

The importance of legislative drafters to legislative scrutiny by parliamentary committees – Challenges presented by recent developments in the (Australian) Commonwealth jurisdiction

Stephen Argument*

Introduction

Given that this is a paper prepared for presentation to a legislative drafting conference, I thought that I would take a slightly tangential approach and address the topic of “Parliamentary review of regulation-making” from the perspective of the role that I believe legislative drafters have in *assisting* the parliamentary review of delegated (or subordinate) legislation.¹ I do so on the basis of my experience in the Australian jurisdiction.

In addition, I will discuss some recent developments in the Commonwealth jurisdiction in Australia that, in my view, present some significant challenges to the role that legislative drafters play in the making (and parliamentary scrutiny) of delegated legislation.

“The first bulwark”

In 1990, in its *Eighty-seventh Report*, the Senate Standing Committee on Regulations and Ordinances published a Special Report by its (then) Legal Adviser, the late, great Professor Douglas Whalan, on the subdelegation of legislative powers. In that Report, Professor Whalan suggested that the Senate Standing Committee for the Scrutiny of Bills was “the first bulwark” in certain aspects of legislative scrutiny.²

In a paper that I presented to the Australia–New Zealand Scrutiny of Legislation Conference, held in Wellington, New Zealand, on 31 July to 2 August 2007,³ I offered a different view to that of Professor Whalan. My primary contention in that paper was my view that it is legislative drafters

* Legal Adviser (Subordinate Legislation), ACT Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) and Legal Adviser, Senate Standing Committee on Regulations and Ordinances. Any views expressed in the paper are views of the author and not those of either committee.

1 In this paper, I will 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 Senate Standing Committee on Regulations and Ordinances, *Special report on subdelegation of powers - Eighty-seventh Report* (November 1990), p 4.

3 See Argument, S, “Straddling a barbed wire fence: reflections of a gamekeeper, turned poacher, turned gamekeeping poacher” (available at http://www.opc.gov.au/calc/docs/Loophole_papers/Argument_Oct2007.pdf).

(and, by that, I mean persons employed in the offices of Parliamentary Counsel and their equivalents) who are the first bulwark in legislative scrutiny.

In making that assertion, I conceded that it was neither a novel nor a revolutionary proposition. I noted, for example, that Miss Rowena Armstrong QC, (then) Victoria's Chief Parliamentary Counsel, told the Fourth Australasian and Pacific Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills (held in Melbourne from 28 to 30 July 1993) that ...

... it is certainly the very existence of the Parliamentary Committee that often gives the drafter the sanction that is needed – you know what the Committee will say if you try that one.⁴

The point to note here is not the role of the parliamentary committee but the fact that the legislative drafter would both refer to the committee and rely upon it for authority in advising client agencies that legislation might offend the legislative scrutiny principles that our various committees seek to uphold.

In the 2007 paper, I also noted that a similar point was made by the Commonwealth's (then) First Parliamentary Counsel, Mr Ian Turnbull QC, at a seminar held in 1991, to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills. Mr Turnbull said:

I think it is safe to say that the provisions that get into Bills and that come before the Scrutiny of Bills Committee are the tip of the iceberg. I think that a far greater number that would have offended have not been put in Bills because we have advised the departments and the departments have had the sense to withdraw them. After all, when we say that the Scrutiny of Bills Committee does not like something, that is a very important weapon in our armoury.⁵

Mr Turnbull's point was acknowledged by the (then) Deputy Chair of the Scrutiny of Bills Committee, Senator Amanda Vanstone, who thanked the Office of Parliamentary Counsel for its role in assigning "certain unwelcome legislative practices ... to the legislative equivalent of Siberia".⁶

"The first bulwark" revisited – the 2011 paper

I revisited the role of legislative drafters in relation to the work of legislative scrutiny committees⁷ for the purposes of a 2011 paper.⁸ In the light of the

4 Armstrong, RM, "Drafting: Should delegated legislation be drafted by a specialist drafting office?", p 4.

5 Turnbull, I, in "Ten years of Scrutiny – A seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills" (held on 25 November 1991 – available at http://www.aph.gov.au/Senate/Committee/scrutiny/10_years/report.pdf), at p 62.

6 Vanstone, A, in "Ten years of Scrutiny" (see note 5), at p 57.

7 For convenience, in this paper, I use the term "legislative scrutiny committee" to refer to any parliamentary committee that undertakes a technical legislative scrutiny role.

8 See Argument, S, "Of parliament, pigs and lipstick (Slight Return): A defence of the work of legislative scrutiny committees in human rights protection", Paper presented

views noted above being quite dated, I decided to explore the matter myself, by seeking the views of the parliamentary counsel in the various Australian jurisdictions.

Though there were some relatively minor caveats, the response of the various parliamentary counsel confirmed that the views of Ms Armstrong and Mr Turnbull still resonated with Australian drafting offices.

The Chief Parliamentary Counsel of Victoria, Gemma Varley, stated:

It is true to say that in Victoria drafters are very aware of the concerns of our Scrutiny of Acts and Regulations Committee [**SARC**] when we draft Bills and settle delegated legislation. We receive the SARC alert digests on Bills and discuss them at drafter's meetings and similarly discuss SARC's reports on delegated legislation. When settling drafting instructions for a Bill and in the course of drafting a Bill or settling regulations, we pass on to instructing departments matters about which SARC may raise concerns. SARC has produced practice notes for explanatory memoranda and other matters which we disseminate to Departments. Section 17 of the *Parliamentary Committees Act 2003* sets out SARC's functions. SARC has a significant function in reporting on the impact of legislation on human rights conferred by the Victorian Charter of Human Rights and Responsibilities. In addition to this, SARC has had for many years a role of reporting on the impact of legislation on rights and freedoms and we paid close attention to its pre-Charter reports as well.⁹

It is important to note that Ms Varley then added:

This does not mean that provisions that impact adversely on rights and freedoms will never be drafted. It means that if a provision is to have an adverse impact it should be the result of informed policy-making, taking into account the Charter and the concerns that SARC is likely to raise.¹⁰

Walter Munyard, the Parliamentary Counsel for Western Australia, indicated that he generally agreed with the views of Ms Armstrong and Mr Turnbull. He then stated:

Clearly drafters wishing to dissuade instructors from requiring them to write law that offends against legal principle will often resort to the threat of unfavourable comment when the legislation comes before parliament.

Committees play an important part in identifying and reporting to the House offensive provisions. The WA parliament has a Joint Standing Committee on Delegated Legislation and sometimes refers Bills to a

to 2011, AIAL National Administrative Law Forum, 21-22 July 2011 (available at <http://www.aial.org.au/NationalForum/ANFIndex.html>).

9 E-mail to the author, dated 29 June 2011.

10 E-mail to the author, dated 29 June 2011.

Legislation Committee for scrutiny. National scheme legislation is automatically referred to a Uniform Legislation and Statutes Review Committee of the Legislative Council.¹¹

Mr Munyard also adds an important rider to the general point:

Inevitably [the Parliamentary Counsel's Office] does not always agree with points taken by a parliamentary committee, but the potential for adverse comment from a committee can be useful to influence the policy that draft legislation must reflect.

Where the balance lies between respecting civil rights and pursuing legitimate policy objectives that might require transgressing those rights is obviously a matter of policy. However, a part of a drafter's role is to suggest less invasive means of achieving the client's policy objective.

Parliamentary committees often work under difficult time constraints and with limited resources. I am not sure that their critics make sufficient allowance for that.¹²

Finally, the Commonwealth's First Parliamentary Counsel, Peter Quiggin, stated:

I think that it is hard to untangle the policy of the Government and the approach of the Scrutiny of Bills Committee on many issues. By this I mean that the policies of the Government on review of decisions, protections where powers are granted and other issues (mainly administered by [the Attorney-General's Department]) often mirror those of the Committee. Consequently, when we draft with "one eye to the relevant committee", we also are drafting with one eye to the relevant Department responsible for the whole of Government policy.¹³

The point that Mr Quiggin makes above is an important one (and echoes a point made by both Ms Varley and Mr Munyard). While it may be the case that legislative drafters draft "with one eye on the relevant parliamentary committee", I would never mean to suggest that legislative drafters draft only in terms of what is likely to please or displease the relevant committee. Clearly, the instructions of the client agency (and the policies of the Government) are the legislative drafter's primary responsibility. Legislative drafters may advise a client agency that "this will probably not go down well with the parliamentary committee" but, equally, legislative drafters might advise "if you go about it this way then you'll have to put up a good explanation, as the parliamentary committee will not like it". In my view, this is all about legislative drafters providing good client service. It's about advising client agencies about the pros and cons of different approaches and about

11 E-mail to the author, dated 27 April 2011.

12 E-mail to the author, dated 27 April 2011.

13 E-mail to the author, dated 27 April 2011.

alerting client agencies about the potential pitfalls of certain options (as well as offering suggestions about how those potential pitfalls might be managed).

Turning to matters of practicality, Mr Quiggin added:

You may be interested to know that there are 19 references to the Senate Scrutiny of Bills Committee in our Drafting Directions and most of these are alerting drafters to issues that the Committee is likely to raise.

We also get copies of the Alert Digests and the Reports loaded on to our internal network so that drafters have access to them. When they arrive in the office, one of our staff sends an email that lists the Bills that have been commented upon.¹⁴

The Queensland Premier's views

Without wishing to labour this point, I would also like to draw attention to some views that, coincidentally, were expressed by the (then) Premier of Queensland, the Hon Anna Bligh MP, at the time of my 2011 paper, in the context of a submission to the Queensland Scrutiny of Legislation Committee's Review of the meaning of "fundamental legislative principles" in the *Legislative Standards Act 1992* (Qld):

The work of the [Scrutiny of Legislation Committee] in advising Parliament about the operation of FLPs [fundamental Legislative principles] in legislation makes a critical contribution to the quality of Queensland legislation. The [Scrutiny of Legislation Committee's] role corresponds with [the Office of the Queensland Parliamentary Counsel]'s functions of advising its clients on the operation of the FLPs, as part of OQPC's [Office of the Queensland Parliamentary Counsel's] role of ensuring the Queensland statute book is of the highest standard under section 7 (j) of the [*Legislative Standards Act 1992*].

OQPC draws considerable value from the high quality research carried out by the [Scrutiny of Legislation Committee] in relation to legal issues relevant to FLP issues arising in legislation. The [Scrutiny of Legislation Committee] frequently deals with new or emerging rights and obligations issues, for example, rights relating to information and privacy. It is frequently the case that research carried out by the [Scrutiny of Legislation Committee], and opinion on new and emerging issues developed by the [Scrutiny of Legislation Committee], is the only source of legal or associated research directly on a legislative issue that is easily accessible to drafters and instructing officers. This research feeds directly into the training given by OQPC to its drafters and into advice given by OQPC drafters to OQPC's clients. It is also considered directly by instructing officers.

14 E-mail to the author, dated 27 April 2011. The Office of Parliamentary Counsel drafting directions are available at http://www.opc.gov.au/about/draft_directions.htm.

The work of the [Scrutiny of Legislation Committee] has a high level of acceptance by OQPC drafters and instructing officers (both for Government legislation and Private Members' Bills), despite the fact that the [Scrutiny of Legislation Committee] membership and governments change. This means that the [Scrutiny of Legislation Committee's] work has an ongoing direct beneficial effect on the development of legislation, and ultimately on the quality of legislation being passed by the Parliament.

The general reports produced by the [Scrutiny of Legislation Committee] on frequently occurring FLP topics are of particular value to OQPC, which considers that it would be valuable if more of these general reports were produced, as a 'clearing house' for the large number of individual [Scrutiny of Legislation Committee] comments.

The [Scrutiny of Legislation Committee's] report on Henry VIII clauses is an example of how a general report can provide a vital guide for ongoing convenient reference, eliminating the need to refer to a multitude of past individual committee comments. OQPC suggests that general reports might facilitate a more in-depth examination of serious issues arising from the general flow of legislation over a period.

The current FLP system is almost 2 decades old. This means there are literally hundreds comments in the [Scrutiny of Legislation Committee's] Alert Digests and Legislation Alerts that relate to particular ongoing issues as they arise in a multitude of circumstances.

OQPC monitors these comments on an ongoing basis and believes they deserve to be generally analysed and synthesised into general commentary that can be used in the development of legislation.¹⁵

As an interesting side-note, I note that the Queensland Scrutiny of Legislation Committee was abolished in 2011 and its functions taken over by the various subject-matter parliamentary committees.¹⁶

The role of the legislative drafter

So, at least up to 2011, there seems to be a consensus that legislative drafters have an important role in relation to the work of legislative scrutiny committees. But is there an explanation for this? It is useful to consider (in more general terms) the role of the legislative drafter.

In 2005, the current Commonwealth First Parliamentary Counsel, Mr Peter Quiggin PSM, made the following statement about the role of a

15 Submission to Scrutiny of Legislation Committee Review of the meaning of "fundamental legislative principles", dated 29 April 2011 (available at <http://www.parliament.qld.gov.au/documents/committees/SLC/2010/FundamentalLegPrinciples/submissions/Sub07-QldGovt.pdf>), pages 3-4.

16 *Parliament of Queensland (Reform and Modernisation) Amendment Act 2011* (see <https://www.legislation.qld.gov.au/Bills/53PDF/2011/ParlQReformB11Exp.pdf>).

legislative drafter to a Commonwealth Association of Legislative Counsel conference in London:

3 The core function of a drafter is to draft legally effective, clearly expressed legislation that best achieves the instructors' policy intentions and does so, as far as possible, within the timetable set down by the government.

4 It is worthwhile articulating the parameters within which an Australian Commonwealth drafter works:

- The drafter's role is collaborative—the drafter is expected to work with the instructing area to analyse policy, flesh out alternatives and resolve problems.¹⁷

Speaking in 1991, one of Mr Quiggin's predecessors, Mr Turnbull, said (of legislative drafters):

We are boffins of a sort. Our primary role is to put into legal effect the policy proposals of the Government, and this means that we have no role whatsoever in the formulation of policy. We are part of the Executive described by Senator Vanstone but we are rather a part of the Executive with a difference. As we have no say in the formulation of policy, we tend to adopt possibly a more objective approach to the making of law.

Mr Turnbull then went on to say:

However, we do regard it as part of our role to advise on the legal principles that are involved in legislation. In particular, since the arrival of the Scrutiny of Bills Committee, we regard it as our duty to advise the departments on the Scrutiny of Bills Committee's principles and also the way in which the Committee interprets those principles. At the end of the day, if we have given this advice and the department still wants to go ahead with a provision which we think may be criticised by the Committee, we are bound by the decision of the department, as our function really is to put into legislative form what they want. The result of this, anyway, is that in practice the Scrutiny of Bills Committee and Parliamentary Counsel work together for the same ends, but we do have different points of view.¹⁸

I will say some more about Mr Turnbull's "working together" point below.

While Mr Turnbull's comments were directed specifically at the role of legislative drafters in the Commonwealth Office of the Parliamentary Counsel in relation to the work of the Scrutiny of Bills Committee, I believe that it is uncontroversial to say that this applies to legislative drafters of both primary

17 Quiggin, P, "Training and development of legislative drafters", paper presented to the Commonwealth Association of Legislative Counsel conference in London, September 2005.

18 Turnbull, I, in "Ten years of Scrutiny" (see note 5), at p 59.

and delegated legislation in the various Australia jurisdictions in which legislative scrutiny committees operate. It is a fact of life that any legislative drafter worth his or her salt will warn their clients against the potential difficulties for provisions that are likely to attract attention from a legislative scrutiny committee.

Indeed, that is my experience as both a legislative drafter and as an instructor of legislative drafters. In my experience as an instructor, I received (literally) hundreds of comments from legislative drafters about the likelihood of particular provisions attracting the attention of one or other of the Senate's legislative scrutiny committees. If anything, I found legislative drafters to raise matters out of an abundance of caution.

My experience as a legislative drafter is relatively slight (ie only 6 years). However, that experience leads me to say that, in my experience, drafting manuals and check-lists highlight the work of the various legislative scrutiny committees and the kinds of issues that are likely to attract comment and that legislative drafters are required to consider legislative scrutiny committee issues in their drafting. I can also say (based on my experience of the dark art of legislative drafting) that discussion of the role of legislative scrutiny committees is a key component in the training of legislative drafters.

None of this is new or revolutionary. It is common sense. It is about legislative drafters doing what they can to assist in putting into legal effect the Government's policy proposals. Dare I say, it's about *good client service*??

“Working together”

As foreshadowed above, I would like to pick up on Mr Turnbull's point about legislative drafters and legislative scrutiny committees working together. These comments relate to my role with the ACT Committee, rather than my role as a legislative drafter for the Commonwealth.

When I gave the 2007 paper, I had only just become a legislative drafter, in what was then known as the Office of Legislative Drafting and Publishing (**OLDP**). At that time, I was both a drafter of delegated legislation in one jurisdiction (the Commonwealth) and a scrutineer of delegated legislation in another jurisdiction (the ACT). This initially felt quite odd. Within the first few weeks of starting work at the OLDP, one of my new colleagues put it slightly better. They suggested to me that I must feel “schizophrenic”. Oddly, my immediate reaction was that, in fact, I *didn't* feel schizophrenic at all. On reflection, I realised that this was because, to a large extent, the ultimate goal of both roles was essentially the same: to produce “better” legislation.

That seems like common sense. Even now. But I wonder whether, in fact, that is the case.

“Better” legislation”

What do I mean when I refer to “better” legislation? From a legislative scrutiny perspective, I mean legislation that does not offend against the

principles of the relevant legislative scrutiny committee. Taking the ACT Committee's scrutiny of delegated legislation as an example, the ACT Committee considers whether such legislation:

- is in accord with the general objects of the Act under which it is made;
- unduly trespasses on rights previously established by law;
- makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
- contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

The ACT Committee also considers whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the ACT Committee.

As to the delegated legislation itself, however, surely it is in everyone's interests if delegated legislation is in accordance with the general objects of the Act under which it is made. Indeed, part of a legislative drafter's responsibility is to draft only legislation that is within the relevant legal limitations. If legislation is not "within power", there is always the potential for the delegated legislation to be found to be invalid. "Better" delegated legislation, therefore, is within the general objects of the Act under which it is made.

Similarly, it is in everyone's interests that delegated legislation not trespass unduly on rights previously established by law. While departments and agencies might not have quite the same interest in this issue as the Committee, a failure to pay heed to this principle might also be a potential basis for delegated legislation being found to be invalid, particularly in jurisdictions (such as the ACT) with a Human Rights Act or equivalent.¹⁹ So "better" legislation does not interfere unduly with existing rights.

In the same vein, legislation that makes rights, liberties, etc unduly dependent on non-reviewable decisions runs the risk of challenge in the courts, on the basis that the legislature could not possibly have intended that decisions in relation to significant rights, etc were not subject to review. So it is "better" that review is provided for.

It is a bigger stretch for me to make an argument about legal validity and the term of reference that relates to matters that are more appropriately dealt with in primary legislation. That said, from a legitimacy perspective (at least), surely it is "better" for all concerned if problematic initiatives are dealt with in primary legislation, rather than delegated legislation, if only because, if the

19 See the decision of the ACT Supreme Court in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 (2 December 2005), in which Higgins CJ (among other things) used the ACT's *Human Rights Act 2004* to determine the proper limits of certain legislation.

legislation is challenged, those defending the validity of the legislation can point to the *Hansard* and argue that, in fact, the legislature did intend to make legislation with that effect.

These elements of “better” legislation are not inconsistent with what a legislative drafter is trying to achieve. From a legislative drafter’s perspective, “better” legislation is legislation that is within power (and that does not get challenged in the courts) and does its job, preferably in a way that everyone can understand. There is (of course) the added imperative that legislation not get slowed down or tripped-up by comments from a legislative scrutiny committee. The real point, however, is that (in my view) legislative drafters do not want their legislation queried by a legislative scrutiny committee as much because they do not want to risk the legal consequences mentioned above as because they do not wish to attract the ire of a committee.

So, in my view, legislative drafters and legislative scrutiny committees are working towards the same general goals.

Legislative drafters and the courts

In researching the 2011 paper, I was heartened by the Federal Court of Australia’s (apparent) recognition of the role of legislative drafters in ensuring that legislation is drafted in accordance with “fundamental principles”.

In *Evans v State of New South Wales*,²⁰ the Full Federal Court (French, Branson and Stone JJ) considered a challenge to regulations made by the NSW Government in the context of the World Youth Day held in Sydney in 2008. The challenge was based on arguments that (among other things) the regulations in question interfered with fundamental rights and freedoms.

The Full Federal Court stated (at [68]):

It is an important principle that Acts be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms. That principle dates back to the statement in *Potter v Minahan* (1908) 7 CLR 277 in which O’Connor J, quoting from the fourth edition of Maxwell PB, *On the Interpretation of Statutes* (Sweet & Maxwell, London, 1905) (at 304):

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

20 [2008] FCAFC 130 (15 July 2008).

See also *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18 and *Coco v R* (1994) 179 CLR 427. In the latter case the High Court said (at 437):

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

Having set out this background to the approach of the courts to laws that interfere with “fundamental principles”, the Full Federal Court stated (at [70]):

... we observe that the legislature, **through the expert parliamentary counsel who prepare draft legislation**, may be taken to be aware of the principle of construction in *Potter* 7 CLR 277 and later authorities such as *Bropho* 171 CLR 1 and *Coco* 179 CLR 427, and the need for clear words to be used before long established (if not “fundamental”) rights and freedoms are taken away. [emphasis added]

This suggests to me that at least the Federal Court appreciates the role of legislative drafters in the protection of “fundamental principles”.

I will return to the relevance of the views of the courts in relation to the work of legislative drafters later in this paper.

A development in Australia – the use of “legislative rules” in preference to regulations

I turn now to a recent development in the Commonwealth jurisdiction in Australia that I believe presents some new challenges to the scrutiny of delegated legislation by legislative scrutiny committees.

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*. It was first considered by the Senate Standing Committee on Regulations and Ordinances (**Senate Committee**), to which I am the Legal Adviser, in the context of its *Delegated legislation monitor No. 2 of 2014*, where the Senate Committee stated:

Prescribing of matters by 'legislative rules'

The committee notes that this instrument relies on section 128 of the *Australian Jobs Act 2013*, which allows for various matters in relation to that Act to be prescribed, by the minister, by ‘legislative rules’. While the explanatory statement (ES) for the instrument does not address the issue, as far as the committee can ascertain this is a novel approach to the prescribing of matters in Commonwealth legislation, insofar as Acts usually provide for matters to be prescribed, by the Governor-General,

by 'regulation'. The committee notes that the latter approach to prescribing matters is consistent with the definition in section 2B of the *Acts Interpretation Act 1901*, which provides that, in any Act, 'prescribed' means 'prescribed by the Act or by regulations under the Act'. This being so, the committee is uncertain as to whether the prescription of matters by 'legislative rules' is also consistent with the *Acts Interpretation Act 1901*.

More generally, the committee notes that the making of regulations is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel and Executive Council, respectively. To the extent that these requirements may be taken as an additional layer of scrutiny in the prescribing of matters by regulation, it is not clear whether these requirements will also apply to legislative rules and, if not, what the ramifications may be for both the quality of, and level of scrutiny applied to, such instruments. **The committee therefore requests further information from the Minister for Industry.**²¹

It is useful to provide some background information at this point.

Frist, since 1904 (when a definition of “prescribed” was introduced into the *Acts Interpretation Act 1901*), Australian legislation had 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 read (by me, at least!!) as meaning “prescribed *by the regulations*”.

Second, it is important to note that regulations have always been drafted by the relevant Commonwealth drafting office²² at no charge to the instructing agency.

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 Quiggin.²³ Among

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

22 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 OPC. For a more detailed history of OPC, see Meiklejohn, C, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel, 2012).

23 The letters 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), at pages 77-7).

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 the fact that the approach was “not novel” (see paragraphs 3 to 6 and 12 of the FPC response).

Relevance of the definition of “prescribed” in the Acts Interpretation Act

On the issue of the definition of “prescribed”, the FPC response stated (at paragraphs 7 and 8):

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.

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 (at paragraph 9):

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

The FPC response went on to say (at paragraph 10):

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

- (a) offence provisions;
- (b) powers of arrest or detention;
- (c) entry provisions;
- (d) search provisions;

- (e) seizure provisions.

Then, the FPC response stated (at paragraph 11):

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

If I could interpose a personal view at this point, there is a logical aspect of the "limited resources" issue that perplexes me. FPC states that he is (in effect) seeking to do less drafting within his officer because he has a resources issue. But the unavoidable effect of what he is doing is to push additional work on to agencies that themselves have resources issue (ie because of budget cuts across the Commonwealth public service). I find it difficult to understand how this can have other than a negative effect on the drafting of delegated legislation in the Commonwealth.

FPC's responsibilities under the Legislative Instruments Act

The FPC response by mentioning FPC's responsibilities under the *Legislative Instruments Act 2003* (**Legislative Instruments Act**). After referring to a series of recent Acts in which the legislative rules approach had been used, FPC stated (paragraph 13):

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

It is relevant to note at this point that (without mentioning the provision specifically) FPC is presumably referring to his obligations under section 16 of the Legislative Instruments Act which provides:

16 Measures to achieve high drafting standards for legislative instruments

- (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.
- (2) The steps referred to in subsection (1) may include, but are not limited to:
 - (a) undertaking or supervising the drafting of legislative instruments; and

- (b) scrutinising preliminary drafts of legislative instruments; and
 - (c) providing advice concerning the drafting of legislative instruments; and
 - (d) providing training in drafting and matters related to drafting to officers and employees of Departments or other agencies; and
 - (e) arranging the temporary secondment to Departments or other agencies of APS employees performing duties in the Office of Parliamentary Counsel; and
 - (f) providing drafting precedents to officers and employees of Departments or other agencies.
- (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).

The FP response concludes by stating (at paragraph 14):

Whether particular legislative rules are drafted by OPC is a matter for agencies to choose. OPC will continue to be available, within the limits of its available resources, to draft (or assist in the drafting of) legislative rules for agencies as required. In this respect legislative rules are in no different position to 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 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* 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 (at page 2):

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:

The Minister may, by legislative instrument, make rules (legislative rules) prescribing matters:

- (a) required or permitted by this Act to be prescribed by the legislative rules; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act

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 (at page 3):

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:

- 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 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 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. 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 a new issue – 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 (at page 4):

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.

The Senate Committee went on (at page 4):

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.

This comment had the effect of opening up a new line of discussion, which is discussed further below. The point to note, however, is that the new approach had not been directly raised with the Senate in any meaningful way, prior to its introduction. In all the circumstances, this would appear to have been a less-than-optimal way of introducing the new approach.

Resources issue

On what might loosely be described as the “resources” issue, the Senate Committee sought to pursue with FPC the particular issue of the likely effect

of the new approach on the quality, etc of drafting. The Senate Committee stated (at page 4):

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.

FPC's advice notes that instruments made under the general instrument-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 (at page 5):

- 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?

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

The Minister for Industry next responded to the Senate Committee in a letter dated 5 June 2014.²⁴ Again, the also response included a detailed response from FPC. In addition, however, the Minister's covering letter also 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, indeed, moved a "protective" notice of motion in relation to the Rule.²⁵

The Senate Committee's response to the second FPC 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.

24 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.

25 For "protective" notices of motion, *Odgers' Australian Senate Practice*, 13th Edition (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).

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.

In accordance with this critical role, the committee's scrutiny principles are 'interpreted broadly to include every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights'.

It follows from this understanding of the committee's role, and the powers and procedures through which it operates, that the committee could make no practical distinction between the substance and form of the rules if it were to conclude that the general rule-making power did not accord with the committee's scrutiny principles, in relation to the proper exercise and oversight of the Parliament's delegated powers by the executive.

More generally, the committee notes that, notwithstanding its concerns in relation to the current instrument, recent bills for proposed Acts continue to make provision for a general-rule making power. The management of risk attendant on use of the general rule-making power while the committee's concerns remain unresolved is a consideration falling outside the scope of the committee's scrutiny functions.
[footnotes – to *Odgers' Australian Senate Practice* – omitted]

I simply note that, for anyone familiar with the work of such committees, this response should be unsurprising.

The Minister's covering letter aside, FPC's second response is more than twice the length of the first response and deals with the relevant issue in significantly more detail. I do not propose to repeat the detail of the second response but simply note the following elements of the response.

"Tied work"

In the second response, 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 OPC (see paragraph 7 of the second response). Though not explicitly acknowledged in the second FPC response, the work in question must be carried out without cost to the instructing agency.

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

The reasons 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, 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, FPC gives some figures in relation to the volume of legislative instruments. I will discuss these figures in more detail below. However, FPC concludes by stating (at paragraph 18):

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

Division of material between regulations and legislative instruments

At paragraphs 24 to 25 of the second response, 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.

If I can interpose a personal view here, this seems like an odd thing (or, perhaps, a brutally honest thing) for someone who is responsible for the office that drafts the legislation that allocates material between regulations and other legislative instruments to say.

The response goes on:

This in turn has meant that the resources of OPC and the Federal Executive Council [which advises and supports the Governor-General in the making of regulations, etc] have been taken up with matter that

are presently inappropriately included in regulations, while more significant matters have been drafted in other instruments outside of OPC.

[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 OPC

At paragraph 33, the second FPC response states:

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.

At paragraph 39, the second FPC response then addresses a question posed by the Senate Committee. The question is:

- 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?

The second FPC response stated:

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.

I simply note that no information is provided in the second FPC response as to how this raising of standards is going to be achieved.

The Senate Committee's response to the second FPC response

The Senate Committee responded to the second FPC response in its *Delegated legislation monitor No. 6 of 2014*.²⁶ The Senate Committee stated (at page 19):

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'.

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'.

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 committee notes FPC's general assurance that ceding responsibility for the drafting of significant instruments to departments and agencies (unless provided to OPC as billable work) will enable OPC to 'take steps' to 'contribute to raise [sic] the standard of legislative instruments overall'. However, in the committee's view, it is incumbent on FPC to properly substantiate how, in practice, such outcomes will be achieved with OPC drafting fewer such instruments and providing only limited oversight to agencies and departments.

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

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

In a letter dated 2 July 2014, FPC responded directly to the Senate Committee's (at that stage) most recent comments.²⁷ Again, I will only selectively refer to material from that response.

Drafting standards

After re-stating his view that OPC does not have the resources to draft all Commonwealth subordinate legislation, "nor is it appropriate for it to do so", 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 itself 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.

This is, of course, good to hear. But (again, to interpose a personal view) it will also be quite a departure from current practice. In my experience at 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. 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 third FPC response also included some significant suggestions in relation to the scope of general rule-making powers. At paragraph 18 of the response, FPC stated that, in his view, the kinds of provisions that he had originally indicated would not (without "strong justification") be included in legislative instruments other than regulations (ie offence provisions, powers of arrest or detention, etc), would, in fact, not be authorised by a general rule-making power. 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).

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

The third FPC response goes on to state (at paragraph 19):

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.

The third FPC response goes on (at paragraph 20):

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

To interpose a personal view, these are welcome suggestions. Given an issue that I discuss further below (in relation to the inclusion of offence provisions in rules, even after FPC's statement that, without "strong justification", offence provisions should only appear in regulations), the suggestions are also timely.

The Senate Committee's response to the third FPC response

The Senate Committee responded to the third FPC response in its *Delegated legislation monitor No. 9 of 2014*.²⁸ In relation to the quality of drafting issue, the Senate Committee stated (at page 22):

... 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. With reference to FPC's advice that the general rule-making power will not lead to OPC drafting fewer instruments, the committee has understood that one of the aims of instigating the general rule-making power was to reduce the number of instruments required to be drafted by OPC. In particular, FPC has advised:

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

OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

12 In my view, the approach set out in [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.

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 Senate Committee stated (at page 23):

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:

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 (at page 24) to do 3 things. It noted that a meeting with 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 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, also 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 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 (in part):

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 OPC’s existing mechanisms and processes, clearly, the more formal mechanisms foreshadowed in FPC’s third response to the Senate Committee cannot be implemented quickly enough.

Where does this issue now stand?

At the time that this paper was submitted, the foreshadowed meeting between the Senate Committee and representatives of OPC is yet to take place.

What is the point?

There are evidently many fundamental issues involved in the interchange between the Senate Committee and FPC that are set out above. However, I will now focus on just one of those issues – the potential effect of the new approach on the quality of drafting of delegated legislation in the Commonwealth jurisdiction. My personal view is that there is a real danger that the quality of drafting will suffer, as less delegated legislation is drafted by OPC, rather than more.

29 It has been pointed out to me that the proposed policy of (in the absence of “strong justification”) 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).

Volume of legislation drafted other than by OPC

In my 18 months 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.

On the proportion issue, I did some rough calculations for the purposes of a seminar that I presented in November 2013. The calculations were based on figures provided to me by OPC.

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 OPC. This being so, for 2011, just over 19% of legislative instruments registered on FRLI were drafted by 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 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 OPC.

I am much more confident about my figures for 2014, as I have been keeping them myself. In particular, I have been keeping a running weekly total of the overall number of instruments that I scrutinise and the number of instruments within that number that have been drafted by OPC (with the latter group being identifiable by the presence of an OPC footer). At the time of submitting this paper, I have scrutinised 1,078 instruments in 2014, in my role as Legal Adviser to the Senate Committee. Of that number, 173 have been drafted by OPC. That's just over 16% of the total.

As already mentioned above, in his second response to the Senate Committee, FPC provided some figures in relation to the volume of legislative instruments.³⁰ FPC stated (at paragraph 17):

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

30 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.

approximately 35% of all the pages of legislative instruments registered on FRLI.

Clearly, the FPC figures are consistent with my “unofficial” figures. I actually think that the 35% page figure is probably inflated by some massive (many hundreds of pages³¹), annual instruments that OPC is currently required to draft because they are regulations. In any event, I have always been surprised that these percentages are so low, and 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 by people without training in legislative drafting.

Quality of non-OPC drafting

As I have already indicated, 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 quality. But this is not surprising, given that AMSA recruited senior, experienced drafters from OLDP to manage the making of Marine Orders. It is not surprising but the AMSA example is relatively unusual.

A good recent 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*.

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

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 Description

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

.....

Schedule 1 then goes on for another page or so.

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.

In my view, this is a perfect example of persons who are other-than professional drafters attempting to draft by using an earlier instrument, drafted by a professional drafting office, as a “template” and then drafting another instrument, 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*.³² 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.³³

Clearly, the fact that this issue is to be addressed for the future is a good thing. However, I find the proposition that the instrument "was drafted in accordance with standard drafting practice for these types of instruments" a little alarming. The fact that it was drafted in accordance with "standard drafting practice" does not alter the fact that (in my view) it simply does not work.

Most Australian lawyers think that they can draft

I do not intend to go through a series of examples of what I regard as less-than-optimal drafting in non-OPC instruments. What I will say, however, is that, 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 even lawyers) even seem to think that they can draft better than the trained legislative drafters. The words "I've given you the words – all you have to do is type them in!!" will haunt me for many years to come.

I do not know whether this is a peculiarly Australian experience (or whether it is, in fact, peculiar to my experience) but I believe that it helps to explain (in part) the approach of some non-OPC drafters to drafting. It helps to explain the 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. I see this all the time. Instruments that are clearly based on an OPC document but that are drafted without an understanding of the OPC template, or the OPC style, or the OPC format, or specific issues such as the correct OPC amending words. And they are also presumably drafted without an understanding of changes to drafting style, as reflected in updating of relevant OPC drafting directions. Those are values that legislative drafters within an office such as OPC bring to drafting that (in my views) many instructors simply have no appreciation of.

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

33 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.

The role of settlers and editors

Another advantage of a specialist drafting office that I believe is not properly appreciated by the outside world 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.

I have worked with some fantastic editors in my time. I have learned much from those 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 (nor that there would be the same formal systems for settling and editing) that exist in a specialised drafting office such as OPC. This is a significant deficiency, in my view.

Rowena Armstrong's 1993 paper

In demonstrating the point that I am attempting to make above, it is useful if I again refer to a paper that Rowena Armstrong QC, (then) Chief Parliamentary Counsel for Victoria, gave in 1993. Miss Armstrong's topic was "Should delegated legislation be drafted by a specialist drafting office?" 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.³⁴

An even more flattering view on 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

34 Armstrong, RM (note 4), p 2.

they have to be consulted on policy issues and from which they have to advise and warn.³⁵

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”.³⁶ 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 observation, 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 kinds of principles that emanate from legislative scrutiny committees. Legislative drafters cannot rely on their instructors to be aware of a legislative scrutiny committees’ 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 of a specialist drafting office will have the sort of working knowledge of the work and requirements of legislative scrutiny committees that a legislative drafter would have. Not impossible but less likely. This is less than ideal.

That leaves the question of how to ensure that there is a “first bulwark” if legislation is drafted in-house. It follows from what I have said above that 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 OPC.

In her 1993 paper, Miss Armstrong suggested that specialist drafting offices could assist in-house drafters by being available to advise and to assist and

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

36 Armstrong, RM (note 4), p 3.

by preparing drafts, where resources permitted. She suggested that drafting offices might also assist by preparing guidelines and setting standards.³⁷

I agree. Indeed, (as I have already noted) in the Commonwealth arena, this is actually 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

The final, substantive point that I would like to make (in the context of this paper) is 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, a PhD candidate at Harvard University, for drawing my attention to this issue.

As I have noted above, Australian courts have tended to approach their interpretation of legislation with an acknowledgment of whether (or not) the relevant legislation was drafted by legislative drafters. In particular, I have already referred to the comments of the Full Court of the Federal Court of Australia, in *Evans v State of New South Wales*.

The question that Mr Tran posed, in discussions 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?” This is a very pertinent question.

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 (without wishing to pick up the particular, Queensland definition of that term) in mind.

This is a topic for another paper. I simply note that the following Australian decisions (in addition to the *Evans* decision) may 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];

37 Armstrong, RM (note 4), p 3.

- *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.

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 to the involvement of both legislative drafters and parliamentary scrutiny committee in relation to the various issues discussed above:

68. The Commonwealth Ombudsman further identifies the differing accountability measures available under legislative and executive schemes in the *Executive Schemes Report No. 21*, August 2009:

1.19 Government schemes that are established by legislation are subject to a range of accountability measures that do not apply to executive schemes.

1.20 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.

1.21 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.

1.22 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.

1.23 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.*

As I said, possible issues for another paper.

Two steps forward, one step back?

I started this paper by referring to the work of the late, great Professor Douglas Whalan. Professor Whalan was an inspiration to me (as a scrutineer of legislation) and also a predecessor to me in my work for both the ACT Committee and the Senate Committee. He was also a great supporter of my work, something for which I will be eternally grateful.

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

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.³⁸

Professor Whalan was speaking at a time when the passage of the Legislative Instruments Act was still quite some way (and quite some pain) into the future.

In 2003, the Commonwealth Parliament passed the Legislative Instruments Act. As I have previously said, this Act is also an innovation worthy of its own paper, not the least because of the lengthy (more than 11 years) gestation period that the Legislative Instruments Act required before finally being enacted.

In brief, the Legislative Instruments Act establishes a comprehensive regime for the making, publication, tabling, parliamentary scrutiny (including disallowance) and “sunsetting” of delegated legislation in the Commonwealth jurisdiction. It also establishes 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 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.

38 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.

- (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 very 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, it has also always been my view that the enactment of the Legislative Instruments Act also went a long way towards addressing the issues identified by Professor Whalan in 1990. I have always believed 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 OLD/OPC, is that there has been no real impact. If there *has* been a real impact then it has eluded me. And I stand to be corrected on this point.

More worrying, however, is that I am concerned 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 OPC to carry out the obligations imposed by section 16 of the Legislative Instruments Act – 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 (in my experience) 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 OPC. That being so, it is important (in my view) that the First Parliamentary Counsel does all that he can to fulfil his obligations under section 16 of the Legislative Instruments Act.

Concluding comments

Clearly, the section of the paper immediately above was written largely with an Australian readership in mind. I apologise for that.

But what are the messages for Canadian and other non-Australian drafters? What is the relevance of the discussion above to the conference topic – “Parliamentary review of regulation-making”?

What I have set out to do in this paper is to state my belief in the importance of legislative drafters to the legislative process (including the legislative scrutiny process) and to demonstrate why I hold that belief. The discussion of the “legislative rules” issue demonstrates (I hope) both a challenge to the important role of legislative drafters and the importance of the engagement of a legislative scrutiny committee in the issue.

I hope that there are some lessons in that for persons outside of Australia.