# Instructor Guidance Note—Commencement provisions

## Importance of commencement provisions

1 Bills and instruments need to clearly state when they commence because the commencement day is the day the law changes. There are different options to suit different circumstances. Instructors should consider when each element of their Bill or instrument should start and provide specific instructions.

## Difference between commencement and application

2 ***Commencement*** provisions determine when the text of the law physically changes on the statute book. ***Application*** provisions clarify the persons, things or circumstances in relation to which legislation will apply, which can include specification by reference to time periods. This guidance is concerned with commencement provisions.

## Form of commencement provisions

3 OPC uses standardised commencement provisions, in table form, that are intended to make it easy for readers to find the commencement details for each legislative provision. The table usually appears in section 2 of the legislation.

## Main commencement options for Bills

4 For Bills, the main options for commencement are:

- by reference to the Royal Assent—e.g. on the day of Royal Assent, the day after Royal Assent or the 28th day (or some other specified period) after Royal Assent; or
- on a specified date, which may be in the future or the past (if it is in the past, it may raise issues associated with retrospective commencement); or
- on a day to be fixed by the Governor-General's Proclamation (generally with a 6 month limit on the power to proclaim); or
- on the commencement of a related piece of legislation; or
- on the happening of some other specified event (e.g. when a treaty enters into force for Australia).

5 If the legislation is required to start as soon as possible, it is typical to specify commencement by reference to the Royal Assent. Unless immediate commencement is imperative for policy reasons, OPC recommends commencement on the day *after* Royal Assent. This avoids any issues about retrospectivity on that part of the day of Royal Assent that elapses before Royal Assent is actually given.

6 If flexibility as to the timing of commencement is required, it is typical to use commencement by Proclamation. This allows commencement to be fixed once the necessary preparatory steps have been completed. Such steps might include:

- preparing legislative instruments;
- appointing staff;
- making IT changes;
- training officials;
- drafting delegations.

7 Whatever commencement option is chosen, instructors should be careful to ensure the option leaves enough time for any necessary preparatory steps to be undertaken.

8 Note that section 4 of the *Acts Interpretation Act 1901* allows for the exercise of powers (e.g. to make instruments or appointments) after the Royal Assent but before commencement. These powers can be exercised as soon as the Act has received the Royal Assent. The instruments or appointments will not take effect until the Act has actually commenced.

9 The period for making a Proclamation is usually 6 months. A longer period can be specified (rarely beyond 12 months), but will need to be justified in the explanatory memorandum. If no Proclamation is made before the end of the period, the usual default position is that the legislation commences automatically immediately after the end of the period.

10 If a Proclamation is needed, the instructing agency will need to prepare drafting instructions and send them to OPC. A Proclamation is a notifiable instrument and will need to be registered on the Federal Register of Legislation.

11 Proclamations can be made during the caretaker period for legislation that received the Royal Assent before the dissolution of Parliament, but such proclamations should not generally specify a commencement date that is after the date of the election.

12 If the legislation is dependent on some other legislation commencing, it is typical to specify commencement by reference to the commencement of that other legislation. An example would be a package of Bills that includes a main Bill and another Bill dealing with consequential and transitional matters. The commencement of the consequential and transitional Bill will be tied to commencement of the main Bill. Another example is contingent amendments, which are changes to the law that are required only if and when some other legislation commences.

13 Using a specified future date is risky because the timing of the Bill through Parliament is not guaranteed. If passage through Parliament takes longer than envisaged, the specified date could end up being *before* the Royal Assent to the Bill (resulting in retrospectivity, which can be problematic). Parliamentary amendments may be needed to change the commencement provision in some way.

14 Provisions that adversely affect rights or impose liabilities should not be given a retrospective commencement otherwise than in exceptional circumstances and with explicit policy authority. A retrospective commencement will need to be explained in the explanatory memorandum.

## Main commencement options for instruments

15 The commencement options for instruments are similar to Bills, but with a couple of different considerations. The main options for commencement are:

- on the day after the instrument is registered on the Federal Register of Legislation (if it is a legislative or notifiable instrument); or
- on a specified date; or
- in accordance with a commencement instrument; or
- on the commencement of a related piece of legislation; or
- on the happening of some other specified event (for example, when a treaty enters into force for Australia).

16 Legislative instruments need to be registered on the Register in order to be enforceable. This is why it is common for legislative instruments to commence on the day after registration. Unless there is a good reason to do so, commencement on the actual day of registration should be avoided. Such commencements can raise issues because the instrument technically has retrospective operation in the period between the start of the day on which it is registered and the actual time of registration on that day.

17 Commencement in accordance with a commencement instrument is very similar to a Proclamation commencement for Bills, except that the commencement instrument is not made by the Governor-General. If the commencement instrument relates to regulations, the power should be given to the relevant administering Minister. Otherwise, the power should be given to the maker of the instrument to which the commencement instrument relates. A commencement instrument is a notifiable instrument and will need to be registered on the Federal Register of Legislation.

18 Subsection 12(1A) of the *Legislation Act 2003* allows a legislative instrument or notifiable instrument to commence before it is registered (i.e. retrospective commencement). However, under subsection 12(2) of that Act, a provision of the instrument will not apply in relation to a person (other than the Commonwealth) to the extent that the commencement before registration results in:

(a) the person's rights being affected so as to disadvantage the person; or

(b) liabilities being imposed on the person in respect of anything done or omitted to be done before the date of registration.

19 The enabling Act for the legislative instrument or notifiable instrument can displace the operation of subsections 12(1A) or (2).

## Staggered commencements

20 Different parts of an Act or instrument can be given different commencements. If different parts of legislation are to be given different commencements, care needs to be taken to ensure that related provisions are not rendered unworkable by commencing at different times (for example, provisions creating offences relating to breaches of licence conditions should not commence before the provisions establishing the licensing scheme).

## More information

- *Drafting Direction 1.3—Commencement provisions*
- *Instructor Guidance Note—Application, saving and transitional provisions*
- *Guidance on Caretaker Conventions* available on the Department of the Prime Minister and Cabinet website