



New South Wales

# Independent Commission Against Corruption Amendment Act 2016 No 65

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New South Wales

# **Independent Commission Against Corruption Amendment Act 2016 No 65**

Act No 65, 2016

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An Act to amend the *Independent Commission Against Corruption Act 1988* with respect to the structure, management and procedure of the Independent Commission Against Corruption; and for other purposes. [Assented to 23 November 2016]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Independent Commission Against Corruption Amendment Act 2016*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

## **Schedule 1      Amendment of Independent Commission Against Corruption Act 1988 No 35**

### **[1]      Section 3 Definitions**

Omit the definitions of *Assistant Commissioner* and *Commissioner* from section 3 (1).

Insert in alphabetical order:

*Assistant Commissioner* means an Assistant Commissioner of the Commission appointed under section 6A.

*Chief Commissioner* means the Chief Commissioner of the Commission appointed under section 5.

*Chief Executive Officer* means the Chief Executive Officer of the Commission appointed under section 104.

*Commissioner* means the Chief Commissioner or other Commissioner of the Commission appointed under section 5.

### **[2]      Sections 3 (1) (definition of “member of staff of the Commission”), 31 (4) (where secondly occurring), 41 (3), 101A, 106, 107 (6) and (7) and 117 (4)**

Omit “the Commissioner”, “The Commissioner” and “the Commissioner’s” wherever occurring.

Insert instead “the Chief Commissioner”, “The Chief Commissioner” and “the Chief Commissioner’s”, respectively.

### **[3]      Sections 3 (1) (definition of “officer of the Commission”), 21 (2), 22 (1) (a), 23, 25 (2) (where firstly occurring), 30 (2), 31 (4) (where firstly occurring), 31A, 34 (2), 35 (1), 35 (4A) (where firstly occurring), 35 (6) (where firstly occurring), 36 (1), 36 (2) (where firstly occurring), 36 (3), 36 (6), 36A, 36B, 37 (3), 37 (5) (a), 39 (1) (where firstly occurring), 40 (2) (where firstly occurring), 40 (3), 40 (4), 48 (2), 76 (2) (f), 98, 99 (except where secondly occurring in section 99 (2)), 100 (1), 100 (4), 100 (7), 100A, 100B, 107 (4) (c)–(e), 107 (5) (e) and (f), 109, 111 (4), 111C and 113 and Schedule 3**

Omit “the Commissioner” and “The Commissioner” wherever occurring.

Insert instead “a Commissioner” and “A Commissioner”, respectively.

### **[4]      Part 2**

Omit the Part. Insert instead:

## **Part 2      Constitution and management of Commission**

### **4      Constitution of Commission**

- (1) There is constituted by this Act a corporation with the corporate name of the Independent Commission Against Corruption.
- (2) The Commission has the functions conferred or imposed on it by or under this or any other Act.

### **5      The Commissioners**

- (1) The Commission consists of a Chief Commissioner and 2 other Commissioners appointed by the Governor.
- (2) The Chief Commissioner is required to be consulted on the persons to be appointed as the 2 other Commissioners.

- (3) A Commissioner has and may exercise the functions conferred or imposed on a Commissioner by or under this or any other Act.
- (4) Schedule 1 contains provisions relating to the Commissioners.

## **6 Exercise of Commission's functions**

- (1) Except as otherwise provided by this section, the functions of the Commission are exercisable by a Commissioner, and any act, matter or thing done in the name of, or on behalf of, the Commission by a Commissioner is taken to have been done by the Commission.
- (2) A decision of the Commission to conduct a public inquiry under section 31 must be authorised by the Chief Commissioner and at least one other Commissioner.
- (3) Any such authorisation may be given in respect of a particular public inquiry or in respect of any public inquiry for a particular investigation or matter.
- (4) An Assistant Commissioner may, at the request of a Commissioner, act for the Commissioner for the purpose of giving any such authorisation if the Commissioner considers that there may be a conflict of interest in the matter.
- (5) A decision of the Commission referred to in subsection (2) is presumed to have been duly authorised under that subsection unless the contrary is established.
- (6) Except as provided by subsection (2), the decision of the Chief Commissioner prevails in the event of any inconsistency in the decisions of the Commissioners.
- (7) A reference in this Act to a compulsory examination or public inquiry before the Commission or anything done or omitted by, to or in relation to the Commission includes a reference to a compulsory examination or public inquiry before, or a thing done or omitted by, to or in relation to, a Commissioner or another officer of the Commission having authority in the circumstances.

### **6A Assistant Commissioners**

- (1) The Governor may, with the concurrence of the Chief Commissioner, appoint one or more Assistant Commissioners of the Commission.
- (2) An Assistant Commissioner has and may exercise the functions conferred or imposed on an Assistant Commissioner by or under this or any other Act.
- (3) An Assistant Commissioner is to assist the Commission, as the Chief Commissioner requires.
- (4) Schedule 1 contains provisions relating to the Assistant Commissioners.

### **6B Management of affairs of Commission**

The Chief Executive Officer is responsible for the day to day management of the affairs of the Commission and for the implementation of the decisions of the Commissioners and Assistant Commissioners.

## **[5] Section 31 Public inquiries**

Omit section 31 (3).

**[6] Section 31B**

Insert after section 31A:

**31B Procedural guidelines relating to public inquiries**

- (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,
  - (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.

**[7] Sections 48B and 50 (except in the reference to the Commissioner of Police)**

Omit “the Commissioner” wherever occurring. Insert instead “the Commission”.

**[8] Section 52A**

Insert after section 52:

**52A Investigative powers exercisable after completion of Commission’s investigations for purposes of prosecutions**

- (1) This section applies to the function of the Commission under section 14 of gathering and assembling evidence that may be admissible in the prosecution of a person for a criminal offence and of furnishing that evidence to the Director of Public Prosecutions or to the Electoral Commission.
- (2) The powers under sections 21, 22, 23 and 40 may be exercised for the purposes of that function after the completion of the Commission’s investigations into a matter if the Director of Public Prosecutions or the Electoral Commission requests the Commission to do so.

**[9] Section 64A Power to veto proposed appointment of a Commissioner or the Inspector**

Omit “as Commissioner” from section 64A (1). Insert instead “as a Commissioner”.

**[10] Section 79A**

Insert after section 79:

**79A Right of response to reports of Commission or Inspector containing adverse findings**

- (1) The Commission is not authorised to include an adverse finding against a person in a report under section 74 unless:
  - (a) the Commission has first given the person a reasonable opportunity to respond to the proposed adverse finding, and
  - (b) the Commission includes in the report a summary of the substance of the person's response that disputes the adverse finding if the person requests the Commission to do so within the time specified by the Commission.
- (2) The Commission must not include in the report any information in the person's response that would identify any person who is not the subject of an adverse finding, unless the Commission:
  - (a) is satisfied that it is necessary to do so in the public interest, and
  - (b) is satisfied that doing so will not cause unreasonable damage to the reputation, safety or well-being of a person who is not the subject of an adverse finding, and
  - (c) includes in the report a statement that the person identified is not the subject of any adverse finding.
- (3) This section applies to the Inspector in the same way as it applies to the Commission, and for that purpose a reference in this section to:
  - (a) a report under section 74 is a reference to a report under section 57B or this Part, and
  - (b) an adverse finding against a person includes a reference to an adverse finding against the Commission or an officer of the Commission.
- (4) In this section:  
*adverse finding* includes an adverse opinion.

**[11] Section 103 Provisions relating to Commissioner and Assistant Commissioners**

Omit the section.

**[12] Section 104 Appointment of Chief Executive Officer and other staff**

Omit section 104 (1). Insert instead:

- (1) The Chief Commissioner may appoint a Chief Executive Officer and such other staff of the Commission as may be necessary to enable the Commission to exercise its functions.
- (1A) The Chief Commissioner is to consult the other Commissioners about the proposed appointment of a Chief Executive Officer.

**[13] Section 104 (3) (a), (6), (7), (8) and (9)**

Omit "Commissioner" wherever occurring. Insert instead "Chief Commissioner".

**[14] Section 104 (3) (b)**

Omit "Commissioner". Insert instead "Commissioners".

**[15] Section 104 (5)**

Omit the subsection. Insert instead:

- (5) The Chief Executive Officer is to be appointed for a term not exceeding 7 years, but is eligible for re-appointment.

**[16] Section 104A Arrangements for use of services of other staff**

Omit “Commissioner” from section 104A (4). Insert instead “Commissioners”.

**[17] Section 107 Delegation**

Omit section 107 (1) and (2). Insert instead:

- (1) The Chief Commissioner may delegate any function of the Commission to an Assistant Commissioner or an officer of the Commission.
- (2) A Commissioner may delegate any of his or her functions to an Assistant Commissioner or an officer of the Commission (other than the authorisation of a decision of the Commission under section 6 (2) or the issue of guidelines under section 31B).

**[18] Section 112 Restriction on publication of evidence**

Insert after section 112 (1A):

- (1B) A direction under this section does not apply to:
- (a) the making of a complaint to the Inspector or the disclosure of information, documents or other things to the Inspector, or
- (b) the disclosure of information, documents or other things by a law enforcement officer to the Director of Public Prosecutions in accordance with the duty of disclosure under section 15A of the *Director of Public Prosecutions Act 1986*.

**[19] Schedule 1**

Omit the Schedule. Insert instead:

**Schedule 1 Provisions relating to Chief or other Commissioners and Assistant Commissioners**

(Sections 5 (4) and 6A (4))

**1 Eligibility for appointment**

- (1) A person is not eligible to be appointed as a Commissioner or as an Assistant Commissioner, or to act in that office, unless the person is qualified to be appointed as or has been:
- (a) a Judge of the Supreme Court of New South Wales or of another State or Territory, or
- (b) a Judge of the Federal Court of Australia, or
- (c) a Justice of the High Court of Australia.
- (2) A person is not eligible to be appointed as a Commissioner or as an Assistant Commissioner, or to act in that office, if the person is:



- (a) a member of the Legislative Council or of the Legislative Assembly or is a member of a House of Parliament or legislature of another State or Territory or of the Commonwealth, or
- (b) the holder of any judicial office of the State or elsewhere in Australia.

## **2 Veto of proposed appointment as Commissioner**

- (1) A person is not to be appointed as a Commissioner until:
  - (a) a proposal that the person be appointed has been referred to the Joint Committee under section 64A, and
  - (b) either the period that the Joint Committee has under that section to veto the proposed appointment has ended without the Committee having vetoed the proposed appointment or the Committee notifies the Minister that it has decided not to veto the proposed appointment.
- (2) A person may be proposed for appointment on more than one occasion.
- (3) In this clause and section 64A, *appointment* includes re-appointment.

## **3 Acting Commissioner or Assistant Commissioner**

- (1) The Governor may, from time to time, appoint a person to act in the office of a Commissioner or an Assistant Commissioner during the illness or absence of the Commissioner or Assistant Commissioner, and the person, while so acting, has all the functions of the Commissioner or Assistant Commissioner and is taken to be the Commissioner or Assistant Commissioner.
- (2) The Governor may, at any time, remove a person from the office to which the person was appointed under this clause.
- (3) A person while acting under this clause is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Governor may from time to time determine.
- (4) For the purposes of this clause:
  - (a) a vacancy in the office of a Commissioner or an Assistant Commissioner is to be regarded as an absence from office of a Commissioner or Assistant Commissioner, and
  - (b) an Assistant Commissioner is to be regarded as absent from office as an Assistant Commissioner during any period when the Assistant Commissioner acts in the office of a Commissioner pursuant to an appointment under this clause.

## **4 Basis of offices**

- (1) The office of the Chief Commissioner is a full-time office.
- (2) The office of a Commissioner (other than the Chief Commissioner) is a part-time office.
- (3) The office of an Assistant Commissioner may be a full-time office or a part-time office, according to the terms of appointment.
- (4) The holder of a full-time office referred to in subclause (1) or (3) is required to hold it on that basis, except to the extent permitted by the Governor.

## **5 Terms of office**

- (1) Subject to this Schedule, a Commissioner holds office for such term not exceeding 5 years as may be specified in the instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

- (2) A person may not hold the office of a Commissioner for terms totalling more than 5 years.
- (3) Subject to this Schedule, an Assistant Commissioner holds office for such term not exceeding 5 years as may be specified in the instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.
- (4) A person may not hold the office of an Assistant Commissioner for terms totalling more than 5 years.

## **6 Remuneration**

- (1) A Commissioner or an Assistant Commissioner is entitled to be paid such remuneration (including travelling and subsistence allowances) as may be specified in the instrument of appointment or as may be afterwards determined by the Governor from time to time.
- (2) A determination does not operate so as to reduce the rate at which remuneration is payable during the person's current term of office.
- (3) Remuneration is payable out of the Consolidated Fund, which is accordingly appropriated to the necessary extent.
- (4) The Minister may seek the advice of the Statutory and Other Offices Remuneration Tribunal as to appropriate rates of remuneration for Commissioners and Assistant Commissioners.

## **7 Vacancy in office**

- (1) The office of a Commissioner or an Assistant Commissioner becomes vacant if the holder:
  - (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) holds office for longer than the relevant period mentioned in clause 5, or
  - (d) resigns the office by instrument in writing addressed to the Governor, or
  - (e) becomes the holder of a judicial office of the State or elsewhere in Australia, or
  - (f) is nominated for election as a member of the Legislative Council or the Legislative Assembly or as a member of a House of Parliament of another State or of the Commonwealth, or
  - (g) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (h) becomes a mentally incapacitated person, or
  - (i) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or
  - (j) is removed from office under subclause (2) or (3).
- (2) A Commissioner may be removed from office by the Governor on the address of both Houses of Parliament.
- (3) The Governor may remove an Assistant Commissioner from office for incapacity, incompetence or misbehaviour.

## **8 Filling of vacancy**

- (1) If the office of a Commissioner becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.
- (2) If the office of an Assistant Commissioner becomes vacant, a person may, subject to this Act, be appointed to fill the vacancy.

## **9 Public Service employment provisions excluded**

The offices of a Commissioner and Assistant Commissioner are statutory offices and the provisions of the *Government Sector Employment Act 2013* relating to the employment of Public Service employees do not apply to those offices.

## **[20] Schedule 4 Savings, transitional and other provisions**

Insert after Part 14:

## **Part 15 Provisions consequent on enactment of Independent Commission Against Corruption Amendment Act 2016**

### **40 Definitions**

In this Part:

*amending Act* means the *Independent Commission Against Corruption Amendment Act 2016*.

*former Commissioner* means the Commissioner for the Commission appointed under section 5 before the substitution of Part 2 of this Act by the amending Act.

### **41 Amendments relating to Commissioners**

- (1) The abolition of the office of the former Commissioner as a result of the substitution of Part 2 of this Act by the amending Act does not affect the identity of the Commission.
- (2) Anything done or omitted to be done by the former Commissioner before the substitution of Part 2 of this Act by the amending Act continues to have effect after that substitution as if it had been done or omitted by the Chief Commissioner.
- (3) A term of office as the former Commissioner is taken to be a term of office as a Commissioner for the purposes of the limitation on the maximum terms of office that a person may hold office as a Commissioner as provided by clause 5 of Schedule 1.
- (4) A reference in any other Act, statutory instrument or document to the former Commissioner is taken to be a reference to the Chief Commissioner or, if the context or subject-matter so requires, to any Commissioner.

**Note.** See also section 5 of the *Independent Commission Against Corruption (Commissioner) Act 1994*.

### **42 Amendments relating to authorisation by Commissioners of public inquiries**

Section 6 (2), as enacted by the amending Act, does not apply to a public inquiry that was commenced before the enactment of section 6 (2).

**43 Application of amendment about responding to adverse finding in report**

Section 79A, as inserted by the amending Act, extends to a report relating to an investigation commenced or undertaken before the date of commencement of that section unless the Commission or the Inspector finalised the report before that commencement.

## **Schedule 2 Amendment of Independent Commission Against Corruption (Commissioner) Act 1994 No 61**

**[1] Section 4 Appointment of Supreme Court Judge as Commissioner**

Omit “Commissioner” wherever occurring (except in section 4 (3) (a) where secondly occurring and section 4 (3) (c) where firstly occurring).

Insert instead “a Commissioner”.

**[2] Section 4 (1) (c)**

Omit “(or, in the case of an appointment that took place before the commencement of this Act, by force of legislation to be subsequently enacted and having that effect)”.

**[3] Section 4 (1) (d)**

Omit “(or, in the case of an appointment that took place before the commencement of this Act, to the application of any such legislation)”.

**[4] Section 4 (3) (a)**

Omit “(including service as Commissioner before the commencement of this Act)”.

**[5] Section 4 (4) (b)**

Omit “clause 6 of Schedule 1”. Insert instead “clause 7 of Schedule 1”.

**[6] Section 5**

Insert after section 4:

**5 Savings provision relating to the Commissioner holding office immediately before commencement of Independent Commission Against Corruption Amendment Act 2016**

- (1) This section applies to the person who was the Commissioner for the Independent Commission Against Corruption immediately before the abolition of that office as the result of the substitution of Part 2 of the *Independent Commission Against Corruption Act 1988* by the *Independent Commission Against Corruption Amendment Act 2016*.
- (2) Section 4 applies to that person (subject to section 4 (4)).
- (3) A reference in section 4 to a person who ceases to hold office as a Commissioner includes a reference to that person ceasing to hold office as the Commissioner following the abolition of that office, unless that person is appointed as a Commissioner with effect immediately after the abolition of that office.
- (4) A reference in section 4 to a person’s appointment or service as a Commissioner, or to the office of a Commissioner, includes a reference to that person’s appointment or service as the Commissioner, or to the office of the Commissioner, before the abolition of that office.

## **Schedule 3 Consequential amendment of other Acts and instruments**

### **3.1 Crimes Act 1900 No 40**

#### **Section 60AA Meaning of “law enforcement officer”**

Omit paragraph (b) of the definition of *law enforcement officer*. Insert instead:

- (b) a Commissioner or Assistant Commissioner of the Independent Commission Against Corruption, or

### **3.2 Criminal Procedure Act 1986 No 209**

#### **Section 14A Proceedings for offences commenced by officers of ICAC or PIC**

Omit “the Commissioner” from the definition of *officer of ICAC* in section 14A (4).

Insert instead “a Commissioner”.

### **3.3 Defamation Act 2005 No 77**

#### **Schedule 1 Additional publications to which absolute privilege applies**

Omit clause 19 (1) (b). Insert instead:

- (b) to or by a Commissioner of the Commission as Commissioner, or

### **3.4 Financial Transaction Reports Act 1992 No 99**

#### **[1] Section 6 Further reports of suspect transactions**

Omit “the Commissioner for” from section 6 (1) (c). Insert instead “a Commissioner of”.

#### **[2] Section 10 Secrecy**

Omit “the Commissioner for” from section 10 (1) (c). Insert instead “a Commissioner of”.

### **3.5 Independent Commission Against Corruption Regulation 2010**

#### **Clauses 3 (1), (definition of “approved”), 4–14, 16 and 17**

Omit “the Commissioner” and “The Commissioner” wherever occurring.

Insert instead “the Chief Commissioner” and “The Chief Commissioner”, respectively.

### **3.6 Law Enforcement and National Security (Assumed Identities) Act 2010 No 73**

#### **[1] Section 4 Definitions**

Omit “Commissioner for” from paragraph (b) of the definition of *chief officer* in section 4 (1).

Insert instead “Chief Commissioner of”.

#### **[2] Section 39 Delegation of chief officer’s functions**

Insert “a Commissioner (not being the Chief Commissioner) or” before “an Assistant” in paragraph (b) of the definition of *senior officer* in section 39 (4).

### **3.7 Law Enforcement (Controlled Operations) Act 1997 No 136**

#### **Section 3 Definitions**

Omit “Commissioner for” from paragraph (b) of the definition of *chief executive officer* in section 3 (1).

Insert instead “Chief Commissioner of”.

### **3.8 Ombudsman Act 1974 No 68**

#### **Schedule 1 Excluded conduct of public authorities**

Omit “the Commissioner” from item 20. Insert instead “a Commissioner”.

### **3.9 Public Finance and Audit Act 1983 No 152**

#### **Schedule 3 Departments**

Omit “Commissioner for the Commission” in Column 2 opposite “Independent Commission Against Corruption” in Column 1.

Insert instead “Chief Executive Officer of the Commission”.

### **3.10 Public Interest Disclosures Act 1994 No 92**

#### **Section 6A Steering Committee**

Omit “Commissioner for” from section 6A (1) (d). Insert instead “Chief Commissioner of”.

### **3.11 Surveillance Devices Act 2007 No 64**

#### **[1] Section 4 Definitions**

Omit “Commissioner for” from paragraph (d) of the definition of *chief officer* in section 4 (1).

Insert instead “Chief Commissioner of”.

#### **[2] Section 4 (1), definition of “senior officer”**

Omit “Commissioner for” from paragraph (c) of the definition.

Insert instead “Chief Commissioner or any other Commissioner of”.

### **3.12 Telecommunications (Interception and Access) (New South Wales) Act 1987 No 290**

#### **[1] Section 3 Definitions**

Omit “Commissioner” from paragraph (c) (i) of the definition of *certifying officer* in section 3 (1).

Insert instead “Chief Commissioner or any other Commissioner”.

**[2] Section 3 (1), definition of “chief officer”**

Omit “Commissioner” from paragraph (c) of the definition.

Insert instead “Chief Commissioner”.

[Second reading speech made in—

Legislative Assembly on 15 November 2016

Legislative Council on 16 November 2016]