

PARLIAMENTARY COUNSEL

Drafting Direction No. 1.1A Names of instruments and provision units of instruments

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

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Part 1—Introduction

1 This Drafting Direction sets out requirements for naming instruments and the provision units of instruments. This Drafting Direction applies to instruments whether they are legislative instruments, notifiable instruments or other kinds of instruments (such as instruments of appointment or delegation and instruments made under prerogative powers).

2 Because of the variety and number of instruments and the need for consistency with the enabling Act, the requirements for the naming of instruments are more structured and allow less creativity than the equivalent requirements for Bills in Drafting Direction 1.1. The main objective of the requirements for the naming of instruments is to establish a *system* for naming instruments that is coherent and comprehensive. (However, the requirements do not override any requirements of an Act for naming instruments made under the Act.)

Note: An instrument may be cited by its name, or by reference to the secular year in which it was passed and its number. See subparagraph 40(1A)(a)(ii) of the *Acts Interpretation Act 1901* as it applies because of paragraph 13(1)(a) of the *Legislation Act 2003* or paragraph 46(1)(a) of the *Acts Interpretation Act 1901*.

3 The main objective of the rules in this Drafting Direction about naming the provision units of instruments is to ensure alignment of the names of those units with the names of corresponding units of Acts (except in rules of court and in references to units in instruments made before 2012).

4 For the purposes of this Drafting Direction, the **enabling Act** of an instrument is the Act under which the instrument is made either directly or indirectly (if the instrument is made under another instrument that is made directly or indirectly under the Act).

5 For the purposes of this Drafting Direction, the **Act component** of the name of an instrument is the short title of the enabling Act, without:

- (a) the word “Act”; and
- (b) the year of passage of the Act; and
- (c) any word (e.g. “Amendment”) that would, if included in the instrument name, give a misleading impression of the nature of the instrument; and
- (d) any other word that would, if included in the instrument name, make the instrument name too cumbersome.

Example: The Act component of the name of regulations made under the *Antarctic Treaty (Environment Protection) Act 1980* is “Antarctic Treaty (Environment Protection)”.

6 For the purposes of this Drafting Direction, a **principal instrument** is an instrument with substantive, and not merely amending or repealing, provisions. Note that an instrument with substantive provisions will be a principal instrument even if it also contains amending or repealing provisions.

Part 2—Internal references to whole instruments

7 A reference in an instrument to be made on or after the date of this Drafting Direction to the instrument itself should use the phrase “this instrument”, except in the following cases:

- (a) the “making words” of the instrument should use the phrase “the following [type of instrument]” except if it would be clearer to use the phrase “the following instrument” (but this exception does not apply to regulations, rules, an Ordinance or a Proclamation);
- (b) in rules of court, the phrase “these Rules” (with a capital “R”) should be used (although the “making words” should still use “the following Rules”);
- (c) in an Ordinance, the phrase “this Ordinance” (with a capital “O”) should be used (although the “making words” should still use “the following Ordinance”).

Note: The “making words” of an instrument are the words on the cover page identifying the maker of the instrument and stating that the maker makes the instrument.

8 If an amending instrument contains text to be included in another instrument (the *amended instrument*) to refer to the amended instrument, that text should reflect the way existing provisions of the amended instrument refer to the amended instrument itself. (This does not require repeating the name of the amended instrument.)

Example: Text inserted by amending regulations in regulations made before 2012 would use “these Regulations” (not “this instrument”) to refer to the set of regulations into which the text is inserted.

Part 3—Naming of instruments

3.1 Purpose of naming

9 The name of an instrument is to:

- (a) provide a convenient way of referring to the instrument (i.e. must not be too cumbersome); and
- (b) be unique (so that the instrument can be identified with complete certainty from its name alone).

3.2 Formal presentation of name

10 Legislative instruments must have a naming section. Non-legislative instruments may have a naming section or may be named by the inclusion of a name in a heading at the beginning of the instrument (after any coat of arms).

Example: A commencement Proclamation (which is not a legislative instrument) is named using a heading between the coat of arms and the words of the Proclamation.

11 The naming section should be the first section of an instrument. In the naming section, the name of the instrument should be italicised.

Example:

1 Name

This instrument is the *Trans-Tasman Proceedings Regulations 2017*.

12 Whether the name of an instrument is in a naming section or just a heading, each word in the name must begin with a capital, except for any definite or indefinite article, preposition or conjunction.

3.3 Name must always end with type and year of making of instrument

13 The name of any instrument must end with what type of instrument it is and what year it was made (subject to paragraph 19, about using numbers between the type of instrument and the year to avoid instruments having identical names).

14 An instrument made on or after 1 January 2017 in the exercise of regulation-making powers is to be named as Regulations (plural). An instrument made on or after the date of this Drafting Direction in exercise of rule-making powers is to be named as Rules (plural). An instrument made in exercise of a power to fix a date or time for commencement of all or part of an Act by Proclamation is to be named as a Commencement Proclamation.

Example: A Proclamation to fix the date for commencement of the *Dog Act 2016* would be named the *Dog Commencement Proclamation 2016*.

15 The name of any other type of instrument made on or after the date of this Drafting Direction should generally reflect the verb used in the conferral of power to make the instrument. Some examples are:

Naming of instrument to reflect wording of power to make instrument	
Column 1	Column 2
A power to ...	is given effect in an instrument named ...
appoint	... Appointment ...
approve	... Approval ...
authorise	... Authorisation ...
certify	... Certificate ...
declare	... Declaration ...
delegate	... Delegation ...
determine	... Determination ...
direct	... Direction ...
exempt	... Exemption ...
proclaim	... Proclamation ...

Note: The instrument's name should be given in the singular in all cases in which it is based on the nature of the power, even though, for example, the instrument provides for multiple delegations.

16 However, some verbs used in a conferral of a power to make an instrument may be inappropriate to use as a basis for naming an instrument. For example, an instrument for the exercise of a power to “fix”, “specify” or “prescribe” is not to be named a “fixation”, “specification” or “prescription”. Similarly, an instrument made under an exercise of an express power to “amend” (not relying on subsection 33(3) of the *Acts Interpretation Act 1901*) is not to be named an “amendment” (although the word “Amendment” may be used in the name of the instrument before the reference to the type of the instrument). If the verb is not an appropriate basis for naming the instrument, it can be named using the generic noun “Instrument” (not the phrase “Legislative Instrument” or “Notifiable Instrument”).

17 The fact that an Act may require something to be done in a way described generically, such as “by legislative instrument” or “by notice”, does not affect the principle that the name of the instrument should generally reflect:

- (a) the nature of the power under which the instrument is to be made; or

- (b) the particular type of instrument by which the power is provided to be exercised.

18 If an instrument exercises more than one kind of power (e.g. an authorisation and a determination), it should generally be named an “Instrument”. In some cases, however, one power may be so closely linked to another that it is appropriate to identify the instrument by the main power exercised (e.g. an instrument that delegates a power and includes directions about how the delegated power is to be exercised may be named a Delegation).

19 If:

- (a) it is reasonably likely (or certain) that 2 or more instruments to be made in the same year would otherwise have identical names; and
- (b) this cannot be avoided by inclusion of descriptions of their subject matter before the reference to the type of instrument in their names as described below;

a unique bracketed number (e.g. “(No. 1)” or “(No. 2)”) must be included in the name of each of the instruments between the type of the instrument and the year of its making.

Note: This is most likely to be relevant to principal instruments, such as instruments each appointing a person to an identical office (for example, appointment as an ordinary member of a particular body). For amending instruments, it should generally be possible to have distinctive descriptions of subject matter, even if only “(2016 Measures No. 1)”, “(2016 Measures No. 2)” etc., as required by paragraph 22(b)(ii).

3.4 Naming principal instrument made under single Act

20 The name of a principal instrument made under a single Act:

- (a) must start with the Act component (see paragraph 5); and
- (b) may include after the Act component an extra expression describing the subject matter of the instrument in brackets (the subject matter of the instrument might be transitional provisions, or both transitional provisions and consequential amendments, relating to the amendment or repeal of other legislation, in which case the word(s) “Transitional”, “Transitional and Consequential” or “Consequential and Transitional”, as appropriate might be included in brackets); and
- (c) must end with the type of the instrument and its year of making, with a bracketed number between them if relevant (see paragraphs 13 to 19).

Example: Principal regulations made under the *Dog Act 2017* to deal with the breeding of dogs could be named the *Dog (Breeding) Regulations 2017*.

Example: Principal regulations made under the *Export Control Act 2017* to deal with transitional matters could be named the *Export Control (Transitional) Regulations 2017*. If the regulations primarily made consequential amendments, as well as dealing with transitional matters, the regulations could be named the *Export Control (Consequential Amendments and Transitional Provisions) Regulations 2017*.

21 Paragraph 20 does not apply to a Territory Ordinance or an instrument made under a Territory Ordinance: see instead paragraph 24 for the naming of such Ordinances and instruments.

3.5 Naming non-principal instrument made under single Act

3.5.1 Instrument to amend or repeal single principal instrument

22 The name of an instrument that only amends or repeals a single principal instrument must:

- (a) start with the Act component (see paragraph 5), followed by any extra bracketed expression included in the name of the principal instrument after the Act component in that name to describe the subject matter of the principal instrument (therefore if the principal instrument was named in accordance with this Drafting Direction, the name of the amending instrument will start with the part of the name of the principal instrument that came before the type of the principal instrument); and
- (b) include, after the material described in paragraph (a):
 - (i) one or more of the expressions “Amendment”, “Consequential Amendments” or “Repeal”, as appropriate to describe the main purpose of the amending or repealing instrument; and
 - (ii) a bracketed description of the subject-matter of amendments, other than consequential amendments, or, if a succinct description that will give a unique name is not possible, a bracketed expression in the form “[year of making] Measures No. [unique number]”; and
- (c) end with the type of the amending or repealing instrument and its year of making (see paragraphs 13 to 18).

Example: Regulations under the *Dog Act 2017* to amend the *Dog (Breeding) Regulations 2017* to deal with registration of breeders would be named the *Dog (Breeding) Amendment (Breeder Registration) Regulations 2017*.

Example: Regulations under the *Air Navigation Act 1920* to repeal the *Air Navigation (Aircraft Noise) Regulations 1984* would be named the *Air Navigation (Aircraft Noise) Repeal Regulations 2018*.

3.5.2 Instrument to amend or repeal multiple instruments

23 An instrument that only amends or repeals multiple principal instruments made under the same enabling Act must be named like an instrument that merely amends or repeals one principal instrument (see paragraph 22), but:

- (a) with the word “Legislation” after the Act component; and
- (b) without any extra bracketed expression included in the name of any of the principal instruments to describe the subject matter of the principal instrument.

Example: Regulations made under the *Airports Act 1996* to amend various aspects of the *Airports (Building Control) Regulations 1996* and the *Airports (Environment Protection) Regulations 1997* would be named the *Airports Legislation Amendment (2017 Measures No. 1) Regulations 2017*.

3.6 Naming Territory Ordinances and instruments made under them

24 The name of a Territory Ordinance must start with the name of the Territory (as set out in Drafting Direction 3.10, but without the words “Territory of”), then follow the practice

for the short titles of Acts as described in Drafting Direction 1.1 (but with the word “Ordinance” instead of “Act”).

25 This Part applies to naming an instrument made under an Ordinance as if the Ordinance were the enabling Act for the instrument.

26 Paragraphs 24 and 25 have effect despite the rest of this Part.

3.7 Naming instruments made under multiple Acts

27 If an instrument is to be made under 2 or more enabling Acts, its name should reflect this by starting either:

- (a) with an Act component based on the short titles of each of the enabling Acts (as described in paragraph 28) unless the instrument is made predominantly under one of the enabling Acts and it would not be misleading for the Act component to be based on the short title of only that Act; or
- (b) with an indication of the common theme dealt with by the instrument in relation to all the enabling Acts (see paragraph 29), followed by the word “Legislation” or “Laws”.

Example: Consistently with paragraph (b), regulations made to deal with licensing of premises under several enabling Acts might have a name starting with “Premises Licensing Legislation”, such as *Premises Licensing Legislation Regulations 2017*.

28 An Act component based on the short titles of multiple enabling Acts (as envisaged in paragraph 27(a)) could be based on either:

- (a) the short titles of each of the enabling Acts, in alphabetical order or another appropriate order; or
- (b) the common component of the short titles of the enabling Acts with similar short titles, followed by the word “Legislation”.

Example: Consistently with paragraph (a), the Act component of the name of an instrument made under both the *Cat Act 2016* and the *Dog Act 2017* could be “Cat and Dog”.

Example: Consistently with paragraph (b), the Act component of the name of an instrument made under both the *Bird Care Act 2016* and the *Bird Licensing Act 2016* could be “Bird Legislation”.

29 An instrument made under multiple enabling Acts may deal with a common theme relating to all the Acts in various ways. Some examples of themes are:

- (a) the instrument may deal with the same subject in relation to various Acts (so the instrument name could start with that subject); or
- (b) the instrument may amend provisions dealing with a particular subject in instruments made under various Acts (so the instrument name could start with that subject); or
- (c) the instrument may amend or repeal instruments under various Acts all administered as part of a particular portfolio or by a particular agency (so the instrument name could start with the name of that portfolio or agency).

30 After the material described in paragraph 27(a) or 27(b), the name of the instrument should reflect:

- (a) paragraph 20(b) and 20(c) (about naming a principal instrument), if the instrument is a principal instrument; or
- (b) paragraph 22(b) and 22(c), if the instrument only amends or repeals one or more other instruments.

3.8 Naming instruments made under prerogative power

31 An instrument made solely under prerogative powers must be named with an indication of its subject matter followed by the type of the instrument and its year of making (and an instrument made under a prerogative instrument could follow the name of the authorising prerogative instrument).

Example: An instrument providing for rules for a new system of Australian honours could be named the *Australian Honours Rules 2017*.

32 An instrument made partly under prerogative powers and partly under an enabling Act could be named using the Act component followed by the type of the instrument and its year of making. However, if more appropriate, it could be named in the same way as an instrument made solely under prerogative powers.

3.9 Amending names of instruments from before 1998

33 The names of regulations, and of many other instruments, made before 1 January 1998 did not include the year of making and were not set in italics. If a pre-1998 instrument is being amended, and the naming section has not already been replaced to provide for the new form of name, the amendments may, if appropriate, bring the naming section into line with current practice (and make necessary consequential changes).

Part 4—Provision units of instruments

34 The provision units of instruments made from 2012 generally have the same name as the corresponding units of Acts, as shown in the following table:

Provision units of instruments made from 2012 and Acts		
Acts	Instruments (except rules of court)	Rules of court
Chapter	Chapter	
Part (in body or Schedule)	Part	
Division (in body or Schedule)	Division	
Subdivision (in body or non-amending Schedule)	Subdivision	
Section	Section	Rule
Subsection	Subsection	Subrule
Paragraph (in body or Schedule)	Paragraph	Paragraph
Subparagraph (in body or Schedule)	Subparagraph	Subparagraph
Sub-subparagraph (in body or Schedule)	Sub-subparagraph	Sub-subparagraph
Clause (in non-amending Schedule)	Clause	

Provision units of instruments made from 2012 and Acts

Acts	Instruments (except rules of court)	Rules of court
Subclause (in non-amending Schedule)	Subclause	
Item (in amending or non-amending Schedule)	Item	
Subitem (in amending Schedule)	Subitem	

35 If amending a principal instrument made before 2012, a reference to a provision unit:

- (a) in text identifying the location of the amendment; or
- (b) in text included by the amendment in the principal instrument;

should be consistent with provision unit names used in the principal instrument.

Example: References in text included by amendment of principal regulations made before 2012 should be to regulations and subregulations (not sections or subsections) of the principal regulations.

36 The *Migration Regulations 1994* use sub-sub-subparagraphs in a schedule. The use of sub-subparagraphs (or sub-sub-subparagraphs) in any other instrument should be exceptional. A new instrument should not include them, nor should they be inserted into an existing instrument by amendment, without the approval of the head drafter.

37 In exceptional cases, the head drafter may approve the use of sections and subsections in a schedule (see e.g. the *Criminal Code*).

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