



# Information for legal practitioners

## Private hearings

The National Anti-Corruption Commission (the Commission) conducts investigations into questions of corrupt conduct involving public officials.

The Commission's functions and powers are set out in the *National Anti-Corruption Commission Act 2022* (Cth) (the Act). The Commission can conduct hearings as part of an investigation.

Investigations can include private or public hearings before the National Anti-Corruption Commissioner (the Commissioner). Hearings are conducted as part of the investigation to collect evidence and differ from a court hearing held in a court or tribunal. A witness is required to appear before the Commissioner to provide evidence rather than support a particular case.

## Summons

Witnesses in hearings will receive a summons to attend under section 63 of the Act. The summons sets out:

- when the person is required to appear
- where the person is required to appear, and
- information about what the hearing is about.

The summons must set out the general nature of the matters about which the witness is to be questioned unless it will prejudice the investigation. This, however, does not limit the scope of the hearing.

## Non-disclosure obligations

The summons may include a non-disclosure notation prohibiting disclosure of information about the summons. Your client should read this carefully. It is an offence under subsection 98(1) to contravene a non-disclosure notation, which carries a maximum penalty of imprisonment for 5 years.

There are 4 main exceptions to this. Information about the summons may be disclosed:

- to a legal practitioner, for the purpose of obtaining legal advice or representation in relation to the summons
- to a legal aid officer for the purpose of seeking assistance in relation to the summons,<sup>1</sup> or any other matter arising under, or in relation to, the Act
- to a medical practitioner or psychologist for the purpose of obtaining medical or psychiatric care, treatment, or counselling (including psychological counselling), and
- in any other circumstances specifically referred to in the non-disclosure notation.

## Legal representation

Under section 66(1) of the Act, a person who is required to give evidence at a hearing may be represented by a legal practitioner.

The legal practitioner does not have to seek leave from the Commissioner to appear.

The legal practitioner should notify the Commission as soon as practicable that they will be representing the person at a hearing. This notification should be sent to the officer specified on the summons.

A person who is summoned to attend a hearing may apply to the Attorney-General for financial assistance in respect of the person's representation at the hearing by a legal practitioner.<sup>2</sup> Information about how to make an application for financial assistance can be found on the website of the Attorney-General's Department.<sup>3</sup>

## What happens at a hearing

A hearing is conducted with the formality of a court proceeding. Counsel are not to robe for hearings.

Use of electronic devices in the hearing room is at the discretion of the Commissioner.

At the commencement of the hearing, legal representatives will be invited to identify themselves for the record. The witness will then be required to either take an oath or make an affirmation.

The Commissioner and Counsel Assisting will question the witness.

At the hearing, a witness may be asked questions or be required to produce documents or things. Where a witness is asked to produce documents or things, they may be required to produce these items during the hearing or be given a timeframe within which to produce them. A witness must answer all questions or produce any document or thing as ordered at the hearing. It is an offence to fail to do so.

A witness may be asked questions in relation to any aspect of a corruption investigation. This is not limited to a specific corruption investigation or the summons.

The rules of evidence do not apply. For example, questions that call for hearsay answers, speculation or opinion are not impermissible. However, objections can be made on grounds, for example, that a question is misleading or confusing, intimidating, offensive, belittling, insulting, oppressive or otherwise inappropriate (as to which section 41 of the *Evidence Act 1995* (Cth) may provide guidance but is not binding). The Commissioner rules on any such objections.

A witness cannot refuse to answer questions on the ground that the answer might tend to be self-incriminating. However, answers given are not admissible in evidence against the witness in a criminal prosecution of the witness.

A witness is not excused from giving an answer or information, or producing a document or thing, on the ground that doing so would disclose legal advice or a communication protected by legal professional privilege, other than in relation to advice or a communication that concerns a direction to produce, a notice to produce, or attendance at a hearing. Where your client would otherwise seek to claim legal professional privilege, this should be indicated and it will be noted for the record.

At the conclusion of the examination of the witness by the Commissioner, the legal practitioner representing the witness will be offered an opportunity to question the witness. The Commissioner may determine whether any question put to the witness is relevant.

You may also be offered the opportunity to make submissions.

Hearings will be electronically recorded. A transcript of a hearing will generally be made available to a witness or legal representative after the hearing. Access to this transcript is subject to any non-disclosure direction made by the Commissioner.

### **Confidentiality direction**

At the conclusion of a private hearing, the Commissioner may issue a confidentiality direction in relation to information about the hearing and given in the hearing.<sup>4</sup>

Examples include:

- particular information or evidence given by a person at a hearing
- the identity of individuals referred to in the hearing
- a document or thing produced by a person at a hearing, or
- the fact that a particular person has given or may be able to give evidence at a hearing.

It is an offence under section 101 of the Act to disclose information about a hearing when there is a confidentiality direction in place. This offence carries a maximum penalty of imprisonment for 2 years.

Again, there are 4 main exceptions to this. Information may be disclosed:

- to a legal practitioner, for the purpose of obtaining legal advice or representation in relation to the summons
- to a legal aid officer for the purpose of seeking assistance in relation to the summons,<sup>5</sup> or any other matter arising under, or in relation to, the Act
- to a medical practitioner or psychologist for the purpose of obtaining medical or psychiatric care, treatment, or counselling (including psychological counselling), and
- in any other circumstances specifically referred to in the non-disclosure notation.

The Commissioner may, under subsection 100(1) of the Act, direct that any notes you have taken during the hearing:

- must not be used or disclosed, or
- may only be used by, or disclosed to, specified persons in specified ways on specified conditions.

Such a direction may sometimes include that all copies of the material are to be retained by the Commission. Where a direction is made that the hearing notes of a legal representative are to be retained by the Commission they will be sealed, securely stored and not accessed by staff of the Commission. A legal representative may contact the Commission to arrange to access and review their hearing notes as required.

## Notes

<sup>1</sup> A 'legal aid officer' means a member of staff of an authority established by or under a law of a State or Territory for purposes that include providing legal assistance, or a person prescribed by Part 3 of the *National Anti-Corruption Commission Regulations 2023*.

<sup>2</sup> Part 4 of the *National Anti-Corruption Commission Regulations 2023*.

<sup>3</sup> [ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance](https://ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance)

<sup>4</sup> Non-disclosure directions are issued under section 100 of the Act.

<sup>5</sup> Refer to the definition of 'legal aid officer' at note 1, above.