

Administrative Review Council

Decision Making: EVIDENCE, FACTS AND FINDINGS

Best-practice guide 3

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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 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. The other guides in the series cover the following areas:

- 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.
- 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 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

Administrative decisions are based on facts, and an important element of decision making is making findings about those facts. Many facts needed to support a decision are clear and uncontroversial, but in other cases it is necessary to obtain and evaluate information.

This guide deals with the legal requirements for information assessment and fact finding. Some errors in fact finding are legal errors—in the sense that they are grounds on which a court might set aside a decision. Although there are important exceptions, a breach of one or more of the following general requirements can amount to a legal error. A decision maker must do the following:

- 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.

Not all errors in fact finding are legal errors. For example, it is not necessarily a legal error to make a mistake when evaluating inconsistencies in the evidence or when drawing factual inferences from other facts.

A court will review a decision only on the ground of legal error. It will not set a decision aside simply because it prefers a different decision or factual finding. The Ombudsman, internal review officers, and some appeals tribunals and investigatory bodies can examine errors in fact finding as well as legal errors. For example, they can consider whether a decision is based on incorrect information or attaches too much or too little weight to particular evidence.

Facts needed to make a decision

A statutory power to make a decision usually depends on the existence of certain ‘material facts’. For example, the material facts in a statutory power to grant a seniors concession to an applicant who is an Australian resident aged over 60 years and not in paid employment are the age, resident status and employment status of the applicant. The facts are material in the sense that the existence or non-existence of each one can affect the decision.

It is necessary to analyse legislation in order to determine what facts are material to the decision that is to be made. The legislation itself often sets out factual matters that must be considered—such as age, income and employment status. Otherwise, the material facts are implied by considering the scope and purpose of the legislation. Agency guidelines and manuals usually say what the agency takes to be the material facts for each type of decision.

As well as material facts, there are ‘relevant facts’—facts affecting the assessment of the probability that a material fact exists. Relevant facts are identified by breaking down a material fact into sub-questions. For example, legislation might require a decision maker to determine whether a claimant has incurred a loss as a result of their own carelessness. To make a finding about that material fact, the decision maker needs to make findings about relevant facts such as the nature and circumstances of the event that caused the loss and the conduct of the claimant and other people involved. The factual findings should form a chain of reasoning that leads logically from relevant facts through material facts to the decision.

Once all material and relevant facts have been identified, the decision maker can distinguish between ‘known facts’ (facts that have already been established) and ‘facts in issue’ (facts about which it is necessary to make a finding on the basis of the evidence). Known facts are factual information that is accepted by the decision maker and by the person or people who will be directly affected by the decision. This might include, for example, personal particulars provided by an applicant on an application form that are accepted as correct or on which the applicant is given the benefit of the doubt. A fact in issue is one about which there is disagreement or insufficient evidence to satisfy the decision maker that the fact exists.

Drawing inferences

Some facts can be logically inferred, or deduced, from other facts on the basis of strong probability, without the need for direct evidence. If, for example, the known facts are that a person worked in Ireland in 2005 and in Australia in 2006, it could

be inferred that the person travelled to Australia at some time between those dates. Many gaps in direct evidence are filled by inferences.

An inference that might be adverse to a person who will be affected by a decision should first be put to that person, so that they have a chance to respond. If, for example, a decision maker infers from the evidence that a person caused loss or injury to another deliberately rather than accidentally, they should notify the person that they propose to draw the inference and give the person an opportunity to refute it. They can do this by asking them direct questions about their intent when they acted.

Evidence

Evidence is not necessarily proof. It is information, documents and other material that can be used to demonstrate the existence of a fact or the truth of something. It can take many forms—information provided in an application form or email, a fingerprint, information provided orally by a person, and so on. It can also be the decision maker's own observations—for example, of a site, a demonstration, or someone's demeanour when making a statement or answering questions. Evidence is amenable to testing and evaluation and can be accepted or rejected when it comes to making findings.

Findings in relation to the facts in issue must be based on evidence that is relevant and logically capable of supporting the findings. They must not be based on guesswork, preconceptions, suspicion or questionable assumptions. This does not preclude a decision maker from taking account of 'notorious facts', which are part of ordinary experience or common knowledge—for example, that each person's handwriting is unique.

Evidence can be provided orally or in documentary form and includes electronic communications and data. When evidence is provided orally—as during an interview or telephone call—the decision maker should make a file note or written record of the interview at the time or soon afterwards, while the memory is fresh. The particulars recorded should be the name, position title and address of the person spoken to, the date, time and place of the conversation, and the main pieces of information provided.

For record-keeping purposes, it is a good idea to ask that the information provided be confirmed in writing or supported by documents. For example, if a person produces an original document as evidence, the decision maker should take a photocopy of it for their file and make a note that it is a true copy of the original. Evidence in the form of emails and electronic documents should be printed and kept on file.

Information provided by an applicant is evidence and may be accepted as establishing facts that are likely to be true or that are not material. In the interest of efficiency, agencies generally try to narrow the facts in issue and to limit their requirements for further evidence.

When it comes to what kind of evidence is regarded as sufficient to prove certain facts, agencies' practice varies. For example, one agency might accept a recent pay slip as proof of a person's income, whereas another might require additional evidence, such as an employer's group certificate or a notice of tax assessment. Requirements can also vary depending on the consequences of the decision, the risk of deception, and the difficulty of obtaining better evidence.

For most administrative purposes, a person may give evidence in the form of a statutory declaration, which is a solemn statement a person makes and declares to be true before a witness authorised under the *Statutory Declarations Act 1959* (Cth) and the Statutory Declaration Regulations 1993 or similar state or territory legislation. A person who wilfully makes a false statement in a statutory declaration commits an offence that, under the Commonwealth legislation, is punishable by imprisonment. Some legislation requires that particular evidence be provided in this form.

Obtaining evidence

Responsibility for providing information

Some statutes oblige applicants to provide the information relevant to the making of a decision. For example, a statute might require an applicant to lodge an application in 'the prescribed form', meaning a form of application prescribed in the associated regulations. The prescribed form usually details the information the applicant must provide.

Unless the statute creates a specific duty, an applicant is not legally obliged to prove a fact or to provide information. Of course, if the applicant wants a favourable decision it is in their interest to provide the required information. Failure to provide it means the decision maker might be unable to make the findings of material fact that will support a favourable decision. Since the applicant is under a practical necessity, rather than a legal obligation, to provide information, it is unhelpful to refer to this as an 'onus (or burden) of proof'.

Making inquiries

Administrative decision makers are generally entitled to investigate the facts before making their decision. They can, for example, take statements from witnesses, ask questions and obtain documents, although the extent to which they do this depends on the type of decision to be made. In some areas of administration decision makers decide on the basis of what is presented to them; in others they seek out information and, in doing so, might be assisted by other officers.

If administrators are expected to have an investigative role, they might be given coercive statutory powers—such as the power to enter and inspect premises, to take away records, and to require a person to answer questions and provide documents.

Unless legislation or court decisions provide otherwise, there is no general legal duty to conduct inquiries into a matter raised by an applicant or another party to the decision. Normally, it is up to the applicant to establish their case, which includes providing evidence in support.

If a decision maker is unwilling to investigate a fact it is useful to tell an unrepresented person what kind of evidence they could provide to substantiate their case. For example, they might ask the person to provide a medical report to confirm the reason for an absence or a receipt to confirm their ownership of specific goods.

In four cases the law recognises a limited duty to make inquiries:

- A decision maker should obtain evidence that is centrally relevant to their decision and readily available to them. For example, if a phone call or letter will resolve a question of fact about whether a person kept an appointment, failure to make the inquiry could be considered a ‘manifestly unreasonable’ failure that amounts to a legal error.
- A decision maker should investigate a fact if their power depends on the existence or non-existence of the fact. For example, if the decision maker has a statutory power to cancel a permit granted after a certain date they might need to investigate a party’s claim that the permit was granted before that date.
- If the applicant is in some way disadvantaged in presenting their case—as a result of, say, language difficulties, youth or disability—there may be a duty to provide extra assistance when obtaining evidence.
- Legislation that empowers the decision maker to act on ‘reasonable suspicion’ might create an ‘implied’ duty of inquiry. For example, if the decision maker exercises a statutory power to detain or quarantine a person on reasonable

suspicion that they have a communicable disease there is an implied duty to make inquiries into any matter that appears to contradict the facts supporting that suspicion.

Assessing the evidence

An administrative decision maker is not bound by the rules of evidence that regulate the admission and evaluation of evidence by courts. Administrative decision making is subject to a different standard: findings of fact must be based on logically probative evidence—material that tends logically to prove the existence or non-existence of a fact. For example, rumour or speculation is not logically probative evidence because it does not tend rationally to prove what it asserts.

An administrative decision maker can receive most kinds of evidence, even if that evidence would not be admissible in a court. Some of the rules of evidence prevent courts receiving certain types of evidence on the ground that the evidence is inherently unreliable, that it would be unfair to admit the evidence, or that the evidence should be excluded for policy reasons because it was unlawfully or improperly obtained. Decision makers are not bound by those rules, but they do provide useful guidance when evaluating evidence. The considerations of fairness and reliability on which the rules are based are also relevant in administrative fact finding.

Hearsay and opinion evidence

One type of evidence that can be received is hearsay evidence—a report by one person of what another person has said. For example, if an applicant's neighbour says the applicant told her he was working, this is hearsay evidence that the applicant was working. In evaluating hearsay evidence, the decision maker should take into account that such evidence is generally regarded as less reliable than evidence given by someone who has first-hand knowledge of the facts alleged.

Another example of where the rules of evidence can provide guidance is in the evaluation of opinion evidence. In a court a non-expert witness is not permitted to give evidence of their opinion on expert matters. As an administrator, the decision maker is not precluded from considering a person's non-expert opinion about, say, the value of their land, but the decision maker might decide to accord that opinion less weight than the expert opinion of a qualified valuer.

Natural justice and fact finding

Administrators are not bound by the rules of evidence, but in many cases they are bound to observe the requirements of natural justice, or ‘procedural fairness’. Most decisions that directly affect the interests of individuals and corporations are subject to natural justice, although the requirements can be modified by statute.

Natural justice requires that a person whose interests might be adversely affected by a decision be notified in advance that a decision is to be made and be given an opportunity to respond. In particular, the person must be given a chance to rebut any evidence or information (including factual information) that is adverse to their case or prejudicial to them personally. It makes no difference whether another party provided the evidence or information or it was obtained as a result of the decision maker’s own inquiries.

Natural justice does not require that a person be kept informed while inquiries are continuing if doing so would undermine the decision maker’s access to further evidence. Disclosure can be deferred until the inquiries are complete. The affected person must, however, be given adequate time to comment on the evidence obtained before findings of fact are made.

When putting adverse evidence to an affected person or witness, it might be necessary for the decision maker to probe their response by asking further questions. The decision maker should take care to avoid doing this in a way that gives the appearance of prejudgment or bias—for example, by aggressive questioning, expressions of impatience or gestures of disbelief. It is generally preferable to use questions that begin with words such as ‘why’, ‘when’, ‘how’ and ‘did you’, rather than questions in the form of a proposition or statement. For example, ‘Did you sign this document?’ is preferable to ‘You signed this document, didn’t you?’

A conflict in evidence

Evidence should be analysed closely and evaluated to determine whether there is any conflict in relation to a material fact. Evidence is not all of equal weight. Assessment of the weight of evidence involves the application of logic, commonsense and experience.

The standard of proof

Whether evidence is sufficient to prove a fact must be determined in accordance with a standard. Courts apply two standards of proof—the criminal standard and

the civil standard. In criminal proceedings before a court the offence charged must be proved ‘beyond reasonable doubt’. In civil proceedings a fact must be proved ‘on the balance of probabilities’; a fact is proved to that standard if the court is satisfied it is more likely than not that the fact is true.

Generally, it is the civil standard that applies in administrative fact finding. There is, however, an important qualification: in court proceedings there are usually two parties who can put forward conflicting evidence, and the court must decide which facts are more likely than not to be true. In administrative decision making the decision maker is responsible for determining all material questions of fact and basing each finding of fact on logically probative evidence. The question to be decided is whether, on the basis of the logically probative evidence, the decision maker is reasonably satisfied that a particular fact is more likely than not to be true.

If a fact in issue involves serious wrongdoing, is inherently unlikely or has grave consequences, better evidence might be required to establish the fact. For example, it would be unsound to make a finding based solely on uncorroborated hearsay evidence that a person forged a document.

A few statutes stipulate special standards that cut across the normal categories. An example is military compensation legislation, which provides that a claim for an injury or disease related to a member’s service must be accepted if a reasonable hypothesis connecting the injury or disease to the service exists and cannot be excluded beyond reasonable doubt.

Evenly balanced evidence

In some cases the evidence may be too evenly balanced to support a definite finding of fact. In court proceedings this situation is resolved by rules relating to the onus of proof, which determine who must prove a fact. One of the parties—usually the applicant—has an obligation to prove the material facts on which their case is based. That party bears the risk that the evidence could be insufficient. For example, if *A* sues *B* for a debt, *A* must prove that the sum was advanced to *B* as a loan. If *B* denies there was a loan and *A* cannot prove it, *A* loses the case.

As a general rule, in administrative proceedings nobody bears an onus of proof in that sense. If the evidence is inconclusive, the legislation should be analysed to see what question must be decided. For example, if the question is whether the applicant meets the statutory requirements for receiving a particular benefit, the benefit can be granted only if the evidence allows the decision maker to be reasonably satisfied that the applicant qualifies. If the decision maker is not so satisfied they must refuse the application.

Although there is no general onus of proof, some statutes impose on a person a duty to prove a specific fact. For example, the *Freedom of Information Act 1982* (Cth) provides that a Minister or an agency that has refused a request for access to a document generally has the onus of establishing that the refusal was justified in proceedings for review of the decision by the Administrative Appeals Tribunal.

An onus of proof may also be inferred from the nature of the power being exercised. If a breach of discipline is alleged, for example, the onus of proving the breach rests with the person making the allegation.

Expert evidence

In some areas of public administration it is common for affected parties to submit expert evidence—such as a property valuation or a report from a medical consultant—in support of their case. A decision maker is not bound to accept this evidence, even if there is no other expert evidence before them.

Expert evidence usually consists of a factual component and opinion evidence. The factual component can be evaluated by examining the adequacy of the expert's research and inquiry and the reasonableness of the inferences and conclusions drawn. The opinion component can be evaluated by, for example, considering the factual basis for the opinion, the expert's qualifications and area of expertise, and whether the expert seems impartial and objective.

For example, if medical experts disagree about the diagnosis of a person's illness, the decision maker might prefer the opinion evidence of the expert who, in the decision maker's view, conducted more thorough tests and examinations, was better informed about the patient's medical history, or was better qualified in that medical speciality. Provided the decision maker does not rely on particular information without first disclosing it to the affected person, the decision maker may evaluate the evidence in the light of their own professional knowledge.

Although a decision maker may evaluate expert evidence, they should be wary of relying on their own non-expert opinion in a matter that requires expert judgment. For example, if a medical practitioner gives a diagnosis of an applicant's illness on the basis of tests the practitioner conducted, it would be unsound for a decision maker to prefer a diagnosis they made on the basis of observing the applicant.

Honesty and truth

When there are conflicting versions of a factual matter it does not necessarily follow that someone is lying: it is possible for people to perceive and remember

events differently. A finding that a person is untruthful or not credible is potentially damaging to them and should be avoided when possible. It is generally better to focus on where the truth lies, rather than on who is to be believed.

A decision maker is entitled to take account of a person's demeanour when they make a statement or answer questions, but there is no sure way of reading non-verbal cues such as facial expression, body language and tone of voice. For example, a person who avoids eye contact is not necessarily lying: the behaviour could stem from a number of different causes—such as a physical impairment or a cultural belief that it is disrespectful to return someone's gaze. Another potentially misleading cue can arise when a person is hesitant or appears uncomfortable when making a statement or answering questions: the nervousness might be due to a factor other than dishonesty.

If a person has lied about one thing it does not necessarily follow that everything they say should be disbelieved. A decision maker must consider why the person lied and whether the same motive might cause them to lie about something else. For example, a person might lie about certain things in order to avoid a loss of face but be truthful about other things that do not arouse the same feelings.

A decision maker should take care when asking apparently irrelevant questions simply to test a person's reliability as a witness. For example, a person who claims to have witnessed an event or conversation might be asked to describe the weather at the time or the room in which the conversation took place. Their inability to answer these questions correctly might reveal little about the reliability of their testimony in relation to the relevant matters.

A better way of evaluating a witness's statement is to examine its consistency with other evidence. A statement is more likely to be true if it accords with known facts, the documentary evidence, or other evidence from a source independent of the witness. The decision maker should also note whether the witness's statement is internally consistent and whether it accords with what the witness has said on other occasions.

The best way of probing inconsistencies is to ask questions. If a decision maker has evidence that contradicts the witness they should put the substance of that evidence to the witness—or, if that is not possible, to the affected person who is relying on the witness's statement—and offer them an opportunity to explain.

If a witness varies their account of the facts in response to questions, the decision maker needs to assess the reasons for the change. Inability to maintain a coherent and consistent account might suggest that the witness is prevaricating. On the other

hand, it might be concluded that the witness has an honest but flawed memory of the events.

If inconsistencies emerge this does not necessarily mean that the witness's statement is false. There could be another explanation. If the inconsistencies are unexplained, it might be useful if the decision maker prepares a summary of the conflicting evidence and seeks the opinion of a more senior officer.

Making findings of fact

Accounting for a decision, including the findings of fact, is an important part of a decision maker's function. Full and accurate records should be kept—including copies of documentary evidence, notes of inquiries, findings of fact, and reasoning. The decision maker might not need to give full details of fact finding when notifying the affected person of their decision, but good record keeping will help with providing a fuller justification if challenged.

Agency records can be scrutinised by the Ombudsman, other bodies such as the Privacy Commissioner and the Human Rights and Equal Opportunity Commission, agency review officers, courts, and appeals tribunals. People affected by a decision can gain access to the records under the Freedom of Information Act or upon appeal. The records should reveal fair, rational and professional administration.

The record of a decision must include the findings of material fact, the evidence on which the findings are based, and the evaluation of the evidence. Not every fact an affected person puts in issue will be a material question of fact on which a finding must be made. It might, however, be desirable to resolve a question of fact that an affected person considers to be of central importance. Otherwise, the person might feel aggrieved that their submissions appear to have been ignored.

The findings in relation to material facts are the crucial points on which a decision maker's decision turns. They should make sure that natural justice has been observed in connection with the findings and that the findings are well supported by evidence and reasoning. The legislation should be checked to ensure that all relevant matters, and no irrelevant ones, have been considered.

If there is a conflict in the evidence, the decision maker should explain why they prefer one account over another. It is unwise simply to say, 'I prefer the evidence of person X' or 'I disbelieved person Y'. Instead, they might say, for example, that the account provided by person X was supported by particular documentary evidence or that person Y had not been consistent in their account. The reasons for the

decision should refer specifically to the particular items of evidence on which the findings are based.