National Anti-Corruption Commission

Procedural fairness

What is procedural fairness?

Some provisions of the *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act), as well as the general law and sound decision-making, require that before forming or publishing findings, opinions or recommendations adverse to a person or agency, they be given an opportunity to address the adverse material.

Procedural fairness is sometimes called 'natural justice' because it involves basic fairness to individuals whose interests could be adversely affected by a decision.

It has 2 elements:

1. **the bias rule**: an individual is usually entitled to have a decision affecting their interests made by a person who is not affected by bias
2. **the hearing rule**: an individual is entitled to an opportunity to be heard and to have their submissions taken into account before a decision adverse to their interests is made.

Procedural fairness is an essential legal requirement of most administrative decision-making processes that affect the rights, interests or legitimate expectations of a person. While procedural fairness is sometimes specifically required by legislation, giving procedural fairness to a person who may potentially be adversely affected by an investigation or public disclosure is also good decision-making, because it helps ensure that all relevant evidence and submissions are considered.

The NACC Act and procedural fairness

The NACC Act requires the Commission to provide procedural fairness in 4 circumstances, namely before:

1. including in an investigation report an opinion, finding or recommendation that is expressly or impliedly critical of a person[1]
2. publishing an investigation report which contains an opinion, finding or recommendation that is expressly or impliedly critical of a person
3. publicly disclosing information that contains an opinion, finding or recommendation that is expressly or impliedly critical of a person[2]
4. making a comment on, or additional recommendation in relation to a report on the completion of an investigation from a Commonwealth agency, state or territory government, or other person.[3]

Investigation reports

If the Commission is considering making a finding, opinion or recommendation in an investigation report that is critical of a person, the Commission must provide the person an opportunity to make submissions before including a critical opinion, finding or recommendation in a report.[4] This extends to the head of an agency or entity if the critical opinion, finding or recommendation relates to the agency or entity.

While the most obvious case of this is a potential finding that a person has engaged in corrupt conduct, it extends to any potential opinion, finding or recommendation that is *expressly or impliedly* critical of a person.

Practically, this means providing the individual with:

- a statement setting out the potential critical opinion, finding, or recommendations, the reasons it is under consideration, and a summary of the evidence which supports it
- a reasonable opportunity to respond.

1 Section 153 NACC Act

2 Section 231 NACC Act

3 Section 53 NACC Act

4 Section 153 NACC Act

If the individual or head of the agency or entity responds, the response must be considered. A decision will then be made whether to include the critical opinion, finding or recommendation, or to amend or exclude, it in light of any matters raised in the response.

Similarly, if the Commission is considering *publishing* an investigation report which contains a critical opinion, finding or recommendation (express or implied) relating to an agency, entity or individual, they must be given the opportunity to respond to both the opinion, finding or recommendation, and the proposed publication.[5] The process will follow the steps described above.

Public disclosure of information

If the Commission is considering publicly disclosing information (in the limited circumstances in which it is lawfully permitted to do so), including through a public statement, and the proposed disclosure contains an opinion, finding or recommendation that is expressly or impliedly critical of a person, the individual (or the head of the agency or entity) must be given procedural fairness before any disclosure.[6] In addition, procedural fairness may also require providing a person on whom a public statement may reflect an opportunity to comment.

As with the investigation report process, this will usually involve providing the individual (or the head of the agency or entity) with:

- a copy of the proposed disclosure
- a reasonable opportunity to respond.

If they provide a response, it must be considered and a decision made whether to proceed with the disclosure as proposed, or in an amended form, or not at all.

Completion reports

If the Commission is considering making a critical comment on, or recommendation in relation to, a report by a Commonwealth agency about the completion of an investigation conducted by the agency, the head of the agency or entity (or person representing them) must be given an opportunity to make submissions about it.

5 Section 157 NACC Act

6 Section 231 and 48(3) NACC Act

What is not required by procedural fairness?

Procedural fairness does not require that a person whose conduct is referred to the Commission:

- is informed of a referral as soon as it is received or an investigation commenced
- be told or consulted on whether or how the Commission undertakes a preliminary investigation or corruption investigation
- be told the identity of the person who referred their conduct
- be told about an allegation against them that the Commission decides not to investigate, or decides does not raise a corruption issue.

Procedural fairness:

- does not apply to decisions whether or not to commence an investigation
- does not entitle a person who refers a matter to the Commission to be consulted about whether or not an investigation is commenced or the conduct of the investigation.

Key takeaway

The Commission is required to provide procedural fairness in certain circumstances to persons whose interests might be adversely affected by its decision. This ensures that decisions which affect individuals are made with appropriate fairness, robustness and impartiality, and in line with the principles of administrative law and universal notions of natural justice.

Contact us

Please use our webform to make a report of corrupt conduct.

If in doubt about whether to refer a matter to the Commission, contact us.

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