



**An Coimisiún Imscrúdúcháin  
(Gníomhaireacht Náisiúnta  
um Bhainistíocht Sócmhainní)**

**Commission of Investigation  
(National Asset  
Management Agency)**

**The Honourable John D. Cooke  
Sole Member**

**Interim Report  
12<sup>th</sup> September 2017**

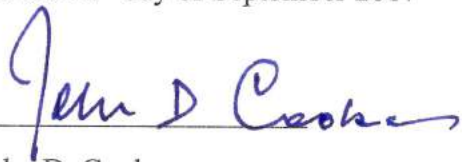
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Delivered to the Taoiseach as the specified Minister and in accordance with the provisions of Section 32 of the Commissions of Investigation Act 2004

On the 12<sup>th</sup> day of September 2017

A handwritten signature in blue ink, reading "John D. Cooke", written over a horizontal line.

John D. Cooke

Sole Member of the Commission

**COMMISSION OF INVESTIGATION  
(NATIONAL ASSET MANAGEMENT AGENCY)**

**INTERIM REPORT**

**Introduction**

1. The Commission was established by order of the Government, on 13<sup>th</sup> June 2017, pursuant to section 3 of the Commissions of Investigation Act 2004 (hereinafter “the Act”). The Order of the Government establishing the Commission is set out in the Commission of Investigation (National Asset Management Agency) Order 2017 (S.I. No. 267 of 2017). Under that Order, the Taoiseach was appointed as the specified Minister, for the purposes of section 3(3)(b) of the Act. The Honourable John D. Cooke, retired judge of the High Court, was appointed as sole member of the Commission.
2. A Head of Administration for the Commission was appointed by the Department of An Taoiseach on the 14<sup>th</sup> June 2017.
3. The Terms of Reference of the Commission are set out in Appendix 1 of this Report. The Commission is charged with investigating matters of significant public concern regarding the disposal by the National Asset Management Agency (“NAMA”) of its Northern Ireland loan portfolio, referred to as “Project Eagle”.
4. This is the Interim Report required by paragraph 8 of the Terms of Reference to be provided within three months of the establishment date. It summarises the steps taken to date in preparing the work of the investigation, engaging personnel and the contacts made with parties relevant to the investigation.
5. The establishment of the Commission followed upon, *inter alia*, the Report of the Public Accounts Committee of the Oireachtas of March 2017 and the Report (No.94) of the Comptroller and Auditor General of the 5<sup>th</sup> of August 2016. (See paragraph 9 below). It was immediately apparent from a perusal of those reports that a large amount of the basic factual information in respect of the Project Eagle transaction was already in the public domain and was unlikely to be disputed or controverted. This suggested that the work of the Commission might possibly be organised so as to proceed upon the basis that extensive hearings to gather basic evidence of a factual character might not be necessary if the Commission’s appraisal of that information proved acceptable to the parties relevant to the investigation.

## Offices, Equipment and Staff

6. The work of the Commission was commenced immediately upon its establishment and was initially concerned with engaging the personnel required to assist and advise in the conduct of the investigation and in obtaining and setting up the necessary offices and equipment.
7. Sanction and approval under Section 8 of the Act was obtained on 26<sup>th</sup> June 2017 for the engagement of a solicitor to the Commission and four junior counsel. Following interviews, a solicitor with extensive inquiry experience was engaged and commenced on the 3<sup>rd</sup> of July, 2017. A suitable suite of offices, which included a hearing room and office accommodation for administrative and legal staff, was identified at St Stephen's Green House in Earlsfort Terrace Dublin 2 (having recently been vacated by the Fennelly Commission). These offices were made available by the Office of Public Works from 19<sup>th</sup> June 2017.
8. Sanction for the engagement of an administrator/legal executive under section 8 was received on the 21<sup>st</sup> of July and following interviews, the post was filled on the 25<sup>th</sup> of July 2017 by a person with previous experience of working for a redress board in a similar capacity.
9. It was apparent, as mentioned, that a significant preparatory task in the investigation would be the collating and appraisal of the very large volume of information and documentation already in the public domain from the three previous inquiries into the sale of the Project Eagle portfolio, namely: -
  - a. The Special Report of the Comptroller & Auditor General into the National Asset Management Agency's sale of Project Eagle, 5<sup>th</sup> August 2016;
  - b. The Report of the Examination of the Committee of Public Accounts of NAMA's sale of Project Eagle, March 2017, and
  - c. The Northern Ireland Assembly Committee for Finance and Personnel Report on Progress of the Review of the sale of the National Asset Management Agency property loan portfolio in Northern Ireland, 10<sup>th</sup> March 2016.
10. As this involved drafting a comprehensive, succinct and objective summary of the essential events and steps in the loan book transaction from the acquisition of the assets in 2010-2011 to its disposal in June 2014, it was clear that this would best be done by a small team. It was therefore decided to commence that substantive task with two junior counsel and to postpone further recruitment for the Commission until the likely extent of the investigation became clearer. Two junior counsel were duly engaged and commenced work in the last week of June.

## **Expert Assistance**

11. As appears from the Terms of Reference, the work of the investigation effectively involves three distinct, if related, strands. The matters to be investigated under paragraph 2 a), b) and c) are concerned with the substance of the Project Eagle disposal transaction, the strategy employed, the procedure followed and the appraisal of the issues of commercial practice and corporate governance there mentioned. The matters covered by paragraph 2 d) and e) relate to the role of the Northern Ireland Advisory Committee and questions of conflicts of interest and how these were dealt with. The third strand concerns the discrete issue as to the appropriateness of the decisions, actions and communications of the Minister for Finance and the Department of Finance there described.
  
12. In respect of the first of those strands, advice and assistance will be required from a wholly independent and unconnected expert with suitable skill and experience in the types of asset disposal transactions which Project Eagle involved. Given the extent of the NAMA operations since its establishment, it was clear that such an expert could probably only be found outside the island of Ireland. Following informal soundings, a suitable candidate was identified in the United Kingdom and an approach was made to him. He has agreed to act in that capacity and his CV was submitted to the Department of the Taoiseach with an application for sanction to engage him. Sanction for his engagement was received on 11<sup>th</sup> September 2017. It is envisaged that it may also be necessary to engage the advice and assistance of an expert with specific reference to the issues of corporate governance.

## **IT Infrastructure: Document Management**

13. It was also apparent from the descriptions of the work undertaken for the reports referred to in paragraph 9 above, that the Commission would be required to examine a large volume of documentation generated by the Project Eagle procedure itself as well as materials resulting from the C&AG and PAC investigations (for example, the C&AG report refers to having dealt with 40,000 documents – see page 24 of that report). The efficient and timely conduct of the investigation therefore required the support of a reliable IT infrastructure and a robust document management software program.
  
14. The likely sensitive and confidential nature of much of the material required that a secure and properly controlled document storage system be put in place as a priority. It was also obviously desirable to avoid, so far as possible, large amounts of duplicated materials being sought from or furnished by the relevant parties.
  
15. Following the carrying out of the necessary public procurement procedures, appropriate computers and related equipment were provided to the Commission in the week of 14<sup>th</sup> to 18<sup>th</sup> August 2017.



16. It was decided that the most efficient and manageable way for the large volumes of documentation to be stored and handled was in a specialised document management system and database. Contact was immediately made with NAMA, the PAC and the C&AG with a view to obtaining access to relevant documentation and arranging its transfer in electronic form. Before receiving delivery of any documentary evidence, however, it was important to ensure that such facilities were in place and were working properly. Accordingly, following the necessary public procurement procedures, a suitable document management system was identified and arrangements were made to have it installed in the Commission in September 2017. The installation of the bespoke system is relatively complex, involving the coordination of two separate IT providers. It is anticipated that the system will be in place within days of the submission of this report.
17. Once the system is installed and operational, staff training on it will be provided and the Commission will be in a position to commence taking the transfers of the significant additional quantities of digital material relevant to its Terms of Reference, which is currently being prepared for transfer by NAMA.

### **Confidentiality Protocol**

18. A Confidentiality Protocol has been adopted by the Commission which is brought to the attention of and signed by all staff members before they commence work with the Commission. It underpins the right of all witnesses to communicate with the Commission in confidence and it requires the strictest standards of confidentiality from all personnel.

### **Rules and Procedures**

19. The Rules and Procedures of the Commission were drafted and formally adopted by the Sole Member on 22<sup>nd</sup> August 2017, pursuant to section 15 of the Act. They are attached to this report at Appendix 2. Under the provisions of the Act, the substantive investigative work of the Commission could only commence when these Rules and Procedures were in place.
20. In that connection, pursuant to section 23 of the Act, guidelines were prepared concerning the payment to witnesses of legal costs necessarily incurred by them in cooperating with the investigation. These guidelines were prepared in consultation with the Department of the Taoiseach. Approval by the Taoiseach of the text now incorporated at Appendix 3 of the Rules and Procedures was received on 31<sup>st</sup> July 2017. In anticipation of future meetings, the document has to date been furnished to NAMA, the C&AG and the Clerk to the PAC for information.

21. The Rules and Procedures are adopted in order to ensure the observation of fair procedures and to secure that the provisions Part 3 of the Act are appropriately applied. The Commission will accordingly, in the first instance, seek the voluntary cooperation of all witnesses from whom evidence is required. In the event that such voluntary cooperation is not forthcoming, the Commission will consider whether to use any of its powers under the Act to compel production of the required evidence.
22. The Commission may receive evidence and information in any form that it considers appropriate, including orally before the Commission, by affidavit, statements, submissions, electronic and paper documents, live video links, video and sound recordings and any other mode of transmission. Evidence, as defined by section 2 of the Act, includes “any expression, orally, in writing or otherwise, of an opinion, belief or intention.”
23. Before giving evidence to the Commission, a witness will be provided with a Witness Notice, which sets out the Commission’s powers under the relevant sections of the Act. The Commission will also give to any person, before he or she gives evidence to the Commission, a copy of the guidelines concerning recovery of legal costs. Both the Witness Notice and the Guidelines on Legal Costs are included in the Rules and Procedures at Appendix 2.
24. The Rules and Procedures also cover matters such as privilege, confidentiality, legal representation and the payment of costs and expenses. Under the Rules, there is no requirement that a witness retain a legal representative, although he or she may be accompanied by a legal representative while giving evidence.

### **The Work of the Commission**

25. In laying the ground for the substantive work of the investigation, preliminary contacts have been made with parties most directly involved in the investigation. In particular, on 3<sup>rd</sup> July 2017, introductory letters were written to NAMA, the C&AG and the PAC.

### **The National Asset Management Agency**

26. The letter to NAMA was by way of introduction and outline of how the Commission proposed to approach the investigation. It welcomed the public statements that the Agency had made assuring full cooperation with the Commission and stated that the Commission accordingly assumed that it was not necessary to make a formal request for confirmation that all documents, e-mails, correspondence and other records generated by or relevant to the Project Eagle

transaction would be carefully preserved intact and made available to the Commission.

27. In view of the likely large volume of documentary and other evidence already available from the Reports (see paragraph 9 above,) and in order to minimise the imposition on NAMA staff and avoid duplication of efforts, the letter suggested holding an initial informal meeting to establish lines of contact for the future exchange of communications and documentation.
28. On 7<sup>th</sup> July 2017, NAMA replied confirming its intention to cooperate with the Commission and welcoming the opportunity for an initial informal meeting. The Agency confirmed that all staff and Board members had been notified that all documents and information related to Project Eagle were to be carefully maintained so as to be available to the Commission if required.
29. Accordingly, the Sole Member and the Solicitor to the Commission held a first preliminary meeting with representatives from NAMA on 19<sup>th</sup> July 2017. At this meeting, the NAMA representatives reaffirmed the intention of the Agency to cooperate fully in the investigation. The Sole Member outlined in general terms how the Commission proposed to proceed, pointing out that a large amount of relevant information and documentary evidence was already available to the Commission in the public domain and it seemed possible that many of the basic facts relating to the course of the Project Eagle transaction and procedure were not in dispute. He noted that NAMA had already agreed a timeline of key events, dates, meetings and correspondence which had been prepared by the C&AG. In order to avoid unnecessary hearings for the purpose of gathering factual evidence, the Sole Member proposed that the Commission put together a comprehensive, objective summary of the key facts and events relating to the disposal transaction and to submit that to the Agency for comment and, hopefully, approval, so that it might constitute a correct account of the agreed facts of the course of the Project Eagle transaction.
30. There followed an exchange of views on a number of questions likely to arise in the course of the Commission's engagement with the Agency including the possibility of claims of privilege or confidentiality, the need for expert evidence in respect of loan and asset sales commercial practice and the possible implications of on-going criminal investigations in other jurisdictions.
31. The Sole Member informed the meeting that Rules and Procedures for the purpose of section 15 of the Act of 2004 were being drafted and that they would be furnished to the Agency when adopted and before any evidence was sought or received from it.



32. The meeting then discussed the practicalities of transferring documentary materials to the Commission once a document management and storage system was in place which was likely at that stage to be after the August holiday period. The NAMA representatives stated that they too might have delays due to the intervention of the vacation and, with a possible need to retrieve some archived e-mails, a little time might be required. The Commission representatives asked if it would be possible for the Agency to provide a list of all current and past NAMA staff members who had been involved at any stage in the Project Eagle transactions. NAMA agreed to provide one. Contact details were then exchanged.
33. By letter of 25<sup>th</sup> July 2017 NAMA reaffirmed its intention to work constructively with the Commission and informed the Commission that it had engaged a firm of solicitors to assist in the collection of the documentation and the compilation of an electronic schedule of the documentation set relating to the transaction.
34. On 9<sup>th</sup> August 2017, the Commission received from the Agency a detailed organogram listing all current and past staff members who had been engaged in the transaction with their relevant positions and functions.

#### **Comptroller & Auditor General**

35. The letter to the C&AG similarly outlined the approach the Commission envisaged adopting and the desire to avoid duplication of documentation by first appraising the materials originating in NAMA before seeking to identify additional items held by the C&AG's office and not elsewhere. It was suggested that lines of contact between the Commission and the C&AG office be put in place to facilitate future exchanges.
36. The Comptroller & Auditor General replied by phone call suggesting a meeting to discuss arrangements and a preliminary meeting with representatives of that office took place on 5<sup>th</sup> September 2017. The purpose of the meeting was to discuss arrangements for the identification and transfer of documents held by the C&AG and not already included in the materials to be furnished by NAMA. The C&AG assured the Commission of full cooperation. The Sole Member outlined the Commission's proposed approach to the investigation and the likely timeline for its engagement with the Office of the Comptroller.

#### **Public Accounts Committee**

37. The Commission's letter of the 3<sup>rd</sup> July 2017 to the PAC welcomed the remarks made on behalf of the Committee in Dáil Éireann on 23<sup>rd</sup> May 2017 confirming its intention to afford full assistance to the Commission. The letter mentioned that the Commission had accessed the transcripts of the oral hearings before the PAC on

the Committee web-site and enquired whether (as it assumed,) those represented the totality of the oral evidence received by the Committee. It explained that the Commission would first proceed to familiarise itself with that evidence and with the documentary evidence listed in the PAC Report. The letter enquired whether there was any additional documentation acquired by the Committee other than that received from NAMA or the C&AG and listed it the Report; and requested that if so, it would be helpful to the Commission if Committee staff could identify such items and supply a list to the Commission.

38. On 4<sup>th</sup> September 2017, the Office of the PAC confirmed by telephone that the requests in the letter of 3<sup>rd</sup> July were being dealt with and that the requested documentation was being reviewed. It was expected that the documents identified would then be retrieved and transferred to the Commission within the following two weeks.

#### **Department of Finance**

39. On 4<sup>th</sup> September 2017, the Commission requested from the Department of Finance a number of documents which had been furnished by the then Minister for Finance, Mr Michael Noonan, to the Public Accounts Committee during its hearings. The links to these documents, which were available on the Department's web-site had been discontinued since the publication of the report of the PAC. A reply was received from the Department on 8<sup>th</sup> September 2017, explaining that the links in question were being reinstated on the Department's new web-site and enclosing an electronic record of the files in question.

#### **United Kingdom National Crime Agency**

40. Prior to the establishment of the Commission, the National Crime Agency in the United Kingdom had offered to give the Government a high-level briefing on the ongoing investigation being conducted by that Agency into certain dealings and events connected with the Project Eagle disposal transaction. This correspondence was provided to the Commission upon its establishment and contact was made with the Agency to accept that offer. Arrangements have been made to receive that briefing in October.

#### **Brown Rudnick**

41. On 24<sup>th</sup> July 2017, an introductory letter was addressed to Brown Rudnick, in Boston, requesting confirmation of its evidence as contained in the letter of the 24<sup>th</sup> November 2016, addressed to the Public Accounts Committee. On 8<sup>th</sup> September

2017, the firm confirmed that the letter had been received and that it was expected to be able to provide a reply within two weeks.

**Timeframe for completion of Report**

42. Having regard to the assurances of full cooperation given by the principal parties concerned in the issues raised by the Terms of Reference and the Commission's preliminary assessment that extensive hearings to gather basic factual evidence may not be required, the Commission is of the view, at this stage, that it should be feasible to deliver a final report within the time scale fixed by paragraph 8 of the Terms of Reference.

**The Hon. John D. Cooke**  
Sole Member

**Dated: 12<sup>th</sup> September 2017**

# **Commission of Investigation (National Asset Management Agency)**

## **Terms of Reference**

1. In the first module of its work, the Commission is directed to investigate and make a report to the Taoiseach in accordance with the provisions of section 32 of the Commissions of Investigation Act 2004 (No. 23 of 2004) regarding the National Asset Management Agency's disposal of its Northern Ireland loan portfolio, referred to as Project Eagle.
2. In particular, the Commission is to investigate, having regard to NAMA's statutory obligations under the National Asset Management Agency Act 2009 and appropriate commercial practice:
  - (a) if the disposal strategy for its Northern Ireland loan portfolio (including the timing of the disposal and sale as a single portfolio) was appropriate in the circumstances;
  - (b) if the minimum price applied (and how it was derived) in relation to its Northern Ireland loan portfolio were appropriate in the circumstances;
  - (c) if the management of the sales process by NAMA, (including procedures and controls applied, timeframes, access to potential bidders and record-keeping) was appropriate in the circumstances and demonstrated best corporate governance;
  - (d) if any conflicts of interest arising in relation to members of NAMA's Northern Ireland Advisory Committee were managed appropriately in the circumstances;
  - (e) when and how NAMA became aware of fees allegedly payable to a former member of the Northern Ireland Advisory Committee by bidders on Project Eagle, and if this issue was managed appropriately by NAMA during the sale of the Northern Ireland loan portfolio, and
  - (f) if decisions and actions of the Minister for Finance and the Department of Finance relating to the disposal of the Northern Ireland portfolio, including communications with members and officials of the Northern Ireland Executive and meetings with potential bidders, were appropriate in the circumstances.

- The Commission shall investigate anything arising outside the State that it considers relevant to any of the matters set out from (a) to (f) above in so far as the Commission considers it practicable, appropriate and reasonable to do so and considers procedures adopted for that purpose can be carried out without unduly delaying the completion of the investigation and with a substantial expectation of being able to obtain the evidence necessary for the investigation.
3. The report to be made by the Commission in relation to the foregoing investigations shall:
    - (a) set out the scope and findings of the investigations in fulfilment of the purposes set out in paragraph 2 above;
    - (b) respect obligations of confidentiality and commercial sensitivity where those are not incompatible with the public interest; and
    - (c) set out such recommendations as the Commission sees fit.
  4. The Commission shall report on any other matters of concern arising from its investigation of the above matters and make any further recommendations as the Commission sees fit.
  5. The Commission shall exercise discretion in relation to the scope and intensity of the investigation as it considers necessary and appropriate, having regard to the general objectives of the investigation.
  6. The Commission shall avail of appropriate and independent commercial and financial expertise to inform its investigation.
  7. Where it deems it appropriate, the Commission shall draw on information already available, including that gathered by, and contained in reports of, the Comptroller and Auditor General and the Public Accounts Committee and the Northern Ireland Assembly Committee on Finance and Personnel.
  8. The Commission shall provide an interim report to the Taoiseach within three months of the date of its establishment and shall provide a final report on this first module of its work by the end of June 2018, subject to section 6 (6) of the Commissions of Investigation Act 2004.
  9. These Terms of Reference may be amended under section 6 (1) of the Commissions of Investigation Act 2004 to require the Commission to undertake further modules of work in relation to certain other transactions to which NAMA has been a party or to the operations of the Agency.



Appendix 2 – Rules and Procedures of the Commission of Investigation



**An Coimisiún Imscrúdúcháin**  
(Gníomhaireacht Náisiúnta  
um Bhainistíocht Sócmhainní)

**Commission of Investigation**  
(National Asset  
Management Agency)

**The Honourable John D. Cooke**  
**Sole Member**

# **Commissions of Investigation Act 2004**

## **Rules and Procedures**

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## **Introduction**

The Commission of Investigation into the disposal by the National Asset Management Agency of its Northern Ireland loan portfolio known as “Project Eagle” (“the Commission”) was established, pursuant to section 3 of the Commissions of Investigation Act 2004 (“the Act”), by order of the Government, dated 13<sup>th</sup> June 2017. (S.I No.267 of 2017.)

Notice of the making of the Government Order (Statutory Instrument No.192 of 2014) was published in *Iris Oifigiúil* on 20<sup>th</sup> June 2017.

The Government appointed the Honourable John D. Cooke, retired judge of the High Court, to act as the Sole Member of the Commission.

These Rules and Procedures are adopted by the Commission, pursuant to section 15 of the Act. They do not constitute an exhaustive statement of the powers and duties of the Commission and should be read in conjunction with and subject to the provisions of the Act.

## **Terms of Reference**

The Commission is directed to investigate and make a report to the Taoiseach in accordance with the provisions of section 32 of the Act on certain matters considered by the Government to be of significant public concern.

These matters are set out in the Terms of Reference of the Commission, which can be found in Appendix 1 of these Rules and Procedures.

The Commission is required to report to the Government no later than the end of June 2018, subject to section 6(6) of the Act.

The Rules and Procedures set out below have been adopted by the Commission in relation to evidence and submissions and, in accordance with section 15 of the Act, will be published to those persons involved in the work of the Commission.

## **Guiding principles**

### **Independence**

The Commission is independent in the performance of its functions.<sup>1</sup> The Commission will conduct its investigation in accordance with section 10 of the Act in the manner that it considers appropriate, having regard to the provisions of the Act and the observation of fair procedures, to the Terms of Reference of the Commission and in accordance with these Rules and Procedures.<sup>2</sup> It will seek and facilitate voluntary co-operation to the greatest extent possible with persons from whom evidence is desired. It will proceed as expeditiously as a proper consideration of the subject matter permits.

### **Conduct of investigation**

The Commission will conduct its investigation in private, save where it decides to grant the request of a witness that his or her evidence be heard in public, or where the Commission is satisfied that it is desirable in the interests both of the investigation and of fair procedures to hear all or part of the evidence of a witness in public.<sup>3</sup>

Where the evidence of a witness is to be heard in private, the Commission may give directions as to the persons who may be present while the evidence is being heard.<sup>4</sup>

The disclosure by any person of evidence heard or documentation produced to the Commission in private is not permitted (save in certain limited circumstances set out in sections 11 and 12 of the Act) and may constitute a criminal offence.<sup>5</sup>

### **Preservation of information**

Section 31(1) of the Act imposes a specific statutory duty on any person who has in his or her possession or power a document, or information in any form, relating to any matter within the Commission's Terms of Reference to preserve that document or information for the duration of the Commission, or the completion of a subsequent tribunal of inquiry.

A person in breach of this statutory duty to preserve a document or information may be guilty of a criminal offence under section 31(2) of the Act.

The decision as to whether a document is relevant to this investigation is a matter for the Commission and not for the person from whom documents are sought.

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<sup>1</sup> Commissions of Investigations Act 2004, s. 9

<sup>2</sup> *Ibid.* s.10.

<sup>3</sup> *Ibid.* s.11(1).

<sup>4</sup> *Ibid.* s.11(2).

<sup>5</sup> *Ibid.* s.11(3).



## **Evidence**

The powers of the Commission relating to the obtaining of evidence are set out in the Act, in particular sections 16, 17 and 28. (These provisions are summarised in more detail in the Witness Notice referred to in Appendix 3 below.)

The Commission will, in the first instance and to the extent permitted by the Act, seek the voluntary co-operation of all witnesses from whom evidence is required.

In the event that such voluntary co-operation is not forthcoming, the Commission will consider whether to use any of its powers under the Act to compel production of the required evidence.

Before a person gives evidence to the Commission, he or she will be provided with a Witness Notice setting out the Commission's powers under the relevant sections of the Act and indicating that, if voluntary co-operation is not given or is withdrawn, the Commission will exercise such of those powers as it considers necessary.<sup>6</sup> The Commission will also give to any person, before he or she gives evidence to the Commission, a copy of the guidelines concerning recovery of legal costs prepared by the Taoiseach.<sup>7</sup>

The Commission may receive evidence and information in any form that it considers appropriate, including orally before the Commission, by affidavit, statements, submissions, electronic and paper documents, live video links, video and sound recordings or any other mode of transmission.<sup>8</sup> Evidence includes any expression, orally, in writing or otherwise, of an opinion, belief or intention.<sup>9</sup>

A person who gives evidence to the Commission otherwise than by attending in person or by means of a live video link, must provide, within a period specified by the Commission, a sworn affidavit acknowledging that the evidence concerned was given by him or her; that the evidence was given voluntarily; and that to the best of his or her knowledge and belief the content of that evidence is true and accurate. A suggested draft affidavit for this purpose can be found in Appendix 2 of these Rules and Procedures.

A witness who attends before the Commission to give evidence may be required to give the evidence on oath or affirmation. If no legal representative is present to advise the witness, the Commission will advise the witness of his or her legal rights and obligations while giving such evidence.<sup>10</sup>

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<sup>6</sup> Ibid. s.13(1).

<sup>7</sup> Ibid. s.23(4).

<sup>8</sup> Ibid. ss.14, 15.

<sup>9</sup> Ibid. s. 2.

<sup>10</sup> Ibid. s.13(2), 14(2).

It is a criminal offence for any person giving evidence to the Commission to make a statement material to the investigation that he or she knows to be false or does not believe to be true. This applies whether or not the statement is made under oath or affirmation.

A person who gives evidence to the Commission, or who produces or sends documents to the Commission on being directed to do so, has the same immunities and privileges, and is subject to the same liabilities, as a witness in the High Court.<sup>11</sup>

### **Disclosure of evidence to witnesses**

The Commission will disclose to any person who is either directed to attend or attends voluntarily as a witness before it, or to any person about whom evidence is given to the Commission, the substance of any evidence in its possession that, in its opinion, the person should be aware of for the purposes of the evidence which that person has given or may give to the Commission.<sup>12</sup>

The Commission is not obliged to disclose the source of the evidence given or document produced by a witness while giving evidence in private, unless the interests of fair procedures require it.<sup>13</sup>

Any person to whom the substance of such evidence is disclosed will be given an opportunity to comment in evidence or by written or oral submissions on the evidence, in such manner as the Commission shall decide in accordance with its discretion.

### **Privilege and confidentiality**

The Commission will respect the confidence of all documents and evidence communicated to it, save to the extent that it is required by any of the provisions of the Act to disclose or report any such matter.

A person who has been requested, directed or ordered to provide documents, evidence or information to the Commission may request the Commission to consider a claim of privilege or duty of confidentiality in relation to the contents of same.

Anyone wishing to assert a claim of privilege or duty of confidentiality must write to the Commission at the earliest opportunity, indicating:

- the specific documents, evidence or information in respect of which a claim of privilege or duty of confidentiality is being asserted,

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<sup>11</sup> Ibid. s.20.

<sup>12</sup> Ibid. s.12.

<sup>13</sup> Ibid. s.12(2).

- the precise privilege or duty of confidentiality asserted,
- particulars of any facts or circumstances relevant to the privilege or duty of confidentiality asserted, and
- any legal submissions in support of the claim of privilege or duty of confidentiality.

Under section 21(2) of the Act, it is for the Commission to determine whether the claimed privilege or duty of confidentiality applies. For that reason, the Act requires that the person asserting such claim provide the documents concerned to the Commission in advance of a ruling by the Commission on the claim of privilege or confidentiality.

Where the Commission determines that the privilege or the duty of confidentiality relied on as grounds for refusing to produce a document does not apply to any of the information in the document, the document is considered for the purposes of this Act to have been received as evidence by the Commission, unless the determination is modified or overturned under section 22 of the Act.<sup>14</sup>

A person whose refusal to disclose information or to produce a document is the subject of a determination by the Commission under section 21(2) of the Act may appeal to the High Court against that determination.<sup>15</sup>

### **Legal representation**

There is no requirement that a witness retain a legal representative.

The fact that a witness has retained a legal representative does not relieve that person of his or her personal duties to the Commission.

A witness may be accompanied by his or her legal representative while giving evidence.

The legal representative of any person other than the witness may be present only if the Commission is satisfied that the presence of such a representative would be in keeping with the purpose of the investigation and in the interests of fair procedures and directs that he or she be allowed to be present. Such a legal representative may cross-examine the witness only if the Commission is satisfied that such cross-examination is necessary in the interests of fair procedures. Such cross-examination shall be limited to matters the Commission considers relevant to the investigation.

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<sup>14</sup> Ibid. s. 21(11).

<sup>15</sup> Ibid s.22.

A person who retains a legal representative for the purposes of dealing with the Commission does not, save as provided by sections 23 and 24 of the Act, thereby acquire any right to the legal costs of that representative.

### **Submissions**

The Commission may, in its discretion, request statements or submissions from any person who may have information of relevance to its investigation.<sup>16</sup>

Such statements or submissions should be communicated in writing to the Commission, in such form as may be decided by it, within a time which it will specify. The time frame for a statement or submission may be extended by the Commission where appropriate.

### **Guidelines on legal costs**

As required by section 23(1) of the Act, the Government, following consultation with the Commission, has prepared general guidelines concerning payment by the Taoiseach (as specified Minister) of legal costs necessarily incurred by witnesses in connection with this investigation.

Section 23(4) requires the Commission to supply a copy of these guidelines to every witness before he or she gives evidence to the Commission. To that end, the guidelines are set out in Appendix 3 of these Rules and Procedures.

### **Payment of witnesses' expenses or legal costs**

Any person who attends, whether voluntarily or otherwise, as a witness before the Commission is entitled to be paid by the Taoiseach (as specified Minister in relation to this Commission) such amount in respect of the expenses of his or her attendance as is determined in accordance with the guidelines prepared in accordance with section 23 of the Act.

Section 24 of the Act empowers the Commission – at the request of a witness – to direct that all or part of the legal costs necessarily incurred by that witness in connection with its investigation be paid by the Taoiseach.

Under section 24(2), the Commission may not issue a direction for the payment of legal costs of a witness unless satisfied that:

- (a) the costs were necessarily incurred, and
- (b) the level and amount of those costs are reasonable.

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<sup>16</sup> Ibid. s. 15.

In considering a request to direct payment of legal costs, the Commission will have regard to all relevant factors, including the specific criteria set out in section 24(3) of the Act, before making any decision in that regard.

### **Procedure for seeking legal costs**

Requests for the Commission to direct the payment of legal costs incurred by a witness must be made in writing to the Commission and should include the following:

- the name of the witness making the request,
- contact details for the witness making the request,
- the factual basis upon which it is claimed that legal costs were necessarily incurred,
- the factual basis upon which it is claimed that the level and amount of costs for which payment is sought are reasonable,
- a bill of costs, and
- the amount of Value Added Tax on those legal costs.

### **Procedure for seeking certain other expenses**

A witness who has incurred heavy expenses (other than legal costs) arising from his or her involvement with the Commission, may request the Commission to direct that all or part, of those expenses be paid by the Taoiseach. These expenses may relate to:

- (a) The nature, volume or location of documents produced by the witness,
- (b) Where relevant, the location outside the State from which the witness travelled to attend before the Commission,
- (c) Any other factor not within the control of the witness.<sup>17</sup>

A request for a direction in relation to such expenses must be made in writing to the Commission and should include the following:

- the name of the witness making the request,
- contact details for the witness making the request,
- the factual basis upon which the expenses are claimed, including all original vouchers and receipts in respect of such expenses,

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<sup>17</sup> Ibid s.24(5).



- the total amount of expenses claimed, and
- the amount of Value Added Tax on those expenses, if any.

The Commission, if satisfied that the expenses incurred were necessary in the circumstances, will direct payment of such amount of expenses as it considers reasonable.

### **Cut-off date for costs and expenses**

Prior to submitting its final report to the Taoiseach, the Commission will schedule a cut-off date, beyond which any requests in relation to costs or expenses will not be considered.

### **Interim reports**

The Commission may submit an interim report to the Taoiseach in the following circumstances:

- At the request of the Taoiseach, or
- Where the Commission considers it necessary to request that the time frame for its investigation be revised under section 6(6) of the Act.

### **Disclosure of draft reports**

Before an interim or final report is submitted to the Taoiseach, the Commission will send the draft report, or relevant sections thereof, to any person who is identified in, or identifiable from the draft report.<sup>18</sup>

A person is considered identifiable if the draft report contains information that could reasonably be expected to lead to his or her identification.<sup>19</sup>

The Commission will specify a period within which any person who receives a draft report or part thereof and who believes that the Commission has not observed fair procedures in relation to him or her, may do either of the following:

- (a) Submit a written statement to the Commission setting out the reasons for the belief and requesting the Commission to review the draft in light of the statement, or
- (b) Apply to the Court for an order directing that the draft be amended before the submission of the report to the Taoiseach.<sup>20</sup>

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<sup>18</sup> Ibid s.34(1).

<sup>19</sup> Ibid s.34(3).

<sup>20</sup> Ibid s.35(1).

## **Final report and dissolution of the Commission**

On the conclusion of its investigation, the Commission will prepare and submit to the Taoiseach a final report, based on the evidence received by it, concerning the matters set out in the Commission's Terms of Reference.<sup>21</sup>

Prior to submitting the final report, the Commission will deposit with the Taoiseach all evidence received by and documents created by or for the Commission.<sup>22</sup>

The Commission shall be dissolved on the submission of its Final Report to the Taoiseach, unless a tribunal is established to inquire into a matter which is wholly within the Commission's terms of reference. In that event, the Government shall, by order notified in *Iris Oifigiúil*, appoint the day on which the Commission is to be dissolved.

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<sup>21</sup> Ibid s.32(1).

<sup>22</sup> Ibid s.43(2).

# APPENDIX 1

## Commission of Investigation (National Asset Management Agency)

### Terms of Reference

1. In the first module of its work, the Commission is directed to investigate and make a report to the Taoiseach in accordance with the provisions of section 32 of the Commissions of Investigation Act 2004 (No. 23 of 2004) regarding the National Asset Management Agency's disposal of its Northern Ireland loan portfolio, referred to as Project Eagle.
2. In particular, the Commission is to investigate, having regard to NAMA's statutory obligations under the National Asset Management Agency Act 2009 and appropriate commercial practice:
  - (a) if the disposal strategy for its Northern Ireland loan portfolio (including the timing of the disposal and sale as a single portfolio) was appropriate in the circumstances;
  - (b) if the minimum price applied (and how it was derived) in relation to its Northern Ireland loan portfolio were appropriate in the circumstances;
  - (c) if the management of the sales process by NAMA, (including procedures and controls applied, timeframes, access to potential bidders and record-keeping) was appropriate in the circumstances and demonstrated best corporate governance;
  - (d) if any conflicts of interest arising in relation to members of NAMA's Northern Ireland Advisory Committee were managed appropriately in the circumstances;
  - (e) when and how NAMA became aware of fees allegedly payable to a former member of the Northern Ireland Advisory Committee by bidders on Project Eagle, and if this issue was managed appropriately by NAMA during the sale of the Northern Ireland loan portfolio, and

- (f) if decisions and actions of the Minister for Finance and the Department of Finance relating to the disposal of the Northern Ireland portfolio, including communications with members and officials of the Northern Ireland Executive and meetings with potential bidders, were appropriate in the circumstances.

The Commission shall investigate anything arising outside the State that it considers relevant to any of the matters set out from (a) to (f) above in so far as the Commission considers it practicable, appropriate and reasonable to do so and considers procedures adopted for that purpose can be carried out without unduly delaying the completion of the investigation and with a substantial expectation of being able to obtain the evidence necessary for the investigation.

3. The report to be made by the Commission in relation to the foregoing investigations shall:
  - (a) set out the scope and findings of the investigations in fulfilment of the purposes set out in paragraph 2 above;
  - (b) respect obligations of confidentiality and commercial sensitivity where those are not incompatible with the public interest; and
  - (c) set out such recommendations as the Commission sees fit.
4. The Commission shall report on any other matters of concern arising from its investigation of the above matters and make any further recommendations as the Commission sees fit.
5. The Commission shall exercise discretion in relation to the scope and intensity of the investigation as it considers necessary and appropriate, having regard to the general objectives of the investigation.
6. The Commission shall avail of appropriate and independent commercial and financial expertise to inform its investigation.
7. Where it deems it appropriate, the Commission shall draw on information already available, including that gathered by, and contained in reports of, the Comptroller and Auditor General and the Public Accounts Committee and the Northern Ireland Assembly Committee on Finance and Personnel.
8. The Commission shall provide an interim report to the Taoiseach within three months of the date of its establishment and shall provide a final report on this first module of its work by the end of June 2018, subject to section 6 (6) of the Commissions of Investigation Act 2004.

9. These Terms of Reference may be amended under section 6 (1) of the Commissions of Investigation Act 2004 to require the Commission to undertake further modules of work in relation to certain other transactions to which NAMA has been a party or to the operations of the Agency.



# APPENDIX 2



**An Coimisiún Imscrúdúcháin**  
**(Gníomhaireacht Náisiúnta**  
**um Bhainistíocht Sócmhainní)**

**Commission of Investigation**  
**(National Asset**  
**Management Agency)**

**The Honourable John D. Cooke**  
Sole Member

## **Affidavit Verifying Evidence**

I, \_\_\_\_\_ [name], of \_\_\_\_\_ [address], \_\_\_\_\_  
[description/occupation], aged 18 years and upwards **MAKE OATH** and say as follows:

1. I am \_\_\_\_\_ [name], of \_\_\_\_\_ [address] and am \_\_\_\_\_ [description].
2. I make this affidavit from facts within my own knowledge and from data, documentation and information within my possession, power or procurement save where otherwise appears and where so otherwise appearing I believe the same to be true.
3. I have read the terms of reference of the Commission of Investigation identified in the above title (“the Commission”).
4. I have read the Rules and Procedures document published by the Commission.

5. I have read the \_\_\_\_\_ [request/direction/order] of the Commission directed to \_\_\_\_\_ [name person] dated the \_\_ day of \_\_\_\_\_, 2017
6. I am aware of, and understand, the requirements of sections 10, 14, 16, 17, 28 and 31 of the Commissions of Investigation Act 2004.
7. I am a person who has given evidence to the Commission otherwise than by attending before the Commission (or, if appropriate, by means of a video link) pursuant to Section 14(4) of the Commissions of Investigation Act 2004.
8. I refer to a text copy of my evidence given on the \_\_ day of \_\_\_\_\_, 2014 at \_\_\_\_\_ [address] upon which and marked with the letter “A” I have signed my name prior to swearing this affidavit.
9. I have read the text copy of my evidence given on the \_\_ day of \_\_\_\_\_, 2014 at \_\_\_\_\_ [address] and I confirm that:
  - ( a ) this evidence was given by me, \_\_\_\_\_ [name], on the \_\_ day of \_\_\_\_\_, 2014 at \_\_\_\_\_ [address],
  - ( b ) this evidence was given voluntarily, and
  - ( c ) that to the best of my knowledge this evidence is true and accurate.

**SWORN** this \_\_ day of \_\_\_\_\_, 2014  
 At \_\_\_\_\_ [address] by \_\_\_\_\_ [name]  
 Before me \_\_\_\_\_ [name]  
 a Commissioner for Oaths/Practising Solicitor  
 and I know the deponent.

# APPENDIX 3



**An Coimisiún Imscrúdúcháin  
(Gníomhaireacht Náisiúnta  
um Bhainistíocht Sócmhainní)**

**Commission of Investigation  
(National Asset  
Management Agency)**

**The Honourable John D. Cooke  
Sole Member**

**General Guidelines on Payment of Legal Costs and  
Other Expenses to Persons Who Become Involved with  
the Commission of Investigation**

**Purpose of General Guidelines**

1. These General Guidelines have been agreed by An Taoiseach, as the specified Minister, following consultation with the Commission and with the consent of the Minister for Public Expenditure and Reform, as required by the Commissions of Investigation Act 2004 (the Act) and the Finance (Transfer of Departmental Administrative and Ministerial Functions) Order 2011 [S.I. No. 418/2011].
2. These guidelines should be read in conjunction with that Act.<sup>23</sup>
3. The Commission operates in accordance with these guidelines on costs but is independent in the performance of its functions as set out in the Act.

**What Expenses (Other than Legal Costs) Can a Person Expect to Recover?**

4. A person who attends as a witness before the Commission is entitled to payment of the expenses incurred by reason of that attendance.<sup>24</sup>
5. The expenses to be covered are travel and transport costs, accommodation, meals and any other expenses that are necessarily incurred as a direct result of attendance before the Commission.

<sup>23</sup> In the event of any dispute, the terms of the Act shall prevail

<sup>24</sup> Commissions of Investigation Act 2004, s. 16(3).

Expenses related to loss of earnings will not be paid unless the person concerned can show to the satisfaction of the Commission that s/he has suffered undue hardship by reason of his/her attendance.

Expenses will not be paid to any serving public servant whose expenses have been met by his/her employer.

Payment in respect of accommodation and meals will be made on the basis of vouched expenses, subject to the following upper limits:

- A maximum of € 108.99 in respect of an overnight stay;
- A maximum of € 33.61 in respect of a period of 10 hours or more;
- A maximum of € 13.71 in respect of a period of 5 hours or more.

Where possible, public transport (bus or rail) should be used. Taxis should only be used where another reasonable alternative does not exist. In the event that use of a private car is necessary, expenses will be met at the rate of € 0.38 per mile / €0.24 per kilometre.

6. A person may also request the Commission of Investigation to pay 'heavy expenses'<sup>25</sup> (other than legal costs) incurred because of:

- The nature, volume or location of the documents produced by the witness;
- The location outside the State from which the witness travelled to attend before the Commission;
- Any other factor not within the control of the witness.

It is a matter for the Commission to decide what constitutes 'heavy expenses' on a case by case basis. The Commission may, on being satisfied that they were necessary in the circumstances, direct that such amount of those expenses as it considers reasonable be paid to the witness.

### **What Legal Costs Can a Person Expect to Recover?**

7. A witness may request recovery of legal costs necessarily incurred.<sup>26</sup>

8. Legal costs shall not be paid except where:

- a) The good name or conduct of the witness are called into question by any evidence received by the Commission, or
- b) Other personal or property rights of the witness are at risk of being jeopardised as a result of any evidence received by the Commission.

'Legal Costs' means fees, disbursements, charges and expenses included in a bill of costs in respect of a barrister or solicitor.

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<sup>25</sup> Ibid. s. 24(5)

<sup>26</sup> Ibid. ss. 23 and 24

9. Discovery costs may be included as legal costs for a party who has been granted legal representation before the Commission, in which case payment of costs of discovery will be decided in the context of payment of overall legal costs.
10. The amount of legal costs to be paid by An Taoiseach, as the specified Minister, shall be assessed by the Commission in the light of the relevant provisions of the Act.<sup>27</sup>

These Guidelines do not place any restriction on the number or type of legal representatives that may be engaged by a party who has been granted legal representation by the Commission.

The Commission may, in its discretion, limit the amount of legal costs recoverable in respect of such representation (including the number of those representatives).

These Guidelines specify a maximum daily rate for Senior Counsel, Junior Counsel and Solicitor in respect of their appearance before the Commission (see paragraph 12 below)

11. The Commission is to be satisfied that any legal costs to be paid were necessarily incurred and that the level and amount of these costs are reasonable.
12. The amounts payable in respect of appearance by a legal representative before the Commission are:

Senior Counsel	€788.27 <i>per diem</i> (excluding VAT)
Junior Counsel	€394.14 <i>per diem</i> (excluding VAT)
Solicitor	€624.00 <i>per diem</i> (excluding VAT)

13. The amounts payable in respect of the following affidavits that may be furnished to the Commission are:

An affidavit of documents	A maximum of €780.00, subject to the exemption set out below
An affidavit verifying evidence	A maximum of €390.00 per affidavit (to cover payment to all legal representatives)
An affidavit	A maximum of €390.00 per affidavit (to cover payment to all legal representatives)

These maximum limits may only be exceeded in respect of an affidavit of documents that requires discovery costs in excess of that limit and where, in the Commission's view:

- The volume of documents discovered is substantial;

<sup>27</sup> Ibid. ss. 23 and 24

- The documents disclosed were relevant;
  - The legal normalities in relation to the swearing of the affidavit of documents was properly and promptly complied with; and
  - These costs were necessarily incurred.
14. To the extent possible, legal representation shall be granted on a joint basis to parties with similar interests, and in any event, the costs incurred by such parties shall be assessed by reference to the potential reduction in legal costs that could have been secured through such joint representation irrespective of whether such joint representation occurred, with the distribution of allowable costs to be determined by the Commission by reference to the criteria in the Act.<sup>28</sup>
15. These Guidelines are definitive as to all legal costs or expenses (including heavy expenses) that may be recoverable by a person who seeks to recover such costs or expenses from the Commission. No payment shall be made in respect of brief fees, instruction fees or any other legal costs or expenses, other than those legal costs and expenses expressly specified in these Guidelines.

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<sup>28</sup> Ibid. ss. 23 and 24



# APPENDIX 4



**An Coimisiún Imscrúdúcháin**  
**(Gníomhaireacht Náisiúnta**  
**um Bhainistíocht Sócmhainní)**

**Commission of Investigation**  
**(National Asset**  
**Management Agency)**

**The Honourable John D. Cooke**  
**Sole Member**

## WITNESS NOTICE

### **Introduction**

The Commission of Investigation into the disposal by the National Asset Management Agency of its Northern Ireland loan portfolio known as “Project Eagle” (“the Commission”) was established pursuant to section 3 of the Commissions of Investigation Act 2004 (“the Act”) by order of the Government dated 13<sup>th</sup> June 2017 (S.I No.267 of 2017).

Before a person gives evidence to the Commission, section 13 of the Act requires that the Commission provide that person with a written statement setting out certain powers of the Commission and indicating the circumstances in which the Commission may decide to exercise those powers.

This is an important document. The Commission invites you to read it carefully before you give evidence to the Commission.

### **Powers relating to witnesses and documents**

Section 16(1) of the Act provides that, for the purposes of its investigation, the Commission may do all or any of the following:

- Direct in writing any person to attend before the Commission on a date and at a place and time specified in the direction and there to give evidence and to produce any document that is in the person’s possession or power and is specified in the direction.



- Direct a witness to answer questions that it believes to be relevant to a matter under investigation.
- Examine a witness on oath or affirmation or by use of a statutory declaration or written interrogatories.
- Examine or cross-examine any witness to the extent the Commission thinks proper in order to elicit information relevant to a matter under investigation.
- Direct a witness to produce to the Commission any document that is in his or her possession or power and is specified in the direction.
- Direct, in writing, any person to-
  - o Provide the Commission with a list, verified by affidavit, disclosing all documents in the person's possession or power relating to a matter under investigation, and
  - o Specify in the affidavit any of the listed documents that the person objects to producing to the Commission and the basis for the objection.

Please note that the rules of court relating to the discovery of documents in court proceedings apply with any necessary modifications in relation to the disclosure of documents pursuant to a direction of this kind by the Commission.<sup>29</sup>

- Direct in writing any person to send to the Commission any document that is in the person's possession or power and is specified in the direction.
- Direct a person, who made a statement or answered a question while being interviewed by a person appointed under section 8 of the Act to advise or assist the Commission, to provide the Commission with a sworn statement, in a form acceptable to the Commission, confirming, (if such is the case) –
  - o That the statement was made or the answer given by him or her voluntarily, and
  - o That to the best of his or her knowledge, the content is true and accurate.

Where such a statement or answer to a question is confirmed in this manner, it is considered to have been received as evidence by the Commission.<sup>30</sup>

- Give any other directions that appear to the Commission to be reasonable.

Where a person does not comply with a direction given by the Commission under section 16(1) of the Act, the Sole Member of the Commission may apply to the High Court for:

- (a) An order that the person comply with the direction, and
- (b) Any other order the Court considers necessary and just to enable the direction to have full effect.<sup>31</sup>

<sup>29</sup> Commissions of Investigation Act 2004, s. 16(4)

<sup>30</sup> Ibid. s.16(5)

<sup>31</sup> Ibid. s.16(6)

Failure to comply with the direction specified in such an order may be dealt with by the Court as if it were a contempt of court.<sup>32</sup>

### **Power to direct certain persons to pay costs**

Section 17 of the Act provides that, where a person obstructs the Commission in the carrying out of its investigation and the Commission thereby incurs costs which it would not otherwise have incurred, the Commission may, in writing, direct that person to pay to the Minister for Finance those costs, including legal costs, as taxed by a Taxing Master of the High Court, and costs arising from any delay in completing the investigation.

Such obstruction may include failing, without reasonable excuse, to comply with one or more of the following:-

- (i) A direction from the Commission under section 16 of the Act.
- (ii) A request for additional information in relation to evidence previously given by that person to the Commission,<sup>33</sup> or
- (iii) A request to submit a document to the Commission for the purposes of determining a claim of privilege or duty of confidentiality in relation to that document.<sup>34</sup>

If the said obstruction adversely affects any other person who attends or gives evidence to the Commission, the Commission may – on its own initiative or at the request of the person so affected – direct that all or part of any costs (including legal costs) incurred by the affected person as a result of the obstruction, be paid by the person responsible for that obstruction.<sup>35</sup>

A direction by the Commission ordering payment of either its own costs or the costs of a witness in the circumstances outlined above does not take effect until it is confirmed by the High Court on the application of the Sole Member.<sup>36</sup> The Court may make an order confirming the direction with or without modification, or may refuse to make such an order.<sup>37</sup>

Any sum payable pursuant to a direction which has been confirmed by the Court may be recovered as a simple contract debt in any court of competent jurisdiction.<sup>38</sup>

A person may be directed to pay costs under section 17 of the Act, even though the act or omission that resulted in the direction is punishable as a contempt of Court or as an offence under the Act. The issuing of a direction under this section of the Act does not prevent the person being punished for contempt or the bringing of proceedings in respect of the offence.<sup>39</sup>

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<sup>32</sup> Ibid. s. 16(7)

<sup>33</sup> Ibid. s. 14(5)

<sup>34</sup> Ibid. s. 21

<sup>35</sup> Ibid. s. 17(2)

<sup>36</sup> Ibid. s. 17(3)

<sup>37</sup> Ibid. s. 17(4)

<sup>38</sup> Ibid. s. 17(5)

<sup>39</sup> Ibid. s. 17(6)

## **Powers of entry and inspection**

Section 28 of the Act sets out a number of powers which can be exercised by “authorised persons” at the direction of the Commission. In this context, an “authorised person” is defined as:

- (a) The Sole Member of the Commission, and
- (b) Any person appointed under section 8 of the Act to assist and advise the Commission and who has been authorised in writing by the Commission to exercise the powers set out in section 28.<sup>40</sup>

Authorised persons may only exercise those powers where the Commission considers it reasonable and necessary for the purposes of its investigation, and so directs.<sup>41</sup>

Subject to those conditions, an authorised person may do any or all of the following:

- Enter at any reasonable time any premises in which the authorised person has reasonable grounds to believe there are any documents or there is information in any form, relating to any matter within the Commission’s Terms of Reference;
- Inspect any documents, or information, in any form, on the premises;
- Secure for later inspection any documents or any information in any form and any equipment in which those documents or that information may be held, if the authorised person has reason to believe that the documents or information may be relevant to the investigation;
- Secure for later inspection the premises, or any part of the premises, but only if the authorised person considers it necessary to do so, in order to preserve for inspection documents or information in any form that he or she has reason to believe may be kept there and may relate to the investigation;
- Take copies of or extracts from any documents or any electronic information system on the premises, including, in the case of information in a non-legible form, copies of or extracts from such information in a permanent legible form;
- Remove for later examination or copying any documents, or information in any form, that the authorised person has reason to believe may relate to a matter under investigation and retain them for the period that he or she considers reasonable;
- Direct any person on the premises to produce to the authorised person any documents, or information in any form, kept on the premises;
- Direct any person on the premises having charge of, or otherwise concerned with the operation of, data equipment or any associated apparatus or material to provide the authorised person with all reasonable assistance in relation to the equipment, apparatus or material;

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<sup>40</sup> Ibid. s. 26

<sup>41</sup> Ibid. s. 27

- Direct any person on the premises to give to the authorised person any information, or information in any form, kept on the premises;
- Direct any person on the premises having charge of, or otherwise concerned with the operation of, data equipment or any associated apparatus or material to provide the authorised person with all reasonable assistance in relation to the equipment, apparatus or material;
- Direct any person on the premises to give to the authorised person any information that the authorised person may reasonably require with regard to a matter under investigation.

An authorised person may not enter a private dwelling or the part of any premises that is used as a private dwelling, except with the consent of the occupier, or under the authority of a warrant issued under section 29 of the Act by a judge of the District Court.<sup>42</sup>

When exercising powers under this section, an authorised person may be accompanied by a member of An Garda Síochána.<sup>43</sup>

The production of a document in compliance with a direction under section 28 of the Act does not prejudice a person's lien on the document.<sup>44</sup>

### **Exercise of powers by the Commission**

The Commission will, in the first instance and to the extent permitted by the Act, seek and facilitate the voluntary co-operation of all witnesses from whom evidence is required.<sup>45</sup>

In the event that such voluntary co-operation is not forthcoming or is withdrawn, the Commission will consider whether to use any of its powers under the Act to compel production of the required evidence.<sup>46</sup>

### **Legal representation before the Commission**

There is no requirement that a witness retain a legal representative. The fact that a witness has retained a legal representative does not relieve that person of his or her personal duties to the Commission.

A witness may be accompanied by his or her legal representative while giving evidence. If you have no legal representative to advise you, the Commission will advise you of your legal rights and obligations while giving evidence.

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<sup>42</sup> Ibid. s. 28(2)

<sup>43</sup> Ibid. s. 28(3)

<sup>44</sup> Ibid. s. 28(4)

<sup>45</sup> Ibid. s. 10(2)

<sup>46</sup> Ibid. s. 13(1)