



Principle (i): Availability of independent review

Overview

Senate standing order 23(3)(i) requires the committee to scrutinise each instrument as to whether it unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, liberties, obligations or interests. Under this principle, the committee will typically be concerned with instruments which:

- exclude, limit or fail to provide for independent merits review;
- exclude or limit judicial review; or
- contain a no-invalidity clause.

Availability of independent merits review

Where an instrument empowers a decision-maker to make discretionary decisions which have the capacity to affect rights, liberties, obligations or interests, those decisions should ordinarily be subject to independent merits review. Accordingly, the explanatory statement to any instrument including such powers should explain:

- whether independent merits review is available; and
- if merits review is not available, the characteristics of the relevant decisions which justify their exclusion from merits review, by reference to the Administrative Review Council's guide, [What decisions should be subject to merit review?](#)

The committee considers that the following factors will not, of themselves, constitute a sufficient justification for excluding independent merits review:

- the enabling legislation does not provide for merits review under the *Administrative Appeals Tribunal Act 1975* (AAT Act);
- the relevant decisions do not fall within the scope of the AAT Act because they are not made 'under an enactment';
- the availability of judicial review; and
- the availability of internal review (for example, review by a departmental officer) or review by the Ombudsman.

Availability of judicial review

The exclusion of judicial review of administrative action removes a fundamental right of persons who are affected by administrative decisions to challenge them in the courts. Any such exclusion requires a clear and substantial justification.

Limiting judicial review is also a serious matter. Such limitations are sometimes provided by no-invalidity clauses. No-invalidity clauses typically provide that the breach of a particular statutory requirement attached to a particular decision or act (for example, a requirement to provide reasons for a decision) does not result in the invalidity of that act or decision. Such clauses potentially restrict an applicant's capacity to seek independent review of the relevant act or decision.

Accordingly, where an instrument contains a 'no-invalidity' clause, the explanatory statement to the instrument should explain:

- the nature and scope of the no-invalidity clause; and
- why it is necessary and appropriate to potentially restrict a person's access to independent review through the inclusion of the no-invalidity clause.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- Availability of independent merits review** Where an instrument empowers a decision-maker to make discretionary decisions with capacity to affect rights, liberties, obligations or interests, the explanatory statement should explain:
 - whether independent merits review is available; and
 - if merits review is not available, the characteristics of the relevant decisions which justify their exclusion from merits review, by reference to the Administrative Review Council's guide, [*What decisions should be subject to merit review?*](#)
- Availability of judicial review** Where an instrument excludes or limits the availability of judicial review in relation to a decision, the explanatory statement should explain:
 - why it is necessary and appropriate to deny or restrict access to judicial review; and
 - the nature and scope of any relevant statutory safeguards in the absence of judicial review.
- No-invalidity clauses** Where an instrument contains a 'no-invalidity' clause, the explanatory statement should explain:
 - the nature and scope of the no-invalidity clause; and
 - why it is necessary and appropriate to potentially restrict a person's access to external independent review by including the no-invalidity clause.