

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL WEBINAR SERIES 2022

Professional Development and Networking for
the In-House Legal Community

Session 3 - Managing a response to a public inquiry

Presented by Asaf Fisher, Partner

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Acknowledgement of Country

In the spirit of reconciliation, HWL Ebsworth Lawyers acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community.

We pay our respect to their Elders past and present, and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

Compulsory powers

- Typically, inquiries have compulsory powers
- Those powers are conferred *in aid* of the fulfilment of an inquiry's functions

Local Government Act 1993 (NSW) (NI), s 438U

- (2) For the purposes of any inquiry under this section, any person appointed to hold the inquiry has the ... powers, authorities, protections and immunities conferred by Division 1 of Part 2 of the *Royal Commissions Act 1923* —
- (a) on a sole commissioner (if the person is the only person appointed to hold the inquiry), or
- ...
- (4) The provisions of the *Royal Commissions Act 1923* (section 13 and Division 2 of Part 2 excepted) apply, with any necessary adaptations, to and in respect of any inquiry under this section and to and in respect of any witness or person summoned by or appearing before the person or persons holding the inquiry.

Power to compel a person to attend to give evidence and/or produce 'documents or other things'

Royal Commissions Act 1923 (NSW), s 8

The chairperson or the sole commissioner, as the case may be, may by notice in writing summon any person to attend the commission at a time and place named in the summons, and then and there to give evidence and to produce any documents or other things in the person's custody or control which the person is required by the summons to produce.

(**'Document'** includes any book, register or other record of information, however compiled, recorded or stored': s 4.)

[cf s 2(1) of the *Royal Commissions Act 1902 (Cth)*.]

Power to compel a person to attend to give evidence and/or produce 'documents or other things'

Royal Commissions Act 1923 (NSW), s 11

- (1) A witness summoned to attend or appearing before the commission shall not be entitled, except as otherwise provided in this section and section 127 (Religious confessions) of the *Evidence Act 1995*, to refuse:
 - (a) ...
 - (b) to answer any question **relevant to the inquiry** put to the witness by any of the commissioners,
 - (c) to produce any document or other thing in the witness's custody or control which the witness is required by the summons to produce.
- (2) Nothing in this section shall make it compulsory for any witness:
 - (a) to answer any question or produce any document or other thing if the witness has a **reasonable excuse** for refusing,
 - (b) ...

Power to compel a person to attend to give evidence and/or produce 'documents or other things'

Royal Commissions Act 1923 (NSW), s 19

- (1) If any person served with a summons to attend a commission, ..., fails **without reasonable excuse** to attend the commission or to produce any documents or other things in the person's custody or control which the person was required by the summons to produce, the person shall be guilty of an offence, and shall be liable to a penalty not exceeding 4 penalty units.
- (2) It shall be a defence to a prosecution under this section for failing without reasonable excuse to produce any documents or other things if the defendant proves that the documents or other things were not **relevant to the inquiry**. (Emphasis added.)

Power to compel a person to attend to give evidence and/or produce 'documents or other things'

Royal Commissions Act 1923 (NSW), s 20

If any person appearing as a witness before the commission refuses to ... answer any question **relevant to the inquiry** put to the person by any of the commissioners, the person shall be guilty of an offence, and shall be liable to a penalty not exceeding 4 penalty units.

(Emphasis added.)

Relevance

- What is the touchstone of relevance?
 - The terms of reference for the inquiry
- What does relevance turn on?
 - The connection between the terms of reference, properly construed, and the question asked or the document or other thing the production of which is sought
 - The degree of the connection required is affected by the investigatory character of an inquiry

Example: terms of reference

To inquire and report ... with respect to whether, in exercising its functions pursuant to sections 21, 22, 23 and 24 of the *Local Government Act 1993* (NSW) (NI) (Act):

- the ***NIRC and its governing body, since 2016, have managed, and are managing***, the finances of the NIRC in accordance with the guiding principle in section 8B(c) of the Act to have effective financial and asset management, including sound policies and processes for the following:
 - performance management and reporting, as they relate to effective financial and asset management;
 - asset maintenance and enhancement, as they relate to effective financial and asset management;
 - funding decisions, as they relate to effective financial and asset management;
 - risk management practices, as they relate to effective financial and asset management.

...

(Emphasis added.)

Is the question, document or thing related to the subject matter of the inquiry as disclosed by the ToR?

Ross v Costigan (1982) 41 ALR 319 at 334:

In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the Commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the Commission or counsel assisting, may nevertheless fail to do so. But if the Commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference in doing so. This flows from the very nature of the inquiry being undertaken. (Emphasis added.)

Is the inquiry going off on a 'frolic of it own'?

Ross v Costigan (1982) 41 ALR 319 at 335 (Ellicott J):

... I think a court if it has power to do so, should be very slow to restrain a Commission from pursuing a particular line of questioning and should not do so unless it is satisfied, in effect, that the Commission is going off on a **frolic of its own**. If there is a real as distinct from a fanciful possibility that a line of questioning may provide information directly or even indirectly relevant to the matters which the Commission is required to investigate under its letters patent, such a line of questioning should, in my opinion, be treated as relevant to the inquiry. (Emphasis added.)

(See also the useful discussion of relevance in *National Crime Authority, Ministers for Justice, Police & Emergency Services v A1 & A2* (1997) 75 FCR 274 at 285 and following.)

Example: *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73

- McGuinness was the editor of a newspaper who wrote articles alleging that unspecified members of Parliament were accepting bribes in connection with 2 Bills
- The Governor of Victoria appointed a Royal Commissioner to inquire into and report on whether, in short, any bribery had taken place in connection with the 2 Bills (see 81)
- McGuinness was asked to reveal the sources of information on which his articles were based; he refused and contended that the question which he 'refused to answer did not touch the subject matter of the inquiry being made by the commission and was not material thereto' (see 82)

Example: *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73

Latham CJ said (at 86):

The Royal Commissioner was appointed to inquire into a specified subject matter, namely, the suggested bribery of members of Parliament. He was not appointed to determine an issue between the Crown and a party, or between other parties. The Commission was appointed to conduct an investigation for the purpose of discovering whether there was any evidence of the suggested bribery. Such an investigation may be, and ought to be, a searching investigation — an inquisition as distinct from the determination of an issue. ***In the course of such an inquiry it would or at least might be a valuable step forward if the identity of the persons giving information to the editor of the newspaper could be discovered so that they could be summoned for the purpose of giving evidence on oath as to their knowledge, or as to the source of their information if they had no direct personal knowledge of the matters in question.***

(Emphasis added.)

Example: *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73

Starke J gave the objection short shrift (at 92):

It is enough to say that the inquiry was what might be described as a ***fishing inquiry*** and very wide in its terms. The question was clearly material to and touching the subject matter of such an inquiry.

(Emphasis added.)

Example: *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73

Dixon J (at 105):

Upon an issue of the guilt or innocence of a given member of parliament or a specific person supposed to have given or offered a bribe, the question would not be relevant, or at all events only exceptional circumstances would give it relevancy. ***But the inquiry commanded by the commission is not the trial of an issue, but the ascertainment of unknown facts. The tracing of informants and the discovering of sources of knowledge fell, in my opinion within the scope of the inquiry and to that the question put to the appellant as a witness was material.***

(Emphasis added.)

Example: *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73

Finally, McTiernan J said in conclusory terms:

It is an ingredient of the offence under s 19(b) that the question which the appellant has refused without lawful excuse to answer should be one "touching the subject matter of inquiry." I agree that the question which the appellant refused to answer was clearly within this category and that this ground of appeal should also fail.

Is there a lawful justification for refusing to answer or produce?

‘Reasonable excuse’: *Royal Commissions Act 1923 (NSW)*, s 4

Reasonable excuse in relation to any act or omission by a witness or a person summoned as a witness before a commission means an excuse which would excuse an act or omission of a similar nature by a witness or a person summoned as a witness before a court of law.

[For a similar definition, see s 1B of the *Royal Commissions Act 1902 (Cth)*.]

Reasonable excuse: examples

- A substantiated claim of legal professional privilege would answer the description of a reasonable excuse (*Attorney General (NSW) v Melco Resorts Entertainment Ltd* (2020) 102 NSWLR 47, [79])
- Self-incrimination (cf, eg, s 17(1) of the *Royal Commissions Act* 1923 (NSW))
- Public interest immunity
 - ‘Public interest immunity is a basis for objecting to production by the executive of relevant and otherwise admissible evidence in the course of litigation. It provides an immunity from production of such evidence where it would be against the public interest to disclose the contents of a document, or where the document “belongs to a class of documents which in the public interest ought not to be produced, whether or not it would be harmful to disclose the contents of the particular document”’: *HT v The Queen* [2019] HCA 40, [69] (Gordon J).

What if there is no reasonable excuse carve out?

- Even absent an express carve out like s 11(2)(a), a power of the kind conferred by s 8 would not generally be construed as authorising an inquiry to compel a person to answer a question or produce a document that would, among other things, disclose information covered by legal professional privilege, or that may incriminate them
- That is because statutes are construed on the basis that the legislature does not intend to interfere with fundamental common law rights, privileges and immunities unless it makes that intention irresistibly clear — either expressly or by necessary implication

What if there is no reasonable excuse carve out?

Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543 at [11]:

Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. ***It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.***

(Emphasis added. Legal professional privilege is properly characterised as ‘an immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications, as *Daniels Corporation* holds’: *Glencore International AG v Federal Commissioner of Taxation* [2019] HCA 26; 265 CLR 646, [12].)

Abrogation?

- Section 17(1) of the *Royal Commissions Act 1923* (NSW) is a 'clear abrogation of legal professional privilege' (*Attorney General (NSW) v Melco Resorts Entertainment Ltd* (2020) 102 NSWLR 47, [14]); so too the privilege against self-incrimination. It provides:

 - (1) A witness summoned to attend or appearing before the commission **shall not be excused** from answering any question or producing any document or other thing on the ground that the answer or production may criminate or tend to criminate the witness, or on the ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground. (Emphasis added.)
- Section 17(1) is in Part 2 Division 2 of the *Royal Commissions Act 1923* (NSW), which only applies to those commissioners who have the status and qualifications described in s 15(1)

Power to compel the provision of *information*

- The ordinary meaning of information is a communication of knowledge about some particular fact, subject or event (*Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at [24] and see also *One.Tel Ltd v Commissioner of Taxation* (2000) 101 FCR 548 at [14]-[15])
- Information may or may not be recorded in a document (*Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217, [24])

Example: power to compel the provision of *information*

Royal Commissions Act 1902 (Cth), s 2(3C)

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.

(Emphasis added.)

Example: power to compel the provision of information

- A request for information must be 'so framed as to be sufficiently clear to convey to the addressee what information is sought'
 - *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187 at 208 referred to in *One.Tel Ltd v Commissioner of Taxation* (2000) 101 FCR 548 at [16]; see also *ANZ Banking Group v Konza* (2012) 206 FCR 450 at [44] citing *Fieldhouse* and *May v Deputy Commissioner of Taxation (Cth)* (1998) 40 ATR 131 at 144-145 referred to also in *One.Tel Ltd v Commissioner of Taxation* (2000) 101 FCR 548 at [19]
- The necessity for clarity and certainty follows in particular from the serious consequences that can flow from a failure to comply with a notice requiring the provision of information
 - see, eg, *One.Tel Ltd v Commissioner of Taxation* (2000) 101 FCR 548 at [16], [20]
- However, the 'requirement of clarity "is not to be applied in a precious or hypercritical fashion"'
 - *ANZ Banking Group v Konza* (2012) 206 FCR 450, [46]

Example: power to compel the provision of information

- The exercise of a power to obtain information may even be related to an exercise of power to require the documents to be produced
- That is illustrated by *Geosam Investments Pty Ltd v Australia and New Zealand Banking Group Ltd* (1979) 9 ATR 836, Gibbs J (in a brief judgment) deciding that the Commissioner of Taxation could require a bank to give particulars of the books, documents and papers it held in its safe deposit boxes so that he would *know* 'which books, documents and papers he can require to be produced' (at 837)

The power to compel a statement

- The power to compel the production of a document or other thing only extends to a document or thing that in fact *exists*
- It is not a power to require a person to bring a document or thing into existence
- In contrast to the *Royal Commissions Act 1923* (NSW), the *Royal Commissions Act 1902* (Cth) makes provision for a member of a Commission to require a person to give a statement in writing

Summary

- The threshold question is relevance, and the touchstone of relevance is the inquiry's ToR
- Is the question, document or thing related to the subject matter of the inquiry as disclosed by the ToR?
- The degree of the connection is informed by the investigatory character of an inquiry
- If the question asked or the document/other thing sought is relevant, is there a lawful justification for refusing to answer/produce?
 - Legal professional privilege
 - Self-incrimination
 - Public interest immunity
- Does the relevant statute abrogate, eg, legal professional privilege or the privilege against self-incrimination?

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Who is Sky?

- Founded 2015 by four eDiscovery professionals with extensive Australian regulatory and Royal Commission experience
- Owner managed
- Focused on smart electronic management of documents – lawyer centric



Who am I?

- Head of Client Engagement
- Background as Litigation lawyer
- Worked in eDiscovery industry for last 16 years
- Provide practical advice in the early engagement stages

Agenda

- DOCUMENT COLLECTION
 - Pitfalls / easy solutions
- TIMELY ACCESS TO DOCUMENTS FOR REVIEW
- **LIVE DEMO** - PRACTICAL ELECTRONIC MANAGEMENT OF DOCUMENTS
- PRODUCTION
 - Keys to compliance

- Pitfalls of self-collection
 - Missing critical data sources at the data identification stage
 - Poor data extraction methods
 - Search failures
 - Short-cuts when dealing with document management systems
- Non-compliance
 - Re-do the collection
 - Issue another notice / summons

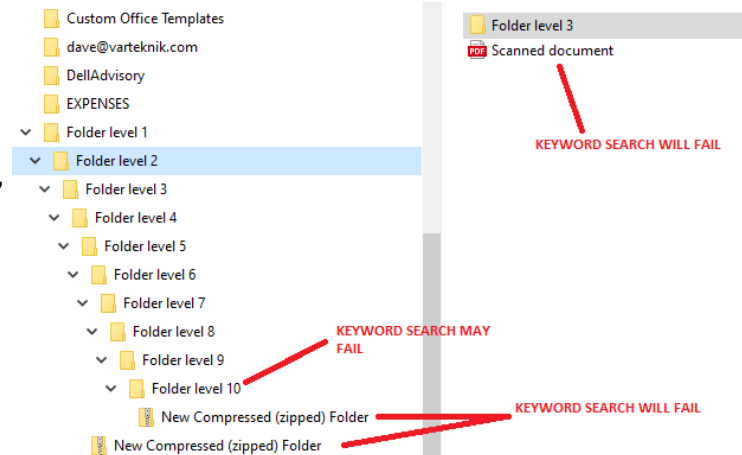
Self- Collection - Missing critical data sources

- Failure to consider all potential sources of relevant data because:
 - DO NOT have a good understanding of where all documents are stored.
- This could be because:
 - Turnover in IT leading to a loss of key knowledge
 - Upgrade of IT infrastructure and migration of data storage
 - The use of personal cloud storage / personal emails / storing on your C drive
 - Use of modern or non-standard communication platforms (Customer Relationship Management Portals etc), instant messaging (text, WhatsApp, Signal etc) and project management tools (Microsoft Teams, Planner, Asana, Monday.com etc)

Self-Collection- Self-search risks

- **Keyword Self-search**

- Will not search within zips or password protected files
- Will not search scanned documents
- May not search deep file paths
- Silent failure
- If scope / keywords change, you will need to re-collect



Self- Collection- Poor Data Extraction methods



- **Drag and Drop**
 - Unable to verify where data came from
 - Changes the document metadata
 - Unable to sort the documents chronologically
 - Additional costs incurred if manual entering of data is needed
 - Inaccurate date search results
- **Copy and Paste**
 - Lose the data source information – unable to verify where data came from
 - Silent failure
 - Long file paths will not copy

Self-Collection from non-standard databases

- **Non-standard databases** **Structured databases**
 - Loss of metadata
 - Need to convert information into documents
 - Breaks link between host and attachments





Self-Collection Best Practice / Easy solutions

- **IDENTIFICATION**

- Make sure your house is in order
- Data mapping
- Custodian Questionnaires

- **DATA EXTRACTION**

- DO NOT DRAG and DROP
- Ensure that the documents are collected in a way to maintain the metadata (Free non-forensic tools - Robocopy, Safecopy etc)
- If data source is not necessarily relevant, at the very least create zip files of documents and move the zips around

- **SEARCHING**

- Avoid self keyword searching
- Collection based on source / For mailboxes, based on date range
- Keyword searching is best undertaken in an eDiscovery platform

- **NON-STANDARD DOCUMENT SOURCES**

- Speak to eDiscovery professional

Fast Processing



Case Study

- 7 day notice to produce
- 53 mailboxes collected
- Lawyers started review within 24 hours of data collection
- 9,000 docs produced within 7 days

Importance of maximising time for reviewing the documents

Search/Review/
Organise



- **Live demo of Relativity covering:**
 - Organisation of documents
 - Searching for documents
 - Tagging documents
 - Building and managing a chronology
 - Exporting offline schedules / subsets of documents

Efficient Production Compliance

- **Automation / Innovation**
- Technology is there to reduce the manual effort (removing junk files / hyperlinking / dealing with complex schedules)
- Compliance can be complicated
- Privilege schedule requirements can be particularly tricky BUT technology can assist

Document ID	Document Date	Document Title	Author	Combined Recipient Parties	Recipients and Their Position and Employer	Privilege	Privilege Basis	Person Who Asserts Privilege	Privilege Holder	Reason for privilege
ABC.001.001.0001	1/01/2020 0:00	Email XXX	Leonie Taylor (Sky Discovery)	John Smith (johnsmith@quinnemanuel.com); Sam Lee (samlee@quinnemanuel.com); Ruby Rose (rubyrose@quinnemanuel.com)	John Smith, Quinn Emanuel, Partner; Sam Lee, Quinn Emanuel, Senior Associate; Ruby Rose, Quinn Emanuel, Senior Associate	Yes	Advice Privilege	Person ABC	Third Party	Advice Privilege. Communication between client(s), through its authorized agent(s) and its legal adviser(s), for the dominant purpose of obtaining/providing legal advice.

Takeaways

- Organise your data at the earliest opportunity
- Understand the risks when collating the data yourself and seek help to ensure metadata is maintained
- Seek out experience, smart tech and advanced technology workflows - this will reduce the manual effort and assist with speedy compliance

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