Don't believe all you read in an EM by David W Marks KC, Inns of Court, Brisbane

Can you trust an Explanatory Memorandum?

Essentially – no.

Who writes the EM?

They are not written by Office of Parliamentary Counsel.

OPC's current publication, "OPC's drafting services: a guide for clients" (July 2022) says:

> *171 The instructing agency is responsible for preparing the explanatory memorandum or explanatory statement. OPC is not involved in preparing or settling it.*

So the drafter may well never see the EM.

The work is done in the Department. And it has been that way for as long as I can remember.

So are there ever errors?

Yes.

Here's an unarguable example.

The EM's author has muddled the differing rules for tax laws, and other laws, about legislated notes to provisions.

There is a note to section 770-15(1) of the *Income Tax Assessment Act 1997*.

The note was not included in the original version of Division 770, in 2007.

The note was inserted by *Tax Laws Amendment (2008 Measures No. 4) Bill 2008.*

At that time, section 13(3) of the *Acts Interpretation Act 1901 (Cth)* said that endnotes, footnotes and marginal notes were <u>not</u> part of a Commonwealth Act. (By the way, I do not think this note was any of those notes. This error happened anyway.)

The more specific provision was section 950-100(1) of the *Income Tax Assessment Act 1997*.

It said that a note, that follows a provision to that Act, forms part of that Act.

That more specific provision prevailed in 2008.

Why then did the person who wrote the Explanatory Memorandum to *Tax Laws Amendment (2008 Measures No. 4) Bill 2008*, say at page 50 of the EM that the Bill (underlining added):

> *Adds a <u>non-operative note</u> to help readers. …*

What happened next?

To pile on confusion, section 13 of the *Acts Interpretation Act 1901 (Cth)* was amended in 2011, with unlimited retrospective effect, to make notes part of Commonwealth statutes.

But that was already the case for the *Income Tax Assessment Act 1997.*

The EM to *Acts Interpretation Amendment Bill 2011 (Cth)* explains the logic of the change in 2011 (underlining added):

> *93. New section 13 states that all material in an Act, from the first section to the end of the last Schedule, is part of the Act. … New section 13 is intended to capture all headings (including the heading to the first section of the Act) and explanatory notes within the Act. … However, from federation, marginal notes and section headings have been included in Bills as part of the text considered by the Commonwealth Parliament. … It is appropriate for this material to be treated as part of the Act, and given appropriate weight in interpreting the terms of the Act. This weight will ordinarily be less than the words of the section itself, given the function of such notes and section headings ...*

Nevertheless, the incorrect information in the EM to the *Tax Laws Amendment (2008 Measures No. 4) Bill 2008* remains uncorrected and extant. It is still quoted uncritically.

Conclusion

The EM was never correct. Whatever doubt there might have been in 2008, caused only by the incorrect EM, was overtaken by the more sweeping amendment in 2011. But the 2008 EM was wrong in 2008, and remains wrong. Quoting it uncritically ever since does not make it "right".

Sometimes it matters.

Do not accept Explanatory Memoranda at face value. The above is not a case of something that is even arguably correct. It was never correct. And the incorrect EM is still being quoted.

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