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INDEPENDENT COMMISSION  
AGAINST CORRUPTION

NEW SOUTH WALES

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**INFORMATION  
FOR WITNESSES**

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**MARCH 2019**

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## ABOUT THE INDEPENDENT COMMISSION AGAINST CORRUPTION

The NSW Independent Commission Against Corruption (“the Commission”) was established in 1989 by the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”). It investigates, exposes and prevents corrupt conduct involving or affecting NSW public authorities and public officials.

For the purposes of an investigation, the Commission may take evidence from a witness in public (a public inquiry) or in private (a compulsory examination).

## ABOUT YOUR SUMMONS

Your summons sets out the date and time when you must attend and whether you are required to give evidence in a public inquiry or a compulsory examination and/or produce documents.

**You must do everything your summons asks you to do. You may be committing an offence under the ICAC Act if you do not do what is required.**

The summons will indicate if there are any restrictions on disclosing to anyone that you have received the summons. You may be committing an offence under the ICAC Act if you fail to comply with any such restriction.

It is an offence to fail to attend or produce any required documents at the time and date specified in the summons without reasonable excuse. A warrant for your arrest may be issued if you fail to attend.

If you have any questions about the summons or attending to give evidence, please contact the Commission officer named in the summons, or your lawyer.

## LEGAL REPRESENTATION

Witnesses are generally allowed to be represented by a lawyer. On some occasions, the Commission may refuse to allow a particular lawyer to appear, where to do so may prejudice the investigation or give rise to a conflict of interest.

You may be able to obtain free legal advice and representation from the **Office of the General Counsel**, Department of Justice. Contact details are:

Telephone: (02) 8346 1488

Address: Level 4 West, Henry Deane Building, 20 Lee Street Sydney.

More details can be obtained from the website - [www.lro.justice.nsw.gov.au](http://www.lro.justice.nsw.gov.au).

## PRE-HEARING PROVISION OF DOCUMENTS

The Commission does not make available to a witness documents proposed to be put to the witness in a compulsory examination prior to that compulsory examination.

Prior to the commencement of a public inquiry, the Commission may provide relevant persons with confidential access to selected documents through its restricted website.

Application for access to the restricted website can be made on the attached application form.

## **WHEN YOU GIVE EVIDENCE**

Public inquiries and compulsory examinations are conducted and presided over by the Chief Commissioner, a Commissioner or an Assistant Commissioner.

The person presiding should be addressed as “Commissioner”.

You can give your evidence on oath or affirmation.

As a witness, you will be asked questions by Counsel Assisting the Commission. You may be asked questions by lawyers appearing for others involved in the investigation.

If you believe that answering any question or producing any document may be incriminating, you may object. If you object to answering a question or producing a document, you must still answer the question or produce the document, however, the evidence cannot then be used against you in any subsequent criminal or civil proceedings, except in relation to prosecutions for offences under the ICAC Act. Evidence given by a public official may be used in disciplinary proceedings against that public official where the Commission has made a finding in a report under s 74 of the ICAC Act that the public official has engaged, or has attempted to engage, in serious corrupt conduct.

If you are not sure whether you should object, you should speak with your lawyer. If you do not have a lawyer representing or advising you, then the presiding Commissioner will explain to you your right to object and the effect of such an objection.

## **PUBLIC INQUIRIES**

The Commission has issued Standard Directions for Public Inquiries and guidelines under s 31B of the ICAC Act relating to the conduct of public inquiries. Copies of these are attached.

## **COMPULSORY EXAMINATIONS**

Evidence given in a compulsory examination is private and usually subject to a non-publication direction under s 112 of the ICAC Act. This means that a witness cannot talk to others about the compulsory examination, their evidence, or the fact that a compulsory examination has occurred, save that a witness can talk with their legal representative.

A direction can be lifted or varied by the Commission where it is necessary or desirable to do so in the public interest. You may apply to the Commission to have a direction lifted or varied on public interest grounds.

## **WITNESS COOPERATION POLICY**

The Commission’s witness cooperation policy is published on its website.

A person can cooperate with the Commission by:

- fully reporting any corrupt conduct at the earliest possible time;

- honestly and completely disclosing all relevant information;
- providing voluntary assistance during an investigation, including by providing evidence and/or other information in relation to the subject matter of an investigation, including at a public inquiry; and
- giving evidence in the criminal prosecution of others arising from the investigation.

Merely fulfilling certain legal obligations under the ICAC Act, such as producing documents in response to a notice or summons issued by the Commission or attending to give evidence in response to a summons (unless the evidence is comprehensive and entirely truthful), does not constitute cooperation for the purposes of the policy.

There are various potential benefits available to those who fully cooperate with the Commission.

### **1. Acknowledgement of assistance in a Commission report**

The Commission may prepare a report in relation to any matter that has been the subject of an investigation. Such reports are published on the Commission's website.

Where appropriate and subject to the consent of the relevant person(s), the Commission will include mention in its report of the cooperation provided by particular persons and the value of that cooperation in uncovering corruption. This will be a public acknowledgement of the assistance provided in uncovering corruption.

### **2. Discretion not to make corruption findings**

In reporting on its investigations, the Commission may make factual findings and findings that a person has engaged in serious corrupt conduct.

The Commission may exercise a discretion not to make such a finding, even though the factual findings would permit it to do so. The discretion may be exercised where a person has fully cooperated with the Commission. Relevant considerations include:

- the value to the Commission of the assistance, including the value of any evidence or other information provided by the person;
- the stage of the investigation the person began to fully cooperate;
- the extent and level of their involvement in the relevant corruption;
- whether they were an instigator or beneficiary of the corrupt conduct; and
- whether the making of such a finding would be, in all the circumstances, unduly severe.

### **3. Discretion not to recommend consideration of prosecution**

In reporting on its investigations, the Commission may make a statement as to whether consideration should be given to:

- obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of a person for a specified criminal offence;
- taking action against a person for a specified disciplinary offence; and

- taking of action against a person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

Where a person has fully cooperated with the Commission, the Commission may also exercise its discretion to not recommend consideration be given to seeking the advice of the DPP or the taking of disciplinary or dismissal action against that person.

Where a person, who has given false or misleading evidence to the Commission, voluntarily returns to the Commission and cooperates by providing a full and truthful account, the Commission will take that cooperation into account when deciding whether consideration should be given to obtaining the advice of the DPP with respect to a prosecution for an offence under s 87 of the ICAC Act of giving false or misleading evidence. In exercising the discretion the Commission will take into account:

- whether the person has on their own volition approached the Commission to change their evidence;
- whether the person has provided a full and truthful account;
- the stage of investigation at which the person approached the Commission to change their evidence; and
- whether the change is likely to materially affect the progress and outcome of the investigation.

#### **4. Indemnities and undertakings**

Under s 49 of the ICAC Act, the Commission may recommend to the NSW Attorney General that a person be granted an indemnity from prosecution for a specified offence or in respect of specified acts or omissions. If such an indemnity is granted, no proceedings may thereafter be instituted or continued against the person in respect of the offence or the acts or omissions.

The Commission may also recommend to the Attorney General that a person be given an undertaking that an answer, statement or disclosure in proceedings before the Commission or the fact of a disclosure or production of a document in proceedings before the Commission will not be used in evidence against the person. If such an undertaking is given, the answer, statement, disclosure or the fact of the disclosure or production is not admissible in evidence against the person in any civil or criminal proceedings, other than proceedings in respect of the falsity of evidence given by the person.

#### **5. Assistance to a person convicted of an offence**

Where a person who has cooperated with the Commission is subsequently convicted of an offence arising from the Commission investigation, the Commission can provide a letter to the relevant court setting out details of the cooperation and request the court take that cooperation into account when imposing the sentence.

## **RECORDING AND LIVE STREAMING YOUR EVIDENCE**

Your evidence will be electronically recorded and a written transcript made from the recording.

Public inquiry transcript is published on the Commission's website – [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au) – and can be accessed from that site.

The Commission does not usually provide a witness with a copy of the transcript of their compulsory examination evidence as it will be the subject of a s 112 direction.

The Commission may publicly live stream its public inquiries via the internet so that external internet users (members of the public and others) can view the proceedings via a desktop or laptop computer, smartphone or tablet.

If you have concerns about your public inquiry evidence being live streamed, you should make a written representation to the Commission, however, the discretion remains with the Commission as to whether or not any exemptions to live streaming will apply.

## **ICAC REPORTS**

After all public inquiries, and sometimes after compulsory examinations, the Commission prepares reports which are provided to Parliament and made public by the Presiding Officers of the Houses of Parliament.

Once a report is made public it is published on the Commission's website. If you are the subject of adverse findings, arrangements will be made to notify you of the likely date the report will be made public.

## **YOUR PROTECTION**

The Commission takes seriously the need to protect witnesses against any potential harm, intimidation or harassment.

If the safety of a person (or the safety of any other person, including family members) may be prejudiced or the person may be subject to intimidation or harassment because the person assisted the Commission, the Commission may make arrangements to:

- protect the person's safety; or
- protect the person from intimidation or harassment.

Such arrangements may involve directing the Commissioner of Police to:

- provide protection;
- provide personnel or facilities or both to assist in providing protection; or
- otherwise assist in providing protection.

The Commission may also make an order to protect a person's safety or to protect a person from intimidation or harassment. It is a criminal offence for anyone to contravene such an order.

It is a criminal offence for any person who uses, causes, inflicts or procures, or threatens to use, cause, inflict or procure, any violence, punishment, damage, loss or disadvantage to any person for or on account of the person:

- assisting the Commission; or
- giving evidence to the Commission.

It is also a criminal offence for an employer to dismiss an employee or prejudice the employee because the employee assisted the Commission.

## **EXPENSES**

The ICAC reimburses witnesses for reasonable expenses incurred in attending a compulsory examination or public inquiry (other than legal expenses). Claims should be sent to the ICAC at GPO Box 500, Sydney NSW 2001.

### **Loss of income**

Any claim for reimbursement for the loss of wages, salary or income for the time spent in hearings must be signed by your employer. If you are self-employed, you must provide details of the methods used to calculate your loss of income, and you may be required to provide evidence of the actual loss. The Commission may impose a maximum daily rate.

Please complete the attached Form 1 "Claim for Witness Expenses".

### **Fares**

The Commission will pay for your reasonable transport costs in getting to and from its premises on days that you are required to attend to give evidence. This includes an allowance for kilometres travelled if your own vehicle is used. The Commission will pay for travel by taxi in the inner metropolitan area but requires receipts for taxi fares claimed.

For country and interstate witnesses, the Commission will normally arrange for travel by air. This can be arranged for you by telephoning the Commission officer named in your summons.

Please complete Form 2 "Claim for Witness Travel Expenses".

### **Meals & Accommodation**

You are eligible to be reimbursed for reasonable costs of meals, including non-alcoholic beverages, if your appearance at the Commission, or related travel, prevent you from having the meal at home or making normal arrangements.

The Commission will arrange accommodation (including breakfast and, if appropriate, an evening meal) for country or interstate witnesses if an overnight stay is necessary. If you choose to make other arrangements, reimbursement will not exceed normal accommodation costs and will be subject to the presentation of receipts.

Please complete Form 2 "Claim for Witness Travel Expenses".





## APPLICATION FOR ACCESS TO ICAC RESTRICTED WEBSITE

The application is only for persons who have been summonsed to appear at the public inquiry or their legal representative. Once completed the application should be emailed to [icac@icac.nsw.gov.au](mailto:icac@icac.nsw.gov.au) for the attention of the Commission officer nominated in the summons. Alternatively, it can be delivered to the Commission at Level 7, 255 Elizabeth Street, Sydney or mailed to the Commission at GPO Box 500, Sydney, NSW, 2001.

The Commission reserves the right to refuse or cancel access to the ICAC restricted website.

### Part 1 – Registration Details

**Witness name:**

**Applicant's name:**

**Applicant's address:**

**Applicant's contact telephone number:**

**Applicant's email address:<sup>1</sup>**

**Applicant's designation: (please circle)**

Senior counsel

Junior counsel

Solicitor

Clerk

Other (specify)

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<sup>1</sup> The email address will be your user name for access to the secure website. It must be a personal email address and not a generic email address.

## Part 2 – Conditions of Access

The ICAC restricted website has been established for the purpose of:

- the Commission’s public inquiry in which the witness has been summonsed to give evidence
- providing authorised persons access to any pre-inquiry disclosure material
- once the inquiry has commenced, providing authorised persons with access to relevant material, including that material proposed to be made an exhibit, lists of proposed witnesses and documents marked for identification .

The content of the ICAC restricted website is subject to a direction of the Commissioner under section 112 of the *Independent Commission Against Corruption Act 1988* (“the Act”) to the effect that the content of the ICAC restricted website may only be published to the witness or a legal representative of the witness who is authorised by the Commission to have access to the ICAC restricted website, and should then only be used by those persons for the purpose of receiving or providing legal advice and representation in relation to the appearance, or reasonably anticipated appearance of the witness at the public inquiry. Commission officers may however publish or communicate material on the ICAC restricted website for the purposes of and in accordance with the Act or pursuant to further direction of the Commission under the Act. It is an offence for any person to publish or communicate the contents of the ICAC restricted website contrary to a section 112 direction.

Only authorised persons may access the ICAC Restricted Web Site. Access to the ICAC Restricted Web Site is via user name and password. Passwords are associated with each user name and are to be known only to the authorised user. Temporary passwords are issued for new accounts and new users are required to change the password when they first log in. The following criteria apply to the selection and use of passwords. A password:

- must be at least six letters or symbols and differ from the user name by at least three letters
- must not be associated directly with the user’s personal details, e.g. related names (maiden, middle or street names) dates of birth, etc., cannot be used
- must be changed at least every three (3) months
- will be masked when entered and displayed on the terminal as a series of stars

If the correct password has not been entered after three (3) attempts the user account will be locked and the Web Content Manager must be contacted to regain access. Authorised users must take reasonable care to ensure their user name and password is protected from unauthorised use.

I understand and agree to the above conditions of use.

.....  
Applicant

.....  
Date

## Part 3 – Approval to Establish User Account

TO: The Web Content Manager

The applicant is a witness/the nominee of a witness who has been summonsed to give evidence at the Commission's public inquiry commencing .....  
(insert date)

A user account may be established for the applicant to access content of the ICAC restricted website in respect of operation/s .....  
(insert operation name/s)

.....  
Signature of : Principal/Senior Lawyer  
Solicitor to the Commission

Date



**INDEPENDENT COMMISSION AGAINST CORRUPTION**  
**STANDARD DIRECTIONS FOR PUBLIC INQUIRIES**  
**FEBRUARY 2018**

These directions apply to the conduct of a public inquiry by the Independent Commission Against Corruption (the Commission). They should be read in conjunction with the Procedural Guidelines issued by the Commission under s 31B of the *Independent Commission against Corruption Act 1988* ("the ICAC Act").

**Sitting times**

1. The Commission ordinarily sits from Monday to Friday each week. Usual hearing hours are from 10:00am to 4:00pm, with a luncheon adjournment from 1:00pm to 2:00pm.

**Authorisation to appear and legal representation**

2. The presiding Commissioner may authorise a person to appear at a public inquiry or a specified part of a public inquiry if it is shown to the satisfaction of the presiding Commissioner that the person is substantially and directly interested in any subject-matter of the public inquiry. Authorisation can be granted subject to conditions.
3. The presiding Commissioner may withdraw authorisation to appear or make the authorisation subject to altered or additional conditions, at any time.
4. Authorisation to appear entitles the person to whom it is granted to participate in the public inquiry subject to the presiding Commissioner's control and to such extent as the presiding Commissioner considers appropriate.
5. The presiding Commissioner may authorise:
  - a. a person authorised to appear; or
  - b. a person giving evidence at the public inquiry;to be legally represented at the public inquiry or at a specified part of the public inquiry.
6. Where it is proposed that an application will be made for authorisation to appear and/or for a party or witness to be legally represented, the application should be made in writing (including by email) to the Commission in the first instance. The application should provide the name of the party or the witness, the names of the legal representatives who seek authorisation and the reason(s) why the party or the witness has a sufficient interest.
7. The Commission prefers that each person seeking to be legally represented have separate and independent representation. The presiding Commissioner will, however, receive and consider applications that a single lawyer or team of lawyers be permitted to represent more than one person where:

- a. it can be demonstrated that there is some reasonable purpose for seeking representation of that kind;
- b. the most senior lawyer involved is able to assure the Commission that no conflict of interest is anticipated; and
- c. all of the lawyers involved give an undertaking, through the most senior lawyer, to inform the Commission immediately upon recognising that a conflict of interest has arisen.

#### **Conduct of the public inquiry – witnesses**

8. Subject to the control of the presiding Commissioner, Counsel Assisting will determine what witnesses to call at a public inquiry and the order in which they are called. It may be necessary to call some witnesses to give evidence on more than one occasion. In determining what evidence to place before the Commission Counsel Assisting will consider the credibility, relevance and significance of that evidence and the extent to which such evidence will assist the Commission to make factual and other findings.
9. The presiding Commissioner may decide to receive the evidence of a witness orally or by statement. The presiding Commissioner will decide whether to require a witness giving evidence by statement to attend for examination or cross-examination.
10. Persons required to give evidence will be provided with appropriate notice of the time the Commission will call upon their summons to attend and give evidence. Witnesses with a particular period of unavailability are required to give notice of that unavailability to the Commission at the earliest possible opportunity.
11. The Commission will regularly publish on its website a list of witnesses proposed to be called each week of the public inquiry.
12. All witnesses will be called to give evidence by Counsel Assisting, and then examined by Counsel Assisting. If there is more than one Counsel Assisting there may be circumstances in which a witness might be examined by more than one of the Counsel Assisting. The witness may then be cross-examined by or on behalf of any person considered by the presiding Commissioner to have sufficient interest to do so. The witness may then be examined by his or her own legal representative. Counsel Assisting may re-examine. Duplication and repetition must be avoided.
13. In determining whether a person has sufficient interest to cross-examine a witness, the presiding Commissioner may call upon the cross-examiner to:
  - a. identify the purpose of the cross-examination;
  - b. set out the issues to be canvassed; and
  - c. state whether a contrary affirmative case is to be made, and if so the details of that case.

14. Where, in the opinion of the cross-examiner, public disclosure of any of the matters referred to in paragraph 13 would substantially undermine the forensic utility of the cross-examination, the cross-examiner may, with the leave of the presiding Commissioner, address those matters in writing. To that end, the cross-examiner must be in a position to do so when called upon by the presiding Commissioner.
15. The presiding Commissioner may:
  - a. limit the particular topics or issues upon which a party can examine or cross-examine; and
  - b. impose time limits upon examination or cross examination.
16. Save as set out in paragraphs 17 to 19 of these Directions, the Commission will not apply the rule in *Browne v Dunn*.
17. The Commission expects that, where it is to be invited to reject or not accept the evidence of a witness on a material fact or issue, on the grounds the witness deliberately gave false evidence, the evidence is unreliable, or the witness has made a mistake on a significant issue, the material grounds of such contention must be put to the witness to allow the witness an opportunity to offer an explanation.
18. What is stated in paragraph 17 is not intended to mean that:
  - (a) mere inconsistencies and unimportant differences in the evidence should be raised;
  - (b) once the grounds for rejecting or not accepting the evidence of a witness have been put by one party, other parties need to put them again; or
  - (c) the grounds for rejecting or not accepting the evidence of a witness need to be put where the Commission is on notice from statements made during the public inquiry by or on behalf of a party, or that party's evidence, or from the general way in which the party has conducted its previous questioning, or some similar source, that the witness's evidence is under challenge on those grounds.
19. Once a witness has been cross-examined on a particular issue, no further cross-examination on that issue will be allowed unless the person wishing to cross-examine the witness on that issue can demonstrate the proposed cross-examination differs to a significant degree from the cross-examination that has taken place.
20. The procedure to be followed by any person seeking to place evidence before the public inquiry is set out in the s 31B Procedural Guidelines.
21. Leave may be granted to any affected person (under s 74A(3) of the ICAC Act) to adduce mitigatory evidence bearing upon the exercise by the Commission of its powers under s 74A(2) of the ICAC Act. Any affected person wishing to adduce such evidence should apply for leave prior to the close of evidence at the public inquiry.

**Conduct of the public inquiry – documents**

22. The s 31B Procedural Guidelines set out the circumstances and procedure by which access will be given to documents prior to the commencement of the public inquiry.
23. Subject to the control of the presiding Commissioner, Counsel Assisting will determine which documents are tendered, and the time at which they will be tendered.
24. A copy of any document proposed to be put to a witness in cross-examination must be provided to Counsel Assisting as soon as possible after a decision is made to use the document for such purpose. In all cases, the document must be provided to Counsel Assisting prior to the commencement of the cross-examination.
25. Any person wishing to have a document placed before the public inquiry must notify the Commission by providing a copy of the document. Commission staff may require the production of other documents. Counsel Assisting will decide whether or not to tender any document. An application may be made directly to the presiding Commissioner to tender a document only after the above procedure has been completed, and Counsel Assisting has refused to tender the document.

**Suppression orders**

26. Suppression orders may be made relating to names and identifying details of persons who have a legitimate need for protection.
27. Parties granted confidential electronic access to documents should notify the Commission lawyer with carriage of the matter of any application for a suppression order in relation to any document or part of a document. Such notification is to be in writing and must be made as soon as possible. The application should clearly identify the material sought to be suppressed and the public interest grounds on which the material should be suppressed.
28. The presiding Commissioner will determine whether or not to hear oral submissions in support of such written applications.
29. Those making such written applications for suppression orders will be advised once the applications have been determined.

**Publication of, and access to, evidence**

30. In respect of all evidence, oral and documentary, the following ruling will apply until vacated either generally or in respect of particular evidence:
  - a. the testimony of any witness before the Commission may be published unless an order is made prohibiting the publication of particular evidence;



- b. any person (or the legal representative of that person) having leave to appear before the Commission will have access to any book, document or writing tendered in evidence for the purpose only of appearance before the Commission and subject to any other direction made by the Commission;
- c. for the purpose of and to the extent necessary for the public reporting of the proceedings of the Commission, any authorised representative of a newspaper, magazine, radio station, online publication or television channel may inspect and take extracts from any book, document or writing tendered in evidence after it has been notified as available for inspection by Counsel Assisting, subject to the conditions that:
  - i. it not be used or permitted to be used for any purpose other than the public reporting of the proceedings of the Commission; and
  - ii. any part of the contents thereof indicated by Counsel Assisting as unsuitable for publication must not be published without the leave of the Commission. Such leave can be sought, for example, if there is a restriction which is believed to obstruct proper reporting of any matter of significance. Any application for leave should be made in writing, in the first instance, to the Solicitor to the Commission.

### **Submissions**

- 31. Unless otherwise ordered, at the conclusion of the evidence oral submissions will not be allowed but orders will be made for the making of written submissions. The Commission may limit the particular topics or issues which may be addressed, and impose time or page limits on submissions. Ordinarily, orders will be made requiring Counsel Assisting to provide written submissions within 14 days of the close of evidence and all other parties to provide their written submissions 14 days thereafter.
- 32. In accordance with Commission practice, a suppression order under s112 of the ICAC Act will usually be made in relation to all written submissions. Ancillary orders may be made to permit publication of certain submissions to specified parties to ensure procedural fairness.

### **Liaison with the Commission**

- 33. Any contact with the Commission made necessary by these directions, or other enquiries in respect of the conduct of the public inquiry, should be made through the Commission lawyer with carriage of the relevant investigation to which the public inquiry relates.



# INDEPENDENT COMMISSION AGAINST CORRUPTION

## PUBLIC INQUIRY PROCEDURAL GUIDELINES

### 1. Preliminary

- 1.1 These Procedural Guidelines (“the Guidelines”) are issued in accordance with the provisions of s 31B of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) and are directed to members of the Commission’s staff and counsel appointed under s 106 of the ICAC Act to assist the Commission (“Counsel Assisting”).
- 1.2 In accordance with s 31B of the ICAC Act, the Guidelines provide guidance to Commission staff and Counsel Assisting on a number of aspects of the conduct of public inquiries, in particular in respect of the matters referred to in s 31B(2) (a) to (e) of the ICAC Act.
- 1.3 The manner in which the Guidelines, or any one or more of them, are implemented in respect of a particular public inquiry, and the timing of such implementation, are matters that are within the discretion of the presiding Commissioner. The presiding Commissioner will take into account the following:
- a) the efficient conduct of the public inquiry;
  - b) the effective pursuit of the Commission’s functions under Part 4 of the ICAC Act;
  - c) the requirements of procedural fairness as determined by the presiding Commissioner that apply in respect of affected persons during the public inquiry in question having particular regard to the matters addressed in s 31B of the ICAC Act; and
  - d) such other matters that the presiding Commissioner considers are relevant to the public inquiry including protection of the public interest and the prevention of breaches of public trust.<sup>2</sup>

### 2. Section 31B of the ICAC Act

#### 2.1 Section 31B of the ICAC Act provides that:

- (1) The Commissioners are to issue guidelines relating to the conduct of public inquiries of the Commission to members of staff of the Commission and counsel appointed under section 106 to assist the Commission.
- (2) The guidelines are to provide guidance on the following aspects of the conduct of public inquiries:
  - (a) the investigation of evidence that might exculpate affected persons,
  - (b) the disclosure of exculpatory and other relevant evidence to affected persons,
  - (c) the opportunity to cross-examine witnesses as to their credibility,

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<sup>2</sup> Section 12 of the ICAC Act.

- (d) providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence,
- (e) any other matter the Commission considers necessary to ensure procedural fairness.

(3) The Commission is to arrange for the guidelines to be tabled in both Houses of Parliament and to be published on a website maintained by the Commission.

(4) In this section:

***affected person*** means a person against whom substantial allegations have been made in the course of or in connection with the public inquiry concerned.

2.2 The ICAC Act does not define “exculpatory evidence”. For the purpose of the Guidelines, “exculpatory evidence” means credible, relevant and significant evidence that tends to establish that a person has not engaged in the corrupt conduct that is the subject of the Commission’s investigation.

### **3. The investigation and consideration of evidence that might exculpate affected persons**

3.1 A key consideration in determining what evidence to obtain during the course of an investigation is the extent to which it will enhance the ability of the Commission to establish the truth. Relevant evidence includes exculpatory evidence.

3.2 The investigation case manager is responsible for determining the most appropriate investigation strategy. The investigation strategy should include consideration of any reasonable steps that can be taken to identify and follow investigative leads which suggest that exculpatory evidence exists. Commission staff involved in the investigation should bring to the attention of the investigation case manager exculpatory evidence of which they are aware and investigative leads that suggest to them, on reasonable grounds, that exculpatory evidence may exist.

3.3 During the pre-public inquiry stage of an investigation, the investigation case manager should ensure, in consultation with the senior case lawyer assigned to the investigation, that relevant material, including exculpatory evidence, within the Commission’s holdings is registered in the Commission’s case management system and entered into the Commission’s records management systems. Any question as to the relevance of material, or whether it is exculpatory, will be resolved by the senior case lawyer.

3.4. Prior to the commencement of the public inquiry, the investigation case manager and the senior case lawyer should further consult in relation to the Commission’s holdings to consider whether any material, including material that has not been registered in the Commission’s case management system and entered into the Commission’s records management systems, has become relevant to the Commission’s investigation. This includes evidence that, as a consequence of the progress of the Commission’s investigation, is exculpatory. Any question

as to the relevance of material, or whether it is exculpatory, will be resolved by the senior case lawyer. In the case of material that has become relevant to the Commission's investigation, but has not been registered in the case management system and entered into the Commission's records management systems, the investigation case manager should take steps to have such material registered and entered.

3.5 The senior case lawyer, in consultation with the investigation case manager, is responsible for determining the material that will comprise the brief to Counsel Assisting.

3.6 The senior case lawyer will ensure that exculpatory evidence that has been obtained during the pre-public inquiry phase of an investigation is included in the brief of evidence for Counsel Assisting. The senior case lawyer will also bring to the attention of Counsel Assisting any exculpatory evidence that comes to his or her attention during the public inquiry, the existence of which is unknown to Counsel Assisting. In either case, Counsel Assisting will bring such evidence to the attention of the presiding Commissioner, who may direct that further investigation be undertaken.

3.7 During the course of a public inquiry, an affected person may seek to place exculpatory evidence before the Commission. If so, the affected person should nominate in writing a person or persons who can give the evidence. The affected person should identify in writing any documentary material that the affected person contends is exculpatory. The affected person should also provide a statement of the proposed evidence or, if that is not possible, a written proof of the evidence that the affected person believes that a witness can give. Copies of the relevant documents, statements or proofs of evidence must be provided to Counsel Assisting as soon as practicable after the existence of the evidence, or its potential relevance to the investigation, becomes known. In consultation with the presiding Commissioner, Counsel Assisting will determine whether such evidence requires further investigation by the Commission, whether any nominated person should be called to give evidence, or whether any document should be tendered.

#### **4. The disclosure of exculpatory and other relevant evidence to affected persons**

4.1 The Commission's duty to afford procedural fairness to an affected person requires it to provide the affected person with material that is adverse to that person and upon which the Commission may rely. The affected person should be given a reasonable opportunity to consider and respond to that material. Where the Commission's investigation includes a public inquiry, it will make available to an affected person exculpatory evidence in its possession. The timing of the disclosure of any such evidence, and the form in which disclosure will be made, are matters for the presiding Commissioner.

4.2 Where Counsel Assisting is aware of evidence, which is adverse to the interests of an affected person and Counsel Assisting intends to rely upon such evidence to contend that an adverse

finding, or findings, against that person should be made, Counsel Assisting will ensure that the substance of that evidence is disclosed to the affected person.

4.3 Where Counsel Assisting intends to contend that the evidence of a witness should be preferred over that of an affected person for the purpose of the Commission making a finding about the affected person and Counsel Assisting is aware that:

- (a) the witness has made an inconsistent statement or previously given inconsistent evidence,
- (b) the witness has been subject to an adverse finding as to credibility,
- (c) the witness suffers, or has suffered, from any physical or mental condition that may affect the reliability of the person's evidence,
- (d) a concession or benefit has been offered or provided to the witness to secure that person's evidence, or
- (e) the witness has been convicted of any criminal offence or is, or has been, the subject of disciplinary proceedings relevant to the conduct of the investigation,

Counsel Assisting will disclose that information to the affected person at an appropriate time.

## **5. The opportunity to cross-examine witnesses as to their credibility**

5.1 Persons that the presiding Commissioner determines have a sufficient interest may apply to cross-examine a witness during the course of a public inquiry, including as to the witness's credibility.

5.2 A witness may only be cross-examined with the leave of the presiding Commissioner and only in respect of a matter that the presiding Commissioner considers is relevant to the investigation.<sup>3</sup>

5.3 Leave will be given to cross-examine a witness as to his or her credibility where the presiding Commissioner considers that the credibility of the witness is of sufficient relevance to the investigation.

## **6. Access to relevant documents and a reasonable time to prepare before giving evidence**

6.1 Where it is proposed to require a person to appear before the Commission at a public inquiry, the person will be given reasonable notice in order to prepare for, and participate in, the public inquiry, including to seek legal advice or arrange for legal representation. What is "reasonable notice" will depend on the particular circumstances of the case, including the individual circumstances of the person whose appearance is required, operational exigencies and the balance of convenience.

6.2 The rules of procedural fairness, as they apply to the Commission, do not require the Commission to provide a witness with access to any evidence before the witness is examined.

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<sup>3</sup> Section 34(1) of the ICAC Act.

- 6.3 Where to do so would not prejudice the investigation, the Commission may provide a witness with access to relevant documents before the public inquiry or before the witness is examined. A decision as to whether relevant documents will be disclosed to a witness before the witness is required to give evidence in a public inquiry, the extent of the disclosure, and the method of disclosure will be determined by the presiding Commissioner.
- 6.4 Any document that is to be disclosed may be subject to the redaction of information of a private or personal nature that is not relevant to the investigation. If the information is relevant to the investigation, but its disclosure would adversely affect the privacy or reputation of a person who is not the subject of the investigation, the Commission will consider what measures should be taken to protect the privacy or reputation of that person, including whether any directions should be made under s 112 of the ICAC Act, prior to making the information available to the witness.
- 6.5 The Commission maintains a restricted access portal on its public website for the purpose of:
- (a) providing authorised persons (witnesses and their legal representatives and other parties deemed to have sufficient interest in the subject matter of the investigation to warrant access) with access to relevant documents, and
  - (b) providing authorised persons with access to relevant documents, once a public inquiry has commenced, including documents proposed to be made exhibits.
- 6.6 The Commission's restricted access portal may be used for the disclosure of relevant documents to authorised persons for the purpose of a public inquiry where, in the Commission's opinion, the use of that website represents the best balance of efficiency and security. Otherwise, portable electronic media storage (that is, DVD or USB) may be used for the disclosure of relevant documents to authorised persons, or the presiding Commissioner may approve the provision of physical copies of the relevant documents.
- 6.7 Where the disclosure of relevant documents to a witness prior to a public inquiry is authorised, the senior case lawyer assigned to the investigation will be responsible for making arrangements for the witness or their legal representative to have access to those documents according to the agreed method of disclosure.
- 6.8 Counsel Assisting may tender as exhibits relevant documents during the course of a public inquiry. Subject to any non-publication direction under s 112 of the ICAC Act, any person (or the legal representative of that person) having leave to appear before the Commission, or any other person who has a significant interest in the issue(s) to which the exhibit relates, is entitled to have access to the exhibit. Such access is subject to any direction made by the presiding Commissioner and will usually be provided by publishing the exhibit on the Commission's public website.

- 6.9 The presiding Commissioner may consider adjourning the evidence of a witness if satisfied it is appropriate to do so to enable the witness to have sufficient time to prepare before giving evidence, or giving further evidence, or to consider evidence placed before the public inquiry in respect of which the witness previously did not have knowledge.

**7. Other considerations necessary to ensure procedural fairness**

- 7.1 A person required to attend a public inquiry is entitled to be informed, before or at the time of their appearance, of the nature of the allegation or complaint being investigated and the general scope and purpose of the public inquiry.<sup>4</sup> The Commission does not fail to provide procedural fairness merely by not providing this information at an earlier point in time than required.
- 7.2 The nature of the allegations under investigation, and the general scope and purpose of the public inquiry, will be set out in each summons served on a witness requiring attendance at the public inquiry.
- 7.3 The nature of the allegations under investigation, and the general scope and purpose of the public inquiry, will be announced by the presiding Commissioner at the commencement of the public inquiry and will be published on the Commission's public website. The opening address of Counsel Assisting will provide further information concerning the allegations under investigation, which may include the identity of each affected person, as known by the Commission at the time of the commencement of the public inquiry.
- 7.4 The Commission will seek to ensure that an affected person has a reasonable opportunity to address material, upon which the Commission may rely, which is adverse to his or her interests.
- 7.5 Counsel Assisting should bring to the attention of any affected person, either through the process of examination of the affected person or other witnesses, the tendering of documentary or other evidence in the course of the public inquiry or by way of submissions, potential adverse findings against the affected person that Counsel Assisting contends should be made by the Commission, and the substance of the evidentiary grounds for such findings.
- 7.6 If any further potential adverse findings are identified during the drafting of the investigation report that were not identified in Counsel Assisting's submissions, the Commission will notify the relevant affected person(s) of the potential adverse finding and provide the person(s) with an opportunity to make submissions in relation to the potential adverse finding.

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<sup>4</sup> Section 30(3) and s 31(6) of the ICAC Act.



# CLAIM FOR WITNESS EXPENSES

NAME: .....

ADDRESS: .....

POSTCODE: .....

DAYTIME CONTACT NO. ....

ATTENDANCE DETAILS:	DATE(S)	TIME ARRIVED	TIME DEPARTED
	.....	.....	.....
	.....	.....	.....

## LOSS OF INCOME – EMPLOYED PEOPLE

EMPLOYER'S NAME: .....

EMPLOYER'S ADDRESS: .....

TOTAL LOSS OF WAGES CLAIMED: \$ .....

INCOME (GROSS) PER ANNUM: \$ .....

## EMPLOYER'S CERTIFICATE

I certify that .....  
*(witness's name)*

☐ Will have wages/salary deducted from the time s/he is absent by reason of being a witness for the Independent Commission Against Corruption for the periods indicated above.

OR

☐ Will be paid wages/salary for the time s/he is absent by reason of being a witness for the Independent Commission Against Corruption for the periods indicated above.

SIGNATURE OF EMPLOYER: .....

NAME AND TITLE: .....

DATED: .....

Payment direct to my employer **is** / **is not** authorised

## LOSS OF INCOME – SELF EMPLOYED PEOPLE

I certify that I have lost actual income amounting to \$..... in connection with assistance given by me to the Independent Commission Against Corruption. This amount is calculated as follows:

.....

**Please note that you may be asked to verify your claim for actual lost income**

SIGNATURE: .....

BUSINESS NAME: .....

DATED: .....

## IMPORTANT PLEASE NOTE:

If payment is made direct to you for loss of income, this amount must be included in your next tax return.

# CLAIM FOR WITNESS TRAVEL EXPENSES

NAME: .....

ADDRESS: .....

POSTCODE: .....

DAYTIME CONTACT NO. ....

CLAIM FOR TRAVEL: <i>(attach receipts and/or tickets)</i>	TRAIN		\$ .....
	BUS		\$ .....
	TAXI		\$ .....
	OTHER:		\$ .....
	PRIVATE VEHICLE: <i>(please state kilometres travelled / engine capacity)</i>	km	Engine Capacity

CLAIM FOR MEALS: <i>(attach receipts)</i>	DATE	TIME	
	.....	.....	\$ .....
	.....	.....	\$ .....
	.....	.....	\$ .....
	.....	.....	\$ .....
	.....	.....	\$ .....
	.....	.....	\$ .....
	.....	.....	\$ .....
	.....	.....	\$ .....

OTHER EXPENSES <i>(attach receipts)</i>	DESCRIPTION	
	.....	\$ .....
	.....	\$ .....
	.....	\$ .....
	.....	\$ .....

TOTAL AMOUNT CLAIMED:	\$ .....
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I certify that the above particulars are true and correct.

SIGNATURE: .....

DATED: .....





INDEPENDENT COMMISSION  
AGAINST CORRUPTION  
NEW SOUTH WALES

9.00 am - 5.00 pm Monday to Friday

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