



the Australia and New Zealand

School of Government

EMPA

Governing by the Rules

Rules, decisions and accountability

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A problem

DECISION-MAKING: LAWFULNESS

- Need to have an understanding of the legal and administrative structure within which decisions are made
- Main issues:
 - *Legality*: decision must be made under a 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 and must notify person of their right to review

POWER TO MAKE DECISION

- **What is the source of power?**
 - Legislation?
 - Regulation?
 - Executive power eg to enter into a contract or manage property
- **Extent of power**
 - Power is always limited
 - Restrictive or punitive laws are narrowly interpreted
 - Laws interpreted so as not to authorise actions contrary to fundamental human rights

POWER TO MAKE DECISION

- **Decision-maker**
 - Statute will state who has authority to exercise the powers conferred by statute eg Minister, authorised officer
 - Presumption that that power can only be exercised by that person unless statute authorises delegation –usually in writing
- **Delegation**
 - Eg to named individual or specified position
 - Delegate exercises power on own behalf and should not sign ‘for’ or ‘on behalf of’
 - Can sub-delegate only if specifically authorised

POWER TO MAKE DECISION

- **Extent of delegated power**
 - Must only use power to extent authorised
 - Not necessary for executive power
- **Unauthorised decision**
 - Is not valid
 - Cannot be validated by authorised delegate: fresh decision must be made
 - Agency may be bound if person has acted in reliance on decision

POWER TO MAKE DECISION

- **Judgments that must be made**
 - Is there a duty: “shall” or “must”?
 - Is there a discretion: “may”?
- **Are there criteria to be considered?**
 - Eg “fit and proper person”; “reasonable grounds”
 - Must examine the facts and assess whether they meet the legislative criteria

POWER TO MAKE DECISION

- **Exercising discretion**
 - Only authorised officer can make decision – but can take into account advice and recommendations of others
 - Cannot be made solely so as to accord with the wishes or views of any other person eg Minister, supervisor, agency head
 - But Minister/agency may provide general guidelines
 - If exercise of discretionary power depends on a discretionary judgment that a criterion or a state of affairs does or does not exist, decision-maker must personally determine whether that state of affairs exists – cannot rely on another person's opinion or belief

POWER TO MAKE DECISION

- **Factors to be considered**
 - Legislation may set out factors that must be considered
 - Exhaustive or non-exhaustive [eg “includes”; “any other matter”]
 - If non-exhaustive, or non-existent, may look to guidelines
 - It is an error to take into account an irrelevant consideration and to ignore a relevant one
- **Policy**
 - Government policy is a relevant consideration eg guidelines as to apply the legislation
 - Cannot conflict with legislation or common law
 - Cannot prevent decision-maker from exercising discretion

POWER TO MAKE DECISION

- **Other rules**
 - Legislation may require particular procedural steps to be followed before decision can be made
 - Strict compliance usually required, but sometimes substantial compliance may be sufficient
- Human rights and discrimination laws

NATURAL JUSTICE

- Requires that administrators adhere to a fair decision-making procedure
- Two major rules
 - The ‘hearing rule’: people who will be affected by a proposed decision must be given an opportunity to express their views to the decision-maker
 - The ‘bias rule’: Decision-maker must be impartial and must have no personal stake in the matter to be decided

NATURAL JUSTICE

- Bias: Conflict of interest:
 - Financial; personal; political; family; social, cultural; religious associations or activities
 - Would a member of the public who knew about this interest reasonably think that it might influence the decision?
 - See Public Services Values and Codes of Conduct
 - Disclosure of interests
- Bias:
 - Must not have a pre-disposition to decide the matter other than with an impartial and unprejudiced mind

NATURAL JUSTICE

Natural justice rule applies where the decision might adversely affect the rights, interests or legitimate expectations of an individual or an organisation

- Might be set out in legislation eg notice, hearing provisions
- May be supplemented by common law

NATURAL JUSTICE

The hearing rule:

- Content of notice must provide notice that
 - a decision is to be made
 - sufficient information to allow person to submit/respond
 - How to make a submission
 - Timeline
- Might require notification that decision-maker intends to depart from advice previously given:
 - Does person have a 'legitimate expectation' that previous commitment will be binding?

NATURAL JUSTICE

- **Adequate hearing**
 - Oral or written submission?
 - Interpreters?
 - Representation
 - Opportunity to respond to adverse information
 - Confidentiality of information
 - Adverse to affected person? Eg informer
 - Special knowledge of decision-maker

EVIDENCE, FACTS AND FINDINGS

Decision-maker must

- determine all material questions of fact—those questions of fact that are necessary for a decision
- not base a decision on a fact without evidence for that fact
- ensure that every finding of fact is based on evidence that is relevant and logically supports the finding
- not base a decision on a finding that is manifestly unreasonable
- observe natural justice
- comply with any statutory duty to give a written statement of reasons for the decision.

ACCOUNTABILITY

Forms of accountability

- Agencies accountable through Parliament
- Financial accountability
- Ethical accountability through Codes of Conduct
- External scrutiny, review and transparency eg
 - Requirement to give reasons
 - Ombudsman offices
 - Review and appeal mechanisms [“standing” – who can apply?]
 - Internal [merits]
 - External
 - courts
 - FOI legislation

JUDICIAL REVIEW

From *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5

• A person who is aggrieved by a decision may apply ... for an order of review in respect of the decision on any one or more of the following grounds:

- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
- (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
- (c) that the person who purported to make the decision did not have jurisdiction to make the decision;

- (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
- (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
- (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
- (g) that the decision was induced or affected by fraud;
- (h) that there was no evidence or other material to justify the making of the decision;
- (j) that the decision was otherwise contrary to law.

- (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:
 - (a) taking an irrelevant consideration into account in the exercise of a power;
 - (b) failing to take a relevant consideration into account in the exercise of a power;
 - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

- (d) an exercise of a discretionary power in bad faith;
- (e) an exercise of a personal discretionary power at the direction or behest of another person;
- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- (j) any other exercise of a power in a way that constitutes abuse of the power.

RULES AND DISCRETION

RULES AND DISCRETION

- Untrammelled discretion?? Desirable?
- Rules are a means of controlling arbitrary discretion, but
- Rules require:
 - Interpretation
 - Choice (eg of rule)
 - Discretion, which requires rules as to how to exercise discretion
- Discretion is central and inevitable in any legal system
- Discretion translates rules into action, abstraction to actuality

DEFINITION

- The space between legal rules in which legal actors may exercise choice
- KC Davis: discretion occurs whenever the effective limits on the power of a public official leave freedom to choose between courses of action or inaction.
- Dworkin: discretion is the area left open by the surrounding belt of restriction: the doughnut theory
- Lempert: the freedom to be influenced by factors other than law
- Rules can structure discretion

WHY GRANT DISCRETION?

- Society is complex
- Legislative task is too great
- Growing dependence on specialist, technical or scientific knowledge or expertise
- Legislators avoid hard issues
- Decision may be complex
- Unforeseen or unforeseeable events
- Preference for principle-based regulation

TO WHOM?

All levels of the public service, law enforcers, law interpreters

Levels of discretion

- Individual
- Agency: discretion re
 - regulatory strategy
 - Priorities
 - Method
 - Degree of discretion to confer on officers

DISCRETION: ADVANTAGES

- Rules cannot anticipate all situations: discretion can fill gaps
- Conflict between rules
- Rule may not achieve justice in particular case: individualisation
- May allow for local circumstances (cf national consistency)
- Circumstances are too complex: no rule can cover situation
- May trust decision-maker more than rule maker
 - Khadi justice vs Weberian justice
 - King Solomon!! No law, rule, principle or precedent

ADVANTAGES

- Rule-building discretion: allow rules to develop organically (eg common law)
- Can take parties' preferences into account
- Can avoid undue legalism which may reduce good will and motivation of actors
- Rule compromise: rule makers cannot agree and pass responsibility to someone else

DISADVANTAGES

- Too subjective
- Inconsistency
- Arbitrariness (based on improper criteria not related to purpose)
- Abuse of power: the greater the discretion the more room for bullying or arm-twisting by a regulator
- Uncertain procedures
- Unaccountable
- May undermine or subvert policy
- May undermine the nature of rule-based system
- Regulatory capture

DECISION-MAKING AND DISCRETION

- Discretion: based on rational choice theory: *decisions are purposive choices made by informed, disinterested and calculating actors working with a clear set of individual or social goals.*
- Intentional and consequential activities carried out by rational individuals:
 - This is the basis of administrative law
 - Make bureaucratic decisions more like legal ones

Constraints on discretion

- Administrative law and judicial review (rule of law)
- Rule of law and predictability
- Cultural and institutional constraints: attitudes, values, ethics, moral standards of organisation
- Aversion to risk
- Industry factors: expertise available

Discretion framework

- Compliance with specific requirements or criteria
- Policies and procedures re discretion to be transparent
- Decisions should conform to rule of law principles (fair, equitable, independent, based on relevant considerations)
- Processes should be documented
- Decisions subject to audit and review
- Decisions subject to appeal

RULES, DISCRETION AND PRECEDENT

- Important in organizations: try to understand what others have done in the past and predict what others will do in the future
- Grants access to repertoire of ways of handling problems
- Makes decisions quicker and easier
- Decisions create expectations for others in same organization
- Instructs other decision-makers
- May acquire binding power: like legal rule
- A refuge when exercise of discretion is questioned

DISCRETION AND RULE TYPE

- Prescriptive rules
- Performance-based
- Principle-based
- Rigidity of rule: may shift discretion: hydraulic theory of discretion: eg mandatory sentencing
- Eg
 - 0.05 BAC vs 'drunk'
 - Machinery must be guarded vs duty to ensure health and safety at work, 'reasonably practicable'.

WORKING WITH RULES

- Can never fix the problem of rules: they can never be precise enough
- Work with the communities that will work with the rules
- **‘Interpretative community’** : try to develop shared cultures, understandings, norm, goals, definitions through education, training etc
- Judiciary do not see themselves as part of a ‘community’ required to further regulatory purpose: exclude them?
- Adopt a compliance rather than punitive approach
- Flexibility about the rule making, rule enforcing and rule changing system