

Administrative Review Council

# **Decision Making: NATURAL JUSTICE**

**Best-practice guide 2**

August 2007

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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 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. 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 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.
- 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

Public sector employees have a legal duty to comply with the general requirements of the law, as well as the specific legislation administered by their agency. An important legal requirement applying to most decisions that directly affect the rights and interests of individuals or organisations is that the decision be made in accordance with the rules of natural justice—also known as procedural fairness.

Natural justice requires that administrators adhere to a fair decision-making procedure. Although fair procedures tend to result in better decisions, the concern here is not whether the decision itself is fair: it is the decision-making process that must be fair. Sometimes statutes require administrators to make a decision that could be regarded as unfair—for example, to require someone to repay an overpaid allowance. For legal purposes, however, a fair decision is one that is properly made, in accordance with the statute and the requirements of natural justice.

There are two primary rules of natural justice. The ‘hearing rule’ is that people who will be affected by a proposed decision must be given an opportunity to express their views to the decision maker. The ‘bias rule’ is that the decision maker must be impartial and must have no personal stake in the matter to be decided.

This guide deals with considerations that commonly arise when the rules of natural justice are applied to administrative decision making.

## Conflict of interest

A conflict of interest exists if a decision maker has a personal interest in the outcome that might prevent them, or appear to prevent them, from performing their duty impartially. An example is a decision maker assessing a tender from a company of which they are a director. The decision maker’s financial and personal interest in the success of the tender might conflict, or appear to conflict, with their duty to assess tenders in accordance with the agency’s requirements.

A conflict of interest can also arise from non-material interests such as involvement in political, social, cultural, religious or sporting associations and activities, or a close family or personal relationship. For example, membership of a community association could present a conflict of interest if the decision maker’s duties include considering an application from the association for a grant. What matters is not the nature of the interest but instead its actual or apparent influence on the person’s ability to decide impartially.

The question that should be asked is: would a member of the public who knew about this interest reasonably think that it might influence the decision? It is irrelevant that the decision maker is personally satisfied that the conflicting interest has been put out of mind in arriving at a decision. The important thing is how the situation might appear to an observer.

## **The Australian Public Service Values and Code of Conduct**

Conflicts of interest in the Australian Public Service and certain statutory offices must be managed in accordance with the Australian Public Service Values and Code of Conduct, as expressed in the *Public Service Act 1999* (Cth). The Act places all APS employees under a legal duty to uphold the values and comply with the code.

The values state that the Australian Public Service ‘is apolitical, performing its functions in an impartial and professional manner’ and ‘has the highest ethical standards’. The code provides that an APS employee and certain statutory office holders:

- must behave honestly and with integrity in the course of APS employment;
- must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment,
- must not make improper use of: (a) inside information or (b) the employee’s duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person; and
- must comply with applicable Australian laws, in the course of APS employment.

State and territory governments generally have broadly similar requirements for their public sector employees. These can be specified in legislation or in agency service charters and codes of conduct, or both.

## **Disclosure of interests**

Each government department or agency has its own procedures for disclosure and management of conflicting interests. The general scheme is that an employee must disclose their interests to the agency, and the agency assesses and manages any conflict with the employee’s duties. Agencies are expected to provide to staff guidelines on what kinds of interests should be disclosed and to whom.

Some employees and statutory office holders are asked to provide a written statement of all their private interests at a particular date. Providing such a statement does not relieve the office holder of the continuing duty to disclose interests and avoid conflicts of interest.

Disclosure of interests enables an agency to manage any conflict between those interests and the discharge of public duties. Supervisors can adjust the duties of employees and the allocation of work in order to avoid conflicts. In some cases an employee might be able to avoid a conflict by disclosing their interest and abstaining from taking part in particular decisions. Employees might also be asked to divest themselves of interests that could conflict with the performance of their duties—for example, membership of a board or association or ownership of shares in a company.

Not every conflict of interest can be foreseen. Sometimes a conflict becomes known only after the decision-making process has started. For example, in the course of dealing with a matter a decision maker might become aware that a friend or family member is a party, a witness or an applicant. It does not automatically follow that the decision maker is in breach of the APS Code of Conduct or other similar code but, to avoid a breach, they must promptly disclose their interest to the agency and, in consultation with their supervisor, take reasonable steps to resolve the conflict.

## **Other forms of the bias rule**

The bias rule of natural justice is not only concerned with conflict of interest: it also requires that a decision maker be impartial and free of actual or apparent bias. ‘Actual bias’ means that the decision maker has a predisposition to decide the matter otherwise than with an impartial and unprejudiced mind. ‘Apparent bias’ means that in the circumstances a fair-minded observer might reasonably suspect that the decision maker is not impartial. In most cases, apparent bias is enough to disqualify a person from making a decision.

Whether a decision maker is disqualified or not is a legal question. A decision maker is not disqualified simply because a person whose interests are affected by the decision alleges bias or asks for a different decision maker. It is not about whether an affected person thinks the decision maker is biased; it is about whether a fair-minded observer would reasonably suspect bias.

An apprehension or suspicion of bias can arise from things the decision maker says or does that suggest he or she is either partial or hostile to one side or has formed prejudgments and is not open to persuasion. A closed mind might be demonstrated by ignoring evidence or dismissing it for insufficient reason. Actual or apprehended

bias can arise if a decision maker plays conflicting roles, such as making allegations and fact finding.

## **Waiving the right to object to bias**

A decision maker is not disqualified by actual or apparent bias if the interest is disclosed to those affected by the decision and they freely waive their right to object. They will be taken to have waived the objection only if they know about both the conflict and their right to object to it and then agree to a waiver.

It could, nevertheless, be unwise for a decision maker to rely on a person's waiver. Although a waiver removes any disqualification under the bias rule, it might not satisfy the duty under the APS Code of Conduct 'to take reasonable steps to avoid ... any conflict of interest (real or apparent) in connection with APS employment'.

It might be different if an affected person knew about a conflict of interest but withheld their objection until notified of an adverse decision. The person is not entitled to have 'a bet each way', biding their time to see how the decision falls. If the right to object is not acted on as soon as possible after the person becomes aware of the conflict of interest, the right could be taken to have been waived.

## **The bias rule and the Australian Public Service Values Code of Conduct**

Both the bias rule and the APS Values and Code of Conduct place Australian government employees and statutory office holders under a duty to avoid conflicts of interest when making decisions. The values and code establish broader ethical standards that go beyond the requirements of natural justice.

An important difference between the bias rule and the code lies in the consequences of a breach. An Australian government employee or statutory office holder who breaches the code is liable to disciplinary penalties under the *Public Service Act 1999*. Non-compliance with the bias rule gives an affected person grounds to have the unlawful government decision set aside.

The bias rule can be excluded by statute, although this is rare. Australian government employees and statutory office holders must still comply with the APS Values and Code of Conduct.

## Decisions to which natural justice applies

Natural justice generally applies whenever a statute gives power to make an administrative decision that might adversely affect the rights, interests or legitimate expectations of an individual or organisation. Examples are decisions to cancel or refuse a pension, benefit or allowance, to refuse an application to renew a licence or permit, or to suspend or cancel a person's professional registration.

Not all government decisions are subject to the requirements of the hearing rule of natural justice. This rule is unlikely to apply to decisions that affect the public generally or a section of the public—for example, decisions to adopt a policy, to propose legislative change or to make regulations. Further, if an agency is considering a person's application for a benefit or licence, it will not usually be required to offer the person a hearing before rejecting the application.

## The interaction between statutory processes and natural justice

The requirements of natural justice come from general administrative law, not the particular statute being administered. Many statutes do, however, spell out procedures that must be followed when making decisions; for example, the statute might stipulate who is entitled to notice, when notice should be given and in what form, what kind of hearing is to be given, and how much time is allowed for a person to respond.

Natural justice imposes similar requirements, independently of the statute. If the statutory procedures are equivalent or superior to what natural justice would require, compliance with the statutory procedures will also satisfy the requirements of natural justice. On the other hand, if the statutory procedures fall short of what natural justice would require, the question of whether the statute establishes a complete procedural code arises. A statute that deals exhaustively with decision-making procedures might be read as implicitly excluding natural justice, but the law leans against that interpretation.

If natural justice is not excluded its requirements operate alongside the statutory procedures and supplement them. This means it might not be sufficient to comply only with the statutory procedures if natural justice requires more. For example, if the legislation allows a person to make a submission at a particular time and further relevant material is later received that is adverse to the person who made the submission, natural justice allows them to read and comment on the new material before a decision is made. Natural justice requires this additional procedure, even if the statutory procedures do not mention it.

## **Notifying a person that a decision is to be made: the hearing rule**

The hearing rule of natural justice is designed to ensure that a person whose interests will be affected by a proposed decision receives a fair hearing. This is consistent with treating people with respect and dignity—an Australian Public Service value. The rule also tends to improve the quality of decision making and reduce errors: as any experienced decision maker knows, something that appears at first to be an ‘open and shut case’ can look very different when the other side of the story is revealed.

Many decisions made by Commonwealth agencies directly affect only one person, such as an applicant. Other types of decisions directly affect two or more parties. For example, the grant of a planning permit can affect the occupiers of neighbouring land; natural justice might therefore require that multiple parties be notified that a decision is to be made.

### **The content of the notice**

The hearing rule requires that a person whose interests could be adversely affected by a decision be notified that the decision is to be made. The notice should provide sufficient information to allow the person to make effective use of the right to respond and present arguments. The nature of the decision and its possible consequences should be described. Details of when, where and how a submission can be made should be given. And the time allowed for a response should be reasonable in the circumstances, having regard to the preparation time involved.

The notice should be consistent with any statutory requirements, although, as noted, natural justice might require disclosure of additional information to a person, so that they can prepare a case and gather evidence. For example, if the decision concerns allegations about a person’s behaviour, details of the allegations should be provided in the notice.

The notice should not imply that a decision has already been made. A notice that refers to a ‘provisional’ or ‘draft’ decision, for example, could give rise to an impression that the matter has been decided before the hearing. The hearing must take place before the decision is made.

### **Protecting personal reputation**

Natural justice protects personal reputation as well as other interests. As a result, it might be necessary to provide a hearing to a person before making a finding or

preparing a report that contains adverse information about the person. For example, if it is to be decided that an applicant's loss was caused through the default of their solicitor, natural justice requires that the solicitor be notified and invited to comment before the decision is made.

## **Departing from an agency commitment**

Natural justice might require that a person be notified if a decision maker intends to depart from advice or a statement about how the decision-making power will be exercised. This is so even if the advice or statement was given by another officer or was given to the public generally in an agency document such as a brochure or guidelines.

Agency statements and undertakings might not be legally binding, but a person might have a 'legitimate expectation' of them being applied when a decision is being made. The person could have acted in reliance on a statement and might be adversely affected if there is a departure from it. For example, if a person relied on an agency's statement that it would accept a certificate as evidence, they could have failed to gather other evidence that is then required. Natural justice entitles a person to be given an opportunity to make a submission against a proposed departure from the agency's statement.

## **Requirements for an adequate hearing**

The hearing rule does not provide a standard set of procedures. Its requirements are adjusted to take account of the legislative framework, the subject matter, and the nature and potential consequences of the decision to be made. Even for the same power and the same decision maker, the same procedures may not be appropriate in all cases. Natural justice requires consideration of the particular circumstances of each matter.

In many cases natural justice is satisfied if the affected person is afforded the opportunity to make a written submission. Oral hearings are more likely to be called for if there are disputed questions of fact to be determined, there is a need to assess whether a person is telling the truth, or an affected person cannot adequately put their case in written submissions. In the most serious matters—such as disciplinary proceedings—natural justice might require formal, structured court-like proceedings.

The legislation often specifies the type and format of the hearing. Unless the statutory procedures exclude natural justice, those procedures should be read as minimum requirements. In particular cases natural justice might require something

more than the statute provides for; for example, it could be a breach of natural justice to refuse to allow a person to use an interpreter at a hearing or to deny them additional time to gather evidence.

In situations where an affected person is not entitled to be represented at an oral hearing, the person should generally be allowed to have someone present to help them and provide moral support. This can be allowed even if the statute does not provide for a public hearing.

## **Decision making in stages**

Administrative decision making can occur in stages. For example, there may be a first stage at which a recommendation or preliminary finding is made, followed by a second stage at which a final decision is made by the Minister or a senior officer. Provided no new material or factors are introduced at the second stage, a further hearing is usually not required before the final decision maker adopts or rejects the recommendation or finding.

It is not always necessary for the decision maker to hear or receive the evidence and submissions in person. Some decisions are made by the Minister or a senior officer, relying on a briefing paper or summary prepared by a subordinate. The summary must be fair and accurate and must not omit relevant evidence or submissions. If the summary appears to make adverse comment about a person's conduct or credibility, the person must be given the chance to rebut the comment if they have not previously had that opportunity.

## **A genuine hearing**

Natural justice means more than affording someone the opportunity to 'say their piece'. They are entitled to have their evidence and submissions properly considered. Failure to give genuine, realistic and proper consideration to both sides of a case can give rise to an apprehension of bias on the basis of prejudice.

## **The opportunity to respond to adverse information**

If an individual or organisation has a right to a hearing they are entitled to respond to any adverse material—from whatever source—that could influence the decision.

The duty of disclosure is a continuing one. If the decision maker becomes aware of new evidence at any stage of the decision-making process, this information must be disclosed unless it is being disregarded because it is not credible, relevant and

significant. Even if there has already been a hearing, an affected person must be given an opportunity to rebut or comment on any new material that is adverse to their case. This also applies to information gathered by the decision maker.

## **Confidential information**

When information is given in confidence the requirements of natural justice are flexible. The law recognises that administrators might have to protect confidentiality in order to obtain from the public the information they need to carry out their duties.

When confidential information that is adverse to an affected person is received, it might be sufficient to disclose the substance of the information while withholding the actual document and the particulars of the informant. For example, a person applying for an income support payment could be asked whether they had worked as a waiter in a particular café on a particular date without the source of that allegation being disclosed.

Adverse information of a personal nature that has been received should generally be disclosed to the person concerned, even if the information will not be relied on when a decision is made. An example is a letter alleging tax fraud on the part of a person applying for an Australian financial services licence. As one judge put it, 'Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information'.

## **Disclosing special knowledge**

A decision should be made on the basis of the evidence and information before the decision maker. In evaluating that material, the decision maker is entitled to draw on their commonsense and general life experience as an ordinary member of the community. They can also apply any specialist knowledge they have acquired through professional training or experience in the relevant area of administration. There is no need to disclose this background knowledge to the person affected by the decision.

If weight is attached to particular information that is not within common knowledge, this should be disclosed to the affected person. An example is recent published research that casts doubt on the reliability of a particular diagnostic test. A person who has submitted a medical report that relies on the test should be informed of both the substance of the research and the source and be given a reasonable opportunity to respond to this.

## Disclosing thoughts

An affected person's attention should be directed to any information or fact that is crucial to the decision but might not be apparent to them. Examples are evidence contradicting that of the affected person or an inconsistency in their case. The person should be given an opportunity to redress the weakness in their case. It is often better if the decision maker does this by putting a question, rather than a statement, to the person: this suggests that the decision maker is amenable to persuasion.

There is no general duty to give an affected person an assessment of their case before the decision is made. It is sometimes helpful to do so, since it promotes the purpose of the hearing by giving the person the opportunity to persuade the decision maker. In disclosing a provisional view, however, the decision maker should stress that a final decision has not been reached.

## The consequence of a breach of natural justice

A decision maker commits a legal error when they breach natural justice or fail to follow a statutory procedure that is designed to provide natural justice. There must be practical injustice before the decision is unlawful for a failure to comply with natural justice.

A person who is, or would be, adversely affected by the decision can apply to a court for judicial review. If the court finds that natural justice has not been complied with, it will usually set aside the decision and order the agency to decide the matter anew. An application for judicial review can be made even before any decision is reached if the decision maker is adopting a procedure that does not conform to the requirements of natural justice. In this case the court will usually restrain the decision maker from continuing with the procedure.

As an alternative to judicial review, legislation might provide for a right of appeal to an independent board or tribunal. Commonwealth tribunals and most state and territory administrative tribunals usually have the power to hear and determine appeals 'on the merits'. This is a comprehensive type of appeal in which the tribunal is able to hear the matter afresh, consider new material, and re-exercise the powers of the original decision maker. A decision by the tribunal on appeal can correct a breach of natural justice in the original decision—meaning the breach can no longer be grounds for judicial review. Courts generally expect a person to exercise their right to appeal on the merits before, or instead of, applying for judicial review.

The Ombudsman can investigate a complaint and make an adverse report in relation to an agency that has acted in breach of natural justice.