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RESPONDING TO CRISIS: ROYAL COMMISSIONS AND PUBLIC INQUIRIES IN AUSTRALIA

PRESENTED BY
DOMINIQUE HOGAN-DORAN
BARRISTER

ABOUT THE PRESENTER

Dominique Hogan-Doran was called to the New South Wales Bar in November 1995.

In 2002 and 2003, Ms Hogan-Doran appeared at the Royal Commission into the Collapse of HIH Insurance Limited as counsel for Hannover Re. She subsequently appeared in Federal Court and High Court of Australia challenges to the use of evidence from the HIH Royal Commission (*X v Australian Prudential Regulation Authority* (2007) 226 CLR 630).

In 2004, Ms Hogan-Doran was appointed Junior Counsel Assisting the NSW Special Commission of Inquiry into the Medical Research and Compensation Fund (the "James Hardie Inquiry") and subsequently appeared on behalf of ASIC in the James Hardie civil penalty proceedings (*ASIC v Macdonald (No 11)* (2009) 71 ACSR 368).

Ms Hogan-Doran has advised and appeared at numerous hearings of the New South Wales Independent Commission Against Corruption, and other regulatory investigations and enforcement action by ASIC, APRA, ATO and the NSW Department of Fair Trading.

Ms Hogan-Doran graduated from the University of Sydney with a Bachelor of Economics (Social Sciences) and a Bachelor of Laws with First Class Honours. Awarded the Sir Robert Gordon Menzies Scholarship in Law, she obtained a Bachelor of Civil Laws with First Class Honours from Oxford University. In 2004, she obtained a Master of Laws from the University of Sydney, majoring in Insolvency Law.

Prior to being called to the Bar, Ms Hogan-Doran was Research Director to the Chief Justice of the NSW Supreme Court and a graduate lawyer at Malleson Stephen Jacques, Solicitors.

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RESPONDING TO CRISIS:

ROYAL COMMISSIONS AND PUBLIC INQUIRIES IN AUSTRALIA

A. Introduction

1. Public inquiries (be they royal commissions, special commissions, reviews, task forces or committees) constitute a distinct advisory instrument. As ad hoc temporary bodies appointed by executive government, they can and have had a great impact on public policy and government action, extending beyond their specific investigations.

2. Although frequently chaired by present or past judges, Royal Commissions are not "judicial inquiries".[1] Royal Commissions are creatures of executive government, whether established under the prerogative or by statutory authority to inquire and to report to government. Their perceived high status and frequent demand is explained by:[2]

> "their coercive and statutory backed powers of investigation, apparent appointment by the Crown rather than elected officials, their often senior judicial and legal professional memberships and their open processes."

3. As the highest and most prestigious form of inquiry on matters of public importance, Royal Commissions in particular occupy a unique place in the Australian system of government. They have exposed unknown corruption and gross maladministration, forced wide-ranging administrative reform, and highlighted substantial deficiencies in corporate governance.

B. Responding to Crisis: Why a Royal Commission?

4. As an act of executive government, it may never be clear what was the actual motive for establishing any Royal Commission. It is possible to suggest that key

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

[2] See Dr Scott Prasser, "When Should Royal Commissions be Appointed" (2005) *Public Administration Today* 57 at 58.

factors, either in combination or alone, motivate their establishment, [3] including:

a. to answer a real and urgent desire to get to the root of an issue;
b. to help deflect public interest in a controversial issue, thereby assisting in the preservation of political capital and popularity;
c. to respond to public criticism on an issue demanding a review by a third party.

5. In substance, the priority accorded to perceived advantages will be a function of perspective, be it rational, populist or pragmatic.

6. Those considering the question from a rational or instrumental decision-making viewpoint will perceive Royal Commissions as satisfying rational policy development by enabling:
    a. provision of impartial, expert and/or independent analysis and advice;
    b. fact gathering;
    c. provision of new, updated research;
    d. mapping new policy directions;
    e. public consultation processes;
    f. development and assessment of policy options;
    g. review and evaluation of programs and policies; and
    h. the market testing of new policy ideas.

7. On the other hand, those adopting a skeptical or even populist viewpoint will regard the appointment as satisfying some perceived politically expedient concern associated with the (political) crisis. That perspective may in turn result in an inquiry characterized by narrow terms of reference, limited powers, processes, resourcing and timeframe, led by biased or inexpert members perhaps with overtly political or ideological motives.

8. The pragmatic view may perceive inquiries as a convenient tool to manage difficult issues and situations. [4]

9. The ad hoc nature and unpredictability of Royal Commissions and public inquiries can make their adoption a brave choice for executive government. Whatever advantages they may be perceived to possess, their attendant risks include:
    a. unexpected outcomes;
    b. non-delivery of desired outcomes;
    c. poor performance;[5]

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[3] Professor Scott Prasser identified ten "basic reasons" in "Royal Commissions and Public Inquiries: Scope and Uses" in P Weller (Ed) *Royal Commissions and the Making of Public Policy* (1994), 6-8.

[4] See further Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (2006).

[5] For example, the inadequacies of the 1983 Agent Orange Royal Commission (Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam) were much criticized.

d. delay and extra cost;
e. interim policy inertia; and
f. loss of control of the policy agenda.

10. Although there has been considerable debate about the use of Royal Commissions to investigate wrongdoings and to make public policy recommendations,[6] Royal Commissions do not and cannot, of course, satisfy everybody.

11. Some commentators complain that certain perspectives on the problem being investigated are privileged while others are marginalised or excluded entirely.[7] Questions arise as to whether judges (retired or otherwise) are appropriate commissioners, as the skills required may cross disciplinary boundaries, and include for example the ability to collect, analyse and evaluate scientific data.

12. Others raise the simple, but significant, complaint as to cost. A Royal Commission incurs start-up costs that an existing agency can usually avoid. When an Australian Law Reform Commission review was announced in 2009, the prime impetus seemed to be because Royal Commissions were decried as "*often ferociously expensive*".[8] On the release of an Issues Paper in April 2009, Prof Weisbrot observed:[9]

> "Royal Commissions usually prove to be very expensive. Precise figures are surprisingly difficult to pin down, but we estimate that, in today's dollars, the Royal Commission into the Building and Construction Industry cost taxpayers over $70M, the one into the collapse of insurer HIH cost over $47M, and the Royal Commission into Aboriginal Deaths in Custody cost over $50M."

C. Royal Commissions in Australia: A Snapshot

13. The use of Royal Commissions by the Crown can be traced to the Domesday Book, compiled by Royal Commissioners sent by William the Conqueror into every county to record land titles. In nineteenth century United Kingdom, Royal

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[6] For general critiques of royal commissions see for example: Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001); Leonard Arthur Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982); A Paul Pross, Innis Christie and John A Yogis (eds), *Commissions of Inquiry* (1990); Patrick Weller (ed), *Royal Commissions and the Making of Public Policy* (1994).

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

[8] http://www.alrc.gov.au/news-media/public-inquiries-and-investigations/alrc-consider-flexibility-formality-and-cost-royal-co

[9] http://www.alrc.gov.au/news-media/public-inquiries-and-investigations/cost-formality-royal-commissions-queried-alrc-review

Commissions of Inquiry "*came to their fullest development and most extensive use*".[10]

14. The *Royal Commissions Act* 1902 (Cth) was one of 59 statutes enacted by the first Parliament of the Commonwealth of Australia. There has since been 128 Commonwealth Royal Commissions, the most recent being the current Royal Commission into Institutionalized Responses to Child Abuse.

15. In the early years, Royal Commissions mimicked the UK experience where they were deployed as a means of inquiring into social, economic, colonial and constitutional questions. In this sense, these ad hoc bodies had many of the characteristics of law reform agencies.[11] However, since 1950, although continuing to serve both policy advisory and inquisitorial roles, *inquisitorial* assignments have represented over 80 percent of Royal Commissions.[12]

16. At a Commonwealth level, numerous areas of policy and institutions of government have been reviewed, ranging from the Constitution,[13] taxation,[14] the building industry[15] and the butter industry.[16] Others responded to major incidents, such as those into the HMAS Voyager disaster,[17] British nuclear testing,[18] the activities of certain corporate groups,[19] as well as broader issues of national security[20] and social policy, such as drug trafficking,[21] indigenous affairs[22] and,

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[10] H Clokie and J Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (1937) at 54.

[11] See further R Sackville, "Law reform agencies and Royal Commissions; toiling in the same field?" [2005] *Federal Judicial Scholarship* 10.

[12] Prasser, *supra*, p 184.

[13] Royal Commission on the Constitution (1927–1929).

[14] Royal Commission on taxation (1920–1923) and Royal Commission on taxation (1932–1934).

[15] Royal Commission into the activities of the Australian Building Construction Employees' and Builders Labourers' Federation (1981–1982) and Royal Commission into the Building and Construction Industry (2001–2003) ("Cole Royal Commission").

[16] Royal Commission on the butter industry (1904–1905). Numerous industry themed commissions occurred in the pre-war years: see eg Royal Commission on stripper harvesters and drills (1908–1909), Royal Commission on the pearl-shelling industry (1912–1916), Royal Commission on the fruit industry (1912–1914), Royal Commission on powellised timber (1913–1914) and Royal Commission on meat export trade (1914).

[17] Royal Commission on loss of HMAS Voyager (1964) and Royal Commission on the statement of Lieutenant Commander Cabban and matters incidental thereto (1967–1968).

[18] Royal Commission into British nuclear tests in Australia (1984–1985).

[19] For example, the Royal Commission of inquiry into the activities of the Nugan Hand Group (1983–1985) and Royal Commission into HIH Insurance (2001–2003). See also (although not a Royal Commission) the Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme (2005–2006) ("the AWB Inquiry").

[20] Royal Commission on espionage (1954–1955), Royal Commission on intelligence and security (1974–1977), Royal Commission on Australia's security and intelligence agencies (1983–1985).

most recently, institutional child abuse.[23] But even when inquisitorial focused, recent Royal Commissions have still been charged with making law reform like recommendations. Thus, the HIH Royal Commission, in consequence of investigating the causes of Australia's largest corporate collapse, made 61 recommendations on matters of corporate governance, financial reporting and assurance, regulation of general insurance, taxation and general insurance, and a support scheme for policyholders of failed insurers.[24]

17. State based commissions have also investigated a range of matters such as the Communist Party in Victoria,[25] corruption in police services[26] and the conduct of high profile companies, such as the James Hardie group's underfunding of asbestos-related liabilities[27] and the collapse of various Western Australian corporations.[28]

D. Establishment and Coercive Powers

18. Originally appointed or commissioned in Britain by the monarch to investigate a particular issue or problem,[29] in Australia Royal Commissions are formally established by *letters patent* issued by the governor-general (or state governor) on the advice of the executive government. The general history of the subject, with particular reference to the relationship with the criminal law and the judicial

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[21] Royal Commission into Drug Trafficking ("Woodward Royal Commission"), (1977–1980) and Royal Commission of Inquiry into Drug Trafficking ("Stewart Royal Commission") (1981–1983).

[22] Aboriginal Land Rights Commission (1973–1974), Royal Commission to inquire into and report upon certain incidents in which Aborigines were involved in the Laverton area (1975–1976), Royal Commission into Aboriginal Deaths in Custody (1987–1991).

[23] Royal Commission into Institutional Responses to Child Sexual Abuse (2012-).

[24] HIH Royal Commission, *The Failure of HIH Insurance* (2003), vol 1, 1xv-1xxiv.

[25] Sir Charles Lowe was appointed as a Royal Commissioner pursuant to the *Royal Commission (Communist Party) Act* 1949 (Vic), requiring him to inquire into the activities of the Communist Party in Victoria.

[26] Royal Commission into the New South Wales Police Service ("Wood Royal Commission") (1994–1997) and Royal commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer ("WA Police Royal Commission") (2002–2004). The Queensland Commission of Inquiry Into Possible Illegal Activities and Associated Police Misconduct (1989) (the "Fitzgerald Inquiry") was not accorded the status of a Royal Commission, but was commissioned by Orders in Council at the initiative of Acting Premier Gunn, the then Premier Sir Joh Bjekle Peterson being involve in the Federal Election.

[27] Special Commission of Inquiry into the Medical Research and Compensation Foundation (NSW) (2004) chaired by David Jackson QC.

[28] Royal Commission into Commercial Activities of Government and Other Matters ("WA Inc Royal Commission") (1990–1992) investigated the collapse of Bond Corporation, Rothwells, Bell Group, and other large businesses in Western Australia as well as government commercial enterprises.

[29] In the United Kingdom, Royal Commissions are not statutory based and do not have the same coercive investigatory powers. The closest statutory equivalent is the *Tribunals of Inquiry Act (Evidence) Act* 1921.

power and the need for statute to provide coercive means to supplement the royal prerogative, was traced in early judgments of the High Court, particularly by Griffith CJ in *Clough v Leahy* (1904) 2 CLR 139 at 155-161, by Dixon J in *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73 at 93-102 and by Brennan J in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 147-158.

19. Section 1A of the *Royal Commission Act* enables a 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*". Thus, Justice Neville Owen was commissioned on 29 August 2001:[30]

> 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. The coercive powers afforded to Royal Commissions include:
    a. the power to summon witnesses and to take evidence on oath or affirmation, even where it will be self-incriminating;[31]
    b. to require witnesses to attend and produce documents;[32]
    c. to permit the issue of extensive search warrants;[33] and
    d. to punish persons who refuse to be sworn, make an affirmation or answer questions.[34]

21. By its very nature, a Royal Commission is a 'fishing expedition".[35] It is argued that a Royal Commission requires broad powers to ensure that the issues and facts are fully canvassed. It is therefore hardly surprising that there are strong similarities in the coercive statutory investigatory powers abrogating common law immunities exercised by Royal Commissions with those conferred on our permanent national regulators such as ASIC, ACCC and ATO.[36]

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[30] http://www.hihroyalcom.gov.au/Documents/TermsOfReference/LettersPatent.v.2.pdf

[31] *Royal Commissions Act*, s 2, s 6A. There is cognate legislation in each state and territory.

[32] *Royal Commissions Act*, s 3.

[33] *Royal Commissions Act*, s 4.

[34] *Royal Commissions Act*, s 6.

[35] *Ross v Costigan* (1982) 59 FLR 184.

[36] See further Chapter 2 "Coercive Investigatory Powers of ASIC, ACCC and ATO" in Legg, *Regulation, Litigation and Enforcement* (2011). D Hogan-Doran, "Legal Professional Privilege and

22. Non-statutory forms of public inquiry may conduct investigations into particular incidents, such as the 2005 inquiry into the immigration detention of Cornelia Rau, and the 2008 inquiry into the case of Dr Mohamed Haneef. These inquiries, however, did not have coercive information-gathering powers. A notable exception was the commission of inquiry into the equine influenza outbreak and related quarantine requirements and practices, which was vested with most of the powers of the Royal Commissions Act. [37]

23. The rules that govern the admissibility of compelled evidence are of critical importance to both the usefulness and fairness of commissions that investigate criminal activity. In *Sorby v Commonwealth* (1983) 152 CLR 281 the majority of the High Court 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.[38] 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. In 2013, in changes wrought by 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 with the introduction of s 6OE into the Act.[39]

24. In 2001, the *Royal Commissions Act* was amended to empower a Royal Commissioner or member of a Commission to require persons to produce documents or things by notice. Previously, persons could be required to produce documents to a Commissioner only at a formal hearing. This proved impractical for Commissions like the HIH Royal Commission which required the collection of

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Privilege Against Self Incrimination", Paper presented to UNSW Law School, *Regulation, Litigation and Enforcement*, 25 September 2013.

[37] Equine Influenza Inquiry (2008). See *Quarantine Act 1908* (Cth) s 66AZE, introduced by the *Quarantine Amendment (Commission of Inquiry) Act 2007* (Cth).

[38] See further Chapter 9 "The Use of Compelled Evidence" in Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001).

[39] *Royal Commissions Amendment Act* 2013 (Cth) (No. 24, 2013), schedule 1. Section 6OE provides:

> *Statements made and documents produced etc. at a private session are not admissible in evidence*
> (1) The following are not admissible in evidence against a natural person in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory:
> (a) a statement or disclosure made by the person at a private session;
> (b) the production of a document or other thing by the person at a private session.
> (2) Subsection (1) does not apply to the admissibility of evidence in proceedings for an offence against this Act.

large numbers of documents.[40] In the *Final Report of the Royal Commission into the Building and Construction Industry*, Commissioner Cole praised these new powers for allowing the Commission to compel the production of documents well in advance of hearings,[41] assisting both in the preparation for hearings and identifying avenues for further investigation. In 2006, there were further changes, introducing a new ss 6AA and 6AB which modified the operation of common law principles of legal professional privilege in relation to evidence produced to a Royal Commission.[42]

25. There is considerable scope for the use of evidence assembled by a commission in criminal prosecutions, including by speeding up investigations and leading to substantial savings of time and resources. Occasionally, statutory enactments have further bolstered that process. For example, after the conclusion of the NSW Special Commission of Inquiry into the Medical Research & Compensation Fund (the James Hardie Inquiry) the *James Hardie (Investigations and Proceedings) Act 2004* (Cth) provided for the transfer of all material gathered by the commission to federal investigators (the ASIC and the DPP), abrogating any legal professional privilege in relation to James Hardie material.

26. The coercive investigative powers that inquisitorial Royal Commissions exercise have long prompted concerns on civil liberty grounds, particularly since Royal Commissions draw their conclusions on the balance of probabilities and acceptance of hearsay evidence. Writing in 1984, Ron Sackville, a Royal Commissioner and later judge of the Federal Court of Australia and Supreme Court of New South Wales, observed there is a:[43]

> "… potential unfairness inherent in permitting royal commissions to make findings of criminal guilt on the basis of evidence that would be inadmissible before a court and by reference to a standard of proof that may be less stringent than that applied in criminal prosecutions."

27. The risk to an individual's livelihood of compelled evidence at a Royal Commission particularly can have particular bite when it is acknowledged that the use immunity conferred by s 6DD of the *Royal Commission Act* does not extend

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[40] Supplementary Explanatory Memorandum, Royal Commissions and Other Legislation Amendment Bill 2001 (Cth), 5.

[41] That Commission issued 1,692 notices to produce. See T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 25.

[42] *Royal Commissions Amendment Act 2006* (Cth). See also *Royal Commissions Amendment (Records) Act 2006 (*Cth).

[43] R Sackville, "Royal Commissions in Australia: What Price Truth?" *Current Affairs Bulletin* (1984) 60 (12) p11. Sackville served as Commissioner for Law and Poverty on the Australian Government Commission of Inquiry into Poverty (1973–1975) and was Chairman of the South Australian Royal Commission into the Non-Medical Use of Drugs (1979–1981).

to administrative proceedings or other administrative action taken by national regulators in the exercise of their various licensing and supervisory powers.

28. In *X v Australian Prudential Regulation Authority* [2007] HCA 4; (2007) 226 CLR 630 two foreign senior executives ('X' and 'Y') of an international reinsurer incorporated in Germany had received "*show cause*" notices from a delegate of APRA proposing to disqualify them from each holding the position of senior managers of a foreign general insurer under s24(1)(b) *Insurance Act* 1973 (Cth). APRA could exercise the power of disqualification if it was satisfied that they were not a "*fit and proper person to be or act*" in such a capacity (s25A(1)). Since section 6DD did not apply to preclude the use of their evidence in these administrative proceedings, the delegate's reasoning made extensive evidence to documents provided by their employer and their own evidence to the HIH Royal Commission.

29. Nonetheless, it was argued by X and Y that were APRA to proceed to disqualify them, APRA thereby would be causing to those persons a disadvantage "for or on account of" evidence given by that person to a Royal Commission, and that this outcome would be an injury by APRA to these witnesses of the kind forbidden by section 6M of the *Royal Commission Act*, which provides:

> **Injury to witness**
> Any person who uses, causes or inflicts, any violence, punishment, damage, loss, or disadvantage to any person for or on account of:
> (a) the person having appeared as a witness before any Royal Commission; or
> (b) any evidence given by him or her before any Royal Commission; or
> (c) the person having produced a document or thing pursuant to a summons, requirement or notice under section 2;
> is guilty of an indictable offence.
> Penalty: $1,000, or imprisonment for 1 year.

30. The appellants therefore suggested that the protection afforded by s 6M(b) was in the nature of a "trade-off". It amounted, in effect, to a counter-balancing protection to a person obliged to give evidence in respect of any later use that might be made of that evidence and which might cause that person disadvantage.

31. The Court rejected the argument. The majority (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ) noted (at [58]) that section 6P of the *Royal Commissions Act*, dealing with the communication of information, postulates the concurrent operation of that statute with the administration by authorities such as APRA of statutes including the *Insurance Act*. They concluded (at [59]):

> … the evidence that X and Y gave at the HIH Royal Commission may provide some, or even all, of the material which APRA may consider, and upon which it may rely, in giving effect to the regulatory provisions of the Insurance Act. Any disadvantage suffered by X or Y, as a consequence of the proper application of those regulatory provisions, would not be "for or on

> account of" his attendance at the Royal Commission or the evidence he gave. Neither Mr Godfrey nor APRA has victimised, and neither proposes to victimise, the appellants in the sense required for the commission of an offence under s 6M of the Royal Commissions Act.

32. Eventually, APRA's later disqualifications of X and Y were quashed on other grounds, and the ability of Royal Commission evidence to be used against like persons was diminished after significant legislative change in 2008 removed from APRA the power to disqualify a person and conferred it upon the Federal Court on application by APRA.[44]

33. Nonetheless, there remains an important capacity for administrative decision making by regulators to proceed on the basis of adverse Royal Commission evidence. For example, s 920A of the *Corporations Act* (as recently amended following the Future of Financial Advice reforms[45]) empowers ASIC to make a banning order against a person in a variety of circumstances, including if:

> (a) ASIC suspends or cancels an Australian financial services licence held by the person; or
> (b) the person has not complied with their obligations under section 912A; or
> (ba) ASIC has reason to believe that the person will not comply with their obligations under section 912A; or
> (bb) the person becomes an insolvent under administration; or
> (c) the person is convicted of fraud; or
> (d) ASIC has reason to believe that the person is not of good fame or character; or
> (da) ASIC has reason to believe that the person is not adequately trained, or is not competent, to provide a financial service or financial services;
> (e) the person has not complied with a financial services law; or
> (f) ASIC has reason to believe that the person will not comply with a financial services law.

E. Constitutional Questions and Validity

34. A Royal Commission cannot inquire into a matter if its inquiry would interfere with the administration of justice.[46] It has been held, for example, that a Royal Commission could not inquire into allegations that a person has been guilty of criminal conduct if a criminal prosecution has been commenced against the person in respect of the alleged conduct.[47]

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[44] See *Financial Sector Legislation Amendment (Review of Prudential Decisions) Act* 2008 (Cth) introducing a replacement s 25A. The 2008 amendment was intended to replace regulator-based disqualification in respect of those activities regulated by APRA with Court-based processes. The Explanatory Memorandum made clear that the intention was to bring the disqualification regime broadly into line with the disqualification regime under the *Corporations Act* 2001 (Cth). By approaching APRA regulated entities in this way, the legislature made a clear distinction between ATO regulated entities (essentially, SMSFs) and APRA regulated entities: see *Porter, Application under the Superannuation Industry (Supervision) Act 1993* [2012] FCA 1431 at [30] (Foster J).

[45] *Corporations Amendment (Future of Financial Advice) Act* 2012 (Cth).

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

[47] *Hammond v Commonwealth* (1982) 152 CLR 188, 198. In the United Kingdom, the minister responsible for establishing a public inquiry may suspend the inquiry to enable the determination of

35. A federal Royal Commission with coercive powers can only be conducted if the subject matter of the inquiry:
    a. lies within the field of Commonwealth power (*Lockwood v the Commonwealth* (1954) 90 CLR 177 at 184) which includes of course the broadly construed "external affairs" power;[48] and
    b. is not expressly excluded from Commonwealth's power.[49]

36. Thus, the Royal Commission into Institutional Reponses to Child Abuse refers 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 is 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 the Convention.[50]

37. The propriety of appointing judges to head Royal Commissions, given the risk they may become embroiled in political controversy,[51] is a matter of much comment in the literature. Since 1918, no sitting High Court judge has accepted appointment to a Royal Commission and although expressly provided for in most jurisdictions,[52] the appointment of a serving Supreme Court judge to a Royal Commission is now exceptional.[53] Nonetheless, challenges to judicial officers have been made, based on bias[54] or lack of power.[55]

38. The constitutionality of judges acting as Commonwealth Royal Commissioners is

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civil or criminal proceedings arising out of matters to which the inquiry relates: *Inquiries Act 2005* (UK) s 13.

[48] *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.

[49] 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 at 131, Latham J said that s 116 only prohibits any "undue infringement of religious freedom".

[50] Beck argues that the Child Abuse Royal Commission will merely "*uncover facts and develop recommendations*" and as such "*is unlikely to interfere in any serious way with the free exercise of any religion*" (at 16) nor do those action 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 *Alt. LJ* 14.

[51] See eg George Winterton, 'Judges as Royal Commissioners' (1987) 10 *UNSW Law Journal* 108; Hallett, 'Judges as Royal Commissioners' (1987) 61 *Law Institute Journal* 811 (advocating use of retired judges as a solution).

[52] See *Royal Commissions Act 1923* (NSW), s 15; *Special Commission of Inquiry Act 1983* (NSW) s 4(2); *Commissions of Inquiry Act 1950* (Qld), ss 10, 13, 30A; *Royal Commissions Act 1991* (ACT), s 6.

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

[54] *Keating v Morris* [2005] QSC 243.

[55] *Clough v Leahy* (1904) 2 CLR 139; *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73.

not doubted: the *persona designata* doctrine permits non-judicial functions being conferred on a federal judge in their personal capacity, provided those non-judicial functions are not incompatible with the judicial function of Federal judges.[56] Federal laws conferring non-judicial functions on state judges are subject to the same limitations.[57]

39. Three potential sources of incompatibility need to be considered when appointing Royal Commissioners:[58]
    a. the breadth of the non-judicial commitment undertaken (although it is not clear whether that is a limitation on the performance of the judge as an individual or impairment on the institution of the state court[59]);
    b. the potential for the integrity of the judicial officer's execution of her or his judicial role to be compromised (although the subsequent power of a judge to recuse themself from deciding a particular case upon their return to the bench would likely deal with this problem[60]); and
    c. the risk that public confidence in the integrity of the judiciary as an institution could be diminished.

40. A particular example of an incompatibility that has been held to invalidate an appointment is where the judge would be providing a report that includes "*political decisions*".[61] Indeed, some commentators have argued that the Letters Patent for the Child Sexual Abuse Commission confer suspect functions more analogous to a lawmaker or a law reform commissioner such that the appointments of Justice McClellan and Justice Coate are arguably invalid.[62] This is because the Letters Patent they expressly require consideration of "*what institutions and governments should do...in the future*" and the making of "*recommendations about any policy, legislative, administrative or structural*

[56] *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Straight Islander Affairs* (1996) 189 CLR 1.

[57] The test of incompatibility at State level may not be identical to that at Commonwealth level: see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103-104 (Guadron J), 117-118 (McHugh J), 137 (Gummow J); *Wainohu v New South Wales* (2011) 243 CLR 181, at 199-208 [25]-[42], 216-217 [63] per French CJ and Kiefel J and 228-229 [105] per Gummow, Hayne, Crennan and Bell JJ.

[58] *Grollo v Palmer* (1995) 184 CLR 348 at 365 per Brennan CJ, Deane, Dawson and Toohey JJ.

[59] But see *Grollo* at 365 per Brennan CJ, Deane, Dawson and Toohey JJ. See also Gummow J at 389 and 392.

[60] See *Grollo* at 366 per Brennan CJ, Deane, Dawson and Toohey JJ), cf at 380-382 per McHugh J and 395 per Gummow J.Se also *Wainohu* at 230 [111] per Gummow, Hayne, Crennan and Bell JJ.

[61] See *Wilson v Minister for Aboriginal and Torres Straight Islander Affairs* (1996) 189 CLR 1 (where 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 made' and 'the duration of any declaration', more akin to that of a ministerial advisor.

[62] Gabrielle Appleby & Matthew Stubbs "The Royal Commission into Institutional Responses to Child Sexual Abuse: Safely in Judicial Hands?" (2013) 24 *PLR* 81 at 84-85.

reforms". These, the authors contend, are "*overtly political matters*" which are reminiscent of the discretion 'not confined by factors expressly or impliedly prescribed by law' which led to invalidity in *Wilson v the Commonwealth* (1996) 189 CLR 1 at 17.[63]

41. Where it is proposed to establish a federal Royal Commission to, inter alia, inquire into state government institutions, their constitutionality will depend on the operation of the intergovernmental immunities doctrine.[64] An issue could arise as to whether a Royal Commission's powers validly extends to compelling a state institution to comply with matters such as orders to produce documents.[65] If there was a State law requirement prohibiting certain information being disclosed, the Commonwealth Act would prevail and override the inconsistent state law pursuant to s 109 of the Constitution.

42. A further constitutional question that can arise is whether a federally constituted Royal Commission could request sensitive and/or high level documents from a State government (a document whose production could otherwise be resisted on the grounds of public interest immunity). That would seem to raise a Melbourne Corporation issue,[66] namely that "*[t]he Constitution predicates [the States] continued existence as independent entities*".[67]

F. Getting the Balance Right

43. Speaking on the release of the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), in August 2009, ALRC President, Emeritus Professor David Weisbrot AM, said that the *Royal Commissions Act* needed some fine-tuning, but is otherwise operating well.[68]

44. In its final report, *Making Inquiries: A New Statutory Framework (ALRC Report*

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[63] Appleby & Stubbs at 84. In *Wilson,* Federal Court judge Justice Jane Mathews was appointed to conduct an inquiry under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1986 (Cth).

[64] The doctrine requires assessment of the impact of particular laws by such criteria as 'special burden' and 'curtailment' of 'capacity' of the States 'to function as governments'. These criteria are to be applied by consideration not only of the form but also 'the substance and actual operation' of the federal law: see *Clarke v Commissioner of Taxation* (2009) 204 CLR 272 at 307 citing *Austin v Commonwealth* (2003) 215 CLR 185 at 249.

[65] The Child Abuse Royal Commission's Letters Patent avoid this by reciting that the state governments have each undertaken to cooperate with the Royal Commission.

[66] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82.

[67] *Melbourne Corporation* at 82 per Dixon J.

[68] http://www.alrc.gov.au/news-media/public-inquiries-and-investigations/alrc-calls-greater-flexibility-more-options-royal-com

111), tabled on 4 February 2010, the ALRC persisted with that view, but made recommendations with a view to enabling costs associated with expensive Royal Commissions to be reduced. The key recommendation was that:

a. Royal Commissions should be the highest form of inquiry established to look into *matters of substantial public importance*;
b. a new second tier of inquiry, to be called 'Official Inquiries', should be established by a minister who wishes to look into *matters of public importance*.

45. The new Official Inquiries tier would have similar advantages and outcomes to Royal Commissions, but offer more flexibility and less formality.[69] Under the recommended new statutory framework, not all inquiries may require formal hearings. In particular, it was envisaged that Official Inquiries would be conducted more informally and perhaps 'on the papers' with a limited number of hearings.[70]

46. Royal Commissions, as the highest tier, would possess a wider range of coercive and investigatory powers than Official Inquiries. To that end, the ALRC recommended that both Royal Commissions and Official Inquiries should have the power to:

a. require the production of documents and other things;
b. require the attendance or appearance to answer questions (on oath or affirmation if so directed by the inquiry); and
c. inspect, retain and copy any documents or other things.

A Royal Commission, but not an Official Inquiry, should have the power to:

a. apply to a judge for an entry, search and seizure warrant, or a warrant for the apprehension of a person who fails to appear or attend; and
b. exercise concurrent functions and powers under Commonwealth and state and territory laws.

Finally, only a Royal Commission should have the power to abrogate client legal privilege or the privilege against self-incrimination.

47. The recommended distinctions between the powers of Royal Commissions and Official Inquiries were depicted as follows:

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[69] http://www.alrc.gov.au/news-media/2010/alrc-recommends-'two-tier'-plan-flexible-cost-effective-public-inquiries

[70] ALRC Report 111 at [11.32].

Table 11.1: Powers of Royal Commissions and Official Inquiries and associated privileges and immunities

Description	Royal Commissions	Official Inquiries
Powers		
Require production of documents and other things	Yes	Yes
Require attendance or appearance to answer questions	Yes	Yes
Require information in an approved form	Yes	Yes
Require evidence on oath or affirmation	Yes	Yes
Administer oath or affirmation	Yes	Yes
Inspect, retain and copy any documents or other things	Yes	Yes
Apply to a judge for a warrant to exercise entry, search and seizure powers	Yes	No
Receive intercepted information	Yes	No
Communicate information relating to contravention of a law	Yes	Yes
Exercise concurrent functions and powers under Commonwealth and state or territory laws	Yes	No
Take evidence and make inquiries overseas	Yes	Yes
Apply to a judge for a warrant for the apprehension of a person who fails to appear or attend	Yes	No
Privileges and immunities		
Client legal privilege can be abrogated]	Yes	No
Privilege against self-incrimination can be abrogated	Yes	No
Direct use immunity applies	Yes	No

48. The Report also proposed a number of measures for the use and protection of national security information by Royal Commissions and Official Inquiries. This had been an issue for a number of inquiries, including the Clarke Inquiry into the case of Dr Mohamed Haneef and the AWB Food-for-Oil Inquiry. While previous inquiries have been able to prevent inadvertent disclosure of national security information, some have encountered practical difficulties accessing and using such material.[71] The proposed new Inquiries Act is intended to overcome many of these difficulties with special procedures and powers for national security information.

G. Conclusion

49. Because policy-making functions of Royal Commissions and public inquiries tend to be incidental to their investigative and forensic responsibilities, their utility as a vehicle for responding to systemic crises is unpredictable. Their public nature and perceived independence, involving external membership, open processes and release of reports, does better distinguish them from advisory bodies constituted within and beholden to government. Their particular strength lies in their ability to get to the root of a crisis, such as where there has been a major accident or disaster or 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 blame, accountability and responsibility, provide catharsis or reconciliation, and to determine what we should do to prevent a repeat.[72]

[71] For the approach internationally, see Stuart Farson and Mark Phythian (ed) *Commissions of Inquiry and National Security – Comparative Approaches* (2011)

[72] Allan Holmes, "A Reflection on the Bushfire Royal Commission – Blame, Accountability and Responsibility" (2010) 69 *AJPA* 387.