COMPULSORY NOTICES IN ROYAL COMMISSIONS AND OTHER STATUTORY INQUIRIES – JUSTICE WITH EFFICIENCY OR MISSION CREEP?

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INTRODUCTION

Use of statutory notices to compel the production of information is an essential step in many investigations and inquiries. Typically, the source of compulsion is the prospect of penalties for failure to comply with a valid notice. There will be time-pressures and other factors which make it challenging to ascertain the boundaries of validity. Given the gravity of the risks of non-compliance, advisers will need to be nimble and well-informed as to the rights and obligations of recipients of a compulsory notice in order to identify areas of potential challenge or objection, and to advise accordingly. In this paper, we set out the permissible contents of a compulsory notice from a Royal Commission or other *ad hoc* statutory inquiry under general inquiries legislation all states and territories, and the Commonwealth. We describe the statutory and other bases for objection to the request for production of information or documents. We argue that the principles developed in caselaw on compulsory notices issued by standing or permanent inquiry bodies should be applied to notices issued by *ad hoc* boards and commissions of inquiry (including Royal Commissions) appointed under the general inquiry legislation of the Commonwealth, State and Territories (**Royal Commissions and Inquiries**). The **Schedule** to our paper includes a tabular summary of the relevant provisions of the Royal Commissions and Inquiries legislation of the Commonwealth, and of each State and Territory, as a quick reference tool for the assistance of advisers.

Our paper is subtitled 'Justice With Efficiency or Mission Creep'. This subtitle refers to the potential tension between the appropriate use of compulsory notices and their overuse. They are a powerful tool for revealing facts, but can impose significant burdens not only on persons required to comply with them, but also on those to whom the task of analysis of the product falls. There is an ever-present risk of overreach, and a balance to be found between the efficient disclosure of facts relevant to the particular inquiry and the imposition of compliance and analysis burdens for questionable returns.

It can be difficult for clients to determine whether to question apparent over-reach of powers in the face of time pressures and the desire to be (and to be seen to be) co-operative with the inquiry. This paper intends to serve the adviser by providing a current and comprehensive review of the powers of compulsory production by notice.

Following a brief comment on the historical use and objectives of compulsory production by Royal Commissions or Inquiries, we discuss and summarise all current state, territory and

Commonwealth powers to order production by notice under the Royal Commissions and Inquires legislation. We argue that the general law supplements the legislation. The general law establishes principles that apply to compulsory notices in the context of other regimes such as trade practices. Finally we discuss the options for derivative use of information and suggest that the role of advisers extends to discussions with those assisting a Royal Commission or Inquiry about what information is sought and for what purpose. The scope of our paper is limited to temporary Royal Commissions or Inquiries. We do not consider permanent inquiry bodies (such as IBAC and ICAC) in any detail.

This discussion covers the following topics, in turn:

(1) A brief note about history – use and objectives of statutory notices

(2) What can be compelled through a notice?

(3) What statutory basis for objection are available?

(4) What other bases for objection are available at general law?

(5) How to challenge a notice

(6) How will information be received and used?

1 A BRIEF NOTE ABOUT HISTORY, USE AND OBJECTIVES OF STATUTORY NOTICES IN ROYAL COMMISSIONS OR INQUIRIES

It is tempting for us to draw a conclusion based on recent experience that there has been a proliferation in Royal Commissions and Inquiries since the *2009 Bushfires Royal Commission*. However a short examination of history confirms that there have been other peaks in popularity. It is reported that between 1832 – 1844, 150 Royal Commissions of Inquiry were at work.[1]

Accurate knowledge of a government's 'subjects' is said to be an essential condition of success in government and a motiving factor behind establishing Royal Commissions or Inquiries:

> How early this was appreciated in our history, and how deep it has cut in our institutions is seen in those Norman inquests which have given us on one side the jury, on the other the 'great inquest of the nation', Parliament itself. The King desired to be informed; he caused his justices to make inquiry by sworn men. These jurors would make presentment to the justices of crimes and of other facts which the King desired to know, or which the country desired to bring before him.

[1] W H Moore, 'Executive Commissions of Inquiry' (1913) 13 *Columbia Law Review* 500, 501

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> Directly the Council or the Star Chamber exercised powers of inquiry which in practice knew no limit save the discretion of the authority itself.[2]

In Australia, Royal Commissions or Inquires are said to be particularly popular,[3] although popularity has waxed and waned from time to time. Among the reasons posited for their popularity is Australia's history as a penal colony.[4] Since 1864, it is reported that there has been legislation in continuous operation in Victoria conferring coercive powers on Royal Commissions and Inquiries.[5] The first Victorian statute was the *Commission of Inquiry Statute 1854*.[6] In Victoria, between 1856 and 1960 there were 124 Boards of Inquiry and 150 Royal Commissions.[7]

Royal Commissions and Inquiries cover an incredibly diverse array of topics which cannot necessarily be synthesised or even likened to each other. Broadly, in this paper, we consider four functions or areas of focus associated with Royal Commissions and Inquiries:

- first, the fact-finding function. Inquiries will often focus on a past event and ask 'what happened?' or be called upon to describe the current status of a particular matter;
- second, a policy or recommendatory function or area of focus. An inquiry that has a policy focus asks 'what should be done' and explores public policy reforms or solutions to problems arising in a policy setting within the constitutional limits that are set by the terms of reference;
- third, compulsory powers to compel the attendance of witnesses to answer questions and require the production of factual material. This paper focuses on the latter. Compulsory notices for production have traditionally been used for the production of documents or things (and in more recent times, information) to elicit facts in relation to the inquiry's terms of reference;

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[2] W H Moore, 'Executive Commissions of Inquiry' (1913) 13 *Columbia Law Review* 500, 501

[3] G Gilligan, 'Royal Commissions of Inquiry' (2002) 35(3) *The Australian and New Zealand Journal of Criminology* 289-307

[4] G Gilligan, 'Royal Commissions of Inquiry' (2002) 35(3) *The Australian and New Zealand Journal of Criminology* 289-307; RC Tadgell quoted in L Hallett *Royal Commissions and Boards of Inquiry* (LBC, 1983) 90, 111-113 explains that democratic government was not the basis for the penal colony in Australia. Therefore the need for coercive powers was more deeply rooted in Australia than the UK, particularly in NSW and Victoria.

[5] L Hallett *Royal Commissions and Boards of Inquiry* (LBC, 1983) 90

[6] L Hallett *Royal Commissions and Boards of Inquiry* (LBC, 1983) 90. This statute is described as innovative for its time.

[7] L Hallett *Royal Commissions and Boards of Inquiry* (LBC, 1983) 332-3

- fourth, the use of notices for production to elicit information beyond that of a strictly factual nature, extending to policy matters and opinions.

As to the fourth function outlined above, there is room for debate about the extent to which opinions should be restricted to opinions from experts, such as the leading experts in the policy field which the Royal Commission or Inquiry is charged with investigating. Following recent amendments to the Commonwealth legislation, there is power to elicit information in the form of a statement in writing.[8] Does this mean a Royal Commission can compel a person to form an opinion and produce it in statement form? We address this question in a little more detail below.

Royal Commissions and Inquiries exercise executive and not judicial power. They are not bound by the rules of evidence. However, they may be guided by those rules and findings may be made on the basis of the civil standard of proof, varying according to the seriousness of the allegation.[9] In the Report of the Royal Commission into the Home Insulation Program, Mr Ian Hanger AM QC identified the applicable principles guiding the fact finding role, drawing on reports of earlier Royal Commissions:[10]

> In the Royal Commission into the Building and Construction Industry, Commissioner Cole QC observed that the law does not mandate any particular level of satisfaction that must be achieved before a finding of fact—which carries no legal consequence—may be made by a Royal Commission.[11] The HIH Royal Commission considered that facts are to be found from the viewpoint that the result must be 'intellectually sustainable,' tempered by restraint and guided by the general principle that the standard varies with the seriousness of the matter in question.[12]

As a model a Royal Commission is typically adaptable and flexible, appointed to investigate and report upon issues, topics and questions set out in the Royal Commission's Terms of Reference and approved under jurisdictional legislation and the Royal Prerogative in the

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[8] Section 2(3C) *Royal Commissions Act 1902* (Cth) provides that a member of a Commission may, by written notice served (as prescribed) on a person, require the person to give information, or a statement, in writing to a person by the time, and at the place or in the manner, specified in the notice. The Explanatory Memorandum to the Prime Minister and Cabinet Legislation Amendment (2017 Measures No 1) Bill 2017 states that Sch 5 implements a recommendation by Mr Ian Hanger AM QC in the Report of the Royal Commission into the Home Insulation Program: see Report of the Royal Commission into the Home Insulation Program (2014), [1.3.36]-[1.3.41], p 12.

[9] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–3 (Dixon J) ('*Briginshaw*'); *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 [325] the Court noted the seriousness of finding that an asserted spiritual belief of a group of people is fabricated in relation to a Royal Commission under the *Royal Commissions Act 1917* (SA) regarding the construction of the Goolwa to Hindmarsh Island bridge.

[10] Report of the Royal Commission into the Home Insulation Program (2014), [1.8.1], p18

[11] Commonwealth, Royal Commission into the Building and Construction Industry, Final Report (2003) Vol. 2 Chapter 5, paragraph [9]

[12] Commonwealth, Royal Commission into certain matters relating to the failure of HIH Insurance Group, Report (2003), Part 1, 1.2.6

Letters Patent that appoint the commissioners. While not binding or enforceable, the conclusions or findings of a Royal Commission may have a significant impact upon those who are the subject of them.[13]

Across the different states and territories, Royal Commission and Inquiries legislation is at different stages of development. In 1912, the *Royal Commissions Act 1912* (SA) was described as 'a very drastic act'.[14] Recently, Chief Justice Doyle of the SA Supreme Court described the *Royal Commissions Act 1917* (SA) as having an 'antiquated air to it' and appearing to be a 'patchwork of provisions borrowed from similar legislation elsewhere in Australia'.[15] In Victoria, one of the recommendations of the *2009 Bushfires Royal Commission* was for the development of inquiries legislation.[16] This recommendation was implemented, resulting in cutting-edge jurisdictional Royal Commission and Inquiries legislation in 2014.[17]

Although Royal Commissions and Inquiries legislation is at different stages of development across the different states and territories, the compulsory notice is the most heavily utilised tool and is relatively uniform in its form across the board. The notice may seek 'information' as well as documents (broadly defined). As a tool, the notice is well-suited to obtaining information about factual occurrences. Arguably it may also be used for opinion-based inquiries.

Royal Commissions or Inquiries are rarely purely 'factual'. For example, the *Royal Commission Into Aboriginal Deaths in Custody* (1991) and the *HIH Royal Commission* (2003) were both primarily tasked to address wrongdoing. However, they each made broad recommendations directed towards reform of the criminal justice and corporate governance systems.[18] Perhaps then there is room for use of compulsory notices in both styles of reform analysis.

Of all forms of executive inquiry, Royal Commissions have the broadest range of coercive powers and, in practice, are likely to be conducted with the greatest level of formality.[19] Royal Commissions are used for the most significant matters. Other models of inquiries have a narrower range of coercive powers than Royal Commissions.[20] They are conducted less

[13] Royal Commission into Aged Care Quality and Safety, *Final Report* , 4a, 4
[14] Harrison Moore 'Executive Commissions of Inquiry' (1913) 13 *Columbia Law Review* 500 at 508-9 quoted in *X v APRA* at [32]
[15] A Vanstone *Review of the Royal Commissions Act 1917* (2020) 3 quoting Doyle CJ Full Court of the Supreme Court of South Australia in *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100 at [112]
[16] A Vanstone *Review of the Royal Commissions Act 1917* (2020) 3 quoting Doyle CJ Full Court of the Supreme Court of South Australia in *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100 at [112]
[17] *Inquiries Act 2014* (Vic)
[18] Australian Law Reform Commission, *Making Inquiries* (2009) 110
[19] Inquiries Bill 2014 (Vic) clause 1
[20] Inquiries Bill 2014 (Vic) clause 1

formally than Royal Commissions and are intended to be a less expensive and time-consuming form of inquiry.

2 WHAT CAN BE COMPELLED?

Documents or things, and attendance and answers under examination

Each jurisdiction provides power for a Royal Commission or Inquiry to compel documents or things to be provided to it by compulsory notice.[21] 'Document' extends to electronic records through interpretation legislation.[22] Each jurisdiction has the complementary power for a witness to be compelled to attend for examination.[23]

Compellability

Royal Commissions and Inquiries are empowered, and generally required, to engage in a far broader forensic process than is available in ordinary litigation – 'they must go on what are called 'fishing expeditions'.'[24] Civil procedure rules for litigation prevent 'fishing expeditions'. When first appointed, it may not be apparent to those conducting the investigation what documentary material is relevant and available for production. Arguably a Royal Commission or Inquiry ought only seek production of information where it appears reasonably likely to assist the resolution of the issues in the terms of reference, and where the production can occur within a reasonable timeframe. However what is reasonable in the circumstances may vary with the length of time it has available for investigation before its reporting deadline.[25] The duration of Royal Commissions or Inquiries vary enormously – some last for a few months[26] and others for a few years.[27]

Care is required in the drafting of notices to produce. The documents required to be produced must be specified with the necessary degree of legal precision. An unclear summons may be set aside. It would be unreasonable to sanction a person for not producing a particular

[21] Schedule, part A
[22] For example, coupled with the definition of 'document' in s 1B of the Royal Commissions Act 1902 (Cth) and 'record' in s 25 of the *Acts Interpretation Act 1901*, includes information stored or recorded in a computer. State or territory interpretation legislation should be checked at a point in time.
[23] Schedule, part A
[24] L Hallett *Royal Commissions and Boards of Inquiry* (LBC, 1983) 97
[25] 'Information gathering is carried out against a background of the unrelenting public inquiry life-cycle with specified and limited timeframes which put considerable pressure on members and staff to move quickly. Public inquiries are not long-term studies where the client is remote and the final product subject to limited review.' S Prasser *Royal Commissions and Public Inquiries in Australia* (2006) 6.26
[26] The Review of the Implementation of the Whole of Government Information Technology Outsourcing Initiative (2000) took 2 months: S Prasser *Royal Commissions and Public Inquiries in Australia* (2006) 6.26.
[27] The *Royal Commission into Violence Abuse Neglect and Exploitation of People with a Disability* is due to report 4 years after commencement: the first public hearing was in September 2019 and the final report is currently due in September 2023 (Commonwealth Letters Patent amended 24 June 2021)

document in the absence of a clear requirement that the document be produced.[28] The principles that apply to requests for compulsory production are set out below in Part 4, including what is reasonable.

The use of notices is 'coercive' or 'compulsory' because fear of sanction induces cooperation.[29] For example, s 6O of the *Royal Commissions Act 1902* (Cth) provides the offence of contempt. A refusal to answer a question or to produce a document that appears to be a 'wilful contempt' in the face of a commission is contrary to s 6O(1) and an offence.[30] Section 60(1) uses broad language: 'Any person who … is in any manner guilty of any wilful contempt of a Royal Commission, shall be guilty of an offence'. Some states set out a special purpose offence for wilful contempt.[31] Legislation may specifically refer to the criminal courts for implementation. A Royal Commission or Inquiry is not a court and therefore could not determine a charge of contempt.[32] That said, s 11 of the *Royal Commissions Act 1917* (SA) purports to invest the Royal Commission with the role of informant, prosecutor and Judge for the contempt offences. This may violate article 14 of the International Covenant on Civil and Political Rights.[33] While a recent review found it was desirable to retain a power in the Royal Commission to deal with contempt, it should not retain power to itself to penalise for contempt. Rather, the Royal Commission should be entitled to apply to the Supreme Court so that the Court may deal with the matter.[34] A reasonable excuse is a defence to an allegation of contempt or a failure to produce information in most jurisdictions.[35] Whether or not an excuse is a 'reasonable' excuse varies across jurisdictions and is discussed below in Part 3.

Information in the form of statements

Recently, as noted above, the Commonwealth has provided Royal Commissions with express power to compel information to be provided in the form of a statement in writing.[36] Similar power exists in WA, Tasmania and Queensland. The extent of what may be compelled is debatable. For example, if a person has not, as yet, formed an opinion on the questions posed in a notice, it is not clear that a Royal Commission or Inquiry has power to elicit a fresh opinion

[28] L Hallett *Royal Commissions and Boards of Inquiry* (LBC, 1983) 98
[29] S Donoghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths, 2001) 63
[30] S Donoghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths, 2001) 68
[31] Section 11 of the *Inquiries Act 1945* (NT) creates an offence of contempt if a person 'commits an offence if: (a) the person intentionally engages in conduct; and (b) the conduct constitutes contempt of a Board or Commissioner and the person was reckless in relation to that circumstance. (2) It is a defence to a prosecution for an offence against subsection (1) if the defendant has a reasonable excuse'
[32] For example, in the ACT, the Criminal Code (ch 2) applies to an offence against the *Inquiries Act 1991* (s 4). The ACT also has an offence of contempt of board under s 36 *Inquiries Act 1991*.
[33] A Vanstone, *Review of the Royal Commission Act 1917* (2020) 36
[34] A Vanstone, *Review of the Royal Commission Act 1917* (2020) 38
[35] Refer Schedule, part B.
[36] *Royal Commissions Act 1902* (Cth), s 2(3C) added by Schedule 5 to the *Prime Minister and Cabinet Legislation (2017 Measures No 1) Act 2018.*

by notice. Of course, experts in a field may be content to prepare opinions to assist. However, if they choose to object, there is likely to be a basis for them to do so.

The extrinsic material surrounding the amendment do not address this issue. The amendment to the *Royal Commissions Act 1902* (Cth) came after strong statements of Commissioner Ian Hanger AM QC in the Home Insultation Royal Commission 2014, including the suggestion that Commonwealth witnesses may have been deterred from co-operating voluntarily with the inquiry by the perception of a risk that they might breach regulation 2.1 of the *Public Service Regulations 1999* and s 70 of the *Crimes Act 1914* (Cth) by doing so.[37] In 2014, Commissioner Hanger pointed to a series of earlier recommendations for the conferral of power to compel the production of a statement, dating back to the Building Royal Commission.[38] In 2009, the Australian Law Reform Commission recommended the power to receive information in the form of a written statement.[39] This recommendation was made to avoid the need for attendance at a hearing, be more efficient and cost effective and allow for more rigorous fact finding.[40] The provision of a statement in writing may add to the efficiency of a Royal Commission or Inquiry. Information provided in compliance with a notice can be circulated to counsel assisting or other Inquiry participants in order to determine whether the person providing it should be required to give evidence orally. Although the state and territory legislation does not contain the same express power, provision of a document in the form of a statement appears to attract the protections of legislation and is therefore used as a tool in reliance on the general compulsory notice head of power. Following the commencement of the amendments in February 2018 (with application to Royal Commissions established after that time[41]), the *Royal Commission into Aged Care Quality and Safety* was the first Royal Commission to exercise the power to require information or a statement in writing.[42] One of the benefits of providing information or documents in response to a compulsory notice is that certain protections then apply to the use (and in some cases, derivative use) of that information or documents.

3 WHAT STATUTORY PROTECTIONS OR RIGHTS OF OBJECTION ARE AVAILABLE?

Reasonable excuse

[37] Report of the Royal Commission into the Home Insulation Program (2014), [1.3.36]-[1.3.41], p 12
[38] Commonwealth, Royal Commission into the Building and Construction Industry, Final Report (2003) Vol. 2 recommendation 1(a).
[39] Australian Law Reform Commission, Report 111 *Making Inquiries* (2009) 270
[40] Australian Law Reform Commission, Report 111, *Making Inquiries* (2009) 271
[41] Item 47 of Schedule 5 to the *Prime Minister and Cabinet Legislation (2017 Measures No 1) Act* 2018
[42] Royal Commission into Aged Care Quality and Safety, *Final Report* (2021) p 185

The primary basis for objecting to a statutory notice in this context is that the person has a reasonable excuse. Some jurisdictions define 'reasonable excuse' with more precision than others. In part B of the Schedule to this paper, we summarise the bases on which a person may refuse to give information or documents to a Royal Commission or Inquiry. There are differences from state to state and as between Royal Commissions and Inquiries.

In a Commonwealth Royal Commission, 'reasonable excuse' is a reason that would excuse an equivalent person in a court of law.[43] This may therefore include privileges and public interest immunity.[44] In NSW, the definition is similar to the Commonwealth for Special Commissions of Inquiry and Royal Commissions.[45] Queensland, NT and WA also extend a 'reasonable excuse' to that which would be open to a witness or person summoned before a court.[46] In Victoria, a 'reasonable excuse' has a more detailed inclusive definition which includes other privileges and immunities.[47]

A lawyer advising a client responding to a compulsory notice issued by a Royal Commission or Inquiry should consider the circumstances in which a client may have a sound basis to object to a notice. Nonetheless, it may be that the client chooses to co-operate, even if there are grounds to object.

Whether or not a 'reasonable excuse' incorporates privileges or immunities may be open to debate (save for the jurisdictions where this is expressly stated, such as Victoria).[48] In 1912, the intention was to confine 'reasonable excuse' solely to physical and practical excuses.[49] However, a more modern view is that a 'reasonable excuse' includes a justification that would

[43] s 1B *Royal Commissions Act 1902* (Cth)
[44] s 1B *Royal Commissions Act 1902* (Cth)
[45] s 4 *Royal Commissions Act 1923* (NSW); s 3 *Special Commissions of Inquiry Act 1983* (NSW)
[46] s 4 *Commissions of Inquiry Act 1950* (Qld); s 3 *Inquiries Act 1945* (NT); s 13(4) *Royal Commissions Act 1968* (WA)
[47] s 18 and 65 *Inquiries Act 2014* (Vic)
[48] s 18 and 65 *Inquiries Act 2014* (Vic)
[49] Commonwealth, Hansard, House of Representatives, 24 July 1912, Second Reading Speech (W Hughes—Attorney-General)

> In another clause 'reasonable excuse' is defined - and I do not think any one will say that it is not high time it was defined - to mean exactly what it means in a Court of law. There it means such an excuse as physically prevents a person from attending. If a. man on his way to the Court meets with an accident, that is a reasonable excuse for not attending. If a man's employer says to him, 'If you attend I shall discharge you,' that is not a reasonable excuse. If a man's wife were ill, that might be held to be a reasonable excuse. If the man were ill himself, it certainly would be. It would, however, not be a reasonable excuse, before a Royal Commission any more than before a Court of law, to say that a witness did not like the Judge, or had an idea that the Judge had treated him or his friends unfairly. Clause 4 amends section 5 of the Act, making the penalty for non-attendance *£590* instead of £50. A penalty of *£50* might be incurred in the case of a great corporation with impunity. A man might say, ' I would rather pay £50 than give information.' It is, therefore; proposed to make the penalty *£500.*

excuse a person from providing information to a court.[50] The Australian Law Reform Commission recommended a non-exhaustive list of the circumstances which constitute a reasonable excuse would assist to clarify what this term means.[51] The fact that it is impossible or impractical for a person to give evidence for physical or practical reasons is clearly an example of a 'reasonable excuse'. However it is not confined to such reasons: 'reasonable excuse' is now held to bear its ordinary meaning, which encompasses legal excuses.[52]

The procedure for determining a claim to 'reasonable excuse' is less than clear.[53] It seems unfortunate that in the absence of practice directions, a person may have to institute court proceedings in some jurisdictions to determine their claim to a 'reasonable excuse' if not accepted by those assisting the Royal Commission or the Royal Commissioners. If there is a claim to a reasonable excuse, in the interests of efficiency a Royal Commission or Inquiry should be able to examine the reasons for the claim and decide whether compliance is required.[54]

The question of whether there is a 'reasonable excuse' is a question of law. Judicial review may be available in the absence of a favourable determination by a Royal Commission.[55] The case of *X v APRA*[56] (discussed below) is an example of administrative law review of the use of information provided pursuant to a compulsory notice.

Privilege against self-incrimination (with a use immunity)

In Victoria, Royal Commissions and Inquiries apply the privilege against self-incrimination with different results. The High Court has also clarified that the privilege against self-incrimination applies to court proceedings but not to disciplinary proceedings. In a Royal Commission, in Victoria, the privilege does not amount to a reasonable excuse unless a

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[50] Professor Enid Campbell: H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [8.2].

[51] Australian Law Reform Commission, *Making Inquiries* (2009) 503

[52] *AWB Ltd v Cole* (2006) 152 FCR 382 [49]. In *Re HIH Insurance Limited* [2002] NSWSC 231 at [12], Barrett J said that the non-application of the definition of 'reasonable excuse' in s 1B to a person served with a s 2(3A) notice seems to mean that the term 'reasonable excuse' in s 3(5) is confined to physical or practical difficulties of complying and does not extend to matters such as legal professional privilege. However, that view has since been rejected. For example in *AWB Ltd v Cole*, Young J held that 'the legislature intended that the expression 'reasonable excuse' should carry its ordinary meaning in s 3(5). That meaning may be wider than the definition in s 1B; certainly it is wide enough to cover any matter, including absence of intention, which the law acknowledges by way of answer, defence, justification or excuse for refusing or failing to produce the specified documents: see *Yuill* at 338-339 per Gaudron J.' See also *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423 at 436 (Kirby P); *Bank of the Valletta plc v National Crime Authority* (1999) 164 ALR 45 at 55 [42] (Hely J)

[53] This is discussed in Part 4 of this paper.

[54] Australian Law Reform Commission, *Making Inquiries* (2009) 504

[55] Eg S 5(1) *Administrative Decisions (Judicial Review) Act 1977* (Cth)

[56] [2007] HCA 4

person has been charged or proceedings are underway.[57] However, legal professional privilege and the privilege against self-incrimination apply in an Inquiry.[58] The Explanatory Memorandum states that Boards of Inquiry have a narrower range of coercive powers than Royal Commissions:

> Consistent with the current position under the *Evidence (Miscellaneous Provisions) Act 1958*, the Bill abrogates legal professional privilege and partially abrogates the privilege against self-incrimination. These privileges are only abrogated for the purposes of Royal Commissions, and not Boards of Inquiry or Formal Reviews.
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> While these privileges are abrogated, a Royal Commission could elect not to require the production of evidence to which these privileges apply. Further, where privileged evidence is provided, the Bill allows the Royal Commission to take steps to ensure that privilege is maintained in other contexts. For example, a Royal Commission could receive privileged testimony in private or make orders to prohibit the publication of privileged evidence. The confidentiality obligations on Royal Commission officers and the offence for taking advantage of information in clause 45 also protect against the misuse of privileged evidence. [59]

The case of *X v APRA*[60] dealt with the question of the use of information provided pursuant to a compulsory notice. X was an employee of the Z, a foreign corporation incorporated in Germany. Z conducted business in Australia as a foreign general insurer. Z produced documents to the HIH Royal Commission pursuant to a notice issued under s 2 of the *Royal Commissions Act 1902* (Cth). X and another employee, Y, travelled to Australia and gave oral evidence. Following evidence, Australian Prudential Regulation Authority, APRA, relied on documents and oral evidence given to the HIH Royal Commission. APRA wrote a show cause letter to X and Y asking why they were not fit and proper persons to hold senior insurance roles, referencing documents provided to the HIH Royal Commission and to X and Y's oral testimony. X and Y claimed that any action by APRA would be unlawful and an offence under the *Royal Commissions Act 1902* (Cth). The appeal to the High Court was concerned with the question: If APRA disqualified X or Y, would APRA cause a disadvantage 'for or on account of' evidence given to the HIH Royal Commission which is forbidden under s 6M of the *Royal Commissions Act 1902* (Cth).

The Court commented that there is no difference between detriment suffered by reason of a party having given evidence about particular matters and detriment suffered by reason of the content of that evidence.[61] Therefore, either ground will protect those who provide information in response to a compulsory notice:

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[57] s 33 *Inquiries Act 2014* (Vic)
[58] s 65(2)(a) *Inquiries Act 2014* (Vic)
[59] Explanatory Memorandum *Inquiries Bill 2014* Division 7
[60] [2007] HCA 4
[61] *X v APRA* [2007] HCA 4 [27]

> There was no difference between punishing a man for giving evidence and punishing him for the content of his evidence or the manner in which he gave evidence. If one was contempt so must the other be. Both were calculated to interfere with the course of justice and to deter witnesses from coming forward and telling the truth plainly and frankly as they saw it.[62]

The High Court held that s 6M was not enlivened because what APRA proposed to do was for the proper discharge of APRA's statutory powers and functions. Therefore the connection between APRA's proposed steps (set out in the show cause letter) and the attendance of X and Y at the commission, or the evidence they gave, lacked the requisite connection captured by the expression 'for or on account of'.[63]

At best, the cloak of protection provided by the *Royal Commissions Act 1902* (Cth) is therefore limited to a use immunity within court proceedings but does not extend to administrative action such as disciplinary proceedings which are a proper discharge of statutory powers and functions. This is particularly relevant to the employment context. The privilege against self-incrimination and use immunity is abrogated in legislation governing inquiries in all but two Australian jurisdictions (SA and NT), as discussed below and described in the Schedule (part B).

Legal professional privilege

In a Commonwealth Royal Commission, a claim to legal professional privilege is a reasonable excuse if accepted by the Commission or a court.[64] If the claim is accepted, the document is returned or disregarded for the purposes of any report or decision of the Royal Commission. Similar processes and principles apply to Inquiries in Victoria (but not Royal Commissions), Royal Commissions and Special Commissions of Inquiry in NSW, WA, Queensland, NT, Tasmania and SA.

Prior to an amendment of the *Royal Commissions Act 1902* (Cth) in 2006, there was uncertainty about the powers of the Royal Commission once a claim of legal processional privilege had been made, and the process by which the claimant of legal professional privilege and/or the Royal Commission could establish the status of the document the subject of the claim. The questions were raised in the context of a legal professional

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[62] *Attorney General v Royal Society for the Prevention of Cruelty to Animals,* The Times, Law Report, 22 June 1985 (Lloyd LJ) in *X v APRA* [2007] HCA 4 at [27]

[63] Kirby J dissenting considered that while the evidence could be used for administrative, disciplinary or other purposes such as that proposed by APRA, and the legislation should be read in its context. A witness should not be able to be victimized for giving evidence to a Royal Commission during court proceedings. He said it is 'improbable that the framers of the [the Royal Commissions Act] could have intended to insert a provision which has virtually no practical effect'. Accordingly, s 6M must be read in light of s 6DD.

[64] s 6AA *Royal Commissions Act 1902* (Cth)

privilege claim during the *Inquiry into Certain Australian Companies in Relation to the UN Oil for Food Programme* (2006). In *AWB Ltd v Cole*, the Federal Court (Young J) confirmed that legal professional privilege was not abrogated by the Commonwealth Royal Commissions Act[65] However, Young J's reasons for judgment cast doubt on whether a Commonwealth Royal Commission had the power to require the production of a document for inspection where a claim of legal professional privilege had been made. Following that decision, the position at a Commonwealth level was clarified by legislative amendment in 2006.[66]

The Royal Commissions Amendment Bill 2006 introduced amendments to:

a. provide that a defence of reasonable excuse on the ground of legal professional privilege is not available unless legal professional privilege was claimed before the Commissioner, or a court has found the document to be subject to legal professional privilege;

b. make plain that a Commissioner can make a decision whether or not to accept such a claim;

c. clarify a Commissioner's powers in this context, particularly with respect to requiring production of documents for inspection; and

d. provide for the consequences of a Commissioner's decision about a legal professional privilege claim.[67]

In Victoria, legal professional privilege is abrogated in a Royal Commission, in the sense that it is not a reasonable excuse for a person to refuse to provide a document on the basis that it is subject to legal professional privilege.[68] The language of the Victorian statute seems to be an example of 'clear and unmistakeable language' described in *AWB Ltd v Cole*,[69] where a compulsory notice should be construed as requiring the production of legally privileged documents, and permitting their use in the inquiry.[70]

The 2006 amendments to the *Royal Commissions Act 1902* (Cth) could perhaps be regarded as making some inroads on legal professional privilege, in that they 'put beyond doubt that a Commissioner may require the production of a document in respect of which LPP is claimed',

[65] (2006) 152 FCR 382 at [34]
[66] Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), l.
[67] Royal Commissions Amendment Bill 2006 (Explanatory Memorandum) p 2.
[68] *Inquiries Act 2014* (Vic) s 32(1)
[69] [51]
[70] The Explanatory Memorandum to clause 32 of the Inquiries Bill 2014 is headed 'clause 32 abrogates legal professional privilege'.

but they only do so 'for the limited purpose of [the Commissioner] making a finding about that claim, that is, deciding to accept or reject it, for the purposes of the Commission.'.[71]

The position under the *Inquiries Act 2014* (Vic) is radically different. Section 32 of the *Inquiries Act 2014* (Vic) provides (emphasis added):

> **32 Legal professional privilege does not apply**
>
> (1) **It is not a reasonable excuse** for a person to refuse or fail to comply with a requirement under this Act to give information (including answering a question) or produce a document or other thing to a Royal Commission that the information, document or other thing is the subject of legal professional privilege.
>
> (2) Information or a document or other thing **does not cease to be the subject of legal professional privilege only because it is given or produced** to a Royal Commission in accordance with a requirement to do so under this Act.

Questions can arise about the practical content of the obligations placed upon the Royal Commission by s 32(2), and the intersection of that provision with the reporting obligations of the Royal Commission,[72] and the Government's and Parliament's functions once a report has been received.[73] Some such questions arose in June 2021 during the public hearings of the Royal Commission into the Casino Operator and Licence in Victoria. The Commissioner proposed to hear certain testimony *in camera* because of the likelihood that it would reveal information subject to claims by the casino operator of legal professional privilege. The Commissioner foreshadowed that there would be a process of redaction of the transcript and non-publication orders over redacted sections to ensure no destruction of privileged information. However, the Commissioner also noted the possibility that in giving his report to the Governor he would be compelled to reveal some such material, thus potentially precipitating the loss of the privilege. The following is an edited version of exchanges on these issues between the Commissioner and Senior Counsel for the casino operator:[74]

> COMMISSIONER: Mr Borsky, one reason for the next witness's evidence to be, as it were, in-camera, is because it is likely, if not inevitable, that questions that will be covered by legal privilege will arise. I wanted to avoid a stop/start because it might be difficult to divide it up

[71] Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), page 1 and Items 4 and 5, on pages 4-6, inserting s 2(5) and s 6AA of the *Royal Commissions Act 1902* (Cth).
[72] *Inquiries Act 2014* (Vic) s 35.
[73] *Inquiries Act 2014* (Vic) s 37.
[74] Royal Commission into Casino Operator and Licensee, Transcript, 22 June 2021, pages 2290-2292

and have a proportion of the evidence on non-privileged topics and a portion on privileged topics. … My present intention … is to proceed on that basis, that is take the evidence without anybody present, and then when the evidence is done, go over the transcript or somebody will go over the transcript, delete bits that are the subject of privilege, and you will be able, of course, to have an input in that and then make the transcript available publicly. …
MR BORSKY: … We don't seek to be heard against that. Just for clarification, of course we've conceded a narrow waiver of privilege and you have accepted that. … And so anything not within the scope of that conceded and accepted partial waiver … insofar as it touches on privileged information will be redacted?
COMMISSIONER: The answer is yes, but I should say the answer to that, I think at the moment, not only for the evidence this afternoon but for all privileged material, **is yes for the time being.** In due course it may be necessary to publish large medium or small portions of what would otherwise be privileged material. If it comes to that, I will let anybody who has a claim to privilege know and they can speak against it, but some parts of the report that I'm obliged to prepare and give to the Governor will not make sense, I fear, unless privileged material is disclosed. If parts of the report are not going to make sense without the disclosure of privileged material, I intend to publish a report that makes sense, if you understand where I'm getting at.
MR BORSKY: I do.
COMMISSIONER: All I can't say is I don't know now what that is and how far the disclosure might have to be made, but if disclosure has to be made for there to be a comprehensive and comprehensible report, disclosure will be made regardless. **In other words, I will take away the privilege.**
MR BORSKY: Well, I've understood we will have an opportunity to be heard before any such step
COMMISSIONER: I just said that.
MR BORSKY: --- and of course if the Commission requires information to be published, then that requirement may have continuing significance for our purposes under section 32(2).
COMMISSIONER: It might.
MR BORSKY: It might. That is an argument for another day.
COMMISSIONER: It won't be an argument with me in any event.

Public interest immunity

Public interest immunity is in a special category. The general law formulation of principle underlying public interest immunity is:

> [T]he court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to do so.[75]

The doctrine is not limited to judicial officers; it applies with equal force to officers constituting non-curial tribunals and inquiries. All such judicial officers or commissioners on notice of the existence of public interest reasons have a discretion to satisfy themselves that the public interest would not be harmed by the disclosure of the relevant information, even if the state does not take the point.[76] In this respect, although the *Evidence Act 1995* (Cth) may refer to it as a form of 'privilege' it differs from other privileges in that it cannot be waived by the person who enjoys it.

In some but not all jurisdictions, Royal Commission and Inquiry legislation expressly provides for the making of claims of public interest immunity as an excuse for omitting to produce documents or information the subject of a statutory notice, or refusing to answer questions. NSW does not expressly refer to public interest immunity (or any other specific form of privilege) as a basis for refusing to answer a question or produce any document to a Royal Commission or Inquiry, but does contemplate refusal if there is a 'reasonable excuse'.[77] Queensland is the same.[78] In WA, powers to collect information may be exercised despite a claim to public interest immunity.[79] Claims are open at a Federal level and in every state but NSW, WA and Queensland require that the test of reasonable excuse is met. In Victoria, Royal Commissions and Inquiries expressly permit claims of public interest immunity as an excuse for not complying with a notice. The Commonwealth, NT, SA and Tas are silent. The position in SA is unclear as to whether a witness before a Commission can claim public interest immunity in relation to the production of documents or the giving of evidence.[80] It is submitted that even in those jurisdictions which do not expressly pick up a reference to public interest immunity, the compulsive powers of the Royal Commission are to be read as being subject to a requirement not to take steps that would derogate from the confidentiality of documents and information that are subject to public interest immunity.

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[75] *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ).
[76] Section 130(1) and (4) *Evidence Act 1995* (Cth); S Odgers, *Uniform Evidence Law* (12th ed, 2016, 1105) notes the adducing of confidential information provided to a statutory authority in connection with its obligation to protect sacred Aboriginal sites may be seen to prejudice the proper functioning of government citing *Chapman v Luminis Pty Ltd [No 2]* (2000) 100 FCR [53]-[58] (von Doussa J). On this a different view was taken under the common law in *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 10 FCR 104 at 114 (Woodward J but not Bowen CJ and Toohey J)
[77] Schedule, part B
[78] Schedule, part B
[79] Schedule, part B
[80] A Vanstone, *Review of the Royal Commissions Act 1917* (2020) 3

The test for establishing public interest immunity is found in case law. Courts limit the disclosure of information or documents on the basis that the public interest against disclosure outweighs the need for disclosure to ensure justice in a particular case. A claim to public interest immunity must 'pass an initial hurdle first, that is, to establish that the class of documents in question … are governmental in character';[81] second, a balancing process applies to determine whether the claim of immunity should be upheld. In *The Commonwealth v Northern Land Council*, [82] Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ stated that:

> The classification of claims for public interest immunity in relation to documents into 'class' claims and 'contents' claims has been described as 'rough but accepted'. It serves to differentiate those documents the disclosure of which would be injurious to the public interest, whatever the contents, from those documents which ought not to be disclosed because of the particular contents.

Whether a claim of public interest immunity may be made over particular documents caught by a particular statutory notice will require close analysis including consideration of the case law which has developed relevant to particular factual scenarios. The question is whether release of certain information would undermine the capacity of the State. For a class claim, the classic statement of the relevant question is whether release would threaten 'the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.'[6] The most obvious category of documents that attract public interest immunity are cabinet-in-confidence documents.

Statutory secrecy, religious confessions, market sensitive information about profits or financial position and other confidential matters

Some statutes contain particular secrecy provisions.[83] Statutory secrecy provisions come in various forms. The drafting of provisions differs across the jurisdictions, and according to subject-matter. In this case (and in all cases) it may be possible to provide redacted documents to the Royal Commission or Inquiry with a claim to confidentiality or other basis for secrecy.

Other secrets include religious confessions, which are dealt with specifically in a single jurisdiction, NSW.[84] By contrast, in general it is accepted that at common law there is no

[81] *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 31-2 (Maxwell P)
[82] (1993) 176 CLR 604, 616
[83] For example, the *Children Youth Families Act 2005* (Vic) (s 492A(2)) relating to secrecy of security arrangements at youth justice facilities
[84] Schedule

privilege that protects a priest or member of the clergy from being required to divulge a religious confession.[85] The *Royal Commission into Institutional Responses to Child Sexual Abuse* recommended that laws concerning mandatory reporting to child protection authorities do not exempt people in religious ministry from being required to report knowledge or suspicions formed in whole or in part on the basis of information disclosed in or in connection with a religious confession.[86] That Royal Commission heard about priests misusing the practice of religious confession to facilitate child sexual abuse or to silence victims.[87] It recommended that:

> 35. Each state and territory government should ensure that the legislation it introduces to create the criminal offence of failure to report recommended in recommendation 33 [Failure to report offence] addresses religious confessions as follows:
>
> > a. The criminal offence of failure to report should apply in relation to knowledge gained or suspicions that are or should have been formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.
> > b. The legislation should exclude any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.
> > c. Religious confession should be defined to include a confession about the conduct of a person associated with the institution made by a person to a second person who is in religious ministry in that second person's professional capacity according to the ritual of the church or religious denomination concerned.[88]

Information about profits or financial position is a further category of secret which may provide an excuse for non-production. In the Commonwealth and WA, provision is made for evidence to be taken in private in some circumstances. In WA, that provision is supplemented with clarification that taking the evidence in public would be unfairly prejudicial to the interests of the person. In Queensland and NSW, a 'reasonable excuse' must be established. Absent a specific provision, this is another area in which a Royal Commission or Inquiry has a discretion to permit non-disclosure of certain information (for example by allowing a party to redact their documents).

Concurrent/combined Royal Commissions

It is not clear what is to be done where a combined Royal Commission is exercising concurrent powers under multi-jurisdictional Royal Commission and Inquiries legislation that confers powers and protections in different terms. A conservative approach would be to only exercise

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[85] S Donoghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths, 2001) 134 and authorities cited at footnote 134
[86] Royal Commission into Institutional Responses to Child Sexual Abuse *Final Report* (2017) Recommendation 7.4
[87] Royal Commission into Institutional Responses to Child Sexual Abuse *Final Report* (2017) 52, 55, 73
[88] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) 158, 203

the most limited form of powers and allow the most expansive form of objections. It will be important to adopt a uniform approach across a single Royal Commission.

4 WHAT NON-STATUTORY RIGHTS OF OBJECTION MAY BE AVAILABLE?

Relevance and general principles

There are limits on the permissible content of compulsory notices, including those dictated by the relevant terms of reference, the need for reasonable certainty and other general law grounds that apply to statutory notices. If the notice seeks information outside the scope of the terms of reference of the inquiry the recipient of the notice could refuse to answer the questions. The test is one of relevance.[89] Questions can only be 'relevant' with respect of a particular subject-matter. The terms of reference determine the scope or 'jurisdiction' of any inquiry.[90]

It has not been definitively established that the rules which apply in a court of law to a subpoena also apply to a notice to produce documents to a Royal Commission or Inquiry. However, some of the principles derived in cases relating to production of material pursuant to subpoenas provide helpful guidance. Some of those principles have been applied in disputes about production of information to permanent Inquiries such as ICAC. There is also a significant body of principles that have been developed in cases concerning statutory notices issued by standing or permanent inquiry bodies and regulators. In these cases the courts have regularly stressed the importance of clarity and precision in such statutory notices.[91] These existing bodies of caselaw and principle are a useful starting-point for approaching the legality of notices issued by a Royal Commission or Inquiry.[92]

For example, the general principles for assessing a typical statutory notice were identified by Davies J of the NSW Supreme Court in *Harris v Mathieson*.[93] In that case, notices under the *Water Management Act 2000* (NSW) were issued by the Natural Resources Access Regulator. As required by the empowering legislation, the notices stated the purpose for which they were issued, which was to determine whether there had been compliance with or contravention of certain provisions of the legislation. Davies J held that certain questions in the second notice did not relate to alleged contraventions and went beyond the power to require information and

[89] This is the test applied in the UK: L Hallett and H Storey, *Royal Commissions and Boards of Inquiry* (LBC, 1982) 106 and footnote 55 therein.
[90] L Hallett, *Royal Commissions and Boards of Inquiry* (LBC, 1982) 106
[91] *Pyneboard Pty Ltd v Trade Practices Commission and Bannerman* (1982) 39 ALR 565 at 568-572; 57 FLR 368 at 371-377
[92] L Hallett, *Royal Commissions and Boards of Inquiry* (LBC, 1982) 99
[93] *Harris v Mathieson in his capacity as an authorised officer under Water Management Act 2000 (NSW)* [2019] NSWSC 1064

records. His Honour drew on the principles derived from cases under s 155 of the *Trade Practices Act 1974* (Cth), which he distilled as follows:[94]

a. The notice must convey with reasonable clarity to the recipient what information he/she is required to furnish or what documents are required to be produced;[95]

b. The documents sought must be capable of being properly regarded as related to the potential contravention;[96]

c. The notice must disclose the relationship between the information sought and the matter in respect of which the information is sought; [97]

d. These requirements (in (a), (b) and (c) above) are not to be applied in a precious, over technical or hypercritical way;[98]

e. Provided the necessary relationship exists between the matter and the information and documents required, the notice is not open to objection on the ground that it is burdensome to furnish the information or to produce the documents;[99]

f. The power conferred is in aid of a function of investigation not proof of an allegation, and it is not possible to define a priori the limits of an investigation which might properly be made. In that way the power should not be narrowly confined;[100]

g. The power may properly be exercised to ascertain facts which may merely indicate a further line of inquiry;[101]

h. The invalidity of one question or requirement to produce will not lead to the invalidity of other independent questions unless the blue pencil deletion of what is invalid is not practicable or, if it is, would result in a substantially different question;

i. Objection may be taken to production on the ground of relevance;[102]

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[94] *Harris v Mathieson in his capacity as an authorised officer under Water Management Act 2000 (NSW)* [2019] NSWSC 1064 [24]
[95] *Pyneboard Pty Ltd v Trade Practices Commission and Bannerman* (1982) 39 ALR 565, 568-572; 57 FLR 368, 374
[96] *Pyneboard Pty Ltd v Trade Practices Commission and Bannerman* (1982) 39 ALR 565, 568-572; 57 FLR 368, 375*; SA Brewing Holdings Ltd v Baxt* (1989) 89 ALR 105; 23 FCR 357, 370; *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 123 CLR 490
[97] *Pyneboard Pty Ltd v Trade Practices Commission and Bannerman* (1982) 39 ALR 565, 568-572; 57 FLR 368, 376*; SA Brewing Holdings Ltd v Baxt* (1989) 89 ALR 105; 23 FCR 357
[98] *Pyneboard Pty Ltd v Trade Practices Commission and Bannerman* (1982) 39 ALR 565, 572; 57 FLR 368, 375, 376
[99] *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 31 ALR 519, 529-531; 47 FLR 163, 172-175; *Riley McKay Pty Ltd v Bannerman* (1977) 15 ALR 561, 567; 31 FLR 129, 136
[100] *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 31 ALR 519 529-531; 47 FLR 163, 172-175
[101] *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 31 ALR 519 529-531; 47 FLR 163, 174
[102] *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240; [2014] NSWCA 414 [4]

j. The possibility, even the certainty, that the notice will cover documents which are not relevant to the investigation is not a basis for setting aside the notice.[103]

Recently, in *Australian Securities and Investments Commission (ASIC) v Maxi EFX Global AU Pty Ltd*,[104] the Federal Court (Wigney J) considered the validity of a notice issued by ASIC. Wigney J applied *Harris v Mathieson* (among other authorities) and added the following further principles:

a. A notice which is 'couched in such wide and general terms that a proper exercise of the investigatory power could not support the requirement in question' would be invalid;
b. Notices are 'to be reasonably, not preciously, construed and the terms used in notices will ordinarily take their meaning from the commercial circumstances in which the notices are given';
c. Validity of notices should not be approached 'carpingly by engaging in a narrow analysis of each word in an attempt to find some latent ambiguity in it';
d. Use of expressions such as 'relating to' 'referring to' or 'recording' does not mean that a notice lacks sufficient clarity or precision; much will depend on the context in which the expression is used.[105]

We suggest that these principles ought to be applied to compulsory notices issued by Royal Commissions or Inquiries. If some or all of the principles are infringed, redrafting or withdrawal of the notice may be requested in the appropriate circumstance on the basis that it is open to reasonable challenge.

5 HOW TO CHALLENGE A NOTICE

The process for challenging a notice issued by a Royal Commission is not clear in every jurisdiction. However as a starting point, a Royal Commission is bound to follow the rules of natural justice and procedural fairness. Therefore, in responding to any challenge to a notice, those rules of administrative law apply.

In the *Royal Commission into the Building and Construction Industry*, Commissioner Cole recommended that the *Royal Commission Act 1902* (Cth) should be amended:

> To provide that no challenge may be made to a notice or summons on the basis that the information sought does not fall within the Terms of Reference of a Royal

[103] *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240; [2014] NSWCA 414 [34]
[104] (2020) 148 ACSR 123; [2020] FCA 1263
[105] [90] – [94] Citations omitted

> Commission, except on the basis that the notice or summons is not a bona fide attempt to investigate matters into which the Commission is authorised to inquire.[106]

Commissioner Cole considered that this recommendation, if implemented, would codify the common law. He considered it was necessary to define the rules as precisely as possible to avoid the delays caused by legal challenges.

In 2009, the Australian Law Reform Commission did not adopt that recommendation, noting that the courts properly ensure the legality of administrative action. The Australian Law Reform Commission noted that the power to compel evidence may only be exercised for the purposes of a particular investigation. However, courts have tended to take an expansive view of the relevance of any information sought to be compelled and the subject of the inquiry.[107] For example, in *Ross v Costigan (No 2)*,[108] the Full Court of the Federal Court stated 'what the Commissioner can look to is what he bona fide believes will assist him in his Inquiry'. In *Douglas v Pindling*,[109] the Privy Council stated:

> If there is material before the commission which induces in the members of it a bona fide belief that such records may cast light on matters falling within the terms of reference, them it is the duty of the commission to issue the summonses. It is not necessary that the commission should believe that the records will in fact have such a result …
>
> > [T]he decision of the commission should not be set aside unless it is such as no reasonable commission, correctly directing itself in law, could properly arrive at.[110]

Commonly Royal Commissions and Inquiries draft their own procedures as an early first step. Such procedures often outline how to challenge a notice. For example, in the recent *Royal Commission into the Casino Operator and Licence*, Practice Direction 3 set out the process for claims to reasonable excuse or legal professional privilege in response to notices.[111]

6 HOW WILL THE INFORMATION BE USED?

One of the factors to weigh in advising on a notice issued by a Royal Commission or Inquiry is the use of the information to be provided. Victorian legislation specifies that a Board that

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[106] Royal Commission into the Building and Construction Industry, *Final Report* (2003) Vol 2, 81
[107] Australian Law Reform Commission, *Making Inquiries* (2009) 361
[108] (1982) 64 FLR 55, 69
[109] [1996] AC 890, 904
[110] [1996] AC 890, 904
[111] Royal Commission into the Casino Operator and Licence, *Practice Direction 3: Production of Documents and Document Management Protocol* (18 May 2021) 2-3

proposes to make an adverse finding is required to afford procedural fairness.[112] All Royal Commissions or Inquiries are bound by the rules of procedural fairness or natural justice unless specifically and clearly excluded by the legislature.[113] It may be appropriate to ask in the particular case whether the Royal Commission or Inquiry proposes any adverse findings arising based on the particular documents or information which have been requested. Depending on its scope, a Royal Commission may receive vast swathes of evidence over many months or years. It is obviously not the case that a finding will be made based upon each relevant aspect of every item of evidence that is received.

CONCLUSIONS

Advisers responding to notices in short time frames should be mindful of both the rights and obligations associated with statutory notices. Advisers may be called upon at short notice and during the running of a Royal Commission or Inquiry, even mid-hearing, to advise on compulsory notices. It is prudent to consider well in advance of a brief or request for advice what rights and obligations apply. Each Royal Commission or Inquiry has the flexibility to adopt its own procedures including timing for response to notices. What is reasonable and appropriate will depend on all the circumstances, including whether it is a fact-finding inquiry (such as *Special Commission of Inquiry into the Ruby Princess*) or a policy inquiry (such as the *Royal Commission into Violence Abuse Neglect and Exploitation of People with a Disability*). We have endeavoured to provide you with a roadmap for use in such circumstances, so that all advisers are well informed if providing legal advice about a compulsory notice issued by a Royal Commission or Inquiry to a tight timetable.

[112] ss 36 and 76 *Inquiries Act 2014* (Vic)
[113] *Mahon v Air New Zealand Ltd* [1984] AC 808; *Annetts v McCann* (1990) 170 CLR 596.

SCHEDULE

A. What powers does a Royal Commission or Inquiry have to obtain information through compulsory process?

	CTH	***VIC***	***NSW***	***WA***	***QLD***	***NT***	***TAS***	***ACT***	***SA***
Legislation	*Royal Commissions Act 1902* (Cth)	*Inquiries Act 2014* (Vic)	*Special Commissions of Inquiry Act 1983* (NSW) *Royal Commissions Act 1923* (NSW)	*Royal Commissions Act 1968* (WA)	*Commissions of Inquiry Act 1950* (Qld)	*Inquiries Act 1945* (NT)	*Commissions of Inquiry Act 1995* (Tas)	*Inquiries Act 1991* (ACT) *Royal Commissions Act 1991* (ACT)	*Royal Commissions Act 1917* (SA)
Notice/Summons/ Subpoena to produce documents	Require a document or thing to be produced at a particular time and place s 2(3A)	By written notice, require a person to produce a specified document or other thing at a particular time and place (RC s 17(1)(a), Inquiry s 64(1)(a))	Summon a person to produce any document or other thing in the person's custody or control which is required by the summons (RC s 11(1)(c))	Written notice may be served requiring specified documents, books, writings or things to be produced (s 8B(1)(b))	By writing under the chairperson's hand, require a person to produce books, documents, writings and records or property or things of whatever description in the person's custody or control as are specified in the writing (s 5(1)(b))	In writing, summon a person to produce any books, documents and writings in the person's possession or control which the person is required by the summons to produce (s 9(1))	By notice served, require a person to produce any document or thing in the person's possession or control which the Commission considers relevant (s 22(1))	In writing, a person may be required to produce a document or thing relevant to a hearing (Inquiry s 26(1)) Require a person by subpoena to appear and give evidence or produce a stated document or other thing (s 34(1))	Require by summons the production of any books, papers, documents or records (s 10(c))
Notice to produce information or a statement	Require information or a statement in writing s 2(3C)	n/a	n/a	Written notice may be served requiring a statement from a public authority or public officer (s 8A(2))	By writing under the chairperson's hand, require a person to give written information (s 5(1)(d))	n/a	By notice, require a document or statement to the Commission containing the information known by the person in respect of the matter specified in the notice (s 23(1))	n/a	n/a

B. What reasonable excuse or other statutory basis for objection may be available in response to a compulsory notice?

	CTH	***VIC***	***NSW***	***WA***	***QLD***	***NT***	***TAS***	***ACT***	***SA***
Legal professional privilege (LPP)	Yes, if claim is accepted by a member of the Commission or a court (s 6AA)	For a RC, no (s 32(1)), but docs / information produced do not cease to be the subject of LPP (s 32(2)) For an Inquiry, yes (s 65(2)(c))	No excuse on the ground of privilege or any other ground (RC s 17(1), SC s 23(1))	(Reasonable excuse) (RC s 13(4)).	(Reasonable excuse) (s 14(1)(b))	(Reasonable excuse)(s 11(1), 12(b)(iv))	A claim to a privilege may be assessed by the commission (s 23A).	An Act must be interpreted to preserve the common law privilege in relation to LPP (s 171 *Legislation Act 2001* (ACT))	*Royal Commissions Act 1917* s 10(c) (Commission's summons to produce documents) and s 11A(1) (Magistrate's summons – subject to reasonable excuse) impliedly subject to LPP
Public interest immunity	n/a	Yes (RC s 18(2)(c), Inquiry s 65(2)(d))	No excuse on the ground of privilege or any other ground (RC s 17(1), SC s 23(1))	No, powers to collect information from a public authority/public officer may be exercised despite a claim to PII s 8A(5)(a))	(Reasonable excuse) (s 14(1)(b))	(Reasonable excuse)(s 11(1), 12(b)(iv))	A claim to a privilege may be assessed by the commission (s 23A).		as above
Parliamentary privilege	Yes, parliamentary privilege applies to documents or information supplied to a Royal Commission which prevents use of the information for drawing certain inferences (s 16 of *Parliamentary Privileges Act 1987*). An RC is a 'Tribunal' for the purposes of the *Parliamentary Privileges Act 1987*.	Yes (RC s 18(2)(b), Inquiry 65(2)(b))	Regard should not be had to parliamentary privilege to the extent that it is waived (SC 9(5)) No excuse on the ground of privilege or any other ground (RC s 17(1), SC s 23(1))	Yes, parliamentary privilege is not abrogated (s 8A(5),(6), *Parliamentary Privileges Act 1891*)	n/a	(Reasonable excuse) (s 11(1), 12(b)(iv))	A claim to a privilege may be assessed by the commission (s 23A).		as above

	CTH	*VIC*	*NSW*	*WA*	*QLD*	*NT*	*TAS*	*ACT*	*SA*
Self-incrimination	Yes, but only if the person has been charged and proceeding not yet dealt with or proceedings have commenced (s 6A)	Yes, for a RC, but only if the person has been charged or proceedings are underway (s 18(2)(a), s 33(2)) Yes, for an Inquiry (s 65(2)(a))	No excuse on the ground that answers or documents may criminate or tend to criminate, or on the ground of privilege or any other ground (RC s 17(1), SC s 23(1))	No this is not a reasonable excuse (s 13(4)(a)) No ground to refuse to answer that the answer might incriminate or tend to incriminate the person or render the person liable to a penalty (s 14(2))	No ground to refuse to produce a document or thing that to do so may incriminate a person (s 14(1A))	(Reasonable excuse) (s 11(1), 12(b)(iv))	No a person is not excused from answering a question asked by a Commission or from producing a document or thing to a Commission on the ground that the answer to the question or the production of the document or thing might incriminate or tend to incriminate that person (s 26)	No a person cannot rely on the common law privileges against self-ncrimination and exposure to the imposition of a civil penalty to refuse to produce the document or other thing or answer the question (Inquiries Act s 19(2), Royal Commissions Act s 24(2))	Yes, a statement or disclosure made to the commission is not admissible in other civil or criminal proceedings against the witness (s 16)
Religious confessions	n/a	n/a	Yes (RC s 11, SC s 17)	n/a	n/a	n/a	A claim to a privilege may be assessed by the commission (s 23A).	n/a	n/a
Secrets	Yes, it is not compulsory to disclose any secret process of manufacture (s 6D(1))	Not a reasonable excuse that the document information or thing imposes a duty of confidentiality on a person (ss 34(1), 34(3), 74(1))	Yes, if it would disclosure a secret process of manufacture (RC s 11(2)(b), SC s 11(2)(b)). Not on the ground of a duty of secrecy or other restriction on disclosure (RC s 17(1)).	For a public officer, no, powers to collect information may be exercised despite a claim to a duty of secrecy or other restriction on disclosure (s 8A(5)(c)) No, breach of an obligation not to disclose information, or not to disclose the existence or contents of a document is not a reasonable excuse (s 13(4)(b)) Yes, it is not compulsory for a witness before a Commission to	Not compulsory to disclose any secret process of manufacture (s 14(1)(a))	(Reasonable excuse) (s 11(1), 12(b)(iv))	n/a		No, a secret process of manufacture is not required to be disclosed (s 14)

	CTH	*VIC*	*NSW*	*WA*	*QLD*	*NT*	*TAS*	*ACT*	*SA*
				disclose to the Commission any secret process of manufacture (s 19(1))					
Profits or financial position	On request such evidence may be taken in private (s 6D(2))	n/a	(Reasonable excuse) (RC s 11(2)(a), SC s 17(2)).	Evidence may be taken in private because the evidence relates to the profits or financial position of any person, and that the taking of the evidence in public would be unfairly prejudicial to the interests of that person (s 19(2))	(Reasonable excuse) (s 14(1)(b))	(Reasonable excuse) (s 11(1), 12(b)(iv))	n/a	n/a	n/a
Relevance	It is a defence to a charge for failure to produce document, give information or statement as required by notice that the information or statement was not relevant (ss 3(3), 3(6C))	RC/Inquiry may conduct its inquiry in any manner that it considers appropriate subject to the requirements of procedural fairness, the letters patent, Order establishing the RC/Inquiry (ss 12, 59)	Only receive evidence that appears to relate to a matter specified in the relevant commission (SC s 9(2)) Only permit to be given in evidence matters likely to be admissible in evidence in civil proceedings (SC s 9(3)) It is a defence to a prosecution for failing without reasonable excuse to produce any books, documents or writings if the defendant proves that the books, documents or writings were not relevant (RC	Defence to contempt that the document or thing was not relevant to the inquiry (s 15B(8))					*Royal Commissions Act 1917* s 10(c) (Commission's summons to produce documents) and s 11A (Magistrate's summons – expressly subject to reasonable excuse) – docs summonsed must be 'relevant to the inquiry'

	CTH	*VIC*	*NSW*	*WA*	*QLD*	*NT*	*TAS*	*ACT*	*SA*
			s 19(2), SC s 25(2))						

KEY

RC – Royal Commission

SC – Special Commission of Inquiry (NSW)

Inquiry – other Inquiry, Commission of Inquiry or Board of Inquiry

August 2021