



CORRUPTION AND CRIME COMMISSION OF WESTERN AUSTRALIA

HEARING PRACTICE DIRECTIONS

1. INTRODUCTION

The Commission conducts examinations, colloquially called “hearings”, for the purposes of a misconduct investigation or an organised crime investigation: section 137 of the *Corruption and Crime Commission Act 2003* (“the CCC Act”).

Commission examinations are not judicial proceedings.

The term “examination” will be used in these Practice Directions to be consistent with the terminology used in the CCC Act.

They are intended to inform and guide the conduct of appearances and legal representation before or in connection with Commission examinations, in order to promote the efficient and effective conduct of such examinations.

Unless otherwise indicated, all section references in these Practice Directions are to the CCC Act.

2. COMMISSION EXAMINATIONS

Commission examinations are held for the purposes of an investigation, so that the Commission might inform itself on relevant matters in order to get to the truth of a matter. Except where the rules of procedural fairness otherwise require, an examination is not held to indulge the private interests of persons appearing. On the contrary, examinations are but one means by which the Commission conducts its investigation. The Commission’s intention is to use examinations to support effective, efficient and well planned investigations.

The Commission will generally retain a legal practitioner (“lawyer”) to assist it at an examination: subsection 143(1), particularly if the examination is likely to be complex or involve several witnesses. In the alternative, a lawyer employed by the Commission or any other person appointed by the Commission to assist it can examine witnesses on any matter that the Commission considers relevant.

The Commission, with the assistance of Counsel Assisting, has full control of the examination, the witnesses to be called and their order, the documents and things to be produced, and the matters and issues to be covered in evidence. The Commission will not tolerate behaviour at or in connection with an examination which serves to frustrate its ability to conduct the examination as it sees fit. It is an offence to wilfully and unreasonably obstruct the Commission

and it will act to protect its investigation from prejudice by removing obstacles to its ability to get to the truth of a matter, or which have the appearance of such.

Lawyers attending a Commission examination to represent witnesses are to inform the presiding Commissioner's Associate of his or her presence and name, the presence and name of any accompanying persons and, where appropriate, the name and contact details of an instructing solicitor.

3. PRIVATE AND PUBLIC EXAMINATIONS

An examination is not open to the public, except as provided in section 140: subsection 139(1). The Commission may open an examination to the public, if having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so: subsection 140(2).

Public examinations may be attended by any member of the public, subject to the availability of seating in the Hearing Room. Generally speaking, private examinations are only attended by the Commissioner, the witness and his or her lawyer, Counsel Assisting or the lawyer appointed to assist the Commission, and other Commission officers. The Commission will not publish any notice of its intention to hold a private examination.

The Commission will advise the time and date of commencement of public examinations on its website at www.ccc.wa.gov.au and make its best endeavours to have the date and commencement time of public examinations mentioned daily in the "In the Courts" section of "The West Australian" newspaper.

In relation to public examinations, the Commission will generally sit from Monday to Thursday, 10.00 am to 4.00 pm, with a short mid-morning break and a lunch adjournment usually between 1.00 pm and 2.00 pm. The Commission may sit at any time for a private examination, depending upon operational exigencies and the availability of witnesses.

4. APPEARANCE AND LEGAL REPRESENTATION AT AN EXAMINATION

A witness may be represented by a lawyer when appearing at an examination: subsection 142(1).

The Commission may also authorise the lawyer for a person to represent that person during the evidence given by another witness, if there are special circumstances: subsection 142(5).

Lawyers do not have an absolute right of appearance before the Commission. The Commission may refuse to allow a particular lawyer to represent a witness if that lawyer is involved in other examinations or in the matter being investigated: subsection 142(4). This may occur, for example, if there is a risk that representation of several witnesses by the same lawyer may prejudice the investigation (see Part 5 below).

Applications by lawyers for authorisation to represent a witness or other persons in respect of whom there may be special circumstances may be made at any time during an examination: subsection 142(5). Generally, such applications will be taken as witnesses are called. Lawyers seeking leave to appear to represent a witness or person at an examination should support their application by submissions which identify with as much precision and particularity as possible:

- The nature of the interest(s) in the examination;
- If an appearance is sought on the basis of the rules of procedural fairness, the particular interest(s) involved;
- the reasons why the rules are attracted; and
- if leave is sought to participate as a lawyer at an examination other than that where that lawyer's client is a witness, what special circumstances exist.

The Commission is conscious of avoiding unnecessary representation at its examinations and takes the view that representation, and the participation in the investigation that it invites, should serve a real and direct interest of the person concerned in or arising from the subject-matter of the examination. An interest means some real risk that they may be subject to an adverse finding or that their reputation may be adversely affected. It must be something more than that which a concerned or curious member of the public may have.

As Commission examinations are not judicial proceedings, lawyers do not robe when appearing before the Commission.

5. JOINT REPRESENTATION AND CONFLICTS OF INTEREST

Subsection 142(4) of the CCC Act provides:

“The Commission may refuse to allow a witness to be represented before the Commission by a person who is already involved in an examination or is involved or suspected to be involved in a matter being investigated.”

The Commission will be reluctant to grant leave for a lawyer to represent more than one person at an examination, due to the high potential for conflicts of interest to exist or to arise in relation to an inquisitorial examination. This is not because of any perceived duty or role on the part of the Commission to police the ethical responsibilities of legal practitioners, but to ensure that its investigation remains free from any potential prejudice as a result of a real or perceived conflict and to ensure that witnesses have the assured benefit of independent legal advice when they need it.

Applications for leave to represent more than one person at a Commission examination should be supported by submissions addressing:

- Whether and how the lawyer has turned their mind to the potential for conflicts of interest to arise in relation to their respective clients;
- The steps that have been taken to avoid the occurrence of any such conflicts; and
- Why no real or perceived prejudice would flow to the Commission's investigation as a result of the joint representation.

If the Commission grants leave for a lawyer to represent more than one person before an examination, it may at any time reconsider the question of leave as the evidence evolves, or where any changes to the subject-matter of the examination suggest a potential for a conflict of interest to arise. In this event the Commission may refuse to allow a lawyer to further represent a particular witness.

Leave may be denied due to a potential conflict arising from evidence unknown to the lawyer. Operational considerations may make it undesirable to provide detailed reasons as to why such a conflict may arise.

Public authorities and individual officers

The Commission takes the view that a lawyer employed "in-house" by a public authority or other entity is not, by virtue of the nature of his or her retainer, entitled to represent any other client, including officers of the authority, in a personal capacity.

Multiple clients

Despite what is known to a lawyer on the basis of their client's instructions at the commencement of the examination, he or she can never be certain that the interests of any two or more clients will never collide. Certainty can only be reached in hindsight, after all of the evidence has been gathered and the Commission has formed its assessments and expressed opinions.

It may be necessary at any stage of an examination to advise a client of the benefits of assisting the Commission, placing the lawyer in an immediate position of conflict in relation to another client whose interests stand to be affected by such assistance.

Arranging legal representation for witnesses

Where the Commission has notice that a witness will not be legally represented at an examination, it can "arrange" for the person to be legally represented at the examination if in all the circumstances it is "in the public interest" to arrange a lawyer: subsection 142(2).

Section 142 provides for representation at an examination, not for general representation throughout, say, a protracted investigation. This limits the scope for representation outside the examination itself although it may extend to some things that are inextricably connected with the examination.

The Commission interprets the word “arrange” to mean that it will facilitate legal representation through the Legal Aid Commission of Western Australia.

There is no provision in the CCC Act that requires the Commission to arrange legal representation for persons who are not witnesses but who may have an interest in the proceedings.

6. NOTIFICATION OF ADVERSE EVIDENCE

The rules of procedural fairness do not impose any obligation upon the Commission to notify any person that evidence may be given that is adverse to their interests before that evidence is given: *National Companies and Securities Commission v News Corporation Ltd* (1984)156 CLR 296.

Even when a Commission conducts its examinations in private, with the result that it is not possible for any person to monitor whether evidence is being given that is adverse to his or her interests, a person does not have a right to be told that evidence has been given that is adverse to them until late in the investigative process, if at all. Accordingly, the Commission’s approach will be persons who are adversely affected by evidence given in public examinations will be afforded an opportunity to respond to that evidence or make submissions regarding it, at some time in due course. It will not, however, be the practice to give advance notice that such evidence may possibly be given.

7. CONDUCT BEFORE AN EXAMINATION

Witnesses and in particular legal practitioners acting on their behalf should observe the following basic principles and rules of conduct:

Examinations are not adversarial

The Commission is not bound by the rules of evidence and can exercise its functions with as little formality and technicality as possible. It will conduct its examinations with as little emphasis on the adversarial approach as possible.

No person has a "case"

No person appearing before an examination of the Commission legitimately has a "case" to pursue. An inquiry is taking place, for the benefit of which a person may have information to give, or submissions to make.

The idea that an inquisitorial examination is a forum appropriate for the preparation and pursuit of a "case" introduces an element inherent to adversarial proceedings, which can only present obstacles to the Commission's ability to get to the truth of a matter.

Seeking "forensic" advantage

Similarly, it is not legitimate for a person to seek personal advantage at an examination by withholding evidence from, or delaying its availability to, the Commission. Such strategies may be perfectly appropriate in the adversarial

setting of court proceedings, where the parties primarily determine the matters in issue, the evidence to be adduced and the documents to be tendered, but are alien to an effective, efficient and well-planned investigation by the Commission.

Examination and cross-examination of witnesses

Representation does not necessarily entail a right to examine the client witness or any other witness. Whether such examination is permitted and when it will occur are matters to be determined by the Commission subject to the variable requirements of procedural fairness.

Examination or cross-examination of any witness by a person authorised to appear at an examination or their lawyer is by leave of the Commission. Where leave is granted, questioning will be confined to such matters as the Commission considers relevant, in the light of the interests in relation to which the person is authorised to appear.

8. COUNSEL ASSISTING – OPENING STATEMENT – PUBLIC EXAMINATION

It is well established that it is part of Counsel Assisting's function in the examination process to formulate and present an opening statement. The opening statement of Counsel Assisting a commission of inquiry differs from an opening address in conventional legal proceedings in that in a trial, counsel must put the propositions of fact and law that he or she will seek to persuade the court to accept. In a commission of inquiry, the purpose of the opening is to introduce each topic or issue generally and outline the facts as then known, thereby providing the context for the examination of witnesses and indicating matters of likely inquiry.

This facilitates procedural fairness to those whose interests might be affected by the Commission's inquiry although an opening statement cannot be definitive. It is usually not possible and, in any event, unwise for Counsel Assisting at the outset of an examination to predict or forecast the matters that the evidence is likely to establish.

An examination in the context of an investigative inquiry is an open-ended and very often unpredictable process and is essentially one that is intended to be instrumental in discovering facts which once assessed by the Commission, in conjunction with other material available to it, forms the basis for its subsequent opinions concerning misconduct and any recommendations it might make.

9. CALLING OF WITNESSES AND PRESENTATION OF EVIDENCE

All witnesses called and physical evidence produced at an examination is done by the Commission. This will be done by Counsel Assisting. No witness or their representative should seek to call other witnesses or produce documents or records.

In some situations, the Commission may invite affected parties to identify further witnesses that may be able to give evidence relevant to the

investigation. In other situations, an affected person may apply to the Commission to call further evidence.

If a person believes that there is other relevant evidence then the proper course is to notify Counsel Assisting as soon as possible.

Statements or documents must not be produced at an examination on behalf of a person without notice and sight unseen by the Commission or Counsel Assisting.

Persons wishing to place evidence before the examination must provide a statement of the evidence to the Commission or Counsel Assisting as soon as practicable after the existence of the evidence, or its potential relevance to the examination, becomes known.

Except where otherwise permitted, the evidence, if deemed relevant, will be introduced by Counsel Assisting at a time of the Commission's choosing.

10. LIMITING OR DEFERRING CROSS-EXAMINATION

Section 143 of the CCC Act provides:-

- (1) When a witness is appearing at an examination a legal practitioner, or any other person, appointed by the Commission to assist the Commission may, so far as the Commission thinks proper [emphasis added], examine the witness on any matter that the Commission considers relevant.
- (2) A person representing a witness before the Commission may, so far as the Commission thinks proper [emphasis added], examine that witness on any matter that the Commission considers relevant.
- (3) This section does not prevent the Commission from allowing any other examination that the Commission considers relevant

Procedural fairness does not usually, and certainly does not invariably require the Commission to permit cross-examination. That is so even where evidence has been given that is adverse to the interests of the person who wishes to conduct the cross-examination: *National Companies and Securities Commission v News Corporation Ltd (1984)* 156 CLR 296.

That is not to say that procedural fairness will never require a body such as the Commission to afford affected persons a right to cross-examine. Much depends upon the context but procedural fairness will rarely impose such a requirement.

In appropriate circumstances, the Commission may limit or defer cross – examination in the following manner:

- Persons other than Counsel Assisting will not be permitted to cross-examine a witness unless and until they have provided to Counsel Assisting a signed statement of evidence advancing material

contrary to the evidence of that witness. Any person providing such a statement will be called by Counsel Assisting and asked to adopt that statement and will be examined by Counsel Assisting, and

- Counsel Assisting the Commission and any person with a demonstrated sufficient interest to do so, and granted leave by the Commissioner, may cross-examine each witness. Cross-examination will be limited to the matters in dispute, and may otherwise be restricted by the Commissioner in accordance with the power conferred by section 143 of the CCC Act.

This practice will enable the Commission to consider the respects in which conflicting evidence has been placed before the Commission, to identify the areas of conflict, and then to rule in advance of a person being recalled for cross-examination on the areas in which cross examination would be permitted. The principles which will generally guide the Commission will be:

- (a) If there is a disputed issue of fact relevant to a matter which is regarded as material to any issue the Commission must determine, the Commission will allow cross-examination upon it.
- (b) If a person gives evidence on oath of an adverse matter, which evidence is not denied, the Commission will not allow cross-examination. This is because no issue is raised regarding the evidence.
- (c) If the disputing evidence is a matter of comment, as distinct from raising a factual conflict, the Commission will not allow cross-examination.
- (d) If a person gives evidence on oath of a fact, and the contestant states that he has no recollection of the alleged fact, the Commission will not allow cross-examination, unless there are surrounding circumstances casting doubt upon the veracity of the evidence alleged. That is because there is no sensible basis upon which a cross-examiner could contest the evidence.
- (e) Overriding all considerations, if there are grave allegations against a person which may be diminished or eliminated by an attack on the credit of the witness giving the evidence, the Commission may allow cross-examination.

To avoid unnecessary repeated cross-examination and acknowledging that affected persons may be unaware of the totality of relevant evidence until the end of the examinations, the Commission may defer cross-examination until that time and then afford legal representatives the opportunity to apply for witnesses to be re-called for the purpose of cross-examination. Such an application should be supported by a written submission setting out the basis of the applications and the material contrary to the evidence of the witness or witnesses to be cross-examined.

Where necessary, the Commission will publish reasons when ruling on applications to cross-examine.

11. OBJECTIONS TO EVIDENCE AT AN EXAMINATION

Lawyers should be mindful of the nature of the Commission's functions when making and framing objections to the taking of evidence at an examination [see also Part 14]. Objections on the basis of the rules of evidence, curial relevance, or the potential inadmissibility of the evidence in court proceedings, will seldom be helpful.

Generally speaking, objections will have more pertinence to the nature of the Commission's functions at an examination where it is reasonably contended that:

- the subject matter of the questioning is manifestly outside the general scope and purpose of the Commission's investigation (though this is not immutable);
- the witness would be unable to give a rational and helpful response to the question; or
- the line of inquiry will not prove helpful in informing the Commission on any matter relating to the functions of the Commission.

12. SUPPRESSION OF EVIDENCE AT A PUBLIC EXAMINATION

The Commission may order that any evidence given, or any information that might serve to identify or locate a person who has given or may be about to give evidence before the Commission, must not be published except in such manner, and to such persons, as might be specified: see subsection 151(3) of the CCC Act.

The Commission will not give a direction suppressing the publication of evidence unless satisfied that it is necessary or desirable *in the public interest* [emphasis added]. An application for a non-publication direction must therefore be supported by positive grounds identifying public interest considerations making it at least desirable for the relevant evidence or information to be suppressed.

In relation to a public examination (where questions as to the need to make a non-publication order will usually arise) the making of a non-publication direction will involve at least a part reversal of the Commission's decision under subsection 140(2) of the CCC Act to hold a public examination. In exercising its discretion, the Commission will usually have considered and weighed the harm to individual reputation that might be caused as a result of a public examination, and determined the public interest to fall on the side of an open examination.

Accordingly, with nothing more, it might be difficult to establish sufficient grounds for a non-publication direction on the basis that the applicant's reputation would be harmed in the absence of any such direction.

It is commonly submitted that relevant evidence should be suppressed, either totally or until such time as the person affected has had an opportunity to reply, as a matter of procedural fairness. However, the authorities have consistently rejected that kind of proposition. While harm to reputation usually attracts a duty to observe the rules of procedural fairness, procedural fairness does not require a public examination to be conducted in such a way as to minimise harm to reputation. Provided an affected person is ultimately afforded an opportunity to respond to relevant allegations and evidence, questions as to the timing of the opportunity are largely for the Commission to determine according to the circumstances of the investigation.

It is also sometimes submitted that the Commission ought to make a non-publication direction on the basis of the way in which the media have reported or may report upon the public examination, to the detriment of individual reputation. While the Commission expects that fair and accurate reporting of its examinations will occur in the media, its functions do not involve supervision of the media and it cannot sensibly conduct its inquiries according to such matters.

None of the above is to say that the Commission will not entertain an application for evidence to be suppressed on the basis of harm to a person's reputation *per se* - particularly where the subject person has become of interest in the investigation subsequent to the initial decision to hold a public examination. Generally speaking, however, a more persuasive basis for a non-publication direction might exist where any potential harm to reputation is attended by a real and significant difficulty on the part of the affected person in adequately defending their reputation publicly. Amongst other things, such might be the case where:

- the nature of the evidence to be aired would make it inherently difficult for the person affected to make a rational response;
- the credibility of any relevant witness is so poor as to not warrant the public airing of allegations, or the identification of the person affected; or
- the relevant allegations are not sufficiently serious, or they do not give rise to a sufficiently important matter of public interest, so as to require their investigation in a public forum.

13. FAILURE TO ATTEND

Pursuant to subsection 148(1), where a person served with a summons to attend the Commission as a witness fails to attend as required by the summons, the Commission may, subject to proof as to service by way of a statutory declaration, issue a warrant for the apprehension of the witness.

Irrespective of whether a summons has been issued, or whether the time for attendance on a summons has passed, the Commission may issue a warrant for the arrest of a person whose evidence *"is desired and is necessary and relevant to an investigation"*, if satisfied by evidence on oath or affirmation that it is probable that the person will not attend to give evidence without being

compelled to do so, or is about to or is making preparations to leave the State and the person's evidence will not be obtained if he or she departs: subsections 148(2), 148(4) and 148(5).

Contempt

It is a contempt of the Commission for a person who is summoned to attend before the Commission at an examination to, "without reasonable excuse", fail to attend in accordance with the summons, to be sworn or make an affirmation, or to answer any question relevant to an investigation that the Commission requires the person to answer: sections 159 and 160.

The absence of a reasonable excuse for a person's non-attendance under a summons is not a prerequisite for the exercise of the Commission's power pursuant to section 148 to issue a warrant for his/her arrest. It may be that, regardless of any excuse, the circumstances of an investigation require the attendance of the person before the Commission at a particular time. However, in determining whether a warrant should be issued, the Commission will usually consider whether the person has a reasonable excuse for their non-attendance.

What constitutes a reasonable excuse is a question to be determined by reference to the scheme and purpose of the legislation concerned. It has been said in relation to legislative schemes similar to that under which the Commission exercises its functions that "reasonable excuse" does not mean a legal excuse, such as matters of privilege, but rather is intended to cover such things as illness or physical incapacity, or the inability to comply with a requirement to produce documents because of practical difficulties, such as their accidental loss or destruction. The Commission is inclined to a similar view.

Unfitness To Attend And Give Evidence At An Examination

The failure of a person to attend a Commission examination as and when required can have significant deleterious consequences for the effectiveness of the investigation concerned.

In the Commission's view, "reasonable excuse" does not mean a legal excuse, but rather such things as illness or physical incapacity, or the inability to comply with a requirement to produce documents because of practical difficulties, such as their accidental loss or destruction.

Where a person claims to be unable to attend in answer to a summons due to illness, in the first instance a medical certificate should be provided to the Commission as soon as practicable after the relevant illness is diagnosed. That is to say, as much notice as possible should be provided to the Commission in order that it may avoid or ameliorate disruptions to its investigation and examination.

The medical certificate (or any other document in which a medical opinion is expressed) must be authentic on its face, and state with as much precision as possible:

- (a) the nature of the person's illness;
- (b) whether in the medical practitioner's opinion the illness diagnosed renders the person unfit to attend before the Commission to give evidence on the day in question, having regard to the physical and/or mental demands understood to be involved in giving evidence;
- (c) the reasons why the medical practitioner is inclined to any such opinion, including the facts upon which the opinion is based; and
- (d) when it might be expected that the person will be able to attend the examination.

It should be remembered that a medical certificate comprises opinion evidence as to the matters stated therein. It remains for the Commission to assess the value of the opinion and whether it should be accepted as a valid excuse for the person's non-attendance. It may be assumed that the Commission will be unpersuaded by medical certificates in general and imprecise terms and will, with nothing more, compel the attendance of the person.

Lawyers should ensure that any member of the medical profession whose certificate is to be relied upon in seeking to excuse a person from attendance before an examination of the Commission is fully aware of the considerable responsibility undertaken in expressing his or her opinions, and of the very real potential for the relevant facts and circumstances to be keenly examined by the Commission, including by requiring the attendance of the medical practitioner to give evidence.

14. EVIDENCE, RELEVANCE AND “ADMISSIBILITY” AND “EXHIBITS”

The rules or practice of evidence do not bind the Commission, and it may inform itself on any matter in such manner as it thinks fit.

The concept of relevance as it is understood and applied as a rule of evidence does little to properly inform an objection to the taking of evidence before a Commission examination. What the Commission may look into is what it *bona fide* believes will assist its inquiries. By the very nature of its functions, it is essentially empowered to conduct what might otherwise be regarded at law as an impermissible "fishing expedition", in order to uncover facts that might be informative of a question of misconduct. As a precept of the law of evidence, "relevance" connotes a connection between the evidence and a fact in issue for determination by a court. It is largely an inappropriate term by which to signify the required connection between evidence and an investigative process, the purpose of which is not to determine issues of fact, but to discover them.

The Commission's investigative methodology involving the taking or giving of evidence before a Commission examination will not involve the "tendering" of exhibits but rather the evidence, documentary or physical in nature, will be "produced" and be identified by reference to a bar-code number.

15. SUBMISSIONS

At the conclusion of an examination, where applicable, the presiding Commissioner will set a timetable for the making of written submissions by interested persons. In appropriate cases, a return examination date may be set for the filing of the submissions.

Lawyers must make every effort to comply with the timetable, and should be aware that the Commission will treat any failure to do so most seriously.

16. CHALLENGE TO THE COMMISSION'S JURISDICTION

Where it is contended that the Commission is or would be acting beyond its jurisdiction in a particular way or matter, the person so contending should provide written submissions to the Commission. Where practicable, the issue should be raised before any relevant examination. The Commission will then be in a position to carefully consider the issues raised before determining whether it should proceed as planned, or make any necessary adjustments to its examination program.

In the event the Commission rejects a challenge to its powers, it may provide written reasons for its decision, either at the time of the decision or as soon as practicable thereafter.

Any mooted judicial challenge should be considered and prosecuted expeditiously. The Commission is neither obliged to, nor will, delay the carrying out of its functions on the basis of foreshadowed legal challenges.

17. CHALLENGE TO WARRANT

The Commission will not indulge or entertain any purported challenge to a warrant during the course of an investigation or examination. Except where the Commissioner authorises a search under section 100, a warrant, whether search, surveillance device or telecommunications interception, normally will have been granted by an appropriately empowered judicial officer, usually on the Commission's application.

The Commission will not release copies of warrants and supporting applications and affidavits to a person appearing before it at an examination, or their legal representative. Not only will any contention about the validity of a warrant be purely speculative, the Commission does not sit in review of the decisions of judicial officers, let alone decisions made on its own application. The only body which needs to be satisfied of the validity of a warrant for the purposes of an investigation by the Commission is the Commission itself.

Any challenge to the validity of a warrant is a matter appropriately reserved for any criminal proceedings in relation to which the warrant may prove relevant, or directed to the Supreme Court as the appropriate forum for substantive review.

18. DEALING WITH CLAIMS FOR PRIVILEGE

“Privilege” is a term describing a number of rules excluding evidence that would be adverse to a fundamental principle or relationship if it were disclosed. Examples include client legal privilege (CLP), privilege against self-incrimination, marital privilege, parliamentary privilege and public interest immunity.

Client legal privilege

The High Court’s decision in *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 192 ALR 561 indicated that CLP “... is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal service, including representation in legal proceedings”.

CLP is thus not merely a rule of evidence and, as such, in the absence of contrary intention may be called in aid to resist giving information or producing documents in investigatory procedures. The importance of CLP is supported by the well-settled principle that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.

Section 144 of the Act expressly preserves CLP. Section 144 is, however, subject to subsection 144(2) which provides that the privilege does not apply to a public authority or public officer “... in that capacity”.

The decision of the Federal Court in *AWB Ltd v Cole* [2006] FCA 571 reaffirmed the judicial position that CLP is a substantive rule of law and not a rule of evidence. The privilege operates to protect a communication between a client and lawyer, whether by documentation or otherwise, from being revealed if such communication was made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. The Court confirmed that for CLP to be abrogated by a legislative provision it must be done either expressly or by implication but the parliamentary intention to so abrogate must be unmistakably clear.

CLP may be claimed by a person who satisfies the legal test confirmed in *AWB v Cole* in respect to documents sought by the Commission for its investigative and examination purposes. Subsection 144(1) of the CCC Act expressly preserves CLP for any person or body that is not a public authority or public officer but subsection 144(2) implicitly abrogates CLP for all public authorities and public officers in that capacity.

Therefore if a person or body claims CLP over a communication in the possession of or required to be produced to the Commission the procedure that the Commission proposes to adopt is set out below. NB: *AWB v Cole* makes it clear that the decision made by the Commissioner about the claim of CLP is binding only in respect to the processes and procedures within the

Commission. It is not a decision which determines as a matter of law the claim for CLP. Thus a party who wishes to remove from the presiding Commissioner the decision about the claim of CLP may, at any point, pursue this claim judicially:

- A If the person or body claiming CLP does not wish to pursue their claim judicially, the Commission should write to the claimant seeking express authorisation to inspect the documents for the purpose of deciding the claim;
- B On obtaining such authorisation, the Commission will conduct a private examination to enable it to make a decision about the claim;
- C The Commission will make procedural orders that the claimant file written submissions with the Commission. Such submissions will set out the nature of the claim and refer to relevant authorities. The Commission will also order that the claimant file evidentiary materials by way of statutory declarations in support of the claim at least 4 working days before the CLP private examination. If such evidentiary material is in writing and is sufficient to demonstrate the privilege without further examination, the Commission may uphold the claim “on the papers”;
- D Upon making its decision the Commission will order:
 - (a) that such part of the documents which are protected by immunity under CLP be returned to the claimant, and
 - (b) that such part of the documents which are not protected by immunity under CLP be retained by the Commission, and
- E The Commission will then deliver the decision made in respect to the claim and may provide a copy of any written ruling evidencing this decision to the parties concerned.

Parliamentary privilege

Parliamentary privilege is the sum of the peculiar rights enjoyed by parliament and its members. In respect of the performance of the functions of the Commission, it is noted that subsection 3(2) of the CCC Act expressly provides:

- (2) Nothing in this Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891* and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable exclusively by a House of Parliament, unless that House so resolves.

The Commission accepts that it is “a place out of Parliament” within the meaning of Article 9 of the *Bill of Rights 1689* and, therefore, bound by parliamentary privilege. It is clear that Parliament intended that the

Commission be constrained by Article 9. The Commission accordingly considers itself bound by the privilege.

Where a question of parliamentary privilege arises during an investigation or Commission examination, the Commission will invite the Speaker of the Legislative Assembly or the President of the Legislative Council (as the case may be), to make submissions on the relevant issue and, if need be, to appear at a private examination to determine the question.

Public interest immunity

This privilege exempts the giving of evidence and/or production of documents or information where their disclosure would be against the public interest. In determining whether to allow the exercise of public interest immunity, the Commission must balance the public interest in withholding the production of the document against the public interest in ensuring that inquirers should have access to relevant evidence: *Sankey v Whitlam* (1978) 142 CLR 1; 21 ALR 505. The Commission may convene a private examination to determine these issues: *Halden v Marks* (1995) 17 WAR 447, at 465.

19. PROCEDURAL ORDERS

The Commission has power to make procedural orders during the course of an examination: section 136 of the CCC Act and section 50 of the *Interpretation Act 1984*. The matters dealt with by such orders, for example, the production of medical certificates and the like, are necessary to enable the Commission to exercise its examinations power.

The Commission will generally formalise such procedural orders in writing and serve same on witnesses and his/her legal representative. Legal practitioners must make every effort to comply with the procedural order and should be aware that the Commission will treat any failure to do so most seriously.

The Commission will enforce such procedural orders where there has been non-compliance. In cases of wilful or contumelious disobedience, the Commission will seek to have such non-compliance punished as a contempt of the Commission: section 163 of the CCC Act.

20. TRANSCRIPTS

Public Examinations

On request, transcripts of public examinations are provided to witnesses and lawyers authorised to appear.

Transcripts of public examinations will be posted on the Commission's website at www.ccc.wa.gov.au on a daily basis subject to legal compliance and operational requirements.

Copyright in transcript belongs to the State. Unauthorised copying or dissemination of transcripts may constitute a breach of copyright.

For further details regarding access to public hearing transcripts, contact the Commission's Legal Services Directorate on 9215 4888. Media enquiries should be directed to the Commission's Media Liaison Coordinator, Owen Cole, on 9215 4802 or 0439 910 161.

Private Examinations

As a matter of policy, the Commission does not release private examination transcripts to affected parties as the evidence given at a private examination is "official information" pursuant to section 152 of the CCC Act.

Witnesses or their lawyers may apply in writing if they wish to attend the Commission following a private examination to view transcript or exhibits.

Corrections

Persons appearing at the Commission and lawyers authorised to appear at the Commission who detect errors in the transcript should contact the Commission's Legal Services Directorate.

21. ACCESS TO EVIDENCE PRODUCED AT AN EXAMINATION

Exhibits

Documents and other things which are produced to the Commission in public examinations will be so produced either publicly or confidentially. Access will be subject to relevant non-publication orders. Publicly produced documents or things may be inspected on request by any media representative or member of the public.

Confidentially produced documents or things may not be inspected, except by Counsel Assisting, an officer of the Commission and such other persons to whom access has been granted by the Commissioner. Confidentially produced documents or things may not be published or communicated further by any person with authority or permission to inspect them.

Witnesses or their lawyers may apply in writing if they wish to attend the Commission to inspect documents or things.

TI Product

Access to information lawfully obtained by the Commission under the *Telecommunications (Interception and Access) Act 1979* (Cth) ("the TIA Act") and or the *Surveillance Devices Act 1998* (WA) and given in evidence in a public examination is constrained by section 63 of the TIA Act.

However, telephone intercepts can be communicated to another person for a "permitted purpose": TIA section 67. In the case of the Commission, a permitted purpose means, *inter alia*, a purpose connected with an investigation into misconduct or a report on such an investigation: TIA Act section 5.

Accordingly, as part of the section 86 process, the Commission will allow an affected person to listen to any relevant TI product at the Commission's premises. No TI product is to be disseminated.

Requests for access to TI product outside of this process will need to be considered on a case-by-case basis.

SD Product

The *Surveillance Devices Act 1998* (WA) ("the SDA") contains a general prohibition against the prohibition or communication of SD product: SDA subsection 9(1).

SDA subsection 9(2) sets out the exemptions to the general prohibition. Paragraph (v) states that subsection (1) does not apply where the publication or communication is made "in the course of the duty of the person making the publication or communication".

Accordingly, as part of the section 86 process, the Commission will allow an affected person to watch and/or listen to any relevant SD product at the Commission's premises. No SD product is to be disseminated.

Requests for access to SD product outside of this process will need to be considered on a case-by-case basis.