THE IMPORTANCE OF LEGISLATIVE DRAFTERS – CHALLENGES PRESENTED BY RECENT DEVELOPMENTS IN THE COMMONWEALTH JURISDICTION

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This paper discusses the important role of drafters of delegated (or subordinate) legislation[1] in the Commonwealth jurisdiction. The discussion is set against some recent developments in the Commonwealth jurisdiction and the challenges that those developments present to the role that legislative drafters play in the making (and parliamentary scrutiny) of delegated legislation.

The use of 'legislative rules' in preference to regulations

Early in 2014, the Minister for Industry made the *Australian Jobs (Australian Industry Participation) Rule 2014*. The Rule was made under section 128 of the *Australian Jobs Act 2013* (Cth). It was first considered by the Senate Standing Committee on Regulations and Ordinances (Senate Committee) in the context of its *Delegated legislation monitor No 2 of 2014*. The Committee stated:

> Prescribing of matters by 'legislative rules'
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> 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.
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> 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**.[2] [emphasis added]

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Since 1904, when a definition of 'prescribed' was introduced into the *Acts Interpretation Act 1901* (Cth), Australian legislation has operated on the basis that Acts allowed for certain things to be 'prescribed' by regulations made under the Act. Indeed, the use of 'prescribed' was commonly read as meaning 'prescribed *by the regulations*'. Regulations have always been drafted by the relevant Commonwealth drafting office[3] *at no charge to the instructing agency*

The First Parliamentary Counsel's (FPC's) first response to the Senate Committee's concerns

Not novel

The Minister for Industry responded to the Senate Committee's initial comment in a letter dated 18 March 2014. The letter included a detailed response from the First Parliamentary Counsel (FPC), Mr Peter Quiggin PSM.[4] Among other things, the FPC letter took issue with the characterisation of the new approach as 'novel' and referred to various previous Acts that, in his view, demonstrated that the approach was 'not novel'.[5]

Relevance of the definition of 'prescribed' in the Acts Interpretation Act

On the issue of the definition of 'prescribed', the FPC response stated:[6]

> 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.
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> 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.

Resources issue

Importantly, the FPC response also stated:[7]

> 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 to do so.

The FPC response went on to say:[8]

> 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:
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> (a) offence provisions;
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> (b) powers of arrest or detention;
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> (c) entry provisions;
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> (d) search provisions; and
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> (e) seizure provisions.

Then, the FPC response stated:[9]

> 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 https://www.opc.gov.au/about/draft_directions.htm.

The FPC response indicates that he is seeking to do less drafting within his office because he has a resources issue. But the unavoidable effect of what he is doing is to push additional work on to agencies that similarly have resources issue, because of budget cuts across the Commonwealth public service. This must result in a negative effect on the drafting of delegated legislation in the Commonwealth.

The FPC's responsibilities under the Legislative Instruments Act

After referring to a series of recent Acts in which the legislative rules approach had been used, the FPC stated:[10]

> 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.

Without mentioning the provision specifically, the FPC is presumably referring to his obligations under section 16 of the *Legislative Instruments Act 2003* (Cth) which provides:

> **16 Measures to achieve high drafting standards for legislative instruments**
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> **(1)** 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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> **(2)** The steps referred to in subsection (1) may include, but are not limited to:
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> (a) undertaking or supervising the drafting of legislative instruments; and
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> (b) scrutinising preliminary drafts of legislative instruments; and
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> (c) providing advice concerning the drafting of legislative instruments; and
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> (d) providing training in drafting and matters related to drafting to officers and employees of Departments or other agencies; and
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> (e) arranging the temporary secondment to Departments or other agencies of APS employees performing duties in the Office of Parliamentary Counsel; and
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> (f) providing drafting precedents to officers and employees of Departments or other agencies.
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> **(3)** The First Parliamentary Counsel must also cause steps to be taken:

(a) to prevent the inappropriate use of gender-specific language in legislative instruments; and

(b) to advise rule-makers of legislative instruments that have already been made if those legislative instruments make inappropriate use of such language; and

(c) to notify both Houses of the Parliament about any occasion when a rule-maker is advised under paragraph (b).

His response concludes as follows:[11]

> 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 other legislative instruments that are not required to be drafted by OPC.

The issues mentioned above set the framework for the discussion with the Senate Committee that followed.

The Senate Committee's response

The Senate Committee responded to the FPC's first response in its *Delegated legislation monitor No 5 of 2014*.

Not novel?

In response to the 'not novel' issue, the Senate Committee contrasted the approach taken in section 128 of the *Australian Jobs Act 2013* (Cth) with the 'traditional' approach in Australian legislation, under which regulation-making powers were set broadly, in terms of prescribing what was 'required or permitted' or 'necessary or convenient' for carrying out or giving effect to the Act, while the power to make non-regulations legislative instruments was generally expressed by reference to specific functions. The Senate Committee stated:[12]

> In the committee's view, the broadly-construed regulation-making power may be contrasted with the usually more specific or constrained provisions allowing for the making of other types of instruments. However, in the present case, section 128 of the *Australian Jobs Act 2013* provides:
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> 128 The Minister may, by legislative instrument, make rules (legislative rules) prescribing matters:
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> (a) required or permitted by this Act to be prescribed by the legislative rules; or
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
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> Further, **the *Australian Jobs Act 2013* does not contain a regulation-making power. The committee notes that the broadly-expressed power to make legislative rules in the *Australian Jobs Act 2013* therefore effectively replaces the regulation-making power**. [emphasis added]

The fact that the Australian Jobs Act did not contain a regulation-making power was a significant issue for the Senate Committee. It went on to state:[13]

> With this context, the committee notes that many of the examples referred to by FPC appear to be distinguishable from this broad power to make legislative rules in the absence of a regulation-making power. A number of these may be distinguished on the basis that:
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> - the relevant instrument-making power is not expressed in as broad a manner in which the legislative-rule making power is expressed in the present case (for example, they are limited to matters 'required or permitted' by the Act, but not to things 'necessary or convenient');

- the rule-making power is complemented by the inclusion of a broadly defined regulation-making power expressed in the usual terms; and
- the rule-making power is constrained by being permitted only in relation to specific parts or subdivisions of the relevant Act (or to specific items).

However, with the exception of the *Income Tax Assessment Act 1997*, the committee notes that seven of the remaining eight examples listed in paragraph 12 provide analogous powers to the legislative rule-making power in the *Australian Jobs Act 2013*. That is, the following Acts provide for a broad rule-making power that appears to take the place of a general power to make regulations:

- *Asbestos Safety and Eradication Agency Act 2013;*
- *Australia Council Act 2013;*
- *Australian Jobs Act 2013;*
- *International Interests in Mobile Equipment (Cape Town Convention) Act 2013;*
- *Public Governance, Performance and Accountability Act 2013;*
- *Public Interest Disclosure Act 2013; and*
- *Sugar Research and Development Services Act 2013.*

The committee notes that these Acts are all dated 2013 and, according to the FPC's advice, were drafted 'since the transfer of the subordinate legislation drafting function to the Office of Parliamentary Counsel in 2012'.

The Senate Committee also picked up on the FPC's reference to Drafting Direction 3.8:

In light of the above, the committee considers that FPC's advice tends to confirm the view that the provision for a broadly-expressed power to make legislative rules in place of the regulation-making power is a novel approach, employed in the drafting of Acts only since 2013. Further, **the committee notes that on 6 March 2014 (subsequent to the committee's initial comments on this 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 committee notes that Drafting Direction No 3.8 appears to confirm the inclusion of such powers in delegated legislation as a novel approach (emphasis added). It states:

> 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. [emphasis added]

The Senate Committee then turned to the fact that, in its assessment, the inclusion of a general rule-making power in Acts was something of a surprise. The Senate Committee stated:[14]

With the exception of the *Public Governance, Performance and Accountability Act 2013* (*PGPA Act*), the committee is not aware of any reference to the inclusion of a general rule-making power in place of the regulation-making power in the explanatory memorandums (EMs) for these Acts. The EM for the *PGPA Act* stated (p 58):

> Using rules, rather than regulations, as the form of legislative instrument is consistent with current drafting practice. The Office of Parliamentary Counsel reserves the use of regulations to a limited range of matters that are more appropriately dealt with in regulations made by the Governor-General than in an instrument made by some other person. Matters in this category include offence provisions, powers of arrest or detention, entry provisions and search or seizure provisions. The rules will be legislative instruments subject to disallowance by Parliament and will sunset under the provisions of the *LI Act*.

In the committee's view, the EMs for these Acts did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of the regulation-making power. The committee's current inquiries seek to provide that opportunity.

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.

The new approach had not previously been directly raised with the Senate in any meaningful way. In all the circumstances, this would appear to have been a less-than-optimal means of introducing the new approach.

Resources issue

On the 'resources' issue, the Senate Committee sought to pursue with the FPC the particular issue of the likely effect of the new approach on the quality of drafting. The Senate Committee stated:[15]

> *Ramifications for the quality and scrutiny of legislative rules*
>
> 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.
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> FPC's advice notes that instruments made under the general instrument-making making power may now be drafted by agencies (unlike regulations, which are required to be drafted by OPC). OPC may, however, draft or assist agencies 'within the limits of available resources'. In the committee's experience, regulations are characterised by the highest drafting standards, and it seems unlikely that agencies are equipped to achieve the same standards in the drafting of instruments under the general instrument-making power. In particular, the committee notes that regulations may be lengthy and complex, covering a range of matters as permitted by the general power on which they are based. Given this, the Parliament's ability to scrutinise instruments that are of a similar character, but not drafted, and subject to only limited oversight, by OPC, may be adversely affected where the highest standards are not maintained.

The Senate Committee then sought the Minister for Industry's advice in relation to the following questions:[16]

- Regarding 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?
- 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?
- 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?

The FPC's second response to the Senate Committee's concerns

The Minister for Industry responded to the Senate Committee in a letter dated 5 June 2014.[17] Again, the response included a detailed response from the FPC. In addition, the Minister's covering letter opened up a new issue. The Minister stated:

> I am concerned that the Rule, which serves an essential function has become the vehicle by which the Committee is exploring OPC's drafting practice of including a rule-making power in primary legislation as opposed to the more traditional regulation-making power. In particular, I note that the Committee has taken the step of having moved a notice of motion to disallow the Rule, notwithstanding the Committee's queries do not relate to the substance of the Rule itself, but rather to the underlying power authorising the making of the instrument.

The Senate Committee had moved a 'protective' notice of motion in relation to the Rule.[18]

The Senate Committee's response to the FPC's second response

In *Delegated legislation monitor No 6 of 2014*, the Senate Committee responded to the Minister's comment (at pages 10 to 11):

> In relation to the minister's view that the matters in question 'cannot be resolved in the context of scrutiny of this rule', the committee notes that the question of whether the Parliament regards the new general rule-making power as appropriate to the exercise of the Parliament's delegated legislative powers goes fundamentally to the committee's institutional role and the principles which inform its operation.
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> The delegation of the Parliament's legislative power to executive government involves a 'considerable violation of the principle of 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'. This principle is effectively preserved through the committee's work scrutinising delegated legislation, and the power of the Parliament to disallow delegated legislation.

'Tied work'

In the second response, the FPC acknowledges that the drafting of legislative instruments that are to be made or approved by the Governor-General are, under the *Legal Services Directions 2005*, 'tied work'. This means (in essence) that the drafting can only be undertaken by the OPC (see paragraph 7 of the second response). Though not explicitly acknowledged in the FPC's second response, the work in question must be carried out without cost to the instructing agency.

The second response goes on to state (at paragraph 11):

> 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.

Section 16 of the Legislative Instruments Act

In the second response, the FPC specifically refers to his responsibilities under section 16 of the *Legislative Instruments Act*. He then goes on to state (at paragraphs 15 and 16):

> I am also required to manage the affairs of OPC in a way that promotes the proper use of the Commonwealth resources that OPC is allocated (see section 44 of the *Financial Management and Accountability Act 1997*), including resources allocated to the drafting of subordinate legislation.
>
> I consider that [Drafting Direction] 3.8 is an appropriate response to these responsibilities in relation to the drafting of Commonwealth subordinate legislation.

Volume of legislative instruments

At paragraph 17 of the second response, the FPC gives some figures in relation to the volume of legislative instruments. However, he concludes by stating:[19]

> 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.

Division of material between regulations and legislative instruments

At paragraphs 24 to 25 of the second response, the FPC addresses the issue of the division of material between regulations and legislative instruments, stating:

> Before the issue of [Drafting Direction] 3.8, 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.

The response goes on:

> …[Drafting Direction] 3.8 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 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 [Drafting Direction] 3.8 to take into account any views the Committee may have.

Quality and accuracy of drafting of instruments not tied to the OPC

The second response states:[20]

> 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.
>
> … 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 [Drafting Direction] 3.8 will contribute to raise the standard of legislative instruments overall.

No information is provided in the second response as to *how* this raising of standards is to be achieved.

The Senate Committee's response to the FPC's second response

The Senate Committee responded to the second FPC response in its *Delegated legislation monitor No 6 of 2014*.[21] The Senate Committee stated:[22]

> The committee notes the advice of FPC that, where provisions that should continue to be included in regulations (according to the recent OPC drafting directions relating to the use of legislative rules) are required, 'it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions'.
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> However, the committee notes that there is no absolute requirement for such matters to be included in regulations, and it is unclear how, and by whom, decisions will be made regarding whether or not there is a 'strong justification' for not including such matters in regulations. The committee notes that the stated effect of implementing legislative rules is to make agencies and departments responsible for the drafting of such instruments; and that FPC has previously advised that OPC will draft or assist agencies only 'within the limits of available resources'. The committee considers that, on its face, the new arrangement carries a significant risk that drafting standards may suffer, and that matters will be improperly included in rules. This is particularly so given FPC's advice that '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'.
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> The committee notes that, to the extent that the implementation of the general rule-making power leads to a diminution in the quality of drafting standards, there is likely to be a corresponding increase in the level of scrutiny required to be applied by the Parliament. Such an outcome would effectively fracture the longstanding requirement of direct executive control of, and responsibility for, the standards of drafting in relation to the exercise of the broadly expressed power delegated by the Parliament to the executive.

The FPC's third response to the Senate Committee's concerns

In a letter dated 2 July 2014, the FPC responded directly to the Senate Committee's (at that stage) most recent comments.[23]

Drafting standards

After re-stating his view that the OPC does not have the resources to draft all Commonwealth subordinate legislation, 'nor is it appropriate for it to do so', the FPC stated (at paragraph 12):

> In my view, the approach set out in [Drafting Direction] 3.8 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 itesl and allow it either to draft or assist agencies to draft other 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.

In my experience at the OLDP/OPC, between 2007 and 2013 (with section 16 of the *Legislative Instruments Act* operating for the whole of that period), I saw no evidence of instrument design or template development for agencies. Editing of or commenting on draft instruments was also actively discouraged. If these activities are carried out in the future then it will be a most welcome innovation.

Scope of general rule-making powers

The FPC's third response also included some significant suggestions in relation to the scope of general rule-making powers. At paragraph 18 of the response, the FPC stated that, in his view, the kinds of provisions that he had originally indicated would <u>not</u> (without 'strong justification') be included in legislative instruments other than regulations (ie offence provisions, powers of arrest or detention, etc), would, in fact, <u>not be authorised</u> by a general rule-making power. The FPC stated that, in his view, such provisions would require an express authorising provision for them to be able to be included in rules (as would be the case for their inclusion in regulations).

The third response goes on to state:[24]

> However, it may be possible to make the matter even more certain. For example, standard form of rule-making power … 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.
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> … 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 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 of compliance with the standards. This would achieve a high level of transparency and should facilitate the Committee's scrutiny function.

These are welcome and timely suggestions.

The Senate Committee's response to the third FPC response

The Senate Committee responded to the third of the FPC's responses in its *Delegated legislation monitor No 9 of 2014*.[25] In relation to the quality of drafting issue, the Senate Committee stated:[26]

> … the committee notes that FPC's view and assurances that the new general-rule making power will 'enhance, and not diminish, the overall quality of legislative instruments'. However, it remains unclear to the committee how this outcome will be achieved in practice, given that departments and agencies will have responsibility for the drafting of rules.
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> … In addition to these questions, it is unclear to the committee what mechanisms are available to OPC to monitor the quality of drafting of instruments based on the new general rule-making power; and what resources and mechanisms may be available to OPC to respond in the event that drafting standards do in fact suffer.

In relation to the issue of the division of material between regulations and other legislative instruments, the Committee stated:[27]

> The committee notes FPC's statement that certain types of provisions such as offence, entry, search, seizure, and civil penalty provisions would not be authorised by either a general regulation-making power or a general rule-making power:
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> > 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.
>
> However, FPC's statement leaves open the question of whether the inclusion of these types of provisions in a rule is both generally appropriate, and appropriate in a given case, thus supporting the inclusion of an express power in a rule to allow for the prescribing of such matters. The determination of this question appears to turn on the policy considerations which will inform judgements as to what is a 'strong justification' as provided for in Drafting Direction 3.8. The committee's inquiries to date have shed little light on 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 Senate Committee then went on to do 3 things.[28] It noted that a meeting with the FPC that had previously been arranged had, due to issues with the Parliamentary program, not taken place and would be rescheduled. It also noted that, in the light of the 'continued engagement' of the FPC in relation to the Senate Committee's concerns, it had agreed to withdraw the 'protective' notice of motion in relation to this particular legislative instrument.

The Senate Committee also referred to its comments in relation to another instrument, discussed in *Delegated legislation monitor No 9 of 2014*. The point of interest was that that instrument – the *Jervis Bay Territory Rural Fires Ordinance 2014* – provided for the creation of offences by legislative rules made under the ordinance. This was clearly contrary to the proposition stated in the FPC's first response to the Senate Committee that, without 'strong justification', offence provisions would be included in regulations, rather than another form of legislative instrument.[29]

The Assistant Minister for Infrastructure and Regional Development, being the Minister responsible for that ordinance, responded to the Senate Committee's concerns in a letter dated 2 July 2014. The Minister stated:

> I am 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.

Given that this instrument appeared to have slipped through the OPC's existing mechanisms and processes, the more formal mechanisms foreshadowed in the FPC's third response to the Senate Committee are welcome.

The FPC's fourth response to the Senate Committee's concerns

In a letter dated 6 August 2014, the FPC responded directly to the Senate Committee's (at that stage) most recent comments.[30]

In the response, at paragraphs 14, 15 and 16, he refers to the 'broad range of measures [that he has taken] to promote high drafting standards for all legislative instruments', the 'other strategies to promote high drafting standards that the OPC is already pursuing' and 'the other measures that OPC is already pursuing'. However, no detail was provided at that point as to the measures and strategies.

Further detail was subsequently provided to the Senate Committee at a private meeting with representatives of the OPC held on 3 September 2014 and in a written response from the FPC in relation to questions that the Senate Committee put on notice, after the meeting. However, the Senate Committee has not yet reported on the meeting, nor has it published the answers to the questions on notice. It is therefore no appropriate that I discuss those details here.

In relation to the effect of the new approach on the quality of legislative instruments, the FPC's fourth response stated:

> … 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.

In relation to the effect of the new approach on the volume of instruments drafted by the OPC, the fourth response stated:

> 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.
>
> 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.[31]

The Senate Committee had also asked the FPC what mechanisms were available to the OPC to monitor the quality of drafting of instruments based on the new general rule-making power. In his fourth response, the FPC stated:[32]

> … I do not agree that the use of general rule-making powers raises risks that require special monitoring. Nevertheless, monitoring mechanisms are available and could be extended if necessary.

The fourth response goes on to state:

> 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.
>
> 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.[33]

The issue identified in relation to the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014* was *first* identified by the Senate Committee on 27 June 2013, in *Delegated legislation monitor No 7 of 2013*, in relation to the *Autonomous Sanctions (Designated Persons and Declared Persons – Syria) Amendment List 2013*.[34] The (then) Minister for Foreign Affairs responded on 5 August 2013 (*Delegated legislation monitor No.8 of 2013*), indicating that future amending instruments would address this issue. Despite this there were at least 2 or 3 further appearances of the issue between the original comment and the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014*.

The Senate Committee's response to the fourth FPC response

The Senate Committee responded to the FPC's fourth response in its *Delegated legislation monitor No 10 of 2014*.[35] However, the Senate Committee merely noted the response and indicated that the response would inform the briefings and deliberations in relation to the meeting with the OPC that subsequently took place on 3 September 2014.

Meeting between Senate Committee and the OPC on 3 September 2014

The Senate Committee met with representatives of the OPC on 3 September 2014. After the meeting, the Senate Committee conveyed a series of questions on notice to the OPC to which the FPC responded in a letter dated 23 September 2014.[36]

The Senate Committee's wrap-up and the OPC response

The Senate Committee concluded its discussion of the issues that had arisen as a result of its discussion of the implementation of the 'general instrument-making power' in referencing the various responses from the FPC, on 3 December 2014, in *Delegated legislation monitor No 17 of 2014*.[37] The Senate Committee made a series of recommendations. The majority of those recommendations related to the management and monitoring of issues that had been identified in the Senate Committee's discussions with the OPC. Many called for relevant amendments to the OPC Drafting Directions and procedures. In addition, the Senate Committee made a significant recommendation in relation to the FPC's obligations under section 16 of the Legislative Instruments Act. The Senate Committee recommended 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 FPC's response to the Senate Committee's recommendations

In a letter dated 15 December 2014, the FPC indicated to the Senate Committee that he accepted the various recommendations. This was largely reflected in amendments that were made to Drafting Direction 3.8. He also advised the Senate Committee that he would include in the OPC's annual reports material indicating the steps that he had taken in relation to his obligations under section 16 of the Legislative Instruments Act.[38]

What is the point? Volume of legislation drafted other than by the OPC

In my 2 years as Legal Adviser to the Senate Committee, I have been fascinated to observe both the proportion of delegated legislation drafted other-than-by-OPC and also the (at best) variable quality of the non-OPC-drafted legislation.

In 2011, 1,471 legislative instruments were registered on the Federal Register of Legislative Instruments (FRLI). Of those legislative instruments, 286 were 'Select Legislative Instruments' or SLIs. Regulations are SLIs. In simple terms, it can safely be assumed that most SLIs were drafted by the OPC. This being so, for 2011, just over 19% of legislative instruments registered on FRLI were drafted by the OPC.

For 2012, 2,591 legislative instruments were registered on FRLI, of which 331 were SLIs. That means that, for 2012, just under 13% of legislative instruments registered on FRLI were drafted by the OPC.

As of November 2013, 1,832 legislative instruments were registered on FRLI, of which 235 were SLIs. That means that, to that point, for 2013, just under 13% of legislative instruments registered on FRLI were drafted by the OPC.

As of 25 December 2014, I had scrutinised 1,722 instruments in 2014. Of that number, 295 had been drafted by the OPC. That is just over 17% of the total.

As already mentioned above, in his second response to the Senate Committee, the FPC provided some figures in relation to the volume of legislative instruments.[39] He stated:[40]

> In 2012 and 2013, Federal Executive Council (ExCo) legislative instruments drafted by OPC (or OLDP before the transfer 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.

The 35% page figure is probably inflated by some massive (many hundreds of pages[41]), annual instruments that the OPC is currently *required* to draft because they are regulations. I have always been surprised that the percentage of non-OPC drafting is so high. For me, this high percentage is a matter of concern, not the least because the vast majority of the relevant instruments appear to be drafted largely by people without training in legislative drafting.

Quality of non-OPC drafting

My experience with the Senate Committee leads me to observe that the quality of non-OPC drafting is, at best, *variable*. At one end of the spectrum is the drafting emanating from agencies such as the Australian Maritime Safety Agency (AMSA), which is responsible for making Marine Orders under section 342 of the *Navigation Act 2012*. Marine Orders

constitute a significant body of delegated legislation. They are generally drafted to a very high standard.

An example of less-than-optimal non-OPC drafting is recent drafting of instruments by the Department of Foreign Affairs to 'designate' a person or entity (for the purpose of the application of autonomous sanctions), under regulation 6 of the *Autonomous Sanctions Regulations 2011*. What often happens in this area is that an instrument is made that amends an earlier instrument. For example, the Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2014, made by the Minister for Foreign Affairs on 8 April 2014, amends the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) List 2012. Section 3 of the amending instrument provides:

> **3 Amendment of the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) List 2012***
>
> Schedule 1 amends the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) List 2012*.

Schedule 1 of the amending instrument then provides (in part):

> **Schedule 1 Designated persons and entities and declared persons**
>
> (section 3)
>
> **Part 1 Designated and declared persons**

Item		
1	Name of Individual:	Augustine CHIHURI
	Additional Information:	Police Commissioner-General
	Date of Birth:	10/03/1953
	Listing Information:	Formerly listed on the RBA Consolidated List as 2002ZIM0015
2	Name of Individual:	Constantine CHIWENGA
	Additional Information:	Lt Gen, Commander Zimbabwe Defence Forces
	Date of Birth:	25/08/1956
	Listing Information:	Formerly listed on the RBA Consolidated List as 2002ZIM0025

……

As a former legislative drafter, my problem with this instrument is that *it simply does not work.* Section 3 of the instrument states that Schedule 1 amends the principal instrument but (in my view) Schedule 1 *does not*, in fact, amend the principal instrument, because there is no amendment instruction in Schedule 1 that indicates *how* Schedule 1 amends the principal instrument. Clearly, what is intended is that Schedule 1 of the amending instrument replaces Schedule 1 in the principal instrument. But nowhere does the amending instrument actually say that.

This is an example of persons attempting to draft by using an earlier instrument, drafted by a professional drafting office, as a 'template' but without understanding what is behind the template.

The Senate Committee raised this issue with the Minister for Foreign Affairs, in *Delegated monitor No 5 of 2014*.[42] The Minister's responded to the Senate Committee in a letter dated 9 July 2014. The Minister stated (in part):

> … the Instrument, which amends the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) List 2012* ('the Principal Instrument'), was drafted in accordance with standard drafting practice for these types of instruments under the *Autonomous Sanctions Regulations 2011*. On the basis of recent advice from the Office of Parliamentary Counsel and the comments of the Committee in the Monitor, DFAT has updated its drafting practices to ensure that future instruments include an express amendment instruction to indicate how the Principal Instrument will be amended.[43]

Clearly, the fact that this issue is to be addressed for the future is a good thing. However, the proposition that the instrument 'was drafted in accordance with standard drafting practice for these types of instruments' is a little alarming.

Most Australian lawyers seem to think that they can draft

In my experience, a surprising proportion of Australian lawyers seem to think that they can draft. An alarming number of the instructors that I have encountered (and not all of them lawyers) seem to think that they can draft better than the trained legislative drafters.

There is an approach that is underpinned by a belief that all a drafter of legislation needs to do is take an existing OPC document and change a few of the words to suit the particular case.

Another example

I recently looked at the Vehicle Standard (Australian Design Rule 42/04 – General Safety Requirements) 2005 Amendment 4.[44] Section 2 of the instrument provides:

> **2. AMENDMENT OF VEHICLE STANDARD**
>
> 2.1. The changes specified in Schedule 1 amend Vehicle Standard (Australian Design Rule 42/04 – General Safety Requirements) 2005.

Schedule 1 then provides:

> **SCHEDULE 1**
>
> [1] Clause 14.3.3.1 **to be** removed:
>
> [2] Clause 14.3.3.2 **to be** renumbered 14.3.3.1
>
> [emphasis added]

The use of 'to be' in items [1] and [2] implies future effect. The instrument (and the amendments made by the instrument) commence on the day after registration. There is no suggestion (in any meaningful way) of future effect. Why not:

SCHEDULE 1

[1] Clause 14.3.3.1

omit

[2] Clause 14.3.3.2

renumber as clause 14.3.3.1

The role of settlers and editors

Another advantage of a specialist drafting office that I believe is not properly appreciated is the role of settlers and, in particular, editors. In addition to their years of experience, and having the benefit of having drafts settled by (usually) more senior officers, legislative drafters usually have access to professional editors.

My drafts were invariably improved by comments that I received from the editors. I doubt that the majority of in-house drafters would have the same sort of access to settlers and editors.

Rowena Armstrong's 1993 paper

In 1993, Rowena Armstrong QC, (then) Chief Parliamentary Counsel for Victoria, gave a paper entitled 'Should delegated legislation be drafted by a specialist drafting office?'.[45] Unsurprisingly, Miss Armstrong concluded that it should. In reaching that conclusion, Miss Armstrong stated:

> In order to carry out the task [of drafting], the drafting office must have certain resources. It must have legally trained staff who specialise in constitutional and administrative law, statutory interpretation and who develop a particular and specialised knowledge of the statute book and of the scope of delegated legislation within the jurisdiction. The skills of this group of people will include a specialised knowledge of Parliamentary procedures.
>
> Most importantly, the members of a drafting office learn from each other. Certain aspects of drafting are skills that are acquired through experience and practice. Drafters are like any other professional group in their interchange with each other. They meet together, criticise each other, discuss current issues and problems and, at least to some limited extent, try to establish a national network in Australia and New Zealand. This also makes it easier to deal with uniform legislation, where that is required, and to address issues about drafting practices, including public comment and criticism.[46]

An even more flattering view of the role of legislative drafters has been expressed by VCRAC Crabbe:

> The training given to parliamentary counsel, their vast knowledge of existing law, their experience of the probable consequences of a piece of legislation, all these matters place them on a pedestal from which they have to be consulted on policy issues and from which they have to advise and warn.[47]

In making her comments in 1993, Miss Armstrong did not rule out a role for in-house drafters. Indeed, she stated that the role of in-house drafters was, in certain circumstances, 'particularly important'.[48] I do not disagree with that proposition. I would, however, make two additional comments.

First, one of the advantages that I see in a specialist drafting office that Miss Armstrong does not refer to is the tendency towards longevity. In my view, legislative drafters do not tend to be the most mobile of lawyers. The nature of drafting and the nature of people who are

attracted to drafting is that legislative drafters are ordinarily in it for at least the medium haul. This means that drafting offices can be great repositories of experience and 'corporate knowledge'. This is one of the reasons that they are so important to legislative scrutiny.

Instructors, on the other hand, come and go. In my experience, increasingly, they move from one project to another. Among other things, this means that, in their dealings with instructors, legislative drafters continually have to reinforce things such as the principles that emanate from legislative scrutiny committees. Legislative drafters cannot rely on their instructors to be aware of a legislative scrutiny committee's requirements because of previous experiences because they may not have had previous experiences. This means that an added advantage of legislative drafters is that they are, in effect, keepers of the faith.

My second point relates to the implications of all that I have said above in relation to legislation drafted outside of a specialist drafting office. I consider that it is less likely that someone outside a specialist drafting office will have the knowledge of the work and requirements of legislative scrutiny committees that a legislative drafter would have. This is less than ideal.

That leaves the question of how to ensure that there is a quality control process if legislation is drafted in-house. I think it is less likely that the same level of expertise and corporate knowledge will develop in departments as has developed in drafting offices. There are exceptions to this rule (in addition to the AMSA example discussed above, I note that the Civil Aviation Safety Authority has both a long history of using internal drafting resources and a high volume of output) but I think that it is generally less-than-optimal to rely on in-house legislative drafters to do the same job as legislative drafters in an office such as the OPC.

In her 1993 paper, Miss Armstrong suggested that specialist drafting offices could assist in-house drafters by being available to advise and assist and by preparing drafts, where resources permitted. She suggested that drafting offices might also assist by preparing guidelines and setting standards.[49]

I agree. Indeed, as already noted, in the Commonwealth arena, this is *required* to be done, under of section 16 of the *Legislative Instruments Act*. In my view, in the light of the 'legislative rules' development, this section 16 obligation is *clearly* more important than ever.

A final point

I note the potential impact of the new approach that has been discussed above on the interpretation of delegated legislation by the courts. I am grateful to Christopher Tran, of the Victorian Bar, for drawing my attention to this issue.

Australian courts have tended to approach their interpretation of legislation with an acknowledgment of whether the relevant legislation was drafted by legislative drafters. In particular, I refer to the comments of the Full Court of the Federal Court of Australia, in *Evans v State of New South Wales* (2008) 168 FCR 576.

The question that Mr Tran posed, in discussions with me in relation to the proposed greater use of 'legislative rules', as opposed to regulations, was 'how will this affect the interpretation of delegated legislation by the courts?'

It is my observation that Australian courts make certain assumptions about legislation, depending on who drafted it. As *Evans* (and other decisions) demonstrates, courts tend to assume that legislation drafted by legislative drafters is drafted with certain fundamental legal principles in mind.

The following Australian decisions (in addition to the *Evans* decision) offer some guidance as to the approach of Australian courts and tribunals to this issue:

- *Paintessa Developments Pty Ltd and Town of East Fremantle* WASAT 81 (1 July 2014), at paragraph 21;
- *Nostrebor Holdings Pty Ltd and Shire of Denmark* [2014] WASAT 64 (10 June 2014), at paragraph 11;
- *Nguyen v Minister for Immigration* [2013] FCCA 1864 (22 November 2013), at paragraphs 38 and 39;
- *Minister for Immigration and Citizenship v Anochie* [2012] FCA 1440 (18 December 2012), at paragraphs [25] to [27];
- *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous (No 2)* [2012] FCA 1275 (31 October 2012), at paragraph [33];
- *Seoud and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 640 (13 September 2011), at paragraph 13;
- *Environment Protection Authority v Schon G Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq)* (16 May 2014), at paragraphs 44 to 45;
- *Day v Harness Racing NSW* [2014] NSWCA 423 (18 November 2014), at paragraph 79.

I also note the following passage from the Federal Magistrates Court's decision in *Kienle and Ors v Commonwealth of Australia* [2011] FMCA 210 (1 April 2011) as an indicative view of Australian courts and tribunals of the involvement of both legislative drafters and parliamentary scrutiny committees in relation to the various issues discussed above:

> The Commonwealth Ombudsman further identifies the differing accountability measures available under legislative and executive schemes in the *Executive Schemes* Report No. 21, August 2009:
>
> > *Government schemes that are established by legislation are subject to a range of accountability measures that do not apply to executive schemes.*
> >
> > *If the eligibility criteria for a grant or program are in an Act, they must pass through several stages of scrutiny before Parliament agrees to them. First, all bills are drafted by the Office of Parliamentary Counsel, whose officers give expert assistance to agencies to ensure allowance is made for transitional arrangements, unforeseen circumstances and protection of rights and liberties in accordance with standard drafting principles. Second, agencies preparing legislation must consult with other government agencies and, where appropriate, with other interested parties. Third, once a bill is introduced to Parliament, it is subject to scrutiny by at least one parliamentary committee. The Senate Scrutiny of Bills Committee considers and reports publicly on each bill against criteria such as whether the bill trespasses unduly on personal rights and liberties, whether it makes rights, liberties or obligations unduly dependent on insufficiently defined administrative powers or non-reviewable decisions, or whether it provides insufficient parliamentary scrutiny of how a power is exercised. In addition, many of the more complex or controversial bills are referred to standing committees for more detailed public inquiry and report before Parliament debates them.*
> >
> > *When the criteria for a program or grant are in regulations made under an Act, there are similar although more limited measures to review their content. The Office of Legislative Drafting and Publishing (OLDP) drafts all*

regulations. The Senate Regulations and Ordinances Committee considers all regulations and reports on whether they are in accordance with the parent statute, whether their provisions would be more appropriately contained in legislation and whether they trespass unduly on personal rights and liberties or make rights unduly dependent on administrative decisions whose merits cannot be independently reviewed. All bills, Acts and regulations are available to the public online.

Sometimes program criteria are not in legislation or regulations but are set out in a legislative instrument. Those too are subject to a range of safeguards: OLDP drafts some of those instruments on request by agencies; there are measures to promote high drafting standards; consultation is required where business may be affected; all instruments are published online on the Federal Register of Legislative Instruments; and all legislative instruments (with limited exceptions) are subject to disallowance by Parliament. These requirements are underpinned by the Legislative Instruments Act 2003.

By comparison, criteria for executive schemes:

- *are less likely to be drafted by a person who has training and experience in legislative drafting*
- *require no public consultation in their development or amendment (except if they are regulatory schemes covered by the Best Practice Regulation Handbook)*
- *are not routinely examined by Parliament, although high profile or controversial schemes may be the subject of committee inquiries or parliamentary questions, particularly during the Senate estimates process*
- *are not agreed by or subject to disallowance by Parliament*
- *are not necessarily published as soon as they come into effect or when they are amended.*[50]

Two steps forward, one step back?

In 1990, the late Professor Douglas Whalan, while Legal Adviser to the Senate Committee, said:

> There is relatively easy access to statutes, regulations and, indeed, ordinances. Not only are they drafted by specialist professionals, but they are properly published in a series in print that can be read without the aid of a microscope. In contrast, some instruments have turned up on rather scrappy bits of paper, with the drafting in them of poor standard and with an indecipherable signature.[51]

Professor Whalan was speaking at a time when the passage of the *Legislative Instruments Act 2003* (Cth) was still in the future.

In 2003, the Commonwealth Parliament passed the Legislative Instruments Act. In brief, the Act established a comprehensive regime for the making, publication, tabling, parliamentary scrutiny (including disallowance) and 'sunsetting' of delegated legislation in the Commonwealth jurisdiction. It also established a registration regime, with delegated legislation published on the Federal Register of Legislative Instruments (FRLI). The Legislative Instruments Act not only requires new delegated legislation to be registered but also sets out procedures for 'backcapturing' delegated legislation that existed at the time that

the Legislative Instruments Act came into effect and that is intended to have continuing effect.

For me, the most exciting innovation introduced by the Legislative Instruments Act is the key concept on which the Act operates: its application is to 'instruments of a legislative character'.

The Legislative Instruments Act applies to 'legislative instruments'. This concept is defined (largely) in section 5 of the Act, which provides:

> **5 Definition—a legislative instrument**
>
> **(1)** Subject to sections 6, 7 and 9, a ***legislative instrument*** is an instrument in writing:
>
> (a) that is of a legislative character; and
>
> (b) that is or was made in the exercise of a power delegated by the Parliament.
>
> **(2)** Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
>
> (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; an
>
> (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.
>
> **(3)** An instrument that is registered is taken, by virtue of that registration and despite anything else in this Act, to be a legislative instrument.
>
> **(4)** If some provisions of an instrument are of a legislative character and others are of an administrative character, the instrument is taken to be a legislative instrument for the purposes of this Act.

While this definition is not without its problems, my firm view has always been that the use of this key term is a stunning development. It means that the Legislative Instruments Act (and all the mechanisms for parliamentary scrutiny, etc that it contains) applies to instruments of delegated legislation based on what they *do*, rather than (as in all other Australian jurisdictions) based on what they are *called*. My particular interest in this issue is that, over a period of 20 years or more, prior to the passage of the Legislative Instruments Act, a vast body of delegated legislation was provided for that escaped proper parliamentary scrutiny purely because it was called something other than, say, a 'regulation' or a 'statutory rule'. Whatever its other faults, the Legislative Instruments Act put a stop to that happening.

Further, the enactment of the Legislative Instruments Act also went a long way towards addressing the issues identified by Professor Whalan in 1990. My belief is that section 16 of the Legislative Instruments Act was of particular relevance in this regard.

Recently, however, I have come to question that belief. My observation of the *real* impact of section 16 of the Legislative Instruments Act, in my time in the OLDP/OPC, is that there had

been *no* real impact. If there *has* been a real impact then it has eluded me and I stand to be corrected.

More worrying, however, is that the recent developments in relation to pushing material that was previously in regulations into 'legislative rules' may result in the Commonwealth legislative landscape being taken backwards, not forwards. If non-OPC drafters are to be responsible for drafting even more Commonwealth delegated legislation than they do at present then – in the absence of a concerted effort by the OPC to carry out the obligations imposed by section 16 of the Legislative Instruments Act (the FPC has told the Senate Committee this *is* now occurring) – I have significant concerns for the effect on the overall quality of Commonwealth delegated legislation.

This is not to disparage the work of non-OPC drafters in the Commonwealth jurisdiction. I am sure that they all do their best to produce the best legislation that they possibly can. The problem is that most of them do so without formal training as legislative drafters, without any substantive guidance as to how they should approach their drafting and, presumably, without the same sorts of formal settling and editing process implemented in offices such as the OPC. That being so, it is important that the FPC does all that he can to fulfil his obligations under section 16 of the Legislative Instruments Act. In that regard, what the FPC has told the Senate Committee (and what he has done and agreed to do) is a very welcome sign.

Concluding comments

This paper states my belief in the importance of legislative drafters to the legislative process (including the legislative scrutiny process) and why I hold that belief. The discussion of the 'legislative rules' issue demonstrates both a challenge to the important role of legislative drafters *and* the importance of the engagement of a legislative scrutiny committee in the issue.

Endnotes

1 In this paper, I use the term 'delegated legislation', rather than 'subordinate legislation' or 'rules', 'statutory rules', etc except where the context suggests the use of a different term.

2 Available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/n02.pdf, at pp 1-2.

3 It is not appropriate to go into a detailed history of the drafting of Commonwealth legislation for this paper. Briefly, until 1973, regulations were drafted by the Office of Parliamentary Counsel (OPC). In 1973, the responsibility for drafting regulations was transferred to the Attorney-General's Department. The relevant area of the department eventually became the Office of Legislative Drafting and then, in 2005, the Office of Legislative Drafting and Publishing (OLDP). In 2012, the functions of OLDP were transferred back to the OPC. For a more detailed history of the OPC, see Meiklejohn, C, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel, 2012).

4 The Minister's letter and the first FPC response are reproduced in *Delegated legislation monitor No. 5 of 2014* (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no5.pdf), in Appendix 3). All but one of the FPC responses are also usefully reproduced in *Delegated legislation monitor No. 17 of 2014* (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/ regord_ctte/mon2014/pdf/no17.pdf), in Appendix 1.

5 Paragraphs 3 to 6 and 12.

6 Paragraphs 7 and 8.

7 Paragraph 9.

8 Paragraph 10.

9 Paragraph 11.

10 Paragraph 13.

11 Paragraph 14.

12 Page 2.

13 Page 3.

14 Page 4.

15 Page 4.

16 Page 5.

17 The letters are reproduced in *Delegated legislation monitor No. 6 of 2014* (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no6.pdf) at pages 61 to 73.

18 For 'protective' notices of motion, *Odgers' Australian Senate Practice*, 13th ed (2012), states: 'Giving notices of motions to disallow indicates concern about the delegated legislation in question, and these are known colloquially as protective notices of motion, in that they protect the right of the committee, and of any senator, to move disallowance if it is subsequently decided that this is appropriate. Such concern is often allayed by further explanatory material from the minister or an undertaking to amend the legislation. Where the committee's concerns are met, the notice of motion to disallow is withdrawn (although it may be taken over by another senator). There are some occasions where the responsible minister does not satisfy the committee and the motion to disallow proceeds. Frequently a protective notice of motion is withdrawn on the basis of undertakings from a minister to take action addressing the matters causing concern, usually by amending the legislation in question.' (see http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers/chap1516).

19 Paragraph 18.

20 Paragraph 33.

21 Available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no6.pdf.

22 Page 19.

23 The letter is reproduced in *Delegated legislation monitor No. 9 of 2014* (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no9.pdf), at pages 49 to 53.

24 Paragraph 19 and 20.

25 Available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no9.pdf.

26 Page 22.

27 Page 23.

28 Page 24.

29 It has been pointed out to me that the proposed policy (in the absence of 'strong justification') of only including offence provisions in regulations is actually at odds with at least 2 recent Acts – the *Navigation Act 2012* (see section 342) and the *Marine Safety (Domestic Commercial Vessel) National Law 2012* (see section 163 of Schedule 1).

30 The letter is reproduced in *Delegated legislation monitor No. 10 of 2014* (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no10.pdf), at pages 75 to 79.

31 Paragraph 17 and 18

32 Paragraph 19.

33 Paragraph 20 and 21.

34 Available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2013/pdf/no7.pdf. See page 445.

35 Available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no10.pdf.

36 Available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no17.pdf.

37 Available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no17.pdf.

38 The letter (and the amended Drafting Direction 3.8) is reproduced in *Delegated legislation monitor No. 1 of 2015* (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2015/pdf/no01.pdf), in Appendix 1.

39 See *Delegated legislation monitor No. 6 of 2014* (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no6.pdf), at page 65.

40 Paragraph 17.

41 For example the *Health Insurance (General Medical Services Table) Regulation 2014* (available at http://www.comlaw.gov.au/Details/F2014L00713).

42 Available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no5.pdf

43 The letter is reproduced in *Delegated legislation monitor No. 9 of 2014* (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no9.pdf), at pages 57 to 58.

44 Available at http://www.comlaw.gov.au/Details/F2014L01285.

45 Armstrong, RM, 'Drafting: Should delegated legislation be drafted by a specialist drafting office?'

46 Armstrong, RM (note 46), p 2.

47 Crabbe, VCRAC, *Legislative Drafting* (1993).

48 Armstrong, RM (note 46), p 3.

49 Armstrong, RM (note 46), p 3.

50 Paragraph 68.

51 Whalan, DJ, 'The final accolade: Approval by the committees scrutinizing delegated legislation', paper given to seminar conducted by the (Commonwealth) Attorney-General's Department titled 'Changing attitudes to delegate legislation', held in Canberra on 23 July 1990, at page 9 of the paper.