



**Australian Government**

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**Office of Parliamentary Counsel**

# **Reducing complexity in legislation**

**Document release 2.1**  
**Reissued June 2016**



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# Contents

<b>1 Introduction</b>	1
<b>1.1 Intended audience of legislation</b>	1
<b>2 Length in legislation</b>	2
<b>2.1 Long Acts</b>	2
<b>2.2 How to reduce the length of long Acts</b>	2
2.2.1 Simplifying the policy	2
2.2.2 Coherent principles drafting	3
2.2.3 Not dealing with remote scenarios	3
2.2.4 Incorporating material	3
2.2.5 Alternative approaches	4
2.2.6 Acts of general application	4
<b>2.3 Long sections and sentences</b>	4
2.3.1 Example of a long section	5
2.3.2 Examples of long sentences	5
2.3.3 How to shorten long sections and subsections	5
<b>3 Structure of legislation</b>	6
<b>4 Concepts</b>	7
<b>4.1 Large numbers of concepts</b>	7
4.1.1 Introducing rarely-used concepts	7
4.1.2 Similar-looking concepts	7
4.1.3 Chains of concepts	8
<b>4.2 Same expression, different meaning</b>	8
<b>4.3 Ill-defined concepts</b>	9
<b>4.4 “Elegant variation” in language</b>	10
<b>5 Complicated provisions</b>	10
<b>5.1 Identifying the real purpose of a provision</b>	11
<b>5.2 Making a provision do too much</b>	11
<b>6 Putting detail in the wrong place</b>	12
<b>6.1 Is the detail necessary?</b>	12
<b>6.2 Including detail in subordinate legislation</b>	12
<b>6.3 Separating detail</b>	13
<b>7 Tinkering</b>	13
<b>7.1 Including matters in subordinate legislation</b>	13
<b>7.2 Coherent principles drafting</b>	13
<b>7.3 Structuring provisions</b>	14
<b>7.4 Repealing and replacing a provision</b>	14
<b>8 Policy decisions that cause complexity</b>	14
<b>8.1 Higher-level policy that causes complexity</b>	15

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<b>8.2 Lower-level policy that causes complexity</b>	15
8.2.1 Extending an existing scheme to cover a new case	15
8.2.2 Creating a new provision or scheme rather than amending an existing provision or scheme	16
8.2.3 Tailoring specific rules for a particular case	17
8.2.4 Exceptions to a main rule	17
<b>8.3 Later changes to a draft or Bill</b>	17
<b>8.4 Requiring specific provisions that are not legally necessary</b>	18
<b>8.5 “Grandfathering” existing arrangements</b>	19
<b>8.6 Implementation of a proposal in stages</b>	19
<b>8.7 Where to put complexity</b>	20
<b>9 Timelines that cause complexity</b>	20
9.1 How timelines can cause complexity	20
9.2 Mitigating tight timelines—instructors	20
9.3 Mitigating tight timelines—drafters	21
<b>10 Role of drafters and instructors in helping readers deal with complexity</b>	21
<b>11 A good example of complex policy in legislation</b>	21
<b>12 Conclusion</b>	23
<b>Attachment A—Longest Acts on the Commonwealth statute book (as at 1 June 2016)</b>	24

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## 1 Introduction

1 This Guide to reducing complexity in legislation has been produced by the Office of Parliamentary Counsel (*OPC*) to assist those involved in the legislation process.

2 Complex legislation uses valuable resources: the increased time and resources taken by courts, advisers, administrators and the general public in reading and understanding the legislation; and the increased time and resources taken by others involved in the legislative process, including instructors, drafters in OPC, and legislators. (Instructors and drafters, as some of the heaviest users of legislation, are greatly affected by complex legislation.)

3 Some decisions about legislation that create complexity are beyond the control of instructors and drafters (such as decisions of Cabinet or Ministers). Political necessities may require particular legislative approaches that are inherently complex. Little can be done about these decisions.

4 This paper discusses the causes of complex legislation and the ways in which instructors and drafters can avoid or reduce complexity. The first 4 topics (length in legislation, structure of legislation, concepts and complicated provisions) are generally topics over which the drafter has a significant influence (although instructors will often have input into all of these topics). The next 2 topics (putting detail in the wrong place and tinkering) can be influenced by both the instructors and the drafters. The next 2 topics (policy decisions and timelines that cause complexity) are often influenced by instructors, with less input from drafters. The paper concludes by discussing what instructors and drafters can do to help readers deal with complexity, and discusses the *Fair Work Act 2009* as a good example of complex policy that has been made as readable as possible.

5 The discussion in this paper is concerned with complexity in Acts (primary legislation). However, much of the discussion is also relevant to complexity in instruments (subordinate legislation).

### 1.1 Intended audience of legislation

6 Before beginning, it is worth mentioning who drafters primarily aim to draft legislation for:

It must not be supposed, however, that statutes can be written so that everyone can understand them. Obviously, not every literate person can understand a modern Landlord and Tenant Act or a Real Property Act, but it does not follow that they are badly drafted statutes ... A draftsman should try to write his statute so that it can be understood by those who are supposed to understand it, namely the persons to whom it is directed, the persons who have to administer it and the courts and judges who have to apply it<sup>1</sup>.

7 A reader who has had no previous contact with legislation will find legislation complex no matter how hard drafters and instructors try to reduce complexity. It is unrealistic to assume that complex subject and policy areas that are regulated by legislation can be reduced to rules that can be understood by the public generally. Instead, complexity should be judged by reference to the standards of the intended audience of legislation: employees with

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<sup>1</sup> EA Driedger, "Legislative drafting", *Canadian Bar Review*, Volume XXVII, pp291-317.

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responsibility for corporate compliance, professional advisers in the area, administrators, judges, instructors and drafters themselves.

## **2 Length in legislation**

8 Length and complexity are distinct but often intrinsically related concepts. As a result, lengthy legislation can be caused by, and result in, complexity.

9 There is a widely held view that length can be a barrier to an Act's accessibility. The fact that an Act must be considered as a whole means that a 500-page Act is inherently more complex than a 5-page Act.

10 Despite the attempts of drafters to draft legislation in clear and concise terms, if the policy to be addressed in the legislation is complex, the resulting Act might be long. The overall length can make understanding the law very difficult, for both lawyers and other users of legislation.

11 On the other hand, an Act may not be particularly long as a whole, but may contain overly long sections so that the reader struggles to maintain a clear understanding of what a particular section is trying to achieve. In either case, length can reduce an Act's readability, and readers may be put off attempting to understand a long Act or section.

### **2.1 Long Acts**

12 There are 26 Acts on the Commonwealth statute book with substantive text over 500 pages (see Attachment A). Complicated subject matters almost inevitably result in long and very detailed Acts (as can be seen from the table in Attachment A).

13 It is worth acknowledging that plain language rewrites of old Acts often contain more pages than the old Act they are replacing. This is largely because of the increased amount of white space in the rewritten Act as a result of breaking up long subsections and sections, and the increased numbers of readers' aids also included in the rewritten Act, such as simplified outlines, notes and headings. However, generally, the word length of the rewritten Act (excluding these readers' aids) remains relatively similar to the old Act despite the increase in page length. The rewritten Act should not be viewed as more complex than the old Act it is replacing merely because it has more pages.

### **2.2 How to reduce the length of long Acts**

14 There are a number of ways of reducing the length of Acts.

#### **2.2.1 Simplifying the policy**

15 An obvious way of reducing the length of an Act is to simplify the policy in the Act. Complex policy is generally difficult to express and results in many provisions. Simplifying the policy of legislation can result in a substantial reduction in the length of the legislation. The effect of complex policy on the complexity of legislation is discussed in more detail in paragraphs 89 to 125.

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## 2.2.2 Coherent principles drafting

16 A drafter's first responsibility is to produce a legally effective Bill that achieves the policy goals of the instructors. Drafters are also responsible for ensuring that the Bill is clear and concise. One way in which the policy can be drafted clearly and concisely is by adopting a coherent principles drafting approach (also referred to as general principles drafting). As the [OPC Plain English Manual](#) says<sup>2</sup>:

This is the style used when you deliberately state the law in general principles and leave the details to be filled in by the courts, by delegated legislation or in some other way ...

Drafters trained in common law countries have traditionally avoided this style on principle, assuming that the users of the legislation don't like it (or wouldn't like it if they knew about it). However, if you use this style properly, it can be an important technique to simplify the law.

17 This approach has been used more recently in drafting taxation laws, such as the *Fuel Tax Act 2006*. From the OPC Plain English Manual<sup>3</sup>:

The most obvious time to consider using [the coherent principles drafting approach] is when you have to cover a wide range of alternatives in minute detail, or when your instructors can't be sure of covering every possible alternative. If you can use a simple general statement that will certainly cover most of the alternatives, but might not cover all of them, your Bill will be a lot simpler.

18 However, before adopting such an approach, drafters and instructors need to weigh up whether the simplicity gained by using coherent principles drafting is worth the loss of precision that results.

## 2.2.3 Not dealing with remote scenarios

19 Many people equate detail with certainty. As a result, some argue that a Bill must contemplate every possible scenario, no matter how remote. Whether to address a remote scenario in detail is a policy decision. In deciding whether to include a specific rule dealing with a remote scenario, consideration should be given to whether the certainty produced by including the rule is proportionate to the risk of not addressing the remote scenario, bearing in mind the increased length and complexity of the Bill resulting from including the rule.

## 2.2.4 Incorporating material

20 Sometimes, an Act needs to rely on material, such as a treaty or an international convention, from extrinsic sources that are publicly available. In this case, the material can be left out of the text of the Act and instead incorporated by reference to the extrinsic sources. This ensures that access to the law is maintained but the volume of the Act can be reduced.

21 Using this approach, there are some existing Acts that have been or would be shortened dramatically. For example, previously the *International Tax Agreements Act 1953* contained 1365 pages of which 1321 pages consisted entirely of Schedules setting out agreements and protocols. Once these Schedules were removed (as the text of the agreements

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<sup>2</sup> OPC Plain English Manual, paragraphs 15 and 16.

<sup>3</sup> OPC Plain English Manual, paragraph 17.

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are available on various websites), this Act was made significantly shorter. Similarly, 712 of the 724 pages in the *Social Security (International Agreements) Act 1999* are international agreements contained in Schedules.

### **2.2.5 Alternative approaches**

22 Drafters may be able to suggest an alternative means of implementing the policy in a way that reduces the overall length of an Act.

23 An example involved the implementation of the Australian Consumer Law. The initial suggestion was to add to the *Competition and Consumer Act 2010* (the *CCA*) (formerly the *Trade Practices Act 1974*) a Schedule of consumer protection provisions that mirrored the consumer protection provisions in the body of the *CCA*, using the same approach as that used for the Competition Code. The States and Territories would then pass laws applying that Schedule as the consumer protection law in their jurisdictions. OPC suggested that the consumer protection provisions in the body of the *CCA* be repealed, and that provisions be inserted into the *CCA* applying the Schedule as the consumer protection law of the Commonwealth. This approach avoided the repetition of large amounts of the *CCA*, amounting to around 200 pages.

### **2.2.6 Acts of general application**

24 Acts of general application can also provide a means of reducing the length of legislation. Where there are provisions that are common across the statute book, such as enforcement provisions, shifting these to an Act of general application offers consistency in approach as well as reduction in overall length. The combination of both these factors reduces the overall complexity of particular Acts.

25 For example, the *Regulatory Powers (Standard Provisions) Act 2014* (the *Regulatory Powers Act*) includes warrant provisions, civil penalty machinery provisions, infringement notice machinery provisions, enforceable undertakings and injunctions. Before the enactment of the *Regulatory Powers Act*, enforcement provisions of these kinds used to add over 30 pages to an Act and were scattered across the Commonwealth statute book. The approach taken to enforcement provisions also varied between Acts. The *Regulatory Powers Act* allows other Acts to pick up the standard provisions in that Act, removing the need for those other Acts to include them. While reducing the length of an Act by 30 pages in this context might not seem significant, for smaller Acts such a reduction is considerable. Relying on the *Regulatory Powers Act* for these provisions also ensures a consistent approach.

26 It was for these reasons that OPC initiated the drafting of the *Regulatory Powers Act*. Greater reliance on other Acts of general application therefore remains a long-term consideration for OPC and the whole of government.

## **2.3 Long sections and sentences**

27 Like long Acts, long sections can frustrate a reader. One particular driver of long sections in older Acts is the drafting approach of having one sentence stating a rule, immediately followed by a lengthy discussion of exceptions and special circumstances.



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### 2.3.1 Example of a long section

28 The *Commonwealth Electoral Act 1918* deals with a variety of complex matters relating to elections. Section 273, for example, deals with the process for counting votes at an election—it covers just over 11 pages and includes 33 subsections. With no subsection headings, a number of very long sentences, sub-subparagraphs, definitions and extensive cross-references, this section presents a significant challenge for any reader.

### 2.3.2 Examples of long sentences

29 The CCA is also home to a large number of complex and long sentences. Section 45C of that Act provides a number of examples of sentences where their length is a cause of complexity:

- (a) Subsection 45C(1) is 165 words or 15 lines long;
- (b) Subsection 45C(2) is 125 words or 12 lines long;
- (c) Subsection 45C(3) is 156 words or 14 lines long (including 9 words or 1 line in paragraph (a) and 63 words or 6 lines in paragraph (b));
- (d) Subsection 45C(4) is 317 words or 32 lines long (including 141 words or 14 lines in paragraph (a) and 158 words or 16 lines in paragraph (b)); and
- (e) Subsection 45C(5) is 79 words or 8 lines long.

30 Each of these subsections is made up of a single sentence dealing with covenants in relation to prices—to understand each subsection is a challenge, but to understand the section as a whole presents a greater challenge.

31 These provisions were drafted in 1977 before OPC began to focus on plain language drafting and when the traditional style only allowed one sentence per subsection. Now, the “5 line” rule aims to avoid such long slabs of unbroken text and each subsection may contain 2 (or sometimes 3) sentences.

### 2.3.3 How to shorten long sections and subsections

32 Making sections and subsections shorter and more reader-friendly is an ongoing challenge for drafters. Plain language drafting is a technique employed by OPC to make the law more reader-friendly, not change the meaning of the text.

33 Fundamental to drafting in plain language is striking a balance between precision and simplicity. This means that each sentence should be constructed carefully, simply and logically. Sentences should be short so that the beginning, middle and end are all clear in the reader’s mind and only a small number of ideas are being thrust at the reader at once:

A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no

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unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subject only in outline, but that every word tell.<sup>4</sup>

34 The “80/20 rule” requires drafters to deal with the important or common operative rule (i.e. the rule that applies to 80% of readers) before dealing with the less important or less common operative rule (i.e. the rule that applies to 20% of readers)). The 80/20 rule is an important means of reducing length and complexity.

35 The OPC Plain English Manual is an excellent resource for how to make Bills as clear and concise as possible. It suggests a number of other approaches to help ensure that sections and subsections are short and readable, such as:

- (a) limiting the number of subsections in a section<sup>5</sup>;
- (b) limiting slabs of text to 5 lines<sup>6</sup>;
- (c) using paragraphs to give structure to a long subsection<sup>7</sup>; and
- (d) using tables for provisions with lots of alternatives<sup>8</sup>.

### 3 Structure of legislation

36 Poorly structured legislation can be a cause of complexity. If the important concepts in a legislative measure are not stated as its central elements, but are obscured by other material such as procedural detail, overly complex provisions are likely to result. Adopting a clearer and more logical structure is a useful step in reducing that complexity. This approach sits well with a plain language approach to drafting. It makes drafting in plain language significantly easier.

37 For example, the unfair dismissal provisions of the *Workplace Relations Act 1996* were contained in Subdivision B of Division 4 of Part 12 of that Act. Subdivision B focussed on the process to be followed in applying for redress, starting with a provision (section 643) dealing with the right to apply to the Commission. The rules about which employees could apply, and in what circumstances redress would be available, were dealt with either as details within procedural provisions (such as section 643) or as scoping or definition provisions in Subdivision A. The overall result was provisions that were more complex, and more difficult to read, than necessary.

38 The unfair dismissal provisions in Part 3-2 of the *Fair Work Act 2009* use a different approach. Part 3-2 is structured as follows (leaving aside the introductory provisions of Division 1):

- (a) Division 2 creates a concept of a person who is “protected from unfair dismissal”;
- (b) Division 3 describes when a person is “unfairly dismissed”;

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<sup>4</sup> W Strunk Jr and EB White, *The Elements of Style*, (1973) 3rd ed at p23.

<sup>5</sup> OPC Plain English Manual, paragraph 112.

<sup>6</sup> OPC Plain English Manual, paragraph 108.

<sup>7</sup> OPC Plain English Manual, paragraph 117.

<sup>8</sup> OPC Plain English Manual, paragraph 125.

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- (c) Division 4 sets out what remedies are available for an unfair dismissal;
  - (d) Division 5 deals with procedural matters.

The adoption of a clearer structure with a stronger narrative allowed the provisions to be drafted in a less complex and more readable way.

39 Another example from that legislation is the location of the administrative provisions. In the *Workplace Relations Act 1996*, the establishment and operation of the various industrial bodies that had a role under the Act were located near the front of the Act. These were the Australian Fair Pay Commission (Part 2), the Australian Industrial Relations Commission (Part 3), the Australian Industrial Registry (Part 4), the Workplace Authority Director (Part 5), the Workplace Ombudsman (Part 5A) and workplace inspectors (Part 6). These provisions amounted to about 100 pages of text, and their position tended to obscure the more important provisions of the Act dealing with pay and conditions, agreements, awards, minimum entitlements etc.

40 In contrast (and in accordance with modern drafting practice), the equivalent administrative provisions of the *Fair Work Act 2009* are located towards the end of the Act, in Chapter 5. The preceding Chapters deal with the matters that most readers would probably consider to be of greater importance.

## 4 Concepts

### 4.1 Large numbers of concepts

41 A large number of concepts within a single scheme can be difficult for a reader to bear in mind and can therefore lead to complexity. Of course, for inherently complex schemes, large numbers of concepts might be unavoidable.

42 However, sometimes drafting decisions add to the complexity of schemes by creating more concepts than are strictly required.

#### 4.1.1 Introducing rarely-used concepts

43 In an attempt to reduce the complexity of a particular provision, a drafter might choose to define a term (thereby adding a concept) even though that concept is required only infrequently. In this case, it is a matter of balancing the simplicity of the provision gained by creating the concept against the added complexity to the scheme by having an additional, rarely-used concept. It is of course ultimately a matter of judgment, but a question to be borne in mind while making drafting choices.

#### 4.1.2 Similar-looking concepts

44 A large number of similar-looking, but subtly different, concepts also adds complexity and can confuse readers. The *Telecommunications (Interception and Access) Act 1979* (the *TIA Act*) is an excellent example of an Act containing a large number of similar-looking definitions. In the Act there are the following definitions:

- (a) 6 definitions of *member of the staff of X body*;

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- (b) a definition of *member* in relation to a criminal organisation;
  - (c) definitions of *member of a police force*, *member of the Australian Crime Commission* and *member of the Australian Federal Police*;
  - (d) a definition of *staff member* in relation to the Australian Federal Police;
  - (e) a definition of *staff member of ACLEI*.

45 The sheer number of concepts, and the fact that there are “members of the staff”, “staff members” and “members”, create complexity. Additional complexity is created by the fact that some of the definitions are defined relationally (for example “*member*, in relation to a criminal organisation,”) while other definitions include the relational aspect in their defined term (for example, *member of a police force*).

46 Having said this, there is no easy solution, particularly where different Acts establishing the relevant bodies presumably refer to “staff member” or “member of the staff”. Possibly the best approach in this difficult case would be to adopt one term (such as *member*) so at least all of the definitions are in alphabetical order (even if this means that the TIA Act refers to “member of the staff of ACLEI” while the *Law Enforcement Integrity Commissioner Act 2006* that establishes ACLEI refers to “staff member”).

#### 4.1.3 Chains of concepts

47 Chains of concepts that feed into each other also cause complexity because the concepts must be held in a reader’s mind in order to understand the head concept. An example of this is in the TIA Act. In that Act, *agency* is defined to mean (among other things) an “interception agency”. That in turn is defined to mean (among other things) “a Commonwealth agency”, which is then defined to mean the AFP, ACLEI or the ACC. So in order to understand “agency”, a reader is then forced to look to 2 further definitions before reaching the full definition.

48 In this case, it might have been better to define *agency* in the particular part of the Act as being the AFP, ACLEI and the ACC.

#### 4.2 Same expression, different meaning

49 Complexity can also be caused by expressions that have different meanings in different parts of the Act. The definition of *agency* in the TIA Act has one meaning in Chapter 2, and another meaning in the rest of the Act. As mentioned, one of the meanings of *agency* is an “interception agency” which in turn has 3 different meanings within the Act. Remembering which part of the Act a reader has come from becomes essential to determining which definition applies, which adds to the complexity of trying to find the definition of “agency”.

50 The possibility of a reader being confused or misled is increased if the same expression has a different meaning according to which Part, Division or section of an Act the expression is used in. For this reason, where possible, drafters generally avoid:

- (a) defining an expression to have different meanings in different parts of an Act;  
or

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- (b) defining, in one part of an Act, an expression that is used in its ordinary meaning in another part of the Act.

51 The approach OPC has taken to new Acts having “one expression, one meaning” should avoid the complexity created by having expressions with different meanings in different parts of the Acts. (Ironically, it means that different expressions are needed for the different meanings, increasing the number of expressions in the Act. Hopefully, the extra expressions do not add to the complexity of the scheme, or add less complexity than is created through having one expression mean different things in different parts of the Act. As usual, it is a matter of judgment for the drafter. An example of where the opposite approach was adopted is discussed in paragraphs 142 and 143.)

### **4.3 Ill-defined concepts**

52 Ill-defined concepts also add to complexity. In this case, ill-defined does not mean concepts that are deliberately vague in order to allow flexibility, but rather concepts that have not been sufficiently defined in the legislation.

53 Concepts can become ill-defined in 2 ways. Firstly, when drafting a new principal Act, a drafter might not fully come to terms with the concept. For example, while defining a concept relationally, the drafter might fail to use the concept relationally in all cases in the Act. Alternatively, a drafter might think that he or she has defined a concept comprehensively when this is not the case.

54 Secondly, while a concept might be relatively clear when an Act first commences, drafters amending the Act might not fully grasp the subtleties of the concept, and later amendments to the legislation might blur the boundaries of the concept.

55 Concepts that are ill-defined in legislation create complexity in a number of ways. Firstly, often practices and understandings develop in the real world which do not match the text of the legislation, as the administrators of the legislation attempt to come to terms with the concept’s meaning. This can lead to legislative complexity later as additional provisions are required to shore up the administrators’ view of the meaning of the concept.

56 Similarly, ill-defined concepts can cause additional complexity later for drafters who are also forced to draft their way around subtleties and confusion. Difficulties in drafting are often the result of difficulties in thinking. Provisions that are inherently difficult to express are often the result of underlying concepts that are poorly thought through.

57 Drafters can avoid this additional complexity by ensuring that they have a strong understanding of concepts that they are working with, either in drafting a new principal Act or amending an existing Act. Using a plan for a Bill, and having initial discussions between the drafter and instructors about the meaning of all fundamental concepts in a scheme, can help to ensure that concepts are well thought through and clear. It is also important for drafters and instructors to keep an open mind when reading their draft to ensure that the concept is well defined. Having others, who have not been so closely involved in the project, read a draft can also bring fresh views to ensure that concepts are defined properly.

58 Finally, concepts can be clear in their boundaries and definition but become ill-defined because of a poor and confusing choice of label. The term “discount capital gain”

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in the *Income Tax Assessment Act 1997* has been criticised<sup>9</sup> as confusing because it is in fact not a capital gain that has been discounted, but rather a capital gain that might be eligible for the discount should certain criteria have been met. The complexity is caused for the reader by having a counter-intuitive label, which the reader understands to mean one thing but really means another thing, confusing his or her understanding of the provisions. The label “discountable capital gain” might have been clearer in this case. Choosing meaningful and clear labels that aid a reader is essential to avoiding complexity in legislation.

#### **4.4 “Elegant variation” in language**

59 There is no room in drafting legislation for elegant variation in language. Complexity can be created when drafters do not use exactly the same language as an existing Act uses (when amending that Act), or throughout a new principal Act. (There are times when drafters deliberately choose to depart from established language in the interests of plain language. Section 15AC of the *Acts Interpretation Act 1901* allows for a later Act to express the same idea in a different form of words, without affecting the meaning, for the purpose of using a clearer style. This is an acceptable approach.) However, when subtly different language is used (without relying on section 15AC), complex issues of interpretation arise as to whether the same meaning was intended.

60 Section 33 of the *Acts Interpretation Act 1901*, as in force before it was amended in 2011, was a good example of the complexity that can be created by not using language consistently. Subsection 33(1) of that Act referred to an Act that “confers a power or imposes a duty”. Subsection 33(2B) referred to an Act that “confers a power or function, or imposes a duty”. The issue raised was whether subsection 33(1) covered when an Act conferred a function. The section was amended in 2011 to clarify that it did.

61 This complexity can be avoided by ensuring that consistent language is used. This is of course easier said than done. When amending a principal Act, tricky drafting questions are raised if a provision is being amended that the drafter sees as being defective in some way. It is probably this reason that the drafter who inserted subsection 33(2B) of the *Acts Interpretation Act 1901* chose to refer to “functions” despite functions not previously having been referred to in the section. Consideration could have been given (and possibly was) to amending the other subsections to ensure consistent language throughout the section, but this of course involves policy authority considerations. In some cases, continuing the “defect” might be the least worst option.

62 In the case of drafting a new principal Act, inconsistencies of language can arise when large numbers of drafting teams are working on the same Act. OPC has developed Act-specific drafting guides (such as for the *Fair Work Act 2009* and the *Paid Parental Leave Act 2010*) to ensure that when large numbers of drafters are working on a single Act the language is as consistent as possible. OPC’s in-house editors and editorial assistants are also highly trained and extremely good at spotting inconsistent language throughout a Bill.

## **5 Complicated provisions**

63 As discussed above, complexity can result from long provisions. However, sometimes drafters draft provisions that are more complicated than they need to be. A drafter might draft

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<sup>9</sup> R Krever, “Taming Complexity in Australian Income Tax” [2003] Sydney Law Review 22.

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a provision that is complicated because the drafter has not sufficiently identified the real purpose of the provision, or because the drafter is trying to make the provision do too much work.

### **5.1 Identifying the real purpose of a provision**

64 It is important for drafters to identify the real purpose of a provision. Just as a concept must earn its place, so too must a provision. Drafters must identify the role of a particular concept or provision before accepting that it will be included in the Bill. It is also important for a drafter to consider a proposed provision in the context of the relevant section, Division or Part.

65 There are 2 ways in which the real purpose of a provision might not be properly identified by a drafter, leading to complex and confusing provisions. Firstly, complex provisions can result from instructors providing instructions that say only how something is to be done, without giving any indication as to what is intended to be achieved. Instructions of this kind:

- (a) do not tell the drafter what the problem is and how it is to be remedied, but tell the drafter how the author thinks an unstated problem can be remedied; and
- (b) do not allow the drafter to identify the real purpose of a provision; and
- (c) presume a drafting approach that may not be the most desirable from a complexity standpoint.

66 A complicated provision might result from a drafter simply including a provision that has been suggested in this way by an instructor.

67 On the other hand, if instructors tell drafters what problem they are trying to solve, drafters can determine the real purpose of the provision, and assess the simplest way of achieving the outcome required.

68 Secondly, complex provisions can be the result of a failure to consider precedents properly. A particular provision that is included in another Act may or may not be relevant to the Bill or amendments being drafted. Careful thought should be given when using precedents, otherwise complex or redundant provisions might be included in a Bill because their purpose has not been identified.

### **5.2 Making a provision do too much**

69 Sometimes a drafter might attempt to draft a single rule that deals with all contingencies, including rare and complicated contingencies. Complexity is created because the concept or provision tries to do too much.

70 By structuring provisions so that there is a main rule, simply stated, with an exception or a specific rule that applies in a particular case, the provisions can remain as simple as possible. The relationship between the general rule and the specific rule needs to be made clear, and if appropriate, a note can be added to the general rule to alert readers to the existence of the exception or specific rule. An additional benefit of this kind of approach is

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that it may save a reader from having to work through provisions that they would otherwise not be concerned about.

71 Ultimately, one of the best sources of information as to whether provisions are complex or complicated are instructors. When instructors (who should know what a provision is seeking to achieve) tell drafters that they have struggled to understand a provision, drafters should consider whether there are other ways in which the provision can be redrafted.

## **6 Putting detail in the wrong place**

72 Inappropriate detail can extend the length of a Bill and take attention away from core provisions, thereby creating complexity.

73 Detail can be inappropriate if:

- (a) the detail relates to a peripheral or supporting issue, not the core policy of the Bill; or
- (b) the detail relates to matters that are administrative or procedural in nature; or
- (c) the detail is likely to change over time; or
- (d) the detail relates to an issue that will arise infrequently.

74 As an example, before the *Regulatory Powers (Standard Provisions) Act 2014*, infringement notice schemes were included in legislation in a variety of different ways. Some Acts left the detail to subordinate legislation while others included the detail in part of the Act. The detail and length of each scheme also varied between Acts.

### **6.1 Is the detail necessary?**

75 Similarly, before the *Regulatory Powers (Standard Provisions) Act 2014*, provisions for infringement notice schemes ranged from just over two pages (the *National Measurement Act 1960*) to 15 pages (the *Corporations Act 2001*). The number of paragraphs used to describe the contents of an infringement notice ranged from 6 paragraphs to 13 paragraphs.

76 The detail necessary to achieve the policy objective of a scheme will depend on the surrounding legislation and should be discussed between the drafter, the instructors and any other agency with policy responsibility in the area. Drafters, instructors and other agencies should always ask themselves whether particular detail must be included in an Act.

### **6.2 Including detail in subordinate legislation**

77 In some cases, if detail is required, it may be appropriate to include the detail in subordinate legislation made under an Act. This approach has the advantage of leaving the Act uncluttered to deal with the core policy, but it does result in shifting the detail to another document.



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## 6.3 Separating detail

78 If matters of detail are to be included in an Act, the detail can be separated and included in a separate part of the Act. Provisions that establish statutory bodies are often grouped in a separate Part (for example, Chapter 5 of the *Fair Work Act 2009*). As discussed above, these Parts are often located towards the end of the Act with other administrative matters. This has the advantage of focusing a reader's attention on the main operative provisions at the start of the Act.

## 7 Tinkering

79 Frequent amendments of an Act, or a provision of an Act, can increase complexity over time.

80 An example of a section that was frequently amended was section 16 of the *Income Tax Assessment Act 1936* as it was in 2010 before it was repealed and replaced by Division 355 of Schedule 1 of the *Taxation Administration Act 1953*. The section related to the secrecy of information obtained under income tax legislation. The section, when originally enacted in 1936, was 6 subsections taking up just over a page. In 2010 before its repeal, the section had been amended 80 times, resulting in a section of 40 subsections taking up 11 pages.

81 The paragraphs below discuss how to draft a provision that will remain durable over time, minimising the need to tinker with it later. The paragraphs also discuss how to reduce complexity that is created through tinkering.

### 7.1 Including matters in subordinate legislation

82 Sections that are frequently amended often contain lists of matters that change over time. If a section is likely to be amended in the future, and the section is not a core part of the Act, consideration should be given by drafters and instructors, at the time the section is being drafted, to dealing with the matters through subordinate legislation to avoid the section being tinkered with.

83 However, amendments of secrecy provisions are often made as a result of other legislative schemes which require consequential amendments of the secrecy provision. The secrecy provision in the *Australian Securities and Investments Commission Act 2001* does allow for regulations to be made to specify further authorised disclosures (subsection 127(5A)) but amendments continue to be made to section 127 itself. This may be because it is simpler for instructing agencies to put all of the consequential amendments for a legislative scheme in an Act rather than start a parallel process to amend regulations. As of 2016, no regulations have been made under subsection 127(5A).

### 7.2 Coherent principles drafting

84 It may be possible to use a coherent principle drafting approach rather than relying on a list of matters. This might be another way of avoiding having to tinker with the provision in future. Information Privacy Principle 11, relating to the disclosure of personal information, is an example of such an approach. This approach can allow individual matters to be grouped

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into one concept, and can be flexible enough to capture new matters without the need for future amendments. These advantages, however, can come at the expense of certainty as to exactly what the principle covers.

85 Combination approaches can also be used where general principles are stated first, and important or additional matters are also mentioned. Section 718 of the *Fair Work Act 2009* is an example of this approach. This has the advantage of reducing the need for future amendments while at the same time providing certainty.

### **7.3 Structuring provisions**

86 If the methods discussed above to reduce the need for tinkering have not been used to create a durable provision, there is no doubt that making small amendments to a section is often easier, from a drafting, administration and political point of view, than rewriting a whole section. However, drafters should consider ways of making sure that the structure of a provision remains clear, particularly if adding length to a section. For example, drafters could consider inserting subsection headings to group subsections on related topics and to provide structure to a section that is being amended.

87 An example of where structure was imposed on provisions that, as a result of tinkering, previously lacked structure is the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010*. That Act rewrote the taxation confidentiality provisions which were previously spread over 18 tax laws. The Act provided structure by using tables and adopting a more coordinated approach to the disclosure of information by chains of people.

### **7.4 Repealing and replacing a provision**

88 There comes a point where a provision that has been tinkered with is no longer functional and the provision needs to be repealed and replaced. Such was the case with the taxation confidentiality provisions discussed above which were redrafted in the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010*. Of course, repealing and replacing a provision will re-expose the provision to Parliamentary scrutiny and can only be done with the agreement of the instructing agency.

## **8 Policy decisions that cause complexity**

89 As mentioned in the introduction to this paper, many higher-level policy decisions are out of the control of instructors. However, it is still worth examining the types of policy decisions that cause legislation to be complex. Instructors may be able to encourage Ministers or Cabinet to consider these issues when making their decisions, or instructors can consider these issues themselves if they are responsible for making policy decisions.

90 Drafters are always willing to discuss with policy officers the issues and possible solutions to reduce complexity, and to advise on the likely impact on complexity of particular decisions or options.

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## **8.1 Higher-level policy that causes complexity**

91 Decisions about fundamental building blocks of a legislative scheme can add complexity to the legislation. This is particularly the case where a number of options are included that are intended to deliver essentially the same, or very similar, policy results.

92 For example, the 30-40% subsidy for private health insurance premiums was previously made available in 3 ways:

- (a) under the premiums reduction scheme under Division 23 of the *Private Health Insurance Act 2007*, insurers could reduce the premium charged by the amount of the subsidy; or
- (b) under the incentive payments scheme under Division 26 of the *Private Health Insurance Act 2007*, buyers of private health insurance could claim the amount of the subsidy as a payment from Medicare Australia; or
- (c) under Subdivision 61-G of the *Income Tax Assessment Act 1997*, taxpayers could claim a tax offset for the amount of the subsidy.

93 Another example was Division 28 of the *Income Tax Assessment Act 1997* before it was amended in 2015, which set out 4 different ways in which a taxpayer could calculate car expense deductions. The Division was drafted in plain language, but the result was still complex.

94 It is also possible, however, for a higher-level decision to reduce complexity. One way to do this is to design a single set of principles-based rules that replace 2 or more sets of existing rules that have policy similarities.

## **8.2 Lower-level policy that causes complexity**

95 Complexity can be caused by decisions that affect the way in which legislation gives effect to a higher-level policy. Four ways in which complexity arises are discussed below. Often the complexity is an unavoidable consequence of giving legislative effect to the higher-level policy. However, in many cases the complexity could be addressed through spending the time and resources needed to redesign the provisions in a less complex way that still meets higher-level policy concerns.

96 For example, Part 3-1 of the *Fair Work Act 2009* is a significant simplification of the rules relating to prohibited workplace practices. This is achieved largely by introducing a concept of “adverse action” and prohibiting the taking of adverse action for a series of specified reasons such as having or exercising workplace rights, engagement in industrial activity, discrimination etc. Before the *Fair Work Act 2009*, these workplace protections were scattered throughout the *Workplace Relations Act 1996* (for example, in Division 10 of Part 8, Subdivision C of Division 4 of Part 12, and Part 16).

### **8.2.1 Extending an existing scheme to cover a new case**

97 Legislation is often amended to extend its operation beyond its original scope. Generally speaking, if the extension involves a substantial amendment, it is done by a

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“modular” approach, where the new text is inserted as a distinct block, rather than by a series of smaller amendments to the existing text. This adds overall complexity to the legislation, even if it does not make it less readable.

98 For example, the *Medical Indemnity Act 2002* originally provided for 2 types of indemnity scheme, one for incidents “incurred but not reported” and one for “high cost claims”. In 2003, the Act was amended by the *Medical Indemnity Amendment Act 2003* to add an “exceptional claims” indemnity scheme. In 2004, the Act was amended by the *Medical Indemnity Legislation Amendment (Run-off Cover Indemnity and Other Measures) Act 2004* to add a “run-off cover” indemnity scheme. These further schemes were included in the existing structure of the Act as separate Divisions, but added considerably to the length of the Act.

99 On occasion, the extension of the legislation cannot be achieved by a modular approach, and the extension is worked into the existing provisions. In these cases, a detailed series of amendments may be required, and considerable complexity can be added to the existing provisions.

100 For example, Schedule 2 to the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* aimed to harmonise the regimes for determining percentages of care under the child support legislation and the family assistance legislation. In particular, decisions taken under one of the regimes relating to percentages of care were to have effect for the purposes of the other regime, and the review procedures under each regime were to be available for decisions taken under the other regime. These features added significant complexity to legislation that was already complex.

101 Obviously, when a decision has been made to extend a scheme to cover a new case, the drafter needs to consider the best way of achieving this to minimise the complexity created. In particular, the drafter needs to consider which of the 2 approaches discussed above (the modular approach or the detailed amendments approach) produces the least complexity.

### **8.2.2 Creating a new provision or scheme rather than amending an existing provision or scheme**

102 There are cases where the simplest way to legislate a particular policy is to amend an existing provision or scheme, but for presentational reasons this is rejected. This adds to the length of legislation, and can also add to complexity by creating a plethora of slightly different provisions or schemes (and by making research of precedents more difficult).

103 For example, the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* conferred on those involved in atomic tests an entitlement to treatment for malignant neoplasia. The Act is 33 pages long and is very closely based on Part V of the *Veterans’ Entitlements Act 1986*. The same result could have been achieved with relatively straightforward amendments of that Part. However, because the entitlement was to be extended to civilians as well as to military personnel, instructors would not permit the *Veterans’ Entitlements Act 1986* to be amended.

104 There may be other cases where a new provision or scheme is created because it is, in the limited time available, quicker than devising a properly designed adaptation of an existing provision or scheme.

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### 8.2.3 Tailoring specific rules for a particular case

105 Legislation often contains rules dealing with how a general principle applies in particular cases. These rules ensure that the legislation gives proper legal effect to the relevant policy in the particular case, but it is at the cost of greater complexity. If the legislation has to deal with a large number of particular cases, the complexity is multiplied, especially if the effects of the additional rules on the other additional rules have to be addressed.

106 For example, Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999* sets out a way of using a “margin scheme” to account for the GST on certain supplies of real property. Section 75-11 contains a number of specific rules dealing with how the margin scheme applies to these supplies if the supplies involve GST groups, joint ventures, deceased estates, going concerns, farm land or associates. This section adds considerable complexity to the general principle of the margin scheme under subsection 75-5(1) of the Act (which is itself a specific rule that departs from the generally applicable approach to accounting for the GST).

### 8.2.4 Exceptions to a main rule

107 Creating an exception to a rule adds a layer of complexity. If there are many exceptions, the primary rule can seem to be swamped. Often the number of exceptions increases over several years, and while each added exception is not necessarily complex in itself, the combined effect of all of the exceptions adds significantly to complexity.

108 For example, section 170 of the *Income Tax Assessment Act 1936* is about the periods within which the Commissioner can amend assessments of income tax. The section is about 12 pages long. The main rule in subsection (1) allows amendment within 2 years or 4 years of the Commissioner’s notice of assessment. Most of the remainder of section 170 is taken up with exceptions to the main rule. In addition, the exceptions are expressed in different ways. Some are not easily identifiable as exceptions, and some are contained in subsection (1) itself.

109 Once a policy decision has been made to include a specific rule for a particular case, or to include an exception to a main rule, the decision for the drafter becomes one of determining how to draft the provision in the simplest way. The drafter needs to consider whether the specific rule or exception needs its own section or Division, and where best to place the specific rule or exception, in a way that does least damage to the main rules. The Act might need some additional structure to be imposed in order to deal with the new rules. For example, it might be best to divide a Part, that previously had no Divisions, into Divisions, so that one Division can deal with the main rules and another Division can deal with the specific rules or exceptions.

## 8.3 Later changes to a draft or Bill

110 As discussed above, lower-level policy decisions that are made initially can cause legislative complexity. Complexity can also be caused later in a drafting process, particularly through incorporating changes to a draft Bill as a result of comments received on an exposure draft of the Bill. While a Bill might be drafted with robust concepts, a good structure and plain language, if ill-considered changes are made in response to comments arising from the exposure process, the Bill can become complex.

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111 In deciding whether to incorporate comments received from an exposure process, instructors should carefully consider the impact incorporating each comment will have on the complexity of the Bill or a particular provision. Sometimes, the total number of changes made can add to the complexity of a Bill. Ultimately, it is a matter of weighing up the increased complexity of a Bill produced through incorporating a change against the interests of particular users of the legislation who seek the change.

112 The same issues arise in relation to changes of a Bill in Parliament.

#### **8.4 Requiring specific provisions that are not legally necessary**

113 Provisions that are not legally necessary are sometimes included in legislation. This is often done because Departments perceive there to be legal risks, or presentational issues, that specific provisions could address. These provisions are often expressed to be “To avoid doubt” or “For the avoidance of doubt”. If the approach is too risk-averse, unnecessary detail can be added to legislation.

114 For example, section 75-14 of the *A New Tax System (Goods and Services Tax) Act 1999* was inserted into the Act in 2005 to counter concerns that developers could include, in their calculations of their margins on the sale of real property, the costs of improvements they made to the real property. This would in effect allow them to double-dip on their input tax credits. The Federal Court decided in *Sterling Guardian P/L v. Commissioner of Taxation* [2006] FCAC 12 that the Act, as it stood prior to the insertion of section 75-14, did not allow these costs to be included in the margin calculation. The section was therefore unnecessary. However, given that the amount of revenue at stake if the outcome of the litigation had been different was very large, the inclusion of section 75-14 was probably justified. As a general rule, however, instructors should consider how genuinely these provisions are required.

115 There are also many cases in which specific circumstances are dealt with in an Act even though they are already covered by rules stated in the Act and are therefore not legally necessary. Often this is prompted by a desire to be able to point to where specific concerns are dealt with in the Act, and by a reluctance to apply instead the principles embodied in a rule in the Act. Where possible, drafters and instructors should resist pressure to legislate for specific circumstances if they would be doing no more than giving effect to an existing rule. For example, in drafting the *A New Tax System (Goods and Services Tax) Act 1999*, a question arose as to whether the Act should include specific provisions stating that the costs of complying with the Act gave rise to entitlements to input tax credits. The instructors successfully resisted pressure to include specific provisions on the ground that the general provisions in the Act dealing with entitlements to input tax credits would clearly apply to these compliance costs. Sometimes including a note in the legislation, or a paragraph in the explanatory memorandum, is sufficient to deal with the issue without including an additional provision in the legislation.

116 Provisions that are not legally necessary are also included in legislation to promote a purposive interpretation of the legislation (for example, objects clauses) or as explanatory material (for example, outline provisions). These provisions (if properly designed) do not add to the complexity of legislation.

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## 8.5 “Grandfathering” existing arrangements

117 Legislation is typically accompanied by a series of transitional, application or savings provisions that ensure that existing entitlements, obligations and processes are dealt with appropriately under the new legislation. Sometimes these provisions deal with the “grandfathering” of detailed arrangements under existing legislation, and the provisions can then become very lengthy and/or complex.

118 For example, the *Workplace Relations Act 1996* contained a number of Schedules that dealt with transitional issues. In particular, Schedules 6 to 8 dealt with transitional arrangements for federal awards, federal agreements, State employment agreements and State awards. The provisions were mainly concerned with the transition of these arrangements to the regime established by the 2005 amendments of the Act, but they also had to deal with the transition of arrangements that had been transitioned from earlier regimes and that were still in operation at the time of the 2005 amendments. Schedules 6 to 8 were about 190 pages in length. A similar transitional regime was then required relating to the *Fair Work Act 2009* (see Schedules 2 to 10 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*). In this case, there was a deliberate decision to limit the impact of complexity by separating the complexity of the transitional regime from the *Fair Work Act 2009*.

119 Another example (in which grandfathering was built into the primary legislation) is the treatment of pre-CGT assets under the income tax law. The effect of the original legislation enacted in 1986 was that disposals of assets that were acquired before 20 September 1985 do not attract tax (but those assets lose their status as pre-CGT assets once they are disposed of). In subsequent years, a significant number of the amendments relating to capital gains tax have made special provision for pre-CGT assets, usually to prevent values of pre-CGT assets being artificially inflated as a way of enhancing the benefit conferred by the exemption or to prevent pre-CGT status being lost as a result of the Act providing that an asset is to be treated as having been disposed of or acquired in particular circumstances. The rate at which these provisions have been added to the Act seems to have been accelerating, and there are now a very large number of them.

120 If, at the time the original provisions were enacted, it had been known how significant that issue would become, drafters might have decided that it was best to have a whole Division or Part that dealt exclusively with pre-CGT assets.

## 8.6 Implementation of a proposal in stages

121 If legislation is to be implemented in stages, this can result in complex transitional arrangements or in layering of commencements.

122 An example of complex transitional arrangements aimed at implementing a proposal in stages is the *Fuel Tax (Consequential and Transitional Provisions) Act 2006*. The *Fuel Tax Act 2006* set out a scheme of entitlements to fuel tax credits that appears relatively straightforward, but this was in part achieved by including complex transitional provisions in Schedule 3 to the *Fuel Tax (Consequential and Transitional Provisions) Act 2006* that have the effect of notionally modifying the scheme during an extended transitional period to take account of the previous legislation that the *Fuel Tax Act 2006* replaced.

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123 An example of layered commencements is the *Health Legislation (Private Health Insurance Reform) Amendment Act 1995*. It contains 4 Schedules of amendments, commencing on specified days one after the other. Several amendments in the later Schedules relied for their effectiveness on the earlier Schedules.

## **8.7 Where to put complexity**

124 When a policy decision has been made where complexity is unavoidable, the decision sometimes becomes where the complexity is to lie. For example, a decision to implement legislation in stages is one where complexity is almost unavoidable. Although the drafter can choose which of the 2 approaches discussed above to adopt, the result is likely to be complex in either case. In this case, it is a matter of weighing up factors, such as:

- (a) what are the options for dealing with the complexity;
- (b) what are the impacts from each of the options;
- (c) how many people are to be affected by the complexity; and
- (d) over what period will people be affected by the complexity.

125 Often, there is no easy solution and it becomes a choice of which is the least worst option.

## **9 Timelines that cause complexity**

### **9.1 How timelines can cause complexity**

126 Tight timelines can result in complexity because there is insufficient time available to consider potential simplifications for either the policy or drafting of a Bill. In an ideal world, significant time would be devoted to planning, drafting and refining the provisions of a Bill. In reality, the political and legal significance of some projects means the planning and refining stages are cut short and the drafter's imperative is to find quickly something that "works", regardless of how inelegant the solution might be.

### **9.2 Mitigating tight timelines—instructors**

127 There are steps that can be taken by instructors to mitigate the effects of a tight timeline on a legislative project. The most important of these is to make early contact with OPC. OPC has [client advising arrangements](#) under which client agencies can obtain quick off-the-cuff advice from a senior drafter about drafting matters.

128 Early access to drafting teams can also be arranged. Traditionally, OPC has not become involved in legislative projects until it receives written instructions from instructors. However, if a legislative project is unusually complex, large or urgent, a drafting team may work closely with instructors from an early stage of the project. Even a few hours or days of advice from a drafting team can leave the instructors better placed to advise Ministers and work on written instructions.



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129 If instructors are unsure as to what is a realistic timeline for the drafting of a particular Bill, they can always use these avenues to consult OPC. It can, however, be difficult to accurately predict the time required for a legislative project.

### **9.3 Mitigating tight timelines—drafters**

130 There are also a few strategies commonly employed by drafters to mitigate the effects of a tight timeline on a legislative project. These all centre around reducing the immediate workload to a more manageable level and include the following:

- (a) marshalling additional drafting resources for the project;
- (b) providing in a Bill for appropriate matters to be dealt with in subordinate legislation;
- (c) leaving certain matters to be dealt with by Parliamentary amendments; and
- (d) leaving certain matters to be dealt with by a later Bill.

131 These approaches can help to reduce complexity by avoiding the need to resort to shortcuts that create complexity and allowing more time to deal with the aspects that must be in the Bill to ensure that simplest approach possible is adopted.

## **10 Role of drafters and instructors in helping readers deal with complexity**

132 The previous topics have discussed the causes of complexity and how to avoid or minimise complexity. However, sometimes policy is so complex and rules, exceptions, qualifications so detailed that no amount of planning, structure and plain language can avoid producing a large, complex Act. In this case, drafters must find ways to help readers to deal with this complexity.

133 Simplified outlines included at the beginning of various parts of Acts (such as Divisions, Parts and Chapters) are a very useful way of giving readers an overview of a part of an Act, or an Act. The overview can help readers better understand the part or Act by giving them some background to the legislation and introducing important concepts. Other techniques (such as notes) that help a reader to navigate their way through the legislation can also be used. Similarly, examples can be used to clarify a particularly complex provision.

134 In addition, instructors should recognise the value of a well-drafted explanatory memorandum in helping readers comprehend complex legislation. Particularly complex provisions or concepts can be further elaborated on and explained in the explanatory memorandum. Examples can also be included to great effect in explanatory memoranda.

## **11 A good example of complex policy in legislation**

135 While there is no doubt that complex policy can lead to complex legislation, by adopting some of the techniques discussed in this paper, drafters and instructors can attempt to draft laws to implement complex policy in terms that are as simple as possible.

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136 The *Fair Work Act 2009* is a good example of complex policy that is rendered as readable as possible, as a result of various drafting and policy decisions. (This is despite a relatively short timeline allowed for drafting the Bill.)

137 Firstly, some policy decisions were taken during the project that allowed previously complex policy to be simplified. As mentioned above, Part 3-1 of the *Fair Work Act 2009* simplifies the general protections relating to prohibited workplace practices by introducing a broad concept of “adverse action”, rather than having separate rules for each type of adverse action.

138 Secondly, the structure of the Act tries to deal with the complexity of the policy as simply as possible by including Chapters in a descending order of importance for readers. The most important Chapter, Chapter 2 on terms and conditions of employment, is near the front of the Act. On the other hand, a Chapter of less importance for most readers, Chapter 5 on the administration of the Act, is nearer the end of the Act. This same structure is generally reflected within Chapters. In Chapter 2, core provisions are dealt with at the front of the Chapter in Division 2 of Part 2-1 (after the simplified outline in Division 1).

139 Each Part of the Act includes a simplified outline at the beginning of the Part to allow readers to understand some of the important concepts in the Part.

140 Thirdly, as mentioned above, a Drafting Guide was developed during the drafting of the Fair Work Bill 2009 to ensure as much consistency as possible among the different drafting teams, to eliminate complexity created through inconsistent language and inconsistent use of concepts. The Guide was also supported by a specifically designed macro to search electronically for inconsistencies and ensure conformity with the Guide. OPC’s in-house editors read the Bill on a number of occasions, looking only for inconsistencies between different parts of the Bills. Meetings were held frequently with all drafters to ensure a consistent understanding of various provisions that were being drafted and approaches that were being taken.

141 The Fair Work Bill Drafting Guide also reiterated some of the material from the OPC Plain English Manual on structuring provisions, such as limiting the number of subsections in a single section and keeping sentences short and reader-friendly.

142 One complexity that the Act did have to deal with was having the same term meaning different things, as *employer* and *employee* have 2 meanings within the Act: their ordinary meaning, and “national system employer” and “national system employee”. This is dealt with as simply as possible by having a statement at the beginning of each Part stating which meaning the term has in that Part. The Dictionary in section 12 of the Act contains a cross-reference stating that *employee* and *employer* is defined in the first Division of each Part in which the term appears.

143 Other approaches to this issue were discussed, such as using *national system employee* and *national system employer* in the provisions where those terms were needed, but it was felt that this would add complexity to those provisions. On balance, it was decided that one simple term that had 2 meanings in the Act produced less complexity than having 2 terms, where one of those terms was long.

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144 OPC has developed a guide to ensure that future amendments of the *Fair Work Act 2009* continue the approaches adopted, so that the Act can remain as simple as possible over time despite amendments.

## 12 Conclusion

145 Complex legislation can result from policy decisions, drafting decisions, or both. This paper recognises that there are some decisions that are beyond the control of instructors and drafters (such as decisions of Cabinet or Ministers). However, there are also many areas where the decisions of instructors and drafters can contribute to creating a complex product, or a product that is simple and elegant. Although some degree of complexity cannot always be avoided, a careful balancing of factors, and good judgment, may help to ensure that the least complex approach is taken. At the very least, the complexity of a particular approach (either a policy or drafting approach) is one factor that should be carefully considered when deciding whether that approach is the most appropriate.

146 While the world in which legislation operates is increasingly complex, instructors and drafters can take steps to reduce this complexity. The *Fair Work Act 2009* is an example of complex policy that, as a result of the effort of instructors and drafters, was stated as simply as possible using some of the approaches discussed in this paper.

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## Attachment A—Longest Acts on the Commonwealth statute book (as at 1 June 2016)

	<b>Act title</b>	<b>No. of pages</b>
<b>1</b>	Income Tax Assessment Act 1997	4757
<b>2</b>	Corporations Act 2001	2871
<b>3</b>	Social Security Act 1991	2407
<b>4</b>	Customs Tariff Act 1995	1725
<b>5</b>	Income Tax Assessment Act 1936	1568
<b>6</b>	Competition and Consumer Act 2010	1494
<b>7</b>	Veterans' Entitlements Act 1986	1421
<b>8</b>	Offshore Petroleum and Greenhouse Gas Storage Act 2006	1329
<b>9</b>	Customs Act 1901	1221
<b>10</b>	Environment Protection and Biodiversity Conservation Act 1999	1028
<b>11</b>	Taxation Administration Act 1953	958
<b>12</b>	Fair Work Act 2009	886
<b>13</b>	Migration Act 1958	875
<b>14</b>	Broadcasting Services Act 1992	858
<b>15</b>	Criminal Code Act 1995	793
<b>16</b>	Telecommunications Act 1997	771
<b>17</b>	Crimes Act 1914	760
<b>18</b>	Social Security (International Agreements) Act 1999	730
<b>19</b>	Biosecurity Act 2015	674
<b>20</b>	Copyright Act 1968	673
<b>21</b>	Family Law Act 1975	671
<b>22</b>	Superannuation Industry (Supervision) Act 1993	621
<b>23</b>	National Consumer Credit Protection Act 2009	597
<b>24</b>	A New Tax System (Goods and Services Tax) Act 1999	594
<b>25</b>	Water Act 2007	585
<b>26</b>	Financial Services Reform Act 2001	580
<b>27</b>	Corporations (Aboriginal and Torres Strait Islander) Act 2006	576
<b>28</b>	A New Tax System (Family Assistance) (Administration) Act 1999	571
<b>29</b>	Bankruptcy Act 1966	566
<b>30</b>	Native Title Act 1993	544
<b>31</b>	Therapeutic Goods Act 1989	542

Note: Only the substantive text of the Act is included in the page number count.