



Royal Commissions Amendment (Records) Bill 2006

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Royal Commissions Amendment (Records) Bill 2006

Date introduced: 30 November 2006

House: House of Representatives

Portfolio: Prime Minister and Cabinet

Commencement: On Royal Assent.

Purpose

The *Royal Commissions Amendment (Records) Bill 2006* (the Bill) inserts provisions for regulations to be made under the *Royal Commissions Act 1902* which will provide for the custody of Royal Commission records, for their use, transfer of records or access to those records by other persons and bodies.

Background

This Bill seeks to insert provisions into the *Royal Commissions Act 1902* to make regulations which will specify how Royal Commission records are to be dealt with, to whom records will be passed, how the records are to be used and who may use them. The regulations will also specify the purposes for which the records are not to be used and any conditions placed on the use of the records by any persons or bodies to whom the records are given or allowed access.

Legislative framework, the High Court's view on procedural fairness and HIH

Archives Act 1983

All records of a Royal Commission that are no longer required for the purposes of the Royal Commission are deemed to be Commonwealth records for the purposes of the *Archives Act 1983* (*Archives Act*) Section 22 of the *Archives Act* governs how records of all Royal Commissions are dealt with under the *Archives Act*. Section 22(3) gives the Minister power to make declarations on the custody of the records and the Australian Archives are not entitled to the records unless the declaration of the Minister indicates otherwise. Section 22(4) states that any direction by the Royal Commission that prohibits publication of a document or matter does not apply once public access is provided under the *Archives Act* in the open access period. Section 22(5) states that the Minister responsible for administering the *Royal Commissions Act 1902* is deemed to be the responsible Minister in relation to records of Royal Commissions. The Department of

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Prime Minister and Cabinet administers the *Royal Commissions Act 1902*, therefore the Prime Minister is the responsible Minister.

The High Court's decision in *Johns v Australian Securities Commission*

In 1993, the High Court of Australia decided that, based on notions of procedural fairness, the Minister is required to notify the person who initially provided specific records to a Royal Commission that the records are about to be transferred to a different retainer.¹ The decision of the High Court is summarised in the following quotation:

At first glance *Johns v Australian Securities Commission* appears to be the high-water mark of the extension of procedural fairness to procedural decisions of investigative tribunals. The managing director of the Tricontinental group of companies was examined on oath by an officer of the ASC in a private hearing, where by law, he was denied the privilege against self-incrimination. The transcript of the examination was confidential to the ASC, except where the chairperson was satisfied that use and disclosure of particular information should be authorised because it would assist the government or an agency to perform a function or exercise a power. It was the ASC's practice to release transcripts of interviews to the royal commission established to enquire into the affairs of the Tricontinental group, the use of the transcripts being restricted to internal purposes of the commission.

The royal commission sought the ASC's permission to lift the confidentiality condition attaching to such transcripts to enable their public release in the course of the commission's proceedings. Exercising delegated power, an ASC officer provided the royal commission with transcripts of the director's examinations together with written permission for the commission to use the transcripts in a public hearing. Eight of the transcripts were tendered at public hearings of the royal commission, and at the same time copies were made available to media organisations. The media published a limited amount of material from the transcripts. In the commission's hearing, the director claimed the privilege against self-incrimination. His entitlement to claim the privilege in the commission's proceedings was upheld by the Supreme Court of Victoria. The royal commission then ruled that it would make no further use of the transcripts already tendered, that there should be no further publication of them, and that it would accept no further transcripts.

The director sought judicial review of the ASC's decision to release the transcripts to the royal commission and an injunction to restrain their further publication. In the High Court Brennan J held that the ASC acted within power in lifting the condition of confidentiality against use of the transcripts in public hearings of the royal commission, but that procedural fairness was implied in relation to that decision and had been breached. The ASC should have given the director an opportunity for a hearing before lifting the condition, since this action would prejudice his interests. In Brennan J's view if that opportunity had been given, the ASC may have thought better of its proposed action, recognising, as the royal commission did at too late a stage, that publication was not consistent with the entitlement of the director to claim the privilege against self-incrimination in the royal commission proceedings. Dawson,

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Gaudron and McHugh JJ agreed with Brennan J on the issue of procedural fairness and the lifting of the condition. Toohey J dissented, holding that no obligation of confidentiality attached to the transcripts and that giving an opportunity to an examinee to be heard before the ASC releases transcripts to a royal commission or some law enforcement agency investigating possible offences might well destroy the investigation.

Johns v Australian Securities Commission raises competing arguments about fairness and the procedure of investigative tribunals. Toohey J's dissent presented a persuasive argument that the implication of procedural fairness in relation to some procedural decisions of investigative tribunals may undermine their investigative processes. On the other hand, common law rights and human rights were directly affected by the royal commission's decision-making, and indirectly affected by the ASC's decision to lift the confidentiality of the transcripts. The tension between these arguments is evident in the reception of *Johns* in the Federal Court, where it has been applied in one case and distinguished in another.²

Due to this decision, any documents obtained by a Royal Commission may only be transferred to a particular agency once the Commonwealth has gone through the process of giving notice to owners of documents and dealt with any lodged objection to the transfer.³

HIH Royal Commission (Transfer of Records) Act 2003

To counter the effects of the High Court's decision in *Johns*, legislation was passed in 2003, specifying what was to happen to the records of the HIH Royal Commission. The purpose of this legislation was to facilitate the transfer of records from the HIH Royal Commission to the Australian Securities and Investments Commission. The [Bills Digest](#) on this particular Bill stated the following:

To overcome this procedural requirement in relation to the HIH Royal Commission, the Bill contains a series of provisions, which state that custody in HIH Royal Commission documents will automatically vest in ASIC. This removes the discretionary power of the Minister to determine custody and hence the need to consult with the original owners of the document.

The Bill puts in place arrangements for ASIC to make use of the records and states that elements of confidentiality, any associated legal professional privilege and protection against self incrimination are maintained⁴

The Explanatory Memorandum to the Bill states that the *HIH Royal Commission (Transfer of Records) Act 2003* was legislation with a similar effect to the Bill.⁵

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The proposed amendments

Procedural fairness in relation to document transfers

The Bill removes the requirement to obtain consent or contact the owner of records, neither giving an opportunity to make submissions or take into account submissions by the owner of the documents. Journalist Mark Metherall commented that:

The changes mean investigators from agencies such as the Australian Securities and Investment Commission would not have to go through consultative processes before gaining commission records.⁶

Legal Professional Privilege

The Bill provides that legal professional privilege is not affected. The Encyclopaedic Australian Legal Dictionary defines the term 'legal professional privilege' as follows:

A common law principle protecting the confidentiality of statements and other materials made between a legal practitioner and client where those statements and other materials have been made or brought into existence for the dominant purpose of the client obtaining, or the legal practitioner giving, legal advice or for use in existing or contemplated judicial or quasi-judicial proceedings: *Esso Australia Resources v FCT* (1999) 201 CLR 49; 168 ALR 123. This principle is referred to in uniform evidence legislation as 'client legal privilege': (CTH) Evidence Act 1995 ss 117-119. At common law, the terms 'client legal privilege' and 'legal professional privilege' have been used interchangeably: *Esso Australia Resources v FCT*. The privilege extends to legal practitioners employed by government agencies in respect of confidential communications between them and their employer: *Waterford v Commonwealth* (1987) 163 CLR 54; 12 ALD 741. The privilege will not apply where the communication was part of a criminal or unlawful proceeding, or was made in furtherance of an illegal object: *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382. The privilege will also be denied to a communication that is made for the purpose of frustrating the processes of the law even though no crime or fraud is contemplated: *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; 61 ALR 55.⁷

However, it should be noted that on 30 November 2006, the Attorney-General announced, an inquiry into legal professional privilege as it relates to the activities of Commonwealth investigatory agencies, to be conducted by the Australian Law Reform Commission (ALRC). Matters relating to legal professional privilege were raised during the Inquiry into the UN Oil-for-Food Program.⁸ The Attorney-General stated:

Commissioner Cole has recommended that consideration be given to providing that legal professional privilege not apply to royal commission proceedings...The ALRC will look at legal professional privilege and its impact on all Commonwealth bodies, including royal commissions, that have coercive information gathering or associated power.⁹

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See also a recent Bills Digest earlier in 2006 in respect of claims of legal professional privilege, [Royal Commissions Amendment Bill 2006](#).

ALP position

The Shadow Attorney-General, Ms Nicola Roxon MP, has raised concerns about the Bill on 30 November 2006. The concerns are that the Bill is too broad and that it allows *all* records of *all* Royal Commissions, whether past or future, to be passed to *any* custodian for *any* purpose.

Labor stands ready to assist with changes that are needed to allow our law enforcement agencies to investigate possible crimes committed by AWB and staff. To do so, we don't need this wide law...

Theoretically, this law allows the Government to order that documents from Royal Commissions 20 years ago should all be given to Fox FM or the Chaser for the purposes of entertainment!

This may sound silly, but the law would allow it.¹⁰

Instead, she called upon the Government:

...to reconsider its approach and limit their law to the matter at hand: AWB and law enforcement issues.¹¹

Financial implications

The Explanatory Memorandum states that the Bill has no financial impact.

Main provisions

Schedule 1 – Amendments to Royal Commissions Act 1902

Item 2 inserts **new section 9** *Custody and use of records of Royal Commission*. **Item 2 new subsection 9(1)** inserts definitions of *body*, *custodian*, *public authority*, *public office holder*, *record*, and *Royal Commission record*.

New subsection 9(2) provides for regulations to be made for the custody, use, transfer of or access to Royal Commission records:

- subparagraph (2)(a) provides for who shall have custody of the records

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- subparagraph (2)(b) provides that the regulations may specify the purposes for which the records are to be used and the purposes for they are not to be used
- subparagraph (2)(c) provides for the circumstances in which the custodian must or may make records available to other persons or bodies
- subparagraph (2)(d) provides for the circumstances in which the custodian must or may allow access to records by other persons or bodies, and
- subparagraph (2)(e) provides that the regulations may specify the purposes for which other persons or bodies may use the records or the purposes for which the records are not to be used.

Regulations made under subparagraph (2)(a) may provide for a person or body to have custody of the records even if that person or body currently has custody of the records by virtue of a declaration under section 22(3) of the *Archives Act*.

New subsection 9(3) provides that the regulations may nominate any one of the persons or bodies listed to have custody to the records or a person or body may be prescribed by the regulations for the purposes of this subsection.

Regulations may impose conditions

New subsection 9(4) provides that the regulations may impose conditions which are to be complied with by the custodian or the persons or bodies to whom records are given or those who are allowed access to the records.

Effect of Regulations under subparagraph (2)(a)

New subsection 9(5) provides that regulations made under subparagraph 9(2)(a) and while those regulations are in force will invoke the effect under the *Archives Act* as though a direction had been issued under subsection 22(3) of the *Archives Act* in relation to the same records. This, according to the Explanatory Memorandum, avoids procedural processes that are involved when transferring the custody of records under a direction of the *Archives Act*.¹²

Use of Royal Commission Records

New subsection 9(6) provides that a custodian may use records for the purposes of the custodian's functions and exercise of powers, or other purposes they could have used the record for, had it been acquired in the course of the exercise of their functions and powers subject to restrictions in the regulations.

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New subsection 9(7) provides that if a person or body who is a public office holder or a public authority is given records or access to records, they may use the records for the purposes of their functions and powers and for any purpose had they acquired the records in the course of exercising their functions and powers. **New subsection 9(8)** provides that the operation of subsections (6) and (7) are subject to the regulations which may specify purposes for which the records are not to be used or conditions imposed to be complied with by the custodian or the recipient of the records.

New subsection 9(9) provides that purposes specified in the regulations in relation to subparagraphs (2)(b)(i), (e)(i) and subsections 9(6) and (7) need not be the same as the Royal Commission when they produced, obtained or were given the records.

Custodian's right to retain possession of records

New subsection 9(10) provides that a custodian of Royal Commission records may retain the records for as long as they think fit despite any requests from the owner of the records that they be returned.

Records may be dealt with without consent, notice or opportunity to be heard

New subsection 9(11) provides that a person or body to whom custody of Royal Commission records are given, may use, give or allow access to the records is not required to obtain the consent, or give notice to, or give an opportunity for submissions to be made or to take account of any submissions made by the owner when making decisions related to the records. See the discussion of *Johns'* case above at pages 3 and 4 of this Digest.

Operation of section 6DD not affected

New subsection 9(12) provides that the operation of section 6DD is not affected. Section 6DD of the *Royal Commissions Act 1902* relates to statements made by witnesses or the production of documents pursuant to a summons, requirement or notice under section 2 or subsection 6AA(3) before a Royal Commission. Such statements or documents are not admissible in evidence in civil or criminal proceedings in a court of the Commonwealth, state or territory.

Legal Professional Privilege not affected

New subsection 9(13) provides that Royal Commission records will still be the subject of legal professional privilege.

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Concluding comments

The Bill was introduced on 30 November 2006 and set down for debate in the House of Representatives on 5 December 2006. Given the scope of the regulation making power and the possible procedural fairness implications for those persons who initially provided specific records to a Royal Commission, Parliament may want to consider whether to allow more time for further consideration of the proposed law. According to the Attorney-General, this will occur with respect to the issue of legal professional privilege, scheduled to be considered by the ALRC.

Endnotes

1. S. Dudley, 'HIH Royal Commission (Transfer of Records) Bill 2003,' Bills Digest, no. 181, Parliamentary Library, Canberra, 2002-03, p. 2.
2. M. Allars, [Reputation, Power and Fairness: a Review of the Impact of Judicial Review upon Investigative Tribunals](#), Federal Law Review, vol. 24, no.2, 1996.
3. Dudley, loc. cit.
4. *ibid.*
5. Explanatory Memorandum, p. 1.
6. Mark Metherall, 'Wider inquiry powers criticised', *Sydney Morning Herald*, 1 December 2006, p. 5.
7. Encyclopaedic Australian Legal Dictionary, 'Legal professional privilege' LexisNexis.AU
8. Hon Philip Ruddock MP (Attorney-General), *Australian Law Reform Commission to Review Legal Professional Privilege*, media release, Parliament House, Canberra, 30 November 2006.
9. *ibid.*
10. N. Roxon MP (Shadow Attorney-General), *Government rush to take some action on AWB – but get it wrong*, media release, Parliament House, Canberra, 30 November 2006.
11. Roxon, *op. cit.*
12. Explanatory Memorandum, p.5.

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