



Principle (a): Compliance with legislative requirements

Overview

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. Under this principle, the committee is typically concerned with:

- whether the instrument is within the powers conferred by its enabling Act;
- whether any statutory preconditions to the making of the instrument have been satisfied; and
- whether the instrument complies with all other legislative requirements.

Requirements of the enabling Act

A legislative instrument must be made in accordance with the powers conferred by its enabling Act. This may include any express limitations or preconditions which must be satisfied for the instrument to be lawfully made. The explanatory statement to the instrument should address the following matters:

- the source of legislative authority for the instrument, including its enabling provisions; and
- whether there are any statutory preconditions that must be satisfied for the instrument to be lawfully made, and whether these were satisfied.

Where an instrument has been made in anticipation of the commencement of its enabling provision, the explanatory statement should indicate that the instrument relies on section 4 of the *Acts Interpretation Act 1901* (Interpretation Act). Similarly, when an instrument repeals or amends another instrument, and there is no express power in the enabling legislation to do so, the explanatory statement should indicate that the instrument relies on subsection 33(3) of the Interpretation Act for its authority.

Other legislative requirements

An instrument and its accompanying explanatory statement must comply with all applicable legislative requirements—in particular the requirements of the *Legislation Act 2003* (Legislation Act). The explanatory statement to an instrument should address the following matters:

- **documents incorporated by reference** – Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement to an instrument that incorporates a document to contain a description of that document, the manner in which it is incorporated, and indicate how it may be obtained. Further information about these requirements can be found in the committee's [guideline on principle \(f\)](#);
- **consultation** – Paragraphs 15J(2)(d) and (e) of the Legislation Act require the explanatory statement to an instrument to describe the nature of any consultation that was undertaken in relation to an instrument. If no consultation was undertaken, the explanatory statement should explain why no consultation was undertaken. Further information about these requirements can be found in the committee's [guideline on principle \(d\)](#);

- **purpose and operation of the instrument** – Paragraph 15J(2)(b) of the Legislation Act requires the explanatory statement to an instrument to explain the instrument's purpose and operation;
- **statement of compatibility with human rights** – Paragraph 15J(2)(f) of the Legislation Act requires that a statement of compatibility be included in the explanatory statement. The Parliamentary Joint Committee on Human Rights has published a [guidance note on drafting statements of compatibility](#) and further information is also available on the Attorney-General's Department's [website](#); and
- **retrospective commencement** – Subsection 12(2) of the Legislation Act provides that the retrospective commencement of an instrument is of no effect if the retrospective commencement would disadvantage the rights of a person (other than the Commonwealth). If an instrument commences retrospectively, the explanatory statement should explicitly address whether the retrospective commencement would disadvantage any person other than the Commonwealth.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

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| <input type="checkbox"/> Legislative authority | The explanatory statement should: <ul style="list-style-type: none">• identify the specific provision/s which provide the legal authority for the instrument;• note that the instrument relies on section 4 of the Interpretation Act, if it is made in anticipation of its authorising provisions;• note that the instrument relies on subsection 33(3) of the Interpretation Act for its authority when the instrument repeals or amends another instrument and there is no express power in the enabling legislation to do so. |
| <input type="checkbox"/> Compliance with legislative preconditions | Where the enabling legislation prescribes any conditions which must be satisfied in making the instrument, the explanatory statement should explain how those conditions have been satisfied. |
| <input type="checkbox"/> Incorporation of documents | Where an instrument incorporates a document, the explanatory statement should address the manner of incorporation; the legislative authority relied upon to incorporate documents from time to time (if applicable); how the incorporated documents may be obtained; and whether they can be freely accessed and used. |
| <input type="checkbox"/> Consultation | The explanatory statement should address the following matters relating to consultation: <ul style="list-style-type: none">• whether any consultation occurred in relation to the specific instrument;• whether persons likely to be affected by the instrument, or with expertise in fields relevant to the instrument, were consulted;• or if no consultation occurred, why no consultation occurred. |
| <input type="checkbox"/> Explanation of purpose | The explanatory statement should include a description of the purpose and operation of the instrument. |

- Statement of compatibility with human rights** The explanatory statement should contain a 'standalone' statement of compatibility with human rights.

- Explanation of retrospective commencement** The explanatory statement should explicitly address whether retrospective commencement would disadvantage any person other than the Commonwealth.