

# PARLIAMENTARY COUNSEL

## Drafting Direction No. 1.3 Commencement provisions

Document History		
Release number	Release date	Document number
1.0	1 May 2006	s06rd372.v01.doc
1.1	2 May 2007	s06rd372.v03.doc
2.0	15 July 2009	s06rd372.v12.docx

Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 10 of 2005.

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## Part 1—Introduction

1 This Drafting Direction sets out the way in which commencement provisions are to be drafted.

2 The general approach is to have commencement clauses drafted in table format with the commencement of each provision specified in the order that the provision appears in the Bill.

3 Attachment A provides examples of commencement provisions drafted using the table format. A simplified guide to drafting commencement provisions is in Attachment B.

### ***Reason for OPC’s approach to drafting commencement provisions***

4 The table format approach to commencement provisions is used to improve access to commencement information. In the past, the traditional (subsection) form of commencement provision was often “converted” into one or more table forms. OPC and Consol staff prepared such tables. This involved working through the subsections of commencement provisions to ascertain commencement details for each provision in a Bill.

5 A user of legislation trying to find out when a particular provision commenced was faced with the choice of relying on an “external” table or working through the commencement provision themselves.

6 The table format commencement provision also includes a subsection enabling the Date/Details column of the table to be completed as part of the publication of Acts. This is intended to further improve the useability of commencement provisions.

7 The use of a standard form is intended to aid the development of a consistent statute book and avoid interpretational problems that can arise when commencement information for the same legislation is presented in different forms.

## Part 2—Commencement provisions: content

### ***Suitability of Royal Assent commencements***

#### **Retrospectivity etc.**

8 From time to time various authorities, including courts and at least one Governor-General, have expressed concern about the use of Royal Assent commencements. The concerns relate to issues such as:

- the theoretical retrospectivity of the commencement (under subsection 3(2) of the Acts Interpretation Act, the Act is treated as in force from the expiration of the last day before the day it is assented to, and is therefore likely to be in force for some hours before it is actually signed by the Governor-General); and
- the operation of an Act during a period of at least several days when a final text of the Act may not be available to the public (this issue may be less significant now that printing of Acts and distribution to government bookshops is a relatively unimportant method of disseminating legislation compared with electronic dissemination).

9 For these kinds of reasons, it is often better to avoid a Royal Assent commencement in favour of commencement shortly after Royal Assent (eg. the day after Royal Assent). You should raise these issues with clients who request a Royal Assent commencement, except in cases, such as tax legislation, in which the application of the provisions rather than their commencement is significant to their operation.

#### **Reliance on legislative instruments**

10 In general, you should not include a Royal Assent commencement if the operation of the Act depends on legislative instruments being in force at the commencement of the Act. This is because the legislative instruments cannot be made until Royal Assent has been given. A Royal Assent commencement may be appropriate if the legislative instruments are able to commence retrospectively either in accordance with an express provision in the Act or because subsection 12(2) of the *Legislative Instruments Act 2003* does not apply.

#### ***Reliance on Acts Interpretation Act automatic commencement***

11 From time to time in the past, attempts have been made to persuade instructors not to use a commencement provision at all, but to rely instead on subsection 5(1A) of the Acts Interpretation Act, which provides for automatic commencement on the 28th day after Royal Assent.

12 I think that reliance on this AIA provision these days is probably not sensible. Users of Bills and the resulting Acts are so used to seeing commencement provisions that they are more likely to interpret omission of a commencement provision as a drafting oversight than as an attempt to rely on the AIA provision. While the legal position would not be in doubt, the omission of a commencement provision is likely to confuse a lot of users and require time-consuming explanations to be given in a range of cases.

13 Accordingly, a Bill should only be drafted in reliance on subsection 5(1A) of the AIA for specific good reason and after discussion with First Parliamentary Counsel. In such a case you should advise your instructors that the operation of that provision should be mentioned in the Explanatory Memorandum.

## ***Proclamation commencement provisions***

### **Proclamations to be used to fix commencement dates**

14 Proclamations, which are made by the Governor-General, are the preferred method of providing a discretion to fix a commencement date (albeit a limited discretion having regard to paragraphs 16 to 22 below). Providing for commencement to be fixed by regulation is risky, given that regulations are subject to disallowance. Providing for commencement to be fixed by another official (eg. the Minister by notice in the *Gazette*) is generally unacceptable as a matter of policy.

15 Any request from instructors to confer a commencement discretion on a person other than the Governor-General, or to provide for a commencement discretion to be exercised otherwise than by Proclamation, should be raised with First Parliamentary Counsel.

### **Restrictions on deferral**

#### ***Background***

16 In the late 1980s, certain Senators criticised the Government over the increasing number of Acts that were passed but then not proclaimed to commence, sometimes for years after passage. In response, the Department of the Prime Minister and Cabinet adopted a policy imposing certain restrictions on the use of Proclamation commencement provisions. That policy is reflected in the following paragraphs. Paragraph 6.17 of the Legislation Handbook is also relevant.

17 The Senate Standing Committee for the Scrutiny of Bills takes an interest in delayed commencement provisions. The Committee is aware of the policy originally adopted in the late 1980s, and generally looks for an explanation for any commencement provision that departs from the standard required by the policy. If you are asked to draft a Proclamation commencement provision that does not comply with the policy set out below, you should advise your instructors of the Committee's interest, and recommend that they explain any departure from the policy in the Explanatory Memorandum.

#### ***The policy***

18 As a general rule, a restriction should be placed on the period within which an Act, or a provision of an Act, may be proclaimed. The commencement clause should specify either a period, or a date, after Royal Assent after which:

- the Act commences, if it has not already commenced by Proclamation; or
- the Act is taken to be repealed, if a Proclamation has not been made by that time.

19 If the specified period option is chosen, the period should generally not be longer than 6 months. A longer period should be explained in the Explanatory Memorandum.

20 If the specified date option is chosen, there is no restriction on how long commencement may be deferred. However, any substantial deferrals should be explained in the Explanatory Memorandum, and it may in fact be sensible to explain the significance of the specified date whenever this option is used.

21 Note that if the “repeal” option is chosen, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made before the end of the specified period or before the specified date.

22 Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain and generally not within the Government’s control (eg. enactment of complementary State legislation). Commencement provisions of this kind should be explained in the Explanatory Memorandum.

### **Scope for multiple proclaimed days**

23 A Proclamation commencement provision may be expressed to permit a single Proclamation commencing all the affected provisions of the Act (“on a single day to be fixed by Proclamation”), or different commencements for different provisions proclaimed by one or more Proclamations (“on a day or days to be fixed by Proclamation”).

24 You should discuss with your instructors which is the appropriate version for a particular Bill. The discussion should take account of:

- the possible need to commence different provisions at different times (eg. to take account of administrative work that needs to be done before commencement, or to ensure that budgetary targets are met); and
- the need to ensure that related provisions are not rendered unworkable by being proclaimed at different times (eg. provisions creating offences relating to breaches of licence conditions should not commence before the provisions establishing the licensing scheme).

25 If multiple commencements are needed, but some groups of provisions all need to commence at the same time, the groups that need to commence together should be linked by the commencement provision (see paragraph 105 for the form of the linking provision).

### **Proclaimed date dependent on specified event**

26 In some cases, a commencement Proclamation should not be made before a particular event occurs (eg. a treaty being signed), and the commencement provision will need to specify this. However, in general, such a commencement provision should also comply with the basic Proclamation policy by providing for automatic commencement, or repeal, if a Proclamation is not made within a specified period after the event occurs.

27 If the particular event may not be readily traceable by readers (see paragraphs 32 to 34), a provision should also be included requiring that any automatic commencement or repeal should be notified in the *Gazette*. If the notice is not one announcing the day an international agreement comes into force for Australia, a provision should be included clarifying the status of the notification for the purposes of the *Legislative Instruments Act 2003*. (It is likely not to be a legislative instrument, although commencement Proclamations

are legislative instruments that are exempt from disallowance and sunseting—see paragraph 6(e), item 42 of the table in subsection 44(2), and item 48 of the table in subsection 54(2), of the *Legislative Instruments Act 2003*).

28 Paragraphs 99 to 102 and 108 sets out the standard form for these commencement provisions.

### **Commencements not to be linked to Proclamations**

29 In some cases it will be desirable to link the commencement of one Bill (or a part of a Bill) to the commencement of provisions of another Bill that are to commence by Proclamation or, if a proclamation is not made within a specified period, at the end of that period.

30 In these cases the commencement should be linked to the commencement of the other provisions and not to the making of the Proclamation. This is because the Proclamation may never be made.

### ***Other deferred commencements***

31 Recently, the Senate Scrutiny of Bills Committee seems to have taken the view that any significant deferral of commencement should be explained. This includes cases in which a guaranteed commencement is provided for, but is deferred for more than 6 months after Royal Assent (eg. commencement 12 months after Royal Assent). If your instructors request such a provision, you should advise them to include in the Explanatory Memorandum some sort of explanation for the length of the deferral.

### ***Provisions that link commencement to certain events***

32 There are a small number of commencement provisions that rely on the occurrence of certain events that are not easily “traceable” (unlike Royal Assent, Proclamation or the commencement of another Act). Such provisions may make it difficult for readers to determine whether an Act has commenced, and are therefore generally undesirable. For commencement provisions linked to certain events (eg the entry into force for Australia of an international agreement) you should consider the issue of retrospectivity discussed in paragraph 8 for Royal Assent commencements.

33 Where it is absolutely necessary to link the actual commencement to an event, it may be desirable to require formal notification, such as notice in the *Gazette*, that the Act has commenced (see paragraphs 99 to 102 and 108). If the notice is not one announcing the day an international agreement comes into force for Australia, a provision should be included clarifying the status of the notification for the purposes of the *Legislative Instruments Act 2003*. The notice is likely not to be a legislative instrument. Note that commencement Proclamations are legislative instruments that are exempt from disallowance and sunseting—see paragraph 6(e), item 42 of the table in subsection 44(2), and item 48 of the table in subsection 54(2), of the *Legislative Instruments Act 2003*).

34 In order to ensure that a consistent approach is taken in these provisions, First Parliamentary Counsel’s approval is required for any commencement provision that relies on an event other than Royal Assent, Proclamation or the commencement of another Act. Where appropriate, such provisions would then be added to the available standard provisions.

### ***Provisions for commencement of Bills in a “package”***

35 It cannot be assumed that any Bill will pass, or that Bills that are considered together will either both (or all) pass, or not pass. If Bills are being introduced as a “package”, the commencement provisions of the Bills should be tied.

36 The most common example is a new principal Bill and a Bill containing the consequential and transitional measures for the principal Bill. Normally, the commencement provisions for the consequential and transitional Bill will be tied to the commencement of the main Bill. This ensures that if the consequential and transitional Bill is passed by the Parliament without amendment, but the main Bill is the subject of disagreement and does not pass, then the consequential and transitional Bill will not come into effect.

37 This does, however, raise the question of what would happen if the main Bill is passed, but the consequential Bill is not. Drafters should think about whether provision ought to be made in the commencement provisions to deal with this case. If you propose to include provisions of this nature, you should speak to First Parliamentary Counsel first.

### ***Provisions that never commence***

38 The statute book contains 3 classes of provisions dealing with provisions that might never commence (because of some other event occurring):

- a provision saying that the provisions concerned do not commence at all (or never commence);
- a provision saying that the provisions concerned are of no effect;
- a provision that operates to repeal the provisions concerned when it is apparent that they will not commence.

39 For future consistency, “do/es not commence at all” is to be used in all cases, other than for provisions that are expressed to be repealed as a result of a failure to commence under a Proclamation. Provisions that do not commence may be repealed in a later amending Bill.

### ***Commencement of paragraphs***

40 You should not give a paragraph of a substantive provision (section, subsection or clause) a different commencement date from other parts of the substantive provision.

41 Section 14B of the *Acts Interpretation Act 1901* permits amending paragraphs to be given separate commencements as if they were self-contained provisions of the amending Act. However, since we no longer use paragraphs in our amending forms, this section has no current relevance for OPC Bills.

### ***References to commencements of Acts***

42 Commencement provisions sometimes refer to the commencement of another Act, and this causes problems if the Act referred to does not have a single commencement. Whole Acts with a single commencement have become even less common under the approach set

out in Part 3, so you should take special care in drafting any commencement provision that refers to the commencement of a specified Act.

### **References to time**

43 References to times in commencement provisions are to be in the following form:

[the specified time] (by legal time in the Australian Capital Territory) on [the specified day]—eg. 7.30 pm (by legal time in the Australian Capital Territory) on 1 July 2000.

44 Obviously, if the time is to be calculated by reference to the legal time in a place other than the Australian Capital Territory, that other place should be specified.

45 The reference to a place does not need to be included if section 37 of the *Acts Interpretation Act 1901* is intended to apply.

## **Part 3—Commencement provisions: form**

### **The basic rules**

46 A simplified guide to drafting commencement provisions is in Attachment B.

### **Commencement provisions to be set out using table**

47 The basic rule is that commencement provisions are to be set out using the table form described below. The only exceptions to this rule are where the whole of the Act is to commence at the same time and:

- on the day the Act receives the Royal Assent; or
- on the day after the Act receives the Royal Assent; or
- on a specified day; or
- at a specified time.

(See paragraphs 8 to 10 for information on matters to be considered if a Royal Assent commencement is proposed.)

48 The reason for the exceptions is that in each case:

- the provision is easy to interpret; and
- both when printed in the Act and when included in the Acts Table, the actual commencement will be obvious on the face of the document; and
- the table, if used, would have only one row.

49 Examples of these forms are shown at paragraph 64.

## **Commencement for each provision to be explicitly stated**

50 The commencement for each provision is to be explicitly stated. This means that:

- (a) no phrases such as “the remaining provisions” or “provisions other than...” are to be used. (The table item covering the preliminary sections will be expressed to cover “anything in this Act not elsewhere covered by this table”. However, this is to be used only to cover things such as the long title, and headings in Bills with split commencements, which may not otherwise be covered. It is not to be used by drafters to cover provisions of the Bill that could be specified in the table); and
- (b) table items should not contain cross-references to other provisions of the Bill, or other table items (ie. each table item should contain the full commencement text for the provisions covered by that table item).

51 There are two exceptions to the rule, which are discussed in paragraphs 52 to 57.

### ***Exception—provisions in separate table items must commence by the same Proclamation***

52 The first exception is if:

- (a) particular provisions of the Bill commence on a day to be fixed by Proclamation; and
- (b) other provisions of the Bill must commence together with those provisions;

the other provisions may be stated to commence at the same time as the provisions covered by the relevant table item (see paragraphs 105 to 107).

53 The commencement item for the other provisions must refer to the commencement table item, not to the substantive provisions. This is because it will usually be easier for a reader to locate the table item than to search for references to substantive provisions within table items.

54 However, if the table item dealing with the Proclamation refers to “a day or days” to be fixed by Proclamation, the other provisions should be stated to commence at the same time as the particular substantive provision(s) that the commencement should be linked to. Otherwise, the commencement will become uncertain.

### ***Exception—provisions must commence immediately after or immediately before other provisions of the Bill***

55 The second exception is, if particular provisions of the Bill must commence immediately after or immediately before another provision in the same Bill, those provisions may be stated to commence immediately after or immediately before the provision covered by the relevant table item.

56 Again, the commencement item must refer to the table item that covers the other provisions of the Bill, not directly to the substantive provisions. This is the case even if the

commencement is related to a single provision and that provision is grouped with multiple other provisions in a commencement table item.

57 However, if the table item to which the commencement is to be linked is one that provides for commencement on “a day or days” to be fixed by Proclamation, then the provisions should be stated to commence immediately after or before the particular substantive provision to which the commencement should relate. (If this would result in the repetition of a substantial amount of text, you should discuss the matter with First Parliamentary Counsel).

### **Commencement provisions to be sequential**

58 Commencement provisions are to appear in sequence. The commencement for each provision is to be set out in the order in which the provision appears in the Bill—ie. each provision must appear in the commencement provision before every provision that comes after it in the Bill (eg. see items 3, 4 and 5 in example 1 in Attachment A).

### **Separate rows for Schedules**

59 The commencement for part of a Schedule (expressed as items, Divisions or Parts) cannot be in the same row of the table as the commencement for any provision of the Act that is outside that Schedule (eg. see items 2 and 3 in example 3 in Attachment A).

### **Standard forms to be followed**

60 Standard forms are provided for the different commencement provisions and must be followed. If you are drafting a commencement provision for which there is no suitable standard form, you will need to get First Parliamentary Counsel’s approval for your commencement provision.

### **Special rules are included in the table**

61 Special rules (such as the six month rule for Proclamations) and alternative commencements are to be included in the table.

62 This is a change from the approach initially taken. It is considered that incorporating the material into the table will make the commencement provisions easier to use.

### **Supporting material to be in subsections**

63 Supporting provisions (such as the provision explaining how additional information can be added) are to be included in subsections in the commencement section.

### ***Form of simple commencement provisions***

64 As mentioned in paragraph 47, there are 4 exceptions to the rule that commencement provisions must be drafted using the table form. The following forms are to be used for these provisions:

#### **Royal Assent**

This Act commences on the day this Act receives the Royal Assent.

### **Day after Royal Assent**

This Act commences on the day after this Act receives the Royal Assent.

### **Specified day**

This Act commences [is taken to have commenced] on [the specified day—eg. 1 July 2000].

### **Specified time**

This Act commences [is taken to have commenced] at [the specified time on the specified day—eg. 7.30 pm (by legal time in the Australian Capital Territory) on 1 July 2000].

65 All other commencement provisions are to be drafted using the table form.

### ***Commencement tables—introductory words***

66 The following words are to be used as the standard introductory words for all commencement provisions that use the table, and are to appear immediately before the table:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

67 The introductory words have been modified to take account of the inclusion of all of the information about the commencement of provisions being included in the table.

### **Commencement tables—form of table**

68 The following is an example of the table:

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		

69 The table has 3 columns:

- Column 1 containing Provision(s);
- Column 2 containing Commencement;
- Column 3 for Date/Details.

## Column 1

70 Column 1 contains an item number to identify each row of the table followed by a full stop and 2 spaces and the provisions to which the commencement will apply. The provisions within a particular row must be sequential (this means that there may be a number of items in the table with identical commencement text).

71 The material in column 1 must identify the provisions directly—it should not identify the provisions by reference to some other matter (for example, the items that amend a particular Act).

## Column 2

72 Column 2 contains the commencement information about the provision(s) in the Provision(s) column. Exceptions, or special conditions, are also to be included in column 2.

## Column 3

73 Column 3 will set out the actual commencement date. It should not set out the commencement time (as opposed to the date) if the time:

- is clear from column 2; or
- is expressed to be when, or immediately before or after, some other event or commencement occurs; or
- is calculated using subsection 3(2) of the *Acts Interpretation Act 1901*.

74 Cases in which column 3 will need to set out a time are likely to be rare. One example would be a case in which a commencement Proclamation was required to set out a time as well as a date.

75 The “details” included in column 3 should be those explaining the basis for the date—eg. details of Proclamations.

76 The information in column 3 will be included by OPC drafters to the extent that it is known at the time a Bill is printed for introduction. Additional information in column 3 will be added when later prints of the Bill are done and as part of a publication after the Act has received the Royal Assent. This information will not be “part of the Act”.

77 First Parliamentary Counsel will approve any changes to the information in column 3 that are made between the production of the LAP print and the production of the introduction print.

78 The information in column 3 is also used to assist the table offices in Parliament to produce the Act print: see paragraphs 135 and 136 for further information.

## Formatting rules

79 Tables are to be formatted in the same way as in the examples in Attachment A. In particular, no full stops are to be used at the end of cells in columns 1 and 3 in the table. Full stops are to be used at the end of every cell in column 2 of the table.

## References to provisions in the table

80 In Column 1 (Provision(s)), an abbreviated method of referring to provisions of Schedules will be used. The reference to the Schedule will come first, followed by a comma, followed by the next largest unit etc.

81 For example, a reference to Division 1 of Part 3 of Schedule 2 would be expressed as Schedule 2, Part 3, Division 1. A reference to item 27 of Schedule 3 would be expressed as Schedule 3, item 27 (whether or not item 27 was in a Part or Division).

82 This should make the references easier to find as well as slightly shorter.

83 Normal reference methods are to be used in Column 2.

## ***Standard provisions for column 2 of the commencement table***

84 The following table sets out the standard provisions to be used for particular kinds of commencements. These are available using the Alt-C macro. First Parliamentary Counsel's approval must be obtained if you need to include a provision that is not based on one of the standard forms.

<b>Kind of commencement</b>	<b>Words to be used in column 2 of the commencement table</b>	<b>Comments</b>
<b>Royal Assent</b>	The day this Act receives the Royal Assent.	See paragraphs 8 to 10.
<b>Day after Royal Assent</b>	The day after this Act receives the Royal Assent.	See paragraphs 8 to 10.
<b>Specified period after Royal Assent</b>	The day after the end of the period of [specified period] beginning on the day this Act receives the Royal Assent.	
<b>28th day after Royal Assent</b>	The 28th day after this Act receives the Royal Assent.	See paragraphs 11 to 13.
<b>Proclamation (single day)</b>	A single day to be fixed by Proclamation.  However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	See paragraphs 14 to 30 and 108.  The most usual alternative has been shown here. Other alternatives are in paragraph 103.

<p><b>Proclamation (multiple days)</b></p>	<p>A day or days to be fixed by Proclamation.</p> <p>However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.</p>	<p>See paragraphs 14 to 30 and 106.</p> <p>The most usual alternative has been shown here. Other alternatives are in paragraph 103.</p>
<p><b>Specified day</b></p>	<p>[the specified day—eg. 1 July 2000].</p>	
<p><b>Specified time</b></p>	<p>[the specified time on the specified day—eg. 7.30 pm (by legal time in the Australian Capital Territory) on 1 July 2000].</p>	<p>See paragraphs 43 to 45.</p>
<p><b>Immediately after/before (except where immediately after/before provisions of the same Act that are to commence on a day or days to be fixed by Proclamation)</b></p>	<p>Immediately after/before the commencement of [the provision(s) covered by table item X]/[specified provisions of] [specified Act].</p>	<p>See paragraphs 29, 30 and 42 and 55 to 57.</p>
<p><b>Immediately after/before (provisions of the same Act that are to commence on a day or days to be fixed by Proclamation)</b></p>	<p>Immediately after/before the commencement of [specified provisions of this Act].</p>	<p>See paragraph 55.</p>
<p><b>At the same time as (provisions of another Act)</b></p>	<p>At the same time as [specified provision of][specified Act] commence[s].</p>	<p>See paragraphs 29, 30 and 42.</p> <p>Commencement at the same time as other provisions of the same Act should be dealt with in accordance with paragraphs 50 to 54 and 105 to 107.</p>

<p><b>At the same time as (provisions of this Act that are to commence on a single day to be fixed by Proclamation)</b></p>	<p>At the same time as the provision(s) covered by table item X.</p>	<p>See paragraphs 29, 30, 52 and 53 and 105 to 107.</p>
<p><b>At the same time as (provisions of this Act that are to commence on a day or days to be fixed by Proclamation)</b></p>	<p>At the same time as [specified provision(s) of this Act].</p>	<p>See paragraphs 57 and 106.</p>
<p><b>The earlier of</b></p>	<p>The earlier of: (a) [first option]; and (b) [second option].</p>	<p>See paragraphs 96 to 98 and 117.</p>
<p><b>The later of (events in both certain)</b></p>	<p>The later of: (a) [first option]; and (b) [second option].</p>	<p>See paragraphs 89 to 102 and 117.</p>
<p><b>The later of (event in second option uncertain)</b></p>	<p>The later of: (a) [first option]; and (b) [second option].  However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.</p>	<p>See paragraphs 89 to 102 and 117.</p>
<p><b>The later of (events in both options uncertain)</b></p>	<p>The later of: (a) [first option]; and (b) [second option].  However, the provision(s) do not commence at all unless both of the events mentioned in paragraphs (a) and (b) occur.</p>	<p>See paragraphs 89 to 102 and 117.</p>

<p><b>Conditional (at a specified time, if a specified event (including commencement of another Act) occurs, or does not occur, within a specified time)</b></p>	<p>[standard description of intended commencement].</p> <p>However, [condition].</p> <p>eg:</p> <p>The day this Act receives the Royal Assent.</p> <p>However, if the XYZ Act 2003 does not receive the Royal Assent before 30 June 2003, the provision(s) do not commence at all.</p>	<p>See paragraphs 32 to 39, 42 and 85 to 88.</p>
<p><b>Not to commence unless other Acts have commenced (the GST provision)</b></p>	<p>The provision(s) do not commence at all unless all of the following Acts have commenced [on or before [specified day], in which case they commence immediately after the last of those Acts to commence:</p> <p>(a) [first Act];</p> <p>(b) [second Act];</p> <p>(c) etc.</p>	<p>See paragraph 42.</p> <p>This is in fact a special case of a conditional commencement, and could be drafted as an ordinary conditional commencement. However, this form emphasises the restrictions on commencement, and may sometimes be required for presentational reasons.</p>
<p><b>Conditional (only one of 2 or more provisions commences)</b></p>	<p>[As for a single conditional commencement, but using a separate row for each of the alternative provisions].</p>	<p>See paragraphs 32 to 39 and 85 to 88.</p>

## ***Special conditions***

### **Conditional commencement**

85 Where a commencement is conditional on something, the following second sentence is to be included:

If [the condition is satisfied/not satisfied], the provision(s) do not commence at all.

86 If it is considered necessary, you may also insert a formal note in the Bill after the relevant provision in the following form:

Note: If [relevant condition is satisfied/not satisfied], this [item/section] does not commence at all. See [relevant table item of the commencement provision].

87 Generally, such notes should be kept to a minimum.

88 If a drafter considers that the inclusion of numerous such notes would be appropriate in a particular case, the drafter should raise the matter with First Parliamentary Counsel.

### “Later of” commencements

89 The form of “later of” commencements depends on whether the events in the 2 options are “certain” or “uncertain”.

90 A *certain event* means an event that, at the time of drafting the Bill, is certain to occur at some future time (even if the exact time is not yet known). The following are examples of certain events:

- (a) a specified date;
- (b) Royal Assent to the Bill that contains the commencement provision;
- (c) the commencement of another provision in the Bill, or of a provision in another Act that has been enacted, where the provision is to commence on proclamation (subject to forced commencement at the end of a specified period if not proclaimed earlier).

91 An *uncertain event* means an event that, at the time of drafting the Bill, may or may not occur at some future time. The following are examples of uncertain events:

- (a) the commencement of another Bill that is still before the Parliament;
- (b) the commencement of a provision of another Act that has been enacted, where the provision is to commence by an open-ended power to proclaim;
- (c) an international agreement coming into force for Australia.

92 It is assumed that it is reasonable to refer to all the kinds of things that might be described in the paragraphs of the commencement provision as “events”, and so we can use a generic form of words such as “if the event referred to in paragraph (x) does not occur”, rather than having to devise a statement of the “non-happening” of the event that involves a repetition of the description of the event.

93 In some situations, there may be a need to build a time limit into the wording that states that the relevant items do not commence if an uncertain event does not occur. For example, “However, the items do not commence at all if the event mentioned in paragraph (b) does not occur before 1 July 2004” (where the event might, eg, be Australia entering into an international agreement). The Senate Scrutiny of Bills Committee has recently commented adversely on Bills implementing international agreements that did not have a time limit (see for example Digest 9 of 2004 and Report 11 of 2004).

94 The examples may not cover all the theoretical possibilities for the way in which a “later of” commencement provision may refer to an uncertain event. For example, they do not cover a situation where commencement should occur even if a specified uncertain event does not occur, as it is hard to think of an example where this would be the desired result. A drafter faced with a situation outside these examples should consult First Parliamentary Counsel about how the commencement provision should be worded.

95 There is only one example of “earlier of” commencement provisions as such provisions do not present the same difficulty for working out what is intended if an uncertain event does not occur.

### **“Later/earlier of” commencements—comparing periods and points of time**

96 An issue arises where there is a “later/earlier of” commencement where one of the events is a day (such as the day the Act receives the Royal Assent) and the other is a point in time (often the commencement of another Act).

97 In these cases, the first option should be “the start of the day this Act receives the Royal Assent”, not just “the day this Act receives the Royal Assent”.

98 (In these cases, subsection 3(2) of the *Acts Interpretation Act 1901* does not convert the expression “the day this Act receives the Royal Assent” into “the start of the day this Act receives the Royal Assent” because, at the point in time at which you are comparing paragraphs (a) and (b) to work out which of the 2 paragraphs should apply, the “Act ... is [not] expressed to come into operation on a particular day”. So without the words “the start of the day”, you would be comparing a period with a point in time. Using the expression “the start of the day” will ensure that you are comparing 2 points in time rather than a point in time and a period.)

### **“Later of” commencements and international agreements etc.**

99 As mentioned above, a “later of” commencement can be used if a Bill is required to commence no earlier than the time at which an international agreement comes into force for Australia. In this case, the commencement might begin:

The later of:

- (a) [the day this Act receives the Royal Assent]; and
- (b) the day the [agreement] comes into force for Australia.

100 The relevant Minister is often required to publish a notice in the *Gazette* announcing the coming into force of the agreement (see also paragraphs 32 to 34).

101 If this requirement is imposed, it should be done by adding these words at the end of the relevant commencement item:

The Minister must announce by notice in the *Gazette* the day the [agreement] comes into force for Australia.

102 This form of words ensures that the notice is not a legislative instrument (see item 35 of Schedule 1 to the *Legislative Instruments Regulations 2004*, which provides that a notice published in the *Gazette* that announces the day an international agreement comes into force for Australia is not a legislative instrument). In these circumstances, do not use the form “...the Minister must announce by notice in the *Gazette* the day the provisions commenced”.

## **Proclamation commencements**

### ***Standard provisions***

103 For each commencement involving a Proclamation, the first “sentence” in column 2 of the table would specify “A single day to be fixed by proclamation” or “A day or days to be

fixed by Proclamation”. (See the table in paragraph 84). The standard forms for the second sentence are set out below.

*Specified period + automatic commencement*

However, if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.

*Specified date + automatic commencement*

However, if the provision(s) do not commence before [specified date], they commence on that day.

*Specified period + automatic repeal*

*[Provisions to commence before end of period]*

However, if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, the provision(s) are repealed on the day after the end of that period.

*[Commencement Proclamation to be gazetted before end of period]*

However, if the commencement of the provision(s) is not fixed by a Proclamation published in the *Gazette* within the period of 6 months beginning on the day this Act receives the Royal Assent, the provision(s) are repealed on the day after the end of that period.

*Specified date + automatic repeal*

*[Provisions to commence before specified date]*

However, if the provision(s) do not commence before [specified date], the provision(s) are repealed on that day.

*[Commencement Proclamation to be gazetted before specified date]*

However, if the commencement of the provision(s) is not fixed by a Proclamation published in the *Gazette* before [specified date], the provision(s) are repealed on that day.

*Effect of automatic repeal on preliminary sections*

104 Because of the rule requiring the preliminary sections to commence on Royal Assent, the result of an automatic repeal provision may be to leave the preliminary sections in operation after the remainder of the Act is repealed. This case is quite rare, and causes no particular problems, so if it arises it should be dealt with by repealing the preliminary sections of the Act when an opportunity arises (for instance, in a portfolio Bill or statute law revision Bill).

**Multiple proclaimed days with some provisions linked**

105 If multiple commencements are needed, but some groups of provisions all need to commence at the same time, the groups that need to commence together should be linked in the table, using the following form:

At the same time as the provisions covered by table item X.

106 This form should only be used where the items are to commence on a single day to be fixed by Proclamation. If the items are to commence on “a day or days” to be fixed by Proclamation, the cross-reference should be to the particular substantive provisions to which the commencement is linked (not to the table item) (see paragraph 54). In all other cases where provisions commence on the same day (or at the same time), the full text of the commencement table item should be repeated. (If this would result in the repetition of a substantial amount of text, you should discuss the matter with First Parliamentary Counsel).

107 While the table item actually containing the Proclamation provision will usually be the first table item that is covered by the Proclamation (or alternative commencement), drafters may specify the Proclamation in a later item if it is considered more appropriate. This may be because it is not the first item in a non-consecutive series of amending items on a topic that is the most important one (the first item on the topic might be a minor amendment consequential on a later substantive amendment in the same series).

### **Proclaimed date dependent on specified event**

108 Standard provisions for a commencement by Proclamation dependent on a specified event (see paragraphs 26 and 27) are as follows:

A Proclamation must not specify a day that occurs before the day [the relevant event occurs].

However, if the provision(s) do not commence within the period of 6 months beginning on the day [the relevant event occurs], they commence on the day after the end of that period. If the provision(s) commence in this way, the Minister must announce by notice in the *Gazette* the day the provision(s) commenced.

[If the notice is not one announcing the day an international agreement comes into force for Australia, a statement clarifying status of notice for the purposes of the *Legislative Instruments Act 2003*.]

### **Standard note to follow table**

109 The following note must be included after the table:

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

110 The note is intended to alert readers to the fact that provisions inserted by later amendments will not be included in the table.

### **Standard subsection to follow table— allowing completion of Column 3 (Date/Details)**

111 The following subsection will always be included as subsection (2):

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

## **Other rules**

### **Royal Assent commencement required for “preliminary” sections**

112 The sections containing the short title and the commencement provisions must be expressed to commence on Royal Assent. In Bills with amending Schedules, the section dealing with Schedule(s) must also commence on Royal Assent. This is included in the template for Bills.

113 The reason for this rule is to avoid possible arguments such as the power to make a Proclamation where the provision providing for the Proclamation has not commenced. This was discussed in *Fagan v Dominitz* (1958) 58 SR (NSW) 122 and is dealt with in subsection 4(3) of the *Acts Interpretation Act 1901*.

114 This rule does not apply to the Bills that have a single, identifiable commencement time, and that are also the Bills that are not required to use the table form commencement provision (see paragraph 47). These Bills are those with commencements specified as the day of Royal Assent, the day after Royal Assent, a specified day or a specified time.

### **No item to cover the whole of the Act**

115 An item of the table must not be expressed to cover the whole of the Act.

116 This follows from the facts that:

- Bills that wholly commence on Royal Assent (or on the day after Royal Assent, on a specified day or at a specified time) will not use the table form commencement provision (see paragraph 47); and
- for Bills that do use the table form commencement provision, a Royal Assent commencement must be specified for the preliminary sections (see paragraph 112).

### **No special provisions for “same time” issues**

117 Where a provision is expressed to commence at the earlier/later of 2 events, no provision is to be included to cover the situation where the events occur at the same time. Similarly, where a provision is expressed to commence at the earliest/latest of more than 2 events, no provision is to be included to cover the situation where more than one of those events occur at the same time.

### **No notes referring to *Acts Interpretation Act 1901***

118 No notes are to be included in the commencement section setting out the effect of provisions of the *Acts Interpretation Act 1901*.

### **References to the table and table items**

119 References in the commencement section itself to the table do not need to specify that it is in subsection (1).

120 References to an item in the table should refer to “table item”.

## **References to “provision(s)”**

121 Any references within the table to a provision or provisions should refer to “provision(s)” to cover both the singular and plural form. However, the plural form of the verb is always used (without the singular form) with “provision(s)”.

## **Defined terms not to be used**

122 Defined words or phrases may be used in the table if they are used elsewhere in the Bill or Principal Act. Words or phrases should not be defined in the Bill solely for use in the table. The reason for this rule is to keep the commencement provision as self-contained as possible.

## **Statute Law Revision (SLR) amendments**

123 The commencement provisions specified in Drafting Direction 4.4 (for SLR amendments) should be used for SLR amendments rather than the general commencement provisions specified in this Drafting Direction.

## **Parliamentary amendments**

124 Parliamentary amendments will often require a consequential amendment of the commencement provision.

125 However, where the amendment is to omit a provision, or insert a provision, that is within a range specified in column 1 of the table, but not specifically mentioned in that column, no amendment should be made.

126 For example, if a table item covers items 10 to 47 of Schedule 1 and there is a parliamentary amendment to omit item 26, no consequential amendment should be made to the table item. Drafters may, however, alert instructors to the need to check whether any change is required to explanatory materials.

## **Provisions not covered by standard forms**

127 Rarely, you may be asked to draft a commencement provision that is not covered by the standard forms.

128 In order to ensure that a consistent approach is taken for non-standard provisions, First Parliamentary Counsel’s approval is required for any commencement provision for which there is not a standard form. Where appropriate, such provisions would then be added to the available standard provisions.

## ***Examples***

129 Attachment A contains examples of commencement provisions drafted in accordance with this Drafting Direction.

### ***Relationship with IT system***

130 The table and the standard subsections (1) and (2) appear in the templates for New Acts and Amending Bills. The other standard provisions for the table are available using the Alt-C macro.

131 There is also a version of the table for use in parliamentary amendments. This is available as an autotext entry. (The same autotext entry can be used as the basis for other amendments of tables.)

132 The Renumber Amending Schedules macro ends with a message reminding staff to check the numbering in the commencement clause.

133 A macro has been developed to renumber the items of the table and renumber any cross-references to those items. Word Note 13 deals with this.

134 The implementation of the OPC form of commencement provisions has also facilitated the automated production of the Acts and Bills Tables from the Bills database.

### ***Providing information to the table offices in Parliament***

135 As part of the scheme to include the information in the third column, the table offices in Parliament will include information that is known at the time (after assent) that they produce the Act print.

136 The OPC assent checker is responsible for working out, and notifying the relevant table office of, any commencement dates that can be calculated immediately after Royal Assent. This process is covered in documents given to the assent checker that describe the role.

Peter Quiggin  
First Parliamentary Counsel  
15 July 2009

## Attachment A—Examples of commencement provisions

The examples in this Attachment are based on actual Bills or Acts but have been modified to comply with all of the new rules.

### Example 1

#### 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedules 1 and 2	The 28th day after this Act receives the Royal Assent.	
3. Schedule 3, items 1 to 40	The 28th day after this Act receives the Royal Assent.	
4. Schedule 3, item 41	Immediately after the commencement of section 26 of the <i>Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988</i> .	1 July 1988
5. Schedule 3, items 42 to 116	The 28th day after this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

### Example 2

#### 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedules 1 and 2	The later of: (a) the start of the day this Act receives the Royal Assent; and (b) immediately after the commencement of the <i>Environment Protection and Biodiversity Conservation Act 1999</i> .  However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	
3. Schedule 3	The later of: (a) the day this Act receives the Royal Assent; and (b) the day the [Agreement], done at [location] on [date], comes into force for Australia.  However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur within the period of 6 months beginning on the day this Act receives the Royal Assent.  The Minister must announce by notice in the <i>Gazette</i> the day the [Agreement] comes into force for Australia.	

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

### **Example 3**

#### **2 Commencement**

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
3. Schedule 2, Part 1	At the same time as the provisions covered by table item 2.	
4. Schedule 2, Part 2	The later of: (a) the start of the day that is the transfer day for the purposes of the <i>Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999</i> ; and (b) immediately after the commencement of the provision(s) covered by table item 2. However, the provision(s) do not commence at all if the event mentioned in paragraph (a) does not occur.	
5. Schedule 3	1 January 1999.	1 January 1999
6. Schedule 4, item 1	Immediately after the commencement of item 44 of Schedule 1 to the <i>Health Insurance Amendment (Professional Services Review) Act 1999</i> .	1 August 1999
7. Schedule 4, item 2	The day this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

## **Example 4**

### **2 Commencement**

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1, Part 1	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
3. Schedule 1, Parts 2 and 3	The day this Act receives the Royal Assent.	
4. Schedule 1, Part 4	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
5. Schedule 1, Parts 5, 6 and 7	The day this Act receives the Royal Assent.	
6. Schedule 2	1 December 2002.	1 December 2002
7. Schedule 3, Part 1	The day this Act receives the Royal Assent.	
8. Schedule 3, items 4 to 7	The day this Act receives the Royal Assent.  However, the provision(s) do not commence at all if this Act does not receive the Royal Assent before the commencement of item 39 of Schedule 3 to the <i>Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001</i> .	
9. Schedule 3, items 8 and 9	The day this Act receives the Royal Assent.  However, the provision(s) do not commence at all if this Act does not receive the Royal Assent before the commencement of item 62 of Schedule 3 to the <i>Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001</i> .	
10. Schedule 3, Part 3	1 July 2003.	1 July 2003

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
11. Schedule 3, Part 4	<p>The later of:</p> <p>(a) the start of the day this Act receives the Royal Assent; and</p> <p>(b) immediately after the commencement of item 62 of Schedule 3 to the <i>Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001</i>.</p> <p>However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.</p>	

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

## **Attachment B—Simplified guide to drafting commencement provisions**

### ***When table must be used***

137 Table is to be used except for the super simple 4 (RA, day after RA, a day, a time).

Reason: The exceptions are the only ones that have a single commencement that will be absolutely obvious from the first page of the Act.

Note: The table and standard subsections (1) and (2) appear in the Amending Bill and New Act templates.

### ***Rules applying when table used (a summary of the main rules)***

138 All tables must have at least 2 rows. (For example, if previously a Bill would have all commenced 28 days after Royal Assent, or on a day to be proclaimed, the initial sections will commence on Royal Assent and the remainder on the later day.)

Reason: This follows from a number of other rules.

139 Initial sections (and odd bits and pieces) must commence on Royal Assent. Use the standard form, which appears in the template.

Reason: This avoids a technical argument about how the initial sections can commence.

140 Every provision must be explicitly mentioned, or covered by an express description of a segment of the Bill (eg. “Part 3, Division 4 ” or “sections 14 to 23”). The extra words in the first table item are only to cover headings etc.

Reason: This is a fundamental principle of the table approach. It ensures that it is easy to find the commencement of every provision in the Act.

141 The provisions of the Bill must be dealt with in the order that the provisions appear in the Bill.

Reason: This is a fundamental principle of the table approach. It ensures that it is easy to find the commencement of every provision in the Act.

142 Standard forms must be used and First Parliamentary Counsel’s agreement must be obtained for any departures from the standard forms.

Reason: This is to ensure consistency and to avoid time being unnecessarily spent inventing and refining new approaches.

Note: To insert the standard forms, position the cursor in the appropriate place in the table or the Bill and press Alt-C.

143 No event-based commencements without the approval of First Parliamentary Counsel.

Reason: This is to because this type of commencement provision can be extremely unhelpful to users.

144 Fill out the third column to the extent that the date is known before introduction.

Reason: To provide as much information as possible during passage of the Bill and to expedite the production of the Act print of the Bill.

145 In column 1 of the table, use the abbreviated method of referring to Schedule provisions (eg. Schedule 3, Part 2, Division 1).

Reason: This is to make the first column easier to read.

146 Get further information from Word Note 39.