The powers of royal commissions

'Royal commissions', or more properly 'royal commissions of inquiry', (or in some jurisdictions, 'commissions of inquiry'), can probably best be described as *ad hoc* advisory bodies appointed by governments to obtain information which is then presented to the government in the form of a report.

INTRODUCTION

Strictly speaking, the term 'royal commission' should not be used to describe the body that is set up to make an inquiry, but refers to the document that is given to the person who is to make the inquiry; however, for convenience the short form is adopted here.

Royal commissions have a long history going back to the *Doomsday Book*. The *Domesday Book* of 1086 was the result of an inquiry appointed by William the Conqueror to establish the ownership of land holdings in England and to value them for taxation purposes. Obviously, it was impossible for the sovereign to attend personally to every task that was required to govern the country, and thus the practice developed of appointing various persons by commission to make inquiries and to report back with their findings. Hence, long before the establishment of Parliament or of legislative procedures, royal commissions were a feature of the administration of government in England.

During the 14th century, parliamentary committees emerged and developed and to a certain extent assumed the role that royal commissions had previously filled. However, royal commissions continued to exist and, during the 19th century, almost 450 royal commissions were created.

Given such an established background in the British governmental system, it is not surprising that royal commissions found a place in the Australian system.

THE SOURCE OF POWER

While the legislation differs from state to state and at the Commonwealth level, this analysis is confined to the *Royal Commissions Act* 1923 (NSW). The general principles apply uniformly across the jurisdictions. The Gyles Royal Commission into the Building and Construction Industry (NSW) is used to illustrate how royal commissions have been conducted pursuant to the Act.

In looking at the powers and functions of a royal commission, the legislation is the necessary starting point. However, in order to determine what type of information is to be gathered and the way in which the royal commission should approach its task, it is also essential to look at the terms of reference.

Unlike other information-gathering bodies that exist to inform government, such as statutory instrumentalities, law reform bodies, etc, a royal commission is created for a specific purpose and, at the completion of its task - that is, when its report is delivered to government - it ceases to exist.

Section 5(1) of the Act refers to the giving of letters patent, under the public seal, by the governor of a royal commission to any person to make any inquiry. However, s4 makes it clear that the terms 'commission' and 'royal commission' are used to refer to any commission of inquiry, and includes the members of the commission.

Part 2 of the Act is divided into two divisions, the first of which refers to commissions generally and confers certain powers, including the power to summon any person to attend to give evidence or to produce documents.

In relation to Division 1 of the Act, s11 provides that a witness shall not be entitled to refuse to answer any question relevant to the inquiry that may be put to him unless he has a reasonable excuse for refusing. Sub-section 3 of s11 further provides that a witness summoned to attend shall have the same protection, and shall be subject to the same liabilities in any civil or criminal proceeding, as a witness in any case tried in the Supreme Court.

THE USE OF ROYAL COMMISSION POWERS

By their very nature royal commissions are required to engage in a 'fishing expedition', which is an activity denied

Bob Whyburn is the senior partner of Whyburns Legal in NSW, and has appeared in several royal commissions.
PHONE (02) 9565 1200 **EMAIL** rlw@whyburn.com.au

to a party in litigation before a court. Such a power is essential, given the inquisitorial remit of a royal commission to unearth facts and matters that might otherwise remain buried.

This power is recognised by the *Royal Commission Act* in ssl2 and 12A. Section l2 is the section that deals with the power to inspect and retain documents and take copies. Section l2A empowers a commission to communicate any information, or furnish material that it obtains, to a commission of inquiry, a law enforcement agency (including any task force set up to investigate matters relating to breaches of law arising out of the inquiry), or other relevant body.

Division 2 refers to those royal commissions conducted by a judge or queens counsel. Such royal commissions have much wider powers, including the power to issue a warrant to apprehend any person served with a summons who fails to attend (s16); all such powers, rights, and privileges as are vested in the Supreme Court in respect of compelling the attendance of witnesses; compelling witnesses to answer questions deemed to be relevant; and compelling the production of documents (sl8).

Sections 18A-D deal with contempt and the powers of a Division 2 commissioner to punish for contempt.

A very important difference between Division 1 and Division 2 commissions is to be found in sl7. That section applies only if the declaration by the governor that the provisions of Division 2 are applicable also specifically states that the provisions of sl7 shall apply with respect to the inquiry.

It is important to consider the specific terms of the section, which are as follows:

17.(1) A witness summoned to attend or appearing before the commission shall not be excused from answering any question or producing any document or other thing on the ground that the answer or production may criminate or tend to criminate him, or on the ground of privilege, or on any other ground.

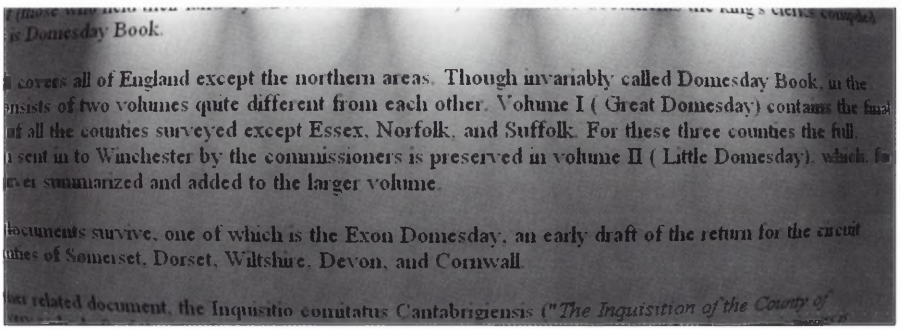
(2) An answer made, or document or other thing produced by a witness to or before the commission shall not, except as otherwise provided in this section, be admissible in evidence against that person in any civil or criminal proceedings.

(3) Nothing in this section shall be deemed to render inadmissible;

(a) any answer, document or other thing in proceedings for an offence against this Act;

(b) any answer, document or other thing in any civil or criminal proceedings if the witness was willing to give the answer or produce the document or other thing irrespective of the provisions of subsection (1);

(c) any book, document or writing in civil proceedings for, or in respect of, any right or liability conferred or imposed by the document or other thing.


Domesday Book.

covers all of England except the northern areas. Though invariably called Domesday Book, in the consists of two volumes quite different from each other. Volume I (Great Domesday) contains the first of all the counties surveyed except Essex, Norfolk, and Suffolk. For these three counties the full sent in to Winchester by the commissioners is preserved in volume II (Little Domesday), which, for ever summarized and added to the larger volume.

documents survive, one of which is the Exon Domesday, an early draft of the return for the circuit unties of Somerset, Dorset, Wiltshire, Devon, and Cornwall.

ther related document, the Inquisitio comitatus Cantabrigiensis ("*The Inquisition of the County of*

> "It is the power to compel the answers to questions and the production of documents that makes a royal commission unique."

It is the power to compel the answers to questions and to compel the production of documents that makes a royal commission unique. The use of that coercive power should arguably be limited to inquiries into matters of great public importance and used with care, especially in inquisitorial commissions. This section is important, particularly when considering the difference between investigative inquiries and inquisitorial inquiries.

The Royal Commission into Productivity in the Building Industry in NSW, which was conducted by Roger Gyles QC, was initially a Division 1 commission, the original letters patent being issued on 18 July 1990. Those letters patent did not include a declaration that the provisions of Division 2 should apply. On 3 October 1990, further letters patent were issued by the governor in which he declared that the provisions of Division 2 applied, and further declared that sl7 of the Act should apply. Further letters patent were issued appointing a second, and subsequently a third, commissioner. Altogether 13 letters patent were issued in respect of the Building Industry Royal Commission, which finally reported to the Government on 8 May 1992.

It is my personal view that, certainly in relation to inquisitorial inquiries, practitioners would be well advised to counsel carefully any client whom they may be representing, and who is to give evidence before such a commission, on the effect of sl7. Almost as a matter of ▶

"The degree of malevolence of royal commissions should not be underestimated."

routine they should advise that client to take the precaution of availing himself or herself of the protection provided by it. The degree of malevolence of royal commissions should not be underestimated, and while there may be a perception in the minds of some that to seek to invoke the protection of sl7 may tend to give rise to a suspicion of guilt, or other wrongdoing, the consequences of not taking the precaution could later prove to be very serious.

It should be noted that sl7 does not prevent a person who has answered questions put to him or her by a commission from being charged with a criminal offence. What it does do is to protect a person from having his or her answers used against him/her, but if sufficient other evidence is available to prove the charge, then the section does not prevent a prosecution.

While sl7 provides protection, it is restricted to answers to questions that are asked, and is not sufficiently comprehensive to safeguard a person who may wish to assist an inquiry. For example, a person who is a potential witness who provides a statement to counsel assisting could later have that statement used against him or her in criminal proceedings.

METHODS OF PROCEDURE

General

There are no rules of procedure for royal commissions, despite the fact that such inquiries have been conducted over many years, and therefore commissions have tended to regulate their own procedure.

In Great Britain in 1966 a royal commission was set up to inquire into tribunals of inquiry (the royal commissions' royal commission). This commission, known as the Salmon Royal Commission, acknowledged the need for inquisitorial inquiries but stated that the dangers to individuals could be minimised if certain cardinal principles were followed, namely:

(a) Before a person becomes involved, the tribunal must be satisfied that there are certain matters that affect him which the tribunal proposes to investigate;
(b) Before any person involved is called as a witness, he should be informed of any allegations that are made against him and the substance of the evidence in support of those allegations;
(c) A person involved should be given an adequate opportunity to prepare his case, be assisted by legal advisers and have his legal expenses met out of public funds in the normal case;
(d) A person involved should have the opportunity of being examined by his own Counsel and of stating his case in public at the inquiry;
(e) A person involved should be able to call any material witnesses.

The Canadian Law Reform Commission put forward suggestions that substantially reflected those reported on by the Salmon Royal Commission.

The legislation in NSW does not inhibit a royal commissioner in the manner in which his or her inquiry is to be conducted; however, the original letters patent issued in relation to the Building Industry Royal Commission directed Gyles to have regard to certain guidelines. The 'guidelines' were that the inquiry was to be conducted with as little formality as possible with a view to making it as economical as possible, and that regard was also to be given to the desirability of taking such steps as may be considered necessary to protect a person's safety; including the taking of evidence or hearing of submissions in private.

Investigative v inquisitorial

An 'investigative' inquiry is one that is set up to gather information and conduct research for the purpose of reporting and making recommendations to government on matters of policy. An example of such an inquiry would be the Royal Commission into the Petroleum Industry (1974-75), which was conducted by Collins J. In such an inquiry, it may be appropriate to proceed with a maximum of informality, behind closed doors, and without giving every person who may conceivably be affected the opportunity to put his or her point of view.

On the other hand, inquisitorial inquiries are normally those set up to investigate allegations of misconduct or criminal behaviour, and which necessarily affect the reputation or criminal liability of individuals. In such inquiries, the procedures adopted normally follow fairly closely the proceedings of a court. For example, evidence is led by counsel assisting and various persons who may be affected are allowed representation. Quite often such inquiries develop into an adversary-type hearing with multi-parties. An example of such an inquiry would be the Wran Royal Commission (1983), which was conducted by Street CJ.

The Royal Commission into the Building Industry was a hybrid inquiry that combined elements of both. The original letters patent gave three terms of reference: the first concerned an inquiry into practices and conduct in the industry affecting efficiency and productivity; the second referred to the nature, extent, and effects of illegal activities; and the third sought recommendations as to any measures that could be taken to increase

productivity or efficiency, or to deter illegal activities in the industry.

Having said that there are no rules regulating procedures, obvious limitations must apply to commissioners when they are deciding how inquiries should be conducted.

For example, although the rules of evidence do not apply, a commissioner, acting fairly, would proceed with caution in accepting hearsay evidence, particularly if the acceptance of that evidence may lead to a grave injustice and, more particularly, if the inquiry was of the inquisitorial kind.

Natural justice/ procedural fairness

In his authoritative work on royal commissions and boards of inquiry published in 1982, Mr Hallett, after reviewing the decisions and in particular the decision of the High Court in *R v Collins: ex-parte ACTU - Solo Enterprises Pty Ltd* (1 975-76) 8 ALR 691, 699, concluded that:

'It must remain doubtful whether a court would hold that the principles of natural justice apply to inquiries by commissions and boards.'

Fortunately, in my view, the law has developed significantly since then.

On 22 December 1991, the New Zealand Court of Appeal gave judgment in *re Erebus Royal Commission: Air New Zealand Ltd v Mahon (No. 2)*. That case involved proceedings brought by the airline and other persons connected with it seeking a judicial review of findings of the royal commissioner who had been appointed to inquire into the causes and circumstances of the crash of an Air New Zealand aircraft on Mount Erebus.

In his report, the commissioner found that the cause of the disaster was the mistake of certain airline officials who programmed the aircraft, and he also found misconduct on the part of certain other airline officials. His report was critical of the airline and indeed stated that there had been 'a pre-determined plan of deception' and 'an orchestrated litany of lies'. An award of costs was made against the airline, ordering it to pay $150,000 to the Justice Department by way of contribution to the public cost of the inquiry.

It was held, inter alia, that the commissioner had acted in excess of jurisdiction and contrary to natural justice.

The commissioner appealed from that decision to the Privy Council, and on 20 October 1983 their lordships delivered a judgment in which it was held that the rules of natural justice required the commissioner:

(a) to make findings based upon material that logically tended to show the existence of facts consistent with those findings; and

(b) to disclose his reasons to support those findings, to ensure that the reasoning was not self-contradictory; and ▶

(c) to ensure that any person represented at the inquiry who might be affected adversely by a finding should know of the risk of such a finding being made and be given an opportunity to adduce additional material that might have deterred the Commissioner from making that finding.

Those two decisions certainly took the position much further than previously. In 1985 the position was clarified in Australia in *Kioa v West* (1985)159 CLR 550. In that case, Mason J developed a concept of procedural fairness and said:

> 'It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of complying with it ... The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation as well as proprietary rights and interests.'

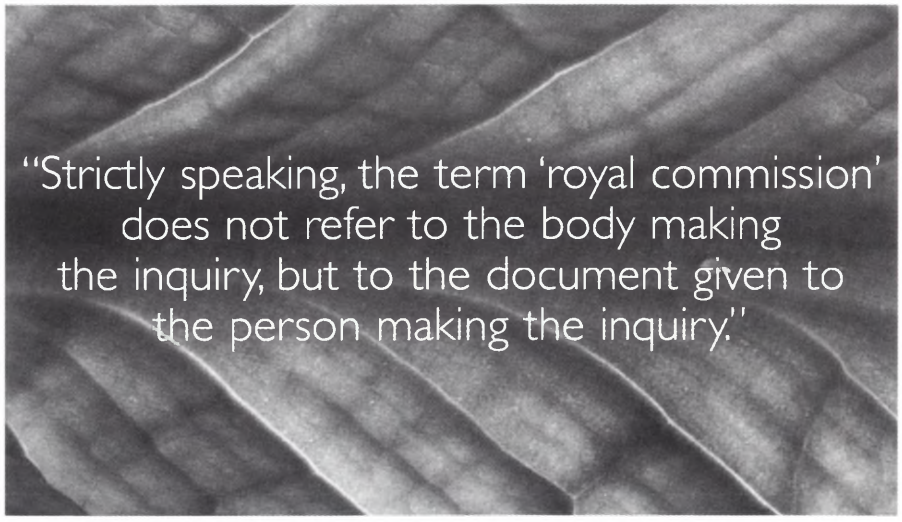
Later, at p584, His Honour said:

> 'The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according to procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.'

The issue appears to come down to whether the decision *directly* affects the person individually and not simply as a member of the public or a class of the public. An executive or administrative decision of the latter kind is truly a 'policy' or 'political' decision and is not subject to judicial review (Salemi (2)1977137 CLR at p452).

Also in *Kioa v West* His Honour said:

> 'Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute ... What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting.'



At p585 of the report, His Honour made the following comments in an important passage:

> 'In this respect the expression "procedural fairness"'more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to define circumstances of the particular case. The statutory power must be exercised fairly – that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations... When the doctrine of natural justice and the duty to act fairly in its application to administrative decision-making is so understood the need for a strong manifestation or contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. *It is: what the duty to act fairly requires in the circumstances of the particular case* [emphasis added].'

The decisions in *Mahon v Air New Zealand* (1984) AC 808 and *Kioa v West* were cited with approval by the High Court when it gave its decision on 20 December 1990 in *AnnettsAnnerts & Anor v McCann & Ors* (1990) 170 CLR 596.

An inquest was being conducted pursuant to the *Coroner's Act* 1920 (WA) into the deaths of two boys who had perished in desert country in Western Australia. One of them appeared to have died of a gunshot wound and the other from thirst.

The parents of the two boys were represented by counsel who were permitted to examine and cross-examine all witnesses. At the conclusion of the evidence, counsel for the parents of the boy who had died from thirst informed the coroner that he wished to make a closing address covering the whole of the evidence. The coroner declined to permit any closing addresses.

In the course of their judgment in which their Honours found that the coroner should reconsider the question and that the parents had a common law

right to be heard in opposition to any potential adverse finding in relation to themselves or their son, the following important passages appear.

At p598:

> 'It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interest or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.'

And at p599:

> 'In determining whether this Act (*Coroner's Act* 1920 (WA)) has excluded the rules of natural justice, two considerations need to be kept in mind. The first is that many interests are now protected by the rules of natural justice, which less than 30 years ago would not have fallen within the scope of that doctrine's protection ... It was even later (post-1969) that the common law rules of natural justice were held to apply to public inquiries whose findings of their own force could not affect a person's legal rights or obligations.'

In so saying, their Honours doubted the previous view of the High Court in *Testro Bros Pty Ltd v Tait* (1963)109 CLR 353. In that case the High Court said:

> 'If all that occurs is inquiry and report and the report is not in law a condition precedent to some further steps, the rules of natural justice are automatically excluded.'

In relation to the question of personal reputation, Brennan J said in *AnnettsAnnett*'s case at p186:

> 'Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has a full and fair opportunity to show why the finding should not be made ... This is a general principle which, subject to any contrary intention expressed or implied in the statute, applies to statutory inquiries in which the inquisitor is authorised to publish findings that might reflect unfavourably on a person's conduct.'

The most recent pronouncement by the High Court in relation to this important issue is to be found in *Ainsworth v Criminal Justice Commission* 1992 66 ALJR 271.

In that case the appellants (manufacturers and suppliers of gong or poker machines), claimed that their business reputation had been damaged by matters contained in a report of the Queensland Criminal Justice Commission, no previous inquiry having been made of them by the Commission nor any indication given that the Commission was interested in and would report upon them, and no ▶

opportunity having been afforded to them so that they might be made aware of the matters adverse to them in the report or to answer those matters.

In interpreting the meaning of the 'proceedings' contained within the legislation constituting the Commission, the High Court held that the word should be given a broad, rather then a narrow, meaning and it is not to confined to formal hearings held pursuant to the Act. Accordingly 'proceeding' refers to any step, no matter how informal, taken in relation to the Commission's function and responsibilities.

The Court also held that it would be unthinkable that the Commission might, in any circumstances whatsoever, proceed in a way that was partial or contrary to the public interest. It was also held that the nature of the Commission and its powers, functions and responsibilities were such that, to the extent that the Act does not provide for it, a duty of fairness is necessarily to be implied in all areas involving its functions and responsibilities, and that the terms of the Act were ineffective to exclude any duty of fairness arising under the general law and, in particular, were incapable of excluding the rules of natural justice. To that extent the Court applied the decision in *Annetts v McCann* and declined to follow *Testro Bros Pty Ltd v Tait*.

"Royal commissions frequently develop into adversary-type hearings."

The Court also found that reputation is an interest attracting the protection of the rules of natural justice and that the same is true of business or commercial reputation and applied the decision in *Mahon v Air New Zealand* (1984) AC 808 at 820.

At p276 of the report the following appears:

> 'Thus, what is decisive is the nature of the power, not the character of the proceeding which attends its exercise. That is not to deny that provision may be made permitting or requiring procedures that are wholly inconsistent with a requirement of procedural fairness ... so far as the decision in that case (Testro Bros) was based on the character of the proceeding, it is inconsistent with the law as it has developed ... since the decision of this Court in *Kioa v West*... In this regard, it is sufficient to note that it was held in... *Mahon v Air New Zealand*... that the investigative powers considered in those cases attracted a duty to act fairly ... As the law has progressed since that case (Testro Bros) the only question which now arises is whether the report adversely affected a legal right or interest, including an interest falling within the category of legitimate expectation, such that the Commission was required to proceed in a manner that was fair to the appellants ... The law proceeds on the basis that reputation itself is to be protected.'

In practice

In relation to an investigative inquiry (such as the investigation into Productivity which was part of the Building Industry Royal Commission), the parties will be encouraged no doubt to provide submissions or make responses to discussion papers. Essentially, however, the royal commission can sit behind closed doors and can inform itself in any way it sees fit.

On the other hand, where the inquiry is inquisitorial in nature (such as the inquiry into illegal activities in the building industry) the procedures of the commission must necessarily more closely approximate those of a court. However, other procedures may be adopted including:

- conducting hearings in closed sessions;
- hearings in which no notice whatsoever is given as to the nature of the subject matter to be inquired into or any allegations which are to be made and where the person against whom an allegation is made is confronted with it for the first time in the witness box. Obviously in such a case the person must then be given an opportunity to seek legal advice and to take such other reasonable steps, including the gathering of material in rebuttal, as would enable him or her to properly address the issues;
- requiring a statement at the start of proceedings as to the position adopted by a particular party in response to allegations of which notice has been fairly given.

Notwithstanding this, it is clear from the cases discussed above that whatever procedures are adopted, in the absence of a clear statutory intention to the contrary, the rules of natural justice must apply so that the Commission is bound to conduct itself in a way that ensures procedural fairness to individuals that may be affected by its finding.

It is therefore submitted that, as there is no clear statutory intention within the *Royal Commissions Act* 1923 to exclude the rules of natural justice, any royal commission to which that Act applies must necessarily proceed in accordance with the principles enunciated in the cases. PL