

Cons <i>ABT &amp; Actors Equity Australia v Saatchi Compton</i> 10 FCR 1	Foll <i>Official Trustee in Bankruptcy v Byrne</i> 94 FLR 465	Dist <i>Victoria v ABCE Employees' &amp; BLF</i> 152 CLR 26	Appl <i>A-G (Cth) v Queensland</i> 94 ALR 515	Appl <i>Donovan v Commissioner of Taxation</i> (1992) 34 FCR 355	Dist <i>Yamazaki Mazak Corporation, Re Applications by</i> (1992) 24	Cons <i>ABT v Saatchi &amp; Saatchi Compton (Vic) Pty Ltd</i> (1985) 60 ALR 756	Appl <i>Mercantile Mutual Life Insurance Co Ltd v ASC</i> (1993) 10 ACSR 140	Dist <i>Aboriginal Legal Service of WA Inc v Western Aust</i> (1993) 113 ALR 87
90 C.L.R.]	Dist <i>Aboriginal Legal Service of WA Inc v State of WA</i> (1993) 9 WAR 297	Refd to <i>Darling Casino Ltd v Minister for Planning</i> (1995) 86 LGERA 186	Refd to <i>Rosemount Estates v Minister for Urban Affairs</i> (1996) 90 LGERA 1	Foll <i>Harris v Great Barrier Reef Marine Park Authority</i> (1999) 162 ALR 651	Refd to <i>Westfield Ltd v Hornsby SC</i> (2000) 110 LGERA 458	Appl <i>Pearson, Re Application of</i> (1999) 149 FLR 342	Cons <i>R v Ellis</i> (2001) 162 FLR 423	177
Appl <i>Mercantile Mutual Life Insurance Co Ltd v ASC</i> (1993) 40 FCR 409	Appl <i>Yaw (Kurri Kurri) Pty Ltd v Scientific Committee</i> (2003) 128 LGERA 419							

[HIGH COURT OF AUSTRALIA.]

LOCKWOOD . . . . . PLAINTIFF ;

AND

THE COMMONWEALTH AND OTHERS . . . DEFENDANTS.

*Constitutional Law (Cth.)—Royal Commissions—Permissible subjects of inquiry—* H. C. OF A.  
*Interpretation of statutes and instruments so as not to extend beyond—Inves-* 1954  
*tigation of subject matter of action pending in superior court—Legality—Royal*  
*Commission on Espionage—Validity—Whether exercising judicial power—* MELBOURNE,  
*Appointment of commissioners—Non-compliance with particular statutory* July 9, 12.  
*provision for particular commission—Compliance with general statutory provision*  
*—Interpretation—The Constitution (63 & 64 Vict. c. 12), s. 71—Royal Com-* Fullagar J.  
*mission Act 1954 (No. 2 of 1954), s. 3—Royal Commissions Act 1902-1933*  
*(No. 12 of 1902—No. 1 of 1933), s. 1A—Acts Interpretation Act 1901-1950*  
*(No. 2 of 1901—No. 80 of 1950), ss. 15A, 23, 46 (b).*

Section 1A of the *Royal Commissions Act 1902-1933* confers a general power on the Governor-General by letters patent to issue commissions to such person or persons as he thinks fit requiring him or them to inquire into and report upon “any matter specified in the Letters Patent, and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth”. Section 3 (1) of the *Royal Commission Act 1954* empowers the Governor-General to issue a commission directed to such person as he thinks fit, requiring or authorizing that person to make inquiry into and report upon subjects specified in the letters patent being (a) the commission of acts of espionage in Australia; (b) the commission in Australia of other acts prejudicial to the security or defence of Australia; or (c) subjects related to any matter referred to in either of the last two preceding paragraphs.

By letters patent dated 3rd May 1954 and purporting to be issued in pursuance of the Constitution of the Commonwealth, the *Royal Commission Act 1954* and all other powers thereunto enabling, the Governor-General appointed three commissioners to inquire into and report upon, *inter alia* “(c) whether any persons or organizations in Australia have communicated information or documents to any such representative or agent” (i.e. of the Union of Soviet Socialist Republics) “unlawfully or to the prejudice or possible prejudice of the security or defence of Australia”.



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*Held*, that the commission did not exercise judicial power.

*Held, further*, that although the appointment of only one commissioner was authorized by the *Royal Commission Act* 1954, the appointment of the three commissioners was valid under the *Royal Commissions Act* 1902-1933, s. 1A. *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co. Ltd.* (1914) A.C. 237 ; (1913) 17 C.L.R. 644, discussed.

*Held, further*, that the word "unlawfully" in par. 3 of the letters patent read in accordance with s. 46 (b) of the *Acts Interpretation Act* 1901-1950 did not render the letters patent invalid.

A person against whom allegations were made before the Royal Commission procured the issue of a writ out of the High Court against counsel assisting the commission and the Commonwealth. The causes of action were slander and libel, the words complained of having, it was alleged, been spoken by counsel in the course of the proceedings before the commission and been printed and published by the Commonwealth as part of the transcript of the proceedings.

*Held* that the commission was entitled to proceed with the inquiry on matters the subject of the writ.

*Semble* the position would be the same irrespective of the mode of appointment of the commission.

#### APPLICATION.

On 8th July 1954 Rupert Ernest Lockwood of Sydney, New South Wales commenced an action in the High Court against the Commonwealth of Australia, the Honourable William Francis Langer Owen, the Honourable Roslyn Foster Bowie Philp, and the Honourable George Coutts Ligertwood. The individual defendants were constituted a Royal Commission by letters patent dated 3rd May 1954, issued pursuant to the Constitution of the Commonwealth the *Royal Commission Act* 1954 and all other enabling powers to inquire into and report upon—(a) the information given to the Commonwealth by Vladimir Mikhailovich Petrov as to the conduct of espionage and related activities in Australia and matters related to or arising from that information ; (b) whether espionage has been conducted or attempted in Australia by representatives or agents of the Union of Soviet Socialist Republics and, if so, by whom and by what methods ; (c) whether any persons or organizations in Australia have communicated information or documents to any such representative or agent unlawfully or to the prejudice or possible prejudice of the security or defence of Australia ; and (d) whether any persons or organizations in Australia have aided or abetted any such espionage or any such communication of information or documents, and, generally, the facts relating to and the circumstances attending any such espionage or any such communi-



cation of information or documents. The defendant the Honourable William Francis Langer Owen was appointed chairman of the commissioners.

The material portions of the statement of claim were as follows—

6. The plaintiff has been served with a subpoena to attend the Royal Commission and his counsel has in fact obtained leave to appear for him before the said commission.

7. It has been alleged at the said Royal Commission that the plaintiff is the author of certain documents marked as Exhibits J and 46 before the said Royal Commission and the commissioners are threatening to inquire into the said documents and the plaintiff's authorship of and connection with them and have to that end issued the said subpoena.

8. The contents of the said documents and the plaintiff's alleged authorship and connection with them are irrelevant to the terms of reference and to the said *Royal Commission Act* 1954 and to any constitutional power of the Commonwealth.

9. The said letters patent are invalid in that they are not authorized by and are beyond the powers of the *Royal Commission Act* 1954 and are beyond the constitutional powers of the Parliament of the Commonwealth.

10. The *Royal Commission Act* 1954 is invalid and beyond the constitutional powers of the Parliament of the Commonwealth.

11. The plaintiff has issued out of this Honourable Court writ No. 9 of 1954 under which he claims damages for defamation against the Commonwealth and one W. J. V. Windeyer, Q.C., in respect of statements made by the said W. J. V. Windeyer, Q.C., at the said Royal Commission and the commissioners are hearing evidence and argument relating to issues in the said writ. By reason of those facts the plaintiff respectfully submits that the commissioners are in contempt of this Honourable Court.

By way of relief the plaintiff claimed (a) a declaration that the letters patent and the *Royal Commission Act* 1954 were null and void; (b) an injunction restraining the defendants (i) from acting on the subpoena issued to the plaintiff (ii) from in any way questioning the plaintiff or exercising against him any of the powers in the *Royal Commission Act* 1954 (iii) from hearing evidence or argument touching matters in the said writ No. 9 of 1954 (iv) from doing anything further pursuant to the said Act.

The facts and the nature of the present application are sufficiently set forth in the judgment hereunder.

*E. A. H. Laurie*, for the plaintiff.

*Cur. adv. vult.*

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FULLAGAR J. delivered the following oral judgment :—

This is a motion *ex parte* for an interim injunction and/or leave to serve notice of motion with writ, in an action commenced in this Court against the Commonwealth and the three members of a Royal Commission appointed by the Governor-General on 3rd May 1954 to investigate and report upon the conduct of espionage in Australia and matters related thereto.

The plaintiff has been subpoenaed to appear before the commission, and the injunction claimed at the moment is of limited character, its terms being directed to preventing the commission from exercising any compulsive powers against the plaintiff and from hearing evidence in regard to certain matters with which the plaintiff is concerned. Some of the grounds, however, on which the plaintiff's claim for an injunction is based, go to the validity of the letters patent appointing the commission, and, if sound, mean that the commission could not lawfully proceed further with its investigation, or at least could not exercise any compulsive powers against any person in connection therewith.

The commission has already sat on a number of days in Canberra, Sydney and Melbourne, and the matters with which the plaintiff is immediately concerned were first mentioned on 18th May 1954. The writ in the action was not issued until 8th July 1954. The importance and urgency of the subject matter of the inquiry are obvious, and I do not think that I ought to grant interlocutory relief unless it is made to appear at least probable that the plaintiff will ultimately succeed. This view is reinforced by the fact that very considerable delay has taken place in commencing proceedings. On the other hand, I do not think that the delay ought to afford a ground for refusal of such relief if a reasonably strong case on the merits is made out. All the questions raised are questions of pure law.

I have come to the conclusion that the present application should be dismissed, and I propose to state my reasons as fully as the time available has allowed. But I would begin by saying that only one of the several points raised by Mr. *Laurie* in an argument which was both clear and concise has seemed to me to have any real substance. It was only because of that one point that I thought I should reserve my judgment. The points raised were really, I think, five. I will deal with them in an order other than that in which they were put.

It was said, in the first place, that the legislation under which the commission was appointed conferred judicial power otherwise



than in accordance with the provisions of c. III of the Constitution. I consider this argument untenable. The duties of the commission are to inquire and report. It has, in order that it may effectively perform the duty of inquiry, certain powers which normally belong to judicial tribunals. But the function which is primarily distinctive of judicial power—the power to decide or determine—is absent. The commission can neither decide nor determine anything and nothing that it does can in any way affect the legal position of any person. Its powers and functions are not judicial.

The next point is the point which has given me a little difficulty. The point taken is that the relevant legislation authorizes only the appointment of a single commissioner to inquire and report. In fact the letters patent appoint three persons to constitute the commission. These are Mr. Justice *Owen* of the Supreme Court of New South Wales, Mr. Justice *Ligertwood* of the Supreme Court of South Australia and Mr. Justice *Philp* of the Supreme Court of Queensland. And the letters patent appoint Mr. Justice *Owen* “to be the chairman of the said commissioners”.

The letters patent purport to be issued in pursuance of the Constitution of the Commonwealth, the *Royal Commission Act* 1954 and all other powers thereunto enabling. The *Royal Commission Act* 1954 became law on 15th April 1954. Section 3 of the Act is in the following terms:—“3. (1) The Governor-General is, by force of this section, empowered to issue, by Letters Patent in the name of the Queen, a Commission, directed to such person as he thinks fit, requiring or authorizing that person to make inquiry into and report upon subjects specified in the Letters Patent, being—(a) the commission of acts of espionage in Australia; (b) the commission in Australia of other acts prejudicial to the security or defence of Australia; or (c) subjects related to any matter referred to in either of the last two preceding paragraphs. (2) The Commissioner so appointed has all the powers rights and privileges which are specified in the *Royal Commissions Act* 1902-1933 as appertaining to a Royal Commission and the provisions of that Act have effect as if they were enacted in this Act and in terms made applicable to the Commissioner”.

It is seen that s. 3 of the Act of 1954 authorizes the issue of letters patent to *such person* as the Governor-General thinks fit. The letters patent may require or authorize *that person* to inquire and report. The *commissioner* so appointed is to have the powers conferred by the *Royal Commissions Act* 1902-1933 as if they were in terms made applicable to *the commissioner*.

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It is quite clear that the section *in terms* gives power only to issue letters patent to a single person. If the Crown had been represented before me, reliance might perhaps have been placed on s. 23 of the *Acts Interpretation Act* (Cth.) 1901-1950, which provides that, unless a contrary intention appears, words in the singular shall include the plural and words in the plural shall include the singular. But it seems to me that to use this provision to make s. 3 of the Act of 1954 authorize the appointment of several commissioners would be not to interpret s. 3 but to distort its plain meaning. I can understand that, if an Act says that a man who owns a dog must register it, the *Acts Interpretation Act* requires this to be read as meaning that, if a man keeps ten dogs, he must register his ten dogs. But if an Act says that the Governor-General may appoint a Commissioner of Taxation, I cannot think that the *Acts Interpretation Act* requires this to be read as meaning that ten Commissioners of Taxation may be appointed. Section 3 of the *Royal Commission Act* 1954 means, to my mind, that one person to be designated may be appointed to fill a specified office, and I do not think that the section can be made to mean anything else.

I feel satisfied, however, that the appointment of the three commissioners is authorized by s. 1A of the *Royal Commissions Act* 1902-1933, and that the commissioners so appointed have by virtue of that Act itself all the powers and privileges thereby given. Section 1A in terms authorizes the appointment of several commissioners. I suggested this view to Mr. *Laurie* during argument and he submitted that there were two objections to it.

Mr. *Laurie* said, in the first place, that the Privy Council had in the case of *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co. Ltd.* (1) decided that the Act, as it stood in 1912, was unconstitutional and void, and that it has been simply a nullity ever since. I am not able to agree with this view. I doubt very much whether the validity of s. 1A was affected in any way by the decision. Apart from a possible objection, based on s. 81 of the Constitution, to the application of public moneys of the Commonwealth to matters outside the powers of the Commonwealth, I can think of no sound reason why the Commonwealth should not make an inquiry into any subject matter which it may choose. Where, however, the subject matter of the inquiry lies outside the field of Commonwealth power, the Commonwealth cannot constitutionally confer compulsive powers on any body set up to make the inquiry. Mr. *Laurie* relied on a passage at the end of the

(1) (1914) A.C. 237; (1913) 17 C.L.R. 644.



judgment, which was delivered by Viscount *Haldane* L.C. His Lordship said:—Their Lordships “think that these Acts were *ultra vires* and void so far as they purported to enable a Royal Commission to compel answers generally to questions, or to order the production of documents, or otherwise to enforce compliance by the members of the public with its requisition” (1).

But this passage and the immediately preceding part of the judgment are directed to the view entertained by Sir *Samuel Griffith* C.J. and *Barton* J. that the Act was wholly valid. Actually the vice, and the only vice, lay in the fact that s. 1A authorized inquiry, attended by compulsive powers, into matters which were not, as well as matters which were, within the constitutional powers of the Commonwealth. The matters in question in the particular case were matters outside Commonwealth power. The matters into which commissions of inquiry were authorized by s. 1A were: “Any matter which is specified in the Letters Patent and which relates to or is connected with the peace order and good government of the Commonwealth or any public purpose or any power of the Commonwealth”. Even under the common law doctrine of severability, I should have thought that the material expressions were clearly enough capable of severance. The peace, order and good government of the Commonwealth is an expression which would, I think, include matters outside the constitutional powers of the Commonwealth. Whether the words “any public purpose” are too wide, or not, depends on whether we read those words as qualified by the words “of the Commonwealth”. I would read them myself, *ut res magis valeat quam pereat*, as so qualified and therefore as not going beyond constitutional power. In any case, matters relating to or connected with any power of the Commonwealth seem clearly to be matters to which the constitutional power extends, so that, at least as to such matters, commissions of inquiry with compulsive powers could lawfully be set up. Thus, even if we use the “blue pencil” and strike out the two other classes of matters, matters related to or connected with any power of the Commonwealth are, I would think, matters in respect of which s. 1A would validly operate.

But, even if the judgment of the Privy Council should be read as excluding any common law doctrine of severability, the position today is covered by s. 15A of the *Acts Interpretation Act* 1901-1950, which came into force in 1930. The *Royal Commissions Act* has never been repealed. It has remained on the statute book. It was amended in 1933. Whatever its operation or legal effect may have

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(1) (1913) 17 C.L.R., at p. 656; (1914) A.C. 237, at p. 257.



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been in the past, it is and always has been an existing legal instrument expressing the formally authenticated will of Parliament. Section 15A applies to all Acts, whether passed before or after it became law. That section peremptorily requires us to read s. 1A of the *Royal Commissions Act* 1902-1933, as validly operating in respect of subjects of inquiry to which Commonwealth powers extend. The subject matter of the inquiry entrusted to the three commissioners in the present case is obviously such a matter.

Mr. *Laurie's* other contention on this point was that the Act of 1954 was intended to be, and was enacted as, an exclusive charter for the appointment of the present Royal Commission. The special enactment, he said, in effect overrode and excluded the general enactment, even if the latter were wholly or partly valid. Again, I am unable to accept this argument. It is, I think, a settled principle that an act purporting to be done under one statutory power may be supported under another statutory power, and, for what it is worth, the letters patent in this case invoke "all powers thereunto enabling". In my opinion, the special Act (like a number of similar Acts in the past) was enacted for no other reason than that it was doubted whether the general Act would suffice to support the proposed appointment. This *abundans cautela* was doubtless wise, but I am of opinion that it was unnecessary.

The third ground of attack on the validity of the appointment of the commission was that the letters patent exceeded the authority given by the Act of 1954 by reason of the insertion of the words "unlawfully or" in par. (c) of the letters patent. But s. 46 (b) of the *Acts Interpretation Act* 1901-1950 applies to the case, and the word "unlawfully" must be read as meaning "contrary to the laws of the Commonwealth". If we so read it, par. (c) does not transcend the authority given by s. 1A of the *Royal Commissions Act* 1902-1933.

The points which I have so far considered are of a general nature. The remaining two matters which were raised are special to the plaintiff. One relates to a document which is in the hands of the Royal Commission but which has been ordered not to be published. It has been referred to as "Document J". The plaintiff seeks an injunction to protect him from further questioning before the Royal Commission with regard to the authorship or contents of this document, on the ground that it is really irrelevant to any of the matters into which the commission is authorized to inquire. As to this, it is sufficient to say that evidence has been given before the commission that this document was written by the plaintiff in the premises of a foreign embassy and delivered to a member or members of the staff of that embassy, that a payment was made



to the author, and that it deals (*inter alia*) with Japanese interests in Australia and American interests in Australia. Whether this evidence is true or not, and what may be the ultimate importance, if any, of the document, are matters with which, of course, I have nothing to do. But it does not seem to me to be seriously arguable that the commission is not entitled, under the terms of its reference, to investigate fully this document, its source, its significance, if any, and the circumstances under which it came to be prepared. The same considerations apply to another document, which has been marked by the commission as "Exhibit 46", and which also it has ordered not to be published.

The last ground on which a limited injunction is sought is based on the issue out of this Court by the plaintiff on the 6th July 1954 of a writ in action No. 9 of 1954. The defendants in this action are the Commonwealth and Mr. W. J. V. Windeyer Q.C., who is the senior counsel assisting the commission in its investigation. The causes of action are alleged slander and libel, the words complained of being said to have been spoken by Mr. Windeyer in the course of proceedings before the commission, and to have been subsequently printed and published by the Commonwealth as part of the transcript of the proceedings. The words in question are concerned with "Document J" and "Exhibit 46".

It is said that the commission cannot lawfully, while this action for alleged slander and libel is pending, proceed with its inquiry so far as any matter referred to in or connected with "Document J" or "Exhibit 46" is concerned. I understood Mr. *Laurie* really to put the matter in two ways. He said that to proceed with the inquiry in respect of these matters while Action No. 9 of 1954 was pending in this Court would be a contempt of this Court. He suggested also that there was a rule of common law, based on natural justice, to the effect that a Royal Commission could not inquire into and report upon a matter which was the subject of pending civil or criminal proceedings. I am not sure that he did not put the suggested rule even higher, but he certainly put it as high as I have stated.

The short answer to the whole argument seems to me to be that this commission is authorized and required, in pursuance of a statute, to undertake the inquiry in which it is engaged. No court could hold, in any circumstances which I find it possible to envisage, that what is expressly authorized by or under a statute is a contempt, and it is a rule of the common law that the common law itself gives way to statute law.

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In disposing of the case on this short and simple ground, I must not be thought to entertain the view that any violation of any principle of justice is involved, or that the position would have been in any way different if the Royal Commission had been appointed by the Governor-General by virtue of the prerogative and not in pursuance of any statute. The judgments in *McGuinness v. Attorney-General for Victoria* (1), and particularly the judgment of the present Chief Justice, strongly suggest to my mind that the position would have been the same if this commission had been appointed without statutory authority. Mr. *Laurie* referred to certain events which took place in Victoria in 1952, when a Royal Commission had been appointed, in the exercise of the prerogative, to investigate certain allegations of corruption. One of the persons whose conduct might have been in question issued a writ, claiming damages for defamation; and the commission, which consisted of three judges of the Supreme Court, declined to proceed further with the inquiry. I have not seen a copy of any reasons given for this decision, and I can therefore express no opinion upon it, but I cannot help feeling that the soundness of the decision may be open to question. 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.

For the reasons I have given I am of opinion that the motion should be dismissed. The order which I make is that the motion be dismissed.

*Motion dismissed.*

Solicitor for the plaintiff, *Cedric Ralph*.

R. D. B.