

# Extracts from Working with the Office of Parliamentary Counsel—A guide for clients

## ***C.7—Drafting approaches***

1 OPC is committed to drafting legislation that is:

- legally effective; and
- effective in communicating its purpose and operations to its users.

2 While these are expressed as separate aims, OPC also recognises that, in many cases, legislation that is not effective in communicating its purpose and operation cannot be said to be legally effective.

3 OPC does not believe that a single set of drafting techniques (whether described as “plain English” drafting or anything else) will always be appropriate to achieve legal effectiveness and effective communication.

4 Rather, OPC has a range of different drafting techniques and tools that have been developed and refined over many years. We believe that careful use of techniques and tools appropriate to individual drafting projects will give the best results in each case. At the same time, to ensure consistency across the statute book and to ensure that the various techniques and tools are used properly, we maintain generally applicable standards and rules about when and how particular approaches may be used. To ensure continuous improvement in our drafting techniques, there is some scope for experimental use of new approaches in particular cases.

5 The main techniques and tools used in OPC are described below. See Part H for examples of most of these techniques and tools.

### **Use of plain language**

6 OPC is keen to replace old-fashioned language, complex sentence structures, legalese and jargon with modern, idiomatic language. However, we recognise the need for care in abandoning legal language which has been subject to judicial consideration, and we also recognise that in some cases it is appropriate to use technical terms (even if these might be described as jargon).

### **Careful organisation of information**

7 Understanding how readers read and absorb information has implications for drafting matters such as sentence structures and length, and the organisation of information within a draft.

### **General principles drafting**

8 The traditional Australian drafting approach involves attempting to deal exhaustively and in detail with every possible case. This approach has a philosophical basis, in that it

requires the elected Parliament to approve a detailed statement of the intended operation of the law (rather than leaving this detail to be worked out by the non-elected courts). However, this approach can lead to long and complex legislation, and it also risks the creation of loopholes (which, when discovered, tend to be filled with yet more long and complex legislation).

9 General principles drafting involves a more general and less detailed expression of the law, often more reliant on references to the purpose of the law rather than to its specific operation. The application of the law to specific cases may need to be determined in the courts. Under general principles drafting, Parliament's input consists of statements of general principle, and the courts may play a substantial role in determining the coverage and the operation of the law.

10 In some cases, a limited or even major use of general principles drafting may be appropriate or desirable; OPC can advise instructors on the issues that must be considered and the risks that might be involved, and help instructors decide whether general principles drafting is suitable for their project.

### **Specific aids to comprehension**

11 There are various ways of helping readers understand legislation that, unlike the techniques described above, are apparent on the face of the draft legislation.

#### ***Readers' guides, summaries and outline provisions***

12 One of the most valuable aids to detailed understanding of a complex set of provisions is a general understanding of the purpose, structure and direction of the provisions. Readers' guides, summaries and outline provisions can give readers that general understanding before they tackle the more complex operative provisions.

#### ***Objects provisions***

13 Some objects provisions give a general understanding of the purpose of the legislation as described in paragraph 12. Other objects provisions set out general aims or principles that help the reader to interpret the detailed provisions of the legislation.

#### ***Notes***

14 Notes to provisions might explain the purpose, origin or operation of the provision, or refer the reader to related provisions or to definitions of terms used in the provision.

#### ***Highlighting of defined terms***

15 Defined terms can be identified in notes, or highlighted in other ways. Some major legislation drafted in the last few years uses asterisks to identify defined terms, with a standard footnote on every page referring the reader to a Dictionary at the back of the Act. Every definition used in the Act is either set out, or signposted, in the Dictionary.

## **Examples**

16 Examples are often a good way of explaining the operation of a complex provision. Worked examples may be particularly useful for provisions requiring complex calculations.

## **Tables**

17 Tables are a useful way of organising a large volume of information. In particular, tables allow quick recognition of the similarities and differences in different cases dealt with in the legislation, and may also reveal the conceptual basis for those similarities and differences very readily. Tables may be operative, or merely an explanation or summary of operative provisions.

## **Other diagrams**

18 Other diagrams can also provide a useful method of communicating complex information. For instance, a flow chart may give a simple overview of lengthy provisions detailing a complex process; a process of pre-qualification for a grant, application for the grant and approval of grant applications might be represented in a one-page flow chart.

## **C.8—Formatting of Bills**

### **Electronic format**

19 Bills introduced into the Commonwealth Parliament use a standard format, which was developed in 1995 by OPC in conjunction with communications experts. The format is standard in appearance, and also in its electronic form.

20 Electronic standardisation is achieved through the use of wordprocessing “styles”, which are made available to contract drafters and to the parliamentary departments by OPC. The fact that Bills have a standard electronic form means that it is relatively easy for them to be converted into other electronic forms (eg for loading onto the Internet). It is therefore important that standardisation is maintained.

### **Standard commencement provisions**

21 OPC has standardised its commencement provisions, with the aim of making them easier for readers to use. Most commencement provisions will now include a table giving as much information as possible about the commencement of provisions of the Act.

22 The standardised commencement table contains a column into which information about commencement dates will be inserted as it becomes available after the Act is passed. For instance, an Act with provisions commencing on proclaimed days will, after the proclamations are made, be able to be published with the proclaimed commencement dates set out in the Act itself. For more information on commencement provisions, see Drafting Direction 2002, No. 2 (available at [www.opc.gov.au](http://www.opc.gov.au)).

## **Format of amending Bills**

23 One element of the standard format for Bills is the form of amending Bills. All amendments are contained in Schedules to the Bill and are made using standard amending forms. Amendments are grouped into Schedules by reference to topics, by reference to the Acts amended, or in any other convenient way. Transitional or saving provisions may be included in Schedules or in the introductory clauses of the Bill.

### **Standard clause for amending Schedules**

24 OPC uses a standard provision for the clause of the Bill that introduces the amending Schedules, as follows:

#### **3 Schedule(s)**

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

25 The standard provision, including the heading with the bracketed “s”, is used in all cases, even if the Bill has only one Schedule and even if there are no “other” items in the Schedules. This saves time, and removes the possibility of error, if late changes to a Bill (or changes made in the Parliament) add or remove Schedules or particular provisions.

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## **Part H—Examples of drafting approaches**

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### ***Use of plain language***

[Public Service Bill 1999, clause 77]

- (1) An Agency Head may, in writing, create positions in the Agency.
- (2) An Agency Head may from time to time nominate any APS employee in the Agency to occupy a position in the Agency, but does not have to do so for all APS employees in the Agency.

[Corporations Law, section 301]

### **301 Audit of annual financial report**

- (1) A company, registered scheme or disclosing entity must have the financial report for a financial year audited in accordance with Division 3 and obtain an auditor's report.
- (2) A small proprietary company's financial report for a financial year does not have to be audited if:
  - (a) the report is prepared in response to a direction under section 293; and
  - (b) the direction did not ask for the financial report to be audited.

[Trade Practices Act 1974, section 75AU]

**75AU Price exploitation in relation to New Tax System changes**

- (1) A corporation contravenes this section if it engages in price exploitation in relation to the New Tax System changes.
- (2) For the purposes of this section, a corporation engages in price exploitation in relation to the New Tax System changes if:
  - (a) it makes a regulated supply; and
  - (b) the price for the supply is unreasonably high, having regard alone to the New Tax System changes (so far as they have taken effect); and
  - (c) the price for the supply is unreasonably high even if the following other matters are also taken into account:
    - (i) the supplier's costs;
    - (ii) supply and demand conditions;
    - (iii) any other relevant matter.

[Corporations Law 1989, section 243PA]

**243PA Financial benefits to members as such**

A public company, or a body corporate that is a child entity of a public company, may give financial benefits to any of its own members, in their capacity as members, on a basis that does not discriminate unfairly, either directly or indirectly, in favour of one or more related parties of the public company.

## **Readers' guides**

See:

*Export Market Development Grants Act 1997*

*Financial Management and Accountability Act 1997*

Corporations Law 1989, Part 1.5 (Small Business Guide)

## **Summaries and outline provisions**

[Crimes (Superannuation Benefits) Act 1989, Part 2A]

### **Part 2A—Freezing employer contributions before a superannuation order is made**

#### **23A Simplified outline of this Part**

The following is a simplified outline of this Part:

This Part lets the Minister freeze a superannuation scheme member's employer contributions and accrued interest, to prevent them from being dissipated (and thus being harder to recover if a superannuation order is made in respect of the member).

The Minister can do so by a direction to the member's superannuation authority if the member has been charged with, or convicted of, an offence that the Minister believes is a corruption offence.

While the direction is in force, a benefit attributable to the member's employer contributions or interest cannot be paid.

The direction ceases to be in force if:

- (a) the charge is disposed of without conviction of the member; or
- (b) the member is convicted but a superannuation order cannot be made against the member; or
- (c) the direction is not extended within 12 months.

## **Summaries and outline provisions**

[Native Title Act 1993, section 4]

### **4 Overview of Act**

#### *Recognition and protection of native title*

- (1) This Act recognises and protects native title. It provides that native title cannot be extinguished contrary to the Act.

#### *Topics covered*

- (2) Essentially, this Act covers the following topics:
  - (a) acts affecting native title (see subsections (3) to (6));
  - (b) determining whether native title exists and compensation for acts affecting native title (see subsection (7)).

#### *Kinds of acts affecting native title*

- (3) There are basically 2 kinds of acts affecting native title:
  - (a) past acts (mainly acts done before this Act's commencement on 1 January 1994 that were invalid because of native title); and
  - (b) future acts (mainly acts done after this Act's commencement that either validly affect native title or are invalid because of native title).

#### *Consequences of past acts and future acts*

- (4) For past acts and future acts, this Act deals with the following matters:
  - (a) their validity;
  - (b) their effect on native title;
  - (c) compensation for the acts.

#### *Intermediate period acts*

- (5) However, for certain acts (called intermediate period acts) done mainly before the judgment of the High Court in *Wik Peoples v Queensland* (1996) 187 CLR 1, that would be invalid because they fail to pass any of the future act tests in Division 3 of Part 2, or for

any other reason because of native title, this Act provides for similar consequences to past acts.

*Confirmation of extinguishment of native title*

- (6) This Act also confirms that many acts done before the High Court's judgment, that were either valid, or have been validated under the past act or intermediate period act provisions, will have extinguished native title. If the acts are previous exclusive possession acts (see section 23B), the extinguishment is complete; if the acts are previous non-exclusive possession acts (see section 23F), the extinguishment is to the extent of any inconsistency.

*Role of Federal Court and National Native Title Tribunal*

- (7) This Act also:
- (a) provides for the Federal Court to make determinations of native title and compensation; and
  - (b) establishes a National Native Title Tribunal with power to:
    - (i) make determinations about whether certain future acts can be done and whether certain agreements concerning native title are to be covered by the Act; and
    - (ii) provide assistance or undertake mediation in other matters relating to native title; and
  - (c) deals with other matters such as the keeping of registers and the role of representative Aboriginal/Torres Strait Islander bodies.

## **Objects provisions**

[Telecommunications Act 1997, section 3]

### **3 Objects**

- (1) The main object of this Act, when read together with Parts XIB and XIC of the *Trade Practices Act 1974*, is to provide a regulatory framework that promotes:
  - (a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and
  - (b) the efficiency and international competitiveness of the Australian telecommunications industry .

[Retirement Savings Accounts Act 1997, section 22]

### **22 Object of Part**

- (1) The object of this Part is to provide for constitutional corporations that can be relied on to conduct RSAs in accordance with this Act and the regulations to be approved as RSA institutions for the purposes of this Act and to provide for the variation, suspension and revocation of those approvals.
- (2) The significance of the approval of RSA institutions is that only RSA institutions can offer RSAs.

Note: In certain circumstances, an entity may cease to be approved as an RSA institution. Many provisions of this Act may continue to apply to that entity.

## **Objects provisions**

[Family Law Act 1975, section 60B]

### **60B Object of Part and principles underlying it**

- (1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:
  - (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
  - (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
  - (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
  - (d) parents should agree about the future parenting of their children.

[Migration Act 1958, section 501E]

**501E Refusal or cancellation of visa—prohibition on applying for other visas**

- (1) A person is not allowed to make an application for a visa at a particular time (the application time) that occurs during a period throughout which the person is in the migration zone if:
  - (a) at an earlier time during that period, the Minister made a decision under section 501, 501A or 501B to refuse to grant a visa to the person or to cancel a visa that has been granted to the person; and
  - (b) the decision was neither set aside nor revoked before the application time.
- (2) Subsection (1) does not prevent a person, at the application time, from making an application for:
  - (a) a protection visa; or
  - (b) a visa specified in the regulations for the purposes of this subsection.

Note: The person may however be prevented from applying for a protection visa because of section 48A.

## Notes

[Anti-Personnel Mines Convention Act 1998, section 4]

*anti-personnel mine* means a mine that:

- (a) is designed, intended or altered so as:
  - (i) to be placed under, on or near the ground or other surface area; and
  - (ii) to be exploded by the presence, proximity or contact of a person; and
- (b) is capable of incapacitating, injuring or killing one or more persons.

However, a mine that is designed, intended or altered so as to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, and that is equipped with an anti-handling device, is taken not to be an anti-personnel mine as a result of being so equipped.

Note: A mine that has been permanently deactivated is not an anti-personnel mine since it is not capable of incapacitating, injuring or killing a person.

## Highlighting of defined terms

[Income Tax Assessment Act 1997, Subdivision 34-B]

### Subdivision 34-B—Deduction for your non-compulsory uniform

#### Table of sections

34-10	What you can deduct
34-15	What is a <i>non-compulsory uniform</i> ?
34-20	What are <i>occupation specific clothing</i> and <i>protective clothing</i> ?

#### 34-10 What you can deduct

- (1) If you are an employee, you can deduct expenditure you incur in respect of your \*non-compulsory uniform if:
- (a) you can deduct the expenditure under another provision of this Act; and
  - (b) the \*design of the uniform is registered under this Division when you incur the expenditure.

Note 1: This Division also applies to PAYE earners and other individuals who are not employees: see Subdivision 34-A.

Note 2: Employers apply to register designs of uniforms: see Subdivision 34-C.

- (2) You *cannot* deduct the expenditure under this Act if the \*design is *not* registered at the time you incur the expenditure.
- (3) However, this Division does not stop you deducting expenditure you incur in respect of your \*occupation specific clothing or \*protective clothing.

#### 34-15 What is a *non-compulsory uniform*?

*What is a uniform?*

- (1) A *uniform* is one or more items of clothing (including accessories) which, when considered as a set, distinctively identify you as a person associated (directly or indirectly) with:
- (a) your employer; or
  - (b) a group consisting of your employer and one or more of your employer's \*associates.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 95-1.

## Examples

[Aged Care Act 1997, section 57-20]

- (6) For the purposes of this section, if the care recipient is provided with care for 2 months or less, the care recipient is taken, for the purposes of working out retention amounts payable, to have received that care during:
- (a) the whole of the month in which the care recipient \*entered the residential care service; and
  - (b) the 2 following months;
- unless the User Rights Principles specify that care is taken to have been provided for a shorter period.

Example: A care recipient who \*entered a residential care service on 20 January and left on 3 March would be taken to have received care for the whole of January, February and March. Therefore, retention amounts could be deducted for each of these months.

[Australian Radiation Protection and Nuclear Safety Act 1998, section 9]

### 9 Operation of Act

- (1) It is the intention of the Parliament that this Act is not to exclude the operation of the *Nuclear Non-Proliferation (Safeguards) Act 1987*, to the extent that the *Nuclear Non-Proliferation (Safeguards) Act 1987* is capable of operating concurrently with this Act.

Example: A controlled person may be required by this Act to hold a licence, and by the *Nuclear Non-Proliferation (Safeguards) Act 1987* to hold a permit, in respect of the same thing. The controlled person must satisfy the requirements of both Acts in so far as they are capable of being satisfied concurrently.

## Examples

[Child Support Assessment Act 1989, section 7A]

### *Examples*

- (4) Subsections (5), (6), (7) and (8) merely give a series of examples of the operation of the rules in subsections (1), (2) and (3). The examples involve Mary and Peter. Mary cares for their child and, on 8 June 2000, makes an application under Part 4 and receives a child support assessment for Peter to pay her child support for the child.

#### *Example—initial child support period resulting from application under Part 4*

- (5) On 20 October 2000, the Registrar makes a new administrative assessment based on an assessment under the income tax law of Peter's taxable income for the 1999-2000 year of income (as required by section 34A). The first child support period starts on 8 June 2000 and ends at the end of 31 October 2000, and the second starts on 1 November 2000.

#### *Example—end of child support period if new taxable income not available within 15 months*

- (6) If no assessment of the taxable income of Mary or Peter for the 1999-2000 or the 2000-2001 year of income had been made under the income tax law before the end of 7 September 2001, the first child support period would start on 8 June 2000 and end at the end of 7 September 2001 (15 months after it started).

#### *Example—child support agreement ends existing child support period and starts a new one*

- (7) If Mary and Peter make a child support agreement to influence the annual rate of child support on and after 15 September 2000:
- (a) the child support period that started on 8 June 2000 ends at the end of 14 September 2000; and
  - (b) a new child support period starts on 15 September 2000.

*Example—child support period for child support agreement setting child support rate lasts 15 months*

- (8) If the child support agreement set the rate of child support payable for the next 2 years (so section 34A did not require the Registrar to make an administrative assessment on 20 October 2000 as described in subsection (5)), the child support period that started on 15 September 2000 would end 15 months later at the end of 14 December 2001 (unless Mary and Peter made another child support agreement to affect the rate of child support payable for a day before 15 December 2001).

[A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Act 1999, section 6]

## 6 What is the family surcharge threshold?

- (1) The **family surcharge threshold** for a person for a year of income is \$100,000.
- (2) However, if the person has 2 or more dependants who are children, the **family surcharge threshold** for the person for the year of income is the amount worked out using the formula:

$$\$100,000 + \left( \$1,500 \times \left( \begin{array}{c} \text{Number of dependants} \\ \text{who are children} \end{array} - 1 \right) \right)$$

Example: If a person has 3 dependants who are children, the family surcharge threshold is:

$$\$100,000 + \$1,500 \times (3 - 1) = \$103,000$$

**Tables**

[Crimes Act 1914, section 23WC]

**23WC How forensic procedures may be authorised in different circumstances**

The following table shows the circumstances in which a forensic procedure may be carried out on a suspect, and shows the provisions that authorise the carrying out of the procedure.

<b>Authority for forensic procedures</b>		
<b>Suspect</b>	<b>Intimate forensic procedure</b>	<b>Non-intimate forensic procedure</b>
<b>1</b> adult not in custody	with informed consent under Division 3 by order of a magistrate under Division 5	with informed consent under Division 3 by order of a magistrate under Division 5
<b>2</b> adult in custody	with informed consent under Division 3 by order of a magistrate under Division 5	with informed consent under Division 3 by order of a senior constable under Division 4 by order of a magistrate under Division 5
<b>3</b> incapable person (whether or not in custody)	by order of a magistrate under Division 5	by order of a magistrate under Division 5
<b>4</b> child at least 10 but under 18 (whether or not in custody)	by order of a magistrate under Division 5	by order of a magistrate under Division 5

## Tables

[A New Tax System (Compensation Measures Legislation Amendment)  
Bill 1998, proposed section 198G to be  
included in the Veterans' Entitlements Act 1986]

### 198G 1 July 2000 increase in certain amounts

- (1) This section applies to an amount (the *base amount*) that is provided for in a provision listed in column 2 of Table A.

Note: Amounts provided for in provisions listed in Table A are amounts as altered from time to time under Division 18 of Part IIIB and sections 198, 198A, 198D and 198F (CPI indexation).

- (2) This Act has effect as if, on 1 July 2000, the base amount were replaced by an amount (the *replacement amount*) worked out by:
- (a) calculating the amount (the *provisional replacement amount*) that is 4% greater than the base amount; and
  - (b) rounding off the provisional replacement amount in accordance with section 198M, using the rounding base for the base amount (see column 4 of Table A).
- (3) For the purposes of subsection (1), the base amount is to include any indexation that occurs on 1 July 2000 under Division 18 of Part IIIB or section 198, 198A, 198D or 198F.

**Table A: Rates**

Column 1 Item	Column 2 Provision providing for base amount	Column 3 Description of amount	Column 4 Rounding base for base amount
1	subsection 22(3)	disability pension (general)	0.10
2	subsection 23(4)	disability pension (intermediate)	0.10
3	subsection 24(4)	disability pension (special)	0.10
4	subsection 27(1)—table— items 1 to 6	disability pension (war-caused injury or disease)	0.10

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**Table A: Rates**

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<b>Column 1 Item</b>	<b>Column 2 Provision providing for base amount</b>	<b>Column 3 Description of amount</b>	<b>Column 4 Rounding base for base amount</b>
5	subsection 27(1)—table— items 7 to 15	disability pension (war-caused injury or disease)	0.10
6	paragraph 30(1)(a)	war widow/war widower pension	0.10
7	subsection 30(2)—all amounts	orphan pension	0.10
8	subsection 97(1)—table— column 2—all amounts	clothing allowance	0.10
9	subsection 98(1)—table— column 2—all amounts	attendant allowance	0.10
10	subsection 104(1)—table— column 2—all amounts	recreation transport allowance	0.10
11	subsection 118S(1)	telephone allowance	0.80
12	point SCH6-B1—table — column 3—all amounts	service pension maximum basic rates	2.60
13	subpoint SCH6-C8(1)— table—column 4	rent assistance	5.20

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## Diagrams

[Social Security Act 1991, point 1067G-J1]

### *Student income bank*

1067G-J1 A person's ordinary income under Module H may be reduced under this Module. This diagram sets out how to work out:

- (a) whether the person's ordinary income for a particular fortnight, in respect of which youth allowance may be payable to the person, is to be reduced; and
- (b) if it is to be reduced, the amount of the reduction.

