

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.8  
Subordinate legislation

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 notes some considerations, and sets out some standard forms, for drafting provisions of legislation dealing with subordinate legislation.

## Part 2—Power to make subordinate legislation

### *Use of legislative instruments*

2 OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so. Drafters should mention to instructors that it is the responsibility of the instructing agency to arrange for the drafting of instruments and, if necessary, explain the options available.

3 However, material covering the following should be included in regulations unless there is a strong justification for prescribing those provisions in another type of legislative instrument:

- (a) offence provisions;
- (b) powers of arrest or detention;
- (c) entry provisions;
- (d) search provisions;
- (e) seizure provisions;
- (f) civil penalties;
- (g) impositions of taxes;
- (h) setting the amount to be appropriated where the Act provides the appropriation and authority to set the amount;
- (i) amendments of the text of an Act.

4 Provisions of this kind are dealt with further in paragraphs 26 to 32.

5 If the operation of an Act is to be modified (as distinct from actually amended), by subordinate instrument, this may be done by regulations or any other type of legislative instrument (although modifying the operation of an Act by subordinate instrument should be used sparingly). However, any textual changes of general application should be done by amendments of the text of an Act and not by modification. Consequently, these should be done by regulation.

6 It will also be appropriate to use regulations where a scheme that already makes provisions for regulations is being amended and the amendments (to the extent to which they relate to instruments) are relatively minor. FPC is happy to discuss individual cases.

7 Drafters should also see FPC to discuss whether politically sensitive provisions should be dealt with by regulation or by another type of legislative instrument.

8 Before agreeing to the use of regulations, drafters should see FPC if:

- (a) they are unsure of the approach to adopt; or
- (b) it is proposed that substantial regulations would be required.

## ***General instrument-making powers***

9 It has long been the practice to include general regulation-making powers in Acts.

10 More recently, an approach has been taken to adapt that practice for other legislative instruments. (For examples of this approach, see the “rules” in the *Public Governance, Performance and Accountability Act 2013* and the “PPL rules” in the *Paid Parental Leave Act 2010*.)

11 As with the current practice for regulations (which involves including a general regulation-making power in the Act), this approach involves including a general legislative instrument-making power in the Act. However, instead of authorising the Governor-General to make regulations when “required or permitted” or “necessary or convenient”, it authorises another person (e.g. a Minister) to make another type of legislative instrument (e.g. rules) in those circumstances. For example, see subsection 101(1) of *Public Governance, Performance and Accountability Act 2013*:

- (1) The Finance Minister may, by legislative instrument, make rules prescribing matters:
  - (a) required or permitted by this Act to be prescribed by the rules; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

All instruments that are made in accordance with this general instrument-making power will be legislative instruments.

12 Once a general legislative instrument-making power is included in an Act, the same practice that applies for regulations applies for instruments covered by the general power. For example, just as it is not necessary to include specific provisions conferring the power to make particular regulations, it is not necessary to include specific provisions conferring the power to make particular instruments covered by the general power (e.g. instead of saying “The Minister may by, legislative instrument, ...”, the Act can say “The [rules] may”).

13 However, it is necessary to include in the definition section a definition of the legislative instrument covered by the general power (because we cannot rely on the definition of **regulations** in section 2B of the *Acts Interpretation Act 1901*). For example, see section 8 of the *Public Governance, Performance and Accountability Act 2013*:

**rules** means the rules made under section 101.

14 There have been examples where a more descriptive label has been used in the defined term for the instrument covered by the general power. For example, see section 6 of the *Paid Parental Leave Act 2010*:

***PPL rules*** (short for Paid Parental Leave Rules) means the rules made by the Minister under section 298.

15 While this defined term does not fix the actual title of the instrument that can be made, to avoid confusion in the future, drafters should avoid including additional descriptive material in the defined term (except as provided by paragraph 33) and instead replicate the name of the instrument covered by the general power (e.g. ***rules***).

16 The approach of providing for legislative instruments (rather than regulations) has a number of advantages including:

- (a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for an Act; and
- (b) it enables the number and content of the legislative instruments under the Act to be rationalised; and
- (c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and
- (d) it shortens the Act.

17 Because of these advantages, drafters should adopt this approach where appropriate with new Acts. However, drafters should include a general instrument-making power in an Act that already has a regulation-making power only after discussing the issue first with FPC. Where possible, and to reduce complexity, drafters should also try to avoid having different kinds of (non-regulation) legislative instruments under an Act.

18 This approach may also be suitable in instruments which provide for other instruments.

## ***Standard forms of regulation-making powers and instrument-making powers***

### **Regulation-making powers**

19 The standard provision authorising the making of regulations under primary legislation should be as follows:

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this [Act/Ordinance] to be prescribed by the regulations; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this [Act/Ordinance].

20 The paragraphing of the standard provisions is to make it clear that the words “for carrying out or giving effect to this Act/Ordinance” do not qualify the words “required or permitted by this Act/Ordinance to be prescribed”.

21 There is no need to specify that the regulations (or instruments) are not to be inconsistent with the primary legislation concerned (or any other primary legislation), as courts will find that any subordinate legislation that is inconsistent with the primary

legislation under which it is made (or any other primary legislation, or a right vested in a person by the common law) is invalid. See also section 13 of the *Legislation Act 2003* (the *LA*).

## **Instrument-making powers—standard form**

22 The standard provision authorising the making of legislative instruments under primary legislation should be as follows:

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

All instruments that are made in accordance with this general instrument making power will be legislative instruments.

23 A definition of the legislative instrument should be included in the definitions section (e.g. *rules* means rules made [*under section xx*])—see paragraphs 13 to 15 above).

## **Instrument-making powers—delegation**

24 As a general rule, a general instrument-making power of a person should not be able to be delegated (just as the general regulation-making power of the Governor-General is not able to be delegated). You should ensure that the general rule-making power is excluded from any delegation power of the instrument-maker.

25 If, in a particular case, an instrument will need to be made frequently and the instructors wish the power to be able to be delegated, generally, you should confer a separate instrument-making power on the instrument-maker (rather than relying on the non-delegable general instrument-making power) and ensure that the particular instrument-making power is able to be delegated. Instructors should also explain the need for this in the explanatory memorandum.

## **Instrument-making powers—dealing with significant provisions**

26 For all instrument-making powers, it is important to clarify with your instructors whether provisions of the kind described in paragraph 3 are required and if so, how they may be dealt with. It would generally be considered that provisions of that kind would not be able to be included in subordinate legislation without express authorisation from an Act.

27 If your Bill will contain a power to make instruments other than regulations, and the instructor's policy is that a provision of a kind described above is not required to be included in the instrument, you should include the following provision:

- (2) To avoid doubt, the [*name of legislative instrument e.g. rules*] may not do the following:
  - (a) create an offence or civil penalty;
  - (b) provide powers of:
    - (i) arrest or detention; or
    - (ii) entry, search or seizure;

- (c) impose a tax;
- (d) [*for Acts, but not Ordinances*] set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
- (e) directly amend the text of this [*Act/Ordinance*].

28 You should include this provision in this form even if not all paragraphs are relevant to your Bill (such as because your Bill does not contain an appropriation).

29 Alternatively, if the instructor's policy is that a provision of a kind described above should be able to be dealt with by subordinate instrument, then you should include a regulation-making power in addition to the instrument-making power, and specifically allow the regulations to provide for that kind of provision.

30 In rare cases, instructors may desire provisions of this kind to be dealt with in legislative instruments other than regulations. You should discuss any such policy with FPC before providing for this. You should also ensure that the instructors are aware that the Senate Standing Committee for the Scrutiny of Bills (and possibly when the instrument is made, the Senate Standing Committee on Regulations and Ordinances) is likely to comment adversely on such an approach. Instructors should ensure that the explanatory memorandum and the explanatory statement provide strong justification for the need to include such a provision in a legislative instrument other than regulations, and set out the factors that are relevant to that justification.

31 In this case, the instrument-making power may include something along the following lines:

- (2) The [*name of instrument e.g. rules*] may [*include description of exception e.g. impose a tax*].
- (3) However, to avoid doubt, the [*name of legislative instrument (e.g. rules)*] may not do the following:
  - (a) create an offence or civil penalty;
  - (b) provide powers of:
    - (i) arrest or detention; or
    - (ii) entry, search or seizure;
  - (c) [*for Acts, but not Ordinances*] set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
  - (d) directly amend the text of this [*Act/Ordinance*].

32 In this case, subsection (3) has been modified to remove the reference to imposing a tax. You will need to modify your provisions according to your requirements.

### **Standard form of instrument-making power where there are 2 powers**

33 It is possible that there may be 2 (or possibly more) general instrument-making powers, (e.g. because different people are to have power to make instruments about different matters), although 2 instrument-making powers should be included in an Act only after discussing the issue with FPC. In this case, each instrument-making power will need its own special label for instruments made under the power. (See for example subsection 5(1) of the *Farm Household Support Act 2014*.)

34 As a general rule, where there are 2 instrument-making powers, each power should be in the standard form and contain a power to prescribe necessary or convenient matters. Consequently, 2 rule-making powers would take the following form:

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

35 You will also need to include a provision of a kind described in paragraphs 26 to 32, and 37 and 38. The provision will need to refer to both sets of rules.

36 It is possible that there may be both a general instrument-making power, and one or more other specific instrument-making powers (e.g. because there are special regimes for the making of the specific instruments, or because instructors want the special regime to result in a stand-alone instrument for some reason). Of course, just as with a general regulation-making power, the fact that there is a single general instrument-making power does not mean that everything that can be prescribed under the power has to be included in the same instrument made under that power.

### **Provision dealing with inconsistency where there are 2 powers**

37 As mentioned, it is possible that an Act may contain:

- (a) a regulation-making power and an instrument-making power; or
- (b) 2 instrument-making powers.

38 In such a case, you should include a provision that clarifies which instrument is to prevail in the event of an inconsistency. If one of the instruments is regulations, then, as a general rule, the regulations should prevail. If one of the instruments is Ministerial rules, and the other is another person's rules, the Ministerial rules should prevail. A provision along the following lines should be included:

- ( ) [*Rules*] that are inconsistent with the [*regulations*] have no effect to the extent of the inconsistency, but [*rules*] are taken to be consistent with the [*regulations*] to the extent that [*the rules*] are capable of operating concurrently with the [*regulations*].

39 If, in a particular case, it is decided not to include such a provision, or to provide a different order of precedence, the drafter should advise instructors that the reason for this will need to be explained in the explanatory memorandum.

## **Standard form of regulation or instrument-making power where there are preconditions for making subordinate legislation**

40 If a provision sets out a precondition for the exercise of a power to make subordinate legislation, the provision should be drafted to make clear who has the responsibility for forming the opinion, or doing the thing, that is the precondition (see Drafting Direction 3.4 for further details).

## ***Provisions for subordinate legislation to be made to do certain things***

### **Provisions for subordinate legislation to modify or amend an Act**

41 If you are considering drafting a provision allowing subordinate legislation (generally regulations) to make amendments or modifications of primary legislation, you must discuss the matter first with FPC. You should also ask your instructors to consult the Courts, Tribunals and Administrative Law Branch of the Attorney-General's Department (**AGD**). You should also make it clear whether the provision is authorising actual amendment, or is authorising modification, of the primary legislation. (See also the discussion above in paragraphs 3 and 26 to 32 when choosing the type of legislative instrument to be used.)

42 If you draft a provision allowing subordinate legislation to make modifications of primary legislation, you should be aware of the following definition in section 2B of the *Acts Interpretation Act 1901*:

*modifications*, in relation to a law, includes additions, omissions and substitutions.

43 Although a provision in primary legislation authorising the modification of the legislation by subordinate legislation would not ordinarily be construed as authorising an increase in a penalty, it should be made clear in such a provision that it does not extend to a modification by way of increasing a penalty provided for in the primary legislation. Any such provision should be discussed with the Criminal Law Policy Branch of AGD.

### **Provisions for subordinate legislation to provide for transitional matters**

44 It is common with new schemes, or significant amendments to existing schemes, to provide an instrument-making power that allows for transitional matters to be dealt with. The standard provision for this where there are significant amendments to an existing scheme is:

- (1) The [*maker e.g. Minister*] may, by legislative instrument, make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by this [*Act/Ordinance*].

45 If a new principal Act or Ordinance is being enacted, the provision should take the following form:

- (1) The [*maker e.g. Minister*] may, by legislative instrument, make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to:
  - (a) the amendments or repeals made by this [*Act/Ordinance*]; or
  - (b) the enactment of this Act or the [*new principal Act/Ordinance*].

46 You could also consider including the following provision:

- (3) This [*Act/Part etc. (other than subsection (2))*] does not limit the rules that may be made for the purposes of [*subsection (1)*].

47 A provision of a kind referred to in paragraphs 26 to 32 should also be included.

### **Provisions allowing subordinate legislation to incorporate material by reference**

48 Section 14 of the LA deals with the extent to which a legislative instrument may apply, adopt or incorporate another document, without reproducing the text of the document in the instrument. The Courts, Tribunals and Administrative Law Branch of AGD should be consulted on any proposal to displace section 14, in whole or part, by providing a contrary intention.

### **Provisions for subordinate legislation to specify things by reference to classes**

49 There is no need to state expressly in primary legislation that subordinate legislation may specify things by reference to a class of things (see subsection 33(3AB) of the *Acts Interpretation Act 1901* for non-legislative instruments and section 13 of the LA for legislative instruments).

### **Drafting instruments for Bills**

50 In some cases, it will be most appropriate and efficient for a Bill drafting team to draft both a Bill and instruments to be made under that Bill when enacted. This is particularly the case when the instructions for the Bill and instruments are combined, or when the policy for the content of the instruments is well developed at the time of issuing drafting instructions on the Bill. In other cases, it might be more appropriate for an instrument drafter to draft relevant instruments for a Bill (although it might still be appropriate for the instrument drafter to be involved in the drafting of the Bill, such as by attending meetings on the Bill). FPC would discuss with drafters which approach to take when allocating instructions on the Bill.

### **Scope of provisions**

51 If you are not sure whether provisions of a draft Bill that provide for subordinate legislation are appropriate to allow subordinate legislation to be made to achieve the result that you understand your instructors want, you should discuss the matter with the head drafter or one of the instrument drafting team heads. This does not limit any requirement (under Drafting Direction 4.2) to refer to AGD particular provisions conferring or affecting a power to make subordinate legislation.

### ***Repeal of provision conferring power to make subordinate legislation***

52 If a provision giving a power to make subordinate legislation is repealed and replaced, it is wise to assume that the repeal will cause the instrument to lapse. If the policy is to continue the subordinate instrument in force, you will generally need to include a transitional provision. This may also be the case for some amendments of such powers.

53 The following is an example of a transitional provision to continue an instrument in force in a case where the enabling provision has been repealed and replaced:

### **19 Transitional—section 34 of the XYZ Act 1968**

An instrument made under section 34 of the *XYZ Act 1968* that was in force immediately before the commencement of this Act continues in force (and may be dealt with) as if it had been made under section 34 of that Act as amended by this Act.

### **Part 3—The *Legislation Act 2003***

#### ***Determining whether an instrument is to be a legislative instrument***

54 The LA contains rules dealing with various matters (including disallowance and sunseting) relating to all instruments that fall within the definition of *legislative instrument* in the LA (see section 8 of the LA).

55 Section 8 sets out a general definition of a legislative instrument. If you draft a provision that states that an instrument is not a legislative instrument and you are not sure whether the characterisation is correct you could talk to the head drafter or one of the instrument drafting team heads. If there is still doubt (or if you consider that the instrument would otherwise be a legislative instrument), the issue of whether the instrument should be exempted from the LA is ultimately a decision for the Attorney-General and you should advise your instructors to discuss this issue with the Courts, Tribunals and Administrative Law Branch of AGD.

56 The LA exempts some instruments from the Act in its totality and from the disallowance and sunseting regimes in particular. (Some of these exemptions depend on the *Legislation (Exemptions and Other Matters) Regulation 2015* (the **LR**.) However, there is still an expectation that all instruments that fall within the definition of a legislative instrument under section 8 of the LA will be subject to the full requirements of the Act unless there is a special reason that justifies a full or partial exemption.

57 An instrument that is administrative in character may be treated as a legislative instrument if the instructing department wants to apply the requirements of the LA applying to legislative instruments to the instrument in full or part. If the LA is to be applied in part, the issue of whether an exemption is required does not arise because the instrument is not legislative in character.

#### ***Application of this Part of the Drafting Direction to certain subordinate legislation***

58 This Part of the Drafting Direction applies to subordinate legislation that can only be made by a person in an official Commonwealth capacity. (*A person may make an instrument in an official Commonwealth capacity even if the person is, or is acting on behalf of, a regulatory or other body that is legally separate from the Commonwealth.*) For example, an application made by a private individual, or an election made by a taxpayer, would not be subordinate legislation for the purposes of this Part of the Drafting Direction.

59 However, if you are in doubt as to whether this Part of the Drafting Direction should apply to a particular kind of instrument, then you should treat the kind of instrument as subordinate legislation for the purposes of this Part of the Drafting Direction.

## ***Generally the status of instruments to be expressly dealt with***

60 When you provide a power in a Bill to make subordinate legislation, the status of an instrument made under that power as a legislative instrument, or not a legislative instrument, must be expressly dealt with. There are 4 main ways in which this might happen:

- (a) an instrument might be stated to be a legislative instrument under section 10 of the LA;
- (b) an instrument might be stated not to be a legislative instrument under subsection 8(8) of the LA or regulations made for the purposes of paragraph 8(6)(b) of the LA (see Part 2 of the LR);
- (c) an instrument might be stated to be a legislative instrument in a provision of the Bill you are drafting;
- (d) an instrument might be stated not to be a legislative instrument in a provision in the Bill you are drafting (either because it is not a legislative instrument under subsection 8(1) of the LA, or because the instrument, despite being a legislative instrument under that subsection, is to be totally exempted from the LA).

61 Rules of court are stated under paragraph 8(8)(d) of the LA not to be legislative instruments. However, under the enabling legislation providing the power to make the rules, they are treated as if they were legislative instruments.

62 Generally, if you are amending an Act that already contains powers to make subordinate legislation, you are not required to clarify by express provision whether those instruments are legislative instruments. However, you may do so if it would be appropriate to do so taking into account the amendments you are making, or if you are given instructions to do so. Also, as doing this will bring greater consistency and certainty to the statute book, you should consider doing this if there is sufficient time.

## ***Whether an instrument is to be a legislative instrument***

### **Discussions with AGD**

63 The issue of whether a legislative instrument is to be exempted from all or part of the LA should be discussed with the Courts, Tribunals and Administrative Law Branch of AGD following referral in accordance with Drafting Direction 4.2. OPC has an interest in ensuring that the LA is not unnecessarily displaced and that there is proper accountability and approval for any displacement.

### **Instruments that are already dealt with by the LA or regulations**

64 No further statement about the status of an instrument needs to be included in the Bill if the instrument is covered by either or both of the following paragraphs (and the effect of the relevant provision in the particular case is clear):

- (a) the instrument is expressly stated to be a legislative instrument under section 10 or 57A of the LA;

- (b) the instrument is expressly stated not to be a legislative instrument under subsection 8(8) of the LA or under Part 2 of the LR or any other regulations made for the purposes of paragraph 8(6)(b).

65 If you are wanting to rely on an exemption in Part 2 of the LR for an instrument-making power, but it is not completely clear that any or all instruments intended to be made under that power would be covered by the exemption, you should discuss the matter with the Courts, Tribunals and Administrative Law Branch of AGD.

66 You should not rely on the exemption in item 19 of the table in section 6 of the LR (the ADJR exemption) if there is any doubt as to whether all instruments made under the power would fall within the exemption.

67 Some kinds of instruments specified in section 6 of the LR must relate to particular individuals in order to be covered by the LR. Unless your instructors envisage that instruments of those kinds could be made in relation to classes of persons, you do not need to comply with paragraphs 73 to 77 in relation to those kinds of instruments.

### **Instruments that are to be legislative instruments**

68 If an instrument (other than one covered by paragraph 64) is to be a legislative instrument, and the entire LA is to apply to the instrument, then you will need to state expressly in the Bill that the instrument is a legislative instrument. This can be done by using the expression “by legislative instrument” in the provision that gives the power to make the instrument. For example:

The Minister may, by legislative instrument, make rules relating to ...

The use of this expression will ensure, because of subsection 8(2) of the LA and section 2B of the *Acts Interpretation Act 1901*, that the instrument is a legislative instrument for the purposes of the LA.

69 If it is not possible to use the expression “by legislative instrument”, then the following form should be used:

*A [insert description of instrument] made under [insert enabling provision] is a legislative instrument.*

70 Sometimes a draft of an instrument is prepared by a body or person, but the instrument does not become a legislative instrument until another person or body approves or accepts the instrument. In this case, it is important to make clear, for the purposes of the LA, who makes the instrument, and when the instrument is made. To do so, the following form should be used:

*A [insert description of instrument] prepared by the [insert preparer] and approved by the [insert approver or acceptor] is a legislative instrument made by the [insert approver or acceptor] on the day on which the [insert description of instrument] is [approved or accepted].*

71 The statement that an instrument is a legislative instrument should be in a substantive provision in the Bill and not in a note.

72 Paragraph 8(2)(a) of the LA provides that if a primary law gives power to do something by legislative instrument then, if the thing is done, it must be done by instrument.

## **Instruments that are not to be legislative instruments**

### ***Express statement that instrument is not a legislative instrument***

73 If an instrument (other than one covered by paragraph 60(b)) is not to be a legislative instrument, then (subject to paragraph 78), you will need to state expressly that the instrument is not a legislative instrument.

74 An instrument might not be a legislative instrument for 2 reasons. First, the instrument might clearly not fall within the definition of ***legislative instrument*** in subsection 8(1) of the LA. Secondly, although the instrument falls within this definition, the policy might be for the instrument to be wholly exempted from the LA.

75 In either case, the standard form for dealing with such an instrument is as follows:

*A [insert description of instrument] made under [insert enabling provision] is not a legislative instrument.*

76 If you are providing a power to do something that, if done in writing, would not be a legislative instrument, and your instructors do not want to require the action to be done in writing, then you should include a provision like:

*If the [insert description of instrument] is made in writing, the [insert description of instrument] is not a legislative instrument.*

77 The statement that an instrument is not a legislative instrument should be in a substantive provision in the Bill and not in a note.

78 As a result of paragraph 8(6)(a) of the LA, only an Act can declare an instrument not to be a legislative instrument (whether because it does not fall within the definition of ***legislative instrument*** or because the instrument is to be wholly exempted from the LA). If, in a subordinate instrument, you are including an instrument-making power, and the instrument (the ***relevant instrument***) being made under that power is not of legislative character, you will need to remain silent on the relevant instrument's status as not being a legislative instrument or consider whether it is appropriate to make the relevant instrument a notifiable instrument (see paragraphs 110 to 115).

### ***Explanatory drafting notes***

79 To assist the Senate Scrutiny of Bills Committee to understand the reasons for an instrument not being a legislative instrument, drafters of Bills should provide some guidance to instructors about including an appropriate explanation in the explanatory memorandum.

80 For instruments that are not legislative instruments within the meaning of ***legislative instrument*** in subsection 8(1) of the LA, drafters of Bills should include a drafting note under the relevant provision in the Bill along the following lines (which can be inserted using Alt + I):

*[: You should explain in the explanatory memorandum that this provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of subsection*

*8(1) of the Legislation Act 2003. If you do not do so, the Senate Scrutiny of Bills Committee is likely to query whether this provision is merely declaratory of the law or an actual exemption from the Legislation Act 2003.]*

81 For instruments that are being exempted from the LA, drafters of Bills should include a drafting note under the relevant provision in the Bill along the following lines (which can be inserted using Alt + I):

*[: You should explain in the explanatory memorandum that this provision is exempting the instrument from being a legislative instrument and give a detailed explanation of the justification for that exemption. If you do not do so, the Senate Scrutiny of Bills Committee is likely to query whether this provision is merely declaratory of the law or an actual exemption from the Legislation Act 2003. In addition, the administrative law area of the Attorney-General's Department must be consulted on the exemption.]*

82 The Courts, Tribunals and Administrative Law Branch of AGD is happy to assist instructors to draft their Explanatory Memorandum in relation to issues raised by the LA.

### **Powers to create some legislative instruments and some instruments that are not legislative instruments**

83 In a small number of cases, the instrument-making powers can result in the making of an instrument of a legislative character if the power is exercised in relation to a class and an instrument of an administrative character if the power is exercised in relation to a particular individual or a particular act, event or case. You should confirm that the instructor is aware of the implications of declaring all instruments made under the power to be legislative instruments or not to be legislative instruments. In some cases there might be a need for some of the instruments made under the power to be declared to be legislative instruments and for other instruments to be declared not to be legislative instruments.

84 In these cases, you should create 2 separate enabling powers: one to enable the making of legislative instruments, and the other to enable the making of non-legislative instruments. You must also describe the tests that are to be used to determine which of the 2 powers to use. The Courts, Tribunals and Administrative Law Branch of AGD can give you advice on the nature of the tests.

85 For example:

- (1) The *[insert name of rule-maker]* may make a *[insert description of instrument]* that *[insert condition e.g. applies to a particular person or a particular entity]*.
- (2) A *[insert description of instrument]* made under subsection (1) is not a legislative instrument.
- (3) The *[insert name of rule-maker]* may, by legislative instrument, make a *[insert description of instrument]* that *[insert condition e.g. applies to a class of persons or entities]*.

86 If you are drafting a provision of this kind, you should ask your instructors whether they need the ability to make a non-legislative instrument that covers more than one individual or entity. If this is intended, you should tailor your provision to achieve this and advise your instructors that they should consult the Courts, Tribunals and Administrative Law Branch of AGD about whether the approval of the Attorney-General is required.

87 Although, the nature of the tests will be advised on by the Courts, Tribunals and Administrative Law Branch of AGD, you should ensure that it will be easy to apply the tests and determine under which power an instrument is to be made. If you do not think that the tests meet this requirement, then you should speak to the head drafter.

## ***Partial exemptions from the LA***

### **Exemptions from the disallowance regime**

88 If:

- (a) an instrument (other than one covered by paragraph 64) is to be a legislative instrument; and
- (b) the policy is that the disallowance regime should not apply to the instrument;

then you will need to state this expressly. The standard form in such a case is as follows:

A *[insert description of instrument]* made under *[insert enabling provision]* is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the *[instrument]*.

89 This form of provision (with appropriate modifications) can also be used in the cases described in paragraph 83.

90 Any proposed exemption of an instrument that is legislative in character from the disallowance regime should be discussed with the Courts, Tribunals and Administrative Law Branch of AGD. You should advise your instructors that the approval of the Attorney-General may be required if the exemption is not agreed between the instructors and the Courts, Tribunals and Administrative Law Branch of AGD.

91 Sometimes an instructing department may require a Bill to provide for a different disallowance regime, most commonly by providing for a different period of disallowance. In this case, a provision should be included along the following lines:

- (x) The *Legislation Act 2003* applies in relation to *[insert description of instrument]* as if a reference in Part 2 of Chapter 3 of that Act (parliamentary scrutiny of legislative instruments) to 15 days were a reference to [x] days.

92 This ensures that other provisions in the *Legislation Act 2003* (such as subsection 15T(7) which ensures that an instrument that is disallowed under section 42 is not shown as in force on the Register) can continue to apply in relation to the instrument. Any different disallowance regime should be discussed with the Courts, Tribunals and Administrative Law Branch of AGD.

93 If more significant changes to the disallowance regime in the *Legislation Act 2003* are required, then this would be done by exempting the legislative instrument from the disallowance regime and providing for the alternative regime. However, any alternative regime must be discussed with the Courts, Tribunals and Administrative Law Branch of AGD and would require the approval of the Attorney-General. It must also be discussed with FPC as alternative tabling and disallowance regimes raise practical issues for the Publications Group.

94 Occasionally an instructing department may want to apply parts of the LA to an instrument that is administrative in character. The non-application of provisions of the LA to such an instrument does not require a decision of the Attorney-General.

95 There are also exemptions from disallowance found in Part 4 of the LR. You should rely on the generic exception in item 3 of the table in section 9 of the LR for an instrument relating to superannuation only if it is clear that the instrument is covered. If an instrument made under a provision of an Act is covered by an exemption in that Part, you should include the following note under the provision:

Note: Section 42 (disallowance) of the *Legislation Act 2003* does not apply to *[name of instrument]* (see regulations made for the purposes of paragraph 44(2)(b) of that Act).

## Explanatory drafting notes

96 To assist the Senate Scrutiny of Bills Committee to understand the reasons for an instrument being exempted from the disallowance regime, Bill drafters should provide some guidance to instructors about including an appropriate explanation in the explanatory memorandum.

97 Bill drafters should include notes along the following lines (as the case requires) under the relevant provision in the Bill. (The drafting note can be inserted using Alt + I):

*[You should explain in the explanatory memorandum the reason why this instrument is being exempted from the disallowance regime.]*

*[You should explain that the instrument is of an administrative character and would not be a legislative instrument without the provision, but that as a matter of policy it has been decided to apply particular (specified) requirements of the Legislation Act 2003 and not other (specified) requirements of that Act.]*

## Exemptions from the sunseting regime

98 It is the policy of the Courts, Tribunals and Administrative Law Branch of AGD that all exemptions from the sunseting regime must be included in the LR and must not be included in the Act containing the power to make the instrument.

99 Therefore, if the policy of the instructors is that there should be such an exemption, they should be referred to the Courts, Tribunals and Administrative Law Branch of AGD to discuss the matter and to arrange to have the necessary regulations drafted.

100 Any proposed exemption of an instrument that is legislative in character from the sunseting regime would require the approval of the Attorney-General.

101 Part 5 of the LR contains the exemptions from sunseting. If an instrument made under a provision of an Act is covered by an exemption in that Part, you should include the following note under the provision:

Note: Part 4 of Chapter 3 (sunseting) of the *Legislation Act 2003* does not apply to the *[name of instrument]* (see regulations made for the purposes of paragraph 54(2)(b) of that Act).

## ***Providing for other requirements for legislative instruments***

### **Publication requirements**

102 You may require a legislative instrument to be published in a particular way. This requirement is additional to the requirement to register a legislative instrument (see subsections 56(2) and (3) of the LA in relation to a requirement to publish a legislative instrument in the *Gazette*).

103 If you do require a legislative instrument to be published in a particular way, you should be aware that *making*, in relation to a proposed or actual legislative instrument, is defined in section 4 of the LA to mean “the signing, sealing or other endorsement of the instrument by the person or body empowered to make it”. Therefore, any publication requirements should occur *after* a legislative instrument is made (rather than being the process by which the instrument is made). One way of doing this is to require a *copy* of the instrument, once made, to be published in a particular way.

104 As all legislative instruments are required to be registered on the Federal Register of Legislation, and the *Legislation Act 2003* also allows for notifiable instruments that are not legislative instruments to be registered on the Federal Register of Legislation, the need for legislative instruments to be published in a particular way in future should be less common (and the need for legislative instruments to be published in the *Gazette* in future should be very unusual). Provisions should be included in legislation requiring gazettal only after discussion with FPC. (See also paragraphs 110 to 115.)

105 However, if you are required to include a requirement that a copy of a legislative instrument be published in the *Gazette*, then you should use the following form:

The Minister may, by legislative instrument, make a *[insert description of instrument]*.

In addition to the requirement under the *Legislation Act 2003* for the *[instrument]* to be registered, a copy of the *[instrument]* must be published in the *Gazette*.

106 The reason for the form of words in paragraph 105 is to make it clear on the face of the statute book that subsection 56(1) of the LA is overridden (which states that a requirement for an instrument to be published in the *Gazette* is satisfied if the instrument is registered as a legislative instrument). You should also adopt a similar form of words (as appropriate) in the case of other methods of publication (such as publication in a newspaper) for consistency (although this is the position, in any case, as a result of subsection 56(3) of the LA).

107 You might also need to consider whether a failure to publish the instrument as required affects the validity of the instrument.

108 For further discussion on publication requirements for instruments, see the discussion below in relation to notifiable instruments.

### **Tabling requirements**

109 The obligation to deliver a legislative instrument for tabling lies on OPC (although that obligation only arises once the instrument is lodged for registration). There should not be

any need to provide for any tabling requirements for legislative instruments that are different from those specified in Part 2 of Chapter 3 of the LA.

## ***Notifiable instruments***

110 The LA provides for a new class of instruments, called notifiable instruments. Section 11 of the LA provides for the following instruments to be notifiable instruments:

- (a) instruments declared to be notifiable by their enabling Act or instrument;
- (b) commencement Proclamations for Acts and similar commencement instruments for instruments;
- (c) instruments (other than legislative instruments) that are registered as notifiable instruments;
- (d) instruments that amend or repeal other notifiable instruments.

111 An instrument covered by paragraph 110(a) is excluded from being a legislative instrument by paragraph 8(8)(a) of the LA, even if it happens to be legislative in character. Similarly, a commencement instrument is excluded from being a legislative instrument. Neither instrument can be registered as a legislative instrument.

112 Notifiable instruments are designed to cover instruments that do not have legislative character, and that are currently required to be made publicly available, whether by publication in the Gazette, on a website, in a newspaper or otherwise. Such instruments will become more easily and consistently accessible than at present by being formally registrable on the Federal Register of Legislation, and by allowing compilations to be made for those instruments that are amended from time to time.

113 Notifiable instruments will be required to be registered, but are not required to be tabled in Parliament; they are not disallowable and they do not sunset. The requirements for consultation before the making of legislative instruments do not apply to notifiable instruments.

114 In the past, drafters may have been instructed to include a requirement for a notice to be published in the Gazette. If instructions are given to provide for instruments, other than legislative instruments, to be made publicly available (whether in the Gazette, on a website or in a newspaper), consideration should be given as to whether the instruments should be notifiable instruments. Ultimately, it is a decision for instructors as to whether an instrument should be a notifiable instrument. Factors that may be taken into account in making the decision include the following:

- (a) whether the instrument should be permanently available;
- (b) the ability of the Federal Register of Legislation to link all instruments made under a particular power and the ability to publish amendments and compilations of notifiable instruments on the Register;
- (c) whether what is being made publicly available is the exercise of a power or a notification of an exercise of a power (where an exercise of power is more

likely to be done by notifiable instrument than a notification of an exercise of power);

- (d) where the public would expect to find the information (that is, would they expect to find the information on the Federal Register of Legislation, on a website or in newspapers);
- (e) the need for the public to be alerted to a matter urgently (where urgent notification is more appropriately dealt with on a particular website than on the Register);
- (f) the relative costs of the various methods of making the information publicly available;
- (g) for instruments that may be either legislative or non-legislative, the ability for the Federal Register of Legislation to house all instruments made under that power in a single location.

115 The standard form of declaration for notifiable instruments should be the same as for legislative instruments, e.g. “The Minister may, by notifiable instrument, determine...”. Of course, this may need to be varied depending on the context, as with legislative instrument declarations (see the examples in new subsections 8(2) and 11(1) of the LA). Where a notification of an exercise of power is done by notifiable instrument, this may be done by using “The Minister must, by notifiable instrument, publish notice of ...”.

116 Section 2B of the *Acts Interpretation Act 1901* defines *notifiable instrument* for all Acts.

### **References to subsection 12(2) of the Legislation Act 2003**

117 Subsection 12(2) of the LA provides that an instrument does not apply to a person if the instrument commences before the day it is registered and it would disadvantage the person. If you do not want this subsection to apply, you can include the following provision:

Subsection 12(2) (retrospective application of [*legislative instruments/notifiable instruments*]) of the *Legislation Act 2003* does not apply in relation to [*name of instrument*] made for the purposes of [*insert reference to relevant provision*].

## **Part 4—Instruments that are not legislative instruments and the Acts Interpretation Act 1901**

118 The *Acts Interpretation Act 1901* contains provisions relating to instruments that are not legislative instruments, notifiable instruments or rules of court: see sections 46 and 46AA of that Act. These provisions are effectively equivalents of sections 13 and 14 of the *Legislation Act 2003*.

## **Part 5—Other matters dealing with or affecting instruments**

### ***Naming of instruments***

119 As mentioned in paragraph 51 of Drafting Direction No. 1.1A (names of instruments and provision units of instruments), an instrument that is made under a power other than a

general rule-making power “should generally reflect the nature of the power given by the Act or instrument under which the instrument is to be made”. For example, if the power is to “declare” a matter, the instrument is called the *ABC Declaration 2015*.

120 Some verbs work better than others for determining the name of an instrument. For example, verbs like “approve”, “authorise”, “certify”, “declare”, “determine”, “direct” or “exempt” work well. Other verbs, like “specify”, “fix” and “prescribe” do not work so well.

121 When conferring a power in a Bill or instrument to make a subordinate instrument, drafters should ensure that an appropriate verb is chosen to minimise naming difficulties when drafting the subordinate instrument.

122 Verbs like “specify” or “fix” can still be used in the following way:

The Minister may, by legislative instrument, make a determination specifying kinds of work for the purposes of paragraph 22(1)(a).

### ***Provisions referring to regulations or other instruments***

123 It is generally undesirable to refer in an Act to particular regulations or instruments or a particular numbered provision of a regulation or instrument, because the reference could easily be made incorrect. However, if you must include such a reference, it should be in the form provided by the regulation or instrument as the name or citation of the regulation or instrument (see Drafting Direction 1.1A and Word Note 4.2).

### ***Provisions amending regulations or other legislative instruments***

124 Acts should not amend regulations or other legislative instruments, unless there are special reasons. This is because of the significantly different nature of Bills and legislative instruments. Bills are laws that are made by Parliament. Legislative instruments on the other hand are a form of legislation delegated by the Parliament to be made by the Executive Government and substantially regulated under the *Legislation Act 2003*.

125 It is generally not considered appropriate, except in exceptional cases, for parliamentary time that is set aside for debating Bills to be taken up with amendments to legislative instruments which are otherwise subject to the disallowance process set out in the *Legislation Act 2003*. If the matters in question are appropriate for this form of parliamentary consideration, there is a strong argument that the material in question should be included in the principal Act, rather than in subordinate legislation.

126 Further, numerous rules apply to legislative instruments under the *Legislation Act 2003*. Some of these rules do not apply to amendments of legislative instruments made by Bills (for example, rules relating to consultation and disallowance). While exceptions to the rules in the *Legislation Act 2003* are occasionally appropriate, increased use of Bills to amend legislative instruments is inconsistent with the fundamental policy underlying the Act, a policy that was consulted on extensively by the Attorney-General’s Department, including with the Senate Scrutiny of Bills Committee.

127 An example of a special reason for including an amendment to a legislative instrument in a Bill would be a need to amend a legislative instrument retrospectively in a way that adversely affects a person’s rights or imposes new liabilities contrary to the *Acts*

*Interpretation Act 1901* or the LA. If you are instructed to draft a provision amending regulations or other legislative instruments in a Bill, you should discuss the matter with FPC.

128 If it is decided that an Act must amend regulations or other legislative instruments, you should take care to ensure that any amending regulations or instruments with suspended commencements will not affect the amendments to be made by the Act (and OPC drafters are aware of the proposed amendments and the instructing department is aware of the need not to make amending regulations or instruments that could affect the amendments to be made by the Act).

129 The usual form of the clause to achieve this is as follows:

### 3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Note: The provisions of the [title of instrument] amended or inserted by this Act, and any other provisions of [that instrument], may be amended or repealed by [an instrument] made under [instrument-making power section] (see subsection 13(5) of the *Legislation Act 2003*).

130 The following subsection is considered unnecessary and should not be included:

- (2) To avoid doubt, [regulations/instruments] amended under subsection (1) are taken to still be [regulations/instruments].

### ***Amendments of definitions in enabling Act relied on in instruments***

131 Previously, there was conflicting jurisprudence on the effect of an amendment of a definition in an Act on existing regulations or other instruments (compare *Birch v Allen* [1942] 65 CLR 621 with *Kostrzewa v Southern Electricity Authority of Queensland* [1970] 120 CLR 653).

132 Section 46 of the *Acts Interpretation Act 1901* and section 13 of the LA now clarify that expressions used in non-legislative instruments and legislative instruments have the same meaning as in the enabling legislation as in force from time to time. This means that changes in definitions in the enabling legislation will flow through to the instruments made under the enabling legislation.

### ***Instruments prescribing penalties***

133 Subsection 33(5) of the *Acts Interpretation Act 1901* provides that, if an Act confers power to make an instrument prescribing limited penalties, that limitation does not prevent the instrument from requiring the making of a statutory declaration.

### ***Explanation when relying on the necessary and convenient power***

134 For a provision of an instrument that relies for its head of power on the necessary and convenient power, drafters should include a drafting note under the provision along the following lines:

[*: This provision relies on the necessary and convenient power in paragraph (x)(1)(b) of the Act. You should indicate in the explanatory statement that this provision relies on that*

*power as the Senate Standing Committee on Regulations and Ordinances expects the explanatory statement to indicate when the “necessary or convenient” power has been relied on.]*

### **Incorporation of material by reference**

135 Section 14 of the *Legislation Act 2003* sets out special rules about the circumstances in which a legislative instrument or notifiable instrument may make provision in relation to a matter by applying, adopting or incorporating material in an Act, an instrument or another written document.

Note: Section 46AA of the *Acts Interpretation Act 1901* sets out a similar rule for instruments that are not legislative instruments or notifiable instruments.

136 The basic rule is that a legislative instrument or notifiable instrument can apply, adopt or incorporate:

- (a) the provisions of any Commonwealth Act or disallowable legislative instrument (within the meaning of the *Legislation Act 2003*) as in force at a particular time or as in force from time to time; and
- (b) matter contained in a non-disallowable legislative instrument or other document as in force or existing at the time when the first-mentioned legislative instrument or notifiable instrument commences.

137 However, a legislative instrument or notifiable instrument can only apply, adopt or incorporate matter contained in a non-disallowable legislative instrument or other document as in force or existing from time to time if the enabling Act allows for this.

138 When drafting a legislative instrument or notifiable instrument that will make provision in relation to a matter by applying, adopting or incorporating material in an Act, an instrument or another written document, the wording used to do this will depend on whether the material is contained in:

- (a) a Commonwealth Act or disallowable legislative instrument (within the meaning of the *Legislation Act 2003*); or
- (b) another kind of instrument or written document (for example, a non-disallowable legislative instrument, State or Territory legislation or a technical standard).

### **Incorporating Commonwealth Acts and disallowable instruments as in force from time to time**

139 When drafting a legislative instrument or notifiable instrument that applies, adopts or incorporates the provisions of a Commonwealth Act or disallowable legislative instrument as in force from time to time, it is generally not necessary to specify that the Act or instrument is “as in force from time to time”. This is because:

- (a) under section 14 of the *Legislation Act 2003*, provisions of this kind are permitted to be applied, adopted or incorporated in a legislative instrument as in force from time to time; and

- (b) the reference to the short title or name of the Act or legislative instrument is a reference to that Act or instrument “as in force from time to time” because of the operation of section 10 of the *Acts Interpretation Act 1901*.

140 However, drafters should advise instructors that the explanatory statement for a legislative instrument should mention that the Act or instrument is being applied, adopted or incorporated as in force from time to time.

### **Incorporating Commonwealth Acts and disallowable instruments as in force at a particular time**

141 It would be unusual for material contained in a Commonwealth Act or disallowable legislative instrument to be applied, adopted or incorporated as in force at a particular time. However, if this is done, the particular time should be specified.

### **Incorporating other instruments and documents—general**

142 If material contained in an instrument or written document that is not a Commonwealth Act or disallowable legislative instrument is to be applied, adopted or incorporated in a legislative instrument or notifiable instrument, the instrument or written document should be specified as being:

- (a) as in force or existing at the time when the legislative instrument or notifiable instrument commences; or
- (b) as in force or existing from time to time (if this is permitted by the enabling Act).

143 In the case of paragraph 142(b), drafters should advise instructors that the explanatory statement for a legislative instrument should mention that the Act or instrument is being applied, adopted or incorporated as in force from time to time.

144 There is some doubt as to whether an instrument can apply, adopt or incorporate the text of a non-disallowable instrument from a time before commencement. Agencies may need to seek AGS advice if they wish to do so.

### **Incorporating other instruments and documents—State and Territory laws**

145 The rule in paragraph 142 applies to material contained in a State or Territory law as a State or Territory law is not a Commonwealth Act or disallowable legislative instrument (within the meaning of the *Legislation Act 2003*). Although section 10A of the *Acts Interpretation Act 1901* provides that a reference to the short title or other citation of a law of a State or Territory is to be construed as a reference to that law as amended from time to time, that section cannot always be relied on in relation to references to State and Territory laws in legislative instruments or notifiable instruments.

146 For example, if a legislative instrument or notifiable instrument refers to a State or Territory law without specifying whether it is as in force or existing from time to time, or as in force or existing at a particular time, and the enabling Act does not permit the State or Territory law to be applied, adopted or incorporated as in force from time to time, the reference could only be to the State or Territory law as in force at the time the legislative

instrument or notifiable instrument commenced (because of the operation of section 14 of the *Legislation Act 2003*) despite section 10A of the *Acts Interpretation Act 1901*.

147 Accordingly, when drafting a legislative instrument or notifiable instrument that applies, adopts or incorporates a State or Territory law, to avoid any confusion as to whether or not section 10A of the *Acts Interpretation Act 1901* is being relied on in any particular case, references to that State or Territory law should always specify whether the State or Territory law is as in force or existing from time to time, or as in force or existing at a particular time.

148 This does not affect the position when drafting primary legislation, which is generally that references to State or Territory law mean references to State or Territory law as in force or existing from time to time.

### **Incorporating other instruments and documents—forms**

149 Section 14 of the *Legislation Act 2003* does not apply in relation to forms (see subsection 14(4) of that Act) so a legislative instrument or notifiable instrument can apply, adopt or incorporate a form as in force or existing at a particular time or as in force from time to time.

150 When drafting a legislative instrument or notifiable instrument that applies, adopts or incorporates a form as in force from time to time, it is not necessary to specify that the form is “as in force from time to time”. However, drafters should advise instructors that the explanatory statement for a legislative instrument should mention that the form is being applied, adopted or incorporated as in force from time to time.

151 It would be unusual for a form to be applied, adopted or incorporated as in force at a particular time. However, if this is done, the particular time should be specified.

### ***Notifying Publications Group if an instrument ceases to be in force***

152 Drafters should notify the General Manager of Publications if they are working on a Bill or instrument that they are aware will result in regulations or other instruments ceasing to be in force (for example, they are repealing provisions under which legislative instruments have been made), or if they become aware that an instrument has ceased to be in force and this has not been reflected on the Federal Register of Legislation. See also Drafting Direction 2.2 in relation to sunset provisions.

Peter Quiggin PSM  
First Parliamentary Counsel  
27 July 2017

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