

EXPLANATORY STATEMENT

Issued by the Authority of the Assistant Minister to the Prime Minister

Royal Commissions Act 1902

Royal Commissions Amendment (Service of Documents) Regulations 2018

Outline

The *Royal Commissions Act 1902* (the Act) provides for the establishment and operation of Royal Commissions. The Act also confers certain powers on Royal Commissions to obtain information.

Section 17 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that the Act requires or permits to be prescribed, or necessary and convenient for carrying out or giving effect to the Act.

The *Royal Commissions Amendment (Service of Documents) Regulations 2018* (the Regulations) amend the *Royal Commissions Regulations 2001* (the Principal Regulations) in relation to the service of notices and summonses.

The Regulations detail how a Royal Commission may serve notices requiring a person to give written information to it. The power to issue these notices was inserted into the Act by the *Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Act 2018*, which commenced on 21 February 2018. This amendment implemented a recommendation of the Royal Commission into the Home Insulation Program (paragraph 1.3.39).

The Regulations largely remake, with minor structural amendments, the existing regulations in relation to the personal service of notices and summonses on individuals and corporations, and also provide for additional ways for Royal Commissions to serve notices and summonses on named persons, namely by:

- handing the notice or summons to a legal practitioner who is authorised to receive the document on behalf of the named person;
- serving the notice or summons in a particular way where this has been agreed in writing with the named person; and
- (in relation to a notice only) by sending it by pre-paid post addressed to the person, where the Royal Commission has previously served that person with a notice.

These changes implement recommendation 77 of the final report of the Royal Commission into Trade Union Governance and Corruption.

The Regulations apply to Royal Commissions commenced on or after the Regulations come into effect, as well as the Royal Commission into Aged Care Quality and Safety established by Letters Patent dated 8 October 2018.

However, the changes do not apply to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Financial Services Royal Commission), established by Letters Patent dated 14 December 2017, because it has largely concluded its evidence-gathering by the time the Regulations took effect. Instead, the previous regulations continue to apply to the Financial Services Royal Commission.

Consultation was undertaken with Commonwealth agencies and the Royal Commission into Aged Care Quality and Safety, who supported the Regulations.

Details of the Regulations are set out in the Attachment.

The Act does not specify conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence the day after registration.

Authority: Section 17 of the *Royal Commissions Act 1902*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Royal Commissions Amendment (Service of Documents) Regulations 2018

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The *Royal Commissions Act 1902* (the Act) provides for the establishment and operation of Royal Commissions. The Act also confers certain powers on Royal Commissions to obtain information.

Section 17 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that the Act requires or permits to be prescribed, or necessary and convenient for carrying out or giving effect to the Act.

The purpose of the *Royal Commissions Amendment (Service of Documents) Regulations 2018* (the Regulations) is to amend the *Royal Commissions Regulations 2001* (the Principal Regulations) in relation to the service of notices and summonses.

In particular, the Regulations detail how a Royal Commission may serve notices requiring a person to give written information to the Royal Commission. The power to issue these notices was inserted into the Act by the *Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Act 2018*, which commenced on 21 February 2018. This amendment implemented a recommendation of the Royal Commission into the Home Insulation Program (paragraph 1.3.39).

The Regulations also detail how a Royal Commission may serve others notices and summonses on named persons. The Regulations remake the existing provisions, which provide that a notice or summons may be served personally on the named person (whether an individual or a corporation). In addition, the Regulations provide additional ways service of a notice or summons may be effected, namely by:

- handing it to a legal practitioner who is authorised to receive the summons on behalf of the named person;
- serving it in a particular way which was agreed to in writing by the named person; and
- (in relation to a notice only) sending it by pre-paid post addressed to the person, where the Royal Commission has previously served that person with a notice.

These changes implement recommendation 77 of the final report of the Royal Commission into Trade Union Governance and Corruption.

Human Rights Implications

This Legislative Instrument engages the following rights:

- The right to a fair hearing—article 14 of the International Covenant on Civil and Political Rights (ICCPR); and

- The right to protection against arbitrary and unlawful interference with privacy and reputation—article 17 of the ICCPR.

The right to a fair hearing (article 14 of the ICCPR)

The Regulations detail how a Royal Commission may serve notices and summonses on persons to give information or a statement in writing. It is an offence to not comply with such a notice or summons.

Because the Regulations provide for the manner in which notices and summonses are served on a person and support powers in the Act to compel production of information, testimony and documents, it might be contended that the Regulations engage Article 14(3)(g) of the ICCPR. Article 14(3)(g) specifies that in the determination of criminal charges, an individual is not to be compelled to testify against themselves or to confess guilt.

A Royal Commission has powers to effectively investigate matters of public importance, while ensuring a person's own statements cannot be used against them in subsequent proceedings, criminal or civil. It does not determine criminal charges as it is not a court or tribunal and cannot adjudicate on a person's guilt or civil liability.

Section 6A of the Act provides that it is not a reasonable excuse for a person to refuse or fail to produce a document or thing, or to answer a question, on the ground that doing so might incriminate the person or make the person liable to a penalty. This abrogates the privilege against self-incrimination.

This provision is balanced by section 6DD of the Act, which provides that statements or disclosures made by a person in the course of giving evidence to a Royal Commission, or the production of a document or thing in response to a summons or notice to produce, are not admissible in evidence against that person in 'any civil or criminal proceedings' in any Australian court, unless the proceedings are for an offence against the Act. Accordingly, the abrogation of the right against self-incrimination by the Act is limited.

The limited abrogation of the right against self-incrimination by the Act is for the purpose of supporting a Royal Commission's function to inquire and report on matters of public importance. This limited abrogation is reasonable, necessary, and appropriate for the purpose of equipping Royal Commissions with investigative powers.

To the extent that the Act does abrogate the right to a fair hearing, the extent of the abrogation is limited and safeguarded by section 6DD which ensures that any self-incriminating evidence given by a person to a Royal Commission is inadmissible in any subsequent proceeding.

The right to protection against arbitrary and unlawful interference with privacy and unlawful attacks on reputation (article 17 of the ICCPR)

The Regulations provide for the ways in which a Royal Commission may serve notices and summonses on persons to give information or a statement in writing. The right to privacy is engaged to the extent that a notice of that kind may require a person to give personal information.

The collection and use of that personal information is a proportionate limitation of the right to privacy in pursuit of a legitimate objective to ensure a Royal Commission can fully inquire

into, and report on, matters of public importance. This limitation is provided by law and is not arbitrary. The limitation is safeguarded by section 6D, which contains provisions for allowing a person to request that their evidence be taken in private where the evidence relates to the profits or financial position of any person and taking of the evidence in public would be unfairly prejudicial to the interests of that person. Section 6D(3) gives the Royal Commission power to make a non-publication direction for any evidence given to it.

Section 6P of the Act provides that potentially private evidence given by a person to a Royal Commission may be communicated to office holders such as the police or the Director of Public Prosecutions where the Commissioner considers it appropriate to do so and where the evidence relates to a contraventions of a law. This limitation on the right to privacy is justified because it is for the legitimate purpose to pursue proper investigation of contraventions of a law.

Conclusion

The Regulations are compatible with human rights because to the extent that it may limit human rights to a fair trial and privacy, those limitations are reasonable, necessary and proportionate.

Detail of the *Royal Commissions Amendment (Service of Documents) Regulations 2018*

Section 1 – Name

This section provides that the title of the Regulations is the *Royal Commissions Amendment (Service of Documents) Regulations 2018*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after registration.

Section 3 – Authority

This section provides that the Regulations are made under the *Royal Commissions Act 1902*.

Section 4 – Schedules

This section provides that each instrument specified in a Schedule to the Regulations is amended or repealed as provided for in the applicable Schedule and any other item in a Schedule will have effect according to its terms.

Schedule 1 – Amendments

Item 1 – Regulation 6

This item repeals the existing Regulation 6 (Service of notices and summonses) and substitutes a new Regulation 6 (Service of notices and summonses). This item provides that Regulation 6 pertains to the service of notices and summonses for the purposes of a Royal Commission on a person named in the notices or summonses in a way specified by the Regulation.

The new subregulations 6(2) and 6(3) are equivalent to the existing subregulations 6(a) and 6(b), making only minor structural amendments. Subregulation 6(2) provides for personal service of a notice or summons on an individual. Subregulation 6(3) provides for personal service of a notice or summons on a corporation.

Subregulations 6(4)-(6) provide additional methods by which a Royal Commission may effect service. These implement recommendation 77 of the Final Report of the Royal Commission into Trade Union Governance and Corruption, which was provided to the Governor-General on 28 December 2015, that personal service not be required in certain circumstances.

Subregulation 6(4) provides the circumstances in which a notice or summons may be served on a named person, whether an individual or a corporation, by handing the document to a legal practitioner. The circumstances are that the legal practitioner has the authority to accept service of the document on the named person's behalf and accepts the service of the document on the named person's behalf.

Subregulation 6(5) provides the circumstances in which a notice or summons may be served on a named person, whether an individual or a corporation, in a particular way. The circumstances are if the named person has, prior to the preparation of the notice or summons,

agreed in writing to accept service for the purposes of the Commission in that particular way and the agreement is still in force.

Subregulation 6(6) provides the method in which a notice (but not a summons) may be served on a named person if the Commission has previously served the named person with a notice for the purposes of subsection 2(3A) or (3C) of the Act in the ways set out in subregulations 6(2) to (5). The Commission may serve another notice on the named person by sending the notice by pre-paid post addressed to them at an address provided by them to the Commission, or at the named person's residential or business address last known to the Commission.

Item 12 provides that regulation 6 applies to Royal Commissions established on or after the day this instrument commences, as well as the Royal Commission into Aged Care Quality and Safety established by Letters Patent dated 8 October 2018. The previous regulation 6 will continue to apply to other Royal Commissions in existence on the day the instrument commences.

Item 2 – After regulation 9

Regulation 13

New regulation 13 provides transitional arrangements for the repeal and substitution of regulation 6 (Service of notices and summonses). It provides that the repeal and substitution of regulation 6 by the Regulations applies only in relation to a Royal Commission established on or after the day that the Regulations commence, as well as the Royal Commission into Aged Care Quality and Safety established by Letters Patent dated 8 October 2018. This means that the old regulation 6 will continue to apply to any other Royal Commission in existence on the day the Regulations commence.

In particular, the old regulation 6 will apply to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Financial Services Royal Commission), established by Letters Patent dated 14 December 2017. This is appropriate as the Financial Services Royal Commission is currently in progress and due to submit its Final Report soon after commencement of the Regulations.