AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

Principle (c): Scope of administrative powers

Overview

Scrutiny principle (c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. Under this principle, the committee will typically be concerned with provisions in instruments which:

- broadly delegate administrative powers and functions;
- confer broad discretionary powers; or
- confer coercive powers on 'persons assisting' authorised officers.

Delegation of administrative powers and functions

Where an instrument delegates administrative powers or functions, the explanatory statement should address the following matters:

- the purpose and scope of the delegation, including why it is considered necessary;
- an explanation of who will be exercising the delegated powers and functions, including whether they possess the appropriate qualifications and necessary skills; and
- the nature and source of any limitations and safeguards relevant to the delegation, including whether they are contained in law or policy.

In addition, where the instrument delegates administrative powers or functions to a member of the Australian Public Service, the committee expects that the delegation will be limited to members of the Senior Executive Service (SES) or equivalent. Consequently, the explanatory statement should provide a thorough justification for any delegation of powers to officers below the SES level.

Conferral of discretionary powers

Where an instrument confers discretionary powers on a person, the instrument should set out the factors which the person must consider in exercising the discretion. The explanatory statement should also address the following matters:

- the purpose and scope of the discretion, including why it is considered necessary;
- an explanation of who will be exercising the discretion, including whether they possess the appropriate qualifications and necessary skills; and
- the nature and source of any limitations and safeguards relevant to the exercise of the discretionary powers, including whether they are contained in law or policy.

Conferral of coercive powers

Where an instrument confers coercive powers on a person or class of persons, the committee will be concerned to ensure that the instrument does not unduly trespass on personal rights and liberties. In particular, the committee will consider whether there are appropriate limits and safeguards in place, and whether the persons on whom the powers are conferred possess the appropriate qualifications

or experience necessary to exercise the powers. Accordingly, the explanatory statement to an instrument containing such a provision should address the following:

- the purpose and scope of the conferral, including why it is considered necessary;
- an explanation of who will be exercising the power, including whether they possess the appropriate qualifications and necessary skills; and
- the nature and source of any limitations and safeguards relevant to the exercise of the coercive powers, including whether they are contained in law or policy.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in explanatory statements where an instrument:

- delegates administrative powers or functions;
- confers discretionary powers; or
- confers coercive powers.

☐	**Purpose, scope and necessity of the provisions**	The explanatory statement should explain the purpose, scope and necessity of including provisions which delegate administrative powers, or confer discretionary or coercive powers, in the instrument.
☐	**Qualifications and skills of the persons exercising the power**	The explanatory statement should explain why it is appropriate for the person or class of persons to whom delegations may be made to exercise the relevant powers or perform the relevant functions, including whether delegates would possess the appropriate qualifications and necessary skills.
☐	**Limitations and safeguards**	The explanatory statement should explain the nature and source of any limitations or safeguards relevant to the exercise of the power, including whether those safeguards or limitations are included in law or policy.