



Is a legislative instrument within power?

Key points

A legislative instrument you are drafting must be **'within power'**. A legislative instrument is within power if:

- (a) the instrument can deal with all the matters included in it;
- (b) the person who makes the instrument has authority to do so; and
- (c) the instrument can be made at that time.

If a legislative instrument is not within power, it may be invalid. The legal, political and administrative consequences of invalidity can be serious.

Consider if each provision of an instrument you are drafting is within power.

How to check if a legislative instrument is within power

Step 1: Identify the 'head of power' for the legislative instrument



A **'head of power'** is a provision of an Act (the **'enabling Act'**) that delegates the power to make a law (a legislative instrument) to a person. A provision of your instrument must refer to the head of power provision.¹ There might be more than one relevant head of power for a legislative instrument!

Tip: when looking for a head of power provision, try searching for words like "rules", "instrument", "specify", "determine", "prescribe", "set out" or "deal with".

Step 2: Determine what matters the legislative instrument can deal with



A legislative instrument can only deal with matters the enabling Act says it can. Make sure the legislative instrument doesn't deal with any other matter.

Step 3: Identify who can make the legislative instrument



A person can only make a legislative instrument if the enabling Act gives that person the power to make the instrument. The head of power provision will tell you who can make the instrument.²

Step 4: Work out when the legislative instrument can be made



A legislative instrument can be made any time after the enabling Act commences and remains in force. It can also be made in the time between when the Act receives Royal Assent and when the Act commences to allow any necessary instruments to be ready to commence when the Act commences (see [section 4](#) of the *Acts Interpretation Act 1901*).

There may also be preconditions in the enabling Act that must be met before making a legislative instrument.

IMPORTANT! Seek legal advice if you are unsure at any step!

Head of power examples

Example 1

The Commissioner may, by legislative instrument, make a determination specifying kinds of prohibited animals.

The determination must be made by the Commissioner, and must specify kinds of prohibited animals. It cannot specify, for example, kinds of prohibited objects.

Example 2

The Minister may, by legislative instrument, make rules prescribing matters:

- (a) required or permitted by this Act to be prescribed by the rules; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Provisions like this are often found in Acts. Para (a) operates with other provisions in the Act that provide for something to be prescribed in the rules.

Seek legal advice if you are relying on the 'necessary or convenient' aspect (para (b)) of such a provision.

Other resources

- [The Instruments Handbook](#)
- OPC's Legislative Instruments: The Basics factsheet
- [AGS Legal Briefing 102](#)
- [Senate Standing Committee for the Scrutiny of Delegated Legislation Guidelines](#)
- [OPC's Drafting Direction 3.8](#)

¹ Unless the head of power is a general head of power provision like example 2. See OPC's Drafting Direction 3.8 for more information.

² Subject to any delegations that are in place. See [Legislative Instruments: The Basics fact sheet].