



## **PRACTICE GUIDELINE 3**

### **LEAVE TO APPEAR AND WITNESSES**

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#### **Leave to appear**

1. Leave to appear before the Royal Commission (“the Commission”) may, at any time, be varied or withdrawn by the Commissioner, or made subject to altered or additional limitations or conditions.
2. Leave to appear will be granted when an applicant has a direct or substantial interest in the hearing of a Case Study or the subject of inquiry, and will generally be granted when an applicant:
  - a. has been summonsed to give evidence;
  - b. is the subject of an inquiry to be undertaken; or
  - c. may be the subject of an adverse allegation.
3. The Commission’s general process for applications for leave to appear is as follows:
  - a. Hearings enable the Commission to inquire into, and receive evidence concerning, a particular topic falling within the terms of reference.
  - b. As the Commission determines its program of public hearings, these will be published on its website. Details of upcoming public hearings will include the scope of those public hearings.
  - c. At the time that the scope of a hearing is published, the Commission invites written applications for leave to appear from persons<sup>1</sup> who believe that they have a direct or substantial interest in the scope of a particular public hearing.

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<sup>1</sup> A reference to a “person” (or “persons”) in this Guideline includes a body politic or corporate as well as an individual.



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4. Applications for leave to appear made by persons referred to in paragraph 3(c) above:
  - a. should be made on the form “Application for Leave to Appear at the Royal Commission”, which will be made available on the Commission website following the initial public hearing. This form should be accompanied by a short submission setting out the basis on which it is said the applicant has a direct or substantial interest in a Case Study or subject of inquiry. The form and the submission should be lodged with the Commission by emailing it to [FSRCSolicitor@royalcommission.gov.au](mailto:FSRCSolicitor@royalcommission.gov.au) by the date required; and
  - b. will either be determined on the papers in advance of each hearing and the outcome of the application will be communicated to the applicant, or the Commissioner may notify the applicant or the applicant’s legal representative that they will be required to appear before the Commission on a specified date for further consideration of the application.
5. It will be unlikely that the Commission will grant any person unconditional leave to appear. It is anticipated that most grants of leave to appear will be confined to the hearing of the particular inquiry or Case Study in which the person has a direct or substantial interest and subject to conditions, such as limiting the particular topics or issues upon which the person may examine or cross-examine a witness.
6. Where a person is granted leave to appear:
  - a. the person to whom leave to appear is granted is entitled to participate in the public hearing concerning the particular inquiry or Case Study, subject to the Commission’s control and to such extent as the Commission considers appropriate;
  - b. the person, or the person’s legal representative, may:
    - i. apply to have evidence tendered or heard;
    - ii. apply for leave to cross-examine a witness; and
    - iii. make submissions about the findings available to the Commission following the relevant hearing; and



- c. the Commissioner may determine the nature and extent of any other conditions attaching to any grant of leave taking into account all relevant considerations, including the individual circumstances of the applicant and the contents of the applicant's application for leave.
7. Persons who have been granted leave to appear and who wish to raise a procedural or legal matter, or wish to make a submission about the determination of their application for leave, should communicate with the Solicitor Assisting the Commission in writing, identifying the issue and providing a brief outline of the submission to be made.
8. Persons who have been granted leave to appear before the Commission may be represented by a legal representative at a hearing without the further need for that legal representative to obtain separate authorisation pursuant to s 6FA of the *Royal Commissions Act 1902 (Cth)* ("the Act").
9. Persons may seek leave to appear at any time if something that has occurred during a public hearing leads them to believe that they may have a direct or substantial interest in a Case Study or subject of inquiry.

## **Witnesses**

### *Witnesses generally*

10. Counsel Assisting the Commission will:
  - a. identify, contact and call each individual whom they wish to give evidence as a witness before the Commission;
  - b. determine whether an individual, in respect of whom a witness statement has been prepared or received, will be called to give evidence at a hearing;
  - c. determine the order in which witnesses are to give evidence; and
  - d. determine which documents are tendered during public hearings.
11. As a general rule, it is expected that the Commission will receive the evidence of each witness called in the form of a written statement. When called to give evidence,



the witness will present and adopt the witness statement as their evidence-in-chief, to be supplemented where necessary.

12. It is expected that where an individual is legally represented:
  - a. their witness statement will be prepared by their legal representative; and
  - b. counsel assisting will provide an outline or rubric of the proposed witness statement, and the witness statement must follow, and address each topic and issue included in, that outline.
13. Where an individual is not legally represented, counsel and the solicitors assisting the Commission will prepare that individual's witness statement.
14. Individuals required to give evidence will be provided with a summons to attend and appropriate notice of the time that the Commission will call upon the summons to attend and give evidence. Individuals unavailable to attend on a particular date should give notice of the date and the cause of the unavailability to the Solicitor Assisting the Commission at the earliest opportunity.
15. Individuals required to give evidence will, in due course, be served with a notice to produce for the production of their witness statement.

### *Cross-examination*

16. Cross-examination of witnesses will be by leave only. No general, open-ended right of examination, cross-examination or tender of evidence will be given to any person.
17. In determining whether a person has a sufficient interest to cross-examine a witness, the Commission 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. provide copies of any documents to which they propose to take the witness.



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18. The procedure for cross-examination will generally be as follows, subject to change where the circumstances require:
  - a. Repetitive questioning or duplication will not be permitted. Where persons represented before the Commission have a common or similar interest in relation to the evidence of a particular witness:
    - i. their representatives should consult with each other and with Counsel Assisting the Commission before the witness is called;
    - ii. agreement should be attempted to be reached between all relevant persons about the order and general areas or subjects of cross-examination;
    - iii. if no agreement is reached, the Commissioner will direct the order; and
    - iv. revisiting general areas or subjects covered by earlier cross-examination by persons with a common or similar interest will not be permitted.
  - b. Cross-examination will be limited to the matters in issue, and may otherwise be restricted by the Commissioner in accordance with the power conferred by s 6FA of the Act. In particular, the Commissioner may limit the particular topics or issues upon which a person can examine.
  - c. A copy of any document proposed to be put to a witness must be provided to Counsel Assisting the Commission as soon as possible after a decision is made to use the document and in all cases prior to the date of the hearing at which it is intended to be used.
  - d. As the Commission is conducting an inquiry, and not a judicial proceeding, cross-examination that raises collateral matters going only to credit will not be permitted.
  - e. Cross-examination will be permitted only to the extent that the Commissioner believes it will assist him in his task of investigating and reporting on the subject matter of the terms of reference.



19. The procedure for examination and cross-examination is as follows, which is subject to change where the circumstances require:
  - a. where the witness is legally represented, the legal representative will be permitted to lead the witness's evidence-in-chief, adopting the statement on oath or affirmation before it is tendered;
  - b. Counsel Assisting the Commission may then ask questions of the witness after evidence-in-chief has been led;
  - c. other persons with leave to appear may then, with leave, cross-examine the witness;
  - d. the legal representative for the witness may then re-examine the witness; and
  - e. finally, Counsel Assisting the Commission may then re-examine the witness.

#### *Tendering documents other than witness statements*

20. Counsel Assisting the Commission, subject to the Commissioner's control, will determine which and when documents are tendered.
21. Before the commencement of a public hearing, each person granted leave to appear at that hearing may be given confidential access to documents that are likely to be tendered as exhibits at the public hearing.
22. One purpose of providing this access is to enable a person to identify whether any application should be made for a suppression order in relation to a document or any part of a document. A copy of a document of this kind will not otherwise be provided to any person. Generally, a document of this kind will be subject to a direction made by the Commissioner that it not be published until the point at which it is tendered.
23. Additional documents may be tendered by Counsel Assisting the Commission during the course of a public hearing. If a person has a significant interest in the issues to which an additional document being tendered relates, the Commission will provide the person with a copy of the additional document relevant to the issues that may give rise to that significant interest.



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24. If a person seeks to have a document placed before a public hearing, the process is that:
- a. they must notify the Solicitor Assisting the Commission that they wish to have the document placed before the public hearing by providing a copy of the document to the Solicitor Assisting the Commission within a reasonable time before the public hearing;
  - b. the Commissioner may require the production of other documents; and
  - c. Counsel Assisting the Commission will decide whether or not the documents are to be tendered.

An application to tender a document may only be made directly to the Commissioner if this process has been completed and Counsel Assisting the Commission has refused to tender a document.

### *General*

25. The Commission reserves the right to vary, at any time, the guidelines contained in this Practice Guideline and any other practice guidelines published by the Commission.

Kenneth Hayne  
**Commissioner**

8 February 2018