

EDITORIAL

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Inquiries conducted by the non-judicial arms of government are not a novelty. The first public inquiries in Australia were held by the pre-Federation colonial governments.¹ In England, royal commissions find their origins in William the Conqueror's Domesday survey of 1086.² In this sense, inquiries have had a longer history than many fundamental institutions of government in our legal system, such as an elected parliament³ and an independent judiciary.⁴

Despite their ancient origins, inquiries have not lost their contemporary relevance. On the contrary, they are being used for an increasingly diverse range of purposes.⁵ Anti-corruption commissions and royal commissions are frequently given the task of making findings in relation to potential criminal conduct,⁶ a function resembling that which is performed by the courts. To enforce the statutes they administer, bodies like the Australian Securities and Investments Commission⁷ and the Office of the Australian Information Commissioner ('OAIC')⁸ conduct inquiries into alleged breaches of those statutes. Meanwhile, institutions like the Australian Human Rights Commission inquire into controversial areas of law to advise the government on potential areas of law reform.⁹ In these ways, the activities of inquiries are suggestive of the functions of all three branches of government.

* Editor, Issue 38(3), 2015.

1 See Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2006) 2 [1.3].

2 Leonard Arthur Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (Law Book, 1982) 16–17; George Gilligan, 'Royal Commissions of Inquiry' (2002) 35 *Australian and New Zealand Journal of Criminology* 289, 290.

3 Parliament of the United Kingdom, *1265 Simon de Montfort Parliament* <<http://www.parliament.uk/about/living-heritage/evolutionofparliament/2015-parliament-in-the-making/get-involved/2015-banners-exhibition/ross-birrell/1265-simon-de-montfort-parliament-gallery/>>.

4 Lord Justice Brooke, 'Judicial Independence – Its History in England and Wales' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 89; Justice Kiefel, 'Judicial Independence' (Speech delivered at the North Queensland Law Association Conference, Mackay, 30 May 2008).

5 See Prasser, above n 1, 2 [1.4].

6 Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths, 2001) 4–5 [1.2]; Angela Gorta, 'The NSW Independent Commission Against Corruption's Experience in Minimising Corruption' (2008) 11(1) *Asian Journal of Political Science* 1.

7 *Australian Securities and Investments Commission Act 2001* (Cth) pt 3.

8 *Privacy Act 1988* (Cth) pt V.

9 Prasser, above n 1, 104 [5.6] ff; Gilligan, above n 2, 302.

For this and other reasons, the place that inquiries have in our legal system has been subject to some debate. Although calling an inquiry is conventionally described as an executive function,¹⁰ inquiries are usually conducted with a considerable level of independence from other executive agencies.¹¹ This has led to suggestions that commissions of inquiry might belong to a fourth, ‘integrity’ branch of government.¹² Inquiries chaired by serving or former judicial officers have been a particular source of confusion. Even though such inquiries involve the exercise of executive rather than judicial power,¹³ they are often described as ‘judicial’ inquiries.¹⁴ The ambiguities surrounding inquiries conducted by the non-judicial arms of government illustrate the need to clarify how such inquiries are conducted, what purposes they serve and how they interact with the other institutions of government.

These are precisely the issues examined by the four articles in the thematic component of this Issue. Fiona Roughley’s article considers the judiciary’s influence on the establishment and subsequent conduct of royal commissions.¹⁵ More specifically, the article examines how the law of contempt might prevent the executive from establishing a royal commission, and when a court might be able to restrain a royal commission from conducting further inquiries that could amount to contempt. The next article, written by Jodie Siganto and Mark Burdon, considers the method of inquiry that the OAIC adopts for its own-motion investigations into potential breaches of the *Privacy Act 1988* (Cth).¹⁶ It continues to explore the interrelationship between inquiries and other parts of government by discussing how the OAIC’s lack of powers and resources might impede the efficient conduct of its own-motion investigations. The third article, written by Elen Seymour and Marina Nehme, analyses law reforms relating to the regulation

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- 10 Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111 (2009) 53–4 [2.11]; Hallett, above n 2, 10. However, conducting coronial inquests is a judicial rather than executive function: *Musumeci v A-G (NSW)* (2003) 57 NSWLR 193, 199 [33] (Ipp JA); *A-G (NSW) v Mirror Newspapers Ltd* [1980] 1 NSWLR 374, 382F [20] (The Court). For another exception, conducting parliamentary inquiries is a legislative function: *McGrain v Daugherty*, 273 US 135, 175 (Van Devanter J for the Court) (1927).
- 11 Prasser, above n 1, 20–1 [2.23]; Donaghue, above n 6, 16–18 [1.12]; Hallett, above n 2, 48–51.
- 12 Chief Justice J J Spigelman, ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724; David Solomon, ‘What Is the Integrity Branch?’ (2012) 70 *ALAL Forum* 26. Cf Chief Justice Wayne Martin, ‘Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government’ (Speech delivered at the Whitmore Lecture, Sydney, 1 August 2013) 40.
- 13 Chief Justice Murray Gleeson, ‘The Right to an Independent Judiciary’ (Speech delivered at the 14th Commonwealth Law Conference, London, September 2005); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Dalton v New South Wales Crime Commission* (2004) 62 NSWLR 77, 87 [55] (Mason P).
- 14 Murray Gleeson, ‘The Judicial Method: Essential and Inessentials’ (Speech delivered at the District and County Court Judges’ Conference, Sydney, 25 June 2009) 13. See, eg, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 33 (Kirby J).
- 15 Fiona Roughley, ‘Royal Commissions and Contempt of Court: The Effect of Curial Proceedings’ (2015) 38 *University of New South Wales Law Journal* 1123.
- 16 Jodie Siganto and Mark Burdon, ‘The Privacy Commissioner and Own-Motion Investigations into Serious Data Breaches: A Case of Going through the Motions?’ (2015) 38 *University of New South Wales Law Journal* 1145.

of the not-for-profit sector.¹⁷ In doing so, the article exemplifies how non-judicial inquiries like the Senate Repeal Inquiry and the National Commission of Audit can shape the policies adopted by the political organs of government. In the last article in this Issue, Meg Brodie considers the conduct of national inquiries by national human rights institutions ('NHRIs').¹⁸ The article captures the complexities of the interactions between independent inquiries and other parts of the executive by documenting politicians' responses to NHRIs' findings, and emphasising the importance of protecting NHRIs' independence.

The issues explored in these articles are wide-ranging, and the institutions which they examine might at first sight appear to be rather loosely related. However, as illustrated above, there are common threads running through all the articles. I hope that readers will keep searching for these overarching principles and will find the thematic component of this Issue useful in clarifying the roles that non-judicial inquiries play in our legal system.

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17 Elen Seymour and Marina Nehme, 'The ACNC, the Senate, the Commission of Audit and the Not-for-Profit Sector' (2015) 38 *University of New South Wales Law Journal* 1186.

18 Meg Brodie, 'Uncomfortable Truths: Protecting the Independence of National Human Rights Institutions To Inquire' (2015) 38 *University of New South Wales Law Journal* 1215.

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