# Evidence

## Information for Parties and Representatives

Evidence can be oral or written and is the relevant witness' testimony and documents or objects presented by the parties. Testimony is the statement the witness gives under oath.

Courts of law are usually bound by what is known as the rules of evidence. These are complex and strict rules about what evidence can be relied on. The Commission is not bound by the rules of evidence. However, some rules of evidence are followed by the Commission as a way to provide procedural fairness, both to the parties and to witnesses.

The Commission may receive hearsay evidence but will consider how much weight it will put on that evidence. If you are trying to prove a key fact in your case, hearsay evidence will probably not be enough proof.

## Discovery

Discovery is a process where each party gives to the other party any documents that are relevant to the case. Documents are discoverable whether they support a party's case or not. Discovery helps to avoid surprise, puts parties on an equal footing, helps to highlight the issues in dispute and is intended to promote a fair hearing for both sides.

Either party can ask for discovery of documents from the other party. For example, an employer can ask for discovery from an employee, and an employee can ask for discovery from an employer. Documents discovered are not necessarily given to the Commission. The parties each choose to put to the Commission those documents which support their case or weaken the other party's case.

### Informal discovery

The Commission will often ask the parties to engage in 'informal discovery'. That means the parties will discuss which documents they are able to provide to each other. They then provide each other with copies of the documents by agreement. Once a party has received a document, it is up to them whether they use it in their case.

Parties may prefer this process because they do not have to comply with strict deadlines imposed by the Commission, and they have greater control over the types of documents they can exchange.

### Formal discovery

If the informal discovery process breaks down, a party may apply for orders to compel the other party to provide discovery of documents. This becomes 'formal discovery'. The Commission then becomes much more involved in supervising the process.

Formal discovery is where the Commission makes orders requiring the parties to provide documents within set timeframes. It is good practice to ask the other party for the documents before making a formal application. The Commission is unlikely to make orders if the party asking for discovery has not asked for the documents first.

A formal application is made by filing and serving a *Form 1A – Multipurpose Form*, stating that discovery is sought for specific types of documents.

Applications for discovery in the Commission have three main considerations:

1. The documents sought must be relevant to a matter in question in the proceedings. Requests must be reasonable.

2. The documents must be in the 'possession, custody or control' of the other party.

    a) Possession means that the other party owns the document.

    b) Custody means that the party physically holds the document, even if they do not own the document; and

    c) Control means the party is able to get the document from someone else.

    This means that a party cannot be required to provide discovery of a document which is not in their possession or custody or control.

3. The request must be 'just'. That is, the party applying for discovery must satisfy the Commission that the documents are necessary for the party to have a fair hearing.

If a document is 'privileged', the document does not have to be given to the other party. The party should still make the other party aware of the document's existence, by describing it in a general way, but say that it is privileged. Commonly this will include 'legal professional privilege', which is communication between lawyer and client for the purpose of obtaining legal advice.

There is more information about discovery in *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel & Others* (1995) 75 WAIG 1801, at page 1805, under the heading 'General Discovery'.

## Submissions

Submissions are the factual and legal arguments that each party will make at hearing. The Commission may ask parties to file written submissions, which means they should file a written summary of the arguments they will make at the hearing. At the hearing, each party can make brief opening submissions. At the end of the hearing, each party will have a further opportunity to highlight or explain various aspects of the evidence.

## Witnesses

### Calling witnesses

As part of your case you may call witnesses to give evidence about a situation that they had some involvement in or saw happening. You can be your own witness. Witnesses are required to give an oath or make an affirmation before giving evidence at a formal hearing. The witness will be examined by the party that called them and may be cross examined by the opposing party to test their evidence.

If you do not call evidence from someone who knows about an important issue in dispute, and that person is available to call as a witness, it is open to the Commission to infer that person's evidence would not have helped your case.

### Outlines of evidence and documents

An outline of evidence is a summary of evidence that a witness will give at the hearing. For example, if a party calls three witnesses, there should be three separate documents explaining what evidence each of those witnesses will give. Each outline of evidence should relate to one witness only and should be titled 'Outline of evidence for [witness name]', and it should explain what evidence that witness will give in the witness box at the hearing.

If there is a document that forms part of your case, it will need to be 'tendered' by a witness. This means that a witness must give evidence about the document and the document should be labelled and referred to in that witness' outline of evidence. For example, if it is your claim, and you want to give evidence, you should file an outline of evidence for yourself. This outline of evidence should set out what you will say in the witness box, and it should explain any documents that you ask the Commission to consider. Those documents should then be labelled and attached to the outline of evidence. You should file an outline of evidence for every witness you want to call.

### Examination-in-chief

Examination-in-chief is where the party who calls the witness has an opportunity to ask the witness questions. There are some restrictions on the questioner during examination-in-chief. Questions cannot be leading. Another restriction is that questions must not be about matters that have no relevance to the issues in dispute, other than to impeach the credibility of the witness.

### Leading questions

A leading question is worded in a way that suggests an answer. The opposing party may object to a leading question. If an objection is sustained by the Commission, the party may be asked to reword the question so that it is not leading.

A leading question:

"Didn't you see Claire taking money out of the till on Sunday night after the shop had closed?"

Not leading:

"What did you see Claire do on Sunday night after the shop closed?"

### Refreshing memory from documents

It may be difficult for some witnesses to give detailed evidence without referring to notes. A witness is allowed to refer to notes if:

1. the witness shows that they are at the limits of their memory and needs a reminder;
2. the witness has the documents with them;
3. the documents were made by the witness or can be verified by the witness;
4. the events were fresh in the witness's mind when the document was made or when they verified the document; and
5. the witness must have found the document to be accurate at the time of making it.

6. Witnesses are also allowed to refresh their memory by reviewing notes before giving evidence.

### Cross-examination

Cross-examination is an opportunity to test the evidence and account of events given by witnesses called by the opposing side. Only one person is allowed to cross-examine a witness.

If you are cross-examining a witness, you must put to the witness the ways your case contradicts their evidence. You must give the witness an opportunity to comment on any evidence they might have an opinion on, and the inferences to be drawn from it. If you do not put every relevant piece of evidence to the witness when you are cross-examining that witness, the Commission may conclude that you do not challenge the witness' evidence on that point.

### Re-examination

Re-examination is an opportunity for the party who called the witness to clarify, explain or qualify any aspects of evidence the witness gave during cross-examination.

## Need more information?

Commission staff cannot give legal advice or advice on how to best make your case. However, they can give information on:

- the processes of the Commission;
- how to fill out forms; and
- other organisations that may be able to assist you.

The Commission's Registry can be contacted on 08 9420 4444 or Registry@wairc.wa.gov.au.

The Commission's website (www.wairc.wa.gov.au) has other information that may assist you.