



## Principle (b): Constitutional validity

### Overview

Senate standing order 23(3)(b) requires the committee to scrutinise each instrument as to whether it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid.

The committee's consistent view is that questions of legal validity—including constitutional validity—are ultimately for the courts to determine, and that it is therefore not the committee's role to make determinative statements about legal validity.

In light of this, the committee generally takes the view that instruments are constitutionally valid if they are made in accordance with their enabling Act. However, there may be circumstances where it is appropriate to draw constitutional questions to the attention of the Senate despite the instrument according with the powers conferred by the Parliament.

Under this principle, the committee will typically be concerned with:

- whether grants and programs specified in instruments made under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986* are supported by a constitutional head of legislative power; and
- instruments which raise questions as to whether they:
  - may breach the separation of powers doctrine embodied in the Constitution; or
  - may restrict the implied freedom of political communication.

### Supported by a constitutional head of legislative power

#### *Instruments specifying expenditure*

Explanatory statements to instruments that specify grants and programs on which expenditure is authorised (usually made under the *Financial Framework (Supplementary Powers) Act 1997* or the *Industry Research and Development Act 1986*) should:

- clearly identify each constitutional head of power that is relied on to support expenditure on the relevant grant or program; and
- explain how each identified head of legislative power supports the grant or program, drawing on relevant jurisprudence where appropriate.

Where numerous heads of power are relied upon, the explanatory statement should include sufficient information to establish how the identified heads of legislative power provide authority for the whole of the relevant grant or program.

Further information about the committee's expectations regarding instruments specifying Commonwealth expenditure is contained in the guideline on [Scrutiny of Commonwealth expenditure](#).

## Otherwise constitutionally valid

The matters below are provided as examples of other matters that the committee may raise under scrutiny principle (b).

### ***Separation of powers—Chapter III issues***

Where there is a question as to whether an instrument may infringe the separation of powers doctrine embodied in the Constitution, the committee will look to the explanatory statement to the instrument for an explanation of how the instrument complies with the doctrine. For example, where an instrument confers non-judicial functions or powers on a court or judicial officer, the explanatory statement should set out whether the functions or powers are to be exercised by the court or judicial officer acting in a non-judicial (e.g. personal) capacity.

### ***Implied freedom of political communication***

Where an instrument raises a question as to whether it may restrict the implied freedom of political communication, the committee expects the explanatory statement to the instrument to address how the instrument does not impermissibly restrict the implied freedom.

## 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"/> <b>Instruments specifying expenditure</b>         | Where an instrument specifies expenditure, the explanatory statement should: <ul style="list-style-type: none"><li>• clearly identify each constitutional head of power that is relied on to support expenditure on the relevant grant or program;</li><li>• explain how each identified head of legislative power supports the grant or program, drawing on relevant jurisprudence where appropriate; and</li><li>• where numerous heads of power are relied on, explain how the identified heads of power provide authority for the whole of the grant or program.</li></ul> |
| <input type="checkbox"/> <b>Separation of powers—Chapter III issues</b>    | Where an instrument confers non-judicial functions or powers on a court or judicial officer, the explanatory statement should include an explanation of how the instrument complies with the separation of powers doctrine embodied in the Constitution.   |
| <input type="checkbox"/> <b>Implied freedom of political communication</b> | Where an instrument raises a question as to whether it may restrict the implied freedom of political communication, the explanatory statement should address how the instrument does not impermissibly restrict the implied freedom.   |