

Administrative Review Council

Decision Making: LAWFULNESS

Best-practice guide 1

August 2007

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Acknowledgments

The Administrative Review Council commissioned Associate Professor Pamela O'Connor of Monash University to prepare the draft of this guide, which was subsequently settled and adopted by the Council. The Council thanks Associate Professor O'Connor for her work.

The Council also thanks the Department of Immigration and Citizenship for contributing funds for this project and for seconding an officer to the Council to assist in the early stages.

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Preface

Most administrative decisions that affect individuals and organisations are made by primary decision makers—front-line administrators in government agencies. Only a minority of these decisions are reviewed by internal review officers, ombudsmen, courts or tribunals. The quality of administrative justice experienced by the public depends largely on primary decision makers ‘getting it right’.

Central to good decision making is decision makers’ understanding of the legal and administrative framework in which decisions should be made. In turn, this depends on whether primary decision makers receive adequate training in relation to that framework. To help agencies develop suitable training programs, in 2004 the Administrative Review Council published *Legal Training for Primary Decision Makers: a curriculum guideline*.

Using the curriculum guideline as the foundation, the Council has now produced this series of best-practice guides. They are designed for use as a training resource and as a reference for primary decision makers in Commonwealth agencies. The legal framework in which state and territory and local government agencies operate is broadly similar, but the guides do draw attention to areas where there are important differences.

Guide 1—*Decision Making: lawfulness*—provides an overview of the legal requirements for lawful decision making, including requirements that have developed through the grounds for judicial review. The other guides in the series cover the following areas:

- Guide 2—*Decision Making: natural justice*—discusses the implications of natural justice (or procedural fairness) for decision makers and its connection with public service values and standards of conduct relating to conflict of interest.
- Guide 3—*Decision Making: evidence, facts and findings*—deals with the role of primary decision makers when receiving evidence, determining questions of fact and accounting for their findings.
- Guide 4—*Decision Making: reasons*—looks at the requirements of two important Commonwealth Acts that impose on many decision makers a duty to provide reasons for their decisions.
- Guide 5—*Decision Making: accountability*—outlines a range of administrative law accountability mechanisms that can be used to review primary decisions;

this includes judicial review, merits review, and investigations by the Ombudsman and other investigative bodies such as the Human Rights and Equal Opportunity Commission and the Privacy Commissioner.

The general principles discussed in the guides might be modified by the legislation that establishes particular agencies or gives agencies their decision-making powers. Agencies wishing to modify or customise the guides for the purpose of training their staff should apply to the Administrative Review Council for permission.

The information provided in the guides is of a general nature: it is not a substitute for legal advice.

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Introduction

Decision making in government agencies involves compliance with a variety of requirements and expectations. Some are legally binding; others, such as standards of timeliness and productivity, might be imposed by the agency itself.

This guide explains the general legal decision making requirements that arise under administrative law, which is the law applying throughout government—Commonwealth, state and territory, and local—to regulate agencies' decision making. The focus of administrative law is on decisions that directly affect the rights and interests of individuals and organisations.

A lawful decision

The administrative law requirements for lawful decision making cover the following matters:

- *Legality.* A decision must be made under legal authority by an authorised person.
- *Procedure.* Legislation might stipulate procedures to be followed when making a decision.
- *Rationality.* The reasoning for a decision must conform to minimum legal standards.
- *Accountability.* A decision maker is accountable for a decision and must notify a person of their right to review.

Some legal requirements are imposed by legislation. Others—particularly legality and rationality requirements—have been developed by judges as they have decided cases. Because these latter requirements are continually being developed and refined, they are not to be found in a single authoritative source such as the Constitution or an Act of Parliament.

If a decision is made in breach of a legal requirement it can be set aside by a court and the agency cannot enforce or rely on it. Members of the public have the right to challenge the lawfulness of government decisions that particularly affect them. This can be done by applying to a court or tribunal or by making a complaint to the Ombudsman.

Power to make a decision

It is important that a decision maker is clear about the decision to be made and about the source of power for that decision. The most common source of power is legislation—either an Act of Parliament (a statute) or a subordinate law made by a person or body to whom Parliament has delegated law-making power. Examples of subordinate laws are regulations, statutory rules and ordinances. It is the decision maker's responsibility to know the legislation being relied on and to keep abreast of any amendments.

Not every decision made by a government agency needs to be authorised by legislation. As well as statutory powers, many agencies possess executive powers to perform their normal administrative functions. Among these executive powers are the common legal powers of an ordinary person or organisation—for example, the power to enter into contracts, to acquire and manage property, to publish guides or advice to the public, and to conduct lawsuits. An agency established as a statutory corporation is often given such powers by legislation or the powers can be incidental to the agency's express powers.

Other laws can regulate the use of statutory and executive powers; for example, when an agency enters into a contract of employment it must abide by the general laws relating to employment contracts.

The extent of power

Powers accorded through legislation are always of limited scope. In some cases, though, their scope might go beyond what is expressly authorised by the words of the legislation. Sometimes an additional power can be implied where it is reasonably necessary to make an express power effective; for example, a statute authorising an agency to grant licences implicitly authorises the agency to develop forms and procedures for licence applications.

Legislation often authorises action that is detrimental to individuals. Examples are statutes that impose taxes, fines and other penalties, authorise compulsory acquisition of land or confiscation of property, or empower police or other officials to detain people. Provisions of this type are interpreted narrowly: they authorise only those actions expressly mentioned.

Statutes are not read as implicitly authorising actions that are contrary to the fundamental human rights recognised by the common law. Among such rights are freedom of speech, freedom of movement, freedom to assemble, freedom from arbitrary detention, search and seizure, freedom to practise one's religion, freedom from arbitrary deprivation of one's property, and the right of access to the courts.

Few of these rights are protected by the Australian Constitution, and most of them can be modified or overridden by legislation—but only if the legislation expresses that intention unambiguously.

A statute authorising the use of a listening device, for example, would not be taken as authorising a police officer to enter private premises without the permission of the occupier for the purpose of installing the device. To infer a power of entry would be to violate a person's common law right to exclude others from their property. The law presumes that if Parliament had meant to authorise a trespass it would have done so expressly. The statute might nevertheless be effective without the additional power of entry: a listening device could in some cases be used with the occupier's consent to entry or without entry to the premises.

The decision maker

A statute will always state who has authority to exercise the powers conferred by statute. The designated person may be the Minister, agency head, governing board of the agency or other officer.

Another way a statute can distribute a power is to assign the power to an 'authorised officer'—usually somebody who has been appointed in writing by a particular person, such as the Minister or the secretary of a department.

If a statute assigns a power to a designated person the law presumes the power can be exercised only by that person, unless the statute expressly authorises further delegation of the power. In exceptional circumstances a power to delegate can be implied. This is better described as an implied power to authorise somebody else to act as an agent for the designated person. It is uncertain when the law will imply such a power, so it is safer to assume that any delegation of power must be expressly authorised by a statute.

A delegation of power must normally be done in writing, in the form of an 'instrument of delegation' signed by the designated person. The decisions the delegate is authorised to make are usually described in the instrument of delegation by reference to the legislative provisions that create the powers.

The way delegation works

When power has been delegated both the designated person and the delegate are authorised to exercise that power. The designated person decides which decisions to make personally and which to leave to the delegate.

There are various ways delegations can be made. A delegation can be made to a named individual or to a person in a specified position or at a particular classification level. A limit such as a monetary value can be placed on the scope of a delegation. Generally, though, delegations are aligned with the distribution of responsibilities in an agency.

When a power is delegated to a specified position any person appointed to that position can exercise the powers associated with the delegation. These may be in addition to other powers delegated to the person as a named individual.

A delegate exercises the power on their own behalf. Accordingly, they should sign the decision in their own name, as a delegate of the designated person. They should not sign 'for' or 'on behalf of' the designated person: this creates confusion about who is the decision maker.

Instruments of delegation should be reviewed from time to time to make sure they are consistent with the legislation and with the allocation of roles in an agency. If the delegate needs particular skills or expertise to exercise the power, the review should also consider whether the delegate is suitably qualified.

The extent of delegated power

When making a decision, a delegate should check that they are legally authorised to make the decision under a current instrument of delegation. They should never assume they have the legal authority to make a decision just because it comes within their job description or arises in a matter that has been assigned to them.

A delegation might not be necessary if the decision involves the use of executive powers. The presumption against delegation does not apply as strictly to non-statutory powers, and a delegate may be deemed to have the executive powers that are appropriate to their level and role. This is subject to any directions from the agency that define the scope of the delegate's executive authority; for example, the holder of the delegate's position might be authorised to purchase particular goods and services up to a specified monetary value.

Before exercising their delegated statutory powers a delegate should also check the scope of those powers. The instrument of delegation might limit the powers, or it might withhold other powers that are needed in order to make the decision. It might, for example, authorise a delegate to ask a person for information but not to compel the person to answer questions. The power to compel the person to answer might have been delegated to a more senior officer.

Some Acts and Finance Directions contain specific rules about delegation and authorisation, and these might override the terms of the instrument or the general principles of delegation just discussed.

A decision made without delegated power

If a decision is made without delegated or executive power the agency will not be able to rely on or enforce the decision. Such a decision cannot be validated by having an authorised delegate subsequently ratify it: a fresh decision will have to be made by an authorised delegate. In exceptional cases the agency might be bound by the decision in its dealings with a member of the public who has acted in reliance on the delegate's apparent authority. This could happen, for example, if the delegate were to act under an instrument of delegation that is later found to be defective or to have expired.

In limited circumstances a designated person can authorise a suitable subordinate to make some decisions on their behalf. The power to give this authorisation can be implied if it is administratively impractical at a particular time for a person such as a Minister or an agency head, who may be absent or busy with other things, to exercise the power personally in every case. If the relevant Act expressly authorises delegation of the power it is preferable that the subordinate acts under an instrument of delegation.

Help with decision making

A delegate can further delegate a power only if both the legislation and the instrument of delegation authorise sub-delegation of the power. This general rule against sub-delegation ensures that the designated person always has control over who is exercising the power.

Not all actions require a formal written delegation. Another officer can provide assistance, for example, by taking statements from witnesses, ascertaining facts, preparing a briefing paper, making recommendations, or administering an approved proficiency test for applicants. In this situation it is important to be clear about precisely who is the decision maker. The authorised decision maker must personally evaluate the facts and the merits of the case and make the decision in their own name. If the assistant is notifying an affected person of the decision the communication should bear the name and signature of the decision maker.

The judgments or choices that must be made

The legislation providing authority for a decision might stipulate the decision to be made if certain facts exist. For example, an Act could stipulate that an application be refused if the applicant does not meet specified criteria. A duty to decide in a particular way is often expressed by the use of words such as ‘shall’ or ‘must’.

Decision-making powers given to administrative agencies are often discretionary powers. These powers involve an element of judgment about the decision. A discretionary power is often expressed using the word ‘may’. For example, if an Act says ‘The Secretary may grant the application unconditionally, or grant it subject to such conditions, or refuse the application’ the decision maker has a choice.

Legislation might also require a decision maker to exercise judgment about whether certain conditions are met—for example, whether a person has ‘reasonable grounds’ for failing to do something or is a ‘fit and proper person’ to hold a particular licence or permit. To make these discretionary judgments, it is essential to examine the facts of the case and assess whether they meet the legislative criteria.

Exercising discretion

If an authorised officer has power to make a decision that involves discretionary power or a discretionary judgment, only that officer can exercise that power or make that judgment. They can take into account the advice or recommendations of others, but it is their responsibility to exercise the discretion and make the decision. Further, their decision must not be made solely so as to accord with the wishes or views of any other person—including a supervisor, the agency head or the Minister. The agency or the Minister can provide general guidelines, but they may not direct the officer in relation to the decision or prevent them exercising their discretion.

Exercise of a discretionary power might depend on a discretionary judgment that a criterion or state of affairs does or does not exist. For example, if an Act gives an officer power to cancel a permit ‘if satisfied that the permit holder has acted in breach of a condition of the permit’ the officer must personally determine whether the person has acted in breach of a condition; they must not act solely on another person’s opinion or belief that a breach has occurred.

Factors to be considered when making a decision

An administrative power must be exercised in accordance with the law. There is an overriding obligation to examine and weigh all the relevant considerations and to ignore irrelevant ones.

It is not always easy, however, to decide what considerations are relevant. The legislation might set out factors that must be considered in each case. If the listed factors are complete, or exhaustive, the decision maker is not permitted to consider other things. More commonly, though, the list is incomplete, leaving the decision maker free to consider other factors that are relevant.

Whether a list of factors in legislation is exhaustive or not is a question of interpretation. A non-exhaustive list is often introduced by the word ‘includes’ or ends with a catch-all expression such as ‘any other matters that, in the opinion of (the decision maker), might be relevant in the particular circumstances of the case’.

Where the legislative factors are not exhaustive, or there is no list at all, a decision maker should seek guidance elsewhere. Most agencies have guidelines that provide examples of the factors that should be considered and advice on how to weigh up the relevant considerations. It is also important to be aware that different factors could be relevant to a particular case; this includes relevant matters raised by a person who will be affected by the decision.

Agency guidelines generally take account of relevant court rulings or tribunal decisions. Courts, tribunals and agencies identify the discretionary factors by a process of statutory interpretation, deducing the relevant factors from a consideration of the words, scope and purpose of the legislation in question.

It is a legal error to have regard to an irrelevant consideration, just as it is to ignore a relevant one. An irrelevant consideration is something outside the purposes for which the power was given. For example, if the legislation requires that a decision maker determine whether a person has sufficient command of English to work as a psychologist it would be irrelevant to take into account the person’s command of Latin. It stands outside the purpose of the power, which is to ensure that the person can communicate in English with clients.

The role of policy in decision making

Any government policy that touches on a decision to be made is a relevant consideration and should be taken into account when the decision is being made. Policies can be made by Ministers, Cabinet or the agency and can exist in various

forms—a ministerial press release, a website, a brochure, a written direction to decision makers, and so on.

Some government policies are statements of intention that require a change to legislation in order to become effective. For example, in the annual budget speech the Treasurer often announces policy changes that will be implemented through legislation at a later date. Announcements of future legislative amendments are not relevant to the interpretation of current legislation.

The policies that are most likely to be relevant in decision making are agency guidelines on how to apply the legislation the agency administers. Guidelines of this kind promote consistency in decision making and inform the public about how the legislation is applied.

How to use policies in the form of guidelines

Although policies can be very helpful in decision making, they cannot be relied on if they conflict with a statute, a subordinate law or a court ruling. Agencies generally take care to ensure that their policies are consistent with the law, but occasionally a policy is out of step or becomes inaccurate as a result of a change in the law. When this happens, it is the law that must be applied, not the policy.

If a decision maker has to make a discretionary judgment, an agency policy might set out the factors that should be considered and the relative importance of each factor. For example, if the decision maker is required to make a discretionary judgment about whether a person is a ‘fit and proper person’ to hold a pilot’s licence, the policy might tell them what information to ask for and how to evaluate the responses.

A policy can guide decision making, but it must not prevent a decision maker exercising discretion. It cannot constrain them to reach a particular decision; nor can it prevent them taking all relevant considerations into account. Policy must not be applied inflexibly. It would be unlawful, for example, to say, ‘It is our policy never to grant a pilot’s licence to anybody with a conviction for speeding in a motor car’. The decision maker must be prepared to consider whether it is appropriate to depart from the policy in an individual case. Otherwise, the policy is effectively a rule, which is inconsistent with discretionary power.

Some statutes give a Minister or an agency head the power to issue binding policy directions to delegates. Powers of this type are usually understood to authorise general directions only, leaving the delegate to decide each case on its merits. In exceptional cases the directions are binding in the sense that the delegate is constrained to reach the decision stated by the policy. When directions are meant to

be binding in this way the legislation often requires that they be tabled in Parliament, so that they are subject to parliamentary scrutiny.

Other rules to be observed when making a decision

Statutory procedures

Legislation might require that particular procedural steps be taken before a decision can be made. For example, there might be a requirement that a written application be lodged with the agency, that another person be notified that an application has been lodged, or that an analysis of the application be prepared and published for public comment.

As those examples suggest, responsibility for completing a procedural step might rest with the decision maker or with another person. Either way, it is the decision maker's responsibility to ensure that any necessary steps are taken before a decision is made. Otherwise, the decision could be invalid.

Strict compliance with procedural steps is usually required unless the legislation states that something less is sufficient. This general rule is reversed in relation to forms: where legislation prescribes a form that a person is to use, 'substantial compliance' with the form is sufficient unless the legislation provides otherwise. If, for example, an applicant uses the wrong form but provides the necessary information this would be taken as substantial compliance with the requirement to use a prescribed form.

Human rights and discrimination

The statute authorising a decision and the general requirements of administrative law are not the only laws that must be observed. It might be necessary to take account of human rights considerations in international conventions to which Australia is a party. Some statements of human rights have been given statutory force; an example is the International Convention on the Elimination of All Forms of Racial Discrimination, which is incorporated in Australian law by the *Racial Discrimination Act 1975* (Cth). Other international conventions express human rights principles that might also be pertinent. Further, some jurisdictions have statutory charters that oblige administrators to act in a way that is compatible with the human rights recognised in the charter.

'Discrimination' means treating someone unfavourably or less favourably without good reason on the basis of specified grounds or attributes. Unlawful

discrimination under Commonwealth law includes race, colour, sex, religion, political opinion, national extraction or social origin, age, medical record, criminal record, marital status, mental, intellectual or psychiatric disability, physical disability, imputed disability, nationality, sexual preference, trade union activity, descent, and national or ethnic origin.

Anti-discrimination and human rights legislation prohibits unlawful discrimination on specified grounds in particular areas of public life—including in the administration of laws and programs and the provision of government services. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) provides the means by which individuals can seek redress against people and bodies (including state and territory agencies) for discriminatory acts and practices that are unlawful under various Commonwealth Acts. Each state and territory also has its own anti-discrimination laws and processes that operate alongside the Commonwealth provisions.

The impact of discrimination law on administrative decision making is pervasive. Bodies such as the Human Rights and Equal Opportunity Commission and state and territory anti-discrimination and human rights bodies have wide powers to inquire into administrative decisions and practices that might breach discrimination laws. Under Commonwealth law, for example, a person who alleges that a decision unlawfully discriminates against them can lodge a complaint with the Human Rights and Equal Opportunity Commission. The President of the Commission will inquire into the complaint and attempt to conciliate it. In some circumstances, if the person is not satisfied they can then apply to the Federal Court or the Federal Magistrates Court. If the court finds that the person has been unlawfully discriminated against in relation to an area of activity covered by the relevant law, it can direct the agency to cease the unlawful conduct, to pay compensation, or to take other reasonable steps to make good any loss or damage incurred by the person.

Direct discrimination

Direct discrimination occurs when a person receives less favourable treatment than would have been accorded another person in the same circumstances because of one of the attributes or grounds specified in discrimination law. For example, it would be directly discriminatory to reject a person's factual claims on the basis that members of that person's race, ethnic group or nationality are more likely than others to tell untruths.

Such discrimination need not be deliberate and can be founded on unconscious attitudes and assumptions. A decision will be a discriminatory act if an unlawful ground of discrimination was the 'dominant' (or, for certain attributes, the

‘substantial’) reason for the decision, even if the decision was also based on non-discriminatory grounds.

Indirect discrimination

Indirect discrimination occurs when a rule, policy or practice that applies generally has a discriminatory impact on people with particular attributes. For example, a general requirement for applicants to attend a specified venue for an interview could indirectly discriminate against people with a disability if the venue is not accessible by wheelchair and no alternative is provided.

If a policy or practice amounts to indirect discrimination, it should not be applied in decision making. If a decision maker suspects it is unlawful they should bring the matter to the attention of their supervisor, who can seek guidance from the agency’s legal advisers.

Exceptions

Although discrimination legislation applies generally to agencies, there are exceptions for actions carried out in direct compliance with certain other Acts. For example, it is lawful under the *Age Discrimination Act 2004* (Cth) to refuse an application for the Age Pension on the ground that the applicant is below the qualifying age specified in Commonwealth pension legislation. There are also exceptions for actions and programs designed to meet special needs of a disadvantaged group or to promote the group’s equality. Some legislation administered by agencies also contains specific exemptions.

There are a number of other exceptions, but these vary according to the ground of discrimination. If a decision maker thinks an agency guideline or practice might be discriminatory, they should raise the matter with a superior and ask whether the agency relies on an exception.