

ROYAL COMMISSIONS AND CONTEMPT OF COURT: THE EFFECT OF CURIAL PROCEEDINGS

FIONA ROUGHLEY*

Royal commissions invariably concern events that have been, are, or may be the subject of legal proceedings. All five royal commissions established by federal governments over the past 10 years¹ fit this description. While it is plainly the role of royal commissioners to inquire into matters that are the subject of their terms of reference, the shadow of other legal proceedings and the law of contempt of court can loom large over the establishment and conduct of such inquiries. Where parallel curial proceedings on the same or related matters are on foot, the law of contempt can constrain the powers² of a royal commissioner. In some instances separate curial proceedings may be a complete bar to the further conduct of a royal commission. In other circumstances such proceedings may only limit the permissible scope or nature of the commission's work. In either case, however, the overlap between curial proceedings and a royal commission's inquiries can have profound implications for the conduct and effectiveness of the work of a royal commission, including the extent to which it can fulfil the fundamental objectives of a 'public' inquiry.

This article addresses the effect of the law of contempt of court on the executive's power to establish, and the powers of a royal commissioner to conduct, inquiries on matters also the subject of legal proceedings. The article is not concerned with the powers of a royal commission to hold a person in

* Barrister, Banco Chambers; PhD candidate, Australian National University; Counsel Assisting, Royal Commission into Trade Union Governance and Corruption (2014). My thanks to Thomas Prince for his very helpful comments on an earlier draft of this article. The views expressed are mine personally; they do not represent the opinions of the Royal Commission into Trade Union Governance and Corruption.

1 Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme (2005–06); Equine Influenza Inquiry (2007–08); Royal Commission into Institutional Responses to Child Sexual Abuse (2013 – present); Royal Commission into the Home Insulation Program (2013–14); Royal Commission into Trade Union Governance and Corruption (2014 – present).

2 Including the compulsive powers conferred on a royal commissioner by statute. In respect of a royal commission established by the Governor-General and exercising functions with respect to a matter within federal jurisdiction, see *Royal Commissions Act 1902* (Cth) ss 2(1) (power to summon witnesses and take evidence), 2(3A) (notice to produce), 4–5 (search warrants), 6D(2), (3), (5) (rights of witness; general powers to order that evidence may be taken in private), 6P (commission may communicate information). See also *Royal Commissions Act 1991* (ACT); *Commissions of Inquiry Act 1950* (Qld); *Royal Commissions Act 1923* (NSW); *Royal Commissions Act 1917* (SA); *Commissions of Inquiry Act 1995* (Tas); *Evidence (Miscellaneous Provisions) Act 1958* (Vic); *Royal Commissions Act 1968* (WA).

contempt.³ Rather, the focus is on the extent to which the proceedings of a royal commission itself may constitute contempt of court. Part I of this article provides a short summary of the law of contempt. Part II concerns the effect of the law of contempt on the executive's power to establish a royal commission. Finally, Part III concerns the impact of the law of contempt on the conduct of royal commissions.

I THE LAW OF CONTEMPT

It is a contempt of court, and unlawful, to interfere with the course of justice. The fundamental nature of the jurisdiction, and its rationale, were explained by Griffith CJ in *Packer v Peacock*:

every superior Court possesses [the jurisdiction] to protect itself from any action tending to impair its capacity to administer impartial justice. Such action is called contempt of Court, and it must be action affecting the Court itself. Punishment for such contempt, however, is not inflicted in order to vindicate the affronted dignity of the members of the Court, whether Judges or jurymen, but in the interests of the public in general, and in particular of suitors, whose right to obtain a hearing of their suit free from prejudice or bias might otherwise be imperilled.⁴

Conduct outside the courtroom (including the publication of material) that, as a matter of practical reality, has a tendency to interfere with the course of justice in a particular case, may amount to a sub judice contempt of court.⁵ There are numerous ways in which such interference may manifest. One example is the exertion of improper public pressure upon litigants⁶ or witnesses⁷ that has a real tendency to deter or influence their participation in proceedings. Similarly, conduct which has a real tendency to influence the tribunal of fact – for example, influencing the findings of a jury in a criminal case – may also amount to a contempt of court.⁸ While actual intention or purpose to interfere is relevant, and conduct designed deliberately to frustrate the effect of an order can constitute a contempt of court,⁹ actual intention is never decisive.¹⁰

In *Balog v Independent Commission Against Corruption*, the High Court held that a court's contempt jurisdiction may be relevant to the construction of a state statute¹¹ – importantly not because it is a factor relevant to validity, but rather because the statute might display (as the Court held the relevant statute in that

3 See, eg, *Royal Commissions Act 1902* (Cth) s 60(1).

4 (1912) 13 CLR 577, 581–2.

5 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 369–71 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

6 *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 27D–27F (Mason P).

7 *A-G (NSW) v Mirror Newspapers Ltd* [1980] 1 NSWLR 374, 390E [46] (The Court).

8 See *Victoria v The Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 57 (Gibbs CJ), 102 (Mason J) ('*Victoria v ABCEBL Federation*').

9 *Hogan v Hinch* (2011) 243 CLR 506, 533 [24] (French CJ).

10 *Victoria v ABCEBL Federation* (1982) 152 CLR 25, 56 (Gibbs CJ), citing *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 371.

11 (1990) 169 CLR 625, 633 (The Court) ('*Balog*').

case did)¹² a legislative intention not to trespass upon the due administration of justice. In *Balog*, even the mere possibility that certain conduct might offend the policy behind the law of contempt was sufficient, in combination with other factors, to warrant the empowering statute for the New South Wales Independent Commission Against Corruption ('ICAC') to be read down so as not to empower ICAC to express a finding concerning the criminal liability of a specified person. The Court observed:

The expression of a finding of guilt or innocence of an offence or even of a prima facie case against an individual, in a report which is bound to be made public, must be likely to have a damaging effect on the reputation of the person concerned. And whilst such a finding may not necessarily have a tendency to interfere with the due administration of justice in the event of a subsequent trial, the possibility cannot be disregarded.¹³

At the federal level, there is some suggestion in the case law that at least some element of the power to punish for contempt is an essential aspect of the character of a Chapter III court. In *Dupas v The Queen*, the Court observed:

Having regard both to the antiquity of the power and its institutional importance, there is much to be said for the view that in Australia the inherent power to control abuse of process should be seen, along with the contempt power, as an attribute of the judicial power provided for in Ch III of the *Constitution*.¹⁴

The possible significance of that dictum arises from the fact that the 'powers of the Parliament of the Commonwealth are conferred by the *Constitution* subject to Ch III'.¹⁵ Just as Parliament cannot validly empower a court invested with federal jurisdiction to do things which are 'repugnant to or incompatible with the exercise of the judicial power of the Commonwealth',¹⁶ it cannot, by legislation directed to another person or agency, alter an essential aspect of the character of a Chapter III court. To the extent the ability to deal with contempt is an essential aspect of such courts, then it might be argued that general provisions such as those found in the *Royal Commissions Act 1902* (Cth) should be read down so as not to offend Chapter III by invalidly empowering a royal commission to commit contempt of a Chapter III court. However, the better view is that Parliament may by express language or necessary implication authorise what would in a particular case otherwise be contempt of court.¹⁷ Such legislation does not deprive a Chapter III court of its general power to punish contempts of court, but merely authorises in a particular case what would normally be a contempt. The

12 Ibid 633–4 (The Court).

13 Ibid 633 (The Court).

14 (2010) 241 CLR 237, 243 [15] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

15 *Hogan v Hinch* (2011) 243 CLR 506, 553 [89] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

16 *Kable v DPP (NSW)* (1996) 189 CLR 51, 104 (Gaudron J), quoted with approval in *Fardon v A-G (Qld)* (2004) 223 CLR 575, 617 [101] (Gummow J), 648 [198] (Hayne J agreeing).

17 *Lockwood v Commonwealth* (1954) 90 CLR 177, 185 (Fullagar J); *Victoria v ABCEBL Federation* (1982) 152 CLR 25, 54–5 (Gibbs CJ), 72–3 (Stephen J), 94 (Mason J), 131 (Wilson J); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 216–18 [26]–[29] (French CJ) ('Lee').

general provisions of the *Royal Commissions Act 1902* (Cth) and its state cognates, however, do not have this effect.¹⁸

II LAWFULNESS OF THE ESTABLISHMENT OF A ROYAL COMMISSION

As a general proposition, there is nothing unlawful in the executive establishing commissions of ‘mere inquiry and report involving no compulsion, except under the authority of statute, no determination carrying legal consequences and no exercise of authority of a judicial nature *in invitos*’.¹⁹ As Gageler J explained in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 279 (*ACMA v Today FM*), the High Court has

repeatedly held that a power of inquiry and determination takes its legal character from the purpose for which it is undertaken, and that a power of inquiry and determination undertaken for a non-curial purpose (be it arbitral, administrative, executive or legislative) can encompass formation and expression of an opinion about an existing legal right or obligation.²⁰ No distinction has been drawn in that respect between an opinion about an existing legal obligation sounding only in civil liability and an opinion about an existing legal obligation sounding only, or also, in criminal liability.²¹

In *ACMA v Today FM*, the High Court confirmed that not only is there nothing offensive to principle about the formation of the opinion for a non-curial purpose, there is also nothing offensive to principle in an administrative body being ‘empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or

18 *Victoria v ABCEBL Federation* (1982) 152 CLR 25, 54–5 (Gibbs CJ), 70–2 (Stephen J), 94 (Mason J), 119–20 (Aickin J), 160–1 (Brennan J). For examples where express language has been used, see *Edelsten v Richmond* (1987) 11 NSWLR 51, concerning s 32W of the *Medical Practitioners Act 1938* (NSW), as repealed by *Medical Practice Act 1992* (NSW) s 195:

A complaint may be referred to a Committee or the Tribunal, and dealt with by the Committee or Tribunal, even though the registered medical practitioner about whom the complaint is made is the subject of proposed or current criminal or civil proceedings relating to the subject-matter of the complaint.

See also *Bayeh v A-G (NSW)* (1995) 82 A Crim R 270, 278 (Court of Appeal), concerning s 38(1) of the *Royal Commission (Police Service) Act 1994* (NSW), which stated that ‘[t]he Commissioner may do any or all of the following, despite any proceedings that may be in or before any court ... commence, continue, discontinue or complete the Commission’s inquiry and any part or aspect of that inquiry’; *Accused A v Callanan* [2009] 2 Qd R 112, 118 [19] (Applegarth J), concerning s 331 of the *Crime and Misconduct Act 2001* (Qld), which provided that ‘[t]he commission may do any or all of the following, despite any proceeding that may be in or before a court ... commence, continue, discontinue or complete an investigation or hearing or any part or aspect of the investigation or hearing’.

19 *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 102 (Dixon J).

20 *ACMA v Today FM* (2015) 317 ALR 279, 295 [64] (Gageler J), citing *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers’ Union of Australia* (1987) 163 CLR 656, 666; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189–90; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 361 [28]; *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 573–4 [82], 576 [90], 578–9 [96], 594–5 [160], 598 [171].

21 *ACMA v Today FM* (2015) 317 ALR 279, 295 [64] (Gageler J) (citations in original).

other action'.²² Although the question of whether an authority or commission is so empowered will be determined by the terms of its empowering statute²³ or terms of reference, the point for present purposes is that, where the commission is so empowered, the formation of the opinion does not involve the exercise of judicial power of the Commonwealth and does not offend Chapter III of the *Constitution*.

There are, however, other limits on what the executive may do when establishing a royal commission. The law of contempt provides one such limit.

The executive has no power to authorise an unlawful act. Hence it cannot authorise a contempt of court.²⁴ In that respect the executive could not, for example, establish a royal commission with the obvious purpose of interfering with the course of justice.²⁵ To the extent the terms of reference of a royal commission are susceptible to ambiguity in this respect, this limitation on power may be relevant to construing those terms. To the extent those terms cannot be read down, this limitation on power affects the lawfulness of the commission itself.

The question that arises in practice is to what extent the establishment of a royal commission to inquire into and report on matters the subject of concluded, extant or foreshadowed litigation, is an impermissible interference with the administration of justice and hence a contempt of court? The answer will depend on the state of the curial proceedings. The various scenarios are addressed in turn below.

A Concluded Proceedings

In respect of concluded proceedings, the executive may establish a royal commission to inquire into and report on matters first ascertained in the course of those earlier proceedings,²⁶ or to inquire into and report on whether the court came to a right conclusion on the facts or the law.²⁷

The seminal case is *Clough v Leahy* (1904) 2 CLR 139. Those proceedings concerned a royal commission established in New South Wales into the Machine Shearers and Shed Employees' Union. The establishment of that Commission was a tactical play in a longer-running turf war between the Australian Workers' Union ('AWU') led by its General Secretary Mr Donald MacDonell, and the Machine Shearers and Shed Employees' Union, led by its Secretary Mr John Leahy. In March 1902 the AWU had applied unsuccessfully to the Industrial

22 Ibid 391 [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

23 See, eg, *Balog* (1990) 169 CLR 625. In *ACMA v Today FM* (2015) 317 ALR 279, 290 [42], French CJ, Hayne, Kiefel, Bell and Keane JJ distinguished the statute at issue in *Balog* from the *Australian Communications and Media Authority Act 2005* (Cth) on the basis that, inter alia, 'ICAC is primarily an investigative body whose investigations are intended to facilitate action by others in combating corrupt conduct. By contrast, [ACMA] is charged with the regulation of broadcasting services including by the enforcement of licence conditions'.

24 *Clough v Leahy* (1904) 2 CLR 139, 155, 161–2 (Griffith CJ), 163 (Barton and O'Connor JJ agreeing).

25 Ibid.

26 Ibid 161 (Griffith CJ), 163 (Barton and O'Connor JJ agreeing).

27 Ibid 162 (Griffith CJ), 163 (Barton and O'Connor JJ agreeing).

Arbitration Court of New South Wales for the cancellation of the registration of the Machine Shearers and Shed Employees' Union. Mr MacDonell appeared on behalf of the AWU in those proceedings. Having modified its rules in an attempt to address the Court's rejection of the application, the AWU reapplied in November that same year for the cancellation of the rival union. The application was again unsuccessful. In June 1903 the AWU made a third application, this time arguing that the Machine Shearers and Shed Employees' Union was not a bona fide union. The Registrar refused the application.²⁸

Having exhausted its curial avenues, on 3 September 1903 Mr MacDonell, who was also a member of the Legislative Assembly, moved in the Assembly for the establishment of a select committee to inquire into and report on an alleged evasion of the *Industrial Arbitration Act 1901* (NSW) by the Machine Shearers and Shed Employees' Union. The select committee procedure was quickly abandoned and substituted for a royal commission. In later litigation in the Supreme Court of New South Wales, Darley CJ indicated he had 'no doubt' that this was done

probably because it was ascertained that the Royal Commission had power under the [*Royal Commissioners Evidence Act 1901* (NSW)], ss 4 and 5, sub-s 2, of compelling the production of books, documents and writings, whereas the select committee had no such power.²⁹

In a remarkable series of events, over the three months from November 1903 to January 1904, three successive royal commissions were established, each one replacing the former. In what can only be described as a brazen conflict of interest, Mr MacDonell accepted appointment as President of the first and a member of the second. He was not appointed to the third, though the seven parliamentary colleagues he had hand-picked for the Select Committee were all appointed as members of it (and had been for each of the previous attempts at constituting the Royal Commission). Finally, on 2 February 1904, a fourth royal commission was issued, with a District Court Judge appointed as its President, and the seven members of Mr MacDonell's Parliamentary Committee, but not Mr MacDonell, also appointed.

The letters patent authorised and appointed these eight Commissioners to inquire into whether the Machine Shearers and Shed Employees' Union was 'an evasion of the *Trade Union Act*, or the *Industrial Arbitration Act*', an 'obstacle to the fair and complete presentation of any dispute which may arise in the pastoral industry to the Industrial Arbitration Court', or hampered the Industrial Arbitration Court 'from doing complete justice in any dispute arising in the pastoral industry'.³⁰ Mr John Leahy, who as noted above was the Secretary of the Machine Shearers and Shed Employees' Union, was summoned to appear before the Commission. The day he attended, Mr MacDonell was also present to instruct counsel.³¹ Mr Leahy refused to be sworn or to give evidence. In fact according to

28 *Australian Workers' Union v Machine Shearers and Shed Employees' Union [No 3]* [1903] AR 366.

29 *Ex parte Leahy* (1904) 4 SR (NSW) 401, 412.

30 *Clough v Leahy* (1904) 2 CLR 139, 141.

31 'Law Report: Monday, May 9', *The Sydney Morning Herald* (Sydney), 10 May 1904, 7.

one contemporaneous report in *The Press*, he ‘flung the Bible on the desk’.³² He was subsequently convicted and fined by a magistrate for his refusal to answer without reasonable excuse.

On an application for prohibition to the Full Court of the Supreme Court of New South Wales, Mr Leahy successfully argued that the Commission was illegal and unconstitutional. Chief Justice Darley indicated that in his view,

the true object of any Royal Commission is to cause enquiry into questions of public interest and for the public good, but that no Royal Commission should be advised by Ministers, or can be legal which has for its object an enquiry into private matters or the subject of litigation between private parties and in which the public have no interest.³³

His Honour was evidently appalled at the antics of Mr MacDonell, the AWU, and the executive more generally:

Here we have a thrice-defeated litigant first obtaining a select committee of the Legislative Assembly, of which committee he is the chairman, to enquire into the subject-matter of the litigation, followed by the appointment of a Royal Commission, of which at first he is made president and the members he had selected for the select committee of the House made members. Common decency at last prevailed, and led to the alteration of this, and after having been made a member of the Royal Commission, he is finally excluded, his nominees, however, remaining as members, a District Court Judge being nominated president ... Is it to be wondered at that the successful litigants refused to give evidence or appear before such a tribunal with its enormous powers of discovery and encroachment upon their private offices and places of business?³⁴

The Chief Justice concluded:

Taking the view I do that the Royal Commission in this case was to enquire into a dispute between two rival unions already three times adjudicated upon and in which the Arbitration Court had full power to do complete justice between the parties, I am of opinion that no public interests were involved, and that the Royal Commission was both illegal and unconstitutional as an unjustifiable attempt to invade private interests and a usurpation of the jurisdiction of a Court lawfully constituted to deal with the same matter.³⁵

Justices Owen and Pring, in separate but concurring opinions, were equally convinced of the illegality of the Royal Commission. Justice Owen was of the opinion that the inquiry directed by the Royal Commission did, ‘in effect’, supersede the Industrial Arbitration Court ‘and relates to a matter which has already been enquired into in that Court and determined, and which may again come before it, and is, therefore, illegal’.³⁶ Justice Pring concluded that the case should ‘for ever be a warning to those who strain the prerogative in order to satisfy the demands of popular clamour’.³⁷

32 United Press Association, ‘The Shearers’ Dispute: Obdurate Witnesses Arraigned Attack on the Commission’, *The Press* (Canterbury, New Zealand), 25 February 1904, 5.

33 *Ex parte Leahy* (1904) 4 SR (NSW) 401, 414–15.

34 *Ibid* 415.

35 *Ibid* 417.

36 *Ibid* 422.

37 *Ibid* 431–2.

The High Court, however, took a different view. On appeal, Griffith CJ (Barton and O'Connor JJ agreeing) started with the principle that the 'power of inquiry, of asking questions, is a power which every individual citizen possesses'.³⁸ Subject to the limitation that the liberty of another can only be interfered with according to law (such that compulsive powers to require a person's attendance or the answering of questions can only be lawfully exercised if empowered by statute), 'every person is free to make any inquiry he chooses; and that which is lawful to an individual can surely not be denied to the Crown'.³⁹ The Crown is no more prohibited from asking impertinent questions than any individual citizen, though the propriety (as opposed to lawfulness) of doing so is an entirely different matter. Unlike the Full Court of New South Wales, the High Court did not consider the establishment of the Royal Commission in this case to involve any interference with the administration of justice and hence any unlawfulness by reason of the previous proceedings (or possibility of future proceedings) before the Industrial Arbitration Court. On the contrary, the Court held:

How the Act does work, and what are its legal effects, can only be authoritatively determined by judicial decision in a suit between two parties; but surely, if, in the course of a suit between two parties, the law is declared to be such as in the opinion of the legislature is unsatisfactory, the Government are not debarred from inquiring into any suggested defects merely because they were first ascertained in the course of legal proceedings.⁴⁰

Taking this reasoning to its conclusion, the Court held that even the prospect of the Royal Commission coming to a contrary opinion to the Industrial Arbitration Court in the prior litigation was of no consequence for the lawfulness of the Royal Commission established by the Governor-in-Council. Because the Commission could not affect any rights declared by the Court to exist as between the litigants, even a direct finding of the Commission that the Court had erred in its prior decisions would not interfere with the administration of justice.⁴¹ There is implicit in this reasoning the logic used by United States Supreme Court Justice Robert H Jackson when penning his famous aphorism almost 50 years later: that the decisions of the courts are not final because they are infallible, but that the decisions are infallible only because they are final.⁴² Accepting the logic of that proposition, since *Clough v Leahy*, the finality of parties' rights in litigation vis-a-vis each other is not in Australia considered sufficient reason to restrain the executive or legislature from establishing a non-curial inquiry into a matter that has been finally determined by a court of law.

38 *Clough v Leahy* (1904) 2 CLR 139, 156.

39 *Ibid* 157 (Griffith CJ).

40 *Ibid* 161 (Griffith CJ).

41 *Ibid* 162 (Griffith CJ).

42 *Brown v Allen*, 344 US 443, 540 (1953).

B Apprehended Proceedings

In respect of allegations not yet the subject of proceedings, in the absence of any law to the contrary, the executive may establish a royal commission to inquire and report on whether any person has been guilty of a crime.⁴³

The facts of *McGuinness v Attorney-General (Vic)* are a case in point.⁴⁴ Following allegations in *The Truth* newspaper that certain persons were collecting funds in order to bribe members of the Victorian Parliament not to pass the Money Lenders Bill of 1938 and the Milk Board Bill of 1939, the Governor-in-Council of Victoria appointed Duffy J of the Supreme Court of Victoria to inquire into and report upon whether, in connection with either Bill, any bribe was accepted by a member of Parliament (and if so, by whom), any bribe was offered (and if so, by whom), and any agreement was entered into to bribe or attempt to bribe any member of Parliament (and if so, by whom). Upon being summoned to give evidence to that Royal Commission, Mr Frank Vincent McGuinness, the editor of *The Truth*, refused to answer the question as to the source of the statements published in that newspaper. His refusal was on the ground, inter alia, that the appointment of the Commission was invalid because its object was to inquire into offences punishable in courts of law.

In five separate judgments, the High Court held that the Royal Commission was not unlawful. Following the earlier decision of *Clough v Leahy*, the Court held that the Victorian Commission did not ‘usurp the functions of any court of justice’,⁴⁵ because it had no power to find any person guilty of giving or receiving a bribe, or to convict or punish any person for such an offence. While ‘in a loose sense’ the activities of such a commission might ‘affect subjects detrimentally’, it could have no effect on their legal rights and duties.⁴⁶

The one qualification recognised by the courts to this general principle is a scenario whereby the executive intends, by the issuing of a commission, to interfere with the course of justice in proceedings not yet commenced.⁴⁷ There is yet to be a case in which a litigant has successfully attracted the benefit of that exception. Apart from far-fetched hypotheticals, it is difficult to conceive of a modern circumstance in which one might.

C Pending Proceedings

A different result applies in respect of pending proceedings. If a royal commission were to be established pursuant to the general power of the Governor-General-in-Council (or Governor-in-Council as the case may be) or pursuant to section 1A of the *Royal Commissions Act 1902* (Cth) (or its cognate provisions) and tasked to inquire into the same matter the subject of pending

43 *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 83 (Latham CJ); *Victoria v ABCEBL Federation* (1982) 152 CLR 25, 50 (Gibbs CJ).

44 (1940) 63 CLR 73.

45 Ibid 84 (Latham CJ).

46 Ibid 90 (Starke J). See also: at 102 (Dixon J).

47 *Victoria v ABCEBL Federation* (1982) 152 CLR 25, 55 (Gibbs CJ).

criminal proceedings, the commission ‘would almost certainly be held to be an interference with the course of justice and consequently to constitute a contempt of court’.⁴⁸ Equally, a commission established pursuant to the general power of the Governor-General or pursuant to section 1A of the *Royal Commissions Act 1902* (Cth) to inquire directly into matters the subject of pending proceedings in the civil courts in a manner prejudicial to those proceedings would be unlawful.⁴⁹

III CONTEMPT AND THE CONDUCT OF A ROYAL COMMISSION

In practice, it is usually the *conduct* of a royal commission, not its establishment, which gives rise to serious questions as to the effect of the royal commission on the due administration of justice. For commissioners and those assisting in the conduct of a royal commission, the boundary that separates permissible conduct of the commission from contempt of court will generally arise in one of three ways:

- first, in determining whether particular lines of inquiry should be pursued at all, and if so, which witnesses should be called and whether the hearings should be held in public or in private. These considerations are, at this point, a matter for counsel assisting in conference with the commissioner. They are not normally discussions held in public and usually do not involve input from persons outside of the commission’s staff and counsel;
- secondly, in circumstances where counsel assisting proceeds to lead evidence concerning a matter the subject of concluded, pending or apprehended proceedings, the issue may arise by reason of an application and submissions made by an interested person to the commissioner that the commission is precluded from further pursuing a particular line of inquiry and ought to cease to do so. Such applications are usually the subject of public hearing and they are not uncommonly the subject of written or oral reasons by a commissioner. Where a commissioner declines to halt the relevant inquiry, an unsuccessful applicant may seek to commence curial proceedings seeking an injunction to restrain the further conduct of the commission (entirely or on a particular issue) or the publication of a report concerning particular matters; and
- thirdly, and finally, the issue is relevant to a commissioner’s decision as to whether to include in his or her report finding as to the rights and liabilities of interested persons, and if so, whether to do so publicly or in a confidential volume of that report.

48 *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 85 (Latham CJ).

49 *Ibid* 85 (Latham CJ).

For each of these scenarios, the relevant principles that govern the interplay between the conduct of a royal commission and the law of contempt are reasonably well settled. The difficulty has proven in practice to be the application of those principles. For that reason, this Part first sets out the applicable principles and then analyses the cases individually. The intent is to provide guidance both for those involved in the conduct of a commission, and for those otherwise interested in that conduct, as to how the principles might be applied in any given case.

A Relevant Principles

Unless authorised by statute (whether expressly or by necessary implication), the conduct of a commission of inquiry otherwise lawfully appointed may be a contempt of court to the extent that it creates a risk of interference, or involves a tendency to interfere, with the administration of justice.⁵⁰ Ordinarily, questions of contempt – except contempt scandalising the court⁵¹ – would not arise with respect to the conduct of a commission at all unless civil or criminal proceedings are pending.⁵² For the purposes of injunctive relief restraining the further conduct of an inquiry on the basis of apprehended contempt of criminal proceedings, the authorities are clear that it is necessary that the criminal proceedings be pending.⁵³ Those authorities would apply a fortiori in relation to civil proceedings.

If *criminal* proceedings are pending, the test applicable to whether a court will restrain all or part of the further conduct of the commission is whether ‘there is a real risk, as opposed to a remote possibility, that justice will be interfered with if the Commission proceeds in accordance with its present intention’.⁵⁴

If *civil* proceedings are pending, the test may be more demanding. In *Victoria v ABCEBL Federation*, Mason J expressed the test as requiring a person seeking to enjoin certain conduct of a commission to establish ‘a substantial risk of serious injustice as an essential qualification of obtaining relief’.⁵⁵ There is a contempt of court ‘only when there is an actual interference with the administration of justice, or “a real risk, as opposed to a remote possibility” that

50 *Victoria v ABCEBL Federation* (1982) 152 CLR 25, 56 (Gibbs CJ), 95 (Mason J), 105 (Murphy J), 129 (Wilson J), 159 (Brennan J).

51 Scandalising the court refers to conduct denigrating the judicial officer or the court and calculated to undermine the public perception of the authority of the court: see *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434.

52 *Sorby v Commonwealth* (1983) 152 CLR 281, 306 (Mason, Wilson and Dawson JJ).

53 *Edelsten v Richmond* (1987) 11 NSWLR 51, 58E (Hope JA), 65D–65E (Priestley JA agreeing), 66 (Clarke JA agreeing); *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 431 [64] (Warren CJ); *A v Boulton* (2004) 136 FCR 420, 431 [43] (Kenny J), 422 [1] (Beaumont J agreeing), 422 [2] (Dowsett J agreeing); *Bartlett v The Queen [No 6]* [2013] WASC 304, [38] (Heenan J); *R v Sellar* (2013) 273 FLR 155, 178–9 [82] (Bathurst CJ). Cf *ML v Australian Securities and Investments Commission* (2013) 276 FLR 1, 7 [25], 10 [40] (Rothman J).

54 *Hammond v Commonwealth* (1982) 152 CLR 188, 196 (Gibbs CJ) (*‘Hammond’*). Justice Mason and Murphy J agreed generally: at 199.

55 (1982) 152 CLR 25, 99.

justice will be interfered with'.⁵⁶ As noted above, actual intention or purpose to interfere is relevant, but never decisive.⁵⁷

B Cases Involving Parallel Criminal Proceedings

Chief Justice Gibbs observed in dicta in *Victoria v ABCBEL Federation* that if a commission is inquiring into allegations that a person has committed a crime, and a criminal prosecution is commenced during that inquiry against that person based on those allegations,

the continuance of the inquiry would, speaking generally, amount to a contempt of court; the proper course would be to do as Townley J did in *Royal Commission Into Certain Crown Leaseholds [No 2]* [[1956] Qd R 239] and adjourn the inquiry until the disposal of the criminal proceedings.⁵⁸

The generality of the statement of Gibbs CJ requires qualification. *Victoria v ABCBEL Federation* involved proceedings parallel to the Royal Commission that were civil proceedings, not criminal. In *Hammond v Commonwealth* (1982) 152 CLR 188 ('*Hammond*') – a case which did concern parallel criminal proceedings – Gibbs CJ repeated these comments,⁵⁹ but the outcome of the case indicates that the determination of lawfulness is fact specific and involves matters of degree.

In *Hammond*, a royal commission was tasked by separate letters patent issued by the Governor-General and Governor of Victoria to inquire into whether malpractices had occurred in the handling of meat. After the letters patent were issued a criminal prosecution was commenced against Mr Hammond alleging that he had conspired to export a prohibited meat export. The Commissioner proposed to direct that further evidence from the accused be taken in private, although permitted the presence of the police officers that had investigated the matters the subject of the allegations.⁶⁰ The accused refused to answer a series of questions directly relevant to issues to be litigated on the hearing of the conspiracy charge against him, and he was temporarily excused.⁶¹

On appeal to the High Court, the majority drew a distinction between the further examination of the accused (which was held to be unlawful) and the further inquiry by the Commission into matters touching and concerning the charges (which was not). In separate but concurring judgments, the Court found there to be a real risk that further examination of the accused by the Commission would interfere with the due administration of justice, and thus granted the injunction sought:

Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the

56 Ibid 56 (Gibbs CJ), quoting *A-G (UK) v Times News Paper Ltd* [1974] AC 273, 299 (Lord Reid).

57 Ibid.

58 Ibid 54.

59 (1982) 152 CLR 188, 198 (Gibbs CJ), 199 (Mason J agreeing), 199 (Murphy J agreeing generally).

60 Ibid 194 (Gibbs CJ).

61 Ibid 195 (Gibbs CJ).

examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.⁶²

Justice Deane (who agreed with the issuing of the injunction to restrain the further examination of the accused) similarly stated:

it is fundamental to the administration of criminal justice that a person who is the subject of pending criminal proceedings in a court of law should not be subjected to having his part in the matters involved in those criminal proceedings made the subject of a parallel inquisitorial inquiry by an administrative tribunal with powers to compel the giving of evidence and the production of documents which largely correspond (and, to some extent, exceed) the powers of the criminal court. Such an extra-curial inquisitorial investigation of the involvement of a person who has been committed for trial in the matters which form the basis of the criminal proceedings against him constitutes, in my view, an improper interference with the due administration of justice in the proceedings against him in the criminal court and contempt of court.⁶³

However, as to the continuation of the inquiry more generally, the majority (Gibbs CJ, Mason, Murphy and Brennan JJ, with Deane J dissenting) held that no injunction was warranted restraining the Commission otherwise inquiring into or reporting on matters touching and concerning the charges. Chief Justice Gibbs (Mason J agreeing) held that as the Commission's inquiries were at an end, an injunction could only be relevant to the Commission's reporting and such an injunction was not warranted because the plaintiff could not establish a real risk that the report would interfere with the administration of justice:

There is no suggestion that the Commissioner will report directly on the question whether the plaintiff is guilty of the offence charged. *It is a mere speculative possibility that anything in his report will affect the plaintiff's trial.* Since it has not been established that there is a real risk that the report will interfere with the administration of justice, the application for order (b) must fail. *It would very seriously impede the conduct of executive inquiries into matters of public importance if no report could be made on a matter which touched and concerned a pending criminal charge. If a report could not be made in such a case, it is difficult to see any reason why the position would be different if the charge was merely contemplated and not pending.* However, as I have said, the theoretical possibility that the trial of an accused person may be prejudiced cannot justify the courts in stultifying proper inquiries into matters of public interest simply because they relate in some way to the subject of a charge. In assessing the likelihood of a prejudice, the court should be entitled to assume that *the executive will exercise a sound discretion in making a decision whether any part of the report that might be prejudicial will be made public while criminal proceedings are pending.*⁶⁴

Justice Murphy found the issue 'troublesome' but ultimately joined in the conclusion that no injunction directed to the Commissioner's report should be issued because any prejudice to the accused from the Commissioner's report 'may not be irreparable'.⁶⁵

62 Ibid 198 (Gibbs CJ). See also: at 199 (Mason J), 201 (Murphy J), 206 (Deane J).

63 Ibid 206.

64 Ibid 199 (emphasis added).

65 Ibid 202.

The importance of *Hammond* is that the mere fact proceedings – even criminal proceedings – are pending is insufficient to justify a court restraining by injunction a royal commission from inquiring into matters that touch and concern the relevant charges. However, a commissioner should exercise restraint and ‘sound discretion’ in making public any aspects of the commissioner’s report that might be prejudicial to pending criminal proceedings. Further, the existence of pending criminal proceedings will be sufficient to prevent a royal commission from compelling evidence from an accused, at least in circumstances where the prosecution will have access to that evidence.

Since *Hammond*, two recent decisions of the High Court have added some measure of complexity to this area of the law, and specifically as to whether an examination in private of an accused person may cure the possibility of a commission of inquiry being in contempt of court in electing to proceed with the examination of an accused. The decisions are *X7 v Australian Crime Commission* (2013) 248 CLR 92 (*‘X7’*) and *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 (*‘Lee’*). Neither concerned a royal commission, but both are relevant insofar as they concerned the validity and exercise of analogous compulsory examination powers in circumstances where the examination was to concern matters the subject of pending criminal proceedings against the examinee. In *X7*, the majority (Hayne, Kiefel and Bell JJ, with French CJ and Crennan J dissenting) held that the *Australian Crime Commission Act 2002* (Cth) did not authorise an examiner to require a person charged with a Commonwealth indictable offence to answer questions about the subject matter of the charged offence. With the addition of Gageler and Keane JJ to the Bench, a majority of the Court in *Lee* (French CJ, Crennan, Gageler and Keane JJ, with Hayne, Kiefel and Bell JJ dissenting) held that the *Criminal Assets Recovery Act 1990* (NSW) did authorise such an examination before the Supreme Court of New South Wales or an officer of such a court.

In *X7*, the majority (Hayne, Kiefel and Bell JJ) held that even if answers given at a compulsory examination are kept secret and restrictions on use prevent them being used directly or indirectly by those responsible for investigating and prosecuting matters charged, ‘the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom’ and was unlawful absent statutory authorisation.⁶⁶ That was said to be because the examination would prejudice the accused in his or her defence. The specific prejudice identified was the inability of an accused person to decide the course to adopt at trial in answer to the charge according only to the strength of the prosecution’s case as revealed by the material provided by the prosecution before, or led at, trial.⁶⁷

In *Lee*, the differently constituted majority (French CJ, Crennan, Gageler and Keane JJ) reached a contrary position in respect of the New South Wales statute

66 (2013) 248 CLR 92, 142 [124] (Hayne and Bell JJ), 152 [157] (Kiefel J substantially agreeing).

67 Ibid 142–3 [124].

there in issue. Chief Justice French distinguished *Hammond* and *X7* on the basis that those decisions concerned interference in the administration of justice by a non-judicial body, whereas the examinations at issue in *Lee* were to be before a court and subject to judicial control and discretion of the kind available under the New South Wales statute.⁶⁸ Justice Crennan relied on that consideration⁶⁹ and further concluded that the legislature had implicitly authorised any resulting interference with the administration of justice.⁷⁰ In their separate reasons, Gageler and Keane JJ did not place reliance on the nature of the examining body. Their Honours indicated their agreement with the observation of French CJ and Crennan J in *X7* that *Hammond* is not authority for the proposition that a real risk to the administration of justice

necessarily, or presumptively, arises by reason only of the exercise of a statutory power to compel the examination on oath of a person against whom criminal proceedings have been commenced but not completed where the subject matter of the examination will overlap with the subject matter of the proceedings.⁷¹

Justices Gageler and Keane considered it critical to the result in *Hammond* (as had French CJ and Crennan J in dissent in *X7*) that ‘criminal proceedings were pending *and* the prosecution was to have access to evidence and information compulsorily obtained which could establish guilt of the offences, and which was subject only to a direct use immunity’.⁷² While their Honours accepted that if a compulsory examination deprives an accused of a legitimate forensic choice it may constitute unfairness amounting to an interference with the due course of justice in a particular case, their Honours did not accept that such a deprivation is made out by a practical constraint on the legal representatives of an accused leading evidence or cross-examining or making submissions in the criminal proceedings to suggest a version of facts which contradicted that given by their client on oath in the examination.⁷³

These various threads may be brought together as follows. A majority of the High Court has now embraced the proposition that *Hammond* is not authority for the proposition that a real risk to the administration of justice

necessarily, or presumptively, arises by reason only of the exercise of a statutory power to compel the examination on oath of a person against whom criminal proceedings have been commenced but not completed where the subject matter of the examination will overlap with the subject matter of the proceedings.⁷⁴

However, the law remains in a state of considerable uncertainty because the differences in the reasoning of the majority in *Lee* compromise the extent to

68 *Lee* (2013) 251 CLR 196, 211–12 [19], 221 [36], 226–7 [47], 228 [49].

69 *Ibid* 259 [151].

70 *Ibid* 259–60 [154].

71 *Ibid* 315 [322].

72 *Ibid*, quoting *X7* (2013) 248 CLR 92, 115 [36] (French CJ and Crennan J) (emphasis added). Note that ‘direct use immunity’ refers to an immunity preventing the *evidence* given by the person from being used against that person. It is narrower than ‘derivative use immunity’ which extends to information, documents and things obtained as a consequence of the person having given evidence.

73 *Lee* (2013) 251 CLR 196, 315 [322].

74 *Ibid*.

which *Lee* provides guidance for the conduct of future royal commissions. Evidently, four members of the Court in *Lee* considered it material to the result in *Hammond* that the prosecution in that earlier case was to have access to evidence and information compulsorily obtained. However, two members of that majority in *Lee* (French CJ and Crennan J) also considered it critical that *Hammond* involved compulsory examination before or by a non-curial body. If lawfulness is contingent on the forum for the examination being a court or before an officer of a court (in his or her capacity as such), no royal commission could ever satisfy that requirement, at least where the only source of the commission's powers are the general powers of a royal commission coupled with the general statutory powers conferred by the *Royal Commission Act 1902* (Cth) or its state cognates. That is, if the result in *Lee* depends upon the nature of the examination being before or by a curial as opposed to non-curial body, then *Hammond* is best understood as still authoritative for the wider proposition that a royal commission cannot compulsorily examine an accused charged in parallel criminal proceedings on matters the subject of those charges without offending the law of contempt. *X7* and *Lee* do not, however, protect persons other than the accused. *Hammond* remains authoritative for the proposition that whatever may be the protected status of an accused person, the mere fact criminal proceedings are pending is by itself insufficient to justify an injunction restraining a commission from otherwise pursuing an inquiry into matters touching and concerning those charges.

C Cases Concerning Parallel Civil Proceedings

Two decisions of the High Court have considered the lawfulness of a royal commission's conduct in continuing with inquiries on matters related to pending civil proceedings: *Lockwood v Commonwealth* (1954) 90 CLR 177 and *Victoria v ABCEBL Federation* (1982) 152 CLR 25.

Lockwood v Commonwealth was a case involving a gagging writ. After counsel assisting the Royal Commission made allegations against him in the course of the Commission's proceedings, Mr Lockwood commenced proceedings alleging slander and libel against counsel assisting the Commission and the Commonwealth (who published the transcript). He further sought an injunction preventing the Commission from exercising any compulsive powers to summon him to give evidence on the matters the subject of the allegations. Justice Fullagar refused the injunction on the basis that 'it would indeed savour of absurdity if an inquiry duly authorized by law could always be stultified by the simple expedient of issuing a writ out of a superior court',⁷⁵ and further, on the basis that the Commission's inquiries were 'expressly authorized by or under a statute' and that the common law of contempt gives way to statute law.⁷⁶ The correctness of the first conclusion cannot be doubted. The correctness of the second was considered in Part I of this article.

⁷⁵ *Lockwood v Commonwealth* (1954) 90 CLR 177, 186.

⁷⁶ *Ibid* 185 (emphasis added).

Victoria v ABCEBL Federation related to the more usual case where a royal commission is established pursuant to the general power of the Governor-General or section 1A of the *Royal Commissions Act 1902* (Cth) and its inquiries overlap with pending civil proceedings that are not in the nature of a gagging writ. As the facts of the case, and specifically the precise terms of reference of the Royal Commission, were of significance to the outcome of the case, it is necessary to outline them in some detail.

The royal commission at issue in *Victoria v ABCEBL Federation* was authorised by two letters patent. The letters patent issued by the Governor-General dated 20 August 1981 appointed Mr Winneke QC to inquire into

whether the Australian Building Construction Employees' and Builders Labourers' Federation ... or any officer or member of the Federation 'in the course of or in relation to the affairs of the Federation, has been or is engaged in activities contrary to a law of the Commonwealth' ...⁷⁷

The letters patent issued by the Governor of Victoria dated 20 August 1981 appointed him to inquire into whether the Federation or any officer or member of it 'in the course of or in relation to the affairs of the Federation, has engaged in any illegal, improper, or corrupt activities (other than activities involving only breaches of the law ... relating to trade unions)' ...⁷⁸

On 25 September 1981, shortly after hearings of the Royal Commission commenced, Victoria, Western Australia and the federal Minister for Industrial Relations, applied to the Federal Court under section 143 of the *Conciliation and Arbitration Act 1904* (Cth) for an order directing the cancellation of the registration of the Federation. The grounds for cancellation relied upon were those set out in sections 143(1)(c), (h) and (j) of that Act,⁷⁹ namely that: the rules of the organisation had not been observed; the conduct of the organisation or a substantial number of its members had prevented or hindered the achievement of an object of the Act; and that the organisation or a substantial number of its members or a section or class of its members had engaged in industrial action that had prevented, hindered or interfered with the provision of any public service. Although those matters were not coextensive with those set out in the Commission's terms of reference (as set out above) it is readily apparent that the two bore a close relationship to each other.

Following the application to the Full Court of the Federal Court for its cancellation, the Federation successfully sought orders in the Federal Court restraining the Royal Commissioner from proceeding with the inquiry in the light of those now pending civil proceedings.⁸⁰ That decision was reversed by the High Court (Gibbs CJ, Mason, Aickin and Wilson JJ, with Stephen and Brennan JJ dissenting).

Chief Justice Gibbs expressed the view that although there was 'some common ground between the matters the subject of inquiry and those relating to

77 *Victoria v ABCEBL Federation* (1982) 152 CLR 25, 105–6 (Murphy J).

78 *Ibid* 111 (Murphy J).

79 *Ibid* 38 (Gibbs CJ).

80 *Ibid* 113 (Aickin J).

the proceedings in the Federal Court', the terms of Mr Winneke's commissions did 'not require him to report into the very matters in issue in the Federal Court proceedings':

There are no specific allegations in the statement of claim in the Federal Court proceedings of any demand or receipt of any improper benefit by any officers of the Federation, although, as I have said, that is the main question that has been the subject of investigation by the Commission. ... [T]he inquiry by the Commissioner is not an inquiry into the matters that fall for decision in the Federal Court. The Commissioner is not concerned to inquire whether any of the grounds set out in s 143(1) of the [Act] ... have been made out. His report is not required to pre-judge any of the issues that arise in the Federal Court, and the evidence before him should not be – and there is no reason to suppose that it will be – directed to those issues.⁸¹

Justice Mason relied upon the fact that the inquiry was to be conducted by an experienced Queen's Counsel 'mindful of the problems of contempt';⁸² his Honour's opinion that the Commission's specific terms of reference did not bear upon the particular issues arising in the Federal Court proceedings; and his Honour's finding that it had not been established (as distinct from speculated) how any resulting prejudice against the Federation would affect the determination of the three judges constituting the bench in the Federal Court proceedings. Although continued public proceedings of the Commission may prejudice or bias the public mind against the Federation, Mason J considered that 'this prejudice, if it arises, will be of a general character and ... will not relate to specific questions arising in the s 143 proceedings'.⁸³

Justice Wilson determined the matter without considering the extent of any overlap between the Commission's inquiries and the Federal Court proceedings, and instead concentrated on the absence of the Federation establishing specific prejudice to it in the Federal Court proceedings.

Justice Aickin was of the opinion that the Federal Court did not have jurisdiction to enjoin the Commission, but indicated that in his view such an order was not warranted in any event because, in addition to the reasons of Wilson J with which he agreed, with the Federal Court proceedings being at a very early stage and the allegations raised in them being long and complex, 'there was no basis for apprehending that at this stage there would be a contempt of the Federal Court'.⁸⁴ The risk of such contempt was 'both slight and remote in time'.⁸⁵

In separate dissenting reasons, Stephen and Brennan JJ considered it relevant⁸⁶ that the pending civil proceedings were not in the nature of a 'gagging writ' issued by a witness before a commission of inquiry so as to attempt to halt the Commission's proceedings. Justice Brennan found that the continuation of

81 Ibid 55–6.

82 Ibid 100.

83 Ibid.

84 Ibid 118.

85 Ibid 119.

86 Ibid 73 (Stephen J), 176 (Brennan J).

the public sitting would ‘as a matter of practical reality tend to prejudice the due administration of justice, particularly by tending to the public prejudgment of the issue as to the cancellation of registration of the [Federation]’.⁸⁷ Both Stephen and Brennan JJ would have upheld the orders of the Full Federal Court enjoining the Commission from further public hearings but not otherwise enjoining the further conduct of the Commission (including any private hearings on the same topics).⁸⁸

From these several statements of reasons it is possible to identify the following matters as being of significance to the outcome in *Victoria v ABCEBL Federation*. First, that no member of the High Court would have considered the further conduct of the Commission in private to have trespassed on the law of contempt. Secondly, that the determination of the extent of any overlap between the Commission’s inquiries and the issues the subject of pending civil proceedings calls for a precise and detailed consideration of the terms of reference and the actual way in which a Commissioner has chosen to proceed. The extent of the overlap is not assessed at a high level of generality, but rather in granular detail. Substantial overlap is necessary, but not sufficient, to warrant restraint of a royal commission’s inquiries. Thirdly, that in order to succeed it is necessary for an applicant for an injunction to establish specific prejudice, and that such prejudice is not established (according to the majority in *Victoria v ABCEBL Federation*) merely by reference to an overlap between the issues the subject of the Commission and those the subject of the curial proceedings. Indeed, even if there had been a direct or greater overlap of issues in *Victoria v ABCEBL Federation*, it seems unlikely that Gibbs CJ, Mason, Aickin and Wilson JJ would have restrained the Commissioner at least in circumstances where the parallel proceedings were civil proceedings not to be tried by jury. Chief Justice Gibbs indicated that where a trial is to be by judge alone

it is not easy to see why the effect of the publication on the public at large should be material ... the fact that the public may form an adverse opinion of one of the parties to litigation does not in my opinion mean that there has been an interference with the due administration of justice, when the public as such plays no part in that administration. The position may be different if the publication exposes the litigant to public and prejudicial discussion of the merits of the facts of his case while it is still pending ...⁸⁹

Justice Mason expressed similar reservations,⁹⁰ as did Wilson J.⁹¹ Their Honours also indicated that there was no prejudice to the Federation in having witnesses which it might call in the deregistration proceedings initially examined and cross-examined in the inquiry on questions relevant to the court proceedings.⁹²

87 Ibid 177.

88 Ibid 75, 77 (Stephen J), 177 (Brennan J).

89 Ibid 57.

90 Ibid 102.

91 Ibid 135.

92 Ibid 103 (Mason J), 131 (Wilson J).

What then, in pending civil proceedings, might constitute a contempt of court? Chief Justice Gibbs indicated that an applicant would need to establish that the conduct of the inquiry in public ‘will deter witnesses from coming forward to give evidence’ in the pending civil proceedings, or ‘will influence the evidence that the witnesses will give’.⁹³ Justice Mason similarly indicated that prejudice in the public mind is of special significance when the parallel litigation is to be tried by a jury or that the conduct of the Commission will put consequential pressure on a party to compromise or abandon its case.⁹⁴ Justice Wilson indicated that the publicity associated with a commission’s inquiry is relevant ‘only to the extent that there is established a real and definite tendency to influence potential witnesses or the judges to behave otherwise than they would if not subjected to the publicity’.⁹⁵

One final decision is of note: *AWB Ltd v Cole [No 4]* [2006] FCA 1050. AWB Ltd (‘AWB’) sought to restrain publication of documents by the Royal Commission that contained references to legal advice it had obtained. AWB contended that publication of the documents would interfere with the disposition of current or future cases in which an issue arose, or might arise, of imputed waiver by AWB of the legal advices.⁹⁶ The application was based solely on principles of contempt of court.⁹⁷

Justice Young rejected the application, holding that publication by the Commission would not increase the risk of AWB’s conduct effecting a waiver of privilege. This was because AWB had done everything within its power to prevent that publication (by making (an unsuccessful) claim to the Commission for confidentiality and making the application for an interlocutory injunction) and the references to legal advices in the documents had essentially the same character as other disclosures that AWB had previously made to the Commission.⁹⁸ For those reasons AWB could not meet the test for restraining an apprehended contempt, namely a real risk of interference with the administration of justice.

D Some Examples of Past Practice

Royal commissions (and other inquiring bodies) have chosen to adopt different approaches to inquiring into or reporting on issues that overlap with those the subject of civil or criminal proceedings. While that practice can provide a helpful guide as to the array of possible options available to a royal commission, there are two dangers in using the practice adopted by different commissions as a guide to the actual limits of a royal commission’s powers.

The first arises because of differences in the terms of reference applicable to different royal commissions. For example, in November 2005, the Hon Terence

93 Ibid 59. See also: at 136 (Wilson J).

94 Ibid 100.

95 Ibid 135.

96 *AWB Ltd v Cole [No 4]* [2006] FCA 1050, [6] (Young J).

97 Ibid [15] (Young J).

98 Ibid [11]–[12] (Young J).

Cole AO RFD QC was commissioned to inquire into, and report on, whether persons or companies connected with the Oil-for-Food Programme in Iraq might have committed a breach of any law of the Commonwealth, a state or territory, and if so, ‘whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency’.⁹⁹ Those terms of reference directly required the Commissioner to inquire into, and report on, whether any person might have breached the law. In contrast, the letters patent establishing the current Royal Commission into Institutional Responses to Child Sexual Abuse provide:

We further declare that you are not required by these Our Letters Patent to inquire, or to continue to inquire, into a particular matter to the extent that you are satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.¹⁰⁰

Secondly, the centrality of matters the subject of curial proceedings to each royal commission will vary significantly between different commissions. For some, it will be inevitable that their inquiries overlap with matters before the courts; for others such overlap is avoidable or non-existent. Different commissioners’ appetites to engage with the potential problem of a possible contempt of court (or even the possibility of an application by an affected person to a court seeking to restrain the further conduct of the commission) will depend on both the precise terms of reference and the significance of the overlapping subject matter for the effective conduct of the commission’s work. Where the possibility of a contempt of court arises – or the possibility of injunction proceedings being brought which allege an apprehended contempt of court – it can detract significant attention and resources away from the work of the commission and its staff. For that reason, decisions to proceed with particular lines of inquiry, or to make findings concerning the rights and liabilities of persons in a final report of the commission, are not lightly taken. In some circumstances of course the costs of testing the boundaries – even successfully – will be thought to outweigh the utility of doing so. The fact a particular commissioner has chosen to adopt a particular course may, and most likely will, reflect both that commissioner’s assessment of the applicable law and the opinion of that commissioner as to what is necessary and appropriate in fulfilling his or her commission. For those reasons the guidance of the case law as to what conduct may trespass upon the laws of contempt is a far more reliable guide to the legal position than examples drawn from past practices of various commissions adopted in differing circumstances.

99 Commonwealth, Royal Commission of Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme, *Report* (2006) vol 5, 13 (app 2: Consolidated Letters Patent).

100 Royal Commission into Institutional Responses to Child Sexual Abuse, *Terms of Reference: Letters Patent* (13 November 2014) <<http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>>.

IV CONCLUSION

In announcing the establishment of Australia's most recent royal commission, Premier Daniel Andrews MP described Victoria's Royal Commission into Family Violence as a 'Royal Commission into the most urgent law and order emergency occurring in our state and the most unspeakable crime unfolding across our nation'.¹⁰¹ It was a statement that reflects the nub of the appeal of royal commissions to an executive government: they are inquiries at the intersection of law and policy and which can publicly consider in a single forum a multitude of case studies on matters of intense public interest. But the Premier's comments also reflect the reasons for why royal commissions will so often need to consider the topic that is the subject of this article. Though usually prosecuted as isolated cases, the disputes of litigants before the courts are frequently ones that also have implications for the law and policy of the country and either are themselves high profile or relate to broader matters of intense public interest. Where the conduct of a royal commission can truly be said to create a risk of interference, or to involve a tendency to interfere with the due administration of justice, the law requires that a royal commission's inquiries be curtailed. But as this article has sought to explain, the application of that test has proved highly nuanced in practice. The courts have shown significant reluctance to restrain the activities of royal commissions on the grounds of an apprehended contempt of court. There is considerable latitude for creativity of process and expression, and perhaps a liberal dose of 'sound discretion', to be used to avoid the actual realisation of a prejudicial conflict between the effective conduct of a royal commission and the administration of justice before the courts.

101 Daniel Andrews, 'Premier Announces Royal Commission into Family Violence' (Media Release, 23 December 2014).