AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Delegated Legislation
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Principle (g): Adequacy of explanatory materials

Overview

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. Under scrutiny principle (g), the committee considers whether the explanatory materials accompanying an instrument provide sufficient information to gain a clear understanding of the instrument. 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; • 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**, including:
		  ○ whether persons likely to be affected by the instrument were consulted; and
		  ○ whether persons 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 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 & 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 review**

Where an instrument provides for discretionary decisions to be made, the explanatory statement should state if independent review of those decisions is available. If merits review is not available, this should be justified by reference to the Administrative Review Council's Guide, *What decisions should be subject to merits 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.

☐ **Exemption from / modification of primary law**

Where an instrument provides an exemption from primary legislation or modifies the application of primary legislation, the explanatory statement should explain:

- the legislative authority relied upon to modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation;
- the scope of the relevant 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); and
- 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).

☐ **Imposition of fees or charges**

Where an instrument imposes fees or charges, the explanatory statement should explain the basis on which the fee or charge is imposed (e.g., fee for services rendered; tax), regardless of whether the fees or charges were the same in previous instruments. If the fees or charges are taxes, the explanatory statement should also 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 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 effect**

Where an instrument may have a retrospective effect, the explanatory statement should state whether any person may be disadvantaged by the retrospectivity and, if so, explain what steps have been or will be taken to avoid such disadvantage.