

'Was there an EM?'—Explanatory memoranda in the Commonwealth Parliament 1901–82

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From 1901 to 1982, explanatory memoranda were an optional part of the legislative process. More often in the earlier decades, comparative memoranda were employed to help legislators understand the changes effected by a bill. This paper explains the two types of documents and their history, and details the evolution of explanatory memoranda from an optional extra to an essential feature of the parliamentary process. It also includes a brief consideration of explanatory memoranda in the states and territories, and outlines the history of explanatory statements to Commonwealth regulations.

Executive Summary

Explanatory memoranda now accompany every government bill introduced into the Parliament, but this has not always been the case. From 1901 to 1982, there was no easy way of knowing if an explanatory memorandum had been produced for a particular bill. An online *Index to Explanatory Memoranda* (The Index), produced by the Parliamentary Library, will now make it possible for legislators and researchers to know if a memorandum was produced.

In the first half of the twentieth century, memoranda more commonly took the form of comparative memoranda: documents that set out the text of a Principal Act as it would appear if the current bill was passed, and identified the additions or deletions made by the bill to that Act. From the 1950s, explanatory memoranda in the modern sense have been more common: documents that assist members of Parliament, officials

and the public to understand the objectives and detailed operation of the clauses of a bill.

Explanatory statements are similar to explanatory memoranda, but the term is used for documents that explain the purpose of Commonwealth regulations rather than bills. These have been supplied by government departments to the Senate Regulations and Ordinances Committee since 1932, but there is presently no easy way to obtain copies of explanatory statements prior to 1991. From 2005, explanatory statements to all subordinate legislation are available from the Federal Register of Legislative Instruments.

Introduction

Since 1984, section 15AB of the *Acts Interpretation Act 1901* has provided for the use of extrinsic material in the interpretation of an Act of Parliament. Included in the list of relevant extrinsic material is:

any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;¹

Previously, explanatory memoranda (EMs) had been used principally as an aid in the legislative process, but with this amendment, they assumed much more importance in the interpretative process. This change was not matched, however,

¹ *Acts Interpretation Act 1901*, s. 15AB(2)(e).

by an increase in the availability of past EMs, and in fact, the early history of EMs has been simply unknown. Judging from the number of phone calls received by the Parliamentary Library in Canberra, the question 'Was there an EM?' must be asked frequently by law librarians, but the only certain way to establish whether or not there was in fact an EM to a particular bill has been to look physically at the bound volumes of bills held by certain libraries.

This is about to change, with the publication by the Parliamentary Library of an online Index to all EMs from 1901 to 1982.² This Index has been established by the only possible means, that of checking all 198 volumes of bills for that period. From 1983, it has been standard practice for an EM to be presented to Parliament with every *government* bill. (This practice does not however apply to private Senators' and Members' bills.) Thus the availability of EMs will now be clear for the whole history of the Commonwealth Parliament. The aim of this paper is to explain some of the history revealed by the new Index.

The first explanatory memorandum: Copyright Bill 1905

So, when *was* the first EM presented to Parliament? The answer is, surprisingly early. When the Copyright Bill was introduced in the Senate in August 1905, questions were asked during debate about the origins of the clauses in the Bill. Senator George Pearce stated that:

Senator Keating in introducing the measure, indicated that it is largely based on the report of the [1875–78 UK] Royal Commission. It would have been helpful to honorable senators in the case of a highly technical measure of this description, if some indication had been given as to what portions of the bill are based on the report of the Commission, and what are based on existing legislation. We should then have been able to see how far the Bill clashes with, or takes away, existing rights in the States.³

Senator Henry Dobson complained that:

I notice from this Bill an absence of marginal notes, telling us from what source the clauses are taken. We have often found such notes of great service in the consideration of Bills. I am, however, informed that many of the clauses have been taken not from English Acts, but from Bills prepared as the result of various conventions and conferences on copyright. Those Bills, as Senator Symon tells us, have not yet been placed upon the statute-book of Great Britain.⁴

In replying to these concerns, Senator John Keating spoke for the government:

I wish to indicate that I heard the representations made by some honorable senators in discussing the second reading. I think it

² The Index is to be published at <http://www.aph.gov.au/library/pubs/explanmem>.

³ Senator George Pearce, 'Second reading speech: Copyright Bill 1905', Senate and House of Representatives, *Debates*, 30 August 1905, p. 1642.

⁴ Senator Henry Dobson, *ibid.*, p. 1646.

- Different versions could be presented to either the Senate or the House of Representatives, if a bill was amended during its passage through the chamber in which it was introduced. Nowadays the differences may be highlighted by the use of the term 'Revised Explanatory Memorandum' or 'Supplementary Explanatory Memorandum', but this was certainly not the case during most of the 20th century. For the period 1901–82, 22 instances have been found of different Senate and House of Representatives EMs, and these are indicated in the Index with the phrase 'Takes account of [Senate/House of Representatives] amendments to the bill.' On the other hand, there are many cases—460 in the Index—where identical EMs were presented to each chamber.
- The differences may be visible only by a close reading of the two documents.
- The EM may be mentioned in the parliamentary debate, but there is usually no mention of it in the Senate Journals nor in the House of Representatives Votes and Proceedings.
- The only way of dating many EMs is to rely on the printer's date, which seems to be consistently used only until 1959. Thereafter, the date of the introduction of a bill is supplied in the Index as an approximation.

The second explanatory memorandum:
Commonwealth Electoral Bill 1905

Two days after the EM for the Copyright Bill was printed, the same Minister, Senator Keating, made the Second Reading speech for the Commonwealth Electoral Bill 1905, saying:

... I hope by Saturday morning to have [senators] supplied with a printed memorandum which will not only give a reference to the sections of the Act sought to be amended, but point out concisely the effect of each amendment and the necessity or reason for its enactment.¹⁰

Later, in response to a request for a copy of the principal Act, he reiterated:

I shall supply [senators] ... with a copy of the principal Act, and a memorandum which will clearly indicate, in concise form, the effect of each amendment, and the necessity or reason for its amendment.¹¹

This description would sit well with any of today's EMs, and qualifies the Commonwealth Electoral Bill 1905 as in fact the first bill to have an EM *in the modern sense*. The four-page EM was printed on 16 September 1905, and although it has at most 3–4 sentences per clause of the bill, and concentrates on explaining what has changed rather than why it has changed, it is easily recognisable as an EM.¹² Again, since the bill was amended in the Senate before being sent to the

¹⁰ Senator John Keating, 'Second reading speech: Commonwealth Electoral Bill 1905', Senate and House of Representatives, *Debates*, 14 September 1905, p. 2274.

¹¹ *ibid.*, p. 2284.

¹² Explanatory memorandum to the Commonwealth Electoral Bill 1905, Senate version, at <http://www.aph.gov.au/library/pubs/explanmem/docs/1905ElectoralSen.pdf> (661 KB).

House of Representatives, a revised EM was printed six days after the Bill was introduced into that chamber.¹³

The differences between the Senate and House of Representatives versions are best seen in the handwritten annotations of Robert Garran, then secretary of the Attorney-General’s Department, in the file on the bill now held by the National Archives.¹⁴ Finally, one could note that a ‘Comparative table of the clauses of the bill and the sections of the *Commonwealth Electoral Act 1902*’ had been prepared for an earlier version of the Bill, in mid-July 1905, and is available in the same file at the National Archives.¹⁵

Although these first EMs were revised to reflect parliamentary amendments to the bills concerned, it was to be over 24 years before similar cases occurred, with the Excise Tariff 1933, the Navigation Bill 1935 and the Australian Soldiers’ Repatriation Bill 1935.

The first comparative memoranda

Although the natural tendency today is to regard EMs as the primary tool to assist the Parliament in its task, this was not the case during the first decades of the 20th century. A number of approaches were tried until the EM established its supremacy.

On a few occasions in 1901–2, when the first laws of the new nation were being made, versions of bills were produced that showed, in bold font or strikethrough font, the additions or deletions being made during passage through Parliament. This happened for such contentious legislation as the Post and Telegraph Bill 1901, the Commonwealth Public Service Bill 1901, the Commonwealth Electoral Bill 1902, and the Customs Tariff Bill 1902.

Today, new versions of bills are routinely produced once a bill has passed one of the houses of Parliament, if amendments have occurred, but what is different about these early examples is that the amendments are made obvious to the eye. This practice seems not to have persisted into 1903, but was replaced by a couple of other approaches. On one occasion, a sheet of amendments was circulated explaining the differences between the Judiciary Bill 1902 and the Judiciary Bill 1903.¹⁶ More often, large bills that had been subjected to many amendments were reprinted during the course of debate, but without highlighting the amendments by use of different fonts.

In 1905, in the debate on the Copyright Bill, there were allusions to the practice:

¹³ Explanatory memorandum to the Commonwealth Electoral Bill 1905, House of Representatives version, at <http://www.aph.gov.au/library/pubs/explanmem/docs/1905ElectoralHR.pdf> (1 MB).

¹⁴ Explanatory memorandum to the Electoral Bill 1905, annotated Senate version, at <http://www.aph.gov.au/library/pubs/explanmem/docs/1905ElectoralSenAnnotated.pdf> (504 KB); source: National Archives of Australia A2863, 1905/29 Part 1.

¹⁵ Explanatory memorandum to a draft Electoral Bill 1905, at <http://www.aph.gov.au/library/pubs/explanmem/docs/1905Electoraldraft.pdf> (468 KB); source: National Archives of Australia A2863, 1905/29 Part 1.

¹⁶ Hon. Alfred Deakin, ‘Second reading speech: Judiciary Bill 1903’, Senate and House of Representatives, *Debates*, 9 June 1903, p. 588.

Senator KEATING.—If an entirely new Bill were submitted, it would be very difficult for honorable senators to appreciate where an alteration was being made.

Senator BEST.—Not unless it was shown in different type.

Senator KEATING.—That method has been adopted, but experience has shown that it is attended with some difficulties.¹⁷

Another legislative aid, used on a couple of occasions, was the production of a table of contents of the sections of a bill. This was done for the Commonwealth Public Service Bill 1901 and the Navigation and Shipping Bill 1904. It did not however become a common practice until 1973.¹⁸

Marginal notes were also inserted into some early bills, showing the location of precedents from other jurisdictions for particular provisions of a bill. These marginal notes were used from 1901 until at least 1945, and some were still present in the 1973 reprint of Commonwealth Acts.¹⁹

A slightly new approach was tried later in 1905, the same year that the first EMs were produced. A document was produced setting out certain sections of the existing *Immigration Restriction Act 1901*, as they would be if amended. Again, in

1906, a part of the Australian Industries Preservation Bill 1906 was printed with the proposed amendments incorporated.

Most of these dozen documents related to completely new laws. As time went by, however, the practice of passing amending acts prompted new ways of conveying information. The developments outlined in the preceding paragraphs culminated in the production of a new type of document.

Late in 1909, a document was presented to the House of Representatives entitled 'Reprint of the Commonwealth Electoral Acts, showing the amendments proposed by the Commonwealth Electoral Bill 1909' (see Figure 2).²⁰ The amending Bill was only twelve pages long, but the anticipatory reprint of the Act contained 54 pages, and began with this note: 'Type ruled through indicates the matter proposed to be omitted. Black type indicates matter proposed to be inserted' (see Figure 3 for a later example). Users of word-processing software that tracks changes would be familiar with the practice adopted here.

This reprint contains nothing by way of summary or explanation of the bill, and therefore cannot really be called an explanatory memorandum. The term 'black-type memorandum' is used for

¹⁷ 'Second reading speech: Commonwealth Electoral Bill 1905', Senate and House of Representatives, *Debates*, 14 September 1905, p. 2284.

¹⁸ The change occurred as a result of *Drafting Instruction No. 1 of 1973*, 'New practices with respect to the form of legislation', issued by the Office of Parliamentary Counsel. Among other things, this Instruction required a table of contents for bills containing 25 clauses or more. A table of contents has been required for all bills since 1995.

¹⁹ The latest example that has been identified is the Life Insurance Bill 1945. For the reprint, see for example the *Bills of Exchange Act 1909–1973*, in *Acts of the Parliament 1901–1973*, vol. 2, at pp. 258–9.

²⁰ Comparative memorandum to the Commonwealth Electoral Bill 1909 (No. 2), at <http://www.aph.gov.au/library/pubs/explanmem/docs/1909ElectoralHR.pdf> (10.8 MB).

this type of document, even today, by staff of the Attorney-General's Department and the Office of Parliamentary Counsel, because new material was shown in bold type. However, the term 'comparative memorandum' (CM) has been used before, and is adopted in the Index for this class of document.²¹ A working definition might be this:

A document that sets out the text of a Principal Act as it will appear if the current bill is passed, and identifies the additions or deletions made by the bill to that Act. Alternatively, it sets out differences between a current bill and a former version of that bill, or between an existing rate of tariff and a proposed rate.

Although the dozen documents produced from as early as 1901 do fit this definition of CM, the significant innovation in 1909 is that for the first time an anticipatory reprint of an existing Act, with proposed amendments highlighted by different fonts, was produced. The innovation did not pass unnoticed. During the Second Reading debate on 29 October, Mr J. H. Catts (Labor, Cook) spoke as follows:

I have not, so far, heard any honorable member congratulate the Minister of Home Affairs on the way in which this Bill has been presented for our consideration. I wish to do so now. Under the practice hitherto adopted in the framing of amending measures it has been very difficult for

honorable members to compare the proposed amendments with the various provisions of existing legislation. I am very glad to note in this case a new departure. The Minister has supplied honorable members with a copy of the existing Act as proposed to be amended by this measure, in which the amendments are indicated in black letters. Honorable members are thus enabled very readily to understand the changes proposed to be made in the existing law.²²

In the period covered by the Index, there are 300 comparative memoranda, the latest having been issued for the Freedom of Information Bill 1981

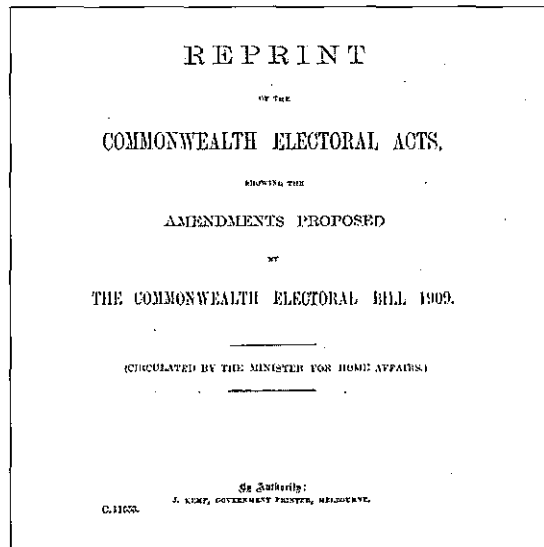


Figure 2: Comparative memorandum to the Commonwealth Electoral Bill 1909 (No. 2)

²¹ Justice Kirby used the term as long ago as 1983: Attorney-General's Department, *Symposium on statutory interpretation*, Australian Government Publishing Service, Canberra, 1983, p. 56.

²² J. H. Catts, 'Second reading speech: Electoral Bill 1909 (No. 2)', Senate and House of Representatives, *Debates*, 29 October 1909, p. 5179.

(showing the differences between it and the Freedom of Information Bill 1978).²³ Of the 300, 112 constitute a subset that is probably of lesser interest for legal research: these are the documents that show the differences between old and new rates of customs and excise tariffs. That leaves 188 CMs that may be of interest to law librarians and other researchers, but be warned not to order a CM when you really want an EM! In contrast to CMs, there are 1423 EMs in the Index.

As with EMs, different versions of CMs may have been presented to each chamber of Parliament, depending on amendments in the originating chamber. This has occurred six times during the period covered by the Index, the last time being with the Conciliation and Arbitration Bill 1956.

Later developments

One of the more interesting EMs is the one presented for the Land Tax Assessment Bill 1909. Although the title of the Bill sounds innocuous, and one would, these days, expect a rather dry outline of taxation, the EM in fact outlines the political objectives of the Bill as being to increase the white population of Australia:

A population sufficiently large to effectively develop its various resources and defend it from invasion is essential to the progress and even the very existence of every country. While this is true of all countries, it is particularly true of Australia. No land has greater natural resources; none, by reason of geographical situation or by the enormous extent of its coastline, is so vulnerable to attack.

... Our need is for men—of our own or kindred races—to settle upon our lands, to further develop our great resources, to create new wealth.²⁴

The first bill that received both an EM and a CM seems to have been the Income Tax Assessment Bill 1930, which occasioned this exchange in the House of Representatives:

Mr THEODORE (Dalley—Treasurer)
[11.25].—I move—

That the bill be now read a second time.

Honorable members will no doubt appreciate the fact that the income tax laws are

²³ Later CMs known to me are those for the National Crime Authority Bill 1983 ('Memorandum showing the changes proposed to be made to the National Crime Authority Bill 1983 by amendments to be moved on behalf of the Government', Senate, 28 May 1984), the Child Support (Assessment) Bill 1989 ('Memorandum showing the Bill as introduced and as proposed to be amended by the Government', House of Representatives, 16 August 1989), and the Privacy Amendment Bill 1989 ('Memorandum showing the Bill as introduced and as proposed to be amended by the Government', Senate, 17 November 1989).

²⁴ Explanatory memorandum to the Land Tax Assessment Bill 1909, at <http://www.aph.gov.au/library/pubs/explanem/docs/1909LandTaxHR.pdf> (414 KB). This Bill also holds a place among the arcana of parliamentary history, since it was introduced as the 'privilege bill' for the 1909 session of Parliament: a bill presented to assert the right of the Parliament to deliberate without reference to the immediate cause of summons (*House of Representatives practice*, 4th edition, 2001, p. 218). These bills are traditionally not dealt with during the remainder of the session, and so the subject of land tax was not considered again until August 1910, eventually resulting in the *Land Tax Assessment Act 1910*, which remained on the statute books until 1953.

very complex, and have become highly technical. Amendments of a comprehensive character have become difficult to follow, and extremely difficult to understand.

Dr. Earle PAGE.—Difficult to explain, too.

Mr THEODORE.—As my predecessor, the right honorable member for Cowper (Dr. Earle Page) remarks, it is difficult to explain them. I have endeavoured to assist honorable members by circulating, in addition to the bill, a printed memorandum, showing, in black type, the proposed amendments to the original law, and also giving explanatory notes that are very extensive.

Mr. STEWART.—A most welcome innovation!

Mr THEODORE.—I think that they will be welcomed, although the notes themselves make somewhat tedious reading because of the technical terminology that must be employed. The circulation of the explanatory memorandum will, perhaps, make it unnecessary for me to traverse the whole bill, and to deal with every provision in detail...²⁵

In this case, the term 'memorandum' appears to be used for what I have called the comparative memorandum, and 'explanatory notes' is used for what is now termed the explanatory memorandum.

Cabinet documents

29. (1) A document is an exempt document if it is—

- (a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted;
- (a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Cabinet;
- (b) an official record of the Cabinet;
- (c) a document that is a copy of, or of a part of, a document referred to in paragraph (a) or (b); or
- (c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
- (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.

(3) Where a document is a document referred to in paragraph (1) (c) or (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet.

(4) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document as described in a request would, if it existed, be one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that, if such a document exists, it is an exempt document of that kind.

(5) Where a certificate in accordance with sub-section (4) has been signed in respect of a document as described in a request, the decision on the request may be a decision that access to a document as described in the request is refused on the ground that, if such a document existed, it would be an exempt document referred to in the paragraph of sub-section (1) that is specified in the certificate.

(6) A reference in this section to the Cabinet shall be read as including a reference to a Committee of the Cabinet.

Figure 3: extract from a typical comparative memorandum: comparison of the Freedom of Information Bill 1978 with the Freedom of Information Bill 1981; deletions are in italics, additions are in bold

The first EM for a private Senator's bill was the one presented for the Wheat Industry Insurance Bill 1938, but as a general rule, private Senators' or private Members' bills have not been accompanied by EMs. Only three other instances of EMs for private bills are noted in the Index, though there may have been more.²⁶ Even today, the requirement for EMs is applied to government bills rather than private bills, although recently there has been a trend to produce EMs for major private bills, such as the National Animal Welfare

²⁵ Edward Theodore, 'Second reading speech: Income Tax Assessment Bill 1930', Senate and House of Representatives, *Debates*, 4 July 1930, pp. 3723–4.

²⁶ The other bills were: Conciliation and Arbitration Amendment Bill (No. 2) 1981, Offences against the Parliament Bill 1981, Constitution Alteration (Fixed Term Parliaments) Bill 1982.

Bill 2003, which was introduced by the Australian Democrats.

Up to the 1940s, the numerical balance between EMs and CMs remained heavily in favour of CMs, but with the 1950s, EMs began to predominate, and during the 1970s, there were only 8 CMs but 518 EMs. As to why CMs have apparently gone out of fashion, the answer might be that a good EM is normally superior to a CM, because it should explain not only the changes, but also the reasons for them. To take a random example, the EM for the Australian Citizenship Amendment Bill 1986 states:

Section 10 of the Act presently provides that persons born in Australia (other than children of diplomats, consular officials and enemy aliens) automatically become Australian citizens. This clause amends section 10 so that a person born in Australia after the amendment comes into effect will be an Australian citizen only if at the time of birth, at least one of the parents of the person is either an Australian citizen or a permanent resident ... (clause 4, at p. 2)

Up to the 1960s, the terms 'explanatory memorandum' and 'memorandum' were used almost interchangeably for what I am now calling comparative memoranda, and during the 1970s the term 'explanatory memorandum' was used interchangeably with 'notes on clauses'.

From unpredictability to codification

It was only in the early 1980s that the availability of an EM for a bill began to become more

predictable. The two sources for today's rules relating to EMs are the *Legislation handbook* and the *Standing orders* of the House of Representatives. Below is an outline of the changes.

Legislation Handbook

The earliest incarnation of the *Legislation handbook* was prepared by the Australian Public Service Board in 1975, and it gives a good description of the practice that prevailed up till then:

5.142 It is the practice of Ministers, from time to time, to arrange for the preparation of explanatory memoranda or other documents in connexion with Bills that are to be introduced into the Parliament. Though the memoranda take various forms, they usually relate to Bills of some complexity. The memoranda are prepared primarily for the information of Senators and Members and copies are circulated to them at the time of the introduction of the relevant Bill in each Chamber. A further distribution of copies to other persons may be made subsequently by the sponsoring department. In the past, the physical form of memoranda has varied, some being duplicated and others printed by letterpress, offset or photo-lithography.

5.143 In the case of those memoranda printed by the A.G.P.S. in letterpress format it has been the practice of the Parliament to order the printing of further copies so that the memorandum may be published and sold by the A.G.P.S. in the same manner as the Bill to which it relates.

5.144 Directions were given in 1968 by the Clerks of the Senate and of the House of Representatives that, in future, all memoranda circulated for the information of Members and Senators in connexion with Bills should be published and sold by the A.G.P.S.²⁷

The *Legislation handbook* has been published by the Department of the Prime Minister and Cabinet since 1980, and has gone through four editions since then.²⁸

The 1980 edition of the *Legislation handbook* stipulates for the first time that EMs shall be prepared for *all bills that need explanation*:

Previously, explanatory memoranda have been prepared on certain complex bills only. These documents are circulated for the information of senators and members at the time of the introduction of a bill in the relevant Chamber and serve a similar purpose to notes on clauses. A unified terminology will now be used and explanatory memoranda should be prepared on all bills the clauses of which require any explanation. Simple bills will require only the heading and outline, described in para

2.73 below. Under this revised format, explanatory memoranda will replace both the notes on clauses and general outline.²⁹

In March 1981, the Attorney-General's Department held an in-house symposium on statutory interpretation.³⁰ This led to the announcement, on 27 May 1981, that a discussion paper would be produced on extrinsic aids to statutory interpretation. (On the same day, the amendments to the *Acts Interpretation Act* requiring the purpose or object of an Act to be taken into account in interpreting it were introduced into the Senate.) The discussion paper was tabled in the Parliament on 14 October 1982,³¹ leading to a public symposium in Canberra on 5 February 1983. The proceedings of the Symposium were tabled on 30 November 1983,³² and the resulting amendments to the *Acts Interpretation Act*—for the purposes of this paper, principally the insertion of s. 15AB—were introduced into the Senate on 8 March 1984, receiving assent on 15 May 1984.³³ From that date, EMs have been a valid extrinsic aid for the interpretation of statutes.

Meanwhile, the second edition of the *Legislation handbook* had been published, taking into account legislative procedures as at June 1983.

²⁷ *Legislation handbook*, Australian Public Service Board, Canberra, [1975], p. 91.

²⁸ The later editions are: 1983, 1988, 1999, 1999 with 2000 update.

²⁹ *Legislation handbook*, Australian Government Publishing Service, Canberra, 1980, p. 18.

³⁰ Published as: Attorney-General's Department, *Another look at statutory interpretation*, Australian Government Publishing Service, Canberra, 1982.

³¹ Attorney-General's Department, *Extrinsic aids to statutory interpretation*, Canberra, Australian Government Publishing Service, 1982. See also Senator the Hon. F. Chaney, 'Paper and Ministerial Statement: Extrinsic Aids to Statutory Interpretation', Senate, *Debates*, 14 October 1982, pp. 1483–5.

³² Attorney-General's Department, *Symposium on statutory interpretation*, Australian Government Publishing Service, Canberra, 1983.

³³ See the first paragraph of this paper for the relevant text.

This edition for the first time required an EM for every government bill:

An explanatory memorandum is prepared for every bill. Where a number of closely interrelated bills are being introduced into the Parliament simultaneously, a single document incorporating explanatory memorandums for all the bills in the package may be produced if that is a more convenient way of providing the information.³⁴

The 1983 *Handbook* also specified for the first time that supplementary EMs should be produced for government amendments unless the amendments were brief and straightforward. It also required EMs to be revised before amended bills were presented to the other house of the Parliament.³⁵ This had of course happened with the first EM in 1905, so the *Handbook* was merely codifying a practice that had been followed many times. This also means that from 1983, simply requesting 'the EM' for a bill that was amended before passing to the next house of Parliament is not a clear-cut request: one should specify *which* EM is required.

Current practice had, however, preceded both the *Legislation handbook* and the amendments to the *Acts Interpretation Act*. By the end of 1982, if not sooner, it was standard practice for an EM to be prepared for every government bill, making 1982 a logical time to conclude the Index. However,

during the 33rd Parliament (March 1983–October 1984), there were in fact three government bills that did not have EMs, perhaps because of the speed of their passage through Parliament.³⁶

The later editions of the *Legislation handbook* spell out in more detail the structure that was already in place. The main changes relate to such things as financial impact statements and regulation impact statements. However, they do include a succinct summary of the purpose of an EM:

8.1 An explanatory memorandum is a companion document to a bill, to assist members of Parliament, officials and the public to understand the objectives and detailed operation of the clauses of the bill.

8.2 The Acts Interpretation Act 1901 (section 15AB) allows an explanatory memorandum (and also a second reading speech—see paragraph 8.28) to be used by a court to interpret legislation to:

- (a) confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
- (b) determine the meaning of a provision when:

³⁴ *Legislation handbook*, second edition, Australian Government Publishing Service, Canberra, 1983, p. 31.

³⁵ *ibid.*, p. 32.

³⁶ The three bills were: Racial Discrimination Amendment Bill 1983 (introduced in response to a High Court decision), Public Accounts Committee Amendment Bill 1983 (arguably not a government bill but a parliamentary bill, increasing the number of members on the Committee), and Christmas Island Agreement Amendment Bill 1983.

- (i) the provision is ambiguous or obscure; or
- (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or unreasonable.³⁷

Standing Orders

The *Standing orders* of the House of Representatives currently provide as follows:

For any bill presented by a Minister, except an Appropriation or Supply Bill, the Minister must present a signed explanatory memorandum at the conclusion of his or her second reading speech. The explanatory memorandum must include an explanation of the reasons for the bill.³⁸

A similar provision was first inserted into the House of Representatives *Standing orders* in February 1994.³⁹ There is no similar provision in the *Standing orders* of the Senate.

Other sources for research on bills

Another source for research on the history of bills—although not a source covered by the *Acts Interpretation Act*—is the original government file on almost every bill passed since 1901. These files were produced by the Attorney-General's Department from 1901 to 1970, and since then have been produced by the Office of Parliamentary Counsel, which was established by the *Parliamentary Counsel Act 1970*. The files occupy 448 metres of shelf-space at the National Archives, and contain 'manuscript drafts, proof and final copies (with manuscript amendments) of Bills as at their first and subsequent readings, and correspondence directing the preparation of them'.⁴⁰ Although there are gaps in the early years, one can find equivalents to EMs, such as a draft EM for the Judiciary Bill 1905, along with what appear to be Robert Garran's annotations.⁴¹

One could also note here that Bills Digests, providing independent analysis of bills, have been produced by the Parliamentary Library since 1977. Comprehensive coverage of Government bills begins around 1993. Digests have been produced for significant private Member's/Senator's bills, but this is not done as a matter of course. The Digests are available online from August 1990.⁴² There is at present no online index

³⁷ *Legislation handbook*, fourth edition, Dept. of the Prime Minister and Cabinet, Canberra, 1999 (with 2000 update), http://www.pmc.gov.au/guidelines/docs/legislation_handbook.pdf, accessed on 6 December 2004, p. 38.

³⁸ House of Representatives, *Standing orders as at 16 November 2004*, Standing Order 142(c).

³⁹ Similar text was first added to Standing Order 215 on 10 February 1994, amended on 22 February 1994, renumbered as Standing Order 217 on 1 May 1996, and again renumbered as Standing Order 142, with slight revisions, from 16 November 2004.

⁴⁰ National Archives of Australia, *Series notes for series A2863*, from the RecordSearch database, http://www.naa.gov.au/the_collection/recordsearch.html, accessed on 6 December 2004.

⁴¹ Draft explanatory memorandum to the Judiciary Bill 1905, at <http://www.aph.gov.au/library/pubs/explanmem/docs/1905Judiciary.pdf> (296 KB); source: National Archives of Australia A2863, 1905/32.

⁴² See <http://www.aph.gov.au/library/pubs/bd/index.htm>.

of those published from 1977–90, but they are available from various libraries.

Online sources for explanatory memoranda

ScalePlus and ParlInfoWeb, 1996–present

It is well known that explanatory memoranda from 1996 are currently made available online in the ScalePlus database.⁴³ These will presumably be migrated to the new ComLaw website during 2005.⁴⁴ Users should remember that memoranda are entered in the database in the year in which the related bill is introduced, which may not be the same year as when the bill is passed.

A parallel source to ScalePlus is the ParlInfoWeb service from the Parliament's website.⁴⁵ The Old Bills database within ParlInfoWeb contains both bills and explanatory memoranda from 1996. The fastest way to access memoranda through this database is to browse Legislation—Old Bills, then select the title of the Bill; the memorandum appears as an option along with the text of the bill, the Parliamentary Library's Bills Digest, and the Second Reading speeches.⁴⁶

Other websites, 1936–present

A less well known site for explanatory memoranda is the Australian Taxation Office's Legal

Database, which has an Extrinsic Materials subset dating back to 1936.⁴⁷ Although the earlier years represented include materials relating specifically to taxation bills, there is a surprisingly wide range of material in later years: 1991, for example, includes material relating to data-matching, political broadcasts, the Medicare levy, superannuation, petroleum resource rent, income tax, fringe benefits tax and the wool tax.

There are also a couple of memoranda, relating to the unsuccessful 1985 and 1988 bills of rights, on the Parliamentary Library website.⁴⁸

Rather than maintain a set of bookmarks or links to all these websites in one's browser, a good alternative is to simply keep a link to the National Library's GovPubs database.⁴⁹

Explanatory memoranda in the states and territories

Although the states and territories are not the main concern of this paper, this is a useful place to summarise research carried out for the National Library's GovPubs database in 2002.⁵⁰ GovPubs is a mini-website that presents the history and availability of the following types of parliamentary and legal publications: bills, EMs,

⁴³ See <http://scaleplus.law.gov.au/html/ems/browse/TOC.htm>, accessed on 20 January 2005. The memorandum for the Trade Practices Bill 1974 is also available.

⁴⁴ ComLaw (<http://www.comlaw.gov.au/>) was launched on 1 January 2005; material from ScalePlus is to be progressively migrated to ComLaw.

⁴⁵ <http://parlinfoweb.aph.gov.au/piweb/>, accessed on 20 January 2005.

⁴⁶ Readers should be wary of assuming that the bill text in this database is the first reading print: the version available is always the latest version to have been before the Parliament, which means that for bills that were passed, the version available is equivalent to the Act. For first-reading prints of bills, the ScalePlus database should be used.

⁴⁷ <http://law.ato.gov.au/atolaw/browse.htm?toc=02:EXT>, accessed on 20 January 2005.

⁴⁸ <http://www.aph.gov.au/library/intguide/law/civlaw.htm#bill>, accessed on 20 January 2005.

⁴⁹ <http://www.nla.gov.au/govpubs/>, accessed on 20 January 2005. Here, click on 'Search', select 'Explanatory Memoranda' from the drop-down box, click on 'Find', and the complete range of resources is set out.

⁵⁰ See <http://www.nla.gov.au/govpubs/>, select 'Browse by Publication', then 'Explanatory Memoranda'.

acts, regulations, budget papers, Hansards, notice papers, gazettes, votes and proceedings/journals, government directories and parliamentary handbooks. It is a very useful library of concise data and URLs for legal researchers. The information below is available in the GovPubs database, but is more easily viewed in one place here.

ACT

From 1975 to 1981, a form of EM was attached to ‘Messages from the Minister [for the Capital Territory]’ and was included in the ACT Hansard.

Since 1989, ACT EMs have been issued as separate documents along with the bills. They are now known as explanatory statements (not to be confused with explanatory statements for Commonwealth subordinate legislation; see p. 22 below). They are available online from 2000, along with explanatory statements to subordinate laws (regulations), disallowable instruments, notifiable instruments, and exposure drafts of bills.⁵¹

New South Wales

Explanatory notes have been issued for many, if not most, New South Wales bills since about 1964. Before that period, very brief explanatory notes were attached to bills such as money bills. One of the earliest occurrences found was for the Statute Law Revision Bill 1937. These explanatory notes have varied from a few paragraphs to a page in length, though from the 1980s they have become longer. From 1987, a separate annual volume of explanatory notes has been issued; before then, the explanatory notes were attached to the front of bills. They are available online from 1990.⁵²

Northern Territory

EMs are rarely issued for Northern Territory bills. For explanations of the objectives of bills, see the Second Reading speech for each bill in the Northern Territory Hansard.

Queensland

Explanatory notes have been issued for Queensland bills since 1990. Since 1992, they have also been published as a separate volume of the Queensland Acts. They are available online from November 1992.⁵³

For the period 1944 to 1989, the published *Record of the legislative acts* contains descriptions of the purposes of Acts as passed.

South Australia

EMs are not issued for South Australian bills. For explanations of the objectives of bills, see the Second Reading speech for each bill in the South Australian Hansard.

Tasmania

EMs are not issued for Tasmanian bills. For explanations of the objectives of bills, see the Second Reading speech for each bill in the Tasmanian Hansard.

Victoria

Documents entitled notes on clauses, explanatory memoranda, or explanatory notes have been issued for Legislative Assembly bills since about 1971, and for some Victorian Legislative Council bills since about 1983. In the early years these titles were used almost interchangeably.

⁵¹ See <http://www.legislation.act.gov.au/es/default.asp>.

⁵² See <http://www.legislation.nsw.gov.au/maintop/scanact/sessional/NONE/0>.

⁵³ See <http://www.legislation.qld.gov.au/Bills.htm>.

Since 2000, EMs for bills that have been passed are included in the annual volumes of acts, before the text of the act itself. They are available online from 2001.⁵⁴

Western Australia

EMs began to be issued for Western Australian bills about 1997. They are available online from about 2001.⁵⁵ For explanations of the objectives of earlier bills, see the Second Reading speech for each bill in the Western Australian Hansard.

Explanatory statements to Commonwealth regulations

The importance of explanatory statements to regulations has been growing in recent years, and has fully come of age with the passing of the *Legislative Instruments Act 2003*. Explanatory statements are to Commonwealth regulations what EMs are to bills. In other words, they fulfil exactly the same function, and the different terminology serves merely to distinguish them from EMs.

The early history of explanatory statements is just as shrouded in mystery as the history of EMs, and they are far more difficult to locate.

The story begins with the establishment of the Senate's Standing Committee on Regulations and Ordinances in March 1932. This Committee, the

oldest Senate committee apart from the in-house committees such as the Standing Orders Committee or the Library Committee, was established in response to concerns about the volume of regulations that were being laid before the Parliament. The figure of 3708 pages of Acts for the period 1901–27 was compared with the figure of 11 263 pages of regulations for the same period.⁵⁶

The first recommendation for a standing committee was made in April 1930. A second proposal was made in July 1930,⁵⁷ the necessary changes to the Standing Orders were drafted by July 1931,⁵⁸ and were approved by the Senate on 4 March 1932, with the new Committee appointed on 17 March 1932.⁵⁹ Contrast the success of this proposal with the fate of the companion proposal in 1930 to establish a Senate Standing Committee on External Affairs: it did not come to fruition until 1970–71, an indication of the relative importance given to parliamentary oversight of regulations.

Not until the appointment of this Committee had there been any effective scrutiny of the Executive Government's regulation-making power. It is a vastly important area of responsibility and the committee is most vigilant in watching that no use is made of the regulation-

⁵⁴ See http://www.dms.dpc.vic.gov.au/domino/web_notes/LDMS/pubhome.nsf/ under the heading 'bills'.

⁵⁵ See <http://www.parliament.wa.gov.au/> under the heading 'bills'.

⁵⁶ Senate, Select Committee ... upon the Advisability of Establishing Standing Committees of the Senate upon Statutory Rules and Ordinances, etc., *Report*, 9 April 1930, p. ix.

⁵⁷ Senate, Select Committee ... upon the Advisability of Establishing Standing Committees of the Senate upon Statutory Rules and Ordinances, etc., *Second report*, 10 July 1930.

⁵⁸ Senate, Standing Orders Committee, *First report: proposed new Standing Orders and amendments of existing Standing Orders*, 24 July 1931.

⁵⁹ Originally operating under Senate Standing Order 36A, the Regulations and Ordinances Committee now operates under Standing Order 23.

making power for matters which should be the subject of parliamentary enactment, and in the protection of personal liberties. It is fair to say that both Houses of Parliament are content to leave to this important committee the parliamentary surveillance of the Government's regulation-making power.⁶⁰

From its beginning, the Regulations and Ordinances Committee has applied four criteria in assessing the validity of subordinate legislation:

- Is delegated legislation in accordance with the statute?
- Does it trespass unduly on personal rights and liberties?
- Does it make rights unduly dependent on administrative decisions rather than judicial decisions?
- Does it contain matters more appropriate for parliamentary enactment?

The availability of explanatory statements from government departments that were making regulations, or the call for explanatory statements to be produced, has been a feature of this Committee's history since 1932. In its *Second report*, in 1933, the Committee commented:

Your Committee acknowledges the great assistance it has received from the practice, instituted last year, of the department concerned in the issue of a new or an amending regulation supplying an explanation of the effect of, or the changes worked by, such regulation.⁶¹

Three years later, the *Third report* repeated the statement:

The Committee again expresses its appreciation of the assistance which Departments generally have given it by the provision of explanatory statements accompanying regulations and ordinances.⁶²

Again in 1938, the *Fourth report* stated:

In the absence of direction as to procedure in considering the regulations and ordinances, the Committee has formulated its own procedure, which consists of obtaining from the public department responsible for the issue of a regulation or ordinance a full explanation of it, with the reasons for the making thereof. These explanations are considered by the Committee in conjunction with the regulation or ordinance under examination, and have been found helpful.⁶³

Later references to explanatory statements, which were also known as 'departmental explanations',

⁶⁰ J. R. Odgers, *Australian Senate practice*, sixth edition, Royal Australian Division of Public Administration (ACT Division), Canberra, 1991, p. 732.

⁶¹ Senate, Standing Committee on Regulations and Ordinances, *Second report*, 8 December 1933, p. 1.

⁶² Senate, Standing Committee on Regulations and Ordinances, *Third report*, 31 October 1935, p. 4.

⁶³ Senate, Standing Committee on Regulations and Ordinances, *Fourth report*, 23 June 1938, pp. 1–2.

make it clear that explanatory statements continued to be provided through the 1940s and 1950s, and even through to the 1980s.⁶⁴ One report includes the text of an explanatory statement:

The explanatory statement circulated by the Department of Air in relation to the regulations reads as follows:

The purpose of this amendment to Air Force Regulations is to provide adequate authority for the Air Board to make deductions from the pay of members of the R.A.A.F. for losses of public money or property or for damage to property occasioned by their neglect or misconduct. The amendment makes provision for delegation of the Air Board's authority.⁶⁵

The first complaints by the Committee appear to have been raised in 1982, fifty years after the Committee—and the provision to it of explanatory statements—began:

In pursuing its work of examining delegated legislation on behalf of the Senate, the Committee is dependent upon Explanatory Statements, provided with the instruments, for the reasons for making the legislation, and the effects it might have, in the same way as the Senate itself is dependent upon Ministers' Second Reading speeches and Explanatory Memoranda on parent legislation.

During the past year, the Committee has noted some deficiencies in the Statements, ranging from what the Committee regarded as inadequacies in stating the purpose of the instrument, [...] through omissions of reasons for provisions [...] to inadequate descriptions of features of provisions.

In view of the fact that matters of concern to the Committee, and the principles under which it operates, are well understood to those involved in the preparation of delegated legislation, it appears to the Committee that more comprehensive and detailed statements, where appropriate, would assist it in its operations, thereby lessening the burden on both the Committee and Ministers.⁶⁶

These concerns about quality were raised again in 1984, 1986, and at some length in 1988, when a whole chapter was devoted to 'A request for better explanatory statements'.⁶⁷

This history is presented at some length here in order to demonstrate that explanatory statements to subordinate legislation have always been a creature of the Senate Regulations and Ordinances Committee, and have been very much a working instrument for the Committee. Which explains why they are so difficult to obtain!

⁶⁴ Senate, Standing Committee on Regulations and Ordinances, *Sixth report*, 29 April 1947, p. 2; *Eighth report*, 29 May 1952, p. 2; *Sixteenth report*, 11 May 1960, p. 3; *Twenty-sixth report*, 23 September 1969, p. 1.

⁶⁵ Senate, Standing Committee on Regulations and Ordinances, *Tenth report*, 22 May 1956, p. 3, referring to Statutory Rules 1955, No. 92.

⁶⁶ Senate, Standing Committee on Regulations and Ordinances, *Seventy-first report*, 11 March 1982, pp. 16–17.

⁶⁷ Senate, Standing Committee on Regulations and Ordinances, *Seventy-fifth report*, September 1984, p. 16; *Eightieth report*, October 1986, p. 30; *Eighty-third report*, April 1988, pp. 18–27.

For the period before 1982, there is currently no access at all to explanatory statements, simply because no-one knows where they are! Being as brief perhaps as one to three paragraphs, they appear to have not been tabled in the Parliament until the 1970s or possibly as late as the mid-1980s, and so apparently they are not preserved in the Senate Table Office archives. This leaves two possible sources: the files of the Regulations and Ordinances Committee, or the files of the departments themselves that created the regulations. Good luck to anyone seeking a departmental file on the creation of a particular regulation: who would know where to start? The files of the Regulations and Ordinances Committee 1932–1988, however, comprise nearly 6 metres of shelf-space at the National Archives, which would be a more manageable research target—if the files were open for research. Since they are Class A parliamentary records, however, they are exempt from the normal 30-year rule applying to government archives, and permission to access them must currently be sought from the President of the Senate.⁶⁸ Further research will reveal whether these files are a useful source for explanatory statements, and whether they can be made more easily accessible.

To complicate matters further, the *Legislation handbook* (1975) indicates that an explanatory memorandum—single-spaced—was presented to the Executive Council with proposed new regulations, while an explanatory statement—

double-spaced—was sent to the Parliament.⁶⁹ Again, only further research will reveal if the two types of documents contained differences.

A bound set of explanatory statements for the period 1982–90 is held by the Attorney-General's Department Library. There are restrictions on the copying and loan of this material, but the National Library has scheduled it for microfilming in the near future. Most of the explanatory statements from 1991 onwards are available online in ScalePlus,⁷⁰ and will presumably be migrated in due course to ComLaw.

From 1 January 2005, with the establishment of the Federal Register of Legislative Instruments under the *Legislative Instruments Act*, explanatory statements have fully matured into documents not only for parliamentary use, but for the use of the legal profession and the wider public: they are now compulsory for all subordinate legislation, and will be placed online with the legislation itself.⁷¹ Not only that, but there is now a legislative definition of explanatory statements, whereas there is none for EMs:

explanatory statement, in relation to a legislative instrument, means a statement that: (a) is prepared by the rule-maker; and (b) explains the purpose and operation of the instrument; and (c) if any documents are incorporated in the instrument by reference—contains a description of the

⁶⁸ *Archives Act 1983*, s. 31(5), as inserted by the Archives (Records of the Parliament) Regulations 1995, schedule, item 9.6.

⁶⁹ *Legislation handbook*, Australian Public Service Board, Canberra, [1975], pp. 122–3.

⁷⁰ See <http://scaleplus.law.gov.au/html/ess/browse/TOCN.htm>, accessed on 20 January 2005.

⁷¹ See especially *Legislative Instruments Act 2003*, ss. 20 and 26. The Federal Register of Legislative Instruments is available at <http://www.fli.gov.au>, or from within the ComLaw website.

documents so incorporated and indicates how they may be obtained; and (d) if consultation was undertaken under section 17 before the instrument was made—contains a description of the nature of that consultation; and (e) if no such consultation was undertaken—explains why no such consultation was undertaken; and (f) contains such other information as is prescribed.⁷²

The requirement for a consultation statement in particular represents a significant new explanatory element.

The status of explanatory statements for use as extrinsic aids to judicial interpretation was previously governed by s. 46(1)(a) of the *Acts Interpretation Act*. This stated that all regulations and other instruments should be treated for interpretative purposes as if they were Acts. Thus, as long as explanatory statements were 'laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted'—fulfilling the conditions of s. 15AB of the *Acts Interpretation Act*—they were given similar status to EMs.

Although the 1984 amendments with which this paper began were designed primarily for EMs, the conditions applied by s. 15AB (see p. 7) were probably fulfilled for explanatory statements from 1932, because they were 'furnished to the members' of Parliament from that date, or from the mid-1980s, when they apparently began to be 'laid before' Parliament. The 1984 amendments thus appear to have applied to explanatory state-

ments as well as EMs from the time the amendments were passed.

Since 1 January 2005, s. 46 of the *Acts Interpretation Act* has been replaced by s. 13(1)(a) of the *Legislative Instruments Act*. The previous provisions have been expressed in more modern language, and applied to all legislative instruments, including regulations.

The Index to explanatory memoranda

Twenty years after the 1984 amendments to the *Acts Interpretation Act* with which this paper began, it is timely that an index to pre-1983 EMs should at last be made available. The online Index to explanatory memoranda (<http://www.aph.gov.au/library/pubs/explanmem>) contains the data necessary to know whether an EM or a CM was produced for any bill between 1901 and 1982, as well as its date, the number of pages, notes such as the full title and whether different versions were produced, and its location in the volumes of bills held by various libraries. In a very few instances there are links to online copies of EMs. There are also instructions as to how to obtain copies, principally through the National Library or the Parliamentary Library. The Index is available to browse in HTML format, or download in Word, Excel or PDF format.

Updates to the information in this paper may be made to the online version accompanying the Index to explanatory memoranda: see http://www.aph.gov.au/library/pubs/explanmem/was_there_an_EM.htm.

⁷² *Legislative Instruments Act 2003*, s. 4.

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