



REFERENCE

Defensible decision making for plant export authorised officers

Purpose of this document

This document provides authorised officers (AOs) with an overview of defensible regulatory decision making relevant to export functions.

In this document

This document contains the following topics.

Introduction	2
What is defensible regulatory decision making?	2
Principles of defensible regulatory decision making	2
Acting within legislative parameters	2
Source of power	2
Delegation for making the decision	3
Applying the natural-justice (procedural-fairness) principles	3
Rules of procedural fairness	3
Hearing rule	3
Bias rule	3
‘No evidence’ rule	4
Following consistent work practices and procedures	4
<i>Public Service Act 1999</i>	4
Departmental client service charter	5
Using the ‘reasonable person’ rule	5
Taking into account all relevant considerations	5
Facts	5
Evidence or lack of evidence	5
Thorough and impartial consideration of all facts and evidence	6
Considering all facts independently	6
Reconsidering the decision if more evidence/information is provided	6
Related material	7
Contact information	7

Document information	7
Version history	7

Introduction

AOs conduct regulatory functions, such as inspections, verification and authorisation of export consignments, and make many decisions on a daily basis.

If the incorrect decision is made, it could negatively impact on the international reputation of the Department of Agriculture and Water Resources, and may potentially result in legal action by exporters.

Therefore, AOs need to understand key legislation relating to defensible regulatory decision making and to apply defensible regulatory decision-making techniques within the workplace.

What is defensible regulatory decision making?

Defensible regulatory decision making is when a person makes ‘the best possible decision that is within legislative parameters and can be justified’.

Principles of defensible regulatory decision making

As an AO, it is important to understand the principles of effective decision making to ensure that all decisions made can be successfully defended if challenged. The following principles are derived from case law relating to decisions that have been successfully overruled. The overruling of decisions through judicial review has set a number of precedents for the standard required when making a regulatory decision.

The process used to make an effective defensible regulatory decision should include:

- acting within legislative parameters
- applying natural-justice (procedural-fairness) principles
- following consistent work practices and procedures
- using the ‘reasonable person’ rule
- taking into account all relevant considerations
- considering all facts independently
- reconsidering the decision if more evidence/information is provided.

Acting within legislative parameters

Defensible decisions are those made within legislative parameters. To make a lawful decision:

- the source of power relevant to the decision is identifiable
- the decision is made within the limits of the source of power.

Source of power

The source (or origin) of power for all defensible regulatory decision making relevant to plant-export functions include the:

- *Export Control Act 1982*
- Export Control (Orders) Regulations 1982
- Export Control (Fees) Orders 2015
- Export Control (Prescribed Goods – General) Order 2005

- Export Control (Plants and Plant Products) Order 2011.

Maintaining an up-to-date knowledge of this legislation and associated delegations will assist AOs in making defensible regulatory decisions.

The most up-to-date versions of this legislation is available from the Federal Register of Legislation.

Delegation for making the decision

The AO needs to know whether the authority to make a decision has been delegated to them via the proper legal mechanisms of delegation and authorisation.

A person who has the decision-making power under the legislation can delegate such power to an AO. However, it is up to the AO to confirm that they are covered by an appropriate delegation prior to making the decision.

Decision-making power can be delegated through authorisation or appointment.

Applying the natural-justice (procedural-fairness) principles

The rules of natural justice are principles developed through case law to ensure the fairness of the decision-making procedure of courts and administrators (who include AOs).

The expression 'natural justice' is used interchangeably with the expression 'duty to act fairly' or 'procedural fairness'.

Rules of procedural fairness

Broadly speaking, the rules of procedural fairness are the:

- Hearing rule
- Bias rule
- 'No evidence' rule.

Hearing rule

The hearing rule requires that a decision maker give to a person, whose interests may be adversely affected by a decision, an opportunity to present his or her case.

This means that before an AO makes a decision that may be unfavourable to a client, the AO should:

- notify the client of the decision to be made
- provide the information upon which decision will be based
- allow the client a reasonable opportunity to comment either verbally or in writing regarding the decision.

The aim of the hearing rule is to ensure that the decision is based on all the relevant facts.

Bias rule

The bias rule requires that the decision maker not be interested in the matter to be decided, nor that there be an appearance that the decision maker brings to the matter a prejudiced mind.

Bias may be in the form of actual bias or apprehended bias.

Actual bias

Actual bias arises:

- when the decision maker has a financial or other personal interest that may result in personal gain (conflict of interest)
- when the decision maker has already pre-judged the outcome and formed a conclusion incapable of alteration regardless of the argument or evidence presented

- when the decision maker is prejudice or has a predisposition against the subject and is incapable of making an unbiased decision.

Example 1: Where an AO has a history of rejecting export consignments from a particular client due to legitimate findings of contamination, has pre-judged the outcome and formed a conclusion incapable of alteration about a current consignment prior to conducting the inspection.

Example 2: An AO would breach the bias rule if they owned shares in an exporting company, and decided to pass that company's goods for export, in a way that disregarded legislative requirements and procedure, to benefit that company.

Important: As per the *Public Service Act 1999*, Section 13 – Code of Conduct, an Australian Public Service (APS) employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment. It is essential that any possible conflicts of interest are declared to the department.

Apprehended bias

Apprehended bias may occur:

- when it is perceived that the decision maker has an actual bias
- when a decision maker gives an outward appearance of being biased.

Example 1: If an AO openly stated that they didn't agree with allowing the export of product to a certain country due to current international political issues and then prohibited export of a consignment to that country due to legitimate findings of contamination, the client may perceive that the AO has an actual bias.

Example 2: If an AO has a history of disagreements with the same client on decisions made, the client may perceive that the AO has an actual bias.

'No evidence' rule

The 'no evidence' rule requires that an administrator's decision be based upon logically probative evidence. This means that the decisions of AOs should be reasonable and based on all the relevant facts that can be proved.

Following consistent work practices and procedures

Although decisions should be made on a case-by-case basis, it is important to follow work procedures and to take into account relevant organisational parameters such as:

- department policy documents
- client service charter
- guidelines
- work instructions
- reference material
- importing-country requirements
- Industry Advice Notices (IANs).

Note: Compliant decision making assists the organisation in achieving national consistency.

Public Service Act 1999

It is a requirement of the *Public Service Act 1999* that services are delivered in a fair manner. To make a fair decision it is important to ensure that the decision is free from factors such as favouritism, self-interest, bias and dishonesty.

To quote the APS Values: 'The APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public.'

Departmental client service charter

It is a requirement under the department's client service charter that staff provide high quality and professional services, programmes and policy advice.

Using the 'reasonable person' rule

Decisions should be made using the 'reasonable person' rule.

'Reasonable person' is a phrase used to represent a hypothetical person who exercises qualities of attention, knowledge, intelligence and judgment that society requires of its members for the protection of their own interest and the interests of others.

The reasonable person test is based on either a failure to do something that a reasonable person would do, or on the doing of something that a reasonable person would not do.

If a decision is made without using the 'reasonable person' rule, the decision made may be considered to be 'unreasonable' which may then lead to the decision being overruled.

Taking into account all relevant considerations

All information and considerations relevant to the situation should be taken into account when making a defensible regulatory decision.

Relevant considerations are usually found in the applicable legislation and have a significant impact on whether the decision will be found to be defensible or whether the decision will be overruled.

Where no legislation or standards exist, other considerations taking into account the overall circumstances guide what is relevant.

Example: The Export Control (Plant and Plant Products) Order 2011 lists acceptable levels of pests and contaminants. A relevant consideration, for example, may be any live insects. The Export Control (Plant and Plant Products) Order 2011 state that a nil tolerance for live pest infestations must be applied to all prescribed goods presented for inspection.

To support the considerations taken into account, it is important to base each decision on:

- facts
- evidence (or lack of evidence)
- thorough and impartial consideration of all facts and evidence.

Facts

When establishing the facts of a situation, the following is considered:

- what is the situation?
- who is involved?
- when did it occur / is it occurring?
- where did it occur / is it occurring?
- how did it occur?

Evidence or lack of evidence

When gathering evidence to support the decision, the evidence should be:

- relevant (related to the issue)

- credible (the source is reliable and believable)
- significant (to address key concerns)
- collected and stored in an appropriate manner.

Note: Evidence may occur in many different forms (e.g. verbal statements, documents, photographs, insects, contamination, product with disease symptoms).

Thorough and impartial consideration of all facts and evidence

When using the facts and evidence as a part of the decision-making process, it is important to ensure that all facts and every piece of evidence are taken into account with no biased exclusions.

Considering all facts independently

When making a decision, it is important to independently consider all the facts.

If the decision maker is unduly influenced by another person, the decision made may be found to have been made whilst 'acting under dictation'.

The decision maker exercises their own discretion and does not surrender the decision-making process to others.

Where the decision maker is making a decision following recommendations presented by others, it is necessary for them to consider all facts and all legal issues independently and be able to show that an independent decision has been made.

Reconsidering the decision if more evidence/information is provided

The ability of the decision maker to reconsider the decision if more evidence or information is provided depends on whether the legislation includes the power to vary or revoke.

Under the Export Control (Prescribed Goods) General Orders

Order 6.09 – Inspection of goods if condition changed etc.

'If an authorised office has reasonable grounds to believe that:

- a) an Export Control Order that applies to prescribed goods has not been complied with; or
- b) the condition of the goods has changed,

before or after the granting of an export permit for the goods but before the export of the goods:

- a) an authorised officer must inspect the goods; and
- b) if an export permit has been issued for the goods, the Secretary may suspend the permit until the inspection and any analysis of the goods is completed.'

Example: A consignment of bagged wheat is passed for export at a registered establishment and the exporter loads the wheat into shipping containers. Three months later, the exporter asks for a permit and phytosanitary certificate for the consignment, which was delayed and held at an unregistered premises.

What should be done in this case?

The goods need to be reinspected as the export permit is invalid (Export Control (Prescribed Goods General) Orders 2005, Part 6 Export Permits and Related Matters, Clause 6.04 Validity of Permit 'An export permit is valid for 28 days after it is issued').

Related material

- *Administrative Appeals Tribunal Act 1975*
- *Administrative Decisions (Judicial Review) Act 1977*
- APS Code of Conduct
- APS Values
- Departmental client service charter
- Export Control (Plants and Plant Products) Order 2011
- Export Control (Prescribed Goods – General) Order 2005
- *Export Control Act 1982*
- Freedom of Information Act 1982
- Public Service Act 1999
- [Plant exports operations manual \(PEOM\)](#)
 - Guidelines
 - Work instructions
 - References.

Contact information

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Document information

The following table contains administrative metadata.

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