AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Delegated Legislation
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Principle (i): Availability of independent review

Overview

Scrutiny principle (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; and
- exclude or limit procedural fairness.

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 merits 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.

Exclusion or limitation of procedural fairness

Procedural fairness is a fundamental administrative law principle that ensures fair decision-making. Amongst other matters, this principle requires decision-makers to be free from bias and the appearance of bias (no bias rule) and people who are adversely affected by a decision to be given an adequate opportunity to put their case before the decision is made (fair hearing rule). Where an instrument limits or denies procedural fairness (for example, by restricting or excluding disclosure of adverse information to the person affected by a decision) the explanatory statement should provide a comprehensive justification for the relevant exclusion or limitation.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in the explanatory statements to instruments which engage this principle.

☐	**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 merits 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.
☐	**Exclusion / limitation of procedural fairness**	Where an instrument limits or denies the right to procedural fairness, for example, by breaching the fair hearing rule or no bias rule, the explanatory statement should comprehensively explain why it is necessary to limit procedural fairness.