


Response to Crisis: Royal Commissions and Public Inquiries

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About the Presenter



Senior Counsel for Commonwealth Bank of Australia subsidiary Aussie Home Loans in the [Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#) (2018)

Senior Counsel for RSL LifeCare in the [Public Inquiry under the Charitable Fundraising Act 1991](#) (2017-2018)

Senior Counsel for Greyhound Racing NSW CEO in [Special Commission of Inquiry into the Greyhound Racing Industry](#) (2015-2016)

Senior Counsel for John Holland/Thiess EGM in Royal Commission into Trade Union Governance and Corruption (2014-2015)

Junior Counsel Assisting the [James Hardie Special Commission of Inquiry](#) (2004) and subsequently for ASIC in [civil penalty proceedings](#) against directors and officers of James Hardie (2008-2010)

Junior Counsel for global reinsurer Hannover Re in the [JH Insurance Royal Commission](#) (2001-2003) and subsequent [shareholder class action](#) (2004-2005) and against APRA in [AAT, Federal Court and High Court disqualification proceedings](#) (2005-2007)

Many public inquiries conducted by NSW ICAC, including for Senator the Hon. Arthur Stodolnik in [Operation Credits](#) (Australian Water Holdings) and [Operation Soler](#) (Political Donations), and for the NSW Mine Subsidence Board in [Operation Tonic](#).

Royal Commissions: a snapshot

- Highest and most prestigious form of inquiry on matters of public importance
- Distinct advisory instrument
- Ad hoc temporary bodies
- Can have great impact on public policy and government action
 - expose unknown corruption and gross maladministration
 - force wide-ranging administrative reform
 - highlight substantial deficiencies in governance

Royal Commissions in Australia - Cth

- 134 Commonwealth Royal Commissions & Commissions of Inquiry since 1902
- In the early years, mimicked UK experience where deployed as means of inquiring into social, economic, colonial and constitutional questions.
- Those ad hoc bodies had many of the characteristics of today's law reform agencies.
- Since 1950, *inquisitorial* assignments have represented over 80 percent.

Royal Commissions in Australia - Cth

Ten Royal Commissions/ Commissions of Inquiry this century

- Royal Commission into HIH Insurance (2001–2003)
- Royal Commission into Building & Construction Industry (2001–2003)
- Royal Commission to Inquire into the Centenary House Lease (2004)
- Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme (2005–2006)
- Equine Influenza Inquiry (2008)
- Royal Commission into Institutional Responses to Child Sexual Abuse (2013–2017)
- Royal Commission into the Home Insulation Program (2013–2014)
- Royal Commission into Trade Union Governance and Corruption (2014–2015)
- Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory (2016–present)
- Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2018)

Royal Commissions in Australia - SA

The first Royal Commission in South Australia was in 1859 (into the loss of the "SS Admella") and 78 Commissions were convened in the period prior to Federation.

Since 1902, there have been 103 Commissions in South Australia, including 7 this century:

- Commission of Inquiry into Children in State Care (2004–2008)
- Commission of Inquiry into Children on the APY Lands (2004–2008)
- Kapunda Road Royal Commission (2005)
- Royal Commission re Independent Education (2012/13)
- Child Protection Systems Royal Commission (2014–2016)
- Nuclear Fuel Cycle Royal Commission (2015–2016)
- Murray Darling Basin Royal Commission (2018)

Commissions across Australia

- *Royal Commission (Communist Party) Act 1949* (Vic) into activities of Communist Party in Victoria
- NSW Royal Commission into NSW Police Service ("Wood Royal Commission") (1994–1997)
- Queensland Commission of Inquiry Into Possible Illegal Activities and Associated Police Misconduct (1989) (the "Fitzgerald Inquiry")
- WA Royal Commission into Commercial Activities of Government and Other Matters ("WA Inc Royal Commission") (1990–1992)
- NSW Special Commission of Inquiry into Medical Research & Compensation Foundation ("the James Hardie Inquiry") (2004)
- Victorian Bushfires Royal Commission (2009)
- Queensland Floods Commission of Inquiry (2012)

Royal Commissions – unique character

- Appointed by executive government
- Not "judicial" inquiries, although frequently chaired by (former) judges
 - *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 per Fullagar J
 - *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 147-158 per Brennan J
 - *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at 642-643 [43] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ

Royal Commission – objectives

- ✓ Gather facts (fishing expedition)
- ✓ Provide impartial, expert and/or independent analysis and advice
- ✓ Provide new, updated research
- ✓ Map new policy directions
- ✓ Undertake public consultation processes
- ✓ Develop and assess policy options
- ✓ Review and evaluate programs and policies
- ✓ Market test new policy ideas
- ✓ Make recommendations for action (including prosecution and enforcement)

Royal Commissions – motives may be mixed

- Respond to crisis (in confidence)?
- Answer a real and urgent desire to get to the root of an issue?
- Respond to public criticism on an issue demanding a review by a third party?
- Help deflect public interest in a controversial issue, assist in preservation of political capital and popularity?
 - narrow terms of reference?
 - limited powers?
 - curtailed processes?
 - limited resourcing and timeframe?
 - led by biased/inexpert members, perhaps with overtly political or ideological motives?

Royal Commissions – can be risky

- ❖ Unexpected outcomes
- ❖ Non-delivery of desired outcomes
- ❖ Poor performance
- ❖ Delay
- ❖ Extra cost
- ❖ Interim policy inertia
- ❖ Loss of control of policy agenda

Royal Commissions - are powerful

- Require production of documents and other things
- Require attendance or appearance to answer questions
- Require information in an approved form
- Require evidence on oath or affirmation
- Administer oath or affirmation
- Inspect, retain and copy any documents or other things
- Apply to a judge for a warrant to exercise entry, search and seizure powers
- Receive intercepted information
- Communicate information relating to contravention of a law
- Exercise concurrent functions and powers under Commonwealth and state or territory laws
- Take evidence and make inquiries overseas
- Apply to a judge for a warrant for the apprehension of a person who fails to appear or attend

Privileges and immunities curtailed

Client legal privilege can be abrogated
Privilege against self-incrimination can be abrogated
Direct use immunity applies

Strategic Considerations

Q1: what is it about?
Q2: where will it end?
Q3: how tell the story?
Q4: how lift the lid?
Q5: who can instruct?
Q6: lawyer up?
Q7: pay up?
Q8: fight or be contrite?

Strategic Q1: what's it about?

Instructions to appear in a Royal Commission can come on quickly with little notice and limited resources and time to get ready

Terms of reference
Minister's statement
Parliamentary debates
Media coverage
Media inquiries
Regulator inquiries
Whistleblowers

Strategic Q2:
where will
it end?

When the rules of evidence
do not apply

And procedural fairness obligations
are limited

Evidence can be used against a person
in subsequent administrative
proceedings: X & Y v APRA (2007) HCA

Referral for further investigation by
regulators, professional bodies

Cancellation of license or banning orders

Criminal prosecution

Civil penalty proceedings

Appointment of external administrator

Compensation proceedings (class actions)

Law reform

Strategic Q3:
how tell
the story?

Media & PR spin is not the only
or best vehicle

Await compulsory questioning
under oath/affirmation?

v

Prepare an early submission and/or
witness statements?

Strategic Q4:
how
lift the lid?

Recognising
strength of compulsory powers

v

the end game

Produce documents and
information only under notice?

v

Voluntarily produce
documents and information?

Compulsory notices

- Within power? (what is legislative source/TOR?)
- Construction of terms of notice
- Who should be author of response?
- Who should inform the author?
- Who should certify the response?
- What (needs) to be protected?
 - Self incrimination privilege*: available to individual but not corporate entity?
 - Legal Professional Privilege*: available? sustainable?
 - Confidentiality*: available? blanket? sustainable?

Strategic Q5: who can instruct?

Conflict management is a major
challenge

Board/sub-committee/management/GC?

Managing conflicts of interest and duty

Maintaining confidentiality/Chinese walls

Records of decisions/instructions

Strategic Q6: lawyer up?

Royal Commissions are draining on
staff morale and time.
Your client's inhouse legal teams may
have been absent or conflicted

Internal legal resourcing

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External legal resourcing

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Other resourcing
(accountants, experts, PR)

**Strategic Q7:
pay up?**

Royal Commissions are very very expensive
Insurance questions can be difficult to resolve quickly
Management of independent legal representation can be time consuming and difficult

Self insure (budget, contingencies)?

Constitution and/or deed of indemnity (exposure)?

External insurance (entity, D&O, professional indemnity) (scope, representation, reservations)?

Remediation/Early Dispute Resolution?

**Strategic Q8:
fight or be contrite?**

Who will provide the ultimate instructions, on what basis, and when?
Who will be held to account?

React - Contest - Resist - Await
v
Assess - Apologise - Embrace - Remediate

Comments/Questions?

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