

Appendix 1

EXPLANATORY MEMORANDUM REQUIREMENTS

Ministers must ensure that the JSCDL receives, within 10 business days of the subsidiary legislation being published in the Government Gazette or on the Western Australian legislation website, an Explanatory Memorandum signed by the CEO of the agency and initialled or signed by the responsible Minister. If an Act specifically allows subsidiary legislation to be made by a person or entity other than a Minister or the Governor, the Explanatory Memorandum must be signed by that person or the senior officer of that entity (in place of the Minister). A copy of the information provided to the Committee should be forwarded to the responsible Minister for reference.

For subsidiary legislation where notice of a disallowance resolution must be given within fewer than the 14 sitting days provided for in section 42 of the Interpretation Act 1984, the agency must provide the Explanatory Memoranda within five business days of the subsidiary legislation being published in the Government Gazette or on the Western Australian legislation website.

An Explanatory Memorandum must contain the following:

- The title of the subsidiary legislation.
- The date of publication of the subsidiary legislation in the *Government Gazette* or on the Western Australian legislation website.
- The statutory head of power in the relevant Act that provides the authority to make the subsidiary legislation.
- A description of the purpose and effect of, and justification for, the subsidiary legislation (or of any amendments to or repeals of affected principal subsidiary legislation that are effected).
- Identification of any unusual or controversial provisions, with particular regard to the [Committee's Terms of Reference](#)
- Details of consultations undertaken, including stakeholders consulted, a summary of their comments and any action taken in response.
- Any regulatory assessments lodged with the Department of Treasury's Better Regulation Unit.
- An overview of any external material (including standards) incorporated by reference in the subsidiary legislation.
- Rationale for changes in penalties and details of the amount of the penalty immediately before the change.
- If the minor consequential amendments process is being utilised:
 - a) a statement that the Explanatory Memorandum is being provided under that process by one responsible agency on behalf of all portfolio areas affected; and
 - b) the identification of any 'tidying up' measures.

Agencies must ensure that the Explanatory Memorandum includes the printed names and signatures (or initials) of the CEO and the responsible Minister, together with the contact details of relevant officers who may be contacted regarding the subsidiary legislation.

Fees and charges

The rationale for any fees (including fee caps) and charges that are established or amended by the subsidiary legislation, and details of the amount of the fee or charge immediately before the change (if applicable), must be set out in the Explanatory Memorandum. This information should be summarised in table form, as shown in this example –

Type of fee charged / fee cap imposed	Date last amended (Increase or Decrease)	Old fee / fee cap (\$)	New fee / fee cap (\$)	Increase / Decrease (%)	Increase / decrease (\$)	% of cost recovery achieved	Cross subsidisation (Yes / No)
Grant or renewal of fishing boat licence for							
• A boat less than 6.5 metres long	10.09.11 (decrease)	550.00	85.00	-84.55	-465	25	No
• A boat 6.5 metres long	10.09.11 (Increase)	550.00	600.00	9.09	50	100	No
• A boat longer than 6.5 metres	10.09.11 (increase)	700.00	700.00	0	0	90	No

Descriptions of the following should also be included in the Explanatory Memorandum:

- The costing systems used to set the fees/fee cap or charges in order to reveal the extent of cost recovery (if applicable)¹.
- The justifications for cross subsidisation, if applicable.

Incorporation of external material

On request, electronic and/or hard copies of any material called up (incorporated by reference) in subsidiary legislation, including Australian or Australian/New Zealand Standards or other relevant external documents, must be supplied to the JSCDL.

The Explanatory Memorandum must contain:

- a full description of why it is believed to be necessary or expedient for the material to be incorporated
- Confirmation the agency:
 - Has copies of Australian or Australian/New Zealand standards that are available to be inspected by the public free of charge, or if not, that it will do so
 - Advises the public of the availability of Australian or Australian/New Zealand standards on its website, or if not, that it will do so.

¹ Cross-subsidisation of fees occurs where a department or agency imposes fees which over-recover in order to subsidise other fees which under-recover. See Joint Standing Committee on Delegated Legislation. report 75. Identifying a Systemic Issue Arising out of Nine Court and Tribunal Instruments. Western Australia. Legislative Council 18 September 2014 p 29. See *Second Public Sector Performance Report 2010*, Office of the Auditor General, Report 12, November 2010, page 7, together with *Costing and Pricing Government Services, Guidelines for use by agencies in Western Australian Public Sector*, Government of Western Australia, Department of Treasury, June 2015 and *Treasurer's Instruction 810, Financial Administration Bookcase*, Government of Western Australia, Department of Treasury, (last updated 18 June 2021).

Omnibus subsidiary legislation

Omnibus subsidiary legislation is subsidiary legislation that amends more than one item of principal subsidiary legislation falling within the same Ministerial portfolio.

Agencies may submit one Explanatory Memorandum covering all amendments made by the item of Omnibus subsidiary legislation. All other requirements above must be met (such as submitting copies of each item of principal legislation that is being amended).

Minor consequential amendments affecting more than one portfolio

New or amending primary legislation will sometimes have the effect of necessitating amendments (usually changes to cross-references) to subsidiary legislation that is the administrative responsibility of portfolio areas other than that of the Minister responsible for the primary legislation. Where this occurs, and the amendments:

- affect a number of items of principal subsidiary legislation; and
- are purely consequential on the passing of the primary legislation,

the Committee is prepared, in these limited circumstances, to deal with the agency of the responsible Minister alone.

Note that subsidiary legislation dealt with under this procedure must not include substantive amendments. The subsidiary legislation may include ‘tidying-up’ measures, and minor technical changes that do not involve new policy but that are consequential on the passing of the primary legislation and directly related to and necessary for the effective operation of the primary legislation.

The requirements above must be met in respect of the amended subsidiary legislation. However, the JSCDL will accept an Explanatory Memorandum from the responsible agency (signed or initialled as above) on behalf of all portfolio areas affected. Where this occurs, the responsible coordinating agency, or PCO, should advise JSCDL staff in advance of this planned arrangement and if the subsidiary legislation includes “tidy ups”. Further information on dealing with minor consequential amendments can be found in the [Procedures for Dealing with Consequential Amendments to Delegated Legislation](#). The JSCDL have accepted this arrangement as an ongoing arrangement with PCO.