

## FOREWORD

THE HON JUSTICE PETER MCCLELLAN AM\*

It is commonplace today when a controversial issue arises to hear calls for a ‘judicial inquiry’. The Editor has given the articles in the thematic component of this Issue the title ‘Non-judicial Inquiries’. It is an interesting choice. Although a royal commission is not required to include a judge as its chair or as a member, and does not involve the exercise of judicial power, the judiciary are looked upon as bringing particular attributes to an inquiry. Independence of decision-making and fairness of process are assumed of judges. Of course any inquiry should be characterised by these attributes. But the Editor is correct. Whether or not a judge is a member of the inquiry, the process is inquisitorial and does not involve the exercise of judicial power. Guidance as to when it is appropriate for the executive to appoint a judge to conduct an inquiry is provided by *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.<sup>1</sup>

The power to hold inquiries is a prerogative of the executive.<sup>2</sup> The executive requires no legislation to initiate an inquiry.<sup>3</sup> In 1998, I was appointed to inquire into the suspected contamination of the Sydney water supply. That inquiry was initiated without any supporting legislation. However, the executive cannot confer on an inquiry the use of compulsory powers. The use of compulsory powers must be expressly authorised by legislation.<sup>4</sup>

The non-judicial inquiry has a long tradition. It can be traced back as far as the time of William the Conqueror. In 1085, England was under threat of invasion. In order for King William to prepare for the defence of his kingdom, he needed to properly understand the resources available to him.<sup>5</sup> He did this by appointing royal commissioners to investigate and record land title information

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1 (1996) 189 CLR 1.

2 *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 93–4 (Dixon J).

3 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 665.

4 *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 83 (Latham CJ), 91 (Starke J), 98–9 (Dixon J).

5 The National Archives (UK), *Domesday Book* <<http://www.nationalarchives.gov.uk/domesday/discover-domesday/>>.

gathered from every county in England.<sup>6</sup> The information collected was then published in the *Domesday Book*.

Informing the executive of matters of state or national significance remains a core function of commissions of inquiry and royal commissions. Justice Stephen, in *Victoria v The Australian Building Construction Employees' and Builders Labourers' Federation*, said that the primary purpose of a commission of inquiry is 'better to inform the mind of the executive', and where that commission publishes a report, to better inform both parliament and the public.<sup>7</sup> That, in Australia, commissions of inquiry have long been considered 'an essential part of the machinery of modern government'<sup>8</sup> is demonstrated by the fact that the *Royal Commissions Act 1902* (Cth) was one of 59 statutes enacted by the first Commonwealth Parliament.<sup>9</sup> The Australian Government has appointed over 130 royal commissions and commissions of inquiry under the provisions of the *Royal Commissions Act 1902* (Cth).<sup>10</sup>

In an article entitled 'Executive Commissions of Inquiry', published in 1913, W Harrison Moore observed that 'inquiry and publicity are regarded as powerful weapons in coping with some of the most characteristic of modern social difficulties'.<sup>11</sup> In the years following the enactment of the *Royal Commissions Act 1901* (Cth), the 'modern social difficulties' which royal commissions inquired into included the location of the seat of government of the newly formed Commonwealth (1903), the butter industry (1904–05) and the conditions, government and improvement of the then Territory of Papua (1906–07).<sup>12</sup>

In *Clough v Leahy*, the first High Court case to discuss the legality of a royal commission, Griffith CJ observed that

It has been the practice in New South Wales, and, I believe, in most, if not in all, parts of the British Dominions, for many years, for the Crown, from time to time, to appoint Commissioners to make inquiry concerning matters as to which the Executive Government thinks it desirable that information should be collected, to be made use of in the administration of the affairs of the country, or for the guidance of Parliament.<sup>13</sup>

The 'affairs of a country' are inevitably wide and diverse. For this reason, the issues that a non-judicial inquiry may be required to consider can, and do, vary greatly. The articles contained in the thematic component of this Issue of the *UNSW Law Journal* confirm that the words of the Chief Justice and those of W Harrison Moore remain true today. Internet related data breaches, the

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6 Ronald Sackville, 'Law Reform Agencies and Royal Commissions' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 274, 277.

7 (1982) 152 CLR 25, 76.

8 W Harrison Moore, 'Executive Commissions of Inquiry' (1913) 13 *Columbia Law Review* 500, 503.

9 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper No 75 (2009) 31 [1.3].

10 Parliament of Australia, *Royal Commissions and Commissions of Inquiry* <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Browse\\_by\\_Topic/law/royal\\_commissions](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/royal_commissions)>.

11 Moore, above n 8, 504–5.

12 Parliament of Australia, above n 10.

13 (1904) 2 CLR 139, 153.

entitlements of same-sex couples and the regulation of the not-for-profit sector are just some of the areas examined by the inquiries discussed.

An inquiry has, as the name suggests, an inquisitorial purpose. The manner in which it conducts its work is derived from its constitutive legislation and terms of reference or letters patent. These constitutive instruments will direct the focus of each inquisitorial body, outline its priorities, delimit its parameters and provide the tools with which it does its work. The nature of the work an inquiry is required to undertake may influence the tools provided to it. For example, the Letters Patent of the Royal Commission into Institutional Responses to Child Sexual Abuse make reference to the importance of survivors of child sexual abuse being able to share their experiences with the Commission in appropriate ways. To facilitate this process, the Commonwealth Parliament amended the *Royal Commissions Act 1902* (Cth) to provide special procedures through which the Commissioners could hear from survivors of child sexual abuse in a less formal setting than a hearing.<sup>14</sup> Those procedures are referred to in the Act as private sessions. As at 1 June 2015, the Royal Commission has held 3487 private sessions. And there are many other people waiting to be heard.

Non-judicial inquiries, in particular royal commissions, may be provided with powerful investigative tools. Although in many cases they may not be utilised, the most significant is the ability to compel witnesses to give evidence or to produce documents. In Australia, powers of compulsion were first conferred on commissions of inquiry by the enactment by the Victorian legislature of the *Commissions of Inquiry Statute 1854* (Vic).<sup>15</sup> In this respect Australia was ahead of the United Kingdom. It would be 67 years before analogous powers were conferred on commissions of inquiry in the United Kingdom.<sup>16</sup>

Compulsory powers, and the circumstances surrounding their exercise, have at times attracted curial scrutiny. The first article in the thematic component of this Issue explores the difficulties which can arise when a commission of inquiry, vested with powers of compulsion, is tasked with investigating matters the subject of current legal proceedings. With the creation of permanent inquiry bodies (effectively standing royal commissions) such as crime commissions and anti-corruption bodies, this is an issue of particular contemporary relevance.

The article, by Fiona Roughley, examines the relationship between royal commissions and the law of contempt. The author observes that royal commissions will often touch on, if not centrally concern, matters the subject of civil and criminal proceedings. The case law examining the effect of the law of contempt on both the executive's power to establish, and the subsequent conduct of, a royal commission is explored in detail in the article. The author observes that recent decisions by the High Court have created uncertainty as to the legitimate reach of an inquiry when criminal proceedings are pending. Both because the power of inquiry is accepted to be necessary in our contemporary

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14 *Royal Commissions Amendment Act 2013* (Cth) sch 1 item 30, inserting *Royal Commissions Act 1902* (Cth) pt 4.

15 Sackville, above n 6, 278.

16 *Ibid.*

and complex society, but also because the rights which may be impacted are fundamental to our legal system, these are issues which require clarification at an early date.

The remaining articles in this volume demonstrate the variety of functions undertaken by non-judicial inquiries and the diverse legal landscapes across which they tread. While royal commissions tend to be the most publically prominent, the authors draw attention to the functions performed by other forms of non-judicial inquiry.

Jodie Siganto and Mark Burdon critically analyse a number of investigations undertaken by the Privacy Commissioner into alleged data breaches. The inquiries were initiated by the Privacy Commissioner. The authors focus on the investigative and decision-making procedures adopted by the Commissioner in six high-profile investigations. They evaluate the processes of the Privacy Commissioner applying standards derived from the Office of the Australian Information Commissioner's published guidance on complaints and recognised principles governing the exercise of regulatory powers. The authors emphasise the need for bodies tasked with inquisitorial or investigative functions to be adequately resourced and appropriately staffed.

Elen Seymour and Marina Nehme explore the creation, and subsequent attempted unwinding, of the Australian Charities and Not-for-Profits Commission and accompanying regulatory reforms, by the Gillard and Abbott Governments. The authors critically examine each government's approach by analysing their reform efforts through the policy process framework developed by John Kingdon. According to Kingdon, three independent streams comprise the policy process: a problem stream, a policy stream and a political stream. The convergence of these streams leads to the opening of a policy window through which reform may be effectively pursued. The authors explore the role of both the Senate Repeal Inquiry and the National Committee of Audit in the law reform process in this area.

The final article, by Meg Brodie, explores the development, use and impact of national human rights institutions, focusing in particular on their work in the context of national inquiries. The author discusses the minimum standards required for a national human rights institution as set out in the *Paris Principles* and the structure typically adopted for a national inquiry. The impact of national inquiries is explored through an examination of three inquiries undertaken by the Australian Human Rights Commission: the National Inquiry into Homeless Children, the Bringing Them Home National Inquiry, and the Same Sex, Same Entitlements National Inquiry. The author also draws on her own research examining a national inquiry on torture conducted by the National Human Rights Commission of Mongolia. The author stresses the need for national human rights institutions to remain independent of government – an issue of public debate in Australia at the time of writing.

Commissions of inquiry are a means by which Australian governments, and often the broader Australian public, can be informed about significant issues affecting the community. The findings of non-judicial inquiries and the reports they publish may point the way forward by proposing potential solutions to

widespread systemic problems. I congratulate the Editor for gathering this diverse and informative group of articles, each of which is a valuable contribution to our understanding of the role and practical operation of inquiries.