PARLIAMENTARY COUNSEL

Drafting Direction No. 3.2
Taxation

Document release 1.1

Reissued May 2013

Contents

Part 1—House of introduction for Bills dealing with taxation or amending Acts that deal with taxation

1 In 2004 I had a discussion with the office of the Clerk of the Senate on the issue of the House of introduction for Bills that deal with taxation. ***Taxation*** in this context includes income tax, GST, fringe benefits tax, duties of customs, duties of excise and any other levies or charges that are imposed as taxes.

2 As a result of that discussion, all Bills that deal with taxation, or that amend Acts that deal with taxation, should be introduced in the House of Representatives.

3 This is to avoid possible difficulties that might arise because of varying interpretations of the prohibition in section 53 of the Constitution that Bills imposing taxation "shall not originate in the Senate".

4 Some Bills will deal with taxation only incidentally, or amend Acts that deal with taxation only incidentally. (For example, a Bill might amend an Act that contains a single provision authorising the collection of a tax by a statutory authority). It is unlikely, on any interpretation, that such a Bill would be regarded as a Bill imposing taxation that should not originate in the Senate. However, because it is difficult to draw a clear distinction between these kinds of Bills and others, please see me if:

(a) your instructors ask that such a Bill be introduced in the Senate; or

(b) your instructors ask that any other Bill dealing with taxation, or amending an Act dealing with taxation, be introduced in the Senate.

Part 2—Obtaining notices for Bills dealing with taxation

5 House of Representatives Standing Order 178 provides that a Minister may present without notice a Bill dealing with taxation. The reason given for the Standing Order in the House of Representatives Practice is "to protect the revenue by not giving advance notice of the Government's intention".

6 You should interpret the Standing Order in such a way that only Bills that deal substantially with taxation matters are introduced without notice. Bills dealing incidentally with taxation matters should be introduced on notice. This interpretation is consistent with the approach adopted by the House of Representatives and with the reason given for the Standing Order.

Part 3—Taxation to be imposed by express words

7 Taxation should be imposed by express words, for example:

- "Tax is imposed in respect of the fringe benefits taxable amount of an employer of a year of tax."
- "Levy is imposed on the export of leviable products."
- "Charge is imposed on the production of eligible tobacco products."

8 There is no constitutional requirement for taxation to be imposed by express words. This instruction is issued to ensure consistency of approach.

Part 4—When to structure provisions as provisions imposing tax

Background

9 During the Budget Sittings in 1993, the Senate took a close interest in the operation of section 55 of the Constitution and, in particular, in the meaning of the phrase "laws imposing taxation". In the course of the Senate's consideration of these matters, the Chief General Counsel produced several important opinions (opinion dated 30 August 1993, volume 95 at page 4484 and opinion dated 21 September 1993, volume 95 at page 4928). The Senate Standing Committee on Legal and Constitutional Affairs also produced 2 relevant reports.

10 In the end, decisions made during the Budget Sittings on the form of the Taxation (Deficit Reduction) Bills were based mainly on parliamentary rather than legal considerations. Since then Bills have mainly been structured following our pre-Budget Sittings practice rather than in reliance on the Chief General Counsel's views.

11 A Deficit Reduction "test Bill" was constructed so as to raise directly the legal issue on which the Chief General Counsel was at odds with some other witnesses before the Senate Committee. It was hoped (although not expected) that the Bill, when enacted, would be challenged in the High Court, and that the case would provide a definitive resolution of that legal issue. No challenge was made. Another Act, which was identified during the Committee proceedings as raising the same legal issue (*Taxation Laws Amendment (Superannuation) Act 1993*), was also not challenged.

12 In May 1993, the Parliamentary Business Committee considered a memorandum seeking guidance about future approaches to the drafting of taxing legislation. In light of that decision, Drafting Direction No. 9 of 1994 was issued (the content of which is now covered by paragraphs 15 to 28 of this Drafting Direction).

13 On 12 November 2004, the High Court handed down the decision in *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Victoria)* [2004] HCA 53. The initial view of AGS is that the decision means that section 55 of the Constitution does not prevent the Commonwealth from combining provisions that impose taxation with, at least, provisions for the assessment, collection and recovery of tax.

14 However, OPC has not asked AGS for advice on the effect of the decision and my view is that the approaches set out below should continue to be followed. This applies not just to Treasury revenue legislation, but other forms of taxation such as charges imposed on various forms of licences and primary industry levies.

Provisions increasing rates

15 Where a Bill contains provisions increasing formal rates of tax (rather than effective rates of tax), the Bill should be structured as if it were a law imposing taxation for the purposes of section 55 of the Constitution and should not contain provisions that would cause it to breach section 55. This applies whether the rates are set out in the imposition Act or in another Act.

16 This approach also applies to:

- provisions increasing the maximum rates of taxes (this is likely to be relevant to such things as primary industry levy Acts which often set maximum rates of levy but allow the actual rate of levy to be set from time to time by subordinate instrument); and

- provisions abandoning tiered levy rates in favour of a single maximum levy that is greater than at least one of the tiered levy rates.

Provisions that move an item from a "low rate" category of taxable items to a "high rate" category of taxable items

17 There is some suggestion that the proponents of the "narrower" view (as described in the Chief General Counsel's opinion dated 21 September 1993) would view as an imposition of tax an amendment that re-categorised an item so that it became subject to a higher rate of tax than before the amendment.

18 A drafter who is asked to draft such an amendment should seek advice from the Office of General Counsel before including such an amendment in a Bill also dealing with matters other than the imposition of tax. That request for advice should canvass the suggestion mentioned above.

Provisions that reduce rates of tax

19 In general, provisions that reduce formal rates of tax or effective rates of tax should be treated as not imposing taxation.

Packages of provisions

20 A package of provisions that resulted in previously exempt income being taxed at a rate lower than non-exempt income was challenged in the Parliament during the Budget Sittings of 1993 on the ground that it amounted to an imposition of tax. The package consisted of 2 provisions, neither of which by itself would have fallen foul of the "narrower view". The provisions were:

- a provision removing a tax exemption from certain credit union income, which by itself would have subjected the income to tax at a 33% rate; and

- provision providing that the tax rate for that income should be 20% instead of 33%.

After some complicated procedural manoeuvring, the Bill was passed intact.

21 Packages of this type should in general be treated as not imposing tax. However drafters should be aware of this issue, and should take appropriate action if the issue arises in a context which is otherwise politically sensitive. This action might include raising the issue with instructors and structuring the provisions so as to avoid any similar argument being raised.

Provisions that expand the tax base etc.

22 Generally, provisions of amending Bills that (without changing formal rates) expand liability for an existing tax should be treated as not imposing taxation (whether they are amendments of an imposition Act or another Act such as an assessment Act or levy collection Act). These provisions will include:

- provisions removing tax exemptions;
- provisions removing or reducing tax rebates;
- provisions expanding a taxable amount (eg by extending the range of fringe benefits whose value is to be included in the amount subject to tax).

These provisions may be included in Bills other than those that impose a different "subject of taxation".

23 It is, however, possible for an amending Bill that expands a tax base to result in an imposition of tax. As a result of the decision in *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, in applying section 55 the text of the principal Act must be considered as if it had been validly amended by the amending Act. For example, the second paragraph would be contravened if the amending Bill attempted to amend the Income Tax Assessment Act by including in taxable income the price of Australian-made goods sold by the taxpayer, because the result would be the imposition of income tax and an excise (see the Chief General Counsel's opinion dated 30 August 1993).

24 The Attorney-General's Department has also advised that the first paragraph of section 55 may be contravened by amendments expanding the tax base to include matters *not falling within the general nature or description of the original tax, but not constituting a separate subject of taxation* (whatever this means). It appears that the more narrow the description of the tax base, the more it is likely for the amending Bill to result in an imposition of tax. If there is any doubt, advice should be sought from AGS.

25 If an amending Bill expands a tax base to result in the imposition of tax, the imposition provisions of the imposition Act should also be repealed and re-enacted. The re-enacting Bill will be a Bill imposing tax.

New taxes

26 Some members of the Senate Committees, and many of the witnesses before those committees, took the view that setting the rates is an integral part of imposing a tax. As indicated in the opinions mentioned above, the Chief General Counsel disagrees with this approach.

27 However, schemes involving the imposition of a new tax should generally ensure that the rates of tax are set out in the imposition Act or, if appropriate, in a separate rates Act rather than in the assessment or collection Act.

28 Schemes in which a single Act sets out a rate (or set of rates) applicable to several different taxes (most commonly involving taxes on goods which are imposed as customs, excise and general taxes) should be avoided for the time being. If (contrary to the views of

the Chief General Counsel) the setting of rates is part of imposing tax, then such a scheme would involve a single rates Act "imposing" tax on 2 or more different subjects of taxation, resulting in the invalidity of the whole Act.

General

29 The matters dealt with in this Part are complex, and it is not possible to give clear guidance on all the possible cases. Drafters should not hesitate to seek advice, either within OPC or from AGS, on issues that they have trouble resolving on the basis of this Part.

30 I would be grateful if drafters would draw to my attention to any AGS advice they receive (or become aware of) that takes any of these matters further.

Part 5—Application of amendments relevant to the making of assessments of income tax and fringe benefits tax

Object of Part

31 The object of this Part is to tell drafters about the need for application provisions for amendments relevant to the making of assessments of income tax and fringe benefits tax (***FBT***).

Why application provisions are needed

32 Assessments can be made at any time in relation to any income tax income year or any FBT year of tax.

33 Application provisions are the best way of clearly establishing which version of the tax law is applicable to the assessment.

34 Application provisions ensure that the correct "old" version of the law remains in force, and can be applied, in making a "prior year" assessment or in making some other assessment dealing with matters to which the "new" law does not apply.

Kind of application provisions

35 As a general rule, amendments relevant to the making of assessments of income tax and FBT should be made applicable to specified matters.

36 The following are examples of the application of such amendments:

Item	Topic of amendment:	Amendment applies to:
1.	Income tax deduction for expenditure incurred by a taxpayer	expenditure incurred after 12 March 2006
2.	Inclusion of an amount in a taxpayer's assessable income for income tax purposes	assessments for the 2006-07 income year and later income years
3.	Income tax rebate for dividend payment	a dividend paid by a company after 31 December 2006
4.	Method of working out depreciation	a depreciating asset acquired under a contract entered into after 30 June 2006
5.	Exemption of income from income tax	income derived on or after 1 July 2006

6.	Valuation of fringe benefit for FBT purposes	benefits provided on or after 1 April 2006

37 The matter specified in an application provision should generally not consist solely of a time or date. For example, you should generally not draft an application provision in the form "The amendments made by this Part apply on and after 1 July 2006". You should discuss with First Parliamentary Counsel any application provision consisting solely of a time or date.

38 The issue of application is distinct from that of commencement (see paragraphs 49 to 51).

When application provisions are not needed

39 Application provisions are not needed if the amendments remove a feature of the tax law that has not been, and never will be, applied in making any assessments. For example, in 1991, the 1995 cut-off for the research and development tax concessions was removed so that the concessions became a permanent feature of the income tax law. The 1995 cut-off will never be applied in making any assessment.

Application provisions—repeal of redundant provisions

40 If you repeal a redundant provision, you should discuss with Treasury whether there is a need to include any application or saving provision and, if so, the nature of such a provision.

Application provisions—insertion of new provisions

41 Every new provision being inserted should normally be covered by an express application provision.

42 The application provision can be:

(a) "built into" the provision; or

(b) included in a separate provision of the amending Act eg "The amendments made by this Schedule apply to assessments for the 2006-07 income year and later income years"; or

(c) for income tax—included in the *Income Tax (Transitional Provisions) Act 1997* in accordance with Drafting Direction 1.8.

Application provisions—repeals/omissions

43 Every repeal or omission should normally be covered by an express application provision in the amending Act eg "The repeal of section ** of the *Income Tax Assessment Act 1997* by this Part applies in relation to income derived on or after 1 July 2006".

44 Sometimes, it may be easier to deal with the application of a repeal/omission by using a "savings" form eg "Despite the repeal of sections ** and ** of the *Income Tax Assessment Act 1997* by this Part, those sections continue to apply, in relation to property acquired under a contract entered into before 1 July 2006, as if those repeals had not happened".

Application provisions—combinations of repeals/omissions and insertion of new provisions

45 Sometimes, application provisions for repeals/omissions and insertions can be combined eg "The amendments made by items ** and ** apply to expenditure incurred after 20 August 2006".

Income tax—substituted accounting periods

46 In considering how to draft income tax application provisions, you should be aware that an income year may be either a financial year or a substituted accounting period (see the definition of ***income year*** in section 995-1 of the *Income Tax Assessment Act 1997*).

47 You should use the "double-year" style of referring to an income year eg "2006-07 income year".

48 For application provisions that refer to income years, you should discuss with Treasury whether any special provisions are required for persons with substituted accounting periods (both "early balancers" and "late balancers").

Commencement

49 Generally speaking, the existence of application provisions means that the timing of the formal commencement date (ie the date on which the legal text is physically altered) is unimportant.

50 However, for reasons of convenience and simplicity, Royal Assent or the day after Royal Assent is the preferred formal commencement date.

51 A retrospectively applied amendment does not usually require a retrospective formal commencement date.

Part 6—Initiation of taxation proposals

52 House of Representatives Standing Order 179 provides as follows.

(a) Only *a Minister* may initiate a proposal to impose, increase, or decrease a tax or duty, or change the scope of any charge. (my italics)

(b) Only *a Minister* may move an amendment to the proposal which increases or extends the scope of the charge proposed beyond the total already existing under any Act of Parliament. (my italics)

(c) A *Member who is not a Minister* may move an amendment to the proposal which does not increase or extend the scope of the charge proposed beyond the total already existing under any Act of Parliament. (my italics)

53 If instructors suggest a course of action that might offend against the Standing Order, you should draw their attention to the Standing Order and House of Representatives Practice.

Peter Quiggin
First Parliamentary Counsel
1 May 2013

Document History

Release	Release date	Document number
1.0	1 May 2006	s06pf337.v01.doc
1.1	1 May 2013	s06pf337.v06.doc

Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 18 of 2005 and Drafting Direction No. 14 of 1993.