



Principle (d): Adequacy of consultation

Overview

Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether those likely to be affected by the instrument were adequately consulted in relation to it. Under this principle, the committee will typically be concerned with:

- whether consultation occurred in relation to the specific instrument;
- whether persons likely to be affected by the instrument were consulted; and
- whether persons with expertise were consulted.

Consultation on the specific instrument

The committee expects the explanatory statement to an instrument to address consultation that was undertaken in relation to the **specific instrument**, including any issues raised during the consultation and the outcomes of the consultation (for example, any action taken based on comments or submissions received).

Where consultation has previously been undertaken in relation a broader issue, set of legislative reforms, or enabling legislation, and no further consultation was undertaken in relation to the specific instrument, the explanatory statement should address the following matters:

- what consultation was previously undertaken; and
- why it was considered unnecessary to undertake additional consultation in relation to the specific instrument.

Consultation with persons affected by the instrument

Section 17 of the *Legislation Act 2003* (Legislation Act) requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content (paragraph 17(2)(b)). The explanatory statement to an instrument should address the following matters:

- details of any consultation that was undertaken with persons likely to be affected by the instrument; or
- if no consultation was undertaken with persons likely to be affected by the instrument, the reasons for not consulting such persons.

Consultation with experts

Section 17 of the Legislation Act requires that prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken, and that in determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation drew on the knowledge of persons with expertise in fields relevant to the proposed instrument (paragraph 17(2)(a)). The explanatory statement to an instrument should address the following matters:

- details of any consultation that was undertaken with persons with expertise in fields relevant to the proposed instrument; or
- if no consultation with experts was undertaken, the reasons for not consulting such persons.

Consultation with the Office of Best Practice Regulation

The committee does not consider consultation with the Office of Best Practice Regulation (OBPR) to be an adequate substitute to consulting with individuals affected by the instrument or relevant experts. Further, any requirements for consultation with the OBPR are separate to the requirements of the Legislation Act. As such, information related to consultation with the OBPR alone is unlikely to satisfy the committee's concerns under this principle.

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"/> Consultation on specific instrument | The explanatory statement should address: <ul style="list-style-type: none"> • what consultation was undertaken in relation to the specific instrument; • any issues raised during the consultation, and any outcomes or action taken as a result of the consultation; and • if the rule-maker is relying on previous broader consultation, why it was considered unnecessary to undertake additional consultation in relation to the specific instrument. |
| <input type="checkbox"/> Consultation with affected persons | The explanatory statement should address who was consulted in relation to the specific instrument, and how they could potentially be affected by the content of the instrument, or, if no consultation with affected persons was undertaken, the reasons for not consulting such persons. |
| <input type="checkbox"/> Consultation with experts | The explanatory statement should address who was consulted in relation to the specific instrument, and the relevance of their expertise, or, if no consultation with experts was undertaken, the reasons for not consulting such persons. |
| <input type="checkbox"/> No consultation undertaken | If no consultation was undertaken, the explanatory statement should explain why no consultation was undertaken. |