

3. Overview of the *Royal Commissions Act 1902* (Cth)

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Introduction

3.1 This chapter provides an overview of the *Royal Commissions Act 1902* (Cth). It outlines the primary features of the Act. In Chapter 5, the ALRC proposes that the *Royal Commissions Act* should be renamed the *Inquiries Act* and amended to enable the establishment of Royal Commissions and Official Inquiries.¹ Particular aspects of the proposed *Inquiries Act* are discussed in greater detail in other chapters in this Discussion Paper.

Establishment

3.2 At common law, the Crown has the power to issue a Royal Commission. This power has been described as ‘an essential part of the equipment of all executive authority’.² A Royal Commission issued pursuant to the Crown’s common law powers may inquire into any matter, so long as the inquiry is for a purpose of government.³ It

1 Proposal 5–1.

2 *Huddart Parker & Co Pty Ltd v Moorhead* (1909) 8 CLR 330, 370.

3 *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25, 156.

does not, however, have coercive powers, such as the power to compel the attendance of witnesses or require the production of documents.⁴

3.3 The Crown's common law power to issue a Royal Commission is supplemented by s 1A of the *Royal Commissions Act*.⁵ This section provides that the Governor-General may, by Letters Patent, issue a commission to a person or persons requiring or authorising him or her to inquire into and report upon 'any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth'. 'Letters Patent' are a type of legal instrument containing public directions from a monarch.⁶ Historically, they have been used for a variety of purposes, such as conferring powers or privileges on persons or companies, and creating peerages.⁷

3.4 Section 16A of the *Acts Interpretation Act 1901* (Cth) provides that a reference in an Act to the Governor-General shall be read as referring to the Governor-General acting with the advice of the Executive Council. The Executive Council consists of all ministers of state (ministers and parliamentary secretaries).⁸ Accordingly, Royal Commissions are established by the Governor-General on the advice of all ministers.

3.5 In *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd*, it was argued that the *Royal Commissions Act* was invalid because it purported to authorise the Governor-General to establish Royal Commissions with coercive powers to inquire into matters beyond the legislative power of the Commonwealth.⁹ While the judgment of the Privy Council in this case cast doubt upon the constitutionality of the Act, a later judgment of the High Court of Australia confirmed that the common law doctrine of severability,¹⁰ as well as s 15A of the *Acts Interpretation Act*, enabled s 1A of the Act to be read as 'validly operating in respect of subjects of inquiry to which Commonwealth powers extend'.¹¹

4 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 83, 99.

5 In Ch 5, the ALRC discusses the prerogative, or common law, power of the executive to establish a Royal Commission.

6 D Walker, *The Oxford Companion to Law* (1980), 761.

7 *Ibid.*

8 *Australian Constitution* s 64. Appointments to the Executive Council are for life, although in practice only executive councillors who are members of the current ministry advise the Governor-General: Australian Government Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook* (2005), [2.14].

9 *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644.

10 The doctrine of severability permits a court to read an Act as if unconstitutional sections of the Act were not included.

11 *Lockwood v Commonwealth* (1954) 90 CLR 177, 184. Section 15A of the *Acts Interpretation Act 1901* (Cth) provides that Acts are to be read and constructed subject to the *Australian Constitution*.

3.6 As noted in Chapter 2, Royal Commissions have been established to inquire into a wide range of matters, including the location of the seat of government,¹² taxation policy,¹³ the *Australian Constitution*,¹⁴ grain storage and handling,¹⁵ the activities of unions,¹⁶ and the ‘usual rich array of alleged improprieties’.¹⁷ A Royal Commission cannot inquire into a matter if its inquiry would interfere with the administration of justice.¹⁸ It has been held, for example, that a Royal Commission could not inquire into allegations that a person has been guilty of criminal conduct if a criminal prosecution has been commenced against the person in respect of the alleged conduct.¹⁹ In the United Kingdom, the minister responsible for establishing a public inquiry may suspend the inquiry to enable the determination of civil or criminal proceedings arising out of matters to which the inquiry relates.²⁰

Jurisdiction

3.7 The ‘jurisdiction’ or ‘charter’ of a Royal Commission is set out in the Letters Patent issued by the Governor-General. For the purposes of this Discussion Paper, the jurisdiction of a Royal Commission is referred to as its ‘terms of reference’.

3.8 Section 1A of the *Royal Commissions Act* does not provide any guidance on the framing of the terms of reference for a Royal Commission. It has been held, however, that the word ‘matter’ in the provision has a wide operation, and that, within constitutional limits, a ‘general description of the subject of the inquiry will suffice’.²¹

3.9 Issues for this Inquiry include whether the proposed *Inquiries Act* should provide further guidance about the subject matter of Royal Commissions and Official Inquiries, or the circumstances in which they should be established. These issues are discussed in Chapter 6.

Membership

3.10 Section 1A of the *Royal Commissions Act* empowers the Governor-General to ‘issue such commissions, directed to such person or persons, as he or she thinks fit’. Accordingly, Royal Commissioners are appointed by the Governor-General, on the advice of the Executive Council. Commissioners are almost always drawn from outside

12 Royal Commission on Sites for the Seat of Government of the Commonwealth (1903).

13 Royal Commission on Taxation of Leasehold Estates in Crown Lands (1919); Royal Commission on Taxation (1934).

14 Royal Commission on the Constitution (1929).

15 Royal Commission into Grain Storage, Handling and Transport (1988).

16 Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984).

17 R Sackville, ‘Law Reform Agencies and Royal Commissions: Toiling in the Same Field’ in B Opekin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 279.

18 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 84.

19 *Hammond v Commonwealth* (1982) 152 CLR 188, 198.

20 *Inquiries Act 2005* (UK) s 13. The power of a minister to suspend an inquiry is discussed in Ch 14.

21 *Boath v Wylwill* (1989) 85 ALR 621, 630.

the government, which enhances the perception that Royal Commissions are independent.²²

3.11 As a matter of practice, Royal Commissions are ‘largely the province of lawyers’.²³ Of the 38 federal Royal Commissions that have been established since 1970, 32 have been chaired by current or former judges, or legal practitioners.²⁴ The membership of inquiries that may be established under the proposed *Inquiries Act* is discussed in Chapter 6.

Coercive powers

3.12 Royal Commissions established under the *Royal Commissions Act* have a number of coercive information-gathering powers. For example, they have the power to summon witnesses to give evidence,²⁵ summon or require witnesses to produce documents or things,²⁶ and require witnesses to give evidence under oath or affirmation.²⁷

3.13 A person who fails to attend a hearing or produce requested documents or things, without reasonable excuse, commits an offence, punishable by a maximum penalty of \$1,100 or imprisonment for six months.²⁸ A person who refuses to be sworn or make an affirmation, or to answer any relevant question asked by a Royal Commission, or legal practitioner assisting or appearing before a Royal Commission, or a person authorised to appear, also commits an offence punishable by the same maximum penalty.²⁹

3.14 Royal Commissions established under the Act have other powers that are not strictly information-gathering powers, but which, if exercised, may ultimately result in the acquisition of relevant information. For example, a ‘relevant Commission’³⁰ may authorise a member of the Commission, a member of the Australian Federal Police, or a member of the police force of a state or territory to apply for a search warrant in relation to a matter into which it is inquiring.³¹ All Royal Commissions can issue a warrant for the arrest of a witness for failing to attend in answer to a summons.³²

22 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [6.7].

23 R Sackville, ‘Law Reform Agencies and Royal Commissions: Toiling in the Same Field’ in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 282.

24 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [8.6].

25 *Royal Commissions Act 1902* (Cth) s 2(1)(a).

26 *Ibid* s 2(1)(b), (2), (3A), (5).

27 *Ibid* s 2(3).

28 *Ibid* s 3.

29 *Ibid* ss 6, 6FA.

30 A ‘relevant Commission’ is a Commission established by Letters Patent that declare that the Commission is a relevant Commission for the purposes of the provision in which the expression appears: *ibid* s 1B.

31 *Royal Commissions Act 1902* (Cth) s 4.

32 *Ibid* s 6B.

3.15 Examination of the powers of Royal Commissions raises a number of questions. For example, do all inquiries established under the proposed *Inquiries Act* require the same coercive information-gathering powers? Do the current coercive information-gathering powers adequately balance individual rights and the powers of the state, and are the penalties for offences designed to support the use of a Royal Commission's powers appropriate? The powers of Royal Commissions and Official Inquiries established under the proposed *Inquiries Act* are discussed in detail in Part D. Offences and penalties are discussed further in Part F.

Methods of taking evidence

3.16 The *Royal Commissions Act* does not preclude the taking of evidence otherwise than on oath or by affirmation.³³ The provisions of the Act, however, 'envisage that Royal Commissions will obtain evidence mainly through oral hearings'.³⁴ For example, s 6FA provides that counsel assisting a Commission, or any person or legal practitioner authorised by a Commission to appear before it, may examine or cross-examine any witness about any matter which the Commission deems relevant, so far as the Commission thinks proper. There are not, however, any provisions expressly enabling evidence to be taken in other ways, for example, by affidavit or written statement.

3.17 Royal Commissions have a general discretion to determine whether to conduct their hearings in public or private.³⁵ When exercising this discretion, a Royal Commission will consider a number of factors, including, for example, whether the risk that a person's reputation will be unfairly damaged outweighs the public interest in conducting a Royal Commission openly.³⁶

3.18 The *Royal Commissions Act* also contains some provisions that deal with the publication of evidence given before a Royal Commission. Section 6D(2) of the Act enables a witness to request that a Royal Commission take evidence in private where the evidence relates to the profits or financial position of any person, and it would be unfairly prejudicial to the interests of that person to take the evidence in public. Further, s 6D(3) enables a Royal Commission to direct that any evidence given before it, any document or thing produced to it, or any information that may enable a person who has given evidence before it to be identified, shall not be published.

3.19 The taking of evidence by potential inquiries under the proposed *Inquiries Act* is discussed in detail in Part E.

33 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 350.

34 *Ibid.*

35 *Royal Commissions Act 1902* (Cth) s 6D(5).

36 See, eg, T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 29.

Privileges and immunities

3.20 A ‘privilege’ is a right to resist disclosing information that would otherwise be required to be disclosed.³⁷ A number of privileges exist at common law—namely, the privilege against self-incrimination, client legal privilege, parliamentary privilege and the privilege in aid of settlement.³⁸ These privileges, as well as some additional privileges, also exist in statutory form.³⁹

3.21 Further, while not strictly a privilege, common law or statutory public interest immunity also prevents the disclosure of certain information—namely, information relating to matters of state—when the public interest in non-disclosure outweighs the public interest in disclosure.⁴⁰

3.22 The *Royal Commissions Act* expressly deals with the privilege against self-incrimination and client legal privilege.⁴¹ It also contains a provision providing that a witness does not have to disclose any ‘secret process of manufacture’.⁴² The extent to which other common law or statutory privileges apply to Royal Commissions is uncertain, and is discussed in detail in Chapter 16. The application of privileges to inquiries that may be established under the proposed *Inquiries Act* also is discussed in Chapter 16.

Offences

3.23 As noted above, under the *Royal Commissions Act* it is an offence to fail to attend a hearing or produce a requested document or thing, or to refuse to be sworn, or make an affirmation, or answer a relevant question. The Act also contains a number of offence provisions designed to prevent interference with witnesses appearing before a Royal Commission. For example, it is an offence to bribe a person called as a witness before a Royal Commission to give false testimony or to withhold true testimony,⁴³ to practise any fraud on a person called as a witness before a Royal Commission with the intent of affecting his or her testimony,⁴⁴ to prevent a witness from attending before a Royal Commission,⁴⁵ or to dismiss an employee for appearing as a witness before a Royal Commission.⁴⁶

37 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 91.

38 Ibid, Ch 7.

39 See, eg, *Evidence Act 1995* (Cth) pt 3.10.

40 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 110.

41 Referred to as legal professional privilege under the Act.

42 *Royal Commissions Act 1902* (Cth) s 6D(1).

43 Ibid s 6I.

44 Ibid 6J.

45 Ibid s 6L.

46 Ibid s 6N.

3.24 In addition, s 6M makes it an offence to use, cause or inflict any violence, punishment, damage, loss, or disadvantage to any person ‘for or on account of’ the fact that he or she appeared as a witness before a Royal Commission, gave evidence before a Royal Commission, or produced a document or thing to a Royal Commission.

3.25 In *X v Australian Prudential Regulation Authority*, the High Court held that s 6M did not prevent the Australian Prudential Regulation Authority (APRA) from taking administrative action under the *Insurance Act 1973* (Cth) against witnesses who appeared before the HIH Royal Commission. This was because the administrative action was a proper discharge of APRA’s statutory powers and functions, and not ‘for or on account of’ the evidence that the witnesses gave to the Commission.⁴⁷

3.26 The Act also contains offence provisions preventing interference with evidence. It makes it an offence to give false or misleading evidence,⁴⁸ or to destroy documents or things that are or may be required by a Royal Commission.⁴⁹

3.27 It has been noted that the offence provisions in the Act ‘have been based very largely on the principles developed by the courts in the exercise of their contempt jurisdiction’.⁵⁰ In addition, an act of misconduct that does not constitute an offence under the *Royal Commissions Act* may constitute an offence relating to the administration of justice under pt III of the *Crimes Act 1914* (Cth) or Chapter 7 of the *Criminal Code* (Cth).⁵¹ The offences established by the *Royal Commissions Act*, and the offences that may be established under the proposed *Inquiries Act*, are discussed in detail in Chapter 18. The nature and adequacy of the penalties attached to these offences is discussed in detail in Chapter 20.

Communication of information

3.28 Section 6P of the Act provides that a Commission may communicate any information it obtains that relates to a contravention of a law of the Commonwealth, or of a state or territory, to certain specified people and bodies, such as the Director of Public Prosecutions. In 2003, the Commissioner conducting the Royal Commission into the Building and Construction Industry recommended that the provision be amended to enable Royal Commissions to communicate evidence or information relating to a contravention of any law to ‘any agency or body of the Commonwealth, [or] a State or a Territory prescribed by the regulations’.⁵² This, he noted, would overcome the ambiguity in s 6P(1)(e), which enables the communication of information relating to a contravention of a law to ‘the authority or person responsible

47 *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, [59].

48 *Royal Commissions Act 1902* (Cth) s 6H.

49 *Ibid* s 6K.

50 E Campbell, *Contempt of Royal Commissions* (1984), 36.

51 *Ibid*, 44.

52 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, Rec 1(c).

for the administration or enforcement of that law'.⁵³ The power of a Royal Commission to communicate information pursuant to s 6P, and the potential power to communicate such information under the proposed *Inquiries Act*, is discussed in Chapter 11.

Contempt

3.29 Section 6O(1) of the Act deals with contempt of a Royal Commission, and provides as follows:

Any person who intentionally insults or disturbs a Royal Commission, or interrupts the proceedings of a Royal Commission, or uses any insulting language towards a Royal Commission, or by writing or speech uses words false and defamatory of a Royal Commission, or is in any manner guilty of any intentional contempt of a Royal Commission, shall be guilty of an offence.

Penalty: Two hundred dollars, or imprisonment for three months.

3.30 The law of contempt is concerned with protecting the administration of justice. Some have argued that the application of the law of contempt in an administrative context is problematic.⁵⁴ This is because 'the very touchstone whereby the question of contempt or no contempt is to be judged has been withdrawn and some new criterion must be found'.⁵⁵

3.31 Section 6O(2) of the Act gives certain judicial officers, in respect of a contempt committed in the face of the Commission, all the powers that a justice of the High Court has in relation to a contempt in the face of the Court. Concerns have been expressed that this provision 'is reminiscent of a "star chamber"', for it empowers a commissioner to act at once as informant, prosecutor and judge'.⁵⁶ In addition, some commentators have questioned the constitutionality of the provision, given that it purports to vest judicial power in an administrative tribunal.⁵⁷

3.32 Some acts that could constitute contempt are already punishable as criminal offences in the *Royal Commissions Act*. For example, it is an offence to refuse to be sworn or make an affirmation, or answer a relevant question. This could also constitute contempt of a Royal Commission. One question is whether conduct which breaches a specific offence provision in the *Royal Commissions Act* also may be punishable under s 6O(1) of the Act.⁵⁸ The issue of contempt of inquiries that may be established under the proposed *Inquiries Act*, is discussed in detail in Chapter 19.

53 Ibid, vol 2, Rec 1(c).

54 See, eg, E Campbell, *Contempt of Royal Commissions* (1984), 42.

55 *R v Arrowsmith* [1950] VLR 78, 85–86.

56 A Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 55.

57 Ibid; E Campbell, *Contempt of Royal Commissions* (1984), 47.

58 E Campbell, *Contempt of Royal Commissions* (1984), 30–31.

Concurrent Commonwealth and state inquiries

3.33 Section 7AA of the Act provides that a Royal Commissioner can perform any functions or exercise any powers conferred on him or her by the Governor of a state, or a minister of a state, provided that the minister has consented to this course. This provision was inserted into the Act in 1982 ‘to remove doubt as to the capacity of a Commonwealth royal commission to accept powers and functions given to it by a State government in the form of a parallel commission’.⁵⁹

3.34 In *Sorby v Commonwealth*, Gibbs CJ noted that s 7AA was a ‘rather curious provision’⁶⁰ because it had been held previously that a Royal Commissioner could perform the functions of a Commissioner conferred on him or her by the Governor of a state while performing similar functions conferred on him or her by the Governor-General.⁶¹ Accordingly, he noted that s 7AA ‘seems to have been unnecessary, unless it was intended to be restrictive, in that it makes the consent of the Minister necessary where it was not previously so’.⁶² Concurrent inquiries conducted under the *Royal Commissions Act*, and under the proposed *Inquiries Act*, are discussed in Chapter 7.

Custody and use of records

3.35 Section 9 of the *Royal Commissions Act* enables regulations to be made about the custody and use of, and access to, Royal Commission records. It sets out the persons and bodies who may be given custody of Royal Commission records by regulations, and provides that, subject to any regulations to the contrary, a custodian of a record of a Royal Commission may use the record for:

- the purposes of the performance of the custodian’s functions and the exercise of the custodian’s powers; and
- any other purpose for which the custodian could use the records if the custodian had acquired them in the performance of the custodian’s functions or the exercise of the custodian’s powers.

3.36 The provision was modelled on the provisions of the *HIH Royal Commission (Transfer or Records) Act 2003* (Cth), which enabled the transfer of certain records of the HIH Royal Commission to the Australian Securities and Investments Commission. It was introduced in 2006 to

remove any argument that there might be a requirement to provide procedural fairness to persons who could be adversely affected if documents obtained by the Cole

59 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security), 2337.

60 *Sorby v Commonwealth* (1983) 152 CLR 281, 248.

61 See *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211.

62 *Sorby v Commonwealth* (1983) 152 CLR 281, 248.

Inquiry, or any other royal commission, for its purposes, were to be made available to other persons or agencies and used for other purposes.⁶³

3.37 Regulation 8 of the *Royal Commissions Regulations 2001* (Cth) deals with the custody and use of, and access to, the records of the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006). The handling of Royal Commission records, and the records of inquiries that may be established under the proposed *Inquiries Act*, are discussed in detail in Chapter 8.

63 Explanatory Memorandum, Royal Commissions Amendment (Records) Bill 2006 (Cth). The 'Cole Inquiry' referred to in this Explanatory Memorandum is the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme (2006).