



Principle (I): Modification of primary legislation

Overview

Senate standing order 23(3)(I) requires the committee to scrutinise each instrument as to whether it contains amendments or modifications to primary legislation, or it exempts persons or entities from the operation of primary legislation. Under this principle, the committee will typically be concerned with instruments which:

- amend primary legislation;
- modify the operation of primary legislation; and
- exempt persons or entities from the operation of primary legislation.

Senate standing order 23(3)(I) also requires the committee to consider whether such an instrument is in force only for as long as is strictly necessary.

Amendment or modification of, or exemptions from, primary legislation

Provisions in delegated legislation which amend or modify primary legislation, or exempt persons or entities from the operation of primary legislation, may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the executive. Such provisions should not ordinarily be included in delegated legislation and the committee will take a strong view on the inclusion of these provisions in executive-made law.

Where an instrument nevertheless includes such provisions, the committee generally considers that it should cease to operate no more than three years after the commencement date for the instrument. This is to ensure a minimum degree of parliamentary oversight.

In addition, the explanatory statement to the instrument 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; 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).

Explanatory statement checklist

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

- 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; 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).