

EXPLANATORY STATEMENT
STATUTORY RULES 1985 NO. 114
ISSUED BY THE AUTHORITY OF THE MINISTER FOR DEFENCE
DEFENCE (INQUIRY) REGULATIONS

Formerly, the three arms of the Defence Force had separate legislative provisions to govern the conduct of service inquiries into matters arising in a service, such as accidents or suspected misconduct. All 3 services had provision for intermediate and lower level inquiries but only the Air Force, through the Air Force Courts of Inquiry Regulations, had provision for a court of inquiry presided over by a judge with full powers to examine service and civilian witnesses. For a full-scale inquiry the Army or Navy needed to have recourse to a Royal Commission or to special legislation.

This Statutory Rule introduces the Defence (Inquiry) Regulations ("the Regulations") which apply to all 3 arms of the Defence Force. The Regulations provide legislative cover for three levels of inquiry:

General Court of Inquiry;

Board of Inquiry; and

Investigating Officer.

A General Court of Inquiry will investigate a matter which concerns the Defence Force and has major ramifications. A Board of Inquiry will investigate a matter of significance to the Defence Force but which does not warrant a quasi-judicial inquiry. An Investigating Officer will investigate minor matters. There is also provision for a Combined Board of Inquiry, to inquire into a matter which involves the armed forces of another country as well as the Australian Defence Force.

A summary of the proposed Regulations is set out at the Annex. The following is a broad outline.

General Courts of Inquiry

- appointed by the Minister, by instrument published in the Gazette.
- President to be a person who is or has been a judge, or a legal practitioner of at least 5 years standing.

- to inquire into and report on specified matters concerning the Defence Force.
- provision for assessors to assist the court, where necessary.
- procedure to be as directed by the President.
- inquiry to be conducted in public, except where privacy necessary in the interests of the defence of the Commonwealth or of fairness to a person affected.
- witnesses may be summoned by President and required to give evidence (unless they have reasonable excuse) on oath or affirmation.
- reasonable excuse includes disclosure of secret process of manufacture or prejudice to the defence of the Commonwealth but does not include self-incrimination. (A witness required to give self-incriminating evidence is protected from subsequent prosecution by sub-section 124 (2B) of the Defence Act).
- a person affected by the inquiry may appear or appoint a representative to appear.
- inquiry to have power to retain documents or articles for copying or testing, subject to compensation for articles destroyed or damaged by testing.
- report to Minister (to include dissenting views, if any).

Boards of Inquiry

- appointed by the Chief of the Defence Force separately or together with the Secretary to the Department of Defence to inquire into and report on specified matters concerning the Defence Force.
- appointed by the Chief of Naval Staff, the Chief of the General Staff or the Chief of the Air Staff to inquire into and report on specified matters concerning the Navy, Army or Air Force.

- . power to appoint may be delegated to officers holding rank not below Navy Commander or equivalent.
- . President to be an officer of the Defence Force.
- . procedure as directed by appointing authority.
- . inquiry not to be in public unless directed by appointing authority.
- . witnesses may be summoned by President and required to give evidence (unless they have reasonable excuse).
- . evidence on oath or affirmation only where a person may be affected by the inquiry.
- . similar "reasonable excuse" provisions to those for General Court of Inquiry.
- . representation by legal practitioner only with approval of President or appointing authority.
- . report to appointing authority (to include dissenting views, if any).

Combined Boards of Inquiry

- . appointed by the Minister to inquire into and report on specified matters concerning the Defence Force and the armed forces of another country.
- . Minister's power to appoint may be delegated to a chief of staff.
- . at least one member to be an officer of the Defence Force.
- . one member to be from armed forces of other country affected.
- . provision for combined presidency, if required.
- . procedure, duties of witnesses and rights of persons affected similar to those for Board of Inquiry.

- report to Minister and authorities responsible for armed forces of other countries participating in inquiry (to include dissenting views, if any).

Provisions Relating to General Courts of Inquiry, Boards of Inquiry and Combined Boards of Inquiry

- not bound by rules of evidence.
- persons affected entitled to submit written statement.
- member of Defence Force (but not off-duty reservist) may be ordered to give evidence.
- prospective witnesses may be excluded while another witness is giving evidence.
- witnesses may be cross-examined.
- penalties for false evidence and contempt.
- members and persons appearing have protection and immunity corresponding to that for High Court justices, barristers and witnesses.
- President may prohibit disclosure of evidence.
- records and reports obtained during course of inquiry not to be disclosed, unless with Minister's authorization.
- fair and accurate account of proceedings or report may be published, unless subject to prohibition order.
- evidence given by a member of the Defence Force not admissible against the member before a service tribunal (except in a prosecution for an offence against the Regulations).

Investigating Officers

- Officer of the Defence Force appointed by commanding officer to investigate matter concerning appointing officer's command.

- procedure as directed by appointing officer.
- inquiry not to be in public and evidence not to be taken on oath or affirmation.
- member of Defence Force may be required to give evidence, subject to reasonable excuse.
- report to be furnished to appointing officer.
- the same provisions in relation to procedures, production of evidence, false evidence, contempt, protection and immunity, disclosure and publication of records or reports, and admissibility of evidence before service tribunals applied to Investigating Officers as pertain to General Courts and Boards.

Commencement

The Regulations will come into operation on 3 July 1985.

S.R. 57/81

DEFENCE (INQUIRY) REGULATIONSNOTES ON REGULATIONSPART I - PRELIMINARY

Regulation 1 - Citation

The Regulations are cited as the Defence (Inquiry) Regulations.

Regulation 2 - Commencement

The Regulations come into operation on 3 July 1985

Regulation 3 - Interpretation

Certain terms and references are defined or interpreted for the purposes of the Regulations.

PART II - GENERAL COURTS OF INQUIRY

Regulation 4 - Interpretation of Part II

Certain terms or references are defined or interpreted for the purposes of Part II of the Regulations.

Regulation 5 - Appointment of General Courts of Inquiry

The Minister for Defence is authorized, by instrument published in the Gazette, to appoint a General Court of Inquiry.

Regulation 6 - Constitution

A General Court of Inquiry may be constituted by one or more persons, at least one being an "eligible person" (defined as a Judge or legal practitioner of not less than 5 years standing). There is also provision for a General Court of Inquiry constituted by more than one member to continue to perform its functions notwithstanding a vacancy or vacancies in the membership of the Court.

Regulation 7 - President

The person constituting a one-member General Court of Inquiry is automatically President. Where the Court is constituted by more than one member, the Minister, by instrument published in the Gazette, appoints an eligible member as its President.

Regulation 8 - Assessors

The Minister may, by instrument published in the Gazette, appoint 2 or more assessors to assist a General Court of Inquiry constituted by one member.

Regulation 9 - Secretary

The Minister may, by instrument in writing, appoint a secretary to a General Court of Inquiry.

Regulation 10 - Procedure

The procedure of a General Court of Inquiry is directed by the President.

Regulation 11 - Conduct of Inquiries in Public or Private

Inquiries are conducted in public unless the President, in the interests of the defence of the Commonwealth or of fairness to a person who may be affected, directs that the inquiry be held in private or orders that a person or class of persons should be excluded. The President may authorize reasonable action necessary to give effect to an order excluding a person or class of persons.

Regulation 12 - Summoning of Witnesses

The President of a General Court of Inquiry may summon persons to give evidence or produce documents or articles at an inquiry.

Regulation 13 - Manner of Taking Evidence

A General Court of Inquiry may take evidence on oath or affirmation.

Regulation 14 - Duties of Witnesses

Witnesses summoned before a General Court of Inquiry and paid reasonable travelling costs must:

- (a) appear before the Court, unless excused by the President;
- (b) be sworn or make an affirmation when required by the President;
- (c) answer relevant questions; and
- (d) produce relevant documents or articles when required by the President.

Sub-regulation 14(5) provides that a witness is not excused from answering a question on the ground that the answer might incriminate the witness. However, in these circumstances, subsection 124(2B) of the Defence Act 1903 provides that where a person has been compelled to give evidence under a provision such as sub-regulation 14(5), that evidence is not admissible against the person in criminal or civil proceedings (except in a prosecution for false testimony at the inquiry).

The penalty for failing, without reasonable excuse, to comply with these provisions is \$500 or 3 months imprisonment. Sub-regulations 14(6) and 14(7) provide that it shall be a reasonable excuse to refuse to answer a question or produce documents or articles if to do so might disclose a secret process of manufacture or prejudice the defence of the Commonwealth.

Regulation 15 - Appearances

A Chief of Staff is authorised by the Regulations to appear before a General Court of Inquiry, and the President may authorize the appearance of any person whom he considers may be affected by the inquiry. A person authorized to appear may be represented by another person.

Regulation 16 - Copy of Evidence Affecting a Person

Where the President of a General Court of Inquiry considers that a person, not present at or represented before the Court, may be affected by evidence given, the President may forward a copy of the evidence to that person and inform the person of a right to apply to appear or to submit a written statement relevant to the inquiry.

Regulation 17 - Powers in Relation to Documents or Articles Produced

A General Court of Inquiry may retain articles or documents produced before it, take copies of and extracts from such documents and order the carrying out of tests on such articles. The Commonwealth is liable for losses occasioned by damage to or destruction of articles tested.

Subject to the foregoing, documents and articles produced before an inquiry must be returned to the person who produced them.

Regulation 18 - Preparation of Report

The President of a General Court of Inquiry must prepare a report setting out the Court's findings together with observations or recommendations arising from those findings. There is provision for other members to see and sign the report or, where there is dissent, for members to furnish separate statements.

Regulation 19 - Role of Assessors in Relation to Report

Assessors are to be given a reasonable opportunity to examine the report of a General Court of Inquiry and, where an assessor disagrees with a finding, observation or recommendation, there is provision for a statement recording the reasons for that disagreement to be furnished to the President.

Regulation 20 - Furnishing of Report

The report of a General Court of Inquiry, together with any assessor's statement and copies of all evidence (including records of oral evidence), must be furnished to the Minister.

Regulation 21 - Dissolution or Reconstitution of Court on Death etc of Member

This regulation sets out the procedure for dissolving or reconstituting a General Court of Inquiry where a member dies or ceases to be a member for another reason.

PART III - BOARDS OF INQUIRY

Regulation 22 - Interpretation of Part III

A term and a reference are defined for the purposes of Part III of the Regulations.

Regulation 23 - Appointment of Boards of Inquiry

The Chief of the Defence Force and the Secretary to the Department of Defence, acting concurrently, may appoint a Board of Inquiry to inquire into matters relating to the administration of the Defence Force; the Chief of the Defence Force may appoint a Board of Inquiry to inquire into other matters relating to the Defence Force; and the Chief of Naval Staff, the Chief of the General Staff and the Chief of the Air Staff may appoint a Board of Inquiry to inquire into matters relating to their respective services. In all cases the appointing authority may add to, vary or revoke the appointment.

Regulation 24 - Delegation of Power to Appoint Boards

A chief of staff may delegate the power to appoint a Board of Inquiry to an officer not below the rank of Navy Commander, or equivalent.

Regulation 25 - Power to Make Recommendations

The instrument of appointment is to stipulate whether a Board of Inquiry may make recommendations arising from its findings.

Regulation 26 - Constitution

A Board of Inquiry shall be constituted by 2 or more persons and shall include at least one officer.

Regulation 27 - President

The appointing authority shall appoint as President an officer who is a member of the Board of Inquiry.

Regulation 28 - Procedure

The procedure of a Board of Inquiry shall be as directed by the appointing authority.

Regulation 29 - Conduct of Inquiries in Private or in Public

The proceedings of a Board of Inquiry shall be conducted in private unless the appointing authority directs that it be held in public, completely or in part, or that a person or class of persons be present. If such a direction be made the President may still direct that all or part of an inquiry be held in private, or give directions to, or make an order excluding, a person or class of persons, in the interests of the defence of the Commonwealth or of fairness to a person affected by the inquiry. In these circumstances the President may authorize a person to take such reasonable action as is necessary to give effect to an order excluding a person or class of persons.

Regulation 30 - Summoning of Witnesses

The President of a Board of Inquiry may summon persons to give evidence or produce documents or articles at an inquiry.

Regulation 31 - Manner of Taking Evidence

A Board of Inquiry shall not take evidence on oath or affirmation unless the appointing authority directs that such a procedure be followed, by reason of fairness to a person who may be affected by the inquiry.

Regulation 32 - Duties of Witnesses

Witnesses summoned before a Board of Inquiry and paid reasonable travelling costs must:

- a. appear before the Board unless excused by the President;
- b. be sworn or make an affirmation (where evidence is to be received in that manner);
- c. answer relevant questions; and
- d. produce relevant documents or articles where required by the President.

Sub-regulation 32(5) provides that a witness is not excused from answering a question on the grounds that the answer might incriminate that witness. However, in these circumstances, sub-section 124(2B) of the Defence Act 1903 provides that where a person has been compelled to give evidence under a provision such as sub-regulation 32(5) that evidence is not

admissible against the person in criminal or civil proceedings (except in the case of a prosecution for false testimony at the Board of Inquiry).

The penalty for failing, without reasonable excuse, to comply with these provisions is \$500 or 3 months imprisonment. Sub-regulations 32(6) and 32(7) provide that it shall be a reasonable excuse to refuse to answer a question or produce documents or articles if to do so might disclose a secret process of manufacture or prejudice the defence of the Commonwealth.

Regulation 33 - Appearances

The President of a Board of Inquiry may authorize the appearance of any person whom he considers may be affected by the inquiry. A person authorized to appear may be represented by another person but not by a legal practitioner unless approved:

- a. - where the Inquiry has commenced - by the President; or
- b. - in any other case - by the appointing authority.

Regulation 34 - Copy of Evidence Affecting a Person

Where the President considers that a person (not being an officer of higher rank than the President), who is not present at or represented before a Board of Inquiry, may be affected by evidence given, the President may forward a copy of the evidence to that person and inform the person of a right to apply to appear or to submit a written statement relevant to the inquiry.

Regulation 35 - Senior Officer Affected by Evidence

Where, in the President's opinion, an officer of higher rank than the President may be affected by evidence, the President must inform the appointing authority of that opinion and furnish the authority with copies of the relevant evidence. The Inquiry is then automatically suspended until an officer of a higher rank than the officer who may be affected is appointed President, or the Board is directed to continue or is dissolved by the appointing authority.

Regulation 36 - Report of Board of Inquiry

The President of a Board of Inquiry shall prepare a report, to be signed by each member, setting out the Board's findings and (if so empowered) recommendations arising from those findings. Where there is dissent each member shall furnish separate statements in writing which shall comprise the report.

The Board's report, together with copies of all evidence (including records of oral evidence) must be furnished to the appointing authority.

Regulation 37 - Dissolution or Reconstitution of Board of Inquiry on Death etc of Member

This regulation sets out the procedure for dissolving or reconstituting a Board of Inquiry in circumstances where a member dies or otherwise ceases to be a member.

PART IV - COMBINED BOARDS OF INQUIRY

Regulation 38 - Interpretation of Part IV

A term and a reference are defined for the purposes of Part IV of the Regulations.

Regulation 39 - Appointment of Combined Boards of Inquiry

The Minister is authorized to appoint, by instrument, a Combined Board of Inquiry to inquire into matters concerning the Defence Force that involve the armed forces of another country or countries.

Regulation 40 - Delegation of Power to Appoint a Combined Board of Inquiry

The Minister may, by instrument, delegate to a chief of staff the power to appoint a Combined Board of Inquiry.

Regulation 41 - Power to Make Recommendations

The instrument of appointment is to stipulate whether a Combined Board of Inquiry may make recommendations arising from its findings.

Regulation 42 - Constitution

A Combined Board of Inquiry shall be constituted by 2 or more persons, shall include at least one officer, and shall include at least one person from each participating country.

Regulation 43 - President

The Minister shall, in the instrument of appointment, appoint a member of a Combined Board of Inquiry to be President, and may appoint 2 or more members to be Presidents.

Regulation 44 - Persons to Assist a Combined Board of Inquiry

The Minister may appoint a person or persons qualified to practice law in a participating country or countries, to assist a Combined Board of Inquiry.

Regulation 45 - Procedure, Summoning of Witnesses etc

Regulation 28 and regulations 30 to 34 (inclusive), concerning procedure and the summoning of witnesses, are applied to a Combined Board of Inquiry as if references to a Board of Inquiry were to a Combined Board of Inquiry and references to the appointing authority were to the Minister.

Regulation 46 - Conduct of Inquiries in Private or in Public

The proceedings of a Combined Board of Inquiry shall be conducted in private unless the Minister directs that it be held in public, completely or in part, or that a person or class of persons be present. If such a direction is made the President may still direct that all or part of the Inquiry be held in private, or exclude or give directions to a person or class of persons, in the interests of the defence of the Commonwealth, or of fairness to a person affected by the inquiry.

In these circumstances the President may authorize a person to take such reasonable action as is necessary to give effect to his direction.

Regulation 47 - Report of a Combined Board of Inquiry

The President of a Combined Board of Inquiry shall prepare a report, to be signed by each member, setting out the Board's findings and (if so empowered) recommendations arising from those findings. Where there is dissent each member shall furnish separate statements which shall comprise the report.

Signed copies of the Board's report shall be furnished to the Minister and, in the manner specified by the Minister, to the authorities responsible for the armed forces of participating countries, together with copies of all evidence (including records of oral evidence).

Regulation 48 - Reconstitution of Combined Board of Inquiry on Death etc of Member

This regulation enables the Minister to appoint a new member where a person ceases to be a member of a Combined Board of Inquiry.

PART V - GENERAL PROVISIONS RELATING TO COURTS OF INQUIRY

Regulation 49 - Times and Places for Conduct of Inquiries

An inquiry shall be conducted at such times and places as the President determines, and may be conducted within or outside Australia.

Regulation 50 - Informal Procedures etc

An Inquiry shall be conducted without regard to legal forms, shall not be bound by the rules of evidence, and may gather such relevant information as it thinks fit.

Regulation 51 - Legal Practitioners Assisting a Court of Inquiry

The appointing authority may appoint a legal practitioner to assist an inquiry.

Regulation 52 - Statement by Person Affected

Where the President of a Court of Inquiry considers that a person may be affected by the inquiry, the President shall grant leave to that person to submit a written statement to the Court.

Regulation 53 - Evidence by Members of the Defence Force

A Court of Inquiry may, for the purpose of assisting the inquiry, order a member of the Defence Force to give evidence or to produce documents or articles.

Regulation 54 - Exclusion of Prospective Witnesses

If satisfied that it is necessary to do so in the interests of the defence of the Commonwealth, or in fairness to a person who may be affected by the inquiry, the President may order that a prospective witness not be present during the taking of the evidence of another witness and may authorize the taking of reasonable action to enforce that order.

Regulation 55 - Examination of Witnesses

A witness appearing before a Court of Inquiry may be examined on any matter relevant to the inquiry, subject to the President's power, under this regulation, to disallow any question.

Regulation 56 - False Evidence

It is an offence punishable by a penalty of \$500 or 3 months imprisonment to give false evidence before a Court of Inquiry.

Regulation 57 - Contempt of a Court of Inquiry

This regulation prescribes offences which shall be a contempt of a Court of Inquiry.

Regulation 58 - Termination of Appointment of Member etc of a Court of Inquiry

The appointing authority may terminate the appointment of a member of a Court of Inquiry on the ground of physical or mental incapacity.

Regulation 59 - Duties of Court on Lifting of Suspension

After the lifting of a suspension and unless dissolved or deemed dissolved, a Court of Inquiry shall continue the Inquiry and, when making its report, shall take into account evidence received before and after the suspension.

Regulation 60 - Fees and Allowances

This regulation provides for fees, allowances and expenses to be paid to members of Courts of Inquiry, assessors and witnesses. Judges, members of the Defence Force rendering service, public servants of the Commonwealth or a Territory or members of the armed forces of another country, are excluded.

Regulation 61 - Protection of Courts of Inquiry

Persons connected with Courts of Inquiry (eg witnesses, members, lawyers etc) have the same protection and immunities as if they were appearing in that capacity in the High Court.

Regulation 62 - Directions Regarding Disclosure of Evidence

In the interests of the defence of the Commonwealth, or in fairness to a person affected by the inquiry, the President may make an order prohibiting the disclosure of evidence received by the inquiry.

Regulation 63 - Disclosure of Records or Reports of Courts of Inquiry

This regulation prohibits the disclosure of the records or report of a Court of Inquiry, except on the authority of the Minister.

Regulation 64 - Protection of Certain Publications

This regulation prohibits the institution of civil or criminal proceedings on the basis of the publication of a fair and accurate account of the public proceedings of a Court of Inquiry or the lawful publication of the report of an inquiry.

Regulation 65 - Admissibility of Statements etc before Service Tribunals

This regulation provides that a statement or disclosure made before a Court of Inquiry by a member of the Defence Force other than a statement which the member has been compelled to make, is not admissible against that person in proceedings before a service tribunal (except in a prosecution for an offence against the regulations).

Regulation 66 - Re-opening of Inquiry

Where a Court of Inquiry has completed its inquiry and the appointing authority considers that the Court should re-open the inquiry and investigate further matters, it may direct the Court to do so.

Regulation 67 - Duration and Dissolution of a Court of Inquiry

This regulation provides that a Court of Inquiry will continue to exist for 2 months after the completion of its inquiry.

PART VI - INVESTIGATING OFFICERS

Regulation 68 - Interpretation of Part VI

A term and a reference are defined for the purposes of Part VI of the Regulations.

Regulation 69 - Appointment of Investigating Officers

This regulation provides that an Investigating Officer may be appointed by a commanding officer or an officer holding an appointment superior to that of commanding officer.

Regulation 70 - Power to Make Recommendations

The instrument of appointment is to stipulate whether an Investigating Officer may make recommendations arising from any findings.

Regulation 71 - Procedure

The procedure to be followed by an Investigating Officer shall be as directed by the appointing officer.

Regulation 72 - Conduct of Inquiries in Private

This regulation provides that an Investigating Officer's inquiry shall not be conducted in public.

Regulation 73 - Manner of Taking Evidence

This regulation provides that an Investigating Officer shall not take evidence on oath or affirmation.

Regulation 74 - Duties of Witnesses

A member of the Defence Force appearing as a witness before an Investigating Officer must:

- a. answer relevant questions; and
- b. produce relevant documents or articles where required.

The penalty for failing to comply with these provisions is \$500 or 3 months imprisonment. Sub-regulations 74(3) and 74(4) provide that it shall be a reasonable excuse to refuse

to answer a question or produce documents or articles if to do so might disclose a secret process of manufacture or prejudice the defence of the Commonwealth.

Regulation 75 - Report of Investigating Officer

An Investigating Officer shall prepare a report setting out the Investigating Officer's findings and (if so empowered) recommendations arising from those findings. The report, together with copies of evidence (including records of oral evidence), shall be furnished to the appointing officer.

Regulation 76 - Re-opening of Inquiry

Where an Investigating Officer has completed an inquiry and the appointing officer considers that the Investigating Officer should re-open the Inquiry and investigate further matters, the appointing officer may direct the Investigating Officer to do so.

Regulation 77 - Duration and Termination of Appointment

The appointment of an Investigating Officer continues for 2 months after the completion of the inquiry (including a re-opened inquiry) but the appointment may, at any time, be terminated by the appointing officer.

Regulation 78 - Application of Provisions to Investigating Officers

The regulation applies, to an Investigating Officer, the same provisions in relation to procedures, production of evidence, false evidence, contempt, protection and immunity, disclosure and publication of records and reports, and admissibility of evidence before service tribunals, as pertain to General Courts and Boards of Inquiry.

SCHEDULE

The schedule sets out a form of oath and a form of affirmation.

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