



the Australia and New Zealand

School of Government

GOVERNING BY THE RULES - 2006 cohort

Subject Outline

Overview of the Subject

The aim of *Governing by the Rules* is to develop public managers' capacity to operate effectively and appropriately within a democracy governed by the rule of law. Public servants work within a web of "rules", stretching from ethics to the constitution. This course explores that web. Although the concepts are crucial, the course is also grounded and practical, making full use of case studies and examples. This is about constitutional democracy as it *should* apply, as it *does* apply - and sometimes as it does *not* apply - in administrative decision-making and management.

Knowledge and understanding of the applicable elements of law, convention, practice and ethics is fundamental to any consideration of public policy. It can be the difference between success and failure for the practical bureaucrat, politician, or manager of a contracted provider. Many intrinsically reasonable statutory initiatives fail in operation because they are *impractical*. Public sector managers need to know how to read the law, how it works and fails, conditions for reasonable performance in operation, and how to successfully navigate through the complexities of government.

Course objectives

The aim is to examine working concepts of law, regulation, and rules more generally, relevant to the public service. Particular attention is given to the constitutional and cabinet context within which the public service must operate, and to the legal and practical differences between public and private sector management. Case examples will form an important part of the course.

By the end of this course, participants should *better*:

- understand the main features of Cabinet and parliamentary government in the Australian and New Zealand contexts;
- understand the relationships between legal rules, political structures, Cabinet and other administrative processes, and policy outcomes;
- analyse problems and seek solutions in a setting governed by public law and other rules of public administration;
- evaluate how "regulation" can, should, does and does not work to solve problems;
- interact with each other, particularly in using the resources of the group for developing arguments about particular issues or problems.

In 2006, all ANZSOG EMPA subjects were assessed according to a capabilities matrix. The aims of GBR are set out in the following table:

Capabilities Matrix	Governing By the Rules
Understanding the Context	
Managing Risk and Ambiguity	
Understanding Obligations	
Team Work / Collaboration	
Managing Stakeholders/Partnerships	
Managing Service Delivery	
Communication	
Networking across government/s	
Understanding Ethics	

Rules in government

Rules are relevant to all aspects of human behaviour: We use rules of language, dress, greetings, and eating, for example, to shape our daily interactions. For government, the rules are often formalised as “law”, from the constitution, to statutes, to laws of fair administrative decision-making, to the laws of contract in employment. But the rules include also *conventions* – unwritten rules of behaviour - that are not actually law. And there are many non-law rules every public servant needs to know.

At its simplest, the core of the rule of law, in a democracy, is that all public power – *everything* done by any person acting for the state, in all its guises - must be *authorised by law*, and the exercise of that power is *controlled by law*. It must always be remembered that government at its base relies on the power of coercion. This is a fundamental difference from the private sector. Through the force of the police and the army any government can compel a member of the society to do many things ranging from taxation, to conscription, to compulsorily acquiring property, to penalties for offences of various kinds. The law is an instrument of the exercise of power.

How exactly the simple principle of the rule of law applies in every circumstance is not always simple in practice. The state cannot conceive of every possible situation when it tries to regulate behaviour using law. New situations arise. The law may be unclear. But even if it is crystal clear, not every citizen knows what it means; nor do public servants.

Working with uncertainty in a *principled manner* is part of the skills of a good public servant. So is learning how to use discretion in making decisions – the choices that public managers must make do not have an infinity of possibilities. They must be made within a framework that *guides* their actions. For the public manager, understanding the rule of law means developing a sense of *principle*. *Principle*, here, thus refers to higher values. Governing by the rules is not only about finding a relevant “rule”. It is about what is *fair, just, sensible, workable and appropriate* under particular circumstances, in a democracy based on the rule of law; about being better public sector managers.

Relevant rules thus include:

- the principles and concepts behind *the rule of law*
- the constitutional framework
- how the law is made and interpreted
- the checks and balances in the system
- rules that a manager must interpret and apply and/or enforce
- rules a manager may be responsible for formulating
- rules that apply to the exercise of discretion
- individual internal rules – ethical principles.

Everyone understands the saying that *just because it's law, does not make it so*. For our purposes, this points to the need for managers to understand both the ambition and the limitations of the law. If the state seeks to regulate *everything*, it will either need massive enforcement (that's what *dictatorship* requires), or it will fail. Whilst most people understand that argument at the extremes, many people nevertheless have remarkable faith about the law's power to turn words on paper into actual behaviour. Practical public servants need to be more respectful of the law, of course, but also somewhat sceptical.

Whole courses can be devoted to simple questions, like what is "law"? Here, we use simple definitions that should be explained briefly.

Laws – are those rules that the state enforces, generally through the courts. In broad terms, laws have two primary sources:

- legislation (made by various parliaments), and
- the common law (meaning here, the way that courts find and apply rules to settle disputes across time).

This subject requires a reasonable understanding of those primary sources of law.

Regulation – The word 'regulation' in this course is used in two main ways. First, 'regulations' are laws passed under authority of statute, hence often called 'delegated' or 'subsidiary' legislation. Often these are more complex, technical and detailed rules e.g. air quality standards.

Secondly, it is the noun from the verb: *to regulate*. Here 'regulation' refers to attempts by government to 'change behaviour' in any area of activity. For example, a 'highly regulated economy' will have complex rules (mostly in statutes, but also in subsidiary legislation) that set standards and demand certain behaviour (and punish deviance) from economic actors, like companies, directors, banks, etc. Conversely, a 'lightly regulated' economy, will have fewer formal rules, and rely instead on competition to penalise some economic actions, and reward others. Similarly, a 'highly regulated' labour market, will have statutes and other rules (like industrial awards) setting standards and controlling actions of workers and employers. The converse will leave decisions to individual bargaining, and the 'rules of the road' will be found in private employment contracts rather than 'state rules.'

Regulation should not be seen as an alternative to 'law' – it is a form of law.

OECD Definition of Regulation

In OECD work, regulation refers to the diverse set of instruments by which governments set requirements on businesses and citizens. Regulations fall into three categories:

- Economic regulations intervene directly in market decisions such as pricing, competition, market entry, or exit.
- Social regulations protect public interests such as health, safety, the environment and social cohesion.
- Administrative regulations are paperwork and administrative formalities through which governments collect information and intervene in individual economic decisions.

Source: OECD (1997), *OECD Report on Regulatory Reform*, Paris

Convention - Conventions are unwritten rules that modify the actions of those within government. They are more or less agreed rules that do not have the force of law but are generally followed. One such convention is the rule that the Governor-General acts on the advice of a Prime Minister who commands the confidence of the House of Representatives. The operations of Cabinet in the Australian system are not set out in the Constitution, nor indeed are the roles of ministers. They are conventions.

Discretion - Governments and their public managers often have considerable scope in deciding the precise application of rules. All laws are not always pursued 'to the full letter of the law'. Public managers often find themselves in situations where they have to decide the limits of the law themselves. As Sparrow notes (p. 5) 'Granting broader discretion to regulators may serve to moderate the excesses of centralized, command-and-control style legislation. It also brings its own dangers'. Discretionary decision-making is obvious when it is being exercised by a court e.g. deciding on a sentence, or an award of damages. But actually every decision-maker has to exercise discretion, all the time. This applies in simple circumstances, such as when people are being interviewed for state benefits. And it applies on more formal regulating, like the criminal law, or economic regulation.

Thus police apply discretion constantly, in deciding where to concentrate resources, or how to keep the peace in a public place, for example. Similarly, public regulators like the Commerce Commission in New Zealand, or the ACCC in Australia, have to make decisions on which activities to pursue, and which to leave to 'the market', at least, for the time being. And there are discretions about *how* to act, as well as whether action is taken. Litigation is not the sole source of achieving objectives. As the police know, warnings often work, and require far fewer resources. For economic regulators, in some circumstances, a public press statement may achieve significant compliance. Indeed, rigid prosecution regardless of circumstance can adversely affect the agency bringing the prosecution. If it appears too inflexible it can lose public support.

Actually, whenever any decision had to be made in the public sector, it will involve applying rules, weighing factors and making choices. Sometimes, the factors are clear, so it is easy to 'know' how the decision should be made. But at other times, things are harder. Again, the fact that there is constant discretionary decision-making at all levels in the public sector, should not suggest that there is anarchy. All discretion operates within a framework of principles, processes and rules.

Accountability – The exercise of discretion by public officials leads naturally to issues of accountability. There are a host of mechanisms by which ‘rule-breaking’ might attract accountability of some sorts. Where decision-making is made by political actors in government (Ministers, and the like), the accountability is ultimately in the “court of public opinion”. This is all influenced by the media, parliamentary politics, and, ultimately, the voters. Public servants know that whilst they might not be directly subject to election, operating in a mandated political environment means that pain inflicted on a Minister from the operations of an official, has consequences. Hence, we need to discuss political accountability and the relationship of public managers with politicians, the role of institutions, traditions, and conventions – as well as the more formal legal systems of accountability.

Ethics – Because the law does not cover everything, it is common to look to higher values as additional guides. Ethics are still rules – ethical public servants ‘ought to’ behave in certain ways, and not in others. A person might be able to ‘get away with’ some action (like cheating expense statements) if the view is that ‘everyone does it’ and there is little chance of getting caught. But the concept of an “ethical public service” is that the higher values are internalised, and hence self-enforcing. People avoid certain behaviour not because they fear sanctions via the law, but because they believe such conduct is ‘right’. Fostering ethics within the public service concerns the voluntary adoption of particular values. It is thus useful to spend some time discussing what *are* the ethics of a public servant, and how (and if) they are *acculturated*.

Problem solving with rules

Public managers may be able to use their laws or regulations as *assets* – to be used or not used depending on the best way of achieving a result.

Achieving a result through the application of rules or laws is not simple. A 1995 OECD paper notes:

Even after the most rigorous decision-making process inside the administration, regulation has yet to pass the most demanding test of all – the public must agree to comply with it. Yet implementation – consisting of strategies such as education, assistance, persuasion, promotion, economic incentives, monitoring, enforcement, and sanctions – is very often a weak phase in the regulatory process in OECD countries, which tend to rely too much on ineffective punitive threats and too little on other kinds of incentive.

GBR needs to be seen, then, not only in the institutions that create and impose the rules, but in how they *work* – and in the role and scope of the public sector manager trying to achieve certain outcomes within these rules.

For the *regulator* in a system, using a particular form of rules (passing laws backed by enforcement and sanctions) is one way to affect behaviour. But it is not the only way of doing so, and nor is it without cost. Understanding the real costs and benefits of ‘regulating’ is important. There is a tendency to assume that all *problems* have legal solutions, and they are cost-less. Actually, the public servant needs to look at how best to achieve results, and that might include other ways of thinking about problem-solving.

Educational format

This subject will be taught intensively from Monday to Friday. It will utilise a variety of educational formats, including case studies, syndicate discussions, exercises and speaker panels. The program involves continuous participation by students, which in turn means that it is important for students to read and prepare set cases and exercises.

Work prior to be done prior to the intensive class

1. The first individual assignment
2. Background reading
3. Case preparation

The Reading Pack contains a significant amount of reading for you to do.

We would like you to read as thoroughly as you can before the program, but we also recognise that there is a lot to get through.

The following book has been sent to all participants in the course.

Sparrow, Malcolm (2000) *The Regulatory Craft*, Washington, Brookings.

This is not a textbook, as such, but rather a useful book pointing to an interesting approach to law and regulation. Specific parts are listed in the guide for particular sessions. Other than those, it is best to have a working knowledge of the arguments Sparrow is making, rather than a detailed knowledge as would be required if it was a textbook. Sparrow aims to be practical and about problem-solving.

Syndicate work

Syndicate work is an important part of this subject as it is in many others within the EMPA.

Syndicate tasks are:

1. compare and discuss the first individual assignments in order to choose one from amongst the syndicate that will form the basis of the syndicate presentation (20%) and written paper (30%).
2. Start preliminary work on this assignment
3. Syndicate presentation on the final day - the syndicate needs to be working together as a team for the Friday morning presentation.
4. Syndicate paper - building on the discussion in the week and the presentation on the Friday, the written paper will need to be done by network, and is due on Monday 9 March.

Syndicate Concert

A feature of the two GBR subjects in 2006 was the GBR Concert. This was such a fun event that it is now firmly established as a GBR tradition.

Where agreement from your group is forthcoming, prepare for the "syndicate concert". Other EMPA subjects have been enlivened by entertainments, most notably by the New Zealanders. On Asian visits, or in the Pacific, public servants are frequently required to sing karaoke or present some entertainment and this

can be a serious matter of diplomacy. Working together on this will prove to be a particularly valuable syndicate exercise, although no-one is to be forced into presenting against their will. A judging panel will be drawn from the student body.

On Thursday night at dinner, each syndicate is invited to present for up to 5 minutes (NB *only* 5). It could be a song or a short play, or a comedy routine - whatever the group wishes. The judging panel will award a prize - byomi - (bring your own musical instruments -portable ones only, please). Staff will also present.

GOVERNING BY THE RULES – 2006 COHORT

Assessment Tasks

First Individual assignment

Task: *In the organisational unit or program for which you are responsible, or in which you work, is there a legal or regulatory issue that is in some way unsatisfactory and in need of resolution? Outline the issue and your proposed strategy for dealing with it.*

Although you should preferably focus on your own organisation, if you would rather outline an issue of more general relevance to government, please do so - the purpose is to lead towards the presentation on Friday, and 'syndicate paper' as outlined below.

In preparing your assignment, read Sparrow Chapter 10 'The stages of problem solving'. This assignment should be based most on stages 3, 4 and 5, in particular in terms of innovation and finding a solution that is administratively feasible.

Length: 1-2 pages

Date due: 1st syndicate group meeting: Monday 1.30pm - please bring 7 copies for the group.

Marks: NOT GRADED, but *one copy should be handed to the Subject Leader*, and each group should discuss the papers and choose ONE topic for its "syndicate presentation and paper".

Syndicate presentation (on the Friday)

Task: On the morning of the last day, each syndicate will make a presentation on the case scenario chosen for their group.

Length: Up to 15 minutes for presentation; 15 minutes for questioning by audience. It is anticipated that 2 or 3 members of the syndicate will do the presentation, while the whole syndicate will deal with the questions.
Maximum total time: 30 minutes.

Date due: Friday, 16 February, in scheduled presentation sessions.

Objective: This is an exercise in problem definition, description and suggestion of possible solutions. The goal is to get to the heart of an issue by utilising the resources of your own syndicate, as well as those of the entire class. There is no expectation that each group will set out the last word on regulation, the law or other rules concerned. Rather, it aims to foster group work, and getting the best out of the resources available.

Marks: 20%

Allocation of Marks: 10 for analysis of the problem;
10 for discussion and responses to questions, including use of group resources.

Written Syndicate paper

Task: As a group, present the problem and range of options (if any) for resolution, along with your justification for any preferred solution.

Your paper should:

- Use relevant concepts from the course;
- Identify and explain the key issues that the scenario raises including why this is a matter that is appropriate for regulation;
- Set out what you think are the options for proceeding and the pros and cons.
- Provide a critical and theoretical analysis of and rationale for, your recommended strategy;
- Identify and explain relevant legal and other rules or principles;
- Demonstrate an understanding of whether and how your proposed solutions will work, compared with the present situation;
- Focus on relevance, be well expressed, and stay within the word limit; and
- State that the paper represents reasonable participation by and contribution from all members (unless this is not the case, in which event please consult the subject leader or c.barker@anzsog.edu.au before submission).

Length: 2500 words, typed on A4, double-spaced, with ample margins.

Please state the number of words used in the substantive part of the essay.

Due dates: 5 pm, Monday 9 March

Marks: 30%

Second individual assignment

Task: An essay on a topic of your choice examining relevant rule and legal matters in the public sector, preferably one of which you have personal knowledge (details are set out below).

Length: 3000 words, typed on A4, double-spaced, with ample margins.

Please state the number of words used in the substantive part of the essay.

Due date: 5pm, Monday 30 March

Marks: 50%

Detailed instructions on Second Individual Assignment

You are asked to research and present an essay on a topic of your choice examining relevant issues relating to rules in the public sector. This is an invitation to write an interesting paper - not a thesis. You are welcome to discuss the issues. Please email one of o.hughes@anzsog.edu.au, andrew.ladley@vuw.ac.nz

The objectives of the assignment are to:

Illustrate the interplay of rules from various levels in a situation of which you have knowledge or which you can research - your essay should achieve the following:

- a) illustrate understanding of the law or regulation at various levels*
- b) illustrate conventions or other rules of departmental or other behaviour that were relevant*
- c) illustrate understanding of the materials and issues put to you in the course of study.*

To give further guidance, an essay that is in the average range of assessment for ANZSOG courses would:

- be an articulate discussion of a defined problem or area of choice, which displays understanding and application of core concepts, some interesting thinking, and a good level of writing skills;
- display understanding of relevant rules, be well-located in any literature that is referred to, and demonstrate a good standard of writing and analysis;
- cover the chosen topic/s in a “coherently integrated” paper (meaning there are clear linkages between title, objectives, coverage and conclusion).

A paper that was adequate, would have the following characteristics:

- no major defects in clarity of expression and in scholarship;
- reasonable linkage between choice of topic and illustration of objectives;
- reasonably clear understanding of the chosen topic and issues, but with a number of the higher range measures not met and not much fresh thinking evident.

In contrast, an essay that did NOT meet appropriate passing standards for this course would have the following characteristics:

- insufficient attention to technical scholarship (e.g. spelling mistakes, poor expression, poor referencing to literature, major gaps in what was read);
- poor understanding of examples chosen, as well as any materials or issues that are used from the teaching part of the course;
- no real attempt made to produce an “integrated” paper as above.

From these broad descriptions, it should be clear that the assessment expects and rewards choice of topic, expression and understanding.

Assessment Tasks

GUIDELINES FOR ASSESSMENT TASKS

Assignments should be typed or neatly presented and submitted directly to ANZSOG by c.o.b. on the date due. Submit your assignments at assignment@anzsog.edu.au. You will receive confirmation of receipt within a day of submission.

Non-completion / late submission of assessment

All assessable work is compulsory. If, because of illness, a participant is unable to complete work, a medical certificate must be produced. Other exceptional circumstances (eg bereavement, highly abnormal work obligations) affecting capacity to complete assessment should be discussed with the lecturer and separate or make-up assessment may need to be substituted. Supporting attestation, for example a work supervisor's written explanation, may be required. Penalties will apply where no adequate exception is established.

Timely completion of assessable work is also expected. A penalty of 5% of the total mark for an item of assessment will be applied for each day late unless waiver for good reason is arranged with the subject leader beforehand. The ANZSOG Student Guide, given to all students, states,

Extensions are normally granted only for medical or other serious reasons. Work related reasons are not normally accepted, as all students are required to balance hectic work schedules and are advised at the commencement of each subject of assessment requirements.

Applications for exception or extensions must be made before the due date. Students should complete the *EMPA application for assessment extension* form that can be found on the ANZSOG website and email it to Alyson Skinner, the Student Administrator (a.skinner@anzsog.edu.au). Alyson will contact the Subject Leader and you will be contacted about any decision reached.

Word limits

Note that text in excess of any stipulated word length may be ignored by the instructor. Word count does not include footnotes, references or appendices, but excessive use of supplementary material in turn may be penalised

Referencing

In all assessable work, full acknowledgement of sources used is required - both for general referencing and for quotation. This includes acknowledgement of any internal documents or web sources relied upon. Where extracts are used directly these must be cited, where ideas are relied upon more broadly referencing is still needed. Please include a full reference list at the end of the assignment, listing in alphabetical order all references cited in the assignment, and in a standard format. The Harvard citation

style is preferred e.g. Smithson (2002) and can be found at <http://www.lc.unsw.edu.au/onlib/ref1.html>.

Plagiarism

Plagiarism remains unacceptable in any format for the purposes of this subject. Students should be aware that software (eg "Turn-it-in") may be used at the discretion of ANZSOG to review material submitted. Serious penalties may be applied in cases of plagiarism.

Return of marks

ANZSOG is aiming at assessment turn-around of three weeks for the syndicate group project and the individual assignment.