need to decide the matter.

15. If an Act allows for significant matters to be prescribed by rules, why should those rules not be required to be drafted by OPC?

The matters that are required to be drafted by OPC are set out in the Legal Services Directions. It is a matter of policy as to whether those Directions should be changed to require rules (or some kinds of rules) to be drafted by OPC.

Of course, Departments may choose to get OPC to draft these rules and OPC will be proactive in seeking to attract this work.

16. R&O has identified rules that already make provision for offences. None of these was accompanied by any justification at all. How are the committees to assess whether the inclusion of significant provisions in rules is based on a 'strong justification'?

OPC is aware of one recent case where provision was made for rules to provide for offences. This occurred as OPC was developing its policy about what was appropriate to be included in rules and before Drafting Direction 3.8 had been updated. Where such provisions are to be included in future, there should be a clear justification for them in the explanatory material for the Bill or instrument.

This material is, of course, provided to the committees. The committee will be able to use their judgment to assess whether the justification provided in the explanatory material is a strong justification".

17. The most recent version of Drafting Direction 3.8 suggests that the general rule-making power should generally not be delegable. What are the criteria for establishing exceptions to this general proposition?

Any exceptions would be a matter for the Government on a case-by-case basis. The exception would need to be justified to obtain policy approval within Government and then justified in the explanatory memorandum for the Bill.

18. Noting that recent Acts have unnecessarily authorised the broad delegation of the general rule-making power (for example, the *Farm Household Support Act 2014*), should those Acts be amended to reflect OPC's current policy position in Drafting Direction 3.8?

    It is a matter for Government whether to amend existing legislation. However, once the long term approach that will be adopted to this issue is completely settled, OPC will discuss with agencies who are responsible for recent legislation whether they would support amending the legislation to bring it into line.

    It is however noted that there are a very large number of existing Acts, many of which have been in force for many years, which provide for the making of instruments and provisions in these limiting delegation are rare (assuming that there are any). It is not proposed to address this at this time.

19. The Scrutiny of Bills committee has seen at least one amending bill introducing rules to a current Act so that matters can be 'migrated' from regulations to rules. Are there guidelines for deciding which Acts will have these rules introduced to them? As an example, will complex or subject-matter sensitive Acts like the Migration Act have rules introduced to them?

    There are a number of areas, and the Migration Regulations are probably the most obvious example, where it is not considered that rules would be likely to replace an existing established structure of regulations. Each decision to move to rules would be determined on a case-by-case basis and change is unlikely in highly sensitive areas.

    It is however noted that there are already a substantial range of legislative instruments made under migration legislation that are not regulations and not generally drafted by OPC.

20. The most recent version of Drafting Direction 3.8 has been revised so that, where a rule-making power is required in an Act, but rules made under that power will not need to include significant matters (such as civil penalties etc as described in paragraph 3 of DD 3.8), the Act should include a provision that expressly states that significant matters may not be provided for in the rules. Given that none of the Acts drafted to date specify this, should those Acts be amended to reflect OPC's policy position in revised Drafting Direction 3.8?

    As Drafting Direction 3.8 states, OPC believes that this part of the Drafting Direction reflects the law. That is, without an explicit power to include such provisions, they could not be included in a legislative instrument (including a rule or a regulation).

    OPC is currently working with the Attorney-General's Department on the best way of implementing the position set out in the Drafting Direction.

As mentioned above, it is a matter for Government whether to amend existing legislation. However, once the long term approach that will be adopted to this issue is completely settled, OPC will discuss with agencies who are responsible for recent legislation whether they would support amending the legislation to bring it into line.

21. What proportion of regulations (and now rules) rely on the 'necessary or convenient' limb of the broadly expressed power?

It is not possible for OPC to provide a definitive answer as we are not aware of any records of this being kept. Based on discussions with drafters, our estimate is that less than 1% of regulations (and now rules) rely on the 'necessary or convenient' limb of the broadly expressed power.

22. Could reliance on the necessary or convenient power be highlighted in the ES?

OPC considers that it would be appropriate for the Regulations and Ordinances Committee to require that the explanatory statement should state when the necessary or convenient power has been relied on for the making of an instrument.

23. What sort of guidance, in the form of manuals, directions et cetera, does OPC provide for departmental or agency drafters? Does OPC actively promote the availability of any such guidance or is it more responsive in nature? Are there costs involved?

OPC has recently reissued the Legislative Instruments Handbook. This contains a substantial amount of information for people involved in the preparation of legislative instruments.

OPC provides the drafting manual and drafting directions that are used by OPC drafters through OPC's website. Substantial work has been done over the last 2 years to amend those so that they are also applicable to legislative instruments.

OPC is looking at whether OPC should issue a series of drafting directions for drafters outside OPC. It is envisaged that this would be a cut-down series of the existing OPC drafting directions. This would be provided at no cost.

As mentioned above, OPC has commenced substantial work to try to improve the general standard of the drafting of instruments. A paper is attached outlining some of the work that has been done in this area. Some of this is done free of charge and some is done on a billable basis.

24. What sort of guidance, in the form of settling services (paid or unpaid) and other support for drafters, does OPC provide for departmental or agency drafters? Does OPC actively promote the availability of any such services or is it more responsive in nature? Are there costs involved?

OPC provides settling services on request to agencies who are drafting instruments. OPC has also met with Departments before and during the drafting process for instruments being drafted by Departments. This is done on a billable basis.

OPC has been actively promoting this over the past 2 years and the volume of this work has increased. There has also been an increase in agencies actually getting OPC to draft the instruments. Since OPC took on the instrument drafting function 2 years ago, the percentage of rules and other untied instruments that has been done by OPC has doubled. We expect this to continue to increase.

As mentioned above, OPC has commenced substantial work to try to improve the general standard of the drafting of instruments. A paper is attached outlining some of the work that has been done in this area. Some of this is done free of charge and some is done on a billable basis.

25. FPC mentioned that OPC has recently delivered training to certain departments. Is this type of training delivered on an ad hoc basis or is it part of a formal 'outreach' program for supporting and improving the standards of drafting in agencies and departments?

OPC has just started this type of training. Now that we have successfully conducted a training program, we will look to promote it with agencies who we are aware draft a substantial number of instruments.

As mentioned above, OPC has commenced substantial work to try to improve the general standard of the drafting of instruments. A paper is attached outlining some of the work that has been done in this area. Some of this is done free of charge and some is done on a billable basis.

26. Given that the general rule-making power was developed to address perceived problems in the use of the general regulation-making power (such as inconsistent allocation of matters to regulations as opposed to other types of legislative instrument), why wasn't the regulation-making power reformed rather than implementing a new general rule-making power?

It is not clear what is envisaged by "the general regulation-making power [being] reformed". It has been reformed to the extent that matters that will be covered by regulations made under it have been rationalised.

There were 2 problems that were being addressed.

The first was the issue of what was appropriate for legislative instruments (other than regulations) and what needed to be reserved for regulations. This was addressed by the guidance set out in Drafting Direction 3.8. It effectively "reforms" the regulation making power because it changes the matters that will be made under future general regulation making powers.

The second issue was a drafting issue. It was to find a way to make the provisions that actually provide for rules to be made much clearer and easier to read. The inclusion of a general rule making power is intended to achieve this. With the general rule making power in an Act, the Act can just say "The rules may…." rather than "The Secretary/Minister may, by legislative instrument, make rules that…." in each provision that provides the power to make a rule on a particular topic.

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel
23 September 2014

Measures taken to enhance the quality of legislative instruments

Introduction

1 The following is a summary of the broad measures OPC has taken to enhance the quality of all legislative instruments and the Commonwealth statute book generally:

(a) harmonisation of drafting standards and style;

(b) development of broader instrument drafting expertise and active engagement with agencies in relation to untied instruments;

(c) development of further guidance to agencies in relation to managing and drafting legislative instruments;

(d) rationalisation of legislative instrument-making powers and limiting the proliferation of the types of legislative instruments;

(e) rationalisation of legislative instruments and working with agencies to manage sunsetting;

(f) legislative instrument framework reform.

Background

2 It may be helpful to give some background to my obligation to take steps to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments under section 16 of the *Legislative Instruments Act 2003* (the LIA).

3 Before 1 October 2012, the Commonwealth had two professional drafting offices (OLDP and OPC). These drafting offices merged on that date and the obligation in section 16 was also transferred to me from the Secretary of the Attorney-General's Department.

4 As I will outline, since the transfer of functions around 2 years ago, I have implemented a number of measures to enhance the quality of all Commonwealth legislative instruments. These measures also fit within OPC's broader responsibility to enhance the Commonwealth's overall statute book.

Measures to enhance the quality of all legislative instruments and the Commonwealth statute book generally

1. Harmonisation of drafting standards and style

5 An important step in enhancing quality has been the harmonisation of drafting standards and styles. The separate drafting offices previously had different styles and this led to a lack of cohesiveness across the statute book. The transfer has enabled me to put in place measures to harmonise the drafting and presentation of Commonwealth Bills and instruments.

6 This harmonisation is the most effective and important measure to enhance the overall quality of legislative instruments. This is because the standard set by the Office is a precedent for other drafters of untied legislative instruments. Harmonisation will also lead to a more cohesive Commonwealth statute book and better support the scrutiny of legislation.

7 As part of this harmonisation I have developed drafting standards that apply to both Bills and instruments. An important example of this harmonisation, and its positive impact on quality, is the system established for naming instruments and the harmonisation of provision units (Drafting Direction 1.1A). Previously there was no consistent standard for the naming of instruments. This drafting standard has improved the naming of instruments and has assisted agencies and other legal service providers drafting untied legislative instruments to ensure instruments have an effective name and can be cited. The Direction also includes an important step towards harmonisation of the name of provision units across the Commonwealth.

8 OPC will continue to improve its drafting standards and styles so that the Office sets a precedent for other drafters of untied legislative instruments.

2. Development of broader instrument drafting expertise and active engagement with agencies in relation to untied instruments

9 The uniting of the Commonwealth's professional drafting offices has also enabled me to develop broader instrument drafting and other expertise in the Office. This has enabled OPC to provide greater assistance to agencies with untied legislative instruments and have our highly experienced drafters available to provide a range of services tailored to agency needs. These services include:

(a) settling drafts drafted by other agencies; and

(b) meeting with agencies who are intending to draft their own instruments to provide advice and guidance on those drafts; and

(c) drafting template documents to be used by agencies; and

(d) advice in relation to document design; and

(e) editorial services; and

(f) research services using OPC's search facilities and expertise in Comlaw.

10 To better target OPC's drafting services to government and departmental needs, OPC has also developed a prioritisation system for instruments made or approved by the Governor-General. This system has enabled OPC to better manage this work and enhance quality. It has also enabled resources to be available to actively engage with agencies in relation to the drafting of untied legislative instruments.

11 To engage actively with agencies in relation to the drafting of legislative instruments, OPC has also assigned client advisers for each agency. OPC client advisers are Parliamentary Counsel from whom agencies can obtain quick, informal advice about matters in which OPC has expertise that may not be readily available in an agency. These matters include matters

necessary, desirable or acceptable for inclusion in instruments and options for improving the standard of instruments.

12 An example of the benefits of these measures is the identification of drafting issues related to the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014* discussed in Delegated Legislation Monitor No. 9. OPC had already detected the issue before the Monitor was published and drafting advice was provided to the agency by the relevant OPC client adviser.

13 Although OPC does not monitor whether legislative instruments drafted outside OPC comply with drafting standards, nor is it appropriate for it to do so because the responsibility for this lies with the relevant agency, our publications and drafting staff actively engage agencies where issues are identified through existing processes.

14 OPC has a strong reputation among Commonwealth agencies, and I strongly believe that they will recognise the benefits of having significant instruments drafted by OPC and will direct a greater proportion of this work to OPC, or will at least seek OPC's assistance. OPC will also actively seek more of this work. Because this work is billable, OPC will be in a better position to increase its overall drafting resources and to take further steps to raise the standard of instruments that it does not draft. All this will contribute to raise the standard of legislative instruments overall.

3. Development of further guidance to agencies in relation to managing and drafting legislative instruments

15 A further measure I have taken to raise the quality of untied instruments is to issue an updated Legislative Instruments Handbook. The LI Handbook is an important guide for drafters and makers of legislative instrument and is used by Commonwealth rule-makers and agencies to manage legislative instruments efficiently, effectively and in accordance with the LIA.

16 Chapter 3 of the LI Handbook includes information on drafting and interpreting legislative instruments. This includes important new information and drafting and publishing standards that agencies and legal service providers need to be aware of to ensure instruments are legally effective, clear and intelligible to anticipated users, including people who may rely on assistive technology.

17 I intend to update and reissue the handbook as OPC develops further measures to encourage high standards in the drafting of legislative instruments. This will ensure that there is a central publication where agencies and other legal service providers can access this information.

4. Provision of training to agencies that draft instruments

18 OPC is keen to provide training to agencies that draft instruments.

19 OPC has already conducted training sessions and will use the materials prepared for that as a template for future sessions.

20 Initial work has begun on a more in-depth training program that could run over a number of days.

21 As this work is billable, it will also provide OPC with additional resources to undertake further training and drafting work.

5. Rationalisation of legislative instrument-making powers and limiting the proliferation in the types of legislative instruments

22 With these broader measures in mind, I have also sought to rationalise legislative instrument-making powers and limit the proliferation of the types of legislative instruments. This change is vital to enhance the quality and standard of legislative instruments and the broader Commonwealth statute book.

23 As I have mentioned in my correspondence to the Committee, the division of material between regulations and other legislative instruments seems largely to have been decided without consideration of the nature of the material itself. This has resulted in the inclusion of inappropriate material in regulations and the inclusion of material that should have been professionally drafted in other instruments. The previous practice has also contributed to the fragmentation of the Commonwealth's statute book by encouraging an unnecessary proliferation in the number and types of legislative instruments.

24 The rationalisation of legislative instrument-making powers will ensure that OPC uses its limited resources to draft the subordinate legislation that will have the most significant impacts on the community. It will also address the proliferation of the number and types of legislative instruments.

6. Rationalisation of legislative instruments and working with agencies to manage sunsetting

25 OPC played a key role in the development and implementation of the *Legislative Instruments Amendment (Sunsetting Measures) Act 2012* that commenced on 23 September 2013 and has enabled thousands of unnecessary legislative instruments to be removed by an efficient, streamlined process.

26 The measures contained in the Amendment Act have rationalised the number of legislative instruments that will need to be considered for sunsetting and has put in place important measures to manage amending instruments. These measures have greatly improved the standard of legislative instruments and will enable the sunsetting process to focus on improving instruments that need to be retained.

27 The sunsetting of legislative instruments under the LIA is an excellent opportunity to raise the standard of legislative instruments by improving their clarity and effectiveness, reducing the regulatory burden, updating them as needed and removing instruments and provisions that are spent or no longer needed. OPC will actively seek to improve the quality of all legislative instruments through the sunsetting process.

7. Legislative instrument framework reform

28 A final measure that I will quickly mention is the reform of the legislative instruments framework in the proposed Acts and Instruments (Framework Reform) Bill 2014. I understand that the Committee has been provided a preliminary draft of this Bill and has provided comments on the draft.

29 I believe the broader framework changes in this Bill will also contribute to the quality and accessibility of instruments as well as improve the overall quality of the Commonwealth's statute book. I note that it is proposed that my obligation under section 16 would be extended to include notifiable instruments. This acknowledges that OPC believes it is important that these instruments are also produced to an acceptable quality to ensure instruments are accessible to users and can be scrutinised more broadly by the public and Parliament.

Conclusion

30 The measures I have taken to improve the quality of legislative instruments and the overall statute book have not been taken in isolation and together will ensure that there is greater consideration given to legislative instruments from the making of new powers through to the making of instruments.

The Hon Jamie Briggs MP
Assistant Minister for Infrastructure
and Regional Development
Member for Mayo

PDR ID: MC14-001534

Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for the Senate Standing Committee on Regulations and Ordinances' letter dated 20 June 2014 about comments contained in *Delegated legislation monitor* No 6 of 2014 regarding the *Jervis Bay Territory Rural Fires Ordinance 2014* and the *Jervis Bay Territory Rural Fires Rule 2014*.

I am advised that the drafting of the above Ordinance and Rule ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.

The Department of Infrastructure and Regional Development will work with the Office of Parliamentary Counsel to address the comments made by the Committee, including amending the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions.

I trust this information addresses the Committee's concerns.

Yours sincerely

Jamie Briggs

- 2 JUL 2014

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The Hon. Barnaby Joyce MP

Minister for Agriculture
Federal Member for New England

Ref: MNMC2014-06199

Senator John Williams
Chair
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams,

I refer to the letter from the Senate Standing Committee on Regulations and Ordinances (the Committee) dated 10 July 2014 in relation to the Farm Household Support Secretary's Rule 2014 [F2014L00614] (the Secretary's Rule). The letter from the Committee sought clarification on matters in relation to the Rule, which are outlined in the Committee's *Delegated legislation monitor No. 8* of 2014 (the Monitor).

In considering my response to the issues raised by the Committee set out below, the following explanation of the *Farm Household Support Act 2014* (the Act) provides the Committee with some context. The Act is complex in that it notionally modifies how the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* operate, so that those Acts can apply in relation to payments made under this Act. Section 90, Simplified outline of this Part, explains how this works.

> The Farm Household Allowance (FHA) is generally treated in the same way as newstart and youth allowance. This means that where there is a reference in the Social Security Act or the Social Security Administration Act to newstart or youth allowance, it is as if there were also a reference to farm household allowance. The farm household allowance, the activity supplement and the farm financial assessment supplement are all treated as if they were social security payments. As a result, the general rules in the Social Security Act and the Social Security Administration Act relating to how to make claims, how payments are made and review of decisions apply in relation to payments under this Act.

While the Act is comprehensive, in forming the policy settings that support farmers in hardship it was clear to me that overly prescriptive legislation could prevent a farmer in need from accessing support as intended, as has been the case in the past. The Secretary's Rule relating to 'whether a farm enterprise has a significant commercial purpose or character' provides a good example of the flexibility I sought in implementing the payment. The significant commercial purpose or character test is based on a ruling of the Taxation Commissioner (TR97/11 Income tax: am I carrying on a business of primary production) which has changed from time to time. Equally, the Secretary's Rule on the 'kinds of requirements not to be included in financial improvement agreements' is modelled on existing social security law, but deals with the special circumstances relevant to farmers

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rather than job seekers or students. Both of these matters relate to the day-to-day operation of the Act.

The Secretary's broad rule making power takes into account both the nature of the rules that would be necessary and the frequency with which rules would be made. The anticipated operational nature of the matters to which the rules will relate, and the likelihood that rules will be required to facilitate the alignment of the FHA with mainstream social security payments has been considered by the Senate Standing Committee for the Scrutiny of Bills, and agreed by the Parliament, indicating the nature of the breadth of the power is appropriate.

I also note that the matters dealt with in the Secretary's Rule all relate to matters which are 'required or permitted'. This shows the Act and rules that relate to matters which are 'required or permitted' deal with foreseeable issues, suggesting the use of the necessary and convenient power will be infrequent.

My response to the specific issues raised by the Committee in relation to the Secretary's Rule is set out below.

Issue: Prescribing of matters by 'legislative rules'

"The committee therefore requests the minister's advice on the appropriateness in this case of providing the secretary with broader rule-making powers than the minister, and the criteria used in making this decision"

"More generally, the committee requests the minister's advice on what policy considerations were taken into account in deciding that the general-rule making power should be granted to persons other than a minister"

In its correspondence to me dated 20 March 2014, the Senate Standing Committee on the Scrutiny of Bills also raised issue with the delegation of legislative power under section 106 of the Act. The First Parliamentary Counsel, Mr Peter Quiggin PSM, provided me with advice on the general application and use of rule-making powers in response to that letter. This advice was provided to the Scrutiny of Bills Committee and relevantly states that [extract included below]:

> OPC's view is that some types of provisions should be included in regulations and be drafted by OPC as the Commonwealth's principal drafting office, unless there is a strong justification for prescribing these provisions in another type of legislative instrument. These include the following provisions:
>
> (a) offence provisions;
>
> (b) powers of arrest or detention;
>
> (c) entry provisions;
>
> (d) search provisions;
>
> (e) seizure provisions.

I note the First Parliamentary Counsel's comments on OPC's approach to the making of instruments rather than regulation and the consistency of this approach with the *Legislative Instruments Act 2003* (the LIA) and the First Parliamentary Counsel functions and

responsibilities under the Act. I also note instrument-making powers are commonly in the form of (or include) a power to "prescribe" particular matters. For example, the rule-making power in subsection 59(1) of the *Federal Court of Australia Act 1976* (which was included when that Act was enacted in 1976). In this respect neither the Farm Household Support Secretary's Rule 2014 nor the Farm Household Support Minister's Rule 2014 [F2014L00687] are inconsistent with other legislative instruments. Accordingly I am satisfied the use of rules, as opposed to primary legislation or regulation, is appropriate.

In response to the question of the appropriateness of the Secretary having broader rule-making powers than the minister, the Monitor already notes OPC Drafting Direction 3.8 states that the 'necessary and convenient power should generally be attached to the maker who is likely to make more instruments'.The vast majority of decisions that may need to be taken under the Act relate to its day-to-day operation. As the Secretary is the delegate for these decisions, it is appropriate that the 'necessary and convenient' power is also held by the Secretary. This will allow for rules to be made in relation to matters which are not readily foreseeable but necessary for the smooth and timely operation of the scheme. I also note that the 'necessary or convenient' rule making power is limited to prescribing matters for carrying out or giving effect to this Act. In this respect I consider the power to be appropriately limited.

Issue: Potential delegation of general rule-making power

The committee notes that section 106 of the Act provides that the Secretary may delegate his powers to officers below the Senior Executive Officer level. It notes the operational reasons given in the explanatory memorandum for the broad delegation of the Secretary's power and seeks clarification as to whether the general rule-making powers may be delegated under section 106, and, if so, what considerations might apply in that case.

My advice is that there is no legal impediment to the Secretary delegating any or all of his powers or functions under the Act (section 101 Delegation of powers). While legally this rule-making power could be delegated, in practice, this delegation is not exercised. This is reflected in the Secretary's instrument of delegation to the Chief Executive of Centrelink and to senior executives within the Department of Agriculture (the department) where this power has been specifically retained. Additionally, in line with the Administrative Arrangements under the Administrative Arrangements Order, the department is responsible for 'rural adjustment and drought issues'. Give this responsibility I do not foresee any circumstances where the general rule making power would be delegated to an employee outside of the department or below the senior executive level within the department.

Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance. An officer from my department can provide the Committee with additional briefing if required.

Yours sincerely

Barnaby Joyce MP

05 AUG 2014

The Hon Warren Truss MP
Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

16 SEP 2014

PDR ID: MNMC2014-07621

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I refer to the letter from the Senate Standing Committee on Regulations and Ordinances (the Committee) dated 28 August 2014 in relation to the *Farm Household Support Secretary's Rule 2014* (the Secretary's Rule). The Committee sought further clarification from the Hon. Barnaby Joyce MP, Minister for Agriculture (Minister Joyce), in relation to the Secretary's Rule. These matters are outlined in the Committee's *Delegated legislation monitor No. 10 of 2014* (Monitor 10). I am replying as Acting Minister for Agriculture.

I note the letter seeks further advice about concerns regarding the Secretary's Rule, as outlined in the Committee's *Delegated legislation monitor No. 8 of 2014* (Monitor No. 8), following Minister Joyce's earlier response of 5 August 2014.

My response to the specific issues raised by the Committee in relation to the Secretary's Rule is set out below.

Issue: Prescribing of matters by 'legislative rules'

'However, in relation to FPC's advice on the general rule-making power cited by the minister, the committee notes that significant issues regarding the consequences and policy guidance for the use of the general rule-making power are not settled'.

I note that the Committee's concern that consequences and policy guidance around the general rule-making power is not settled. I am advised that since Minister Joyce's response of 5 August 2014 you have met with Mr Peter Quiggin PSM, First Parliamentary Council and Mr John Lahey, Principal Legislative Counsel. Given this issue has much broader application to Commonwealth legislation than the *Farm Household Support Act 2014* (the Act), the resolution of this at a generic level through your interactions with the Office of Parliamentary Counsel would seem the most appropriate course of action.

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Issue: Potential delegation of general rule-making power

'In the committee's view, notwithstanding the minister's advice that there is no legal impediment to the delegation of the rule-making power in this case, there remains a questions as to whether it is appropriate in any case that the general rule-making power be delegated (noting in particular the committee's concerns regarding the extent to which the general rule-making power diminishes the requirement for close executive oversight of the exercise of Parliament's delegated legislative powers). The committee therefore seeks the minister's further advice on this matter.'

I note that the general rule-making power was not delegated in relation to the instrument currently being considered by the Committee, as it was made by the Secretary of the Department of Agriculture (secretary).

I also note that, as Minister Joyce advised in his previous response to the Committee of 5 August 2014, in practice the rule making power in section 106 of the Act has not been delegated. As an example, the secretary deliberately chose not to delegate the power to the Chief Executive of Centrelink, which contrasts with most other powers under the Act, which were delegated. In addition to the above, the secretary has informed me that at the current point in time, he has no intention of delegating his rule making powers, or that any such delegation is currently necessary for administration of Farm Household Allowance.

I have also been advised that the Office of Parliamentary Counsel has provided the Committee with a draft Drafting Direction that will clarify the issue of delegating the power to make instruments under future legislation. I understand that the Committee has also discussed this broader issue with the First Parliamentary Counsel and the Principal Legislative Counsel.

I thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

WARREN TRUSS

The Hon. Barnaby Joyce MP

Minister for Agriculture
Federal Member for New England

Ref: MNMT2014-08113

Senator John Williams
Chair
Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Williams,

I refer to the letter from the Senate Standing Committee on Regulations and Ordinances (the Committee) dated 25 September 2014 in relation to the Farm Household Support Secretary's Rule 2014 [F2014L00614] (the Secretary's Rule). The letter from the Committee sought a legislative amendment in relation to the secretary's general rule-making power under the *Farm Household Support Act 2014* (the Act), which are outlined in the Committee's *Delegated legislation monitor No.12* of 2014 (the Monitor).

My response to the specific issues raised by the Committee in relation to the Secretary's Rule is set out below.

Issue: Prescribing of matters by 'legislative rules'

'As noted by the minister, the committee is pursuing a number of issues arising from the prescribing of matters by legislative rules, and will report on these in due course. The committee has therefore concluded its examination of this aspect of the instrument.'

I note the Committee has concluded its examination of this aspect of the instrument.

Issue: Potential delegation of general rule-making power

'Taking into account the scrutiny preference, as expressed by the Scrutiny of Bills committee, that the delegation of legislative power be only as broad as strictly required, the committee therefore requests that the Farm Household Support Act 2014 be amended to specifically exclude the delegation of the general rule-making power'.

I note the Committee has requested the Act be amended to specifically exclude the delegation of the secretary's general rule-making power.

In line with the Committee's request, I have instructed my department to pursue an amendment to the Act to achieve this outcome as the opportunity arises.

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Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

Barnaby Joyce MP

30 SEP 2014

Appendix 2
Guideline on consultation

Standing Committee on Regulations and Ordinances
Addressing consultation in explanatory statements

Role of the committee

The Standing Committee on Regulations and Ordinances (the committee) undertakes scrutiny of legislative instruments to ensure compliance with non-partisan principles of personal rights and parliamentary propriety.

Purpose of guideline

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *Legislative Instruments Act 2003* (the Act) regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister seeking compliance, and ensure that an instrument is not potentially subject to disallowance.

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the rule-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

Requirements of the Legislative Instruments Act 2003

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business.

Section 18 of the Act, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate'.

It is important to note that section 26 of the Act requires that explanatory statements describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

Describing the nature of consultation

To meet the requirements of section 26 of the Act, an ES must *describe the nature of any consultation that has been undertaken*. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

Method and purpose of consultation

An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.

Bodies/groups/individuals consulted

An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.

Issues raised in consultations and outcomes

An ES should identify the nature of any issues raised in consultations, as well as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

Explaining why consultation has not been undertaken

To meet the requirements of section 26 of the Act, an ES must *explain why no consultation was undertaken*. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

Specific examples listed in the Act

Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.

Timing of consultation

The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

Seeking further advice or information

Further information is available through the committee's website at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/index.htm or by contacting the committee secretariat at:

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