

PARLIAMENTARY COUNSEL

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

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—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 (e.g. 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 1(a) and (b). Part 3 deals with agreements covered by paragraphs 1(c) and (d).

Part 2—International agreements (e.g. treaties and conventions)

Role of Parliament

3 Legislation 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 the head drafter.

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*.

Note: The report provides (in part):

The Committee takes the view that the Parliament is responsible for determining when laws are to come into force and has consistently opposed the inclusion in legislation of open-ended proclamation provisions. The commencement provisions in these bills have all the hallmarks of open-ended proclamation provisions. They provide for commencement on the date of an ‘uncertain event’ without providing the means for determining conclusively that the event has not occurred or will not occur. The choice of the date of commencement is delegated by the Parliament to the Executive, without limitation.

...

The Committee does not see why legislation implementing international treaty obligations should be treated differently from any other legislation susceptible to delay, namely, by including a date (or period) after which the legislation must commence or be taken to be repealed and providing an explanation where a particular date (or period) represents a significant delay in commencement. . . .

Identifying international agreements

6 There can be no mistake about identifying the agreement if the text of it is included in the legislation. 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 usually that instrument will not be available. If it is not, you should use the copy of the text available in the Australian Treaties Library at www.austlii.edu.au. If you need a printer-friendly copy of the text, contact the Treaties Secretariat at the Department of Foreign Affairs and Trade (**DFAT**) on 6261 3072. If in doubt about whether the copy that is made available to you is adequate, you should consult the head drafter.

7 As discussed above, setting out the text of an agreement in a Schedule can involve a lot of work in obtaining the authoritative text of the treaty, formatting it and checking it, even though it is convenient for the reader. Since international agreements are now ordinarily available on the internet, it is probably less important for legislation to include the text of agreements. Word Note 4.3 deals with the formatting of agreements.

8 However, if the text of the agreement is not included in the legislation, 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 Office of International Law (**OIL**) has advised that when giving the place and date the agreement was made it is acceptable to use the description “done at [place] on [date]” as long as this sufficiently identifies the agreement. Cases in which a drafter considers that this form of description is not appropriate for a particular agreement should be discussed with OIL.

10 The description “done at [place] on [date]” should refer to the place and date at which the agreement was adopted and not the place and date that the agreement opened for signature. You should be aware that the introductory text at the start of a particular Australian Treaty Series number may refer to the place and date that the agreement opened for signature.

11 The legislation should include a note informing readers where to find the text of the agreement. The note should comply with Part 7 of Drafting Direction 2.2 as illustrated by the examples below. The note can be inserted using the Standard Provisions macro, which can be run using the shortcut Alt+N.

Finding the text of an agreement that is in force

12 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 website; or
- (b) by using the Australian Treaties Library, to which DFAT's website also has a link, on www.austlii.edu.au.

13 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 Convention is in Australian Treaty Series 1997 No. 21 ([1997] ATS 21) and could in 2013 be viewed in the Australian Treaties Library on the AustLII website (<https://www.austlii.edu.au>).

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

14 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:

Treaty means the Arms Trade Treaty done at New York on 2 April 2013.

Note: The Treaty could in 2013 be viewed in the Australian Treaties Library on the AustLII website (<https://www.austlii.edu.au>).

With or without amendments?

15 It is obviously a policy issue whether legislation should (as far as possible) give effect to an agreement:

- (a) as in force at a particular time; or
- (b) as in force from time to time; or
- (c) with only those amendments that are explicitly identified or endorsed in a particular way.

16 If an international agreement (whether bilateral or multilateral) is to be implemented as in force from time to time, it should be identified consistently with the following example:

Agreement means the Agreement on an International Energy Program done at Paris on 18 November 1974, as in force for Australia from time to time.

Note: The Agreement is in Australian Treaty Series 1979 No. 7 ([1979] ATS 7) and could in 2018 be viewed in the Australian Treaties Library on the AustLII website (<https://www.austlii.edu.au>).

17 Commonwealth subordinate legislation generally cannot automatically give effect to an agreement as in force from time to time by applying, adopting or incorporating the agreement, because of subsection 14(2) of the *Legislation Act 2003*.

18 For an example of a provision giving effect to an agreement with only those amendments that are explicitly identified or endorsed in a particular way, see the definition of **IMF loan agreement 2016** in section 3 of the *International Monetary Agreements Act 1947*.

Part 3—Domestic agreements and agreements with private parties

Authority to enter these kinds of agreements

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

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

21 If you include an authorising provision in a draft, 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

22 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). You should discuss with your instructors what appropriation is to be relied on to authorise the payments. It may be necessary to include in the Bill an express appropriation for payments to be made under the agreement.

23 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

24 Generally, if legislation 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

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

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

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Document History		
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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 8 of 2005.