



## Instrument Drafting Guidance Note No. 1.1

# Deciding if a non-tied instrument should be drafted by OPC

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### Purpose of this document

- 1 The purpose of this document is to assist agencies decide whether to engage OPC to draft a non-tied instrument.<sup>1</sup>
- 2 When deciding if a particular non-tied instrument should be drafted by OPC, agencies should consider the matters listed in **Attachment A**. Subject to capacity, OPC should draft the instrument if one or more of those matters applies in relation to the instrument.
- 3 Agencies should consult with their relevant internal legal or legislation area before engaging OPC.
- 4 Agencies may also find it useful to consult OPC, including by calling the OPC instrument client adviser on **(02) 6120 1390**.

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<sup>1</sup> The main kinds of instrument drafting work tied to OPC under the [Legal Services Directions](#) are the drafting of regulations and other instruments made by the Governor-General. If instrument drafting work is not tied to OPC, agencies are not required to use OPC.

## Relevant matters

If one or more of the following matters applies in relation to an instrument, agencies should consider engaging OPC to draft the instrument.

- 1 It is unclear if the instrument is authorised by an Act or another instrument.
- 2 The instrument raises a constitutional issue (such as whether the instrument is supported by a constitutional head of power or is otherwise constitutionally valid).<sup>2</sup>
- 3 The instrument relates to a significant or sensitive legal, political, administrative or financial matter.
- 4 The instrument is a new principal instrument.
- 5 The instrument is an amending instrument that makes significant changes to a principal instrument.
- 6 The instrument raises a novel or complex legal or drafting issue.
- 7 The instrument is intended to fix a mistake or problem that involves a medium to high level of risk or raises significant legal issues.
- 8 The instrument modifies the operation of an Act or another instrument.
- 9 The instrument authorises the making of another instrument.
- 10 The commencement or application of the instrument is retrospective or is otherwise novel or complex.
- 11 The instrument includes offences or civil penalty provisions.
- 12 The instrument includes provisions that should be dealt with in regulations (such as the imposition of tax, powers of arrest or detention or other coercive powers).<sup>3</sup>
- 13 The instrument is intended to be used as a template to draft other instruments.
- 14 The instrument:
  - (a) raises policy issues that are the responsibility of other agencies;<sup>4</sup> or
  - (b) is likely to attract comment from the Senate Standing Committee for the Scrutiny of Delegated Legislation<sup>5</sup>; or
  - (c) is likely to be subject to significant scrutiny for any other reason.

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<sup>2</sup> An instrument may be invalid if it infringes a constitutional limitation or principle such as the separation of powers, the implied freedom of political communication or the limitation on giving preference, in laws of trade, commerce or revenue, to a State or part of a State. For further information, see OPC's [Drafting Direction 3.1](#).

<sup>3</sup> For further information, see OPC's [Drafting Direction 3.8](#), paragraph 4.

<sup>4</sup> For further information, see OPC's [Drafting Direction 4.2](#), Attachments A and B.

<sup>5</sup> For further information, see the Committee's [guidelines](#) for applying its scrutiny principles.