

# PARLIAMENTARY COUNSEL

## Drafting Direction No. 1.3A Simplified outlines

Note: This Drafting Direction contains references to the “head drafter”. It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC.

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## Part 1—Background

1 As part of OPC’s commitment to drafting clearer laws and Regulation Reform, we are continuing to look for ways to reduce the complexity of legislation and increase reader understanding.

2 While OPC is a recognised leader in this area, some legislation is still difficult for readers to understand. Therefore, we will continue to strive to make it easier to understand.

### ***Simplified outlines as aids to understanding***

3 Simplified outlines are one feature that can assist understanding.

4 Users of simplified outlines have indicated that simplified outlines are useful aids to understanding. The 2010 Legislation Users Survey commissioned by OPC found that the majority of respondents agreed this feature makes legislation easier to understand (86%) and easier to read (77%).

5 Courts have found them useful. For example, in the case of *Seven Cable Television Pty Ltd v Telstra Corp Ltd* [2000] FCA 350 a simplified outline was referred to in the reasons for judgement. The text of simplified outlines has also been included by courts in judgements by way of describing the relevant background legislation (e.g. *Allan v Transurban City Link Ltd* [2001] HCA 58) and when considering construction issues (e.g. *Gheko Holdings Pty Ltd v The Chief Executive Medicare* [2013] FCA 164).

6 Members of Parliament have also found simplified outlines useful. For example, the Senate Environment, Communications, Information Technology and the Arts Committee report on the original *Environment Protection and Biodiversity Conservation Bill 1998* commended “the use of these drafting mechanisms” and recommended that more be included in the Bill.

7 Including simplified outlines drafted in accordance with this Drafting Direction should assist OPC in achieving our aim of assisting people to understand legislation.

### ***Other aids to understanding***

8 Drafters are encouraged to raise with the head drafter any ideas they have for the adoption, improvement or standardisation of other aids to understanding.

## Part 2—Simplified outlines

### ***Which legislation should contain simplified outlines***

#### **New principal Acts**

9 Simplified outlines must be included in all Bills for new principal Acts, unless:

- (a) the Bill is an annual or special appropriation Bill; or
- (b) the Bill is a taxation imposition Bill; or
- (c) the Bill is intended to have no legal effect; or

- (d) the Bill is of an extremely technical nature and of interest only to specialists for a limited period (e.g. a validation Bill); or
- (e) First Parliamentary Counsel agrees that simplified outlines are not required.

### **Amending Bills**

10 Simplified outlines must not be included in the substantive provisions (as opposed to the text being inserted) of any Bills for amending Acts, unless First Parliamentary Counsel agrees otherwise.

11 When amending a principal Act that includes simplified outlines, drafters should ensure that the simplified outlines are updated to reflect those amendments.

12 Simplified outlines must also be included for a new Chapter or Part that is inserted into an existing principal Act that does not include simplified outlines, unless First Parliamentary Counsel agrees that it is not required.

13 Drafters are encouraged to “retro-fit” simplified outlines to principal Acts that they amend. Depending on the time available, the simplified outlines may be drafted for the whole Act or for specific units of the Act (e.g.: particular Chapters, Parts or Divisions).

### **Instruments**

14 There may be cases of instruments where it is considered that simplified outlines would be useful. This should be determined by drafters on a case-by-case basis.

15 Part of the difficulty with having simplified outlines for instruments is that:

- (a) some instruments do not have the complexity to warrant a simplified outline; and
- (b) an instrument may not have a structure that lends itself to having a useful simplified outline if the instrument is a collection of separate rules prescribed under a number of heads of powers from an Act.

16 However, there are many new instruments that would benefit from a simplified outline. Indeed, in some cases, the simplified outline could be useful in allowing the instrument to give context and information from the Act to help readers understand the significance of the provisions they are reading. In addition, frequently instruments include a provision entitled “Purpose of this [Part/Division]” which contains material similar to the kind of material that is included in simplified outlines. While this provision is generally used to allow the drafter to refer to the head of power, many drafters also use this provision to provide context for the provisions that follow.

17 The factors that a drafter should take into account in deciding whether the instrument would benefit from an outline would be whether the instrument is of sufficient complexity, and whether there is anything holistic that could be said about the instrument or a part of the instrument. When an instrument would benefit from a simplified outline, the starting position is to include a simplified outline.

18 It may be that in relation to simplified outlines for instruments a greater degree of flexibility is required for the units in relation to which the outlines are included. If a drafter would like to include simplified outline(s) in an instrument and is considering departing from the usual rules, the head drafter should be consulted.

### ***Content of simplified outlines***

#### **Aim of simplified outlines**

19 Our key aim of including a simplified outline for legislation is that each educated reader (whether with or without legal training or specialist knowledge) can easily gain a general understanding of what the legislation is about.

#### **Content to achieve aim**

20 Simplified outlines can provide many benefits to readers. For example, they can do the following:

- (a) assist readers to ascertain the relevancy of the legislation to their needs;
- (b) give readers key background knowledge (including key themes, issues and concepts and the relationship to other legislation) before substantive provisions are read;
- (c) give readers an overview of coming provisions and “prime” readers to find the intended meaning in the text;
- (d) make the structure of the legislation, sequence of events, nature of events and relationship of events clear to readers to permit faster movement through the legislation;
- (e) provide a helpful summary of the legislation and highlight key operative provisions;
- (f) assist a group of readers who might not be the main target group;
- (g) give guidance as to the contents of units of legislation if the other functions are not practicable.

21 Drafters should use their judgement when determining the content of simplified outlines. When exercising that judgement, drafters should ensure that the simplified outline achieves one or more of those benefits for readers. (A well-crafted simplified outline might achieve many of those benefits.) In all cases, drafters should consider whether the simplified outline is achieving the aim of assisting readers in gaining a general understanding of the legislation.

#### ***Two types of simplified outlines***

22 There are 2 types of simplified outlines—simplified outlines for key provisions and simplified outlines for machinery provisions (such as delegation powers, instrument making provisions etc.). The first type of simplified outline should contain more information for readers than the second, and below is some guidance to drafting those types of outlines.

23 Simplified outlines for key provisions should assist readers in working out whether those provisions are relevant to them. Because readers of legislation read for a purpose (whether that purpose is to find the answer to a specific question or to understand the overall scheme of the legislation), indicating relevancy allows readers to determine whether or not they need to read the text that follows, and so assists readers in easily gaining a general understanding of the legislation.

24 Wherever practicable, simplified outlines for key provisions should “tell a story”. The point of telling a story is to assist the reader in understanding and navigating through the provisions.

25 Opening with a “theme statement” that states in very general terms what the operative provisions are about can be very helpful. For example: “The Commonwealth may sell one-third of its equity interest in Telstra, but must retain the remaining two-thirds.”.

26 Drafters should note that the 2010 Legislation Users Survey commissioned by OPC indicated that if simplified outlines do not allude to exceptions, readers may be misled by the simplified outlines. Drafters should not feel obliged to spell out exceptions to rules. However, drafters should at least use words (e.g. “certain”, “most”, “broadly” and “generally”) that efficiently indicate the legislation contains further complexities.

27 Simplified outlines for key provisions should not be a mere repetition or expansion of the headings, nor a cursory statement of the content of the provisions. This is because readers can obtain that information from the table of contents and headings. For simplified outlines for key operative provisions to add value, they need to provide readers with additional information. For example, for a Part that has the heading “Information-gathering powers of the Commissioner”, the simplified outline for the Division should be in the form:

The Commissioner can gather information necessary to monitor registered entities’ compliance with certain provisions and to assess registered entities’ ongoing entitlement to registration.

not just:

This Part sets out the information-gathering powers of the Commissioner.

28 If drafters propose to include such simplified outlines for key provisions (as opposed to machinery provisions), they should raise this with the head drafter.

### **Content not to conflict with substantive provision(s)**

29 Drafters must bear in mind that section 13 of the *Acts Interpretation Act 1901* ensures (subject to a contrary intention) that simplified outlines within Acts are part of the Acts. This has been noted by the courts (e.g. *Gheko Holdings Pty Ltd v The Chief Executive Medicare* [2013] FCA 164). Paragraph 13(1)(a) of the *Legislation Act 2003* applies the *Acts Interpretation Act 1901* to legislative instruments, ensuring that simplified outlines within legislative instruments are part of the instruments.

30 Everything in a simplified outline must have a substantive provision underlying it, and drafters should check carefully to ensure that simplified outlines do not conflict with, or

detract from, substantive provisions. In particular, simplified outlines should never be used as quick fixes for poorly-drafted substantive provisions.

31 Drafters should not include provisions setting out the interpretive status of simplified outlines. However, drafters should ensure that the following standard drafter's note appears in drafts in which the drafter proposes to include a simplified outline:

*[Instructors: You should explain in the Explanatory Memorandum that, while simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.]*

### **Form, location and style of simplified outlines**

#### **Label to be “simplified outline”**

32 OPC has been using brief summary provisions of this type since 1991. In the past, we have used a variety of labels such as “Simplified outline”, “Guide”, “Simplified overview” and “Overview”.

33 For reasons of consistency and clarity only one label should be used in future: “simplified outline”. However, if a drafter is amending legislation that already labels each of these simplified outlines as something different (e.g. “Guide”), the drafter should maintain consistency within the legislation and continue to use that term.

34 A key reason for the use of “simplified outline” as a label is to emphasise to readers, including courts, that the outline represents a simplification of the relevant legislative scheme, which may be in the nature of a summary and may be incomplete.

#### **Required location(s) and coverage**

35 If simplified outline(s) are included in an Act, there should be a simplified outline for the whole of the Act. It does not need to contain all of the information that is included in later simplified outlines. However, it may be difficult to find anything particularly useful to say about an entire instrument even where simplified outlines for parts of the instrument may well be useful.

36 In addition to the simplified outline for an Act, there should also be simplified outlines for at least one level of unit in the Bill (i.e. Chapter/Part/Division). While drafters may decide which level of unit is to have a simplified outline, a simplified outline must then be included at that level throughout the Bill. For example, if it is decided to have simplified outlines for Parts, then every Part must have a simplified outline. However, this does not preclude drafters from including additional simplified outlines (e.g.: a simplified outline for a particular Division). A more flexible approach may be taken to simplified outlines in instruments.

37 The level at which simplified outlines should be included will vary between legislation and is a matter for judgement. Drafters who have any doubts about the level at which simplified outlines should be included should raise the matter with the head drafter.

### **Simplified outlines to be contained in sections**

38 Simplified outlines should be contained in sections. This facilitates the making of amendments and ensures that the heading “Simplified outline” appears in the Table of Contents.

39 The section should not be “floating”. For example, it should not be between a Part heading and Division heading. If a Part is divided into Divisions, the simplified outline must be in a Division even if this means that a Division needs to be included that only includes the simplified outline section.

### **Headings to be “Simplified outline of this ...”**

40 The standard form for section headings for simplified outlines is “Simplified outline of this [*Act/Chapter/Part/Division etc.*]” (not “simplified outline **to/for** this [*Act/Chapter/Part/Division etc.*]”).

41 If there is a separate Part or Division just for the simplified outline, its heading should be in the same form. However, the heading “Introduction” may be used if it is used consistently through the Act or instrument and some include material in addition to the simplified outline.

### **No precursor words**

42 In the past, some drafters have included words to the effect of “The following is a simplified outline of this Part”. In future, simplified outlines should not have precursor words between the section heading and the text of the simplified outline.

### **Standard formatting and styles**

43 Simplified outlines should always be in boxes using the simplified outline styles (see Word Note 4.1).

44 Dot points may be used for the primary level of text in simplified outlines, depending on the drafter’s judgement.

### **Reasonably brief length**

45 Simplified outlines should be reasonably brief.

46 It is expected that simplified outlines should be less than one page. However, the initial simplified outline for some legislation may need to be longer.

47 Drafters should use their judgement when determining the length of a simplified outline and are encouraged to discuss any uncertainty about whether a simplified outline is an acceptable length with the head drafter.

### **Less formal writing style**

48 The writing style for simplified outlines may be different from the writing style normally used for substantive provisions. For example drafters can do the following:

- (a) use a lighter or more conversational tone;

(b) use language that users of the legislation are likely to be very familiar with.

49 However, while drafters may have more freedom of language in simplified outlines, they should be mindful about the importance of consistency of language, particularly for defined terms. For example, it would not be appropriate to refer to a concept that is defined by using a term other than the defined term. If drafters find that the terminology used in the simplified outline is quite different from that used in the provisions (because, say, users are more likely to be familiar with that terminology), then they should consider changing the terminology used in the provisions.

50 Simplified outlines should never patronise, or be condescending to, readers.

### **Uncomplicated visual appearance**

51 Drafters should avoid making the text in simplified outlines appear complex. So, for example, simplified outlines should not include subparagraphs and large unbroken “chunks” of text.

52 You should also avoid the approach of a list of paragraphs starting with a reference to a provision, such as “Division 2 sets out ...”, “Section 10 deals with ...”.

### ***Relationship with other types of provisions***

#### **Definitions**

53 Sometimes defined terms are key components of legislative schemes and a vital part of the “story” that a simplified outline tells.

54 In these cases, drafters should ensure that the “defining” of the terms is done in substantive provisions, not in the simplified outlines. Similarly, other substantive material should not be included in the outline.

55 Drafters should not use any formatting devices to indicate that terms used in the simplified outlines are defined (e.g. asterisking, bold italicising). Wherever possible, drafters should avoid using formatting devices in these cases and instead rely on the narrative of the story, or conventions used very widely in the community.

56 Here are 3 examples of techniques that may be used:

Mining profit may be reduced by allowances for past losses, for the miner’s existing investments at 2 May 2010 (called a starting base allowance)...

An approved authority is the body to which recurrent funding under this Act is ultimately paid.

There are 2 types of copied State instruments—a copied State award and a copied State employment agreement.

## **Objects provisions**

57 As simplified outlines have a different role from objects provisions, it will be appropriate in some legislation to include both simplified outlines and objects provisions. (For an example see, the *Australian Charities and Not-for-profits Commission Act 2012*.)

58 It is more appropriate to include aspirational material in objects provisions than in simplified outlines.

59 Drafters should try to avoid using words like “object” and “purpose” in simplified outlines to assist in maintaining the distinction between the two types of provisions.

## ***Sufficient time for drafting simplified outlines***

60 It is very important that sufficient time is given for drafting simplified outlines. When discussing the timetable for drafting projects, drafters should raise this with instructors and ensure that enough time is allocated. If drafters find that there is insufficient time allocated or available for drafting simplified outlines, they should raise this with the head drafter.

## ***Review***

61 I am intending to continue to review the operation of this Drafting Direction. In particular, I am intending to consider any judicial, parliamentary and community comments on simplified outlines.

62 Drafters should raise with me any information that may assist in that review, and any other matters that they think the review could usefully cover.

Peter Quiggin PSM  
First Parliamentary Counsel  
1 November 2016

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## Attachment A—Sample simplified outlines

This attachment contains examples of simplified outlines using the new styles. The examples are intended to give an indication of the approach that can be used.

Note: The text of some of the examples has been modified slightly from the originally enacted provisions to ensure the examples comply with this Drafting Direction, including by applying new styles.

### **Sample of a simplified outline of an Act**

*Safe Work Australia Act 2008 [section heading of sample altered]*

#### **3 Simplified outline of this Act**

This Act creates a body called Safe Work Australia to improve occupational health and safety outcomes and workers' compensation arrangements in Australia.

Safe Work Australia mainly consists of members who represent the Commonwealth, the States, the Territories, workers and employers (see section 10).

It has various functions relating to occupational health and safety and workers' compensation (see section 6). For example, one of its functions is to prepare model OHS legislation for adoption as a law of the Commonwealth, each of the States and each of the Territories.

The Ministerial Council (a body that consists of Ministers from the Commonwealth, States and Territories) has some oversight of Safe Work Australia's activities. For example, the Council considers whether to approve the model OHS legislation that Safe Work Australia has prepared.

Safe Work Australia has a CEO who is responsible for its administration and for assisting it to perform its functions. It is also assisted by its staff, its committees and others.

### **Samples of simplified outlines for significant Parts and Divisions of Acts**

*Fair Work Act 2009 [section heading of sample altered]*

#### **768AF Simplified outline of this Division**

If there is a transfer of business, then this Division provides for certain terms and conditions of a transferring employee's employment with the old State employer to be transferred to the employment with the new employer.

The transfer of those terms and conditions is achieved by creating a new instrument—called a “copied State instrument”—for the transferring employee. The new instrument is a federal instrument that is enforceable under this Act.

There are 2 types of copied State instruments—a copied State award and a copied State employment agreement.

A copied State award copies the terms of a State award that covered the transferring employee and the old State employer immediately before the termination of the employee's employment with the old State employer.

A copied State employment agreement copies the terms of a State employment agreement that covered the transferring employee and the old State employer immediately before the termination of the employee's employment with the old State employer.

*Paid Parental Leave Act 2010 [section heading of sample altered]*

## **7 Simplified outline of this Part**

This Part has the key provisions for this Chapter (which deals with when parental leave pay is payable to a person).

A person can only be paid parental leave pay if the Secretary makes a determination that parental leave pay is payable to the person. Part 2-2 has the rules about when the Secretary can make that determination.

The Secretary cannot make that determination if the person has not made a claim for parental leave pay. Part 2-4 has the rules about claims. There are 3 types of claims: a primary claim, a secondary claim and (in rare cases) a tertiary claim. These claims relate to each other, although the primary claim is the main one—a secondary or tertiary claim cannot be made without it. The primary claim will often be the only claim that is made.

If the Secretary makes a determination that parental leave pay is payable to a person for a child, the parental leave pay is payable for the particular period that is specified in the determination. This period is the person's PPL period. The maximum period for which any person may be paid parental leave pay is 18 weeks. A person's PPL period may be the full 18 weeks or a lesser period (e.g. where the person is not eligible for parental leave pay for that full period).

If a secondary or tertiary claim is made, that claim will be for the part of the maximum 18 week period (or lesser period) in which parental leave pay was not payable to the primary claimant. The person's employer or the Secretary will pay instalments of parental leave pay for that period (see Chapter 3 for the rules about how the person is paid parental leave pay).

*Australian Education Bill 2013 [section heading of sample altered]*

## **71 Simplified outline of this Part**

The Minister approves approved authorities, block grant authorities and non-government representative bodies under this Part.

An approved authority is the body to which recurrent funding under this Act is ultimately paid. For government schools, the approved authority is the relevant State or Territory. For a non-government school, the approved authority is the body corporate approved by the Minister for the school.

A block grant authority is one of the bodies to which capital funding may ultimately be paid under subsection 67(1), and is the body to which capital funding is ultimately paid under subsection 67(2). A body can be a block grant authority only for non-government schools.

A non-government representative body for a non-government school represents the interests of the approved authority for the school. A non-government representative body is the body to which funding under section 70 is ultimately paid.

An approved authority, block grant authority or non-government representative body must satisfy basic requirements (such as being fit and proper), as well as ongoing requirements (such as requirements relating to dealing with financial assistance and providing information).

*Trade Practices Act 1974 as in force in 2000 [section heading of sample altered]*

### **152AA Simplified outline of this Part**

- This Part sets out a telecommunications access regime.
- The Commission may declare carriage services and related services to be declared services.
- Carriers and carriage service providers who provide declared services are required to comply with standard access obligations in relation to those services.
- The standard access obligations facilitate the provision of access to declared services by service providers in order that service providers can provide carriage services and/or content services.
- The terms and conditions on which carriers and carriage service providers are required to comply with the standard access obligations are subject to agreement.
- If agreement cannot be reached, but the carrier or carriage service provider has given an access undertaking, the terms and conditions are as set out in the access undertaking.
- If agreement cannot be reached, but no access undertaking is in operation, the terms and conditions are to be determined by the Commission acting as an arbitrator.
- An access undertaking may adopt the terms and conditions set out in a telecommunications access code.
- The Commission may conduct an arbitration of a dispute about access to declared services. The Commission's determination on the arbitration must not be inconsistent with the standard access obligations or an access undertaking.
- The Commission may register agreements about access to declared services.
- A carrier, carriage service provider or related body must not prevent or hinder access to a declared service.

### ***Sample of a simplified outline of a machinery Part***

*Fair Work Act 2009 [section heading of sample altered]*

## 790 Simplified outline of this Part

This Part deals with miscellaneous matters, such as delegations and regulations.

### ***Sample of a simplified outline of an instrument***

*Excise Regulation 2015*

#### **5 Simplified outline of this instrument**

This instrument complements the *Excise Act 1901* (the Act) by prescribing matters relating to excise.

Section 78 of the Act sets up a framework for the remission, rebate and refund of excise duty. Part 2 of this instrument provides details of that framework, including the circumstances in which a remission, rebate or refund of excise duty may be made, and the amount of the remission, rebate or refund.

Section 79 of the Act deals with drawback of excise duty. Part 3 of this instrument provides when drawback is, and is not, payable. The Part also prescribes the conditions to which the payment of drawback is subject.

Part 4 of this instrument prescribes matters relating to particular goods, including tobacco leaf, LPG, compressed natural gas, stabilised crude petroleum oil and condensate. These matters relate to delivery, the amount of a penalty under the Act, notices, and the conversion of measurements.

Sections 61D and 61E of the Act set up a framework for permitting excisable goods sold in an outwards duty free shop, or an inwards duty free shop, to be delivered to, and exported by, relevant travellers. Part 5 of this instrument provides details of that framework, including the circumstances in which permission may be given or revoked, and conditions to which a permission is subject.

Part 6 of this instrument prescribes which ship's stores are liable to excise duty, and the manner in which samples of material and goods are to be taken. This Part also deals with what happens with a security if the CEO obtains judgment against a person in legal proceedings about the security.

This instrument replaces the *Excise Regulations 1925*. Part 7 provides transitional arrangements for the replacement of those regulations by this instrument.

### ***Sample of a simplified outline of a significant Part of an instrument***

*Excise Regulation 2015*

#### **7 Simplified outline of this Part**

This Part deals with the remission, rebate or refund of excise duty under the Act.

The CEO may make a remission, rebate or refund of excise duty in particular circumstances, which are set out in Division 2 and Schedule 1.

Some of these circumstances require an application to be made for the remission, rebate or refund. The application must satisfy particular requirements, including being in the approved form. The CEO may require the applicant to provide records or give further information so that the CEO can verify that a circumstance applies. Some applications must be given to the CEO within a particular period.

The amount of a remission, rebate or refund of excise duty that may be made for a particular circumstance is set out in Division 4. The amount of a rebate or refund payable to a person may be set off against the whole, or part, of the person's liability for excise duty.