TheBenchBook

A guide to Corruption and Crime Commission examinations
## THE BENCH BOOK

A GUIDE TO CORRUPTION AND CRIME COMMISSION EXAMINATIONS

<table>
<thead>
<tr>
<th>THE COMMISSION’S JURISDICTION</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td>OVERVIEW OF THE COMMISSION</td>
<td>3</td>
</tr>
<tr>
<td>PURPOSES</td>
<td>4</td>
</tr>
<tr>
<td>FUNCTIONS</td>
<td>5</td>
</tr>
</tbody>
</table>

### EXAMINATIONS INTRODUCTION

<table>
<thead>
<tr>
<th>STATUTORY BASIS FOR EXAMINATIONS</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRACTICAL DIFFERENCES BETWEEN A COMMISSION INQUIRY AND A COURT PROCEEDING</td>
<td>7</td>
</tr>
<tr>
<td>THE ROLE OF COUNSEL ASSISTING THE COMMISSION</td>
<td>8</td>
</tr>
<tr>
<td>INFORMATION FOR LEGAL REPRESENTATIVES</td>
<td>10</td>
</tr>
<tr>
<td>INFORMATION FOR WITNESSES</td>
<td>12</td>
</tr>
<tr>
<td>INFORMATION FOR MEDIA - PUBLIC EXAMINATIONS</td>
<td>17</td>
</tr>
</tbody>
</table>

### PROCEDURAL MATTERS

<table>
<thead>
<tr>
<th>EXAMINATION DIRECTIONS AND OPENING REMARKS</th>
<th>19</th>
</tr>
</thead>
<tbody>
<tr>
<td>OATHS AND AFFIRMATIONS</td>
<td>20</td>
</tr>
<tr>
<td>SUPPRESSION ORDERS</td>
<td>21</td>
</tr>
<tr>
<td>PROCEDURAL ORDERS</td>
<td>23</td>
</tr>
</tbody>
</table>

### ADMINISTRATIVE

| SUMMONS TO ATTEND                          | 25 |
| NOTICE TO WITNESSES                       | 29 |

### LEGAL ISSUES

| PRIVATE OR PUBLIC EXAMINATIONS | 30 |
| EVIDENTIARY CONSIDERATIONS     | 32 |
| PROCEDURAL FAIRNESS            | 34 |
| PRIVILEGE                      | 39 |
| CONTEMPT                       | 42 |
THE COMMISSION'S JURISDICTION

OVERVIEW OF THE COMMISSION

All references in this manual to 'the Commission' are to the Corruption and Crime Commission unless otherwise specified. All statutory references are to the Corruption, Crime and Misconduct Act 2003 (CCM Act) unless otherwise specified.

The Commission was established in 2004 as an independent anti-corruption agency to improve the integrity of the Western Australian public sector.

The Commission is a body corporate, s 8.

The functions and powers of the Commission are contained in the CCM Act.

The Commissioner carries out the functions of the Commission in the name of the Commission. The Hon John McKechnie, QC, became Commissioner in April 2015. The Acting Commissioner, Mr Scott Ellis, was appointed in June 2016.

The Commission investigates allegations of serious misconduct against Western Australian public officers including WA Police, government departments, government instrumentalities, boards, public universities and local governments.

The Commission has exclusive jurisdiction over police misconduct in Western Australia and is empowered to investigate police reviewable action and any police misconduct.

The organised crime function enables the Commission to authorise the use of exceptional powers by Police to investigate organised crime.

The minor misconduct function is now within the exclusive jurisdiction of the Public Sector Commission.
PURPOSES

The main purposes of the CCM Act are:

1. to combat and reduce the incidence of organised crime; and

2. to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector (s 7A).

In order to combat and reduce the incidence of organised crime, the Commission is able to authorise the use of investigative powers not ordinarily available to WA Police to effectively investigate particular cases of organised crime (s 7B(2)).

To improve the integrity of the public sector, the Commission, in cooperation with the Public Sector Commission, assists public authorities to increase their capacity to prevent misconduct.

The Commission also uses investigative powers to identify and deal effectively with serious misconduct in the public sector.

The Commission may prepare a report on any matter in respect of serious misconduct, whether or not it has been the subject of an investigation, and cause that report to be laid before each House of Parliament or given directly to government departments or ministers (ss 84, 89).
FUNCTIONS

The Commission has the functions conferred or imposed by or under the CCM Act or any other written law (s 16).

Under the CCM Act the Commission has the following functions:

1. Serious misconduct function (s 18)
2. Functions in relation to Police Royal Commission (s 19)
3. Functions in relation to the Anti-Corruption Commission (s 20)
4. Organised crime function (s 21)
5. Reviewable police action (s 21A)
6. Prevention and Education function: police misconduct (s 21AA)
7. Capacity development function: public authorities (s 21AB)
EXAMINATIONS INTRODUCTION

STATUTORY BASIS FOR EXAMINATIONS

The Commission may hold an examination for the purposes of an investigation under the CCM Act or for the purposes of an investigation in respect of which an exceptional powers finding has been made related to organised crime and an organised crime summons has been issued. It is just one means by which the Commission conducts an investigation.

Commission examinations are not ‘judicial proceedings’; they are an exercise of executive and administrative power. They are part of an investigation. Nonetheless, in the course of an examination, the presiding Commissioner is ‘a person acting judicially’ within the meaning of Evidence Act 1906 (WA) s 3.

Examinations differ from proceedings in courts or tribunals, and the role of Counsel is different. See 'Information for Legal Representatives' for further information.

In a Commission examination, there is no issue to be decided. They are inquisitorial rather than adversarial. The examination is designed to discover facts that may lead to further action being taken. No person appearing at a Commission examination has a 'case' to pursue.

The essential and immediate purpose of an investigation is to inform the Commission on matters of serious misconduct to enable the Commission to make assessments, form opinions, make recommendations and to communicate the results of the investigation to Parliament.

Examinations are to be conducted in private unless provided in s 140. The Commission may make an order as to who may be present during the whole or any part of an examination that is not open to the public (s 139).

A Public examination is allowed when, 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 (s 140). The decision to open an examination to the public may be made at any time before or during the examination (s 140(3)).
# PRACTICAL DIFFERENCES BETWEEN A COMMISSION INQUIRY AND A COURT PROCEEDING

<table>
<thead>
<tr>
<th></th>
<th>Inquiry</th>
<th>Court</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Terminology</strong></td>
<td>Examination</td>
<td>Hearing</td>
</tr>
<tr>
<td><strong>Purpose</strong></td>
<td>Forms one part of an investigation to ascertain facts. There are no issues to be decided.</td>
<td>To decide a 'matter' between parties (civil or criminal).</td>
</tr>
<tr>
<td><strong>Public/Private</strong></td>
<td>Inquiries are generally conducted in private unless it is in the public interest to open them to the public.</td>
<td>Court hearings are mostly held in public.</td>
</tr>
<tr>
<td><strong>Rules of evidence and procedure</strong></td>
<td>Not bound by rules of evidence or procedure but is confined to the scope and purpose of the investigation.</td>
<td>Must abide by rules of evidence and procedure.</td>
</tr>
<tr>
<td><strong>Exhibits</strong></td>
<td>Documents are not tendered. They are usually referred to as 'materials produced' and are barcoded.</td>
<td>Documents and other things produced are tendered as exhibits and given an exhibit reference number.</td>
</tr>
<tr>
<td><strong>Witnesses</strong></td>
<td>A witness may be the focus of an investigation but is always referred to as a witness. They may have legal representation.</td>
<td>Witnesses are not legally represented.</td>
</tr>
<tr>
<td><strong>Non-Disclosure</strong></td>
<td>Any evidence in an examination is 'restricted matter' and must not be disclosed except in accordance with the CCM Act.</td>
<td>In the absence of a suppression order, any evidence may be disclosed.</td>
</tr>
<tr>
<td><strong>Examination of Witnesses</strong></td>
<td>Counsel representing a witness or other person may be permitted to examine a witness if the Commission considers it relevant.</td>
<td>Counsel representing an accused is permitted to cross examine all witnesses.</td>
</tr>
<tr>
<td><strong>Outcome</strong></td>
<td>The Commission may form an opinion which it will often report on.</td>
<td>A court will make findings which are legally binding.</td>
</tr>
</tbody>
</table>
THE ROLE OF COUNSEL ASSISTING THE COMMISSION

The Commission may appoint a person to assist the Commission at an examination (s 143(1)). This person is referred to as Counsel Assisting.

Opening statement

If the examination is open to the public, Counsel Assisting may present an opening statement to introduce general topics or issues and to outline the facts as then known, thereby providing the context for examination of witnesses.

Examining witnesses

Counsel Assisting may examine witnesses on any matter that the Commission considers relevant (s 143(1)) but limited to the scope and purpose of the investigation.

Counsel Assisting must apply professional etiquette and are bound by ethical duties and obligations of the legal profession. The role of Counsel Assisting is not to 'prove' facts or to advocate a particular position, it is to seek out the truth and ascertain relevant facts and information to give

Lawrie v Lawler [2016] NTCA 3 highlighted that it is important, at some stage during the examination process, to ensure parties are made aware of the relevant issues and possible criticisms of them, including any standards of conduct and departures from those standards.

Counsel Assisting will determine the order of witnesses to be called.

When adducing evidence, Counsel Assisting is not limited in the manner in which they conduct questioning. In an examination Counsel Assisting may have to examine, cross examine, challenge a witness's testimony or put forward other accounts to a witness for comment.

To facilitate procedural fairness during an examination, Counsel Assisting may:

1. use opening submissions to introduce relevant topics and outline facts known (unless it would be strategically undesirable to do so);

2. when examining witnesses, ensure that:
   a. possible adverse findings are formulated with clarity and precision and put to the witness;
   b. the witness is given a chance to respond to possible adverse conclusions; and

3. make final submissions as to possible findings of fact and possible conclusions that should be drawn.
Producing documents

Counsel Assisting will control the evidence produced at an examination.

Other counsel present are not entitled to produce documents or statements or to call for the production of documents.

Persons wishing to produce evidence to the Commission should provide a statement of the evidence or a copy of the document or thing to the Commission or Counsel Assisting. The Commission will then determine whether the evidence should be introduced as part of its inquiry.

A witness may be required to produce documents or other things to the Commission at an examination if summoned to do so in accordance with CCM Act s 96.

Closing statement

At the end of a public examination, Counsel Assisting may deliver a closing statement.

The closing statement will generally:

1. outline possible findings of fact that could be made by the Commission;
2. identify relevant matters that have been established by the evidence, including matters that support or do not support the making of possible findings; and
3. raise relevant matters upon which adverse findings could be made against particular persons.

Preparation for examinations

Counsel Assisting has a role in relation to the coordination, management, administration, direction and control of Commission processes and operations to ensure that the examination proceeds in an accountable and appropriate way and that it is an appropriate exercise of statutory powers.

In this role, Counsel Assisting may assist in preparation of summons to the witnesses, advise or prepare examination guidelines and procedures and is obliged to ensure that the examination proceeds in a manner to achieve the purposes of an investigation.
INFORMATION FOR LEGAL REPRESENTATIVES

A witness may be represented by counsel in their examination before the Commission (s 142(1)).

If a witness is not legally represented at an examination, and the Commission considers that it would be in the public interest for it to do so, the Commission may arrange for the person to be legally represented (s 142(2)).

Legal aid grants are available in certain circumstances for representation at Commission examinations. For more information see: http://www.legalaid.wa.gov.au/LegalAidServices/applyingforLegalAid/Pages/Corruption-and-Crime-Commission-fund.aspx

Witnesses appearing at examinations may be subject to restrictions regarding the disclosure of matters and information connected with their attendance at the Commission. You may be similarly restricted. Further details accompany the summons. See also 'Information for witnesses'.

Counsel do not have an absolute right of appearance before the Commission. An application for leave to represent a witness is generally made as the witness is called. Leave to appear may be granted with conditions. The Commission may refuse to allow a witness to be represented by a person who is already involved in an examination, or is involved (or suspected to be involved) in a matter being investigated (s 142(4)). Leave to appear may also be revoked.

Leave will not ordinarily be granted for an 'in-house' lawyer employed by a public authority to represent other officers of the authority in a personal capacity.

Representation of more than one witness in Commission examinations (whether by the same counsel or by different counsel instructed by the same firm) presents particular difficulties for counsel due to the fact-finding nature of an examination. The Commission requires that applications for leave to represent more than one person at a Commission examination must be supported by written submissions addressing:

1. whether the lawyer has turned his or her mind to the potential for conflicts of interest to arise in relation to their respective clients;

2. the steps that have been taken to avoid any potential conflicts of interest; and

3. the reasons why no real or perceived prejudice would flow to the Commission’s investigation as a result of the joint representation.

Please note that legal practitioners do not robe when appearing before the Commission. The Commissioner is to be addressed as 'Commissioner'.

The Examination Process

Examinations are very different to trials or proceedings in courts or tribunals. See table on 'Practical differences between a Commission inquiry and court proceedings.'
Examination of witnesses is one aspect of a Commission investigation. Its purpose is to enable the Commission to find out facts and get to the truth of allegations of serious misconduct about public officers.

The Commission prefers to conduct examinations with minimal formality and technicality and is not bound by the rules of, or practice of, evidence. The Commission will regulate the conduct of examinations as it thinks fit (s 138(3)).

At the commencement of an examination, the Commission will usually outline the general scope and purpose of the investigation unless it would be undesirable to do so (s 138(1),(2)).

When Counsel Assisting concludes his or her examination, the Commissioner may ask their legal representative whether they wish to examine the witness. The Commission will only allow a witness to be examined if the evidence is relevant to the investigation and advances the investigation (s 143(2)).

A witness may also be examined by a person representing another witness (s 143(3)). This will only be allowed if the Commission considers there are special circumstances (s 142(5)).

If counsel makes an application to examine a witness, the Commission requires the legal representative to identify the topics that he or she proposes to examine and how an examination of those topics will advance the Commission's inquiry. The proposed questions should bear directly on the factual issues or provide clarification of the evidence adduced in the Commission's examination of the witness.

In considering an application the Commissioner may invite Counsel Assisting to make submissions and will then determine whether the proposed questions may be asked. Counsel will confine themselves to those questions.

The Commission may allow any other examination that it considers relevant (s 143(3)), such as cross-examination and re-examination. Cross-examination may be deferred until the end of the examinations because affected persons may be unaware of the totality of the relevant evidence until that stage.

The Commission will endeavour to conduct examinations with procedural fairness principles in mind, see 'Procedural fairness'.

The Commission will not tolerate behaviour at an examination that serves to frustrate its ability to conduct an examination as it sees fit. Counsel and witnesses should note the contempt provisions in pt 10 and other offences in CCM Act pt 11. For further information see 'Contempt'.

Transcripts of public examinations are available on the Commission's website at www.ccc.wa.gov.au. Transcripts of private examinations are not generally released to witnesses or their legal representative. Legal practitioners may apply to the Commission in writing for permission to inspect the transcript of private examinations.

See also: 'Evidentiary Considerations'.

11
INFORMATION FOR WITNESSES

If you are a witness in a Commission examination, you will have been served with a summons. The summons will require you to give evidence, or produce any record or other thing in your custody or control (as described in the summons), or to do both of these things.

You must report to the Commission on the date specified in the summons. You will need to attend until the Commission tells you that you are released.

Your summons may include a notation prohibiting disclosure of information. This may include information about the summons, your attendance as a witness, information referred to in the summons, information in documents, statements, evidence or anything relevant to a Commission examination. Please read the notation carefully and make sure you comply with it.

The existence of a summons or any information about it, and the existence of any official matter connected with a summons or any information about that official matter is 'restricted matter' (s 167(1)).

You can disclose any 'restricted matter' in the circumstances provided for in the notation on your summons (if any). You can also disclose restricted matter in some circumstances set out in CCM Act (s 167(4)), including:

1. to a lawyer to obtain legal advice and representation relating to the summons; and
2. for the purpose of obtaining legal aid relating to the summons.

You may obtain legal representation as a witness and in some circumstances the Commission may assist you to do so.

The WA Government has established a fund to provide legal assistance for serving and former public officers called as witnesses or served with notices or summonses by the Commission. Applications for legal aid may be made to Legal Aid WA. For more information see http://www.legalaid.wa.gov.au/LegalAidServices/applyingforLegalAid/Pages/Corruption-and-Crime-Commission-fund.aspx).

If you need an interpreter, please let the Commission know as soon as possible so that arrangements can be made for an interpreter to be present at the examination.

What to expect

Commission examinations may be held in private, or in public.

If the examination is a private examination, only your lawyer (if you appoint one), Commission Officers, and other people specified by the Commissioner will be present.

Public examinations may be attended by anyone and may be streamed live via the Commission's website.

Examination of witnesses is one aspect of a Commission investigation. Your evidence will help
the Commission determine the facts and get to the truth of allegations of serious misconduct about public officers.

The Commission can inform itself on any matter in any way it thinks fit, and is not bound by the rules of, or practice of, evidence.

The Commission's examinations are conducted in a formal setting, similar to a court. Examinations are recorded. Transcripts from public hearings may be published on the Commission’s website.

**Giving evidence in an examination**

When addressing the Commissioner, call him 'Commissioner' or 'Sir'.

If you need a break at any time during the examination, you can ask the Commissioner for one.

You will be required to take an oath or make an affirmation before giving your evidence.

The Commission will tell you at the start about the general scope and purpose of the Commission's investigation.

During the examination, a lawyer appointed by the Commission (referred to as Counsel Assisting) may ask you questions on any matter that the Commission considers relevant to its investigation.

When Counsel Assisting finishes his or her examination, the Commissioner will, if appropriate, ask your lawyer whether they want to examine you. The Commission will only allow your lawyer to examine you if the evidence is relevant to the investigation and advances the investigation.

You may also be examined by a person representing another witness. This will only be allowed if the Commission considers there are special circumstances.

You may be reminded at the conclusion of a private examination that any evidence given before the Commission is 'restricted matter' and must not be disclosed except in accordance with the CCM Act (ss 151 and 167(4)). Disclosing any information about restricted matter is a criminal offence. The restrictions on disclosure to any person remain in place until the Commission advises you to the contrary.

In answering Counsel Assisting's questions:

1. listen carefully and think about each question carefully before you answer;
2. answer each question truthfully and to the best of your recollection;
3. if you do not think you heard a question properly, ask the lawyer to repeat it;
4. if you do not understand a question, say so;
5. do not guess – if you are not sure about the answer, just say so.
Speak clearly so that your evidence can be understood. Make sure you say 'yes' instead of nodding, so that your answers can be recorded through the microphone in front of you.

If Counsel Assisting wants to ask you questions about any documents, these will be handed to you or displayed on a screen in front of you during the examination. You will be given time to read the document before you are asked questions about it.

You must answer any question put to you by the Commission, even if your answer may incriminate you. Please note that you may be in contempt of the Commission if you fail or refuse to answer any question relevant to the investigation that the Commission requires you to answer. It is an offence to give false or misleading testimony to the Commission.

Is my evidence admissible in court?

Anything you say in your evidence may be admissible in court if:

1. you are charged with contempt of the Commission;
2. you give false and misleading evidence to the Commission;
3. you give evidence in a prosecution against you inconsistent with evidence you gave to the Commission; or
4. you are a public officer and there are disciplinary proceedings against you.

Witness expenses

You are entitled to claim for reasonable expenses which you have incurred as a result of attending a Commission examination, however these are only nominal.

To make a claim for witness expenses complete an 'Application For Payment of Witness Expenses'.

If you make a claim, the Commission will review your claim and certify the amount considered reasonable for payment of witness expenses.

What happens if I don't attend when summoned to do so?

Failure to obey a summons without reasonable excuse is a contempt of the Commission.

If you are unable to attend at the Commission as required by the summons for any medical or other reason, you should contact the Commission as soon as possible to discuss your circumstances.

If you are unable to attend an examination due to ill health, a medical certificate must be provided to the Commission as soon as practicable. The medical certificate must state:

1. the nature of your illness;
2. whether, in your medical practitioner's opinion, your illness means you are unfit to attend before the Commission to give evidence on the day specified in the summons;
3. the reasons why the medical practitioner holds that opinion, including the facts upon
which that opinion is based; and

4. when it might be expected that you will be able to attend the examination.

You should note that the Commission has the power to issue a warrant for your arrest if you
fail to attend an examination as required by the summons and the CCM Act (s 148). It is
therefore very important that you contact the Commission before the examination date if
there is a reason why you are unable to attend.

The Commission may also issue a pre-emptive arrest warrant if certain conditions are
satisfied (ss 148(2),(3)). Essentially this allows the Commission to arrest a person where it is
possible that they will not attend at an examination or they are making preparations to leave
the State.

A pre-emptive arrest warrant may be issued without a summons being issued (s 148(4)). A
pre-emptive warrant may also be issued after a summons has been issued and before the
examination is due to take place (s 148(5)).

Victimisation

If you have attended, are attending or are due to attend before the Commission to give
evidence or to produce a document or any other thing and, because of this, you have
concerns for your safety or the safety of any other person, or you or another person is being
subjected to intimidation or harassment, you should notify the Commission immediately. The
Commission can make arrangements for your protection and the protection of other persons.
In some circumstances, the Commission can also make orders to help facilitate these
arrangements.

A person who:

1. prejudices, or threatens to prejudice, the safety or career of another person;

2. intimidates or harasses, or threatens to intimidate or harass another person; or

3. does any act that is, or is likely to be, to the detriment of another person,
because that other person mentioned in paragraph 1, 2 or 3 or someone else gave evidence
to, or helped, the Commission or Parliamentary Inspector in the performance of its, his or her
functions is guilty of an indictable offence.

Witness Welfare

If you have attended, are attending or are due to attend before the Commission to give
evidence or produce a document or any other thing and, because of this, you consider you
need to consult a close family member, medical practitioner, psychologist or psychiatrist, you
are at liberty to do so. However, you are not permitted to disclose to them:

1. anything about the existence of a notice or summons or any other official matter (as
defined in CCM Act s 99) connected with a notice or summons; or
2. any information about that notice, summons or official matter.

Any evidence given before the Commission, any document produced to the Commission, or any information that might establish that you have been examined, or are about to be examined by the Commission is classified as 'restricted matter'. It must not be disclosed.

If there are any special circumstances that support disclosure of restricted matter by you, you may contact the Commission officer listed on the summons to request that the Commissioner vary the non-disclosure notation. You will receive a written notification if your request is granted.

Special circumstances could include, but are not limited to, the need to speak to a close family member or medical practitioner, psychologist or psychiatrist about your welfare.
INFORMATION FOR MEDIA - PUBLIC EXAMINATIONS

Media outlets will receive a media release announcing details of a public examination before it starts. Instructions on how to access livestream viewing will also be provided. A Commission representative will conduct a media briefing immediately before an examination begins.

Media representatives can attend public examinations and have exclusive use of a media room where the proceedings can be viewed and listened to.

Mobile devices and cameras

Media cameras are not permitted on the floor of the examination room unless specifically authorised. For example, permission may be given to record the opening address of an examination.

Mobile phones must be switched to a silent mode in the examination room so they do not interrupt proceedings. The media are permitted to use mobile phones in the media room. This privilege may be withdrawn if photographs or audio recordings are taken by a mobile device on the Commission’s premises.

Transcripts and exhibits

Transcripts of the examinations will be made available on the Commission’s website as soon as practicable - subject to operational constraints.

Where practicable, public versions of telecommunications intercepts and material from surveillance devices will be made available to the media on request. However, under Commonwealth legislation they can only be used for the fair and accurate reporting of evidence given at Commission examinations. Any dealing with the information, including copying, may be regulated by the Telecommunications (Interception and Access) Act 1979.

Requests for transcript, vision or audio material can be made by completing a media exhibit form or by contacting Mills Wilson on (08) 9421 3600.

Suppression orders

Media outlets are responsible for ensuring they comply with suppression orders and any changes made to them. Copies of suppression orders are available in the media room.

It is a breach of the CCM Act to disclose any details of a private examination; including the witnesses who may have or are going to appear, what the hearing was about, or any evidence that may have been given.

Interview requests

Interviews with the Commissioner will not be granted during public examinations. Interviews with witnesses and counsel will also not be facilitated by the Commission and are not permitted on its premises.
Media enquiries

During an examination, media enquiries can be made to MillsWilson:

Marie Mills Louisa Mitchell
Ph: 0418 918 202 Ph: 0434 308 208
Email: mariem@millswilson.com.au Email: louisam@millswilson.com.au

Moving a public examination into a private examination

The Commission has the right to switch a public examination, or parts thereof, into a private examination. If this occurs, all people in the hearing room are required to vacate the examination till further notice.

The media cannot attend or report anything about private examinations held by the Commission. It is an offence to report that a private examination is to be held, or has been held, to name witnesses who appeared at a private examination, or any details of the evidence given.
PROCEDURAL MATTERS

EXAMINATION DIRECTIONS AND OPENING REMARKS

At the commencement of an examination, the Commissioner and Associate will deliver directions:

The directions will generally address:

1. the scope and purpose of the Commission’s investigation;
2. appointment of Counsel Assisting;
3. legal representation;
4. who else may be present at the hearing;
5. recording of the proceedings; and
6. rights and obligations of the witness.

In a public examination, Counsel Assisting and/or the Commissioner will also deliver opening remarks which are more detailed, going into the reasons why the Commission has decided to open the examination to the public. They may also contain background information specific to the investigation.
OATHS AND AFFIRMATIONS

Before giving evidence in a Commission examination, a witness will be required to take an oath or affirmation.

The Commissioner may administer the oath or affirmation to the witness (s 141(2)). This is a function which cannot be delegated by the Commissioner to any other Commission officer. However, the term ‘administer’ is not defined. As a matter of statutory construction it is to be given its ordinary meaning. The Australian Concise Oxford Dictionary defines ‘administer’ in relation to an oath as '2c. to direct the taking of (an oath)'.

Pursuant to Oaths, Affidavits and Statutory Declarations Act 2005 s 6(1)(b), a person, such as the Commissioner’s Associate, who is authorised by the Commissioner to administer the oath or affirmation, may do so. There are no formal requirements for such an authorisation.

Therefore, in a Commission examination it is the Associate who asks the witness to take the oath or affirmation in the presence of the Commissioner.

Oath:

I swear by Almighty God, that I will speak the truth, the whole truth, and nothing but the truth, in answer to all questions that may be asked of me before the Corruption and Crime Commission.

Affirmation:

I do solemnly and sincerely declare and affirm that I will speak the truth, the whole truth, and nothing but the truth, in answer to all questions that may be asked of me before the Corruption and Crime Commission.

Other forms of oath are available for alternative religions. Notifying the Associate of the religion practised by a witness prior to an examination will help facilitate administering the appropriate oath or affirmation. Where a witness is unable to read, the Associate will read the oath/affirmation and the witness will repeat the words.
SUPPRESSION ORDERS

The Commission may direct 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 by the Commission.

The power to make a suppression order is found in s 151(3) which provides:

Unless the Commission orders otherwise, a restricted matter may be disclosed if that matter has already been disclosed at a part of an examination that was open to the public.

Restricted matter is defined in s 151(1) and includes evidence given before the Commission, s 151(1)(a).

Application may be made for a direction by the Commission suppressing the publication of evidence. Alternatively the Commission may make a suppression order of its own motion. An application for a suppression order must be supported by relevant considerations.

The Commission has a discretion to open or close the examination in accordance with s 140 if it considers that a suppression order is not a sufficient remedy.

A suppression order will be exact in its terms and include the following matters:

1. exactly what evidence is to be suppressed from publication;
2. the type of publication that is prohibited;
3. the duration of the suppression order;
4. that the order is made pursuant to s 151(3); and
5. the penalties for breaching the order.

Exercising the discretion

There are no express statutory criteria for granting suppression orders although ss 140 and 156 may provide some guidance. For example, the need to consider the potential for prejudice or privacy infringements (in the context of deciding whether to hold a public examination). There may be cases where, during a public examination, the potential for a person's interests to be prejudiced is so great as to require an order be made in the public interest. There may also be cases where the publication of evidence may infringe a person's privacy. If the safety of any person may be prejudiced by the publication of certain evidence, that may be sufficient grounds for a suppression order (see s 156). Likewise, if the publication of evidence at a public examination is likely to subject a person to intimidation or harassment, the Commission may choose to make a suppression order.

An example of a suppression order is below:
SUPPRESSION ORDER NOTICE

Commissioner John McKechnie, QC

SUPPRESSION ORDER No: XX of 2020

CASE NAME: [insert]


TERMS OF ORDER:

In respect of the Commission public hearings which commenced on [insert date] and are still in progress I order, in accordance with Corruption, Crime and Misconduct Act 2003 (CCM Act) s 151(3) that:

there be no publication of the name, or any other matter that may result in the identification, of the following persons:

- [insert name]
- [insert name]

This order is to remain in force until further order of the Commission.

Contravention of this Suppression Order is punishable by imprisonment for 3 years and a fine of $60,000 pursuant to CCM Act s 151(7)

John McKechnie, QC
Commissioner

ORDER EFFECTIVE UNTIL: (PLEASE TICK BOX AND COMPLETE DETAILS)

[ ] Date order expires.
[✓ ] Until further order of this Commission.
[ ] Until completion of hearing/investigation/current project.
[ ] Other (Please Specify).
PROCEDURAL ORDERS

During an examination, the Commissioner may make such procedural orders as are reasonably necessary for the exercise of the examination power (s 138(3)).

After the Commissioner makes an oral order, the Commissioner’s Associate will reduce that order to writing and the Commissioner will sign it. Once that is done the order is to be served on the parties. This will ensure that the parties are in no doubt as to what is required of them. The order should contain a warning that a failure to comply with the order is a contempt of the Commission.

It is important that orders are particularised and served on the parties.
ORDER ISSUED BY COMMISSIONER
DURING PUBLIC HEARING
OPERATION XXXXX

Commissioner John McKechnie, QC


TERMS OF ORDER:

In respect of the Commission investigation delineated by the following Scope and Purpose.

   To determine if any public officer has engaged in misconduct in relation .........

I make the following Order.

   I order that all witnesses are to remain out of the Hearing Room until such time as they are called to give their evidence, and further order that witnesses not discuss their evidence with any other witness until that witness has completed giving his or her evidence.

John McKechnie, QC
Commissioner

WARNING: it is a contempt of the Commission to fail to abide by this Order, pursuant to Corruption, Crime and Misconduct Act 2003 (CCM Act) s 162(1)(e). A contempt of the Commission can be punished as if were a contempt of the Supreme Court, pursuant to CCM Act s 163.
## ADMINISTRATIVE SUMMONS TO ATTEND

### Section 96 Summons

<table>
<thead>
<tr>
<th><strong>Corruption, Crime and Misconduct Act 2003</strong></th>
<th><strong>Witness summons to give oral evidence</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Corruption and Crime Commission</td>
<td>Summons No. S [XXXX/XXXX XXXX]</td>
</tr>
<tr>
<td>Level 5, 45 Francis Street</td>
<td></td>
</tr>
<tr>
<td>NORTHBRIDGE WA 6003</td>
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</table>

**To:** [Full name and address]

**Requirement**
You are required to attend personally at the time and place specified below to give evidence in an examination before the Corruption and Crime Commission.

**Time and place to attend**
You must attend personally as follows:

- **Date:** [ ]
- **Time:** [ ]

At: Corruption and Crime Commission
Level 5, 45 Francis Street, Northbridge WA 6003

You are to REPORT to the Commission from day to day unless excused or released from further attendance.

**Warning**
If you fail to attend as required by this summons, the Commissioner may issue a warrant for your apprehension. In that case, you will be immediately brought before the Commission and detained in custody for that purpose until released by order of the Commissioner.

**Date summons issued**
Date: [ ]
Signed: [ ]
John McKechnie, QC
COMMISSIONER

**Scope and purpose**

**Schedule**
If you are required to PRODUCE records or things in your custody or control, a Schedule detailing those records or things will be attached to this summons.

Enquiries regarding this Notice should be directed to [Name], an officer of the Corruption and Crime Commission, on (08) 9215 4888.

---

*Section 99 notation: You must not disclose any information about this Section 96 Summons, or about any official matter connected with it, to any person, except in the circumstances outlined in the attached information sheet.*
Section 99 Non-Disclosure Notation

If you have been served with a summons from the Corruption and Crime Commission which contains a red section 99 non-disclosure notation, then the following information is applicable to you.

You must not disclose ‘restricted matter’. The penalty for disclosing ‘restricted matter’ is imprisonment for 3 years and a fine of $60 000.

Restricted matter means any of the following —

(a) the existence of a notice or summons or any information about it;
(b) the existence of any official matter connected with a notice or summons or any information about that official matter.

Official matter means any of the following (whether past, present or contingent) —

(a) the investigation for the purposes of which a notice or summons that includes a notation under this section was issued;
(b) an examination before the Commission for the purposes of the investigation;
(c) court proceedings.

Disclosing the existence of something includes disclosing information from which a person could reasonably be expected to infer its existence.

Circumstances where restricted matter may be disclosed

Restricted matter may be disclosed to a legal practitioner for the purpose of obtaining legal advice or representation relating to the summons, or to a person for the purpose of obtaining legal aid relating to the summons. It may also be disclosed in accordance with circumstances, if any, specified in the notation.

If there are special circumstances that support disclosure of restricted matter by you, you may contact the Commission officer listed on the summons to request that the Commissioner vary the non-disclosure notation. You will receive a written notification if your request is granted.

Special circumstances could include, but are not limited to, the need to speak to a close family member or medical practitioner, psychologist or psychiatrist about your welfare.

The non-disclosure notation also applies to any person to whom you are authorised to disclose information as outlined above. Your legal practitioner may refer to the Corruption, Crime and Misconduct Act 2003 section 167 for further information about their obligations.

The non-disclosure notation ceases to apply when the Commission serves written notice of that fact or when a period of 5 years elapses after the issue of the summons.
NOTICE TO WITNESSES

The Commission may summons witnesses to give evidence on oath or affirmation to assist the Commission in its investigations. To that end, the Commission’s lawyer, called Counsel assisting, will ask you questions with the Commissioner presiding over the examination.

A witness has several rights and obligations.

Rights

• You have a right to be told the general scope and purpose of the investigation unless the Commissioner considers that would be undesirable in the circumstances.

• You are entitled to a Lawyer. Financial assistance may be available.

• You are entitled to be paid for the expenses of attendance to an amount the Commission certifies as reasonable.

• Anything you say in your evidence is inadmissible in a court except:
  o if you are charged with contempt of the Commission;
  o if you give false and misleading evidence to the Commission;
  o if you give evidence in a prosecution against you inconsistent with evidence you gave to the Commission;
  o in disciplinary proceedings against you. (Public officers only.)

Obligations

• You must take an oath or affirmation.

• You must answer truthfully and to the best of your ability all questions asked of you. Giving false or misleading testimony is a criminal offence.

• If so ordered you must not discuss your evidence or the fact that you have given evidence with anyone except your lawyer.

For further information for witnesses is available at www.ccc.wa.gov.au.
Summons No: S XXXX/XXXX XXXX

RECORD OF SERVICE

I, ........................................................................................................ did attend at

(Name of person effecting service)

........................................................................................................

(Place service effected)

at ........................................................................on ........................................ 201X

(Time) (Date)

and there served on ........................................................................

(Name of person being served)


........................................................................................................

(Signature of CCC Officer effecting service) (Date)

I, ........................................................................................................, acknowledge that I have

(Name of person served)

received the specified Summons containing a notation that prevents me from disclosing any information about this notice and I am aware that serious penalties apply if I do.

........................................................................................................

(Signature)
NOTICE TO WITNESSES

The Commission may summons witnesses to give evidence on oath or affirmation to assist the Commission in its investigations. To that end, the Commission’s lawyer, called Counsel assisting, will ask you questions with the Commissioner presiding over the examination.

A witness has several rights and obligations.

Rights

- You have a right to be told the general scope and purpose of the investigation unless the Commissioner considers that would be undesirable in the circumstances.
- You are entitled to a Lawyer. Financial assistance may be available.
- You are entitled to be paid for the expenses of attendance to an amount the Commission certifies as reasonable.

Obligations

- You must take an oath or affirmation.
- You must answer truthfully and to the best of your ability all questions asked of you. Giving false or misleading testimony is a criminal offence.
- If so ordered you must not discuss your evidence or the fact that you have given evidence with anyone except your lawyer.

The Corruption, Crime and Misconduct Act 2003 (CCM Act) s 145 sets out what use may be made of the evidence that you give before the Commission. In summary:

- Anything you say in your evidence is not admissible in evidence against you in any criminal proceedings or proceedings for the imposition of a penalty except for:
  - contempt proceedings; or
  - proceedings for an offence against the CCM Act; or
  - disciplinary action.

- Anything you say in your evidence is admissible in evidence against you:
  - in any proceedings under the Criminal Property Confiscation Act 2000; and
  - in any civil proceeding.

- You may, in any civil or criminal proceedings, be asked about your evidence under the Evidence Act 1906 s 21.

<table>
<thead>
<tr>
<th>Acknowledgement by Witness:</th>
<th>Witness to signature (Commission officer):</th>
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<tbody>
<tr>
<td>Name: ______________________</td>
<td>Name: ______________________</td>
</tr>
<tr>
<td>Signed: ____________________</td>
<td>Signed: ____________________</td>
</tr>
<tr>
<td>Date: ______________________</td>
<td>Date: ______________________</td>
</tr>
</tbody>
</table>

I acknowledge that I have read and understood the contents of this “Notice to Witnesses”.

Contact the Corruption and Crime Commission

Level 5, 45 Francis Street Northbridge WA 6003

General Enquiries (08) 9215 4688
Report Corruption 1800 809 600
www.ccc.wa.gov.au  info@ccc.wa.gov.au  @CCCWestAus
LEGAL ISSUES

PRIVATE OR PUBLIC EXAMINATIONS

All Commission examinations are to be private unless otherwise directed by the Commission (s 139). CCM Act s 140(2) sets out the considerations to be carried out by the Commission in determining whether it is in the public interest to conduct public examinations.

The Commission considers each proposed witness as a separate examination.

When the decision may be made

A decision to open an examination to the public may be made at any time before or during an examination (s 140(3)).

Both in the lead up to and during a public examination the Commission continuously reassesses the decision making process referred to in s 140(2) and may for a particular purpose decide to open or close it (s 140(4)).

'Weighting' the interests

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 (s 140(2)).

<table>
<thead>
<tr>
<th>Benefits of public exposure</th>
<th>Potential prejudice</th>
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<tbody>
<tr>
<td>AND</td>
<td>v</td>
</tr>
<tr>
<td>Public awareness</td>
<td>Potential privacy infringements</td>
</tr>
</tbody>
</table>

then ... 'is it in the public interest?'

The 'benefits' are the furtherance of the Commission's functions under the CCM Act: A v Corruption and Crime Commissioner [2013] WASCA 288 at [232] per McLure P. At [218] McLure P stated that 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'.

The terms 'public exposure', 'public awareness', 'prejudice' and 'privacy infringement' are not defined in the CCM Act. They are to be given their ordinary meaning (the Interpretation Act 1984 s 19).

CCM Act s 99, which deals with the power to prohibit disclosure of information about a notice or summons, provides three examples of where prejudice may arise. Those factors are:

1. the safety and reputation of a person;
2. the fair trial of a person who has or may be charged with an offence; or
3. the effectiveness of an investigation.
The public interest

The CCM Act does not define 'the public interest'. The determination of the public interest for the purpose of conducting public examinations, is intended to be informed by the specific considerations in s 140(2) but is not limited by them.

The determination of what will advance the public interest is generally a discretionary judgment often confined only by the subject matter, scope and purpose of the Act conferring the power to make the assessment: O'Sullivan v Farrer (1989) 168 CLR 210, 216, A v Corruption and Crime Commissioner [2013] WASCA 288 at [80].

Very often the ascertainment of the public interest will require the consideration of a number of competing factors or considerations, or differing features or facets of the public interest: Osland v Secretary to the Department of Justice [2008] HCA 37 at [137].

Public examinations may serve the public interest by the fulfilment of the Commission's functions pursuant to CCM Act s 18 and the purposes of CCM Act s 7A. The following factors may be considered:

1. exposure of corruption;
2. exposure in public allows public sector agencies to take immediate remedial action to ensure good governance is not compromised;
3. exposure in public may encourage others with information about serious misconduct to come forward;
4. exposure in public may assist the Commission to help public authorities prevent serious misconduct as an aspect of its serious misconduct function (s 18(4));
5. openness avoids suspicion and rumour; and
6. the Commission's processes are open to public scrutiny.

If the Commission determines that a public examination is in the public interest, where appropriate, the Commission may nonetheless make orders pursuant to s 138(3) concerning the conduct of those examinations so as to avoid prejudice or damage to reputations. Such orders might include the conduct of part of the examination in private (s 140(4)), not to adduce certain material or to adduce redacted material, or the use of pseudonyms or suppression orders.
EVIDENTIARY CONSIDERATIONS

An examination is inquisitorial, that is, it is an inquiry being conducted by the Commission to ascertain facts. It is not an adversarial contest between parties trying to prove (or disprove) a case. The purpose is to ascertain the truth, to find out the facts of the matter and expose them to scrutiny.

The Commission is not bound by the rules of evidence and can inform itself on any matter in such manner as it thinks fit (s 135). For these reasons the notion of 'cross-examination' by counsel representing witnesses is misconceived: it is the role of the Commission itself to test the evidence so as to discern the truth.

Relevance

A witness may be examined on anything the Commission thinks is relevant (s 143(1)) and the Commission may look into what it bona fide believes will assist its inquiry, Ross v Costigan (No 2) (1982) 41 ALR 337 at 351. The concept of relevance or admissibility of evidence does not apply in the same way as it would in an adversarial proceeding.

It was held in Ross v Costigan (1982) 41 ALR 319 at 334:

...the Commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the Commission or counsel assisting, may nevertheless fail to do so. But if the Commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference in doing so. This flows from the very nature of the inquiry being undertaken.

The Commission’s examination power may properly be exercised to gather facts for further inquiry, or prove/disprove facts of circumstances relevant to the matter under investigation.

An investigation by the Commission is not focussed solely on the gathering of evidence that may be admissible in a prosecution or disciplinary proceeding. The Commission does not have the power to make findings (s 43(6)) as to criminal conduct and may only make recommendations for consideration to be given to prosecutions (s 43(1)).

General Scope and Purpose

Before the Commission conducts an examination for the purposes of an investigation under the CCM Act, the Commission is to inform the witness of the general scope and purpose of the investigation (s 138(1)) unless the Commission considers that in the circumstances it would be undesirable to do (s 138(2)).

The general scope and purpose of an examination is not a form of pleadings. The Commission does not conduct its examinations according to strict terms of reference, in the manner of a Royal Commission or other ad hoc commissions of inquiry.

A person seeking to challenge the Commission's jurisdiction to explore a particular matter at
an examination on the basis that it is outside the general scope and purpose of the investigation will have to establish that the questioning cannot, on any reasonable view, assist the Commission's investigation of the matter under investigation.

A line of questioning may be perceived to be irrelevant to the general scope and purpose of the investigation. However, as discussed above, the Commission is lawfully entitled to explore issues it *bona fide* considers may assist it, directly or indirectly, to form a view on a question of misconduct.

**Objections**

Legal practitioners should be judicious in their objections at an examination. Generally, the Commission will not be assisted by objections predicated on the rules or practice of evidence.

Greater assistance may usually be derived from a considered submission that the question put, or matter being explored, cannot serve to assist the Commission's inquiries or the formation of relevant opinions at its conclusion.

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 or outside any relevant examination. The Commission will then be in a position to carefully consider the matter before determining whether it should proceed as planned, or make any necessary adjustments to its examination program.

Where the Commission rejects a challenge to its powers, it may provide written reasons for its decision.
PROCEDURAL FAIRNESS

This chapter discusses the principles of 'procedural fairness' as they may apply to the conduct of an examination under CCM Act.

What does 'procedural fairness' mean?

'Procedural fairness' refers to an implied common law principle which ensures the probity of decision-making processes in relation to the exercise of statutory and prerogative powers.

The principle of procedural fairness is implied as a condition of the exercise of a statutory power and is inferred in statute establishing a statutory power unless clearly displaced: Minister for Immigration and Border Protection v SZSSJ; Minister for Immigration and Border Protection v SZTIZ [2016] HCA 29 at [75].

The requirements of procedural fairness depend upon the particular statute and particular circumstances of each case: Glynn v Independent Commission Against Corruption (1990) 20 ALD 214.

There is an established line of case authority confirming that the condition of procedural fairness applies to commissions of inquiry/ statutory investigative bodies (such as the Commission) in the exercise of their statutory powers: Annetts v McCann [1990] HCA 57; Lawrie v Lawler [2016] NTCA 3.

What interests?

The common law principle applies where the exercise of statutory power affects an individual's 'interests'.


What does procedural fairness require overall?

Procedural fairness is concerned with procedure, rather than with outcomes: Edward Moses Obeid Snr v David Andrew Ipp [2016] NSWSC 1376 at [90].

'What is required by procedural fairness is a fair hearing, not a fair outcome':SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 at [25].

The overall question is whether, having regard to all the circumstances, the hearing was fair or whether, in a real sense, there had been some practical injustice to the appellant 'which is the gravamen of procedural fairness' (per Middleton J in Telstra Corporation Ltd v Smith (2008) 105 ALD 521 at [61] and [62])

The concern of procedural fairness is to avoid practical injustice - there is no denial of procedural fairness where no practical injustice is shown: Re Minister for Immigration and Multicultural and Indigenous Affairs, Re; Ex parte Lam (2003) 214 CLR 1 at 821.

The requirements of procedural fairness must depend on the circumstances of the case and do not require the inflexible application of a fixed body of rules but rather, specific fairness in all the circumstances: National Companies and Securities Commission v News Corporation
The obligation of procedural fairness on a commission of inquiry will likely include providing an opportunity to deal with adverse information that was credible, relevant and significant to its potential findings: *Kioa v West* (1985) 159 CLR 550 at 628–629.

The rules of procedural fairness may also vary from case to case although each may be conducted before the same tribunal or person: *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 per Gibbs CJ at 312. See also: *Independent Commission Against Corruption v Chaffey* (1992) 30 NSWLR 21 per Gleeson CJ at 28.

**The hearing rule**


The hearing rule requires a fair opportunity to be heard: per *Mahon v Air New Zealand* [1984] AC 808 (per Lord Diplock at 820) and applied in *Annetts v McCann* [1990] HCA 57; 170 CLR 596. This applies to the party liable to be directly affected by the decision: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [32] (the High Court approving the Full Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590–591).

In the exercise of the power to conduct an inquiry the party liable to be affected will have notice of:

1. the nature and purpose of the inquiry;
2. the issues to be considered in conducting the inquiry; and
3. the nature and content of information that might be taken into account in making an adverse conclusion.

See *Minister for Immigration and Border Protection v SZSSJ; Minister for Immigration and Border Protection v SZTZI* [2016] HCA 29 at [83] and also *Lawrie v Lawler* at [180].

Fairness may also require disclosure of adverse material. *Edward Moses Obeid Snr v David Andrew Ipp* [2016] NSWSC 1376 citing *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214 [96]:

> Inevitably such an inquiry will expand and move into new or different areas, within its terms of reference, as it progresses. What is necessary is that by the end of the hearing, a party potentially affected by an adverse finding have the opportunity to meet it by submission, and if necessary, by evidence…. (per Wood J at 218–219).

**Procedural fairness at the Commission**

The Commission recognises that there are reputational and other potential consequences to a published opinion of serious misconduct.

In using its examination powers under the CCM Act, the Commission seeks to afford
procedural fairness in accordance with relevant provisions in the CCM Act and in recognition of the relevant legal principles as it considers may be required by the circumstances of each specific case.

**Procedural fairness provisions in the CCM Act**

The following provisions in the CCM Act relate to procedural fairness:

1. s 86 requires the Commission to afford an affected party a reasonable opportunity to make representations concerning matters which may be adverse to their interests;

2. s 135 provides that the Commission is not bound by rules of evidence and can inform itself on any matter in such manner as it thinks fit;

3. s 138(1)-(2) provides that a witness at an examination is to be informed of the general scope and purpose of the investigation unless undesirable to do so;

4. s 139 provides that except as provided in s 140, an examination is not open to the public;

5. s 140 provides for public examinations as the exception to s 139;

6. s 142 allows a witness (or interested party in special circumstances) to be legally represented at an examination;

7. s 143(2) allows a person representing a witness, so far as the Commission thinks proper, to examine that witness on any matter that the Commission considers relevant.

**Commission examinations**

The Commission may also afford procedural fairness by any of the following:

1. opening address by Counsel Assisting the Commission outlining the matters under investigation and relevant;

2. witnesses are given opportunity to respond to possible adverse matters or conclusions;

3. affected person/s may apply to the Commission for further evidence to be called;

4. closing submissions as to relevant issues, possible findings of fact and conclusions.

There is no entitlement for a witness to be informed that evidence has been taken that is adverse to them.

**Section 86**

The Commission is required by s 86 to provide a draft of relevant excerpts of its reports to persons who may be adversely affected. Provision of draft or tentative adverse findings is not a freestanding requirement of procedural fairness: *Lawrie v Lawler* [2016] NTCA 3 at [192].

Further, a decision-maker does not have to reveal their thought processes: *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-2.
Whether or not procedural fairness has been afforded is ultimately a matter for the courts to determine: *Kioa v West* at 627.

**The rule against bias**

Procedural fairness also requires that a decision-maker should neither be biased (actual bias) nor appear to be biased (apprehended or ostensible bias). This is known as the 'rule against bias'.

**Application in a Commission examination**

The requirement for a decision-maker to bring an impartial mind to matters before them is relevant in the context of non-judicial administrative proceedings, including commissions of inquiry.

In judicial proceedings the rationale relates to fundamental and deep-rooted considerations of judicial independence and the need to maintain and promote public confidence in the courts. In administrative proceedings it is said that the apprehended bias principle is derived solely from natural justice or procedural fairness requirements: *Re Refugee Tribunal Ex parte H* (2001) 179 ALR 425.

The precise practical requirements of the rule against bias principle vary from case to case, and will be influenced by the nature, function and composition of the particular tribunal: *Re Finance Sector Union; ex parte Illaton Pty Ltd* (1992) 66 ALJR 583.

The statutory context of functions with respect to serious misconduct by public officers will be a prime consideration: see *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504.

A Commission examination is an inquisitorial environment. A greater degree of intervention will be permitted on the part of a presiding official in an inquisitorial hearing than might be the case in curial proceedings: see *Re Carruthers v Connolly, Ryan & A-G* [1997] QSC 132.

It is expected that the Commissioner may directly, and through counsel assisting, question witnesses in the course of the examination. This conduct, of itself, will not demonstrate 'bias'.

The expression of tentative views in examinations will not demonstrate 'bias':

> It must be stressed that the expression of tentative views, designed to elicit relevant submissions, does not constitute bias nor create a reasonable apprehension of bias. Indeed, this practice actually enhances procedural fairness by alerting the parties to the thoughts of the tribunal and providing them with an opportunity to persuade the tribunal to adopt a different course.

('Apprehension of Bias', a paper delivered by Justice Morris at the Australasian Conference of Planning and Environment Courts and Tribunals 14 September 2006)

**The required 'tests' for bias in case law**

A concern of bias will not be grounded unless it meets the tests for actual or apprehended bias. Actual bias concerns the actual state of mind of a person said to be biased. Its focus is on reality rather than perception.
The test for actual bias requires the applicant to 'distinctly and clearly' prove the bias:

*South Western Sydney Area Health Services v Edmonds* [2007] NSWCA 16 at [97].

'Apprehended' bias is to be distinguished from 'actual' bias. Its focus is on a perception of bias rather than actual bias in fact.

In a judicial context, the ground for disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather that he (or she) will decide the case adversely to one party: *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

The test for apprehended bias is concerned with the perception of bias by a hypothetical outsider - 'the fair-minded lay observer': *Warwick Entertainment Centre Pty Ltd v Earlmist Pty Ltd* [2016] WASC 79.

The general test for apprehended bias is whether a hypothetical fair-minded person who is properly informed as to:

1. the statutory context and decision-making structure;
2. the matters to be decided; and
3. the objective facts which are material to the allegation of apprehended bias,

might reasonably apprehend that the decision-maker might not bring an independent and impartial mind to the resolution of the decision he or she is required to make: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

In administrative proceedings it is likely that the onus is on the applicant alleging bias by a Commissioner to:

1. identify the factors relevant to the decision-maker that give an apprehension of bias;
2. identify how that factor(s) may cause apprehension that the decision-maker would be partial;
3. identify that the apprehension by a fair minded lay observer is reasonable and thereby demonstrating any incapacity of the Commissioner to deal with issues impartially.

The onus is not satisfied by setting a low threshold. A reasonable apprehension of bias does not arise merely on the basis of 'fanciful claims' - the allegations must be 'firmly established' and not be 'reached lightly': *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 519.

**Commission examinations**

Where a witness has proper grounds for a concern as to actual or apprehended bias in a Commission examination, counsel appearing for the witness potentially affected should raise the concern in writing, in detail, to the Commissioner, prior to the day of examination.

It will be appropriate to allow the Commission a reasonable time to respond to the written concerns, before commencement of any proceedings in respect of the matter.
PRIVILEGE

‘Privilege’ is a term describing a number of rules which operate to exclude evidence on the basis that it would be adverse to a fundamental principle or relationship if it were disclosed. Importantly, 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.

Examples include legal professional privilege, privilege against self-incrimination, marital privilege, parliamentary privilege and public interest immunity.

Legal professional privilege

Legal professional privilege (LPP) is upheld as a fundamental and basic common law right and not merely a rule of evidence.

The case of Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission (2002) 213 CLR 543 describes the core principles at 552:

It is now settled that legal professional privilege 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 services, including representation in legal proceedings.

LPP prevents disclosure where it involves:

1. confidential communications between a client and their lawyer (in their legal capacity); and

2. communications made for the 'dominant purpose' of:
   a. giving or obtaining professional legal advice; or
   b. the provision of legal services, including legal representation in litigation which is pending or in reasonable contemplation.

The 'dominant purpose' test applies to the purpose of the communication at the time it was made.

Legal professional privilege extends to the compulsory disclosure of communications and extrajudicial proceedings: Baker v Campbell (1983) 153 CLR 52.

Legal professional privilege may be applied to resist giving information or producing documents within investigatory procedures pursuant to s 155 Trade Practices Act 1974 (Cth) (see Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission (2002) 213 CLR 543 at 552-553).

Legal professional privilege may also be used to refuse to produce documents that are the subject of a search warrant authorised by statute or other extra-curial process as well as a subpoena issued under or discovery required by rules of court (see Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission (2002) 213 CLR 543 at 563).
LPP applies to investigative bodies such as a Commission exercising powers of compulsion, subject always to clear and unmistakable statutory language relating to LPP (see *AWB Ltd v Cole* [2006] FCA 571 at [51]).

**LPP and the CCM Act**

CCM Act s 144 provides that a person who is required by the CCM Act to answer questions, give evidence, produce records, things or information or make facilities available, is not prevented from claiming LPP as a reason for not complying with the requirement. However, under subsection (2) the privilege does not apply to 'a public authority or public officer in that capacity'.

This means that when a witness is summoned to appear at, or produce a record or thing to the Commission in their capacity as a public officer, neither the public officer nor their agency can avail themselves of the immunity of legal professional privilege as a reason for refusing to comply with the Commission’s request.

An exception may apply where the communication was for the purpose of providing or receiving legal advice in relation to a witness's appearance, or reasonably anticipated appearance, at an examination before the Commission.

**Commission process for LPP claims**

If a witness (other than a public authority or public officer in that capacity) claims LPP over a communication required to be produced to or in answer to the questions of the Commission, the presiding Commissioner will make a decision about the LPP claim.

**Public Interest Immunity**

'Public interest immunity' or 'public interest privilege' provides an exemption to giving evidence and/or producing documents or information where disclosure would be against the public interest and was historically known as 'Crown privilege'.

The principle of public interest immunity is a principle of law to be applied in respect of evidence, irrespective of any actual claim of privilege by a party.

A typical reason for a claim of PII is the need to safeguard the proper functioning of the executive arm of government and of the public service. For example, there is a high degree of public interest in the confidentiality of documents recording Cabinet deliberations, however, immunity in this context is not absolute.

Public interest immunity it is not confined to judicial or quasi-judicial proceedings and may apply to the execution of search warrants under *Crimes Act 1914* (Cth) s 10 (See *Jacobsen v Rogers* (1995) 182 CLR 572, at 589).

Public interest immunity may be available in investigative hearings.

Issues of public interest immunity apply to documents and other forms of real evidence and to the oral evidence of witnesses (see *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ at 38; *Holden v Marks* (1995) 17 WAR 447 per Rowland, Murray and Anderson JJ at 465; *R v Young* (1999) 46 NSWLR 681 per Beazley JA at [125]).
The Commission may resolve questions of public interest immunity attaching to evidence in accordance with the principles laid down in the authorities, including determination of the 'highest public interest' (see Halden v Marks (1995) 17 WAR 447 at 464-5). The Commission must balance the public interest in non-disclosure against the public interest in ensuring that inquisitors have access to relevant evidence.

**Public interest immunity and the CCM Act**

Very clear statutory language is required to exclude a common law doctrine such as public interest immunity. CCM Act s 96 allows the Commission, by summons, to require a person to attend an examination and give oral evidence and to produce any record or thing.

CCM Act div 2 pt 7 provides for 'claims of privilege and reasonable excuse' in Commission examinations. As referred to above in this chapter, s 144 expressly deals with another common law right, that of legal professional privilege. In contrast, Division 2 does not contain an express provision relating to public interest immunity.

Practical difficulties in giving effect to the immunity in the context of examinations are likely to be an inadequate reason for holding the doctrine to be inapplicable: Jacobsen v Rogers (1995) 182 CLR 572.
CONTEMPT

The circumstances in which a person may be in contempt of the Commission are detailed in CCM Act pt 10.

Failure to comply with a notice or summons

A person who fails without reasonable excuse to comply with a notice served under s 94 or s 95, or a summons served under s 96, is in contempt of the Commission (s 158(a), s 159).

The expression 'reasonable excuse' excludes the failure to produce a document or other thing that might incriminate or tend to incriminate the person, render the person liable to a penalty or would be a breach of an obligation not to disclose information about the document or thing (s 157).

A person who, in purported compliance with a notice served on any person under s 94 or s 95, furnishes information knowing it to be false or misleading in a material particular, is in contempt of the Commission (s 158(b)).

A person required to comply with a notice served under s 94 or s 95, or a summons served under s 96, has the same protection, and is subject to the same liabilities in any civil or criminal proceedings, as a witness in any case tried in the Supreme Court (s 163(6)).

Failure to be sworn or give evidence

It is a contempt of the Commission to fail to be sworn or make an affirmation or answer any question relevant to the investigation that the Commission requires a person to answer. A person is not excused from the requirement to answer the question on the ground that the answer might incriminate or tend to incriminate the person or render the person liable to a penalty (s 160).

A statement made by a witness in answer to a question that the Commission requires the witness to answer is not admissible in evidence against the person making the statement in any criminal proceedings or proceedings for the imposition of a penalty (other than contempt proceedings, proceedings for an offence against the CCM Act or disciplinary action) (s 145). However, the witness may, in any civil or criminal proceedings, be asked about the statement in accordance with Evidence Act 1906 s 21, which permits cross-examination on and proof of prior inconsistent statements.

As the Court noted in Hammond v Aboudi; Hammond v Sorani [2005] WASCA 204 at [31], a breach of s 160 is established if a person served with a summons under s 96:

1. fails to answer any question;
2. the question is relevant to the investigation; and
3. the Commission requires the person to answer the question

Hindering the execution of search warrants

Hindering the execution of a search warrant, without reasonable excuse, is a contempt of the Commission (s 161).
Other contempts

Section 162 sets out a number of other contempts of the Commission:

(1) A person who —

   (a) insults the Commission while the Commission is conducting an examination; or

   (b) deliberately interrupts an examination conducted by the Commission; or

   (c) at an examination conducted by the Commission, contravenes a provision of this Act relating to the examination; or

   (d) creates or continues or joins in creating or continuing, a disturbance in or near a place where the Commission is conducting an examination; or

   (e) does anything else at an examination conducted by the Commission or otherwise that would be contempt of court if the Commission were a judge acting judicially,

is in contempt of the Commission.

Punishment of contempt

The Supreme Court has jurisdiction to deal with contempt as if it were a contempt of the Supreme Court (s 163).

Where a contempt of the Commission is alleged to have taken place the Commission may present to the Supreme Court a certificate setting out the details of the act or omission that the Commission considers constitutes the alleged contempt (s 163(1)). Such a certificate is prima facie evidence of the matters certified in it (s 163(2)). The question whether or not the acts or omissions the subject of a certificate constitute contempt is a matter for the Supreme Court: Hammond v Aboudi; Hammond v Sorani [2005] WASCA 204 at [24].

An act may be punished as a contempt of the Commission even though it could be punished as an offence (s 164(1)).