

# Shaping policy into law: A strategy for developing common standards<sup>1</sup>



**Nick Horn<sup>2</sup>**

## 1 Introduction

I am honoured to have the opportunity to give a presentation half way around the world at this first Africa Regional meeting of the Commonwealth Association of Legislative Counsel. I feel humbled to be sharing a platform with such distinguished speakers, but I hope I may offer a modest contribution to the discussion at the conference on the topic of drafting standards.

Today I will discuss the interaction between policy and legislative drafting. First I will make a few remarks on the general topic of the proper role of the legislative drafter. Then I will introduce a working tool refined in my office—the “legislative plan” or blueprint—by which drafters are encouraged to work with instructors in the development of their policy for new legislation. Finally, I propose a more structured way in which this tool might be put to use to reinforce a uniform approach to the legislative drafting task, at least as it is undertaken in most Commonwealth countries.

It may surprise you to hear that the poet T. S. Eliot wrote about the relationship between policy and law. He took a very bleak view:<sup>3</sup>

Between the idea  
And the reality  
Between the motion  
And the act  
Falls the Shadow

Today I will be reflecting more positively (I hope) on the capacity of the drafter and instructor together to find a passage across the shadowy territory between the policy “idea” and the “reality” of the drafted law; between the “motion” expressed in drafting instructions and the “act” of parliament.

## 2 The role of the legislative drafter

It would appear from most of the literature in the Commonwealth drafting tradition that drafting technique consists mostly in finding the *right words*, and putting them in the *right order*.<sup>4</sup> Many of us were introduced

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<sup>1</sup> Originally presented by Nick Horn at the CALC Africa Region Conference Abuja, Nigeria, 6-8 April 2010.

<sup>2</sup> Senior Assistant Parliamentary Counsel, Office of Parliamentary Counsel, Australia.

<sup>3</sup> T. S. Eliot, “The Hollow Men”, lines 72-76, *Selected Poems*, Faber 1954-1961 p 80.

at an early age to Coode's rule on the ordering of the legislative sentence. In Australia, at least, and I suspect in many other places in the Commonwealth where drafters are trained through an apprenticeship system, we have absorbed from our senior drafting masters, and from our local statute book, not only Coode's seminal analysis, but also the drafting principles of Sir Henry Thring, Sir Courtenay Ilbert and Sir Alison Russell (albeit perhaps unconscious of the origin of these principles). To a significant extent, modern textbook writers on the subject, led by Elmer Driedger and Garth Thornton, have continued this emphasis on the centrality of language to drafting technique. The latter-day proponents of plain English legislative drafting have continued this tradition. If I may sum up the received wisdom, it is that the drafter's expertise is the ability to deploy the English language to write effective legal rules with clarity and force.

Yet legislative words do not occupy empty air. They are the tokens for concepts that represent government policy. The policy comes first. A drafter's first and most crucial task (and probably the more difficult job) is not to *draft*, but to *shape policy* into a form that can be drafted as law. As Professor Ann Seidman—who I am pleased to see will be presenting a paper at this conference—writes (with her co-authors Professor Robert B. Seidman and Nalin Abeysekere) in *Legislative Drafting for Social and Democratic Change* (Kluwer, 2001):

Between 'policy' and 'legislation', open spaces exist. Just as an architect creatively helps to fill in the open spaces between 'house' and the plans and specifications for building it, so a drafter creatively contributes to filling in the open spaces between a policy and the law that aims to put that policy into effect. (27)

Words are not enough. The communication of a given policy is not enough. As these authors argue, the Commonwealth drafting tradition unduly restricts the role of the drafter to that of wordsmith. They advocate a much more significant role for the drafter, as an agent of social change. A "communication" model (for which Thornton is their paradigm) is unfavourably counterposed against a "translation" model of drafting, as advocated by the authors. As a translator, the legislative drafter must apply "reason informed by experience" to *translate* policy into "transformatory" laws that beneficially modify behaviours on a significant scale; laws that can contribute to the social and democratic change of their text's title.

This ideal is especially difficult to achieve in countries with the legacy of the Commonwealth tradition because of fixed institutional roles and administrative history that require division rather than integration of policy and drafting. Some of the work the authors assign to the drafter—in particular the preparation of a reasoned and evidence-based "research report" for any significant legislative reform—is more properly the responsibility of public policy officials in many countries. Seidman et al are critical of such compartmentalising of the drafting process, tracing its origins to a bureaucratic compromise reached as part of the centralising of legislative drafting under Henry Thring (later Sir Henry) in 1869 (30). But to this day, more than ever it remains a fact of life.

Although in Australia and elsewhere in the Commonwealth the division between "drafter" and "instructor" undoubtedly confines the drafter's role in formulating transformatory laws, I take my starting point for this talk from the more profound reality, as the authors state, that:

...whoever writes out a law's detailed provisions inevitably serves not merely as a communicator, but as a participant in the process of determining the policy's operational content. That reality exists because form and content remain inextricably linked. (26)

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<sup>4</sup> For an excellent survey of the literature, see Spring Yuen Ching Fung and Anthony Watson-Brown, "Traditional Drafting in Common Law Jurisdictions", *Statute Law Review* (1995) 16.3, pp 167-186.

Since the form of the drafter's translation (into law) determines the law's policy content, the drafter must take proper responsibility for policy as well as formal technical matters (in order to bridge the gap between the "motion" and the "act"). The drafter, intent on wordsmithing, who declines to take an active role in shaping policy, runs the risk of drafting beautifully expressed laws that are not fit for purpose. The use of the planning technique that I will now go to describe can help us towards the goal of ensuring that our *belles lettres* are as effective as they can be in achieving the policy objectives of our legislatures and governments.

### 3 A useful tool for shaping policy into law<sup>5</sup>

I want to introduce to you today a particular tool that the Australian Office of Parliamentary Counsel ("OPC") has developed to encourage drafters to be aware of their role as policy translators, and to manage the day-to-day process of working in collaboration with instructors in refining policy. This is a working document known as a "drafting plan" or "blueprint". Particularly at the earlier stages of a drafting project, this is seen as assisting the members of the drafting and instructing teams to tackle their task at a conceptual level before a commitment is made to a particular drafting form or approach.

Many of you will be familiar with the checklist of matters to be considered by the drafter as listed by Mr Justice VCRC Crabbe.<sup>6</sup> This covers such important matters as defining the problem to be addressed, establishing the policy objective, locating evidence and research on which the policy proposal is based, setting out the state of the law and constitutional issues. The OPC legislative planning tool enables the drafter to canvass these issues in consultation with the instructing team, in an iterative way, in order to further refine the policy proposal and possible drafting approaches.

An approach known as "drafting from a blueprint" was developed in OPC starting in 1991, as the brainchild of one of our most innovative drafters, Adrian van Wierst. Over the last decade it has become generally used by most OPC drafters, at least for medium- to large-scale projects. In its original conception, the bulk of the drafting process is taken up with developing the "blueprint" in collaboration with the instructors to the stage where drafting and settling a Bill based on its concepts becomes a relatively simple exercise. In practice, most drafters (myself included) would generally start to draft the Bill proper at an earlier stage than this. However, this does not take away from the main advantage of this approach, which is to focus on what the real problem to be solved is, and the development of a sound and simple solution to the problem at the conceptual level. This is still a valuable achievement even if many details remain to be sorted out in the drafting phase.

Attachment A sets out a hypothetical OPC Plan for the "Social Welfare Benefits Amendment Bill 2010". The cover page of the Plan is used to record basic background information in an accessible way, including contact details, details of government authority and priority and timelines.

The Plan itself is set out in a table. We have found that the tabular format is very convenient for enabling topics, amendments/rules and comments to be visually correlated. As the Plan is to be used as a vehicle for communication, it is most important that it be as accessible as possible. Also, since instructions generally come in narrative form, the table gives the drafter the opportunity (and challenge) of "shaping" the instructions into a form more susceptible of being translated into legal rules, and that may bring out aspects of the instructions not immediately apparent in the narrative format. In particular, the change of format enables the drafter to convey a bird's-eye view of the instructions, and to start to apply appropriate logical principles to the organisation of the material.

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<sup>5</sup> This section of the presentation draws significantly on a paper prepared by my colleague Louise Finucane, and another by Adrian van Wierst (a former OPC drafter). Attachment A is based on an example prepared by Louise Finucane.

<sup>6</sup> *Legislative Drafting: Volume 1*, Cavendish 1993 rpt 1998. See Appendix C, "Tin tacks for Parliamentary Counsel" (adapted from Reede Dickerson, *Materials on Legal Drafting*, p 115).

From this particular plan you can see the bare bones of the amending legislation necessary to give effect to policy changes to a fairly typical benefit scheme as those amendments emerge in the middle column (although in this case they are still sketchy). It usually takes several iterations before any “rule” or detail appearing in this column began to look like a draft law.

The right-hand column offers a convenient way to summarise some of the consequences of the instructions, to convey queries to the instructors and to record agreements regarding policy and drafting approaches to the project.

A plan like this might be prepared following an initial meeting with instructors, and then be used as a way to advance the project for some time. The drafter would control the content of the plan, but the instructors often find it convenient to respond to the plan by annotation. Multiple planning tables may be used for larger, more complex schemes. As greater policy clarity is achieved through the planning process, many drafters start to “draft in” to the middle column, but in its purest conception this column is still expressed in flexible language and the drafting itself is a relatively short process that occurs after the plan is “complete”. The drafter aims to prepare a “blueprint” for the scheme (in constant collaboration with the instructor) to the stage where drafting becomes a relatively technical operation, with all major conceptual problems solved.

There are no fixed rules about using the plan, nor about whether to use it or not. For shorter projects, particularly if time is tight, drafters might not use a plan at all. For any project of a significant size, a positive side-effect of the planning approach is to assist in the project management aspect of drafting (timing, need for authority, provision of formal legal advice, need to refer to relevant central policy agencies etc.).

The plan is also a very good training tool. For a project for which a “junior” drafter is primarily responsible, the junior drafter’s conceptual capacity and project management ability can be developed more systematically than if the junior drafter goes straight to a draft. In the short course I teach on drafting at the Australian National University the plan offers a very useful pedagogical vehicle for the same reason.

#### 4 Shaping policy using a template

The OPC plan has proved a most effective tool overall for bringing drafter and instructor together (literally) onto the same page, and enabling the drafter to make contributions to the policy development process before committing to any particular drafting solution to an individual project. Notwithstanding this, apart from highlighting the broad shared drafting principle of working together with those on the policy side of the table to knit policy into law, the use of the plan (as outlined) would not of itself assist in the development of uniform standards.

However, the OPC plan could potentially be used in a more fundamental way in the process of shaping policy into law. It is in this further aspect that I will argue that the use of the plan or blueprint has some capacity to contribute to the development of more uniform drafting standards.

I have mentioned earlier the work of Professor Ann Seidman and the other authors of *Legislative Drafting for Social and Democratic Change*. They propose a “default” outline of topics for structuring a Bill. In the classification and ordering of these topics in a legislative plan I see the germ of an idea for developing a uniform standard (or starting point) for shaping amorphous policy schemes into effective legislative frameworks. With some minor variation on the 7 categories outlined by the authors (at p 221-222), I propose the following basic generic template (with 8 categories):

- (i) **Framing** provisions (title, commencement, definitions, etc.);
- (ii) **Primary** rules (“a law part that prescribes the primary role occupants’ behavior”) (221);

- (iii) **Implementation** rules (the “part that prescribes the behavior of the implementing agency” (221));
- (iv) **Compliance** rules (not separately identified in Seidman et al). These include inspection, monitoring and reporting rules designed to encourage compliance but also to support enforcement action where necessary. Such rules are a subset of the implementation rules, but they also have something in common with enforcement rules. In my experience it is very often useful to set them apart as a separate group of provisions “in between” those falling into the other two topics;
- (v) **Enforcement** rules (“A sanctions part that provides for penalties or other direct conformity-inducing measures with regard to the prescribed behaviors” (221));
- (vi) **Dispute settlement** rules (e.g. administrative and judicial review, or conciliation);
- (vii) **Finance** rules (the “part that provides for resources (the necessary funds) to implement the Bill’s provisions” (222));
- (viii) **Miscellaneous** provisions (e.g. powers to make subordinate instruments; other executive powers; provisions safeguarding constitutional validity; possibly definitions in a “dictionary” at the end of the Bill) (222).

There is not sufficient time to discuss any of these categories in detail here. Some familiarity with the legislative process would however enable you to understand the broad ambit of what is encompassed by each genre of rule. And of course there will always be exceptional cases that don’t quite fit, or that require a different ordering of topics.<sup>7</sup>

At Attachment B I have sketched a legislative plan for a scheme to regulate dealings in coins and collectibles inspired by a perceived need to deal more systematically with organised currency forgery. The first item in the plan sets out the government decision with little by way of detailed instructions. The plan is a response to the policy that structures the issues involved in accordance with the general template outlined here. It indicates gaps and ambiguities in the policy at a broad level, but also concerns itself with the routine drafting and administrative matters that will arise (referring particular matters to other agencies etc.). Its “shaping” task is further implemented by grouping known rules and issues together under the template headings.

### **(i) Overview and general considerations (including “framing” provisions)**

Matters of purpose at item 1.1 and the “big picture” at item 1.2, in particular are intended to initiate a conversation with the instructors about the fundamental policy for the intended scheme. By listening carefully to the response of the instructors to a range of alternatives offered in the plan, the drafter will be able to tune his or her approach, using “reason informed by experience” (as Seidman et al advocate) with drafting different types of scheme to guide the instructors, who may not have the same breadth of experience. Other items under this rubric concern essential legal matters (1.3 constitutional power) and the drafting frame (1.4 legislative vehicle).

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<sup>7</sup> There will be local variations, of course, as well. In Australia, there is a longstanding modern tradition (in all our jurisdictions) of blending primary legal rules prescribing behaviour with enforcement rules by the beguilingly simple device of appending “penalties” at the foot of the behavioural rule (supported by general interpretative rules in the relevant Crimes Act or Interpretation Act). This mixes “primary” and “enforcement” rules, with some unfortunate results. First, it goes against the assumption that we should be making as drafters, that as a general rule, those subject to law would prefer to understand and obey the law rather than know how they are to be punished for disobeying it. Therefore the drafter should be emphasising the behavioural rule. But the drafter wishing to do so can find herself thwarted by a criminal law policy, particularly in a couple of Australian jurisdictions with Criminal Code default rules on physical and mental elements, which insists on particular (user-unfriendly) drafting forms to be adopted to make enforcement easier for the Director of Public Prosecutions. However, this is a topic for another presentation.

## **(ii) Primary rules**

One of the key architectural principles of Seidman et al is the identification and prominent placement of the primary rules in a scheme: those rules intended to modify behaviour. It is very common for instructors to prioritise administrative (implementation) matters, and the main rules of the scheme are often disguised. In this case, the setting down of a potential primary rule in the central column allows it to be examined from a number of different angles, including in particular the exploration of conceptual difficulties (dealing what, how, by whom and with what permission?).

## **(iii) Implementation (administration)**

This section sets out some of the issues that arise in devising legislation of the general regulatory type. Here again the drafter is able to draw on the familiarity with the nuts and bolts of such legislative schemes to give advice to the instructors about how to put together a workable administrative framework. Such advice includes the note to the instructor (at 3.2) that the criteria for the grant of the “permission”, while apparently a matter of administrative detail, is actually a crucial way in which the overall purpose of the legislation will be implemented.

## **(iv) Compliance**

As indicated at 1.2, it could be that one of the main aims to be achieved by the scheme is simply to allow police to keep tabs on the numismatics trade. If that is the case, then the compliance powers at section (iv) will be critical, and the drafter must do his or her best to lead the instructors through a range of possible methods of compliance.

## **(v) Enforcement**

The drafter is always aware of enforcement at the “bottom line” of any law: one fundamental question must be answered by almost all legislation, namely, “what happens if there is a failure to obey the law?”. In section (v), given that we have little or no instructions to speak of, a range of possible sanctions is set out: criminal and civil penalties and administrative disciplinary action.

## **(vi) Dispute resolution**

In this type of law, the question of statutory administrative review should be tackled. The default standard (established and monitored by parliamentary scrutiny committees in Australia) is for administrative decisions that have a significant effect on rights and liberties to be subject to independent merits review. By raising the issue of administrative review and other dispute resolution methods as a matter of routine, the drafter is helping to ensure either that policy is framed around the standard, or at least in conscious departure from it.

## **(vii) Financial**

At the federal level in Australia, the Department of Finance has significant input into every proposed legislative scheme that involves the appropriation of Commonwealth finance. Drafters need to be conscious of the criteria applied by that Department in advising instructors. All of the issues raised in this section are aimed at attempting to guide instructors through the thickets of finance and tax policy. For schemes funded by annual departmental appropriations, however (in Australia at least) there may be no need to include any “financial” rules at all.

### **(viii) Miscellaneous**

There are always some things that don't quite fit, try as we obsessive drafters might. Routine drafting matters such as commencement, transitional, regulation-making powers can also be noted here (or at (i) (Framing)), together with anything specific to the project that cannot be classified.

## **5 Conclusion : towards a uniform drafting template**

As the template approach I have outlined is not a feature of my office's current drafting practice, still less of any other Australian drafting office, it seems a trifle premature to be advocating its use as a basis for uniform standards internationally at any level. However, I believe that Professor Seidman and her colleagues, in this basic schema, have distilled something in common between countries that share the common law tradition of legislative drafting. They have done at the policy level what Spring Yuen Ching Fung and Watson-Brown<sup>8</sup> have done at the technical drafting level in drawing together the various strands that make up our legislative tradition.

In addition to the distillation of the common elements of our tradition, which we can use as a common template on which to shape many new policy schemes, the uniform template is aimed at keeping the user of the law at its centre, with every other aspect structured around the emphasis on the primary rules that are to modify user behaviour. By contrast, the administration of the scheme is given a subordinate priority; while the implementation of the law is of course vital (and it is vital that it be informed by fundamental humanitarian principles) the law is not first and foremost a handbook for administrators—though naturally a transparent process is important in its own right and greatly beneficial for the primary user, for example in contesting the impact of the law.

The consideration of a template structure such as that presented here, based on the work of Seidman et al, as the basis for a uniform statutory architecture (or one of the forms for such an architecture) would be just a small step in the direction of uniform drafting standards. However, to return to the theme with which I began, it is as an architect, giving shape to abstract ideas, that the drafter exercises a crucial beneficial influence in policy formation. Therefore it seems best to develop drafting standards from this stage, where we can influence the overall shape of the law as it emerges from its policy beginnings. Common legal forms are not enough to achieve uniformity and uniformly high drafting standards if there is no agreement on common methods of translating policy into legal forms.

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<sup>8</sup> In the article already cited, and particularly in *The Template: A Guide for the Analysis of Complex Legislation*, Research Working Papers, Institute of Advanced Legal Studies, University of London, London, 1994.

# OPC plan for Social Welfare Benefits Amendment Bill 2010

**Instructing agencies:** Agency 1

**OPC drafters:**

Nick Horn (Ph: 6270-XXXX; email: nickthedrafter@opc.gov.au)

Drafter 2 (Ph: 6270-XXXX; email: drafter2@opc.gov.au)

**Instructors:**

Julia (Ph: 62XX-XXXX; email: Julia.XX@agency1.gov.au)

Robert (Ph: 62XX-XXXX; email: Robert.XX@agency1.gov.au)

**Authority:** Agency 1 is seeking policy approval from the PM.

**Priority:** T (**Time-critical**, that is, the highest priority) is being sought

**Timetable**

*Week 1 introduction*

13 August	Settle Bill
14 August	Send Bill to OPC editorial section
20 August	Send Bill to PM&C
25 August	Bill cleared by LAP
27/28 August	Introduction

*Week 2 introduction*

20 August	Settle Bill
21 August	Send Bill to OPC editorial section
27 August	Send Bill to PM&C
1 September	Bill cleared by LAP
3/4 September	Introduction

**Abbreviations used in these notes:**

Benefit Act = *Social Welfare Benefits Act 1995*

B1	= Benefit 1
B2	= Benefit 2
B3	= Benefit 3
OPC	= Office of Parliamentary Counsel

**Table 1: Benefit 1**

#	Topic	Amendments/rules	Comments
5	Extension to eligibility for B1	Amend section 10 of the Benefit Act to include: <ul style="list-style-type: none"> <li>• Payment 1;</li> <li>• Payment 2;</li> <li>• Payment 3;</li> <li>• Payment 4.</li> </ul>	<p>1. This amendment will extend eligibility for B1 to those who are receiving payment 1, payment 2, payment 3 or payment 4.</p> <p>2. Recipients of payments 5, 6 and 7 won't be eligible for B1. Agency 1 said on 14/11 that this is correct because it would not be possible for those recipients to qualify for B1.</p>
10	Increase of B1 rate	Section 11: omit "\$50", substitute "\$150".	1. This amendment will increase the rate of B1 to \$150 for a person who is not a member of a couple, and \$75 for a person who is a member of a couple.
15	Half yearly payments of B1	Amend the definition of "B1 qualifying day" in subsection 12(3) of the Benefit Act to include 1 January.	<p>1. This amendment will result in there being 2, instead of 1, B1 qualifying days of:</p> <ul style="list-style-type: none"> <li>• 1 January</li> <li>• 1 July.</li> </ul> <p>2. At the meeting on 20/11 it was decided not to align the qualifying days with the current qualifying days for B3 (20 January, 20 July). At that meeting it was also tentatively decided to change the B3 qualifying days so that B1, B2 and B3 qualifying days were all the same. However, Agency 1 said in their email on 12/12 that there are to be no changes to the B3 qualifying days.</p>
20	Amount of instalment of B1	Amend section 15(1) of the Benefit Act: omit "1", substitute "2".	<p>1. This amendment will result in each instalment of B1 being half the annual rate, rather than the whole annual rate.</p> <p>2. This amendment relates to the half yearly payment amendment in item 15 above.</p>
25	Multiple entitlements	Repeal paragraph 14(2)(b) of the Benefit Act, substitute: (b) either B2 or B3 are payable in relation to that day.	<p>1. This amendment will prevent B1 being payable for a qualifying day if B2 or B3 is payable for that day.</p> <p>2. At one stage, we were going to make an amendment that prevented a payment of B1 if 2 instalments of B1 or B2 under the Benefit Act were payable to the person in that financial year (i.e. amend subsection 14(1) to omit "1" and substitute "2"). However, with the alignment of the B1 and B2 qualifying days, that amendment could have resulted in a person being paid double the amount on a particular qualifying day (1 payment of B1 and 1 payment of B2) and so get the money earlier than they should have. The benefit of this amendment is that this stops this happening, and it also is easier to understand (i.e. recipients will understand that you don't get B1 if you get B2).</p> <p>3. At the meeting on 17/12 the main situation we considered for this issue was this:</p> <ul style="list-style-type: none"> <li>• a person who is a eligible for B2 applies on 18/2 for payment 5 before the qualifying day on 25/2;</li> </ul>

**Table 1: Benefit 1**

#	Topic	Amendments/rules	Comments
			<ul style="list-style-type: none"> <li>• the person is paid B2 on the 1/3;</li> <li>• a determination is made on 3/3 that the person is granted payment 5;</li> <li>• the grant determination takes effect retrospectively to the date of application (18/2).</li> </ul> <p>4. On the qualifying day (25/2), the Benefit Act will operate so that both B1 and B2 are payable to the person: B1 is payable because payment 5 was payable on the qualifying day so B1 will also be payable on that day. B2 will be payable because the person will still have been eligible for payment 5 on the qualifying day (i.e. cancellation of payment 5 in those circumstances could only take effect on or after the day of the determination and not retrospectively back to the time of grant of the payment: see s45 of the Benefit Act). For this reason, the amendment will prevent the payment of B1 where the person has already been paid B2.</p> <p>5. Agency 1: At the meeting on 17/12 we decided that the amendment should provide that B1 is not payable for a qualifying day if B2 has been paid for that day. However, I think that we can stick with “payable”, just in case it hadn’t actually been paid. This term is consistent with the current language of the provisions and, because we are not inserting a similar provision in the B2 provisions, there won’t be a circularity between the B1 and B2 provisions on this issue.</p>
30	Indexation of B1		<p>1. We won’t be amending the indexation rules for B1. However, the first indexation of the new rate of B1 is to occur on 1 July 2011. See the transitional provisions in item 45 below.</p> <p>2. The indexation rules for B1 are in section 55 of the Benefit Act. The indexation days are 1 January and 1 July.</p>
35	Commencement	Royal Assent.	<p>1. Agency 1: The Bill may receive Royal Assent before, on or after 1/7.</p> <ul style="list-style-type: none"> <li>• If the Bill receives Royal Assent before or on 1/7, the new B1 amount will be able to be paid on 1/7.</li> <li>• If the Bill receives Royal Assent after 1/7, the new B1 amount won’t be able to be paid on that day, only the existing amount will. This is because, on 1/7, the Benefit Act won’t have been amended by the Bill to provide the new B1 amount. However, after the Bill commences, the increased amount can be paid because of the application provision in item 40 below.</li> </ul>

**Table 1: Benefit 1**

#	Topic	Amendments/rules	Comments
			That is, after commencement, a person will be entitled to be paid the difference between what he or she was actually paid on 1/7 and the new increased amount.
40	Application	The amendments apply in relation to B1 that is payable on and after 1 July 2011.	
45	Transitional	#1. A transitional provision that provides that there is no indexation of the B1 rate on 1 July 2011.	1. The transitional in #1 will stop the new rate being indexed (the new rate will start on the same day as it would usually be indexed).

## OPC plan for Currency Dealers Bill 2010

**DRAFT-IN-CONFIDENCE**

This draft is supplied in confidence and should be given appropriate protection

**Instructing Department(s):**

**OPC drafter(s):**

Name (Ph: 6270-14?? Fax: 6270-1403)

**Instructor(s):**

Name (Ph: ; Fax: )

**Authority:**

**Priority:** T A B C

**Timetable**

- [\*] Settle Bill
- [\*] Send Bill to OPC editorial section
- [\*] Send Bill to PM&C
- [\*] Bill cleared by LAP
- [\*] Introduction

**Bill(s):**

*Bill 2010*

**Abbreviations used in these notes:**

OPC = Office of Parliamentary Counsel  
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## Currency Dealers Bill 2010

#	Topic	Details/rules	Comments and questions
<b>1. Overview and general considerations</b>			
1.0	General scope of project	<ol style="list-style-type: none"><li>1. There have been an increasing number of currency forgeries, threatening the integrity of Australian currency.</li><li>2. A national policy task force has traced the forgeries to coin, medal and currency dealers.</li><li>3. Cabinet has decided to legislate to</li></ol>	<ol style="list-style-type: none"><li>1. This plan is designed to elicit more detailed instructions for the government scheme.</li><li>2. Further policy authority will have to be sought from Cabinet or the Prime Minister as further details of the scheme are worked out in the course of the drafting process.</li></ol>

## Currency Dealers Bill 2010

#	Topic	Details/rules	Comments and questions
		<p>regulate the numismatics industry to deal with the forgery problem systematically.</p> <p>4. The outline of the scheme proposed is as follows:</p> <ul style="list-style-type: none"> <li>• to have Government permission deal in numismatic materials, a person or company must be registered on a national register;</li> <li>• a person cannot be registered if the person has a criminal record;</li> <li>• registration lapses every 5 years, but is renewable;</li> <li>• annual fees based on 0.5% of profits to be imposed, to be applied directly to administration of scheme.</li> </ul>	
1.1	Purpose <i>[why legislate?]</i>	To provide a control system to reduce the incidence of forgery of Australian currency.	<p>1. You indicate that there is a need to regulate other aspects of industry (e.g. fraudulent dealings in rare coins, medal, tokens, etc.) Additional authority would be needed for this.</p> <p>2. Do you want a purpose clause?</p> <p>3. Is the suggested short title adequate? Should a reference be made to 'collectibles'?</p>
1.2	Nature of scheme <i>[the big picture]</i>	<p>(a) entry controls (permission);</p> <p>(b) ongoing supervision: (reporting, monitoring, inspection, renewal);</p> <p>(c) exit controls (revocation of permission);</p> <p>[Indicates 'main rule' e.g. 'A person must not deal in currency etc.]</p>	<p>1. How is the proposed scheme to give effect to the purpose? If, for example, the police say that the principal reason for the proposal is to collect information about the industry &amp; monitor changes, it might be appropriate to devise a scheme based around automatic registration coupled with information-gathering (e.g. regular reporting), inspection &amp; monitoring powers—i.e. no 'entry' or 'exit' controls at all.</p>
1.3	Legislative vehicle		<p>1. New primary Bill? Or insert in <i>Currency Act 1965</i>? (amending Bill)</p> <ul style="list-style-type: none"> <li>• How self-contained is the scheme?</li> <li>• How much amendment to the Currency Act would be needed? (what is the degree of interaction with other provisions of the Act?)</li> <li>• Are there any political considerations?</li> </ul>

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#	Topic	Details/rules	Comments and questions
1.4	Power	Constitution s 51(xii) – currency, coinage & legal tender; also taxation & appropriation powers — extension to external territories (must be expressly provided for)	1. Australian Government Solicitor advice needed re extension to medals & tokens & to ‘rare’ coins & notes; incidental area? (Const. s 51(xxxix)) other powers (e.g. corporations, trade & commerce, taxation).
<b>2. Primary rules</b>			
2.1	Rules about dealing in currency and collectibles	1. A [person] must not [deal] in [currency or collectibles] unless the [person] has a [licence/is registered] under this Act. 2. A [person] must not [deal] in [currency or collectibles] except in accordance with a [licence/registration] under this Act.	[These are the primary rules for the scheme. The primary rules are those that are intended to directly affect the behaviour of the primary users of the law.] 1. For rule 2 (which relates to licence conditions), see topic 3 below (implementation). 2. For compliance and enforcement issues (e.g. criminal/civil/administrative sanctions), see topics 4 & 5 below.
2.2	Dealing in what?	1. Coins, notes, medals, other collectibles.	1. Need clear instructions about exactly what things are to be covered. Consider industry practice & terminology, coverage of existing Cwlth/State/Territory laws.
2.3	Dealing how?	1. Commercial dealing or trade.	1. What about hobby numismaticists who occasionally trade for profit? - where should we draw the line between ‘commercial’ and ‘non-commercial’ trade?
2.4	Dealing by whom?	1. Individuals 2. Companies	1. What about other entities? e.g.: partnerships trusts other incorporated entities unincorporated entities 2. Criteria for grant (see below) may extend beyond permission holder - e.g. to persons with degree of control over corporate entity/other individuals (‘active’ vs ‘sleeping’ partners).
2.5	Nature of ‘permission’		1. Is it intended that a ‘permission’ is to entitle the holder to trade? If intention is to grant privilege only (revocable at will by Minister), significant concerns will be raised by Attorney-General’s Department (civil justice) and Senate Scrutiny Committee (Cwlth). 2. If ‘permission’ is in reality an entitlement, concepts of ‘licence’ or ‘registration’ preferable.
<b>3. Implementation (administration)</b>			

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#	Topic	Details/rules	Comments and questions
3.1	Implementing agency		<p>1. Department [e.g. controls given to 'Minister' - query re delegation &amp; extent of delegation - Scrutiny Committee concern]</p> <p>2. Existing independent agency? (e.g. ASIC, Reserve Bank)</p> <p>3. New statutory agency? (detailed instructions needed - legal status, degree of independence from Crown, how appointed etc.)</p>
3.2	Criteria	1. Criminal activity	<p>1. General test of character and competence (fit &amp; proper person)? Or more specific criteria (no prior conviction for forgery or similar offences - Cwlth/State/Territory/foreign law?)</p> <p>2. Should criteria apply to affiliates etc. of individuals/persons with some degree of responsibility/control in corporate entities etc.? Consider similar concepts in other laws, e.g. Income Tax law, Corporations Act.</p> <p>[Note that criteria for grant is crucial in implementing purpose. Ensure that this aspect is fully investigated.]</p>
3.3	Administrative procedures & controls	1. 5-year duration.	<p>Topics that need addressing include:</p> <ol style="list-style-type: none"> <li>1. application - who? - fees - form</li> <li>2. conditions (statutory &amp; specific to holder - e.g. reporting requirements)</li> <li>3. variation</li> <li>4. duration (5 years)</li> <li>5. renewal &amp; criteria for renewal</li> <li>[6. discipline—aspect of enforcement (see topic 5)]</li> <li>[7. review - see topic 7]</li> </ol>

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#	Topic	Details/rules	Comments and questions
<b>4. Compliance</b>			
4.1	Monitoring		<p>1. <i>Generally</i>: These powers will allow police to keep tabs on the industry. They are a crucial element of the scheme and need to be thought out carefully, with a balance between the value of obtaining information and impinging on individual liberties (an AGD civil justice and scrutiny committee concern).</p> <p>2. Should there be a requirement to report significant dealings (this could be imposed as a licence condition)?</p> <p>3. Information-gathering powers (see 4.2).</p> <p>4. Privacy concerns? Consult relevant department re policy</p>
4.2	Inspection		<p>1. Inspectors - appointment, id cards etc.</p> <p>2. Powers of entry, warrants (warrant-less entry will attract criticism AGD Civil Justice &amp; scrutiny committees)</p> <p>3. Inspection &amp; information-gathering powers (requirement to answer questions etc.)</p> <p>4. Powers of seizure</p> <p>5. Compensation for seized items (not directly the subject of criminal activity). Need to consult Attorney-General's Department criminal law policy.</p>
<b>5. Enforcement</b>			
5.1	Criminal & civil controls	<p>1. Main offences dealing etc. without a licence (or other than in accordance with a licence)—see 2.1</p> <p>2. Secondary offences needed e.g. to support information gathering/monitoring/inspection powers.</p>	<p>1. Offences - nature &amp; penalties</p> <p>2. Civil penalties (perhaps coupled with an infringement notice system)?</p> <p>Consultation necessary with Attorney-General's Department criminal law policy.</p>
5.2	Administrative controls		<p>1. Disciplinary system (suspension/cancellation licence etc.). Effective controls for licensees once they are in the system:</p> <ul style="list-style-type: none"> <li>• by whom?</li> <li>• show cause - natural justice</li> <li>• reprimand/monetary penalty/suspension/cancellation ?</li> <li>• restriction on future registration (including restriction of "influential persons" with respect to corporate entities whose registration is</li> </ul>

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#	Topic	Details/rules	Comments and questions cancelled/suspended)
<b>6. Dispute resolution</b>			
6.1	Decisions		<p>1. Decisions for which review may be recommended by Attorney-General's Department administrative law policy</p> <ul style="list-style-type: none"> <li>• grant/refusal licence</li> <li>• licence conditions</li> <li>• cancellation of licence</li> <li>• compensation for seized items</li> </ul>
6.2	Type of review		<p>1. Type of review</p> <ul style="list-style-type: none"> <li>• internal (Minister)/external (court/tribunal)</li> <li>• merits? (e.g. Administrative Appeals Tribunal)</li> <li>• due process judicial review only? (<i>Administrative Decisions (Judicial Review) Act 1989</i>)</li> </ul>
<b>7. Financial</b>			
7.1	Tax on profits	1. 0.5% tax on annual profits.	<p>Consultation with Treasury needed</p> <ol style="list-style-type: none"> <li>1. How are 'profits' determined?</li> <li>2. Taxation cycle? (at what point is tax imposed, in relation to which annual profits)</li> <li>3. Administration/implementation? Apply existing taxation administration system?</li> <li>4. Need for separate imposition Bill (Constitution, s 55)</li> </ol>
7.2	Use of tax for administration of numismatic regulatory scheme.	1. Tax is to be dedicated to costs of administering scheme.	<p>Consultation with Treasury/Finance needed</p> <ol style="list-style-type: none"> <li>1. To avoid tax going into Consolidated Revenue Fund, an amount needs to be 'specially' appropriated out of CRF equivalent to the amount of tax collected.</li> <li>2. Need for special appropriation provision in the Bill (Cwlth: Constitution, s 83 (appropriation by law); s 53, 54, 56 for parliamentary procedural rules).</li> <li>3. Method of 'dedicating' tax - [special fund under <i>Financial Management and Accountability Act 1991</i>]</li> <li>4. Investment of funds? Proceeds of investments?</li> <li>5. Other accounting considerations, e.g. reporting (may dictate features of the legislative scheme).</li> </ol> <p>Consider similar schemes elsewhere in statute book e.g. Cwlth: <i>Plant Health</i></p>

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## Currency Dealers Bill 2010

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#	Topic	Details/rules	Comments and questions
			<i>Australia (Plant Industries) Funding Act 2002.</i>
<b>8.</b>	<b>Miscellaneous</b>		
8.1	Consultation		(a) internal – e.g. [Cwlth] Dept of Finance and Administration; Treasury (tax); Attorney-General’s Dept for criminal justice, administrative law and any international law issues; Dept of Foreign Affairs and Trade (treaties); (b) external – States & territories; foreign and international agencies if there are relevant international legal obligations (e.g. Interpol)—issue for instructors more than drafters
8.2	Commencement		1. Delayed commencement may be necessary to: <ul style="list-style-type: none"><li>• phase in licensing/reg. scheme (particularly if there are existing schemes which are to be superseded);</li><li>• allow for time for administrative implementation, e.g. IT registration system, administering agency staffing &amp; systems etc.</li></ul>
8.3	Transitionals		If there are any existing regulatory schemes that are to be superseded—options: <ul style="list-style-type: none"><li>• preserve operation existing scheme for existing scheme members?</li><li>• grandfather existing scheme members into new scheme?</li><li>• require existing scheme members to enter new scheme on same basis as others?</li></ul>
8.4	Consequential		What amendments to other Acts will be necessary? Still to be determined.

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