



Principle (ii): Insufficiently defined administrative powers

Overview

Scrutiny principle (ii) requires the committee to scrutinise each bill as to whether it makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. Insufficiently defined administrative powers are of concern to the extent that they may be exercised arbitrarily or inconsistently; such powers may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles. Under this principle, the committee will typically be concerned with bills which:

- confer broad discretionary powers; and
- allow for broad delegation of administrative powers and functions.

The following discussion summarises the committee's expectations regarding key issues arising under principle (ii). The issues identified are not exhaustive.

Broad discretionary powers

Many administrative powers are granted to decision makers on a discretionary basis. This means that the decision maker is not required to exercise the relevant power in a particular way but has a range of options open to them. The committee's scrutiny concerns will be heightened where provisions exempt a decision maker from the requirement to consider whether or not to even exercise a power at all. Where a bill contains a discretionary power, the committee expects the explanatory memorandum to the bill to address the following matters:

- the purpose and scope of the discretion, including why it is considered necessary;
- whether there are appropriate criteria or considerations that limit or constrain the exercise of any power, including whether they are contained in law or policy;
- whether the decision maker is required to exercise the power and, if not, whether this will limit a person's right to an effective judicial review remedy; and
- an explanation of who will be exercising the discretion, including whether they possess the appropriate training, qualifications, skills or experience.

Broad delegation of administrative powers and functions

Bills that provide an official with a range of powers and functions generally contain the ability for these powers to be delegated to other officials. When a bill allows for the delegation of these administrative functions or powers, the committee generally expects that any delegation will be limited to nominated office holders or members of the Senior Executive Service. Where a bill allows for broad delegation of administrative powers and functions, the committee expects the explanatory memorandum to the bill to address the following matters:

- the purpose and scope of the delegation power, including why it is considered necessary;
- an explanation of who will be exercising the delegated powers and functions, including whether they possess the appropriate training, qualifications, skills or experience;

- if a delegation extends beyond nominated office holders or members of the Senior Executive Service—why this is appropriate, what safeguards are in place to ensure that any powers are appropriately delegated, and whether these safeguards are contained in law or policy; and
- if a delegation extends beyond members of the Australian Public Service—why this appropriate, what safeguards are in place to ensure that powers are delegated only to appropriate persons and whether there will be any impact on an individual's right to judicial or merits review if decisions are made by persons who are not government officials.

Explanatory memorandum checklist

The following checklist summarises the types of information which should be included in explanatory memoranda where a bill may engage scrutiny principle (ii).

- Broad discretionary powers** Where a bill contains a discretionary power, the explanatory memorandum should explain:
 - the purpose and scope of the discretion, including why it is considered necessary;
 - whether there are appropriate criteria or considerations that limit or constrain the exercise of any power, including whether they are contained in law or policy;
 - whether the decision maker is required to exercise the power and, if not, whether this will limit a person's right to an effective judicial review remedy; and
 - who will be exercising the discretion, including whether they possess the appropriate training, qualifications, skills or experience.

- Broad delegation of administrative powers and functions** Where a bill allows for broad delegation, the explanatory memorandum should explain:
 - the purpose and scope of the delegation power, including why it is considered necessary;
 - who will be exercising the delegated powers and functions, including whether they possess the appropriate training, qualifications, skills or experience;
 - if a delegation extends beyond nominated office holders or members of the Senior Executive Service—why this is appropriate, what safeguards are in place to ensure that any powers are appropriately delegated, and whether these safeguards are contained in law or policy; and
 - if a delegation extends beyond members of the Australian Public Service—why this appropriate, what safeguards are in place to ensure that powers are delegated only to appropriate persons and whether there will be any impact on an individual's right to judicial or merits review if decisions are made by persons who are not government officials.