COERCIVE POWERS OF ROYAL COMMISSIONS

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FOLEY'S LIST

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Introduction

A significant aspect of the attraction of Royal Commissions for governments is the suite of powers that they possess to inquire effectively into areas that previously may not have been the subject of effective scrutiny. The powers have been the subject of extensive case law and commentary.[2] For many entities whose conduct may be affected by a Royal Commission, it is the public policy changes that may flow from the findings of a Royal Commission that are most important and which may have a major impact upon business operations and commercial viability. For most individuals, the major concern about a Royal Commission is the damage to reputation and even of civil, disciplinary and criminal litigation which may flow from a Royal Commission's analyses and recommendations.

The potency of a Royal Commission even gave rise to a (failed) constitutional challenge to the Letters Patent of the BLF Royal Commission.[3]

For both entities and individuals the bases upon which findings and recommendations are arrived at is the evidence derived from a Royal Commission's wielding of its coercive inquisitorial powers. Importantly, too, a Royal Commission is not ultimately bound by the strict rules of evidence in reaching its findings. This leaves the role of legal representatives in preparing for hearings, generating statements and undertaking advocacy on behalf of their clients as very important. It is apparent that the Financial Services Royal Commission will be reasonably liberal in granting leave to appear

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[2] See eg Leonard Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (Law Book Co, 1982); Ron Sackville, "Royal Commissions in Australia: What Piece Truth?" (1984) 60(12) *Current Affairs Bulletin* 11; A Paul Pross, Innis Christie and John A Yogis (ed), *Commissions of Inquiry* (Thomson, 1990); Patrick Weller (ed) *Royal Commissions and the Making of Public Policy* (MacMillan Education, 1994); Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths, 2001); Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (Connor Court Publishing, 2006).

[3] See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* [1982] HCA 31; (1982) 152 CLR 25.

when an applicant for such status can establish a direct or indirect interest in the hearing of a Case Study or the subject of inquiry. Commissioner Hayne has announced that such standing will generally be granted when an applicant:

(a) has been summonsed to give evidence;

(b) is the subject of an inquiry to be undertaken or

(c) may be the subject of an adverse allegation.[4]

The powers of a Royal Commission are set out in the *Royal Commissions Act 1902* (Cth) ("the Act"), which has been significantly amended over time:

- The power to summon witnesses to give evidence and produce documents or other things (s2(1)) under pain of penalties (s3);
- The power to take evidence on oath or affirmation (s2(2)), under pain of penalties (s6);
- The power to authorise a member of the Commission or of the AFP or another police force to apply for a search warrant (s4(1A), including by telephone in circumstances of emergency (s5);
- The power to require documentation the subject of legal professional privilege save in designated circumstances (s6AA), under pain of penalties (s6AB);
- Limitations on the privilege against self-incrimination (s6A);
- The power to issue a warrant for arrest of a person's apprehension if they have been served with a summons to attend a Royal Commission as a witness and they have failed to comply (s6B);
- The power to inspect retain and take copies of documents produced before or delivered to the Commission (s6F);
- The power to examine witnesses (s6FA), subject to penalties, if evidence given is knowingly false or misleading (s6H).[5]

The report by the Australian Law Reform Commission into Royal Commissions and Official Inquiries constitutes a useful reference point for evaluation to content and extent of Royal Commission powers.[6]

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[4] See Practice Guideline 3: https://financialservices.royalcommission.gov.au/hearings-and-transcripts/Documents/Practice-Guideline-3.pdf

[5] For a history of how some of the powers of Royal Commissions have developed, see *X v Australian Prudential Regulation Authority* [2007] HCA 4; (2007) 232 ALR 421; (2007) 81 ALJR 611.

[6] Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework* (ALRC 111, 2009): http://www.austlii.edu.au/au/other/lawreform/ALRC/2009/111.pdf?stem=0&synonyms=0&query=Making%20Inquiries:%20A%20New%20Statutory%20Framework%20(ALRC%20Report%20111) See also Australian law Reform Commission, *Review of the Royal Commissions Act* (ASLRC IP35):

Summons Powers

Under section 2(1) of the Act a "member of a Commission" is empowered to summon a person to appear before the Commission at a hearing to give evidence or produce documents, or other things, specified in the summons. At a hearing it can take evidence on oath or affirmation. (s2(3)) In the course of a hearing a member of the Commission may require a person appearing at a hearing to produce a document or other thing. What follows is that the documentation taken in the possession of a witness to a hearing should be the subject of consideration and care should be taken in the answering of questions by a witness in respect of documentation to which reference is made.

Legal professional privilege (see below) may still be a reasonable excuse for refusing or failing to produce a document.

Commissioner Hayne has stated that:

> A confidentiality or non-disparagement clause in an agreement will not act as a reasonable excuse against production in answer to a notice to produce or a summons. It would not be a reasonable excuse not to answer a question in a hearing. It seems to me to follow that answering a notice or summons would not amount to a breach of any confidentiality or non-disparagement clause.[7]

This has generated some concern within the profession. However, it may be that the Commission will not be focused upon the amount of a settlement or its precise terms, and that, rather, the Commissioner was concerned to ensure that there would not be any interference with the Commission's investigations:

> Further – and this is very important – under section 6M of the Royal Commissions Act, if a witness gives evidence or produces a document under a notice or summons, no injury can be done to that person. Suing the person

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http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/lawreform/ALRCIP/2009/35.html?stem=0&synonyms=0&query=IP%2035

[7] https://financialservices.royalcommission.gov.au/hearings-and-transcripts/Documents/transcripts-2018/12-february-2018-initial-public-hearing.pdf

> would almost certainly fall within that prohibition. In many cases where a dispute had been settled on confidential terms, the most immediate fact for the Commission will be that the dispute was settled, not the particular terms on which it was settled, and the fact of the settlement of the dispute will not be within any confidentiality provision. Any institution which sought any form of legal redress against a member of the public or a whistleblower seeking to volunteer information to the Commission in anticipation of the possible exercise of the Commission's coercive powers would be taking a step which would very likely provoke two immediate consequences. First, the Commission would be very likely indeed to exercise its compulsory powers to secure the information in question. Second, the very fact that an institution sought to inhibit or prevent the disclosure of the information would excite the closest attention not only to the lawfulness of that conduct by the institution, but also to what were the institution's motives for seeking to prevent the Commission having that information.[8]

A Royal Commission can inspect documents produced (under s2(3A) or s6AA(3)) and retain them for as long as is reasonably necessary. (s6F(1))

In Practice Guideline One of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, issued on 22 January 2018, the Commission has permitted documents to be produced electronically.[9]

A warrant can be issued for the apprehension of a person who has failed to attend the Commission in answer to a summons. (s6B)

If a person who is served (as prescribed) with a summons to appear as a witness at a hearing fails to attend as required, or to produce a document or thing that is required they are subject to imprisonment for 6 months or a $1000 fine. It is an offence of strict liability but subject to the defence of "reasonable excuse", as to which the defendant carries an evidential burden. (s3))

It is a defence to a prosecution for failure to produce a document or thing that the document or thing was not relevant to the matters into which the Commission was inquiring. The concept of "relevance" is broad.[10]

[8] https://financialservices.royalcommission.gov.au/hearings-and-transcripts/Documents/transcripts-2018/12-february-2018-initial-public-hearing.pdf
[9] https://financialservices.royalcommission.gov.au/hearings-and-transcripts/Documents/Practice-guideline-1.pdf

However, the potential for a defence of irrelevance highlights the need for careful attention to be paid to the terms of reference of a Royal Commission and to how the Commission applies and interprets them.

Search Warrant Powers

Under section 4 of the Act a Royal Commission is empowered to authorise a member of the Commission or a member of the Australian Federal Police ("AFP") or another police force to apply for a search warrant to a judge of a prescribed court for a search warrant "in relation to matters into which the … Commission is inquiring." The authorization must be in writing. Its terms will be strictly construed against the terms of reference of the Commission.

Where an application is made to a judge, the judge, if satisfied "there are reasonable grounds for issuing the warrant" can issue a search warrant authorising a member of the AFP or other police force, or any other person named in the warrant, with such assistance as the member or person thinks necessary and if necessary by force:

(a) to enter upon the land or premises, vessel, aircraft or vehicle;
(b) to search them for things of the relevant kind; and
(c) to seize any things of the relevant kind that are found. (s4(3))

Importantly, and this should always be checked carefully, a warrant that is issued must state:

(a) *the purpose for which the warrant is issued*, which must include a reference to the matter into which the relevant Commission is inquiring and which the things of the relevant kind are connected;
(b) *whether entry is authorized to be made at any time* of the day or night or during specified hours of the day or night;
(c) *a description of the kind of things authorized* to be seized; and
(d) *a date, not being later than one month* after the issue of the warrant, upon which the warrant ceases to have effect. (s4(4))

There needs to be strict compliance with each of these requirements; any departure from them may render the warrant unlawful.

[10] See section 55 of the *Evidence Act 1995* (Cth): "The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."

Some latitude is provided by section 4(5) in relation to other matters seized during the execution of the warrant. It is appropriate to look carefully to ascertain whether this has been abused:

> If, in the course of searching, in accordance with a warrant issued under this section, for things of a particular kind connected with a matter into which a relevant Commission is inquiring the person executing the warrant finds:
>
> (a) any thing of another kind that he or she believes on reasonable grounds to be connected with that matter; or
>
> (b) any thing that he or she believes on reasonable grounds to be connected with another matter into which the Commission is inquiring,
>
> and he or she believes on reasonable grounds that it is necessary to seize that thing *in order prevent its concealment, loss, mutilation of destruction,* the warrant shall be deemed to authorize the person to seize that thing.

There are three important issues in this regard:

- the nexus requirement;
- the objective component of the requisite beliefs; and
- the need for the belief in necessity for seizure for the prescribed purposes, which should not be viewed as a given.

In reviewing the propriety of seizure, each matter should be considered separately and carefully.

Applications can also be made for telephone warrants but only "if the applicant considers it necessary to do so because of circumstances of urgency." (s5(1)) No reference is made to the requirement for reasonableness of such a belief but the belief could not be wholly unreasonable or without logical foundation.

Power to Compel Evidence

A Royal Commission has the power to compel a witness appearing as a witness before the Commission to be sworn/make an affirmation[11] and not just to give

[11] See *Clough v Leahy* [1904] HCA 38; (1904) 2 CLR 139 where a witness refused to be sworn before a Royal Commission.

evidence but to "answer any question relevant to the inquiry put to him or her by any of the Commissioners."(s6(1))[12] However, the power is to be ascertained by the process of statutory interpretation, any breach of which has the potential to take the exercise of power into the category of being an abuse of power.[13]

Once again, in this context the nexus of the question to the terms of reference of the inquiry is crucial. The offence is one of strict liability by reference to section 6(1) of the Criminal Code. The penalties are 6 months' imprisonment or a $1000 fine.

Legal Professional Privilege

It is NOT a reasonable excuse for the purposes of subsection 3(2B) or (5) for a person to refuse or fail to produce a document that it is subject to legal professional privilege ("LPP"). (s6AA(1))

However, this is subject to two exceptions which need to be borne in mind in giving advice on the issue:

(a) if a court has found the document (or relevant part of the document) to be subject to legal professional privilege; or
(b) a claim that the document (or the relevant part of the document) is subject to legal professional privilege has been made, to the member of the Commission who required production of the document:
    (i) within the time that the member of the Commission, in requiring production of the document, allowed for its production; or
    (ii) within such further time as the member of the Commission allows for production of the document.

When such a claim is made, the member of the Commission who required production of the document (not another member) "may decide whether to accept or reject the claim". (s6AA(2))

[12] See eg *McGuinness v Attorney-General of Victoria* [1940 HCA 6; (1940) 63 CLR 73 where the editor of The Truth declined to answer questions posed by a Commission of Inquiry investigating bribery of members of Parliament.
[13] See Stephen Donaghue, "Coercive Questioning After Charge" (2000) 28 *Federal Law Review* 1: http://www.austlii.edu.au/au/journals/FedLawRw/2000/1.pdf

In terms of process for decision-making there are specific provisions. The member of the Commission may, by written notice served on the person, require them to produce the document *for inspection* (by the member of another person authorized by the member) for the purpose of deciding whether to accept or reject the claim. (s6AA(3))

If the claim for LPP is accepted, the Commission is obliged under section 6AA(4) to:

- return the document;
- disregard, for the purposes of any report or decision that the Commission makes, that which is found to be subject to LPP. (s6AA(4))

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has issued Practice Guideline Two, dated 29 January 2018, stipulating processes for communicating with the Solicitor Assisting the Commission in respect of claims of LPP.[14] The Practice Guideline should be consulted in detail, although it is simply an operationalization of sections 6AA and 6AB of the Act.

Privilege against Self-Incrimination

Historically, the most contentious of the powers of a Royal Commission is its ability under section 6A of the Act to abrogate the privilege against self-incrimination, both in respect of incrimination of a person (in the sense of rendering them at risk of criminal prosecution) and rendering them liable to a penalty.[15]

Subsections 6A(1) and (2) provide that a natural person is not excused from answering a question that they are required to answer or to produce a document on the

[14] https://financialservices.royalcommission.gov.au/hearings-and-transcripts/Documents/Practice-Guideline-2.pdf

[15] See the Hon Mark Weinberg, "The Impact of Special Commissions of Inquiry/Crime Commissions on Criminal Trials – Speech", paper presented to the Supreme Court of New South Wales Annual Conference, 1 August 2014: http://assets.justice.vic.gov.au/supreme/resources/66d960d7-4dae-4b13-853c-71a94e97a424/the+impact+of+special+commissions+of+inquiry+weinberg+j+-+1+aug+2014.pdf

basis that to do so "might tend to" incriminate them or make them liable to a penalty. However, these requirements do not apply if:

(a) the production of answer might tend to incriminate the person or make them liable to a penalty in relation to an offence; and
(b) the person has been charged with that offence or proceedings in respect of a penalty have commenced; and
(c) the charge or proceedings have not been finally dealt with by a court or otherwise disposed of. (s6A(3)-(4).

There is an important protection.[16]

Importantly, a statement or disclosure made by a person giving evidence before a Commission or the production of a document or other thing pursuant to a summons is not admissible in evidence (against a natural person) in any civil proceedings – of the Commonwealth, a State of a Territory (s6DD(1)), other than an offence against the *Royal Commissions Act 1902* (Cth). This constitutes direct (as against indirect) use immunity. Put another way, the actual words used will not be able to be employed in civil proceedings but a range of problematic indirect consequences could flow from what has been said. There is some protection, but it is modest.

Secret Processes of Manufacture

It is not compulsory for any witness before a Royal Commission to disclose to the Commission any secret process of manufacture. (s6D(1))

Private Evidence

A witness is entitled to request that a Royal Commission take their evidence relating to a particular subject in private on the ground that the evidence "relates to the profits or financial position of any person, and that the taking of the evidence in public would be unfairly prejudicial to the interests of that person." (s6D(2)).

[16] See *Sorby v Commonwealth* [1983] HCA 10; (1983) 152 CLR 281.

A Royal Commission has broad non-publication powers without clear criteria for their invocation (s6D(3)).

Protections for Commission Processes

A series of criminal offences has been crafted in order to protect the processes of Royal Commissions.

It is an indictable offence punishable by up to five years' imprisonment or a fine of up to $20,000 to give evidence that a person knows to be false or misleading in relation any matter that is material to the inquiry being made by the Commission. (s6H(1)-(2)) Importantly, this serious criminalizing provision relates only to evidence material to a Commission's inquiry.

The same penalty applies to any person who gives, confers, or procures or promises, or offers to confer or to procure any property or benefit upon, or for, any *person to give false testimony or to withhold true testimony* from a Royal Commission. (s6I) Similarly, heavy penalties apply to interference with production of documents required by the Commission. (s6I(2))

A two year jail term offence is committed by any person who practises fraud or deceit of intentionally makes or exhibits any statement, representation, token or writing, knowing it to be false to any person called or to be called as a witness or produce a document with an intent to affect the person's testimony or production of a document or thing. (s6J) The same penalty applies to a person or omitting to act if the act or omission results in a document or thing being concealed, mutilated, destroyed, rendered incapable of identification or rendered illegible or indecipherable and the person *knows or is reckless* as to whether the document or thing is or may be required in evidence before a Commission or a person has been, *or is likely to be required to produce to the Commission.* (s6K(1)) This very broad provision is designed to prevent any form of obstruction to the investigative processes of a Commission even before formal requirements are issued.

Another indictable offence punishable by 12 months' imprisonment (or a $1,000 fine) relates to causing harm to a person who has participated in a Royal Commission:

> Any person who uses, causes or inflicts, any violence, punishment, damage, loss, or disadvantage to any person *for or on account of*:
>
> (a) the person having appeared as a witness before any Royal Commission; or
>
> (b) any evidence given by him or her before any Royal Commission; or
>
> (c) the person having produced a document or thing pursuant to summons, requirement or notice under section 2.(s6M)

This provision was tested in *X v Australian Prudential Regulation Authority*[17] where the Australian Prudential Regulation Authority ("APRA") proposed to take action against an insurer in reliance upon documentary and oral evidence presented to the HIH Royal Commission. The plurality (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ) held that while sections 6DD, 6M, 6O and 6P may be seen as assisting the effective operation of Royal Commissions, section 6M of the Act did not preclude the use of evidence adduced before the HIH Royal Commission by APRA. This leaves open usage of such information for a number of administrative, disciplinary or other uses.[18]

An important provision, designed to protect whistleblowers is section 6N of the Act which creates a criminal offence punishable by 12 months' imprisonment (or a $1,000 fine) for any dismissal by an employer of an employee or "prejudice" to an employee who has appeared as a witness before a Royal Commission, given evidence or produced a required document. (s6N(1)) It is a defence if the dismissal or prejudice was for another reason. (s6N(2))

Communication of Information by a Commission

[17] [2007] HCA 4; (2007) 232 ALR 421.
[18] [2007] HCA 4; (2007) 232 ALR 421 at [129].

Where a Commission, in the course of its inquiry, obtains information that relates, or may relate, to a contravention of the law, or evidence of that, whether it be the law of the Commonwealth, the State or a Territory, it may communicate the information or furnish the evidence to prosecutorial authorities. (s6P(1)) Similar considerations apply to referral of material to the Australian Crime Commission. (s6P(2A))

Concluding Observations

It can be seen from this brief synopsis that the coercive powers of Royal Commissions are broad and such as to have major potential ramifications for persons the subject of interest by a Commission. However, each one has limitations and exceptions. Time expended scrutinising the empowering provisions has the potential to repay worthwhile dividends. Efforts directed toward evaluating whether technicalities have been complied with by the Commission are an important responsibility of legal advisers. Behind the scenes, given the sensitivities that attach to objections and positions take in public, temperate, strategically conducted negotiations with those assisting the Royal Commission have the potential to defuse issues of sensitivity and to enable better informed preparation of clients for the generation of their statements and for their oral evidence.