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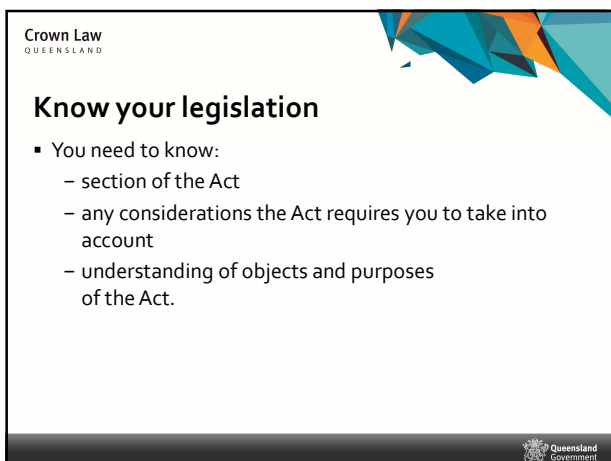
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### The power to make a decision

- There are two main ways you can figure out if you have the power to make the decision you are being asked to make:
  - Act might specifically give you the power
  - person specifically mentioned in the Act may delegate that power to you.

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### The power to make a decision

- Checking your delegation:
  - must be in writing and signed by the person who is delegating the power
  - your position description should match the delegation exactly
  - always get a signed and dated copy of a delegation.

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### The power to make a decision

- Sometimes, certain requirements must be met before you have the power to make a decision:
  - certain facts must exist before decisions can be made
  - decision maker must form a certain state of mind before making a decision.

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## Gathering the relevant documents

- All relevant documents in one place and organised:
  - good practice
  - allows accurate representations to Supreme Court
  - there may be tight litigation timeframes
  - ensures compliance with obligations as decision maker under an Act.

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## Briefing high-level decision makers

- High level decision makers e.g. Ministers or Chief Executives not expected to gather material relevant to decisions and examine it personally
- Summarise relevant material
- Imperative that summary is as accurate and as detailed as it needs to be
- Sometimes provide source documents to decision maker in addition to summary
- Avoid unnecessary duplication of information.

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## Natural justice

- Rule of law which applies to administrative decision making
- Two components:
  - fair hearing rule
  - rule against bias.

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## Natural justice

- Reasonable and fair opportunity to present case
- Some statutes set out precisely what is required of decision maker.

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## Natural justice

- Many statutes don't so it is up to you to follow the common law principles of natural justice
- Courts usually expect that, as a minimum, a decision maker must give people affected by a proposed decision the opportunity to comment on every adverse piece of material which is credible, relevant and significant to the decision being made.

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## Natural justice

- 'Show cause notice' or a 'consider not grant letter'
- Letter to affected person (usually the person who has applied to the decision maker to make the decision) which should set out:
  - what decision you are proposing to make
  - reasons why you are leaning towards making that decision.

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## Natural justice

- Substance of adverse information that has led you to forming that view
- Period of time in which that person can respond to what you have said.

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## Natural justice

- Sometimes insufficient to simply provide substance of adverse material
  - e.g. an expert report
- Exceptional cases – permissible to not provide natural justice
  - e.g. contrary to public interest to disclose information, such as threats to national security or revealing identity of confidential informants.

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## Natural justice

- Other factors:
  - cannot avoid natural justice obligations by simply saying that you are putting adverse material out of your mind
  - legal requirement for decision maker to afford natural justice to person affected by a decision
  - RTI laws are not substitute for natural justice.

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### Bad faith

- No genuine or honest attempt to exercise the decision making power
- More often pleaded than actually found by courts.

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### Bias/conflict of interest

- Bias – real or perceived?
- Vested interest in decision outcome?
- Actual bias – decision maker must be shown to be unwilling or unable to decide issue impartially and not be amenable to persuasion by any evidence that might be before them
- Perceived bias – would the circumstances give rise to a reasonable person having an apprehension of a lack of impartiality on part of decision maker?

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### Bias/conflict of interest

- Question to ask yourself as decision maker:
  - Am I coming to this decision making process with a clear and open mind? or
  - Would a fair minded observer think I was coming to the process with a clear and open mind?

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## Relevant/irrelevant considerations

- Relevant and irrelevant considerations?
- Error of law to:
  - ignore mandatory considerations
  - take into account prohibited considerations
- What makes them relevant or irrelevant?
- Issue of statutory interpretation.

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## Human Rights Act

- Scheduled to commence on 1 January 2020
- 23 human rights to be protected
- Recognises that human rights are not absolute and may be justifiably limited in appropriate circumstances
- Public entities (defined in s 9) are required to act compatibly with human rights (s 58(1)(a)), subject to certain exceptions
- Public entities must also consider human rights when making a decision (s 58(1)(b)).

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## Compatibility with human rights

- Defined in s 8 as one of two things:
  - the measure does not impact on a human right at all (that is, the human right is not 'engaged', or the human right's 'scope' does not extend to cover the measure), or
  - the measure does limit a human right, but the limit is nonetheless justified under s 13.

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## Limitation clause – s 13

- ‘Structured proportionality’ test
- Four elements:
  - (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right [s 13(2)(b)];
  - (ii) is the measure rationaly connected to that aim [s 13(2)(c)];
  - (iii) could a less intrusive measure have been used [s 13(2)(d)]; and
  - (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community? [s 13(2)(e)-(g)]

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## Discretion

- All decision makers have element of discretion.
- What is discretion?
- How can you apply it to stay within established boundaries of law?

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## Policy

- Strict adherence to policy without having due regard to merits of case:
  - another common error found in administrative decisions
- Acting under dictation
- What to do where there is an inconsistency between the Act and the policy.

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## Making a final decision

- Look at all of your material again and further submissions from applicant or other parties
- Final check
- Does it look sound?

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## What now?

- Notify parties of decision and statement of reasons
- Let interested parties know about decision as soon as practicable
- Keep notes from decision making process organised and accessible
- Bear in mind you may have to provide statement of reasons.


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## Questions?


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# Morning tea

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# Workshop scenario 1

You are a decision-maker working for the Department of Forests and Trees.

Your position title was 'Regional Executive Director – Forest Preservation', but under a recent departmental restructure your position title has been changed to 'Regional Managing Director – Preservation of Forests'.

You make your decisions under the Forest, Tree and Sapling Act 1956 ('the Act').

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# Workshop scenario 1

The Act states that the Chief Executive may grant a permit to allow an applicant to remove protected trees from their property, where the Chief Executive is satisfied that the removal of the trees will not cause excessive detriment to the protected tree population in the relevant area.

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### Workshop scenario 1

The Act states that the Chief Executive may take into account the number of protected trees in the area, the effect of the removal of these trees on the protected tree population, and any other information the Chief Executive considers necessary to make a decision to grant a permit to remove the protected trees.

Theresa Green, a member of the community, applies for a permit under the Act to remove seven protected trees from her property. This application is placed in your in-tray and you are asked to make a decision on it.

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### Question 1

- What should your first actions be in relation to the application?

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### Scenario 1 cont.

In the course of gathering all the relevant material in order to make your decision, you obtain a report. This report is written by a specialist in arboriculture (a 'tree expert') who concludes that the destruction of the protected trees would decimate the protected tree population in the area, and would be disastrous for the tree ecosystem in that region. Parts of the report deal with a highly confidential departmental proposal of a scheme to revegetate portions of the region which has not yet been disclosed publicly.

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### Question 2

- Once you have gathered all of your relevant material, what is the next step you will take in your process?

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### Question 3

- What are you going to do with the expert report and the information contained in it?

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### Workshop Scenario 2

- You have the power under the *Rollercoaster Enjoyment Act 2001* to make decisions about the type and number of rollercoasters that are permitted in theme parks across Queensland.
- You have heard that your Aunt Madge and Uncle Bill own a theme park somewhere near Mount Isa, but you have not been in close contact with them for over ten years (except for the occasional Christmas card). You are not sure what their theme park is called or even if they are still running the business.

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### Workshop Scenario 2

- An application comes to you from a theme park in Camooweal for the installation of three new state-of-the-art rollercoasters, which the application asserts will make Camooweal the roller-coaster destination of Queensland.
- You've never heard of Camooweal, but with your finely-honed internet research skills, you ascertain that it is 188 km west of Mt Isa.

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### Workshop Scenario 2

- The application has been made by a company called 'Pimp My Rollercoaster Pty Ltd'. The contact person listed on the application is not familiar to you, but you discover from a company search that your aunt and uncle are the managing directors of Pimp My Rollercoaster Pty Ltd.

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### Question 1

- What steps should you take now in relation to making this decision?

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### Workshop scenario 2 cont.

- Your delegate now has the decision-making responsibility in relation to this application.
- Despite the overwhelmingly positive effects the rollercoasters are likely to have on the economy of the region and the strength of the business case put forward by the applicants, the decision-maker decides to reject the application.
- The rejection is based on a departmental policy which states that outback towns should not have more than two rollercoasters. However, the *Rollercoaster Enjoyment Act 2001* provides no such restriction.

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### Question 2

- Do you think this is a sound decision? Why or why not?

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## Statement of reasons and standing

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### Statement of reasons

- At common law, decision makers are not required or obliged to give reasons
- However, the Judicial Review Act 1991 may apply where applicant can request a statement of reasons.

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### Decision writing framework

- Whether parties were accorded natural justice
- Whether the decision was based on findings of material fact
- That the decision was reached lawfully, within power and on proper consideration.

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### *Acts Interpretation Act 1954*

- If an Act requires written reasons to be given for a decision, the statement must:
  - set out findings on material questions of fact
  - refer to evidence or other material on which those findings were based.

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### Statement of reasons

- Statement should make it abundantly clear to an impartial, reasonably intelligent reader:
  - what issues were considered
  - the reason why relevant material was accepted or rejected
  - the basis of the decision
  - the reasoning process adopted.

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### Statement of reasons checklist

- Do I have an obligation to provide a written decision?
- Can I refuse to provide a written decision?
- What must be in my written decision?
- How and when should my decision be prepared?
- How should I treat recommendations, reports or submissions in my written decision?
- What happens if my written decision is not adequate?

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### Statement of reasons checklist

- Do I have an obligation to provide a statement of reasons?
  - Good administrative practice to make notes of decision at the time it is made
  - You can then easily provide a written decision if requested to do so.

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### Aggrieved person's entitlements

- Obligation to provide a written decision under the *Judicial Review Act 1991* to a person aggrieved by decision.

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### Aggrieved person

- Not limited to applicant – may extend to others who have special interest in or connection with the subject matter of your decision.

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### *Judicial Review Act 1991*

- s.33(4)(a) allows an aggrieved person to apply for a written reason within 28 days of a decision
- s.33(4)(b) allows for an aggrieved person to apply for a written reason within a reasonable time after the decision was made – usually 28 days after request or awareness of decision.

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### Standing to request reasons?

- *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493:
- Special damage, e.g. damage to legal rights or proprietary interests (but not necessary to show financial damage)
- Special interest in, or a connection with, the subject matter of your decision or
- Mere emotional or intellectual concern or similar objects on their own are not sufficient.

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### Statement of reasons checklist

2. Can I refuse to provide a written decision?

- Only if:
  - decision is not a 'decision' under the *Judicial Review Act 1991* or the applicant has no standing
  - you have already given a written decision that complies with requirements of the *Judicial Review Act 1991*
  - request is out of time.

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### Statement of reasons checklist

3. What must be in my written decision?

- Length is not a guide to sufficiency
- A statement must:
  - set out your decision
  - list findings on material facts
  - refer to evidence for findings
  - give reasons for decision.

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### Findings on material facts

- Check legislation for express and implied factors:
  - see subject matter, purpose and scope of the Act
- Set out those critical matters of fact taken into account
- Include evidence and other material on which findings were based.

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### Specify relevant law and guidelines

- Refer to legislation under which you have power to make decision
- Refer to any relevant guidelines or policies – explain significance of these
- Tailor reasons to recipient so they are easily understood.

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### State real reason for decision

- Trace all steps in reasoning process
- Link facts to decision
- Make the reasoning easily understood
- Reciting evidence and conclusion without more is not sufficient.

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### Statement of reasons checklist

4. How and when should my written decision be prepared?

- Comply with statutory timeframes
- Use clear and unambiguous language
- No technical language, unless absolutely essential and you are confident recipient will understand it
- Paraphrase legislation and guidelines where possible
- Length will not be decisive factor – more by the reasoning process.

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### Statement

- Keep accurate notes at time of decision to show reasoning process
- No uncritical use of proformas, blueprints or policy – shows a lack of consideration.

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### Statement of reasons checklist

5. How should I treat recommendations, reports and submissions?

- Refer to relevant recommendations and reports, indicating their weight and the reason for this
- Refer to matters in submissions which are relevant, significant and material.

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## Statement of reasons checklist

6. What happens if my written decision is not adequate?

- Court or appeal body may find the decision was unlawful
- Under Judicial Review Act 1991, Supreme Court can order the provision of an additional statement if initial statement is inadequate.

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## Questions?

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