



STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Guideline on incorporation of documents

Purpose

This guideline provides information on the committee's expectations in relation to legislative instruments that incorporate, by reference, Acts, legislative instruments or other external documents, without reproducing the relevant text of the incorporated material in the instrument.

Where a legislative instrument incorporates material by reference, that material becomes part of the law. The committee therefore considers it important that persons interested in or affected by the law understand how that material is incorporated, and are able to readily and freely access its terms. The *Legislation Act 2003* (Legislation Act) also imposes some restrictions on the incorporation of documents in instruments, and requires certain information about any document incorporated in an instrument to be included in the explanatory statement (ES) to the instrument.

In brief, the committee expects the instrument and/or its ES to:

1. specify the manner in which the Act, legislative instrument, or other document is incorporated;
2. identify the legislative authority for the manner of incorporation specified;
3. contain a description of the incorporated document; and
4. include information as to where the incorporated document can be readily and freely accessed.

Manner of incorporation

Instruments may incorporate, by reference, part or all of Acts, legislative instruments and other documents as they exist at particular times:

- as in force from time to time (which allows any future amendment to or version of the document to be automatically incorporated);
- as in force at an earlier specified date; or
- as in force at the commencement of the instrument.

The manner in which the material is incorporated must be authorised by legislation.

Legislative framework

- **Incorporation of Commonwealth Acts, disallowable legislative instruments and rules of court**

Subsections 14(1)(a) and 14(3) of the Legislation Act provide that a legislative instrument may apply, adopt or incorporate provisions of an Act, a Commonwealth disallowable legislative instrument or rules of court, with or without modification, as in force at a particular time or as in force from time to time.

Section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the Legislation Act) has the effect that, unless otherwise specified, references to Acts or Commonwealth disallowable legislative instruments can be taken to be references to those instruments as in force from time to time.

- **Incorporation of state and territory Acts**

Section 10A of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the Legislation Act) has the effect that references to state and territory Acts can also be taken to be references to those Acts as in force from time to time.

- **Incorporation of other documents**

Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any other document in writing which exists at the time the legislative instrument commences, or at a time before its commencement.¹ Examples of such documents may include Commonwealth legislative instruments that are exempt from disallowance, state and territory legislative instruments, treaties, guidelines, or Australian and international standards.

However, subsection 14(2) provides that (subject to below) such other documents may not be incorporated as in force from time to time. They may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences.

The operation of subsection 14(2) can be overridden by a specific provision in the legislative instrument's authorising Act (or another Act of Parliament), that specifically allows (certain or any) documents to be incorporated in the instrument as in force or existence from time to time. In the absence of such a legislative provision, however, other documents can not be incorporated as in force or amended at any time after the legislative instrument commences.²

The committee's expectations

Unless specified in the instrument, the committee expects the ES to a legislative instrument to set out:

- the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time; and

¹ Subparagraph 14(1)(b)(ii) clarifies that a previously existing document can be incorporated into a legislative instrument whether or not it still exists or has effect when the legislative instrument commences.

² An exception to this restriction applies to forms: subsection 14(4) provides that if an instrument provides for a form to be used, section 14 does not apply in relation to the form.

- the legislative authority, consistent with the above, for the manner of incorporation. In particular, where documents other than Acts or Commonwealth disallowable legislative instruments are incorporated as existing from time to time, the specific legislative provisions which provide the authority to do so, should be cited.

The committee considers that this would enable a person interested in or affected by an instrument to understand which version of a document is incorporated, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

Description of, and access to, incorporated documents

A fundamental principle of the rule of the law is that every person subject to the law should be able to readily and freely access its terms, without cost. This principle is supported by provisions in the Legislation Act.

Legislative framework

Paragraph 15J(2)(c) of the Legislation Act requires the ES to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations

The committee therefore expects ESs to:

- contain a description of any incorporated documents; and
- include information about where incorporated documents can be readily and freely accessed.

The committee expects that the ES should indicate where incorporated documents are publicly, readily and freely available, not only available to a restricted group of persons or only at a cost. In addition to access for people that are directly affected by a legislative instrument (such as members of a particular industry or profession), the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.³

Below are some examples of explanations provided in ESs with respect to access to incorporated documents which, with appropriate justification, the committee has previously accepted:

- the incorporated documents are freely available online, with website details provided;
- the incorporated documents are available at (specified or all) Australian public libraries;

³ The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue: see Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Thirty-Ninth Parliament, Report 84, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) <http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3>. This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

- copies of incorporated documents will be made available for viewing free of charge at the administering agency's state and territory offices;
- copies of incorporated documents will be made available free of charge on request to the administering agency or another relevant body; or
- the relevant extracts from the incorporated documents are set out in full in the ES.

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