

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.11 Implementing Commonwealth agreements (including treaties and conventions etc.)

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Contents

Part 1—Introduction	2
Part 2—International agreements (eg. treaties and conventions)	2
Role of Parliament.....	2
Identifying international agreements.....	2
Finding the text of an agreement that is in force.....	3
Finding the text of an agreement that is not yet in force.....	3
Part 3—Domestic agreements and agreements with private parties	4
Authority to enter these kinds of agreements.....	4
Payments under agreements.....	4
Agreements entered into by Ministers and other Commonwealth officers.....	4
Identifying domestic or private agreements.....	5

Part 1—Introduction

1 This Drafting Direction deals with agreements entered into by the Commonwealth. Agreements that the Commonwealth enters will generally fall into one of the following broad categories:

- (a) international agreements that are binding at international law (eg. treaties and conventions);
- (b) non-binding international agreements;
- (c) domestic agreements between the Commonwealth and other domestic bodies politic such as the States and Territories;
- (d) informal agreements or contracts between the Commonwealth and private parties (these agreements may involve either domestic or foreign private parties but would be governed by private, not public, law).

2 The matters you need to consider vary according to the kind of agreement in question. Part 2 of this Drafting Direction deals with agreements covered by paragraphs (a) and (b). Part 3 deals with agreements covered by paragraphs (c) and (d).

Part 2—International agreements (eg. treaties and conventions)

Role of Parliament

3 Bills relating to international treaties and conventions, or other non-binding international agreements, should not include provisions providing for parliamentary approval of the treaty or convention (see the *Legislation Handbook*). If you are requested to include such a provision, you should refer the matter to First Parliamentary Counsel.

4 As a matter of procedure, your instructors should be aware of the government policy in relation to parliamentary review of binding international agreements. In particular:

- (a) agreements should, unless urgent or sensitive, be tabled before both Houses of Parliament at least 15 sittings days before they are entered into; and
- (b) all agreements are to be referred to the Joint Standing Committee on Treaties.

5 You should also ensure your instructors are aware of the comments made by the Senate Scrutiny of Bills Committee in Report 11 of 2004 in relation to the commencement of the *US Free Trade Agreement Implementation Act 2004*.

Identifying international agreements

6 There can be no mistake about identifying the agreement if the text of it is included in the Bill. However, if this is done, the text included must be checked at some point in the drafting process. Ideally, it should be checked against the text of the original instrument; but sometimes that instrument will not be available. If it is not, you should obtain the most

Implementing Commonwealth agreements (including treaties and conventions etc.)

reliable copy of the instrument (which may be electronic). The Department of Foreign Affairs and Trade (*DFAT*) sometimes has certified copies. In other cases, you may have to use your discretion in deciding what kind of copy should be required from the instructors for checking purposes. If in doubt about whether the copy that is made available to you is adequate, you should consult First Parliamentary Counsel.

7 As discussed above, setting out the text of an agreement in a Schedule can involve a lot of work for OPC in obtaining the authoritative text of the treaty, formatting it and checking it (see also Word Note 25), even though it is convenient for the reader. Since international agreements are now ordinarily available on the Internet, it is probably less important for Bills to include the text of agreements.

8 However, if the text of the agreement is not included in the Bill, it is important that the agreement is clearly identified. This should be done by giving:

- (a) the name of the agreement;
- (b) the place and date the agreement was made; and
- (c) if the agreement is in force—the agreement’s formal Australian Treaties Series citation (the Australian Treaties Series is maintained by DFAT).

9 The Bill should also include a note informing readers where to find the text of the agreement.

Finding the text of an agreement that is in force

10 If the agreement is in force, it will be published in the Australian Treaty Series. The Series can be accessed:

- (a) by using the Australian Treaties Database on DFAT’s Internet site; or
- (b) by using the Australian Treaties Library, to which DFAT’s Internet site also has a link, on www.austlii.edu.au.

11 The note informing readers how to find the text of an agreement that is in force (which, if you are using a defined term as a shorthand way of referring to the agreement, may conveniently be added after that term) should be consistent with the following example:

Convention means the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, done at Strasbourg on 8 November 1990.

Note: The text of the Convention is set out in Australian Treaty Series 1997 No. 21 ([1997] ATS 21). In 2008, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Finding the text of an agreement that is not yet in force

12 If the agreement is not yet in force, but Australia is a signatory, it will not be published in the Australian Treaties Series. However, it may be accessible using the Australian Treaties Library. If it is, the note informing readers how to find the text of the agreement should be consistent with the following example:

Convention means the International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997.

Note: In 2008, the text of the Convention was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Part 3—Domestic agreements and agreements with private parties

Authority to enter these kinds of agreements

13 Agreements made using the executive power of the Commonwealth do not need Parliamentary approval. Accordingly, it is not necessary to include a provision in a Bill that purports to authorise the making of such an agreement by the Commonwealth.

14 However, the inclusion of an authorising provision may be justified if it improves the coherence of the Bill. As well, for reasons of policy or presentation, your instructors may prefer to see such a provision in the Bill.

15 If you include an authorising provision in a Bill, you should consider whether it is also desirable to provide that the authorising provision does not, by implication, limit the executive power of the Commonwealth to enter into agreements.

Payments under agreements

16 If you draft a Bill that authorises the making of an agreement under which payments are to be made by the Commonwealth, those payments (like any expenditure of public money) require legislative authority (an express or implied appropriation). The Bill should make it clear where the appropriation is to be found. This should be done either:

- by including in the Bill an express appropriation for payments to be made under the agreement; or
- by providing that payments under the agreement are to be made out of money appropriated by the Parliament (this is a conventional way of making it clear that authorising the making of the agreement does not impliedly amount to an appropriation).

17 If the agreement has not been entered into when the Bill is introduced, you may need to set some limits to the authority provided by the Bill. If the form of the agreement has been decided upon, this may be achieved by providing that, if an agreement is entered into substantially in accordance with the form set out in the Bill (usually in a Schedule to the Bill), payments may be made in accordance with the agreement. Alternatively, it may be sufficient to set out the important elements of the proposed agreement in the Bill (see, for instance, sections 20E and 21 of the *Rural Adjustment Act 1992*).

Agreements entered into by Ministers and other Commonwealth officers

18 Generally, if a Bill authorises a Minister, or any other Commonwealth officer, to enter into an agreement, it should specify that the person does so on behalf of the Commonwealth. This makes it clear that the Commonwealth is the party to the agreement, and that the Minister or other officer is not bound in a personal capacity.

Identifying domestic or private agreements

19 The comments at paragraph 6 in relation to including the text of agreements in a Bill (except so far as they mention DFAT) apply equally to these kinds of agreements.

20 Because these agreements are likely to be less readily available than international agreements, the arguments in favour of including the text in the Bill may be stronger. However, if the text of the agreement is not included in the Bill, drafters should ensure that the description of the agreement is sufficient to precisely identify it.

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