



Regulatory Litigation

Royal Commissions and Inquiries

Howard Rapke and Roxanne Burd

28 February 2018

Royal Commissions



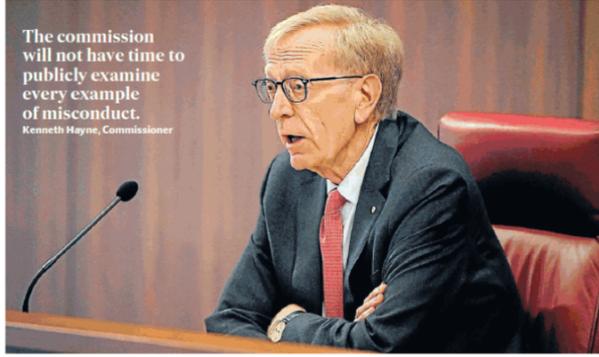
THE AGE
Scrape out the union corruption

Police to probe alleged union corruption

Big banks rapped for missing dirty laundry list deadline



Royal commission head tersely demands more information ▶ Customers not treated honestly
Hayne slaps down banks



The commission will not have time to publicly examine every example of misconduct.
Kenneth Hayne, Commissioner

James Frost
Commissioner Kenneth Hayne has set the tone for a fast but punishing Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry yesterday as he revealed his first targets would be the bank's biggest profit centres and lashed out at the quality of their submissions. At its first public hearing, Commissioner Hayne revealed the banks had been asked to resubmit their homework after fundamentally misunderstanding the initial request for information about the nature, extent and effect of misconduct over the past 10 years. The submissions from the banks have not been adequate with the royal commission shortening the scope of its questions on February 2 but asking for a more comprehensive set of answers. The royal commission has not been deterred, however, and next month it will begin a series of public hearings focused on examples of dishonest and unfair behaviour in the banks' home loan and credit card operations. Disturbing themes were fast emer-

Hanse again
The Turnt demonstra would boo is to have critical On In an in Financial Pauline H a lower co franking c Senator arguments ation expe higher own credit. ▶ N

Banki weigh
Australian by banks i services a S&P/ASX or 0.3 per cent to \$7 cent to \$28 to \$27.70, dropped 2 cash earn \$225.3 mil casts for a ▶ Markets ▶ FT more

Banks to file embarrassing dirty laundry

ANZ's Elliott: submission is confronting

What does it mean for you?

Terms of reference

- What is the scope of the Commission?
- What (and who) will be investigated?
- Be alive to conflicts: are there multiple interests within your organisation or department?

Compulsive powers

- Wide-ranging
- Attendance of witnesses
- Production of documents
- Can use other federal agencies to investigate (eg, AFP)

The team – who will you pick?

- Internal/external:
 - Legal representation?
 - Communications and media advisors?
- Counsel?

Getting organised – first steps

Consider what can be done in advance to prepare

Initial preparation

- Marshalling the evidence: can you run searches to get a sense of potential exposure?
- Are your documents easily accessible?
- How and where are critical documents stored (hard copy, electronic, external storage)?
- Can costs be indemnified under an insurance policy?

Get to know the RC team

- Confucius says you catch more flies with honey than with vinegar
- Get to know the Royal Commission team of Solicitors and Counsel Assisting

Internal resources

- Nominate a person (or team) to be the key point of reference who can report up to the General Counsel or the board
- Do you need to involve IT personnel at the outset?
- Be prepared for some disruption to your business or department for a period of time

Getting organised – first steps

Be mindful of the potential fall out from the outset

- The terms of reference will nominate a due date for publication of the final report
 - Be prepared for the reporting date
 - BUT, note that the report may be tabled and published in advance!
- At the outset, consider the potential fall out:
 - Media publicity?
 - Adverse findings?
 - Referral to another agency for further investigation or prosecution?
 - Subsequent litigation?
- Consider a media strategy early and keep assessing the media approach as the matter evolves

Producing documents and information

Consider requests for documents or information carefully

- Notices to Produce are likely to be the first active step of a Royal Commission
 - HOWEVER, in the Banking Royal Commission general requests for information were made before Notices to Produce were served
 - There may be time pressure to comply
- It is a compulsive notice, akin to a subpoena
 - Consider the breadth of the notice - what type(s) of documents are captured and where do you need to look for them? Consider “documents” beyond emails (eg: SMS; notebooks and handwritten notes; electronic notes stored on computers, phones or tablets)
 - Non-compliance may result in criminal sanctions

Producing documents and information

Documents produced to the Royal Commission may be used in subsequent investigations or litigation

- There is no general discovery obligation *per se*, however it is an offence to:
 - mislead a Royal Commission; or
 - “conceal” a document that is likely to be required to be produced or may be required in evidence
- Assume that any document produced pursuant to a compulsive notice (whether tendered as evidence or not) may be passed on if a matter is referred to another investigative agency (eg ASIC)

Legal professional privilege

Are documents genuinely subject to a claim of legal professional privilege?

Advice privilege

- **Confidential communication** between a lawyer and a client or a **confidential document** brought into existence for the **dominant purpose of giving or obtaining legal advice**

Litigation privilege

- **Confidential communication** between lawyer, a client or a third party or a **confidential document** created for the **dominant purpose of providing legal services in relation to current or anticipated proceedings** in which the **client was or may be a party**

Waiver of privilege

- Strategic advantage or detriment?
- Do you know what is waiting around the corner?

Witnesses

- There is no prima facie right to decide who will give evidence – the Commission will decide for you
 - Usually hearings will be conducted in public (may be streamed live) and witnesses will be summoned to attend
- Consider whether your legal team should attend the testimony of other witnesses
 - Recent Commissions have conducted hearings by way of case studies. Be prepared for an intense week or two of hearings per case study
- Practice directions will set out the procedure before the Royal Commission, including the process for examining witnesses
 - Rules of fairness should, but may not, apply!
- Protections for witnesses:
 - Evidence given by a witness is inadmissible as evidence against that person in subsequent proceedings
 - *Limited* privilege against self-incrimination
 - There is a protection against dismissal for employees who give evidence

Remember: the element of surprise



The rules of procedural fairness, and evidence, do not necessarily apply!

No right to inspect documents produced by other parties that may affect your rights

No right to be notified of private hearings that may affect your rights

No right to call your preferred witnesses

Regulatory investigations and prosecutions

ACCC; ASIC; IBAC

- Many of the considerations that apply to a Royal Commission are applicable to other forms of regulatory investigations
- Like a Royal Commission, each of ASIC, the ACCC and IBAC have powers to compel:
 - the production of documents
 - attendance of witnesses at examinationsNon compliance carries significant penalties
- In recent times IBAC investigations have attracted some prominence

How best can you prepare?

01 Consider the terms of reference early and carefully – what will be your exposure?

02 Be organised and pick your team carefully

03 Do you have sufficient internal resources to handle the Royal Commission process?

04 Expect surprises and possible media attention

05 Assume that everything that is produced may be passed on to other agencies if the matter is referred

06 The final report may not be the conclusion of the matter; a Royal Commission may refer for further investigation or prosecution (eg, AFP or VicPol; ASIC; ACCC), so can IBAC



Thank you

Howard Rapke

Melbourne Managing Partner

T: +61 3 9321 9752

E: howard.rapke@holdingredlich.com

Roxanne Burd

Barrister, Dever's List

T: +61 3 9225 7999

E: rburd@vicbar.com.au

Disclaimer

The information in this publication is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, we do not guarantee that the information in this publication is accurate at the date it is received or that it will continue to be accurate in the future. We are not responsible for the information of any source to which a link is provided or reference is made and exclude all liability in connection with use of these sources.



HOLDING REDLICH