# LESSONS FOR GOVERNMENT FROM

# RECENT ROYAL COMMISSIONS AND PUBLIC INQUIRIES

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**About the Presenter**

Dominique Hogan-Doran SC is an honours graduate of the University of Sydney (*BEc (Soc Sc), LLB (Hons I), LLM*) and the University of Oxford (*BCL (Hons I)*), where she was the Menzies Scholar. She was admitted to legal practice in 1994, called to the NSW Bar in November 1995, and took silk in 2015.

Dominique was recognised in *Best Lawyers - Australia 2020* for Litigation and by *Doyle's Guide to the Australian Legal Profession* as a 'Leading Commercial Litigation and Dispute Resolution Senior Counsel' (2016, 2017, 2018, 2019), and as a 'Leading Mediator' (2018, 2019). She was 'Barrister of the Year' in the 2016 *Lawyers Weekly* Australian Law Awards.

Dominique has extensive experience acting for government, organisations, and individuals in royal commissions and public inquiries. She is currently briefed to appear for NSW Roads and Maritime Services in the Independent Commission Against Corruption's *Operation Ember*, and for numerous aged care operators in the *Commonwealth Royal Commission into Aged Care Quality and Safety*.

In recent years, Dominique has appeared for: the Commonwealth Bank of Australia, and the trustee of the Energy Industries Superannuation Scheme, in the *Commonwealth Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2018); WaterNSW in the Ombudsman's Inquiry into *Water Compliance & Enforcement* (2017-2018); RSL LifeCare in the *Inquiry under the Charitable Fundraising Act 1991 (NSW)* (2017-18); Senator the Hon. Arthur Sinodinos AO in ICAC *Operation Credo (Australia Water Holdings)* and *Operation Spicer (Political Donations)* (2014-2017) and the related NSW Electoral Commission investigation; the Deputy General Manager in ICAC *Operation Ricco (Botany Bay Council)* (2017); the John Holland/Thiess executive who negotiated with the Hon. Bill Shorten in relation to the construction of the EastLink project in the *Commonwealth Royal Commission into Trade Union Governance and Corruption* (*Australian Workers Union Case Study)* (2015); the CEO of Greyhound Racing NSW in the *Special Commission of Inquiry into Greyhound Racing in NSW* (2015-16); the NSW Mine Subsidence Board in ICAC *Operation Tunic (NSW Mine Subsidence Board)* (2014-2015), and businessman Rodric David in ICAC *Operation Vesta (Sydney Harbour Foreshore Authority)* (2011).

Earlier in her career, Dominique was junior counsel assisting the *Special Commission of Inquiry into the Medical Research and Compensation Foundation* (the James Hardie Inquiry) (2004), and junior counsel for the appellants in *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, concerning the proper construction of the *Royal Commissions Act* 1902 (Cth) and the use of evidence gathered during the *Commonwealth Royal Commission into the collapse of HIH Insurance*, in which she had appeared for a German reinsurer and its associated entities and executives (2002-2003).

**Lessons for Government from Recent Royal Commissions and Public Inquiries**

**Dominique Hogan-Doran SC**

1. Public inquiries constitute a distinct advisory instrument of government. Despite being ad hoc and temporary, they can have great impact on public policy and government action, extending far beyond their specific investigations and remit.
2. Royal Commissions, in particular, have become an entrenched feature of Australian public life. Whatever be the political motive behind their establishment, their qualities of independence, neutrality, transparency, and delivery of a reasoned report make them attractive tools to government. Like their standing cousins created to tackle ongoing problems such as public sector corruption, they will likely remain popular mechanisms to address issues of serious concern to modern government.
3. While government lawyers may be familiar generally with the work of Royal Commissions and ICAC, responding in a timely and strategic manner can be confronting for those new to this specialist area. For those called upon to advise government as to whether, and/or how, to initiate an inquiry of this kind, the task can be even more daunting. There is a need to be alert to a myriad of issues arising in relation to:
    - their establishment and the exercise of executive power;
    - the investigatory powers requiring production of information and attendance;
    - the circumstances in which disclosure may not be appropriate;
    - the consequences of failing to comply with directions or notices;
    - what is involved in appearing and participating in public hearings; and
    - formulating submissions on law and policy.
4. Such advice must be delivered amidst a growing chorus of senior public figures expressing misgivings as to what the increasingly frequent calls for Royal Commissions, and their apparent proliferation, tells us about the state of our democratic institutions. Recently, former shadow Victorian Attorney-General John Pesutto argued that "*if the massive and growing apparatus of government cannot identify potential system failures*" before they materialise with catastrophic consequences for innocent people, then "*we have to wrestle honestly with vexed questions about how we change those institutions*."[1] Former justice of the High Court of Australia, the Hon. Kenneth Hayne AC QC (himself a recent Royal Commissioner) has despairingly remarked that "*reasoned debates about issues of policy are now rare*" and *"[t]rust in all sorts of institutions, governmental and private, has been damaged or destroyed*".[2] That dismal view highlights an increasing rejection of expertise and established knowledge, including the idiom of its expression, which is fuelling the resentful, angry populism that has made its way into the civic life of the world's democracies.[3]

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[1] J Pesutto, *The Age*, 20 July 2019, available at https://www.theage.com.au/national/proliferation-of-royal-commissions-points-to-wider-shortcomings-20190719-p528u6.html

[2] K Hayne, "*On Royal Commissions*" Speech to the CCCS Conference, Melbourne School, 26 July 2019.

[3] For further exploration of this issue, see: T Nichols, *The Death of Expertise: The Campaign Against Established Knowledge and Why It Matters* (Oxford University Press, 2017). Tom Nicols is Professor of National Security Affairs at the U.S. Naval War College.

5. Happily, it is not the task of this paper to resolve that particular political conundrum. Suffice to say, the pedigree of Royal Commissions is substantial; their use by the Crown can be traced to the Domesday Book, compiled by Royal Commissioners sent by William the Conqueror in 1085 into every county to assess the value of land titles and the state of the English economy in the aftermath of the Norman Conquest and the unrest that followed.[4]

6. The *Royal Commissions Act* 1902 (Cth) was one of 59 statutes enacted by the first Parliament of the Commonwealth of Australia, the practice of Royal Commissions being already well established in the colonies.[5] From early on, Australian Royal Commissions mimicked experience from the United Kingdom; being deployed as a means of inquiring into social, economic, colonial and constitutional questions – sharing characteristics with our present-day law reform agencies.

7. In the early years following Federation, Royal Commissions into the effectiveness of government agencies also held prominence. The Royal Commission into Postal Services, conducted between 22 June 1908 and 5 October 1910, expressed scathing criticism of the administration of both the Public Service Commissioner and the Postmaster-General's Department.[6] The appeal of star witnesses featured even then: the American inventor of the telephone, Dr Alexander Graham Bell, travelled to Melbourne in August 1910 and provided extensive evidence before an august panel of Commissioners.[7]

8. Since 1950, although continuing to serve both policy advisory and inquisitorial roles, inquisitorial assignments have represented over 80 percent of Royal Commissions. Recent Royal Commissions have been empowered and resourced in a manner dwarfing standing regulators, whose work has been limited by budgetary cycles or restrictions. Indeed, as shown by the inquiry into regulation of the financial services industry, Royal Commissions can prove useful in holding regulators to account. After all, the clients of a regulator are not their regulated entities, but government itself, and thereby, its citizens.[8]

9. This paper's ambitious task is to sift through the peculiarly sprawling field of law applicable to Royal Commissions (and to a lesser extent, other forms of public inquiry), to survey the wide-ranging recent experience, identify caselaw developments of interest, and draw together from these disparate elements ten key insights that highlight the ways in which this exercise of executive power can be enhanced, compromised, or thwarted.

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[4] The irreversible nature of the information collected led people to compare the work to the Last Judgment, or 'Doomsday', described in the Bible, when the deeds of Christians written in the Book of Life were to be placed before God for judgement. The name was not adopted until the late 12th century.

[5] For example, the first Royal Commission in South Australia was in 1859, into the loss of the "SS Admella", and 78 Royal Commissions were convened in the period prior to Federation.

[6] "*The Report must be considered as one of the most condemning documents in Australian administrative history ... The list of faults touched every conceivable aspect of the Department.*" See https://www.apsc.gov.au/ch-1-beginnings-1902-act.

[7] Dr Bell revealed himself to be far-sighted, and fair-minded. For example: "*Do you consider that wireless telephony is likely to develop greatly in the future? – Yes, it is in use now in America experimentally, and speech has been transmitted 12 or 14 miles. When an invention begins in that way one cannot tell how far it will go.*" … "*Is there any limit to the size of a workable network? – We have not reached it yet. It was my dream to bring people face to face in every part of the United States.*" … "*Do you know whether the occupation of a telephonist is nerve-racking or injurious to females? – I have not heard of such a thing.*" Transcript available on request.

[8] To extend the observation of Commissioner Hayne: "*Financial services entities are not ASIC's 'clients'. ASIC does not perform its functions as a service to those entities.*" *Final Report*, vol. 1, p 424.

***Lesson 1: establishing a Royal Commission is a 'brave' choice for Government***

10. As an act of the executive,[9] Royal Commissions and public inquiries may be initiated in any circumstance of an executive government's choosing, subject to any constitutional limitations. Perhaps government has a genuine desire to get to the root of an issue; perhaps a (less genuine) desire to deflect public interest; perhaps, in light of public criticism and media pressure, it acknowledges a demand for independent, transparent, review.[10]

11. The acknowledged strength of these bodies lies in their ability to get to the root of a crisis, such as where there has been a major accident or disaster, an allegation of corruption, or the death or wrongful treatment of individuals. In that setting, they present an opportunity to reconcile what has happened, to apportion responsibility, blame, and accountability, provide catharsis or reconciliation, and identify what should be done to prevent a repeat.[11]

12. Royal Commissions can also help open up difficult public policy issues requiring broad based public support: they have the potential to 'cut through' a confronting, complex problem, and better assist policy development. Their transparency from beginning to end could promote confidence in a process of inquiry and policy development that the fractured and fragmented processes of modern government may struggle to deliver. They could provide a forum for vulnerable, or disenfranchised, members of the public to contribute in a secure and supported manner. They could also provide a forum for think tanks, industry associations, and lobby groups to bring their ideas, research, and advocacy to the policy development process in a transparent and open way.

13. This pleasing wish-list should not shroud the reality that whatever advantages Royal Commissions may possess, their attendant risks include non-delivery of desired outcomes, unexpected outcomes, poor performance, delay, interim policy inertia, and loss of control of the policy agenda. Their unpredictability can make them a brave choice for executive government.

14. Moreover, they can be ferociously expensive.[12] A Royal Commission incurs start-up costs that an existing agency (or other method of inquiry – such as a Parliamentary inquiry) avoids. The latest Commonwealth Royal Commission - into Disability Services - has a

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[9] The "*executive, as distinct from the legislative branch of government, represented by the Ministry and the administrative bureaucracy which attends to its business*": *Sue v Hill* (1999) 1999 CLR 462, 499 [87] (Gleeson CJ, Gummow and Hayne JJ). Section 61 of the *Constitution* provides that the executive power is vested in 'the Queen', which is to be understood as describing the Monarch acting on the advice of Commonwealth Ministers responsible to the Commonwealth Parliament. As to the receipt of executive power in NSW, see *New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act* (2016) 91 ALJR 177, 201-2 [126]-[130] (Gageler J).

[10] Professor Scott Prasser identified ten "basic reasons" in his early paper "Royal Commissions and Public Inquiries: Scope and Uses" in P Weller (Ed) *Royal Commissions and the Making of Public Policy* (1994), 6-8. For other critiques of royal commissions see: L.A. Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982); A Pross, I Christie and JA Yogis (eds), *Commissions of Inquiry* (1990); S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001); S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006); S Prasser & H Tracey (eds), *Royal Commissions & Public Inquiries: Practice & Potential* (2014).

[11] A Holmes, "A Reflection on the Bushfire Royal Commission – Blame, Accountability and Responsibility" (2010) 69 *Australian Journal of Public Administration* 387.

[12] The Australian Law Reform Commission gave weight to cost concerns when it formulated an alternative, stripped-down, inquiry process: see *Making Inquiries: a New Statutory Framework* (ALRC Report 111, 2010). The recommendation has not, to date, been adopted.

budget of approximately half a billion dollars, which is about the annual budget for the Commonwealth Department of Social Services.

15. Despite popular clamour, not everyone will be supportive. Some may voice concern that certain perspectives will be privileged, and others marginalised or excluded entirely.[13] The wider consultation on terms of reference for recent Royal Commissions (particularly those into Aged Care and Disability Services) can be seen to have anticipated these concerns.

16. The grant of a royal commission by letters patent involves the exercise of the prerogative;[14] the decision to appoint a particular Royal Commissioner is non-justiciable. Government may take solace from there being no necessity to disclose its reasons in order to initiate the processes of inquiry. As an act of executive government, it need never become public knowledge as to what was the executive's *actual* motive behind any particular initiative. Public interest immunity is a doctrine of substantive law and represents a fundamental immunity. The deliberations of Cabinet (and associated materials) usually remain confidential because of a public interest in Cabinet members exchanging different views while maintaining the principle of collective responsibility.[15] Generally, only in exceptional cases may they be subject to judicial review[16] and disclosure.[17]

***Lesson 2: Royal Commissions enjoy wide-ranging coercive powers, so if to be given broad terms of reference, do be careful what you wish for***

17. A Royal Commission may be established only by Letters Patent issued by the Governor-General (or Governor). Unlike standing commissions, such as the ICAC, Royal Commissions cannot conduct investigations on their own initiative,[18] or as a result of a

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[13] See, e.g., E Marchetti, "Critical Reflections upon Australia's Royal Commission into Aboriginal Deaths in Custody" (2005) 5 *Macquarie Law Journal* 103, at 104; H Wootten, "Reflections on the 20th Anniversary of the Royal Commission into Aboriginal Deaths in Custody" (2001) 7: 27 *Indigenous Law Bulletin* 3.

[14] *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 93-4 (Dixon J); *Lockwood v Commonwealth* (1954) 90 CLR 177, 185-6 (Fullagar J), *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 85, 88 (Mason J), 139 (Wilson J), 155-6 (Brennan J).

[15] Although no class of document (including cabinet documents) is entitled to absolute immunity from disclosure, the question is to be determined by balancing competing aspects of the public interest: *Sankey v Whitlam* (1978) 142 CLR 1, 38-39 (Gibbs ACJ); see also 49 (Stephen J); 95-96 (Mason J).

[16] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 619 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ), 631 (Toohey J); *South Australia v O'Shea* (1987) 163 CLR 378, 387-388 (Mason CJ), 412 (Brennan J), 419-420 (Deane J).

[17] *Commonwealth v Northern Land Council*, 614-619 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ), 629-631 (Toohey J); *Sankey v Whitlam*, 40-48 (Gibbs ACJ), 52-71 (Stephen J), 93-102 (Mason J), 107-110 (Aickin J). As to disclosure of Cabinet documents: *Harbours Corporation of Queensland v Vessey Chemicals Pty Ltd* (1986) 67 ALR 100; *NT Power Generation Pty Limited v Power and Water Authority* [1999] FCA 1185; [1999] ATPR 41-709; *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60; *Kamasaee v Commonwealth of Australia (No 5)* [2016] VSC 595 (upholding the Commonwealth's objection to production of certain documents concerning Manus Island and offshore processing).

[18] cf *Independent Commission Against Corruption Act* 1982 (NSW) (**ICACA**) s20(1). ICAC prepares its own *'scope and purpose'* document to act as its internal terms of reference, which it may choose to amend from time to time.

complaint,[19] report,[20] or reference by a House of Parliament[21] made to it.[22] However, although the office of Royal Commissioner is dependent on the Letters Patent, the powers of compulsion regarding witnesses and information are entirely dependent on statute.

18. Thus, the *Royal Commission Act* 1902 (Cth) enables a Commonwealth Royal Commission with coercive powers to be established to inquire into and report on "*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*".[23] The expression 'any matter' in s 1A is used as a comprehensive term to refer to any subject of inquiry (the expression used in the advice of the Privy Council in *Attorney-General for the Commonwealth v Colonial Sugar Refining Co. Ltd* (1913) 17 CLR 644, 650, that is to say, any subject matter that may be chosen for inquiry (the language of Fullagar J in *Lockwood v The Commonwealth* (1954) 90 CLR 177, 182).

19. To illustrate, Justice Neville Owen was commissioned (rather succinctly[24]):

> BY these Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and pursuant to the Constitution of the Commonwealth of Australia and the Royal Commissions Act 1902 and other enabling powers, We appoint you to be a Commissioner to inquire into the reasons for and the circumstances surrounding the failure of HIH prior to the appointment of the provisional liquidators on 15 March 2001.

20. Subject to the supervision of the courts, the interpretation of the terms of reference is a matter for the inquiry.[25] Declaratory relief, supported if necessary by an injunction, may be available to keep an inquiry within its terms of reference.[26] In an exceptional case, a court of review may terminate an inquiry,[27] or if the report of an improperly conducted inquiry is in preparation, order that an offending part of it be deleted, suppressed, or reconsidered.[28]

21. A Royal Commission cannot inquire into a matter if its inquiry would interfere with the administration of justice.[29] 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

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[19] cf ICACA s 10.

[20] cf ICACA s 11 (reports by public authority obliged under legislation to report suspicions of corrupt conduct).

[21] cf ICACA s 13(1)(b), s 74(2) (references by houses of parliament).

[22] ICACA s 74(2). Other than where required to investigate a matter referred to it by parliament, ICAC has a discretion to investigate any matters that may involve corrupt conduct, whether or not a particular public official or other person has been implicated: s 20(2).

[23] *Royal Commission Act 1902* (Cth) (**RCA**) s1A; *Special Commission of Inquiry Act 1983* (NSW) (**SCOIA**) s 4.

[24] Terms of reference need not be so succinct: Letters Patents issued to Kenneth Hayne were more prescriptive, running to ten substantive paragraphs over several pages.

[25] *Easton v Griffiths* (1995) 69 ALJR 669, 672 (Toohey J).

[26] *Ferguson v Cole* (2002) 121 FCR 402 (concerning the "First Report" of the Royal Commission into the building and construction industry).

[27] As happened in *Carruthers v Conolly* [1988] 1 Qd R 339 and *Keating v Morris* [2005] QSC 243 (Bundaberg hospital inquiry).

[28] *Campbell v Mason Committee* [1990] 2 NZLR 577.

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

prosecution has been commenced against the person in respect of the alleged conduct.[30] This consideration is now routinely taken up in the drafting of terms of reference.

22. That is not to say that a Royal Commission into a particular matter cannot be asked as part of its terms of reference to examine the past conduct of the prosecution in a particular criminal case: the Wood Royal Commission,[31] the Fitzgerald Royal Commission,[32] and of course, the current Victorian Royal Commission into the Management of Police Informants [in particular, 'Lawyer X'][33] are good examples.

23. The terms of reference are within the control of the executive of the day: indeed, they can be so broad as to encompass the activities of previous executive governments. Thus, the first matter identified for inquiry by the 2013 Letters Patent for the Commonwealth Royal Commission into the Home Insulation Program was:[34]

> the processes by which the Australian Government made decisions about the establishment and implementation of the Program, and the bases of those decisions, including how workplace health and safety and other risks relating to the Program were identified, assessed and managed.

24. A Royal Commission is said to require broad powers to ensure that the issues and facts are fully canvassed.[35] It is therefore not surprising that there are close similarities in the coercive information-gathering powers abrogating common law immunities exercised by Royal Commissions to those conferred on regulators (such as the ASIC, the ACCC and the ATO). Powers include the power to obtain warrants to enter and search premises and to seize documents and things,[36] and to mount covert operations, using surveillance devices

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

31 New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) 87, 120.

32 Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (1989) 237-8.

33 This followed critical decisions of the Victorian Court of Appeal (*AB v CD & EF* [2017] VSCA 338) and the High Court of Australia (*AB (a pseudonym) v CD (a pseudonym)* [2018] HCA 58) regarding a former criminal defence barrister recruited by Victoria Police as an informant.

34 See C Bleby, "Executive Power and Responsible Government" in M Hinton & J Williams (eds) *The Crown: Essays on its Manifestation, Power and Accountability* (2018), 244-245 (suggesting that the terms of reference were an argument in favour of the federal Liberal government's authorisation of the disclosure of Cabinet documents of the former Labor government in answer to a summons by the Royal Commission).

35 The general history of the subject of Royal Commissions, with particular reference to the relationship with the criminal law and the judicial power, and the need for statute to provide coercive means to supplement the royal prerogative, was traced in early judgments of the High Court of Australia, particularly by Griffith CJ in *Clough v Leahy* (1904) 2 CLR 13, 155-161, and later by Dixon J in *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73, 93-102 and Brennan J in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 147-158.

36 A Royal Commission designated a 'relevant commission' in its letters patent may apply to a judge for a search warrant. It is not necessary for the Commission to suspect that an offence has occurred before it can obtain a warrant: cf *Crimes Act* 1914 (Cth) Pt IAA. The Commission need only have 'reasonable grounds for suspecting' that there may be any relevant evidence of a specified kind in a specified place, although it must also 'believe on reasonable grounds' that if a summons were issued for the production of the evidence, the evidence 'might be concealed, lost, mutilated or destroyed': ss 1B, 4(1). By contrast, under the *Crimes Act* there is only a requirement that there be 'reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises": s 3E(1). There is no power under the SCOIA for a commissioner to apply for a search warrant.

or telephone interceptions.

25. Oral examination of witnesses can also facilitate the identification of relevant facts, disclosure of existence of documents, and the obtaining of assistance with the interpretation of documents. The power to summon witnesses to attend before an inquiry is therefore so common as to be almost universal.[37]

26. The rules of evidence usually do not apply,[38] although this does not mean that they "*may be ignored as of no account*".[39] Even so, other than objections of relevance, certain privileges, or unfairness,[40] most questions are likely to be allowed, even where they seek to elicit hearsay or invite merely speculative answers. That is not to say that hearsay evidence should not be given little weight in some circumstances: *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666. Before a commissioner stigmatizes an identified or identifiable person, they should act on the *Briginshaw* formula, such that the evidence required for 'reasonable satisfaction' depends on the gravity of the allegation and the consequences of the person accused, if it is sustained (*Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362). A finding must be based on "*some material that tends logically to show the existence of facts consistent with the finding, and that the reasoning supporting the finding, if it be disclosed, is not logically self-contradictory*": *Mahon v Air New Zealand* [1984] AC 808, 820.

27. 'Relevance' operates very broadly in relation to investigative inquiries, and regard must be had to its investigatory character. A Royal Commission is essentially a 'fishing expedition". In *Ross v Costigan* (1982) 41 ALR 219, Ellicott J explained:[41]

> Where broad terms of reference are given to it, the Commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the Commission or counsel assisting, may nevertheless fail to do so. But if the Commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference in doing so. This flows from the very nature of the inquiry being undertaken.

28. A Commission is therefore unlikely to be regarded as outside its terms of reference if it *bona fide* seeks to establish a relevant connection between certain facts and the subject

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[37] See RCA s 2(1), ICACA s 35(1), SCOIA s 14. Not all public inquiries have coercive information gathering powers, for example the 2005 inquiry into the immigration detention of Cornelia Rau, and the 2008 inquiry into the case of Dr Mohamed Haneef did not. On the other hand, the 2008 Equine Influenza Inquiry, chaired by former justice of the High Court of Australia, Ian Callinan AC QC, did: see *Quarantine Act 1908* (Cth) s 66AZE, introduced by the *Quarantine Amendment (Commission of Inquiry) Act* 2007 (Cth).

[38] However, some Royal Commissions (such as the Costigan Commission) have been bound by their terms of reference to base their findings only on admissible evidence.

[39] *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at 256 (Evatt J).

[40] Such as where the witness has not accepted the premise of a question, or the question has multiple parts.

[41] *Ross v Costigan* (1982) 41 ALR 319, 334. The case concerned a challenge to the Victorian Royal Commission into conduct by the Federated Ship and Painters and Dockers Union. The passage in the judgment of Ellicott J was approved by the Full Court in another unsuccessful challenge in *Lloyd v Costigan [No 2]* (1983) 76 FLR 279 (Bowen CJ, Lockhart and Morling JJ). See also *Harper v Costigan* (1983) 72 FLR 140, 153-4.

matter of the inquiry.[42] That is not to say it would not be restrained from pursuing a line of questioning that amounts to "*going off on a frolic of their own*".[43]

29. It is mandatory to comply with the exercise by a commission of a coercive power, subject only to successful objections of relevance[44] and the existence of a "*reasonable excuse*"[45] (or "*lawful excuse*") for the failure to comply. Circumstances held *not* to constitute a reasonable excuse include:

- that the appointment of the Commissioner is allegedly invalid;[46]
- that providing information will cause the witness to violate foreign banking secrecy laws;[47]
- that the witness has given an undertaking (express or implied) to protect the confidentiality of documents discovered or produced on subpoena;[48]
- that a journalist wishes to protect the confidentiality of their sources.[49]

30. Absent this, non-compliance risks prosecution for an offence.[50] Failure to comply with a particular direction of a commission may be punishable as an offence.[51] To facilitate the inquiry, provision is made for a range of other offences, including offences against

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[42] *Ross v Costigan*, 334; *Ross v Costigan [No 2]* (1982) 41 ALR 337, 351; *NCA v A1* (1997) 145 ALR 126, 136-8, 145; *AB v NCA* (1998) 156 ALR 52, 64; *MF1 v NCA* (1991) 105 ALR 1, 11-12, 16, 22.

[43] *Ross v Costigan*, 335; *Douglas v Pindling* [1996] AC 890, 904.

[44] RCA s 3(3); ICACA s 85(2), SCOIA s 24.

[45] RCA s 3(1), s 1B (a reasonable excuse is an excuse which would excuse an act or omission of a similar nature by a witness or a person summonsed as a witness before a court of law'); ICACA s 86(1), SCOIA s3(1) for definition of reasonable excuse.

[46] *Clough v Leahy* (1904) 2 CLR 139.

[47] *Bank of Valletta PLC v NCA* (1999) 165 ALR 60, 65.

[48] *ASC v Ampolex Ltd* (1995) 39 NSWLR 504, 519-20; 529-31. Rather, an application should be made for a non-publication direction,

[49] *ICAC v Cornwall* (1993) 116 ALR 97, 123, 135; *R v Parry* (1997) 92 A Crim R 295 (contempt).

[50] RCA s3(1), (2); ICACA s 85; SCOIA ss 25 to 33. Refusing to answer a question without reasonable excuse is an offence: RCA s 6(1); ICACA s s86(1)(c), SCOIA s 26. whether the question be put by counsel assisting, a person or counsel authorised by the commission to appear before it: RCA s 6FA; ICACA s 34(2); SCOIA s 12(3). *R v McDonald* (1983) 78 FLR 329. Knowingly giving false or misleading evidence with respect to any matter that is material to the inquiry may be punishable as an offence: RCA s 6H(1); ICACA s 87, as to which see *R v Cassell* (1998) 45 NSWLR 325, 333; SCOIA ss 27, 28. False responses may well be punished, not as contempt but as perjury: *Coward v Stapleton* (1953) 90 CLR 573, 579; *Keely v Brooking* (1979) 143 CLR 162, 170. The jurisdiction to commit a witness for contempt as a result of prevarication is strictly limited and to be exercised with extreme caution: *Coward* at 580; and is justified only when a witness gives an answer which is 'plainly absurd' or 'palpably false', but also when a witness persistently asserts that they have no recollection of events when there is every reason to suppose that they would recall them: *Keely*, 169.

[51] RCA s 6O(1), s 6O(2) (where commissioner is a judge, has power to punish); ICACA s 98, 99 (ICAC to certify contempt to Supreme Court); *Wood v Galea* (1995) 79 A Crim R 567, 573; *Thelander v Woodward* [1981] 1 NSWLR 644, 647. ICACA s 101, SCOIA s24(d). Section 24 will only apply where the Governor makes a declaration in the Letters Patent that section 24 is to apply.

witnesses,[52] and offences of disruption or obstruction.[53]

31. The trend is to expand, rather than restrict, the information-gathering powers of Royal Commissions. In 2013, in changes wrought to facilitate the establishment of the Child Sexual Abuse Commission, the use immunity afforded by s 6DD was extended to evidence obtained in private sessions by Royal Commissioners provided by a new Part 4 with the introduction of s 6OE into the Act.[54] On 31 July 2019, the *Royal Commissions Amendment (Private Sessions) Bill* 2019 passed the Commonwealth Parliament, to enable the private sessions regime in Part 4 to be extended to other Royal Commissions by regulation, recognising that this was a useful way for a Royal Commission to obtain sensitive and personal information to inform its inquiry.[55]

32. Consistently with this trend, further legislation has been enacted to validate certain actions and findings of past inquiries (e.g., the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW)[56] retrospectively authorised certain inquiries, so as to overcome the narrower reading adopted by the High Court of Australia in *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1) or to provide additional powers to inquiries already underway (e.g., the introduction of Part 3A into the *Charitable Fundraising Act 1991* (NSW), so as to reconstitute a non-public inquiry into the RSL and its associated entities into a public inquiry[57]).

33. In New South Wales, it is not unusual for public authorities to be authorised to arrange the holding of an inquiry cloaked with compulsory powers akin to those exercised by Royal Commissions. For example, pursuant to s 143 of the *Casino Control Act* 1992 (NSW), for the purpose of the exercise of its functions, the NSW Liquor and Gaming Authority may hold inquiries, in public or in private, with the power to take evidence on oath or affirmation. The person presiding at an inquiry is not bound by the rules or practice of evidence and may inform himself or herself on any matter in such manner as the person considers appropriate. On 8 August 2019, the authority announced a public inquiry concerning the Barangaroo restricted gaming facility licensee and its close associates.[58]

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[52] E.g. bribing, making threats against, causing injury to, or dismissing from employment, commission witnesses: RCA ss 6I, 6J, 6L, 6M, 6N; ICACA ss 89-94, SCOIA s 28 where a person procures or causes, attempts or conspires to procure the giving of false testimony.

[53] E.g. by disclosing the fact that a summons has been issued, violating a non-publication order: ICACA ss 85, 112, 114.

[54] *Royal Commissions Amendment Act* 2013 (Cth) (No. 24, 2013), schedule 1.

[55] The Morrison Government proposes to recommend to the Governor-General that private sessions be applied to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Disability Royal Commission) and the Royal Commission into Aged Care Quality and Safety (the Aged Care Royal Commission): *Explanatory Memorandum*, [4].

[56] The High Court of Australia upheld the validity of the Act in *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83. The effect of this legislation was also to expand the functions of the ICAC by including within the scope of corrupt conduct in s 8(2) conduct which could adversely affect the efficacy (but not necessarily the probity) of the exercise of official functions. The amendment operated retrospectively. See also *Lazarus v Independent Commission Against Corruption* (2017) 341 ALR 483; 94 NSWLR 36, which confirmed that the Act operated retrospectively to validate the steps taken in the prosecution of criminal charges, and was constitutionally valid in that respect.

[57] See *Charitable Fundraising Amendment (Inquiries) Act 2017* No 36 (NSW).

[58] The inquiry will investigate a transaction involving the proposed sale of shares in Crown Resorts from James Packer's CPH Crown Holdings to Melco Resorts & Entertainment, a Hong-Kong-based casino

34. This expansive trend has proceeded apace despite the fact that coercive investigatory powers of Royal Commissions[59] prompt concerns on civil liberty grounds, particularly since Royal Commissions draw their conclusions on the balance of probabilities and acceptance of hearsay evidence. These days, the risk to an individual's livelihood of being compelled to give evidence at a Royal Commission has extra bite. This is because use immunity and the prohibition on causing injury to a witness do *not* preclude compelled evidence being used in administrative action by regulators in the exercise of their various licensing and supervisory powers - something to watch for in the fallout from the Financial Services Royal Commission, [60] with echoes of the knock-on effect of the HIH Royal Commission. [61]

***Lesson 3: Constitutional limitations can restrict the work of your Royal Commission***

35. A Commonwealth Royal Commission with coercive powers can only be conducted if the subject matter of the inquiry lies within the field of Commonwealth power[62] (which includes, of course, the broadly construed "external affairs" power[63]) and is not expressly excluded from the Commonwealth's power.[64] Thus, the Royal Commission into

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operator, though a subsidiary: https://www.liquorandgaming.nsw.gov.au/news-and-media/nsw-independent-liquor-and-gaming-authority-inquiry-into-barangaroo-restricted-gaming-facility-licensee-and-its-close-associates.

59 In *Sorby v Commonwealth* (1983) 152 CLR 281 the majority of the High Court of Australia held that s 6A of the Royal Commission Act required a witness to answer questions put to him notwithstanding that the answers might tend to incriminate him. Section 6DD renders inadmissible in subsequent civil or criminal proceedings in any Australian court (federal, State or Territory) statements or disclosures by witnesses in answer to questions put by a Royal Commission. The majority also decided that s 6DD did not remove the right of a witness to refuse to answer a question on the ground that the answer might tend to incriminate him.

60 Section 920A of the *Corporations Act* 2001 (Cth), which was amended following the 2012 Future of Financial Advice reforms, empowers ASIC to make a banning order against a person in a variety of circumstances.

61 APRA's conduct in the aftermath of the HIH Royal Commission was challenged in *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 in the context of the proposed use by APRA of evidence given to the HIH Royal Commission so as to disqualify senior insurance managers of a foreign general insurer, under s24(1)(b) *Insurance Act* 1973 (Cth). At that time, APRA could exercise the power of disqualification if it was satisfied that a senior manager was not a "*fit and proper person to be or act*" in such a capacity (s25A(1)). The challenge was unsuccessful, but APRA's power to disqualify was subsequently removed by Parliament, and instead conferred upon the Federal Court, on application by APRA: see *Financial Sector Legislation Amendment (Review of Prudential Decisions) Act* 2008 (Cth), substituting a new s 25A.

62 *Lockwood v the Commonwealth* (1954) 90 CLR 177, 184.

63 *Australian Constitution* s 51(xxix); *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Victoria v Commonwealth* (1996) 187 CLR 416.

64 For example, s 116 of the *Constitution* expressly limits the Commonwealth's power in respect of the free exercise of religion: see *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)* (1912) 187 CLR 416. However, in the *Jehovah' s Witnesses Case* (1943) 67 CLR 116, 131, Latham J said that s 116 only prohibits any "undue infringement of religious freedom". Beck argued that the Child Abuse Royal Commission would merely "*uncover facts and develop recommendations*" and as such was "*unlikely to interfere in any serious way with the free exercise of any religion*" (at 16) nor would those actions have "*the purpose of prohibiting the free exercise of religion*" (at 17): "Institutional Responses to Child Sexual Abuse: The Constitutionality of a Royal Commission" (2012) 38:1 *Alternative Law Journal* 14.

Institutional Reponses to Child Abuse referred in its Letters Patent to Australia's obligations under the *Convention on the Rights of the Child*, to which Australia is a signatory, and the Royal Commission was said to be a genuine step in the process of protecting children from abuse and thus a genuine step in the implementation of Article 19(1) of that convention.

36. Where it is proposed to establish a Royal Commission to, *inter alia*, inquire into state government institutions, their constitutionality could also depend on the operation of the intergovernmental immunities doctrine.[65] An issue may arise as to whether a Commonwealth inquiry's powers validly extend to compelling a state institution to comply with matters such as orders to produce documents, since if there was a State law requirement prohibiting certain information being disclosed, the Commonwealth Act would otherwise prevail and override the inconsistent state law: s 109 of the *Constitution*.[66]

37. *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 concerned an attempt by the federal government to establish the Commonwealth Bank as the central bank in Australia which was to handle all government business. The High Court of Australia held invalid s 48 of the *Banking Act 1945*, which prohibited banks, without the consent of the Federal Treasurer, from conducting banking business for a State or a State agency.

38. The reasons of the Justices were expressed in various ways,[67] but the *Melbourne Corporation* principle was summarised in a joint judgment of Hayne, Bell and Keane JJ in *Fortescue Metals Group Ltd v The Commonwealth*[68] as requiring consideration of "*whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments*". Earlier this year, in *Spence v Queensland* [2019] HCA 15, Kiefel CJ, Bell, Gageler and Keane JJ (at [309]) also observed that the doctrine of inter-governmental immunities expounded in the *Melbourne Corporation Case* is a structural implication captured in the proposition articulated by Starke J in that case that "*neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or 'obviously interfere with one another's operations*".[69] His Honour had explained that "*[i]t is a practical question, whether legislation or executive action thereunder on the part of a Commonwealth or of a State destroys, curtails or interferes with the operations of the other*".[70] The essentially practical nature of the enquiry involved in determining whether a law of one polity impermissibly interferes with the operations of government of another is borne out by subsequent cases in which

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65 *Clarke v Commissioner of Taxation* (2009) 204 CLR 272, 307; *Austin v Commonwealth* (2003) 215 CLR 185, 249.

66 The Child Sexual Abuse Royal Commission resolved this; the Commonwealth government obtained, and the letters patent recited, the undertaking of the state governments to cooperate.

67 As to Justice Dixon's reasons, see in particular the speech by then NSW Attorney-General, Jeff Shaw, 'The 50th Anniversary of *Melbourne Corporation v The Commonwealth'* (1999 Spring) *Bar News: Journal of the NSW Bar Association* 31.

68 (2013) 250 CLR 548, 609 [130]; see also 563 [6], 614 [145], 636-637 [229].

69 (1947) 74 CLR 31, 74, quoting *Graves v New York; Ex rel O'Keefe* [1939] USSC 60; (1939) 306 US 466, 488.

70 (1947) 74 CLR 31, 75.

Commonwealth legislation has been held to contravene that structural implication.[71]

39. In *Commonwealth of Australia v Commissioner Bret Walker SC & Anor*, High Court of Australia proceedings No. C7/2018, a question arose as to whether the Commissioner of the Murray-Darling Basin Royal Commission (a South Australian Royal Commission), was authorised to issue summonses requiring the attendance of, or to require the production of documents from, current and former officers or employees of the Commonwealth or of the Murray-Darling Basin Authority (a Commonwealth authority) or residents of another State, or to impose penalties for failure to comply with such summonses. An alternative question arose as to whether certain provisions of the *Royal Commissions Act* 1917 (SA) conferring powers to summon witnesses are constitutionally invalid in their application to such persons.

40. Unfortunately, the rights and wrongs of that constitutional controversy remain unresolved, as the summonses were ultimately withdrawn due to the exigencies of timing, and the proceedings discontinued by consent.[72] Although refusing to concede the argument, in his final Report, Commissioner Walker warned:

> Had the Commonwealth succeeded in its arguments, an infirmity in our Constitution would have emerged, alongside that which sec 100 memorializes. It would counsel reluctance to enter intergovernmental arrangements without explicit agreements of an unusual, and unusually binding, nature, so as to establish adequate modes of investigation of 'co-operative' activities. That seems to be a ponderous way to launch national projects.[73]

***Lesson 4: not everyone wants to, or should, be a Royal Commissioner***

41. The obvious appeal in finding a judicial (or former judicial) officer to chair a Royal Commission or public inquiry reflects the expectation that they will typically closely follow 'judicial process', in that the Commissioner will act '*openly, impartially and in accordance with fair and proper procedures*'.[74]

42. The constitutionality of judges acting as Commonwealth Royal Commissioners is not doubted. The High Court of Australia in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (the Hindmarsh Island Bridge case) (1996) 189 CLR 1 allowed that the conduct of a Royal Commission could be compatible with judicial office, depending on its terms of reference and enabling legislation. This *persona designata* doctrine permits non-judicial functions to be conferred on a judge in their personal capacity, subject to the need

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[71] E.g. *Austin v The Commonwealth* (2003) 215 CLR 185, 249 [124]; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 298-299 [32]-[34], 305-307 [61]-[66], 312-313 [93]-[95].

[72] The Commonwealth and the MDBA also declined to accept an invitation to appear voluntarily but provided some written submissions in response to a request to voluntarily co-operate. New South Wales declined the Commissioner's invitation to provide written responses to specified attendance by way of attendance. See further https://www.mdbrc.sa.gov.au/resources/key-correspondence.

[73] Section 100 of the Commonwealth *Constitution* provides: "*The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.*"

[74] To adopt Gaudron J's description of 'judicial process' in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 22.

for a judge's consent to acting in the role and the requirement that there be no incompatibility with the proper discharge of the judicial function.[75]

43. Three potential sources of incompatibility may arise: *Grollo v Palmer* (1995) 184 CLR 348. *First*, the actual performance of the judge's judicial functions may be significantly compromised as a result of a non-judicial function. *Secondly*, the personal integrity of the judge may be compromised or impaired by the non-judicial function.[76] *Thirdly,* incompatibility may arise where the extrajudicial function is so repugnant to the judge's judicial office that it diminishes public confidence in the judicial institution as a whole.[77]

44. Justice French (speaking extra judicially when a justice of the Federal Court of Australia) observed that the boundary line dividing functions compatible with the exercise of a federal judicial commission and functions incompatible was "*not informed by any particularly coherent body of principle*". In taking on a non-judicial task, there is a risk that the judge - and by association in the public mind, the judiciary as a whole - might be drawing upon capital, being the confidence and authority deriving from the special character of judicial office and its independence of the executive and legislature.[78] While a Royal Commission is institutionally segregated from the courts, a Commissioner's report often includes policy recommendations that could be seen to align a judge, on return to their court, with a particular policy outlook, or enmesh the judge in 'political controversy'.[79]

45. A lively debate continues as to whether *serving* judges should conduct Royal Commissions and special commissions of inquiry.[80] In *Wilson v the Commonwealth* (1996) 189 CLR 1, the federal judge appointed to inquire into Aboriginal sacred sites was required to decide "*the extent of the area that should be protected*", "*the prohibitions and restrictions to be*

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[75] See *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ) 389 and 392 (Gummow J); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 esp 17; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103-104 (Gaudron J), 117-118 (McHugh J), 137 (Gummow J); *Wainohu v New South Wales* (2011) 243 CLR 181, 199-208 [25]-[42], 216-217 [63] (French CJ and Kiefel J) and 228-229 [105] (Gummow, Hayne, Crennan and Bell JJ).

[76] *Grollo* (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ). Neither of these first two bases of incompatibility was applied in *Grollo* (or in any subsequent case) despite the judge in question being required to excuse himself from the trial of Mr Grollo on the basis of his actions as *persona designata*, without being able to give reasons to the parties. A majority of the High Court of Australia was satisfied that this conflict did not indicate incompatibility as it could hypothetically have been avoided by 'the adoption of an appropriate practice' prior to the proceedings that could have avoided the subsequent conflict of interest.

[77] In *Grollo* a majority of the High Court of Australia was satisfied that the judge was exercising an independent function by determining whether to grant the warrant application. The preservation of the judge's independence maintained the constitutional validity of the warrant scheme.

[78] Justice Robert French "Executive toys: judges and non-judicial functions" [2008] *Fed J Schol* 8, [85].

[79] B Mason, 'Falling Asleep at its Master's Feet? The *Kable* Principle and Royal Commissions' (2015) 22(3) *Australian Journal of Administrative Law* 177, 197 (suggesting that the Petrov Royal Commission as a possible example of an inquiry that, given its political dimensions, could no longer be validly undertaken by state judges).

[80] *Wainohu* (2011) 243 CLR 181, 198–9 [23] (French CJ & Kiefel J) discussing service by Australian judges as Royal Commissioners generally. See too G Winterton, 'Judges as Royal Commissioners' (1987) 10 *University of New South Wales Law Journal* 108; AJ Brown, 'The Wig or the Sword? Separation of Powers & the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48; F Wheeler, '"Anomalous Occurrences in Unusual Circumstances"? Extra-Judicial Activity by High Court Justices: 1903 to 1945' (2013) 24 *Public Law Rev*. 125.

*made*" and "*the duration of any declaration*", more akin to that of a ministerial advisor.

46. These kinds of concerns have led the High Court of Australia since 1918 to eschew participation of its serving judges in Royal Commissions (of course, former justices of that court have proven popular selections in recent years). Since the decisions in *Grollo* and *Wilson,* other federal courts have retreated from their past practice of providing a ready source of Royal Commissioners for the Commonwealth. The appointment of a federal judge, Justice Jennifer Coate of the Family Court, as one of six Commissioners appointed to the Royal Commission into Institutional Responses to Child Sexual Abuse was a rare exception. Although expressly provided for in most jurisdictions,[81] the appointment of a serving Supreme Court judge to a Royal Commission is now exceptional.[82] In 2013, Justice Peter McLellan of the New South Wales Supreme Court accepted an appointment as Chair of the same Royal Commission as Justice Coate, but retired without returning to the Court of Appeal when his commission expired. The Queensland approach appears to have shifted towards New South Wales in recent years, with the 2011 appointment of (then) Justice Catherine Holmes of the Queensland Court of Appeal to conduct the Queensland Floods Commission of Inquiry.[83] The practice in Victoria has been to the contrary. [84]

47. Royal Commissions that involve 'inherently political matters' may pose a particular risk for serving judicial officers. Some commentators argued that the Letters Patent for the Child Sexual Abuse Royal Commission conferred 'suspect' functions more analogous to a lawmaker or a law reform commissioner, such that the appointments of Justice McClellan and Justice Coate were arguably invalid.[85] This was because the Letters Patent expressly required consideration of "*what institutions and governments should do...in the future*" and the making of "*recommendations about any policy, legislative, administrative or structural reforms*". These, it was contended, were "*overtly political matters*" which were reminiscent of the discretion "*not confined by factors expressly or impliedly prescribed by law*" which led to invalidity in *Wilson*.

48. Government may still encounter reluctance from judges who are no longer serving. Royal Commissioners enjoy few formal protections for their independence from executive government. The requirement of independence is not set out in Australian legislation establishing public inquiries.[86] Although state and territory judges are beyond the *direct* reach of the federal separation of powers, in *Wainohu v New South Wales* (2011) 243 CLR 181 the High Court of Australia held that the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 extended its protection to the independence and integrity of serving judges in the states. The *persona designata* device weighs into the overall analysis in a different way in the states and territories than it does at federal level:

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81 *Royal Commissions Act* 1923 (NSW), s 15; SCOIA s 4(2); *Commissions of Inquiry Act* 1950 (Qld), ss 10, 13, 30A; *Royal Commissions Act* 1991 (ACT), s 6.

82 E Campbell & HP Lee, *The Australian Judiciary* (2nd edn, Cambridge University Press, 2013), 191-192.

83 The Supreme Court of Queensland had adopted a stance against involvement of its judges in commissions of inquiry in 1987: J Thomas, *Judicial Ethics in Australia* (3rd ed, 2009) 196.

84 Victorian opposition was expressed in the 1923 'Irvine Memorandum': see Sir M McInerney and G J Moloney, 'The Case Against' in Glenys Fraser (ed), *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (Australian Institute of Judicial Administration, 1986) 10–19.

85 G Appleby & M Stubbs "The Royal Commission into Institutional Responses to Child Sexual Abuse: Safely in Judicial Hands?" (2013) 24 *Public Law Review* 81, 84-85.

86 ALRC, *Making Inquiries: A New Statutory Framework*, Report No 111 (2009) 54 [2.15] n 16.

the fact that a role is conferred on a judge personally rather than on a court simply forms a factor to weigh into the balancing exercise that characterises the *Kable* incompatibility analysis.[87]

49. Although s 6 of the *Royal Commissions Act* 1923 (NSW)[88] gives a Commissioner the same immunity as a Supreme Court judge, it does not otherwise specifically protect a Commissioner's independence. At common law, non-statutory offices under the Crown are generally held at the pleasure of the Crown. A person appointed to conduct a royal commission of inquiry may therefore be removed from office by revocation of the letters patent which commissioned the inquiry, before their report is even made.[89] A former judge's fees may even be the subject of negotiation. The cases highlight the fragility of protections for judicial appointments, tenure and remuneration in the states and territories, as well as the potential for further development of the *Kable* principle to improve protections in this respect.[90]

50. Lastly, although frequently chaired by past or present judges, a reminder that Royal Commissions are not "*judicial inquiries*".[91] Indeed, the skills required may cross disciplinary boundaries, and include, for example, the capacity to collect, analyse and evaluate scientific data. A lack of public administration and policy experts may be exacerbated by inquiry commissioners, often former judges, and lawyers tending not to have deep knowledge of policy and administration. Whether judges of any kind are appropriate at all may be debated, and the practical utility (or political wisdom) of some of their recommendations may be open to question.

51. This can all prove troublesome for government, since it is seldom politically feasible to refuse to wholesale adopt recommendations. Consider, for example, the declarations of political intent to adopt Commissioner Hayne's recommendations concerning the financial services industry before they were even published, and the prominence given to those

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87 See *Wainohu* (2011) 243 CLR 181, 212 (French CJ and Kiefel J), 228–9 (Gummow, Hayne, Crennan and Bell JJ). On the emerging separation of powers limitations on extra-judicial activity by state judges see further S Kozlina & F Brun, "Limits to State Parliamentary Power and the Protection of Judicial Integrity: A Principled Approach? Wainohu v State of New South Wales" (2011) 15(1) *UWS Law Review* 129; F Wheeler, "Constitutional Limits on Extra-Judicial Activity by State Judges: Wainohu and Conundrums of Incompatibility" (2015) 37(3) *Sydney Law Review* 301. The profoundly important development of the protection of the institutional integrity of the State judicatures by *Kable* and later cases and of the protection of the supervisory role of the State Supreme Courts (and so, ultimately, the High Court of Australia) by the mechanism of jurisdictional error by *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, "*mean that State power, like Commonwealth power, is subject to the control of legality and lawful authority by the judicial power*": Allsop, "The Foundations of Administrative Law" [2019] *Fed J Schol* 5.

88 And to similar effect, *Commissions of Inquiry Act* 1950 (Qld), s 20(1).

89 *Wilson* (1996) 189 CLR 1, 18–19 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See also E Campbell, "Termination of Appointments to Public Offices" (1996) 24(1) *Federal Law Review* 1.

90 See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 87 [97] (Gummow, Hayne and Crennan JJ) (suggesting the *Kable* principle places some limits on the power of state Parliaments to appoint acting Justices); R Ananian-Welsh & G Williams, "Judicial Independence from the Executive: A First-Principles Review of the Australian Cases" (2014) 40(3) *Monash University Law Review* 593, 610.

91 *Clough v Leahy* (1904) 2 CLR 139; *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73, 84 (Latham CJ), 100-101 (Dixon J); *Lockwood v The Commonwealth* (1954) 90 CLR 177, 180-181.

recommendations and their implementation during the recent Federal election campaign. Consider, too, the backlash and fate of the NSW Government under Premier Mike Baird when it adopted (although subsequently abandoned) the chief recommendation of a Special Commission of Inquiry, led by former justice of the High Court of Australia Michael McHugh QC, to close the Greyhound Industry in NSW.

52. Impartiality is not the only desirable quality for a potential Commissioner; but it is certainly a necessary one. Plainly, an appointee must have no personal interest in the subject matter of the inquiry: failure to clear in advance all conflicts (actual, potential, or perceived) can lead to embarrassing false starts. In early 2019, Malcolm Hyde AO APM was forced to resign his commission alongside former Queensland Court of Appeal President the Hon. Margaret McMurdo AC to conduct the Victorian Royal Commission into the Management of Police Informants after unexpected revelations that Informant 3838 (aka 'Lawyer X') was retained by Victoria Police a decade earlier than previously reported. This unfortunately meant that there was potential for overlap between the matters of interest and Mr Hyde's time at Victoria Police.

***Lesson 5: your Commissioner could be challenged: the spectre of allegations of bias***

53. Even if government can persuade a judge (or former judge) to accept a commission to inquire into a matter of public controversy, any ongoing association (actual or perceived) with the executive (especially in the sense of the political party in government) may leave them open to subsequent challenge for bias. A finding of actual bias is a grave matter.[92] Unsurprisingly, allegations of *apprehended* bias are more commonly made.

54. From the contemporary foundations laid in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, the law in this field has been edging towards ever-greater complexity.[93] In such challenges, the question will be whether there are circumstances arising as might cause a fair-minded lay observer to reasonably apprehend that the Commissioner might not bring an impartial and unprejudiced mind to the resolution of the question they are required to determine.[94] Application of this apprehension of bias principle requires two steps.[95] *First*, it requires the identification of what it is said might lead the decision-maker to decide a case other than on its legal and factual merits. And *second*, there must be an articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits. This requires the applicant to show an association between the conduct and the fear that the judge will not decide the case impartially. As one commentator has put it, the party must "*essentially 'join the dots'*".[96]

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[92] *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 127 (Burchett J); *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98, [68] (Gleeson JA; Emmett JA and Tobias AJA agreeing).

[93] For a recent survey of the rule against bias in Australia, see S Young, "The Evolution of Bias: Spectrums, Species and the Weary Lay Observer" (2017) 41(2) *Melbourne University Law Review* 928.

[94] *Michael Wilson & Partners v Nichols* (2011) 244 CLR 427, [31]. As to significance of later statements by the decision maker, see *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283, [137]-[138] (Heydon, Kiefel and Bell JJ).

[95] See *Ebner,* [8]; *Duncan v Ipp* (2013) 304 ALR 359, [147] (Bathurst CJ, Barrett and Ward JJA agreeing) as to the two-stage approach to the question.

[96] M Groves and H P Lee (ed), *Australian Administrative Law* (Cambridge University Press, 2007) at 320.

55. This hypothetical observer is a legal fiction used by the courts to ensure that claims of bias are decided by an objective standard that reflects views of the wider public rather than the court itself. The "fair minded observer" test is essentially a question of fact to be decided in accordance with the circumstances of the particular case.[97] The test is subject to criticism, including that it provides a "*flimsy disguise for judges to continue deciding bias claims by use of their own views*".[98] This criticism endures, notwithstanding that the High Court of Australia decided in *Webb v The Queen* (1994) 181 CLR 41 that the existence of an apprehension of bias should be decided by the views of the public rather than judges.[99]

56. The rule against bias extends to a Royal Commission,[100] and statutory commissions of inquiry.[101] As was pointed out in *Ebner*, the application of that test to decision-makers outside the judicial system must accommodate differences between court proceedings and other kinds of decision-making. As such, the application of the rules to investigative bodies differs from their application to litigation,[102] their investigation being essentially inquisitorial. When applying the test of reasonable apprehension of bias, the nature of the commission of inquiry is the starting point.[103] There are a number of significant differences between a Royal Commission and a judicial proceeding. A Royal Commission has an inquisitorial role which a judge does not have. A Royal Commission is not bound by the rules of evidence, nor by procedural rules applied in courts. The findings of a Royal Commission have no effect on legal rights and obligations. The report which is produced is in the nature of advice to the Executive, which may or may not be published, and may or may not be acted upon.

57. It follows that a Royal Commissioner is permitted to take "*a more active, interventionary and robust role in ascertaining the facts and a less constrained role in reaching conclusions*" than applies in court proceedings.[104] A Commissioner is entitled to formulate questions, have suspicions that are tested by asking questions, select witnesses or persons of interest for questioning and even form and announce preliminary conclusions, none of which can give rise without more to a reasonable apprehension of bias in the sense of pre-judgment. [105] As Gleeson CJ and Gummow J (Hayne J agreeing) said in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 531:

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[97] *Aitkin v Willee* (2011) 194 FCR 220; (2011) 121 AL 105; (2011) 281 ALD 38, [49]. See *Wells v Carmody* [2014] QSC 59, [69] (Martin J) as to what a fair minded observer will be assumed to know, and *Victoria Police SOG Operators 16, 34, 41 and 64 v Coroners Court of Victoria* [2013] VSC 246, [42]; *Galea v Galea* (1990) 19 NSWLR 263, 279 as to the assumption they will base their opinion on a fair assessment of the whole of the decision-maker's conduct in the context of the whole inquiry.

[98] M Groves, "The imaginary observer of the bias rule" (2012) 19 *Australian Journal of Administrative Law* 188.

[99] Rejecting *R v Gough* [1993] AC 646, which held that bias claims should be decided by the impressions and conclusions of judges.

[100] *R v Carter*; *Ex parte Gray* (1991) 14 Tas R 247.

[101] *Carruthers v Connolly* [1998] 1 Qd R 339 and *Ferguson v Cole* (2002) 121 FCR 402.

[102] *Keating v Morris*, [33], [35]-[36], [39]; *Duncan v Ipp* (2013) 304 ALR 359, [153].

[103] See *Atkin v Willee* (2011) 194 FCR 220 (Gray J, authorising a writ of prohibition to a military commission of inquiry).

[104] *Keating v Morris* [2005] QSC 243, [46] (Moynihan J). See also *R v Carter; Ex parte Gray* (1991) 14 Tas R 247 (FC), 260–263 [29]–[34] *per curiam*; *Carruthers v Connolly* [1998] 1 Qd R 339, 358 (Thomas J).

[105] *Ferguson v Cole* (2002) 121 FCR 402, 422 [67]–[69] (Branson J).

> The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion.

58. Conduct by a Commissioner which may give rise to an apprehension of bias includes:

- examination of witnesses which illustrates a disdain or contempt towards certain witnesses (e.g. aggressive assertions, contemptuous or dismissive comment);[106]
- favourable treatment of some witnesses, contrasted with hostility and disparagement towards others (e.g. referring to a witness as a 'hero' or profuse commendation of a witness);[107]
- entering the fray and cross-examining witnesses;
- interrupting counsel for a witness in a way which is designed to deter cross-examination of a particular witness;[108]
- sarcastic and flippant remarks;[109]
- participation in tactical decisions regarding evidence;[110]
- failing to investigate or refer for police investigation leaking of material to the media.[111]

59. The Full Court of the Supreme Court of Tasmania summarised the position as follows:[112]

> The fair-minded person would not be quick to suspect bias if the Commissioner intervened in the cross-examination of certain witnesses in a robust way and on occasions to an extent in excess of that expected of a judicial officer. Similarly, the fair minded observer would not be quick to suspect bias upon learning that the Commissioner was, in general terms, directing counsel assisting to pursue certain lines of inquiry nor even if he learnt that the Commissioner, as his inquiry progressed, began to entertain certain tentative views about key witnesses. The Commissioner's duty to inquire as well as to report and recommend is a factor which the fair-minded bystander will have to the forefront of his or her mind when considering whether the Commissioner's conduct, relied upon by the Prosecutors reasonably gives rise to an apprehension of bias."

60. Recusal challenges in this context are not procedurally straightforward, nor is their success frequent. The onus is on the applicant. The allegation is a serious one and the gravity of the issue necessarily is reflected in the weight of proof required to establish the facts founding the conclusion.[113]

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[106] E.g. *Keating v Morris*, [90]-[91].

[107] *Keating v Morris*, [99], [107].

[108] *Keating v Morris*, [116], [118].

[109] *Victoria Police v Coroners Court*, [64].

[110] See e.g. *R v Coroner Maria Doogan; ex parte Lucas-Smith* (2005) 193 FLR 239, [97]. The case involved the conduct of a coronial inquest into the 'Canberra firestorm' of 2003. A subsequent challenge to the Coroner's report was rejected: *Lucas-Smith & Ors v Coroner's Court of the ACT & Ors* [2009] ACTSC 40.

[111] *XX v AG (NSW)* [2011] NSWSC 658, [43] (Rothman J) (referral of an allegation for investigation, and is terms, discloses an open mind, rather than either prejudgement or bias).

[112] *R v Carter; Ex parte Gray* (1991) 14 Tas R 247 (FC), 263 [34] *per curiam*.

[113] See *Keating v Morris* [2005] QSC 243, [47]; *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16, [97] (McColl JA; Giles and Tobias JJA agreeing).

61. The need to establish a logical connection was central to the decision in *Duncan v Ipp* (2013) 304 ALR 359,[114] which rejected allegations of apprehended bias on the part of then Commissioner of the ICAC, former NSW Court of Appeal judge, David Ipp AO QC. The principal question was whether there was a connection between the Commissioner's conduct – including communication with and advice to the Executive and the Department of Premier and Cabinet – and the possibility that the Commissioner had a closed mind about the outcome of the inquiry. Speaking subsequently of the decision, NSW Chief Justice Bathurst emphasised that it is not necessary for the logical connection to be absolutely certain.[115] All aspects of the test – for instance, the two 'mights' referred to above – are framed in terms of 'possibility', not probability:[116]

> In that sense what is required is that the fair-minded observer might perceive a logical connection between the conduct complained of and the judge's possible departure from deciding the matter impartially. In addition, when assessing if there might be a logical connection, it is appropriate to look at alternate possibilities as to why the decision maker took a particular course of action. Considering other explanations may affect whether the fair-minded observer might see a logical connection. However, the fact there are other possibilities does not mean that the fair-minded observer might not conclude that there was the possibility of bias.

62. The second issue concerns the knowledge of the lay fair-minded observer.[117] The extent and detail of the knowledge that is attributed to the fair-minded observer is one aspect of the test that has proved complicated, and there has been an accumulation of dissatisfaction with the test.[118] Despite this, Chief Justice Bathurst confirmed his view that:[119]

> While it may present some difficulties, it seems the fair-minded observer is just as useful as the passenger on the Clapham omnibus or the Bondi tram is in other contexts.

63. The role of Counsel Assisting is to assist the Commissioner carry out their duties and functions in accordance with the Letters Patent. In *Firman v Lasry* [2000] VSC 240, Ashley J stated that if the conduct of Counsel Assisting a Royal Commissioner was, or reasonably appeared to be, partial, and the Commissioner appeared to condone that

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[114] *Duncan v Ipp* (2013) 304 ALR 359, special leave to appeal refused: *Duncan v Ipp* [2013] HCATrans 157.

[115] See the Hon. T Bathurst, "Duties of Bar and Bench: Some Reflections on Case Management and Judicial Bias" [2014] *NSW J Schol* 20 [37] (speech to NSW Bar Association CPD Conference, Sydney, 29 March 2014).

[116] Citing *Duncan v Ipp* (2013) 304 ALR 359, [147]-[150].

[117] See further J Tarrant, *Disqualification for Bias* (Federal Press, 2012), 52-56.

[118] J Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) 38 *Federal Law Review* 353; M Groves, 'The Imaginary Observer of the Bias Rule' (2012) 19 *Australian Journal of Administrative Law* 188; Justice Debbie Mortimer, 'Whose Apprehension of Bias?' (2016) 84 *AIAL Forum* 45; A Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68 *Cambridge Law Journal* 388.

[119] Bathurst, op. cit., [41], referring to *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7, 36.

conduct, then the hypothetical observer might reasonably apprehend partiality on the part of the Commissioner.[120] Ashley J gave the following example of such conduct:[121]

> if the conduct of counsel assisting showed an evident and persisting inequality of treatment as between witnesses espousing one view of matters under inquiry and witnesses espousing [an] opposing view, if one group of witnesses was apparently aided in giving its account of events whilst the other group was apparently frustrated in its attempts, and if a Commissioner either gave support to or took no action to redress the situation which unfolded before him, it would not be wrong to consider that support or inaction if an allegation of apprehended bias on the Commissioner's part was raised by an individual whose conduct was under scrutiny. Whether a conclusion adverse to a Commissioner might then be drawn must depend upon the particular circumstances.

64. The fact that applications are made in the first instance to the judge against whom bias is alleged may be surprising to the wider public.[122] A high profile example of a failed recusal application exciting public attention was that led by the Australian Council of Trade Unions to the continuing appointment of J. Dyson Heydon AC QC, another former justice of the High Court of Australia, to inquire into trade union governance and corruption. In contending that the fair-minded lay observer might reasonably apprehend that Heydon might not bring an impartial mind to his task, the ACTU argued that the mere fact Heydon had accepted an invitation to speak at a Liberal Party function was enough to create an appearance of bias. In the alternative, combing through a chain of emails between Heydon, his staff and the organisers of the Sir Garfield Barwick lecture, the unions argued that the fair-minded lay observer would conclude that Heydon's purpose in accepting the invitation was to raise funds for the Liberal Party.

65. In his reasons dismissing the application, Heydon mused that:

> ... it might seem strange that a person complaining about the bias of a royal commissioner should make application for disqualification not to a court, but to the person accused of bias or apprehended bias. … What are the prospects of success in making an application against a royal commissioner on that ground, it might be said, when that commissioner hears the application?

As curious as the procedure may be perceived, an unsuccessful challenge need not end there (and notably the ACTU chose not to pursue its claim elsewhere). Where an allegation of bias or apprehended bias is rejected by a Royal Commissioner, the person making the allegation may then seek a writ of prohibition from a court, such as the High Court of Australia or the Federal Court of Australia for a Commonwealth appointee. A person who alleges bias against a Royal Commissioner may also seek a writ of prohibition from a court without making a prior application to the Commissioner for disqualification, but this course has the significant risk that the court will refuse any relief because the application is premature.[123]

66. There are two important exceptions to the rule against bias, which may be called in aid to, in effect, 'save' a Commissioner.

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[120] *Firman v Lasry* [2000] VSC 240 [27], [28]; Cf *R v Doogan; Ex parte Lucas-Smith* [2005] ACTSC 5; (2005) 157 ACTR 1, 18–19 [70]–[71]. See also *Victoria Police Special Operations Group v Coroners Court of Victoria* [2013] VSC 246, [46] (Kryou J). See also *Bretherton v Kaye and Winneke* [1971] VR 111, 123 and *R v Stuart* [2011] NSWCCA 172, [36] and [39] (McClellan CJ at CL).

[121] *Firman* [2000] VSC 240 [28].

[122] Self-disqualification is also accepted practice in the UK, the US, Canada and New Zealand.

[123] See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013), 782–783 [12.60].

67. The *first* is waiver: when comments are made which are likely to convey an impression of bias to a fair-minded lay observer, a party is not entitled to stand by until the contents of the final judgment are known, and then, if the contents are unpalatable, to attack the judgment on the ground that there has been a failure to observe the requirement of an appearance of impartial judgment.[124] A party which is aware of the circumstances entitling them to object on the ground of apprehended bias and which fails to do so, waives the right to object at a later time.[125] Both the timing and the nature of any objection made are relevant to the question of whether a party has waived a right to object on the ground of apprehended bias.[126]

68. The *second* is the principle of necessity: a decision-maker who is biased may nevertheless continue to occupy his or her decision- making role if there is no alternative to the decision-maker against whom bias is alleged.[127] The doctrine does not require that it is impossible by any means to secure the hearing of the proceeding, but there must be a substantial degree of impracticality.[128] Relevant considerations include whether it is in fact possible to appoint another decision-maker, the length of the existing inquiry and the expected further duration, the resources expended in the inquiry, whether matters of credit are in issue, the degree, nature and gravity of bias or apprehended bias involved and the decision-maker's qualifications and experience.[129]

***Lesson 6: there is need to hasten slowly: procedural fairness must be afforded***

31. Insofar as the exercise of powers is capable of adversely affecting a person's rights or interests,[130] the common law will imply a condition that the powers conferred on such a body be exercised with fairness to those whose interests might be affected.[131]

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[124] *Vakauta v Kelly* (1989) 167 CLR 568, 572 (Brennan, Deane and Gaudron JJ).

[125] *Smits v Roach* (2006) 227 CLR 423, 439 [43] (Gleeson CJ, Heydon and Crennan JJ). See also *Michael Wilson Partners Limited v Nicholls* (2011) 244 CLR 427, 449 [76] (Gummow ACJ, Hayne, Crennan and Bell JJ).

[126] *Michael Wilson & Partners Limited v Nicholls*, 451 [84].

[127] See *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411, 443–445 (Mahoney JA); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 359 [64]–[65] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[128] See e.g. *Clarke v Habersberger* [1994] VicSC 322 (Coldrey J) (necessity applied to complex single investigator inquiry into the Farrow group of companies and the Pyramid Building Society conducted over number of years with in excess of 200 sitting days and considerable number of credit issues made appointment of a new investigator to complete it "quite unrealistic"); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 359 (necessity applied to lengthy trial where credit in issue and a principal witness had died); *Carruthers v Connolly* [1998] 1 Qd R 339, 389–390 (doctrine of necessity not applied to permit continuation of second commissioner when first commissioner was disqualified; this is because second commissioner had no power or authority to continue).

[129] M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013), pp 673–734 [9.390].

[130] See, e.g., *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[131] *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ).

69. One relevant 'interest' is a person's reputation. This was established in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, where a report prepared by the CJC was tabled in the Queensland Parliament containing adverse recommendations about certain persons involved in the poker machine industry, without any notice having been given to those mentioned in the report of its existence or contents. The plurality stated that "*reputation is an interest attracting the protection of the rules of natural justice*", including one's "*business or commercial reputation*".[132] However, the *content* of that requirement is more difficult to identify. In *ICAC v Chaffey* (1993) 30 NSWLR 21, Chief Justice Gleeson remarked that not every public inquiry "*must be conducted in such a way as to minimize any damage to … reputation. Proceedings before courts frequently carry a risk, sometimes almost a certainty, of [such] damage*".[133]

70. Certainly, the right to *notice* is a fundamental part of procedural fairness, but the common law position is that witnesses have limited rights to notice of the areas under investigation by a commission. There is no statutory right to notice by a Royal Commission, although a person appearing before the ICAC at a hearing is entitled[134] to "*be informed of the general scope and purpose of the hearing*"; however, there is no obligation to give "further and better particulars". There is some debate as to *when* persons of interest are entitled to know more specifically the nature of the allegations to be put against them; must it be given in the opening statement of counsel assisting at the commencement of the hearing;[135] by the time the person's name is placed on the witness list, or by the time they are sworn/affirmed.[136]

71. The second aspect is the so-called '*hearing'* rule. As Wood J explained in *Glynn v ICAC* (1990) 20 ALD 214, 218, a person is entitled to the opportunity to meet the case put against them "*by submission, and if necessary, by evidence*". In *Duncan v ICAC* (2014) 311 ALR 750, McDougall J interpreted this to mean that, if a person believes that they have been denied the opportunity to lead (or to test) evidence on a particular topic or topics, because their significance had not been apparent at the time, they can make application to reopen the public hearing.[137]

72. Eventually, the commission will issue a written report, representing work that reflects the examination undertaken. In publishing an interim report, a commission must be careful not to express concluded opinions about matters not yet properly tested, although provisional views are unobjectionable.[138] The final report will set out various findings and usually make detailed recommendations. Depending on the nature and scope of the inquiry, those recommendations may include referral to a prosecuting authority for review and

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[132] (1992) 175 CLR 564, 578 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also *ICAC v Chaffey* (1992) 30 NSWLR 21, 27 (Gleeson CJ) and *Re Erebus Royal Commission* [1983] NZLR 662 (Privy Council).

[133] *ICAC v Chaffey* (1993) 30 NSWLR 21, 28.

[134] ICACA, s 30(4).

[135] See *Bretherton v Kaye and Winneke* [1971] VR 111, 125.

[136] In 2014, the then ICAC Commissioner's practice seemed to take a middle course, which in view of the "roving" nature of inquiries, made it difficult to predict when (or what) evidence would emerge: see *Bond v Australian Broadcasting Tribunal (No 2)* (1988) 84 ALR 646, 661; *Glynn v ICAC* (1990) 20 ALD 214, 218 (Wood J).

[137] *Duncan v ICAC* (2014) 311 ALR 750, [216].

[138] *Ferguson v Cole* (2002) 121 FCR 402, [61].

prosecution, policy recommendations and legislative reform. But there is no obligation of fairness to provide a person with advance access or draft conclusions before its release.

***Lesson 7: with public sector scrutiny comes complex legal resource and personnel management***

73. A government agency has no private interest in the performance of its functions separate from the public interest it is constitutionally bound to serve.[139] Accordingly, a lawyer advising an agency must also take particular care to ensure that the matter is approached from a whole-of-government perspective, a duty which arises because of the indivisibility of the Crown.

74. The recent decision of *Comcare v Banerji* [2019] HCA 23 reminds us:[140]

> Members of the Australian Public Service are enjoined by the *Public Service Act* (s 13) to act with care and diligence and to behave with honesty and integrity. This is indicative of what throughout the whole period of the public administration of the laws of the Commonwealth has been the ethos of an apolitical public service which is skilled and efficient in serving the national interest.

75. Recent experience confirms that those most susceptible to adverse scrutiny by a Royal Commission are those organisations lacking appropriate governance, accountability, and transparency measures, or which have adopted a high handed or dismissive attitude to law and regulatory standards. Problems with 'culture' are by no means restricted to corporate Australia.[141] Vital questions for government lawyers to contemplate, beyond their usual duties as lawyers acting for government,[142] also ought now include:

- how would our agency fare should it be subjected to the scrutiny of a Royal Commission?
- is there a disconnect in the strategic and operational performance of our agency?
- how active is our monitoring and evaluation of governance and performance frameworks?

76. Representation of staff by a single legal representative which is also acting for a public sector authority may be convenient, but scrutiny of individual conduct can cause rapid

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[139] *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 156 (Finn J).

[140] *Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146, [55]; *Comcare v Banerji* [2019] HCA 23, [31] (Kiefel CJ, Bell, Keane and Nettle JJ); [70] (Gageler J). In *Banerji* the Court held that the requirements in the Australian Public Service ('APS') Code of Conduct for APS employees to behave at all times in a way that upholds the APS Values, in particular the APS Values about an impartial and apolitical public service, do not infringe the implied freedom of political communication. The Court's decision made clear that anonymous comments and comments made outside work by APS employees, including on social media, can amount to a breach of the Code in some circumstance; and that because a decision-maker is required to act reasonably, there will be no infringement of the implied freedom of political communication when making a decision under s 15(1) of the *Public Service Act 1999* in relation to a sanction for a breach of the Code.

[141] In the sense that 'culture' is the meaning and priority that employees attach to systems of governance and performance in an organisation.

[142] As to which, see B Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *Public Law Review* 114; G Donaldson, "The Crown Being a Model Litigant" and the Hon. Justice G Parker, "Advising and Acting for the Crown" in M Hinton & J Williams (eds) *The Crown: Essays on its Manifestation, Power and Accountability* (2018).

disintegration of that plan. This complicated situation has as its source that there is no automatic right of appearance at a Royal Commission, ICAC or Special Commission of Inquiry.[143] The usual test for leave to appear is whether it can be shown to the satisfaction of the commissioner that a person has a substantial and direct interest in any subject matter of the inquiry or their conduct may be challenged to the detriment of the person.[144] The usual reasoning behind the existence and exercise of the discretion is a perceived risk that to allow the representation either will, or may, prejudice the investigation,[145] or give rise to a conflict of interest. Thus, shared representation may validly be refused,[146] if there will arise an inevitable conflict between the obligation to comply with a confidentiality order made at a private hearing and the duties owed to multiple clients, and that there is a risk that the lawyer may (without consciously intending any impropriety) foreworn a future witness of what they might expect to be asked.[147]

77. Practitioners and their clients are often perplexed, some even annoyed, by the absence of a right of appearance, and a conditional right to share representation. A related limitation concerns the right to cross-examination, which is traditionally curtailed in the context of investigative commissions, but of course a fixed policy to refuse cross-examination would be inconsistent with procedural fairness.[148] Nonetheless, the position remains within the discretion of the particular commission itself.[149]

78. Getting caught up in a Royal Commission or public inquiry can create a substantial personal and financial strain for even the smallest of 'bit' players. Financial assistance may need to be arranged by an authority for individual staff, often at short notice, including provision for witness expenses or even legal financial assistance or representation. Regrettably, the practical realities of navigating these processes is often unsatisfactory. This carries the risk of delayed retention of separate representation, not to mention compromising the ability of an agency, in the face of heightened scrutiny, to bring forward relevant information and ensure its legal representatives act only upon non-conflicted instructions.

***Lesson 8: among claims for privilege, parliamentary privilege must be maintained***

79. Generally, it is not an excuse to refuse, or fail, to produce a document claiming that the document is subject to legal professional privilege.[150] However there are exceptions, for

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[143] RCA s 6FA, ICACA s 33, SCOIA s 12. The ICACA only provides that ICAC "may authorize a person to be represented by a legal practitioner at the hearing or specified part of it" (s 33(1)), and the Commission is "required to give a reasonable opportunity for a person giving evidence at the hearing to be legally represented" (s 33(2)).

[144] RCA s 6FA, ICACA ss 32, 33 and SCOIA s 12(2).

[145] *NCA v A, B and D* (1988) 78 ALR 707, 716. The discretion is reviewable: *X v McDermott* (1994) A Crim R 508, 520; *Ex p Tarrant* [1985] 1 QB 251, 273, 270, 295.

[146] *Australian Securities Commission v Bell* (1991) 32 FCR 517, 521 (Lockhart J), 531-532 (Sheppard J) and 532-533 (Burchett J). The power must of course, as with any statutory power, be exercised for legitimate statutory purposes.

[147] *Stockbridge v Ogilvie* (1993) 43 FCR 244, 249-250.

[148] *Finch v Goldstein* (1981) 36 ALR 287.

[149] The right is limited to lawyers who have been given leave to appear: RCA s6FA; ICACA s 34(1).

[150] RCA s 6AA, ICACA s 37, SCOIA s 23(1). As to legal professional privilege, see *Glencore International AG & Ors v Commissioner of Taxation & Ors* [2019] HCA 26.

example where the Royal Commission accepts the claim for this privilege.[151]

80. The same is not true for parliamentary privilege; government should be alive to the risk that the increasingly political remit of Royal Commissions and public inquiries must still give sway to parliamentary privilege.[152] Parliamentary privilege is a fundamental and well-established principle of constitutional and democratic government; it can be located within what has been called the 'rough' doctrine of the separation of powers that operates in Westminster parliamentary systems.[153] As the Lord Chief Justice of England and Wales recently explained, the various rights that constitute the privilege stem from the much older common law principle that the High Court of Parliament had exclusive cognisance of its own proceedings - in effect, the private law applicable only to Parliament and over which only it, as a court, had jurisdiction.[154]

81. Parliamentary privilege serves to assert Parliament's independence from the modern-day Executive. Parliament's immunities prevent incursions into parliamentary freedoms, by commissions of inquiry which an executive has commissioned. The matter of parliamentary privilege is dealt with differently under the governing acts, but is essentially consistent, having as its source article 9 of the English *Bill of Right*s.[155] *Erskine May*, the definitive work on parliamentary practice and procedure in the United Kingdom, describes it as:[156]

> the sum of certain rights enjoyed by each House [of Parliament] collectively as a constituent part of the High Court of Parliament; and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

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[151] RCA s 6AA.

[152] T Carmody, 'Royal Commissions, Parliamentary Privilege, and Cabinet Secrecy' (1995) 11 *Queensland University of Technology Law Journal* 49.

[153] Parliamentary privilege was the basis for the Federal Court's recent rejection of an attempt to pursue judicial review of the tabling of a redacted copy of a report to the Minister for Employment of an inquiry into complaints about the Vice President of the Fair Work Commission: *Carrigan v Honourable Senator Michaelia Cash* [2017] FCAFC 86 (refusing leave to appeal from the decision of *Carrigan v Honourable Senator Michaelia Cash* [2016] FCA 1466).

[154] "*Parliamentary Privilege – Liberty and Due Limitation*" speech to the 21st Commonwealth Law Conference, Zambia, 9 April 2019, referring to W Blackstone, *Commentaries on the Laws of England* (1765), 58–59.

[155] *Bill of Rights Act 1688* 1 Wm & M s 2 c 2 (Eng). See *Easton v Griffiths* (1995) 69 ALJR 669 (Toohey J). In *Prebble v Television New Zealand* [1995] 1 AC 321 at 33203, the Privy Council held that art 9 should be given a wide operation. Section 49 of the Commonwealth *Constitution* provides that, until declared by the Parliament, the powers, privileges and immunities of the Senate and the House of Representatives and the Members and committees of each House shall be those of the British House of Commons at the time of Federation (1901). In Australia the law of parliamentary privilege varies across jurisdictions. At the Commonwealth level it is codified under the *Parliamentary Privileges Act* 1987 (**PPA**); in Victoria it is defined by statute under s 19(1) of the *Constitution Act 1975* by reference to the privileges of the House of Commons as at 1855; in New South Wales, Article 9 of the Bill of Rights of 1689 applies further to s 6 of the *Imperial Laws Applications Act* 1969, but otherwise the privileges of its Houses are largely on a common law basis, to be implied by reasonable necessity: see *R v Jackson* (1987) 8 NSWLR 116, 118.

[156] M Jack (ed), *Erskine May – Parliamentary Practice* (24th edn) 203.

82. There is a general prohibition on impeaching or questioning activities that occurred in parliament,[157] and so a commission will impermissibly impeach or question parliamentary proceedings if they inquire into the motives, intentions or truthfulness of a speaker in parliament, or allow witnesses to be cross-examined in relation to words spoken or documents tabled in parliament. To appreciate its reach, parliamentary privilege:

- covers *all words spoken and acts done in the course of, or for the purposes of, or incidental to* parliamentary business, including Hansard, hearings and reports of parliamentary committees, documents prepared for parliamentary use (such as question time briefs and answers to questions on notice) and drafting and preparatory steps in such processes. Remarks made outside the House and then repeated inside are not protected;[158]
- applies to this information regardless of whether it is widely known and publicly available or sensitive and confidential;
- protects against the use of parliamentary information for a very wide range of prohibited purposes including *drawing, or inviting the drawing of, inferences or conclusions wholly or partly* from parliamentary information;
- prevents parties, courts and tribunals from tendering or receiving evidence, asking questions and making statements, submissions or comments concerning parliamentary information;
- does not prevent the use of extrinsic materials (such explanatory memoranda and second reading speeches) in interpreting legislation but is otherwise subject only to very limited and uncertain possible exceptions.

83. Proceedings before a Royal Commission or other public inquiry apparently constitute "a place outside of parliament" within the meaning of Art. 9 either because it is comprehended by an extended interpretation of the term "court" or is sufficiently *ejusdem generis* to qualify as a "place". In the Queensland Crown Leaseholds Royal Commission, the Commissioner was required by his terms of reference to enquire into the validity of corruption allegations made in the course of a parliamentary debate. The politician who made the allegations challenged the Commissioner's authority to interrogate him in relation to a privileged statement. The Commissioner ruled that the witness:[159]

> is not bound to answer whether he made the speech in question or any question as to his reasons for making it, as to information he possessed when he made it, or as to the identity of the person or persons from whom he had obtained such information unless he has the permission of the House and not even then if he objects to doing so.

84. Parliamentary privilege also inures to the limited benefit of members of parliament in other ways. MPs are immune from compliance with a summons to attend before a commission on a day when parliament is sitting – the period under the Commonwealth Act is even

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[157] PPA s 16(3); see recently *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125, [179] (s16(3) is not confined to the receipt of evidence).

[158] *R v Abingdon* (1794) 1 Esp. 226; 170 ER 337.

[159] (1956) St R Q 225, 232.

wider.[160]

85. That said, parliamentary privilege "*has never ever attached to ordinary criminal activities by members of Parliament*".[161] This directs attention to the second class of cases, which concern matters said to be within the 'exclusive cognisance' or jurisdiction of Parliament, flowing from Parliament's power to punish for contempt. That jurisdiction is not all encompassing - the New South Wales Court of Appeal has made clear that the House of Commons, and thus the New South Wales Parliament, does not have an exclusive jurisdiction to deal with criminal conduct, even where this relates to the internal proceedings of the House. [162]

***Lesson 9: no report is sacrosanct: the potential for judicial review abounds***

86. No "appeal" lies from the result, but there is scope for judicial review. As Chief Justice Brennan explained in *Church of Scientology Inc v Woodward* (1982) 154 CLR 25:[163]

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

87. A court's jurisdiction is confined to determining whether a Commissioner acted within the law as provided by the governing Act, for example, by declaring the report was made without jurisdiction or in excess of jurisdiction and was a nullity, or that on the facts as found in the report, the determinations or findings were wrong in law.[164]

88. Government must therefore be mindful that potential grounds of review could include that:

- there was no evidence to support a finding in the report;[165]

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[160] PPA, s 14(1)(e) (5 days either side of a sitting day), which has a broader operation than *Evidence Act* 1995 (Cth) s 10 and s15(2) and *Evidence Act 1995* (NSW) s 10 and s 15(2). See further E Campbell, "Commonwealth Powers and Privileges of State Parliaments" (1999) 20(2) *University of Queensland Law Journal* 201, 210-212.

[161] *R v Chaytor (and others)* [2010] UKSC 52; [2011] 1 AC 684, [81] (the Lord Chief Justice, giving judgment for the Court of Appeal).

[162] In *Obeid v R* [2015] NSWCCA 309, [131], the court rejected the argument for the reasons given by the primary judge, which were as follows: '*It is at this point that the argument breaks down. It elides the distinction between the function of an MLC in communicating with the Executive and its employees on the one hand and whether a particular communication had the requisite nexus with proceedings in Parliament on the other. ... In this case the relevant action is not communicating with the [E]xecutive generally but communicating with Mr Dunn about the renewal of the leases in particular. There is nothing to suggest that particular communication had any connection to Parliamentary proceedings much less that denying it privilege was likely to impact adversely on the core business of Parliament*': *R v Obeid* (No 2) [2015] NSWSC 1380, [132]-[133]. See also *Obeid v R* [2017] NSWCCA 221, [139] (Bathurst CJ, Leeming JA, R A Hulme, Hamill and N Adams JJ agreeing).

[163] (1982) 154 CLR 25, 70.

[164] Relief of this nature was pursued (unsuccessfully) in *Kazal v Independent Commission Against Corruption* [2013] NSWSC 53; (2013) A Crim R 510, following delivery of the report in Operation Vesta, an investigation into the undisclosed conflict of interest of a senior executive of the Sydney Harbour Foreshore Authority.

[165] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355.

- a finding was not reasonably open on the evidence;[166]
- the Commissioner acted without probative evidence;[167]
- there was an absence of material capable of supporting a finding on a material issue;[168]
- a finding was arrived at on the basis of a process of reasoning that was neither logical nor rational;[169]
- a material issue was not addressed, or material evidence was overlooked;[170]
- the Commission failed to consider a submission of substance which, if accepted, would be capable of affecting the outcome.[171]

***Lesson 10: no need to implement, nor account for the implementation of, the report - but is that always such a good thing?***

89. Governments plan, decide, do, deliver, adjust, reverse and terminate many things, all the time. The drama of royal commissions might satisfy the public's democratic urges, but there is a risk that any learning from policy failures will not avoid repetition, if preventing failure is not given the priority it requires.[172] Nonetheless, there remains no formal requirement for government to be held to account for the decisions it makes in the aftermath of Royal Commissions and public inquiries.

90. It is almost a decade since the Australian Law Reform Commission recommended legislation requiring government to publish an update on implementation of recommendations that it accepts one year after the tabling of the final report, and periodically thereafter to reflect any ongoing implementation activity. Australia is not alone in having no formal accountability procedure. In the UK, the government increasingly relies on public inquiries to examine major incidents and tragedies (the latest being the Grenfell Tower disaster). A 2017 report by the Institute for Government found that of the 68 public inquiries that have taken place since 1990, only six were fully followed-up by select committees to see what government did as a result of the inquiry.[173]

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166 *Australian Broadcasting Tribunal v Bond*, 356.

167 *Bruce v Cole* (1998) 45 NSWLR 163, 188.

168 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, [91]; *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242, [224].

169 See *Amaba Pty Ltd v Booth* [2010] NSWCA 344, [22]-[24]; *D'Amore v Independent Commission Against Corruption*, [223]-[236] on appeal from *D'Amore v Independent Commission Against Corruption* [2012] NSWSC 473 (McClellan CJ at CL).

170 See *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33, [9].

171 *Defence Force Retirement and Death Benefits Authority v House* [2009] FCA 302; (2009) 49 AAR 525, [31].

172 See M Bovens & P t' Hart (2016) "Revisiting the study of policy failures", (2016) 23:5 *Journal of European Public Policy* 653; see also interview with Paul t' Hart published in *The Mandarin*: "Paul 't Hart on why royal commissions fall short on policy learning" available at https://www.themandarin.com.au/62301-paul-t-hart-royal-commissions/ (published 5 April 2016).

173 *How Public Inquiries Can Lead to Change* (published 12 December 2017), available at https://www.instituteforgovernment.org.uk/publications/how-public-inquiries-can-lead-change

91. The value of tracking implementation of inquiry recommendations was recently demonstrated through substantial research work commissioned by the Royal Commission into Institutional Responses to Child Sexual to review the extent to which 288 recommendations arising from 67 previous inquiries had been implemented, and the possible factors that determined, contributed to, or were barriers to successful implementation. The research report (which runs over 1,170 pages)[174] found that:

    - The majority of recommendations were rated as implemented either in full (48%) or partially (16%). Twenty-one percent were rated as not implemented, and the implementation status of 14% could not be determined.
    - In relation to the recommendations rated as not implemented, the implementation of 39% was in progress or under consideration.
    - Recommendations from earlier inquiries were more likely to be rated as implemented in full than those from more recent inquiries. Governments commonly reported that recommendations from more recent inquiries were under consideration or in progress.

92. The major factors seen to contribute to implementation were:

    - establishing processes and structures to facilitate implementation;
    - strong leadership and stakeholder engagement; and
    - an accountability framework and monitoring process.

93. By contrast, the major factors seen as barriers to implementation were:

    - practical constraints;
    - organisational culture;
    - structural constraints; and
    - narrow or prescriptive recommendations.

94. Other factors included: policy concerns, difficulty implementing whole-of-government recommendations, an inability to implement reforms across or outside jurisdictions, challenges in implementing multiple reforms, conflicting legislation, resource limitations, and political resistance to long-term/preventative/early intervention strategies.

95. It recommended that the main strategies inquiry bodies use to address the barriers to implementation include:

    - consulting with stakeholders before recommendations are handed down, and articulating the 'vision' of the reforms to gain support;
    - developing recommendations that focus on outcomes and are evidence-based, realistic, feasible and tailored to different jurisdictions and agencies; and
    - taking resourcing implications into account.

96. The report also suggested that an external oversight body may be necessary for the effective monitoring and evaluation of implementation, ensuring accountability. The report bears

[174] Parenting Research Centre, *Implementation of recommendations arising from previous inquiries and supplementary materials – Ensuring a positive impact – Final Report*, (2015).

close consideration and emulation by anyone involved in establishing, conducting, and implementing Royal Commissions and public inquiries.

## Concluding remarks

97. Although broad in compass, this paper is by no means comprehensive in every respect. The aim has been to offer up insights, borne from the experience of advising and appearing in Royal Commissions and public inquiries over the last two decades, with a particular eye to recent experience. These are my opinions on the matter. I could be wrong, or misguided - this is an imperfect business. The value of democratic discourse lies in exchanging and challenging even strongly held views. I look forward to discussing yours.

25 August 2019