



Principle (g): Adequacy of explanatory materials

Overview

Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

The committee has long emphasised the importance of explanatory statements as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation. The checklists below identify the types of information which the committee typically considers should be included in explanatory statements. They are indicative, rather than exhaustive, and the committee's expectations may differ depending on the purpose and scope of the instrument.

General matters

- Purpose and operation** The explanatory statement should clearly describe the purpose and operation of the instrument.
- Provision by provision explanation** The explanatory statement should contain a brief explanation of the purpose and scope of each clause in the instrument, with sufficient detail for a reader to understand how each clause will function. It should not simply repeat the text of the clauses.
- Legislative authority** The explanatory statement should:
 - identify the specific provision/s which provide the legal authority for the instrument;
 - note that the instrument relies on section 4 of the *Acts Interpretation Act 1901*, if it is made in anticipation of its authorising provisions; and
 - note that the instrument relies on subsection 33(3) of the *Acts Interpretation Act 1901* for its authority when the instrument repeals or amends another instrument and there is no express power in the enabling legislation to do so.
- 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.
- Constitutional validity** The explanatory statement does not ordinarily need to explain why the instrument is constitutionally valid, unless:
 - the instrument is made under the *Financial Framework (Supplementary Powers) Act 1997* or the *Industry Research and Development Act 1986*; or
 - the instrument is likely to engage an express or implied constitutional principle or guarantee, such that it is necessary to explain why such terms are not breached.
- Consultation** The explanatory statement should address the following matters relating to consultation:
 - 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.

- Statement of compatibility with human rights** The explanatory statement to all instruments should contain a 'standalone' statement of compatibility with human rights. Further information about drafting statements of compatibility is available on the Attorney-General's Department's [website](#), and the Parliamentary Joint Committee on Human Rights' [website](#).

Common instrument-specific matters

- Collection, use and disclosure of personal information (privacy)** Where an instrument provides for the collection, use or disclosure of personal information, the explanatory statement should explain:
- the nature and scope of the provisions (including the nature and extent of the information that maybe disclosed and the persons and/or entities to whom disclosure is permitted);
 - why the provisions are considered necessary and appropriate; and
 - what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the *Privacy Act 1988* applies).
- Availability of independent merits review** Where an instrument empowers a decision-maker to make discretionary decisions with capacity to affect rights, liberties, obligations or interests, the explanatory statement should explain:
- whether independent merits review is available; and
 - if merits review is not available, the characteristics of the relevant decisions which justify their exclusion from merits review, by reference to the Administrative Review Council's guide, [What decisions should be subject to merit review?](#)
- Delegated and discretionary powers** Where an instrument delegates administrative powers or functions, the explanatory statement should explain:
- the purpose, scope and necessity of the delegation,
 - who will be exercising the powers and functions, including whether they possess appropriate qualifications and skills; and
 - the nature and source of any limitations and safeguards.
- Amendment or modification of, or exemptions from, primary legislation** Where an instrument includes a provision which amends or modifies primary legislation, or exempts persons or entities from the operation of primary legislation, the explanatory statement should explain:
- the legislative authority relied upon to amend or modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation;
 - the scope of the relevant amendment, modification or exemption, including the persons, entities or classes of persons or entities to which it applies;
 - why it is considered necessary and appropriate to modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation (instead of amending primary legislation);
 - the duration of the relevant amendment, modification or exemption, and if this is longer than three years, the reason this is necessary;
 - whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate (including whether it is appropriate to include the provisions in delegated legislation).

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- Exemption from sunseting** Where an instrument is exempt from sunseting, or contains measures that will remain in force within a principal instrument that is exempt from sunseting, the explanatory statement should:
- set out the source of the exemption from sunseting; and
 - justify the exemption, noting the effect of the exemption on parliamentary oversight.
- Imposition of taxes and levies** Where an instrument imposes a charge, fee or levy, the explanatory statement should explain the purpose of the imposition (e.g., fee for services rendered). Where the amount does constitute a tax or levy, the explanatory statement should explain:
- the legislative authority relied upon for using delegated legislation to set the levy or tax (e.g. a charges Act);
 - whether the enabling Act sets any limits on the imposition of tax (for example, a statutory cap on the amount that may be imposed); and
 - why it is considered necessary and appropriate to use delegated legislation to set the levy or tax, rather than primary legislation.
- Incorporation of documents** Where an instrument incorporates a document into its text, other than a law of the Commonwealth, the explanatory statement should:
- describe the document;
 - identify the manner of incorporation (at a fixed date, or as in force from time to time);
 - identify the legislative authority for incorporating documents from time to time (if applicable);
 - indicate how the document may be obtained; and
 - indicate where the document may be freely accessed and used by members of the public.
- Reverse burden of proof** Where an instrument includes an offence which reverses the legal or evidential burden of proof, the explanatory statement should justify the reversal by reference to the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#) (see section 4.3).
- Retrospective commencement or effect** Where an instrument commences retrospectively, or commences prospectively but has a retrospective effect, the explanatory statement should explain:
- the nature and scope of the relevant provisions;
 - why the retrospectivity is considered necessary and appropriate; and
 - whether any person has been, or may be disadvantaged by the retrospectivity and, if so, what steps have been or will be taken to avoid such disadvantage.