

School of Government

PADM 505
GOVERNING BY THE RULES
(24 POINTS)

Trimester One 2009

COURSE OUTLINE

CONTACT DETAILS

Victoria University of Wellington

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Course Dates, Times and Location

Residential course in Sydney.

Monday 16th February – Friday 20th February 2009 inclusive.

Location and class times to be advised by ANZSOG.

Withdrawal Dates

Withdrawal notice must be in writing to School of Government, Victoria University of Wellington. Ceasing to attend or verbally advising a member of staff will not be accepted as notice of withdrawal.

Course Objectives, Course Content, Expected Workload, Group Work, Readings, Materials and Equipment, Assessment Requirements, Penalties, Mandatory Course Requirements, Communication of Additional Information

Refer to the subject outline supplied by ANZSOG.

Faculty of Commerce and Administration Offices

Railway West Wing (RWW) – FCA Student and Academic Services Office

The Faculty's Student and Academic Services Office is located on the ground and first floors of the Railway West Wing. The ground floor counter is the first point of contact for general enquiries and FCA forms. Student Administration Advisers are available to discuss course status and give further advice about FCA qualifications. To check for opening hours, call the Student and Academic Services Office on (04) 463 5376.

Easterfield (EA) – FCA/Education/Law Kelburn Office

The Kelburn Campus Office for the Faculties of Commerce and Administration, Education and Law is situated in the Easterfield Building on the ground floor (EA 005). This counter is the first point of contact for:

- Duty tutors for student contact and advice.
- Information concerning administrative and academic matters.
- Forms for FCA Student and Academic Services (e.g. application for academic transcripts, requests for degree audit, COP requests).
- Examinations-related information during the examination period.

To check for opening hours, call the Student and Academic Services Office on (04) 463 5376.

Use of Turnitin

Student work provided for assessment in this course may be checked for academic integrity by the electronic search engine www.turnitin.com. Turnitin is an online plagiarism prevention tool which identifies material that may have been copied from other sources including the Internet, books, journals, periodicals or the work of other students. Turnitin is used to assist academic staff in detecting mis-referencing, misquotation, and the inclusion of unattributed material, which may be forms of cheating or plagiarism. *At the discretion of the Head of School, handwritten work may be copy-typed by the School and subject to checking by Turnitin.* You are strongly advised to check with your tutor or the course coordinator if you are uncertain about how to use and cite material from other sources. Turnitin will retain a copy of submitted materials on behalf of the University for detection of future plagiarism, but access to the full text of submissions will not be made available to any other party.

General University Policies and Statutes

Students should familiarise themselves with the University's policies and statutes, particularly the Assessment Statute, the Personal Courses of Study Statute, the Statute on Student Conduct and any statutes relating to the particular qualifications being studied. See the Victoria University Calendar or go to www.victoria.ac.nz/home/about/policy/students.aspx

For information on the following topics, go to the Faculty's website www.victoria.ac.nz/fca, under Important Information for Students:

- Academic Grievances
- Student and Staff Conduct
- Meeting the Needs of Students with Impairments
- Student Support

Academic Integrity and Plagiarism

Academic integrity is about honesty – put simply it means *no cheating*. All members of the University community are responsible for upholding academic integrity, which means staff and students are expected to behave honestly, fairly and with respect for others at all times.

Plagiarism is a form of cheating which undermines academic integrity. The University defines plagiarism as follows:

The presentation of the work of another person or other persons as if it were one's own, whether intended or not. This includes published or unpublished work, material on the Internet and the work of other students or staff.

It is still plagiarism even if you re-structure the material or present it in your own style or words.

Note: including the work of others will not be considered plagiarism as long as the work is acknowledged by appropriate referencing.

Plagiarism is prohibited at Victoria University and is not worth the risk. Any enrolled student found guilty of plagiarism will be subject to disciplinary procedures under the Statute on Student Conduct and may be penalised severely. Consequences of being found guilty of plagiarism can include:

- an oral or written warning
- cancellation of your mark for an assessment or a fail grade for the course
- suspension from the course or the University.

Find out more about plagiarism, and how to avoid it, on the University's website at www.victoria.ac.nz/home/studying/plagiarism.html

Manaaki Pihipihinga Programme

Manaaki Pihipihinga is an academic mentoring programme for undergraduate Māori and Pacific students in the Faculties of Commerce and Administration, and Humanities and Social Sciences. Sessions are held at the Kelburn and Pipitea Campuses in the Mentoring Rooms, 14 Kelburn Parade (back courtyard), Room 109D, and Room 210, Level 2, Railway West Wing. There is also a Pacific Support Coordinator who assists Pacific students by linking them to the services and support they need while studying at Victoria University. Another feature of the programme is a support network for Postgraduate students with links to Postgraduate workshops and activities around Campus.

For further information, or to register with the programme, email manaaki-pihipihinga-programme@vuw.ac.nz or telephone (04) 463 6015. To contact the Pacific Support Coordinator, email pacific-support-coord@vuw.ac.nz or telephone (04) 463 5842.

Subject Outline

Overview of the Subject

Governing by the Rules aims to develop the capacity of public managers 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 use of case studies and examples.

Knowledge and understanding of the applicable elements of law, convention, practice and ethics is integral to the development and implementation of public policy. It is axiomatic that government programs must have a sound legal basis. On the other hand, statutory initiatives that are intrinsically reasonable can fail in operation if 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 the legal system. In short, managers need to know how to govern by the rules. They also need to understand how to govern by means other than rules.

Course objectives

The aim of this course is to examine the nature and form of rules and their relationship to law and regulation. Case examples will form an important part of the course.

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

- understand the nature, form, complexity and limits to rules as tools of government;
- understand the interrelationship of legal rules, administrative processes, and policy outcomes;
- understand the role, uses and control of discretion;
- 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.

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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', ranging from the constitution, to statutes, to legal principles of fair administrative decision-making, and common law rules on public liability and contract in employment. Rules, viewed broadly, also include *conventions* – unwritten rules of behaviour that may not be legally enforceable, but have a prescriptive influence on public sector conduct. In public administration, the dividing line between those and other categories of rules that are expected to be observed can be blurred or inessential in practice.

The core meaning of the rule of law, in a democracy, is that the exercise of public power by government agencies and officials must be *authorised by law*, and the exercise of that power is *controlled by law*. The guiding principle in the private sector is the reverse: there is freedom of action except to the extent that there is a limitation imposed by law. To this matrix, notions of ethics are added to either confirm or challenge a proposed course of action.

Legal authority is important to government in another way. Law confers coercive power on government – to tax, to imprison, to penalise, to compulsorily acquire, to conscript, to detain, and to issue enforceable demands and directions. In this sense, law is an instrument of the exercise of power.

Law, though essential to government, does not provide the answer to every problem. It is not always simple in practice to implement legislative objectives. Nor can laws anticipate every problem, or easily regulate all forms of human and corporate behaviour. Legal rules can also be unclear when it comes to applying them. Even when the individual rules are clear, there may be a thicket of rules that is not fully known or understood by the public, or even by public servants.

Working with uncertainty in a *principled manner* is the skill of a good public servant. So is learning how to use discretion in making decisions. Of all the options available, some will be more suitable or acceptable than others and ethical considerations are often crucial to the necessary choice. The choice of option must also be made within the broader framework of rules or policies that are meant to guide official action. For the public manager, understanding the rule of law means developing a sense of *principle*. *Principle*, here, thus refers to higher values and the ethics derived from them. Governing by the rules is not only about finding a relevant 'rule'. It is about making choices that are *fair, just, sensible, workable and appropriate*. This is the skill of a good public sector manager.

The rules that are relevant to government can include:

- the principles and concepts behind *the rule of law*
- the constitutional framework

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- 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 and standards of professional behaviour.

Part of the challenge facing government is to understand that legal enforcement is sometimes difficult, even undesirable. Laws can become outdated and incompatible with contemporary norms. Practical constraints also apply, when the resources to enforce the law are limited or inadequate. The state cannot regulate all behaviour, or achieve all statutory objectives. It will fail if it tries. It can nevertheless be difficult for the state to explain or justify why the law is not being enforced, or is being enforced selectively. Scepticism about the possibilities and the limitations of law is another skill required of an effective public sector manager.

The study of what is 'law' is a larger topic than the scope of this course. Here, we use simple definitions that should be explained briefly.

Laws – Viewed strictly, these are the rules that the state enforces, ultimately through the courts. Broadly, there are two primary sources of law:

- legislation, made either by parliament (called Acts, or statutes) and subordinate legislation made under the authority of parliament (such as regulations, by-laws and other legislative instruments)
- the common law, also called judge-made law, which is the rules developed over time by courts in solving novel disputes that arise for adjudication.

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

Regulation – From the verb *to regulate*, refers to action by government to control and even change behaviour. For example, a 'highly regulated economy' will have complex rules (mostly in statutes, but also in subordinate legislation and policy and program documents) that set standards and demand certain behaviour (and punish deviance) from economic actors, like companies, directors and banks. 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 (such as industrial awards) that set standards and control the 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.'

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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 influence, direct and modify the actions of those within government. They are more or less agreed rules that are not directly enforceable by courts, 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 governed by convention.

Discretion – Governments and their public managers often have considerable scope in deciding the precise application of rules. The rules themselves may offer different choices of action, or there can be a choice as to which rule to apply, or whether to take no action at all. Public managers are often in the position of having to decide when and how to apply the law. As Sparrow notes, 'Granting broader discretion to regulators may serve to moderate the excesses of centralized, command-and-control style legislation. It also brings its own dangers'.¹ 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 all decision makers exercise discretion, all the time. Discretionary decisions can guide simple processes – such as interviewing a person to gauge their eligibility for a state benefit – as well as complex processes, such as administering the criminal law, or economic regulation.

Discretionary action controls both *how* to act, as well as whether action is taken. The range of options can be very broad. Litigation, for instance, is a hard-edged method of ensuring legal compliance, but is not the first option that is usually chosen.

¹ Sparrow, Malcolm (2000), *The Regulatory Craft*, Washington, Brookings at p 5.



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Most decisions to be made in the public sector will potentially involve applying rules, weighing factors and making choices. The factors are sometimes clear, so that it is easy to 'know' which decision should be made. At other times the matter is not as clear-cut. The fact that there is constant discretionary decision-making at all levels in the public sector should not suggest that there is a lack of guiding principle, even anarchy. All validly exercised discretion operates within an ethical framework of principles, processes and rules.

Policy – Administrative rules and policies that are developed within government agencies, usually to supplement legislation, play an important role in providing detailed guidance to administrative decision makers. Often these are the rules to which administrators turn when making decisions. Reliance by administrators on policy can be an important means of ensuring consistent decision making across an agency. Policies are also the means of ensuring that agencies implement or act consistently with the views of the elected government.

Administrative policies that sit alongside legislation raise interesting practical issues that cannot be ignored by public sector managers. Not least is the need to ensure that the policies within an agency are consistent with legislation and do not improperly curb a discretionary power available to the agency. There is also a transparency issue, in ensuring that policies are as accessible and up-to-date as the legislation that they supplement.

Accountability – The legitimate exercise of public power by public officials depends ultimately on accountability. There are legal processes through which accountability is made a reality, but those processes sit alongside other forums and mechanisms. Importantly, decision-making within the political realm of government (Ministers, and the like) is accountable ultimately in the 'court of public opinion' – which includes the media, parliamentary forums and, ultimately, the voters. Public servants, though not elected, are not immune from the influence of this mechanism of accountability: they know, crudely stated, that pain inflicted on a Minister by the actions of an official will be at the forefront of people's minds. Hence, political accountability and its implications for public managers is considered in this course.

Ethics – The law cannot provide rules for every issue in government, and it is common to rely upon other values to provide guidance. Ethics are a higher-order variety of rule, broadly construed. Ethics can help public servants to know how they 'ought to' behave in different discretionary situations (and even some situations that appear not to allow for any discretion). 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. Internalising a sense of ethics and ethical complexity is a key challenge for governance courses such as this. People have the choice to avoid certain behaviour



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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, experiencing how (and if) they are *acculturated*.

Problem solving with rules

Public managers may be able to use laws and the craft of regulation 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.²

This course on *Governing by the Rules* 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 available to the public sector manager who is 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.

² OECD (1995) *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation*.

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Work to be done prior to course delivery

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

The Reading Pack contains a significant amount of reading for you to do. You should read as thoroughly as you can before the program. Other reading sources are referred to in the Reading Pack, and will be given in class.

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 16 March 2009**.

Subject leader

Professor Arie Freiberg
Dean
Monash University Law School
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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.

Although you should preferably focus on your own organisation, you may choose an issue that is more generally relevant in government. Bear in mind that the objective is to frame a topic that your syndicate group may choose as the basis for a presentation on Friday, followed by the preparation of a 'syndicate paper'.

Guidance on problem solving is given in an extract in the reading pack that you should read in preparing this assignment: M. Sparrow, *The Regulatory Craft*, Ch 10, 'The stages of problem solving'. Focus particularly on stage 4 with a view to developing and evaluating both rule and non-rule based solutions.

Length: 1 page

Date due: 1st syndicate group meeting: Monday 16 February, 12:30pm. 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 Friday 20 February)

Task: Each syndicate will make a presentation on the last day of the course.

Length: Up to 10 minutes for presentation; 10 minutes for questioning by audience. It is anticipated that 2 or 3 members of the syndicate will do the presentation, while all syndicate members will deal with the questions.
Maximum total time: 20 minutes.

Date due: Friday, 20 February, in scheduled presentation sessions.

Objective: This is an exercise in problem definition, description and suggestion of possible rule-based and non ruled-based 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.

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Rather, this exercise aims to foster group work, and getting the best out of the resources available.

Marks: 20% for each syndicate member.

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, prepare a written paper that presents 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 a rule-based and/or non ruled-based approach.
- 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
- Ensure that the paper represents reasonable participation by and contribution from all members

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.

Date due: 5 pm, Monday, 16 March 2009

Marks: 30% for each syndicate member.

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Second individual assignment

Task: An essay on a topic of your choice examining a legal or non-legal rule, legal policy, soft law topic or regulatory challenge in the public sector, preferably one of which you have personal knowledge.

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, 6 April 2009

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 and regulation in the public sector. This is an invitation to write an interesting paper - not a thesis. You are welcome to discuss the issues with a subject leader during the course.

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 rules, law, ethical standards 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).

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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.

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Assessment task guidelines

GUIDELINES FOR ASSESSMENT TASKS

Assignments should be typed and submitted directly to ANZSOG by cob 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 Linda Losanno, Student Coordinator at l.losanno@anzsog.edu.au. Linda 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



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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 and collusion

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. For further information, see the student guide: http://www.anzsog.edu.au/images/docs/programs/EMPA_Student_Guide_2009.pdf.

Return of marks

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