

COMMISSION WATCH

Taking a closer look at Abbotts Royal Commission



FACT SHEET #1

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WHAT IS A ROYAL COMMISSION?

A Royal Commission is an inquiry initiated by the executive arm of a state or federal government, to examine and report on issues of public importance or concern.

Governments regularly claim that Royal Commissions are best able to consider these issues because they can be carried out at “arm’s length” from the usual political processes and interference. However the decision to establish a Royal Commission is often politically motivated with the outcomes used to justify controversial changes to the law. The Government also sets the scope of the inquiry and appoints the personnel to carry it out.

HOW IS A ROYAL COMMISSION ESTABLISHED?

The legal power to establish a Royal Commission is exercised by the Governor General on behalf of the Crown (or the Governor of a State in the case of state Royal Commission), acting on the advice of Government ministers. The Australian Parliament has made a law confirming this power (*Royal Commissions Act 1902 (Cth)*) and regulating, to some limited degree, how Commonwealth Royal Commissions are to be conducted.

Aside from having the power to set up a Commission, the Government provides its funding, determines its life-span and chooses the people to conduct the inquiry. Critically the Government also determines the scope of the Royal Commission by deciding on its

“terms of reference”. This allows it to seek to exclude politically damaging or embarrassing lines of inquiry and to focus the inquiry on issues which may be politically advantageous to it.

A ROYAL COMMISSION IS NOT A COURT

Under the Australian Constitution only courts can exercise judicial power and determine the legal rights and obligations of citizens. Whilst Royal Commissions have some of the appearances of courts, they are not courts and do not exercise judicial power. As the High Court has said:

If (a) Commissioner were to report that he is of the opinion or that he finds that a person has contravened a law, the report would carry no legal consequence; (Victoria v ABCE & BLF 1982 152 CLR 25 (Brennan J at 154))

However, findings of guilt or wrongdoing during the course of a Royal Commission can have serious consequences:

“...the fact that the finding is not binding on any court is of little comfort to the person found guilty; there is no legal proceeding which he can institute to establish his innocence. If he is prosecuted, the investigation and findings may have created ineradicable prejudice.” ((Victoria v ABCE & BLF 1982 152 CLR 25 (Murphy J at para 16))

ROYAL COMMISSION PROCESSES

The conduct of a Royal Commission is largely at the discretion of the Commissioner.

The Commissioner and Counsel Assisting determine the matters to be examined and the investigation process, including gathering evidence through the use of coercive powers or by persons voluntarily providing material to the Commission.

Royal Commissions are not bound by the rules of evidence and the usual standards of proof do not apply. A Commission can conduct public hearings or sit in private.

The common law (and criminal law) protection against self-incrimination does not apply to those called to give evidence to a Royal Commission. The so-called “coercive powers” of a Royal Commission enables a Commission to compel people to attend and answer questions under oath. Failure to comply with a summons issued by a Royal Commission may result in a fine or in some circumstances, imprisonment.

Subject to the rules of natural justice, a Royal Commission can determine the terms on which parties can appear in the Commission’s proceedings and the extent to which cross-examination of witnesses is permitted. In practice, both can be severely limited. During the Cole Royal Commission into the Building and Construction Industry for example, cross-examination of Commission witnesses was generally only permitted where another witness was prepared to give evidence contradicting the evidence of the first witness. In practice this often meant that the evidence of the first witness could not be tested by cross-examination until many weeks after it was given, if at all. Yet it was reported by media outlets at that time as being a truthful

account of events, even where another witness was able to give a different account under oath at a later time.

Once concluded, a Commission may make “findings” of unlawful conduct or recommend that persons be prosecuted through the ordinary courts. These recommendations are not always followed by prosecuting authorities since the legal protections in the court system for accused persons – rules of evidence, standard of proof, protection against self-incrimination and the like – can make a successful prosecution difficult or unlikely.

Recommendations set out in Royal Commission reports are often legislated for.