

## **EXPLANATORY STATEMENT**

Issued under the Authority of the Assistant Minister for Productivity  
in compliance with section 26 of the *Legislative Instrument Act 2003*

*Royal Commissions Act 1902*

*Royal Commissions Amendment Regulation 2016 (No. 1)*

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### **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 or convenient for carrying out or giving effect to the Act.

Section 9 of the Act provides for the custody and use of records of Royal Commissions. Subsection 9(2) allows for regulations that may provide for the custody, use or transfer of, or access to, Royal Commission records.

By Letters Patent dated 13 March 2014 (as amended by Letters Patent dated 30 October 2014) the Hon Dyson Heydon AC QC was appointed under the Act to inquire into matters relating to the affairs of various entities, particularly employee organisations (the Trade Union Royal Commission).

The Regulations amend the *Royal Commissions Regulations 2001* (the Principal Regulations) in relation to the custody and use of Trade Union Royal Commission records, to allow law enforcement agencies to access and use relevant Trade Union Royal Commission records, in accordance with subsection 9(11) of the Act. The Regulations dispense with the requirement to individually notify the person or body who initially provided specific records to the Royal Commission, that the records will be transferred to a different retainer. Thus, relevant records will be able to be passed quickly to agencies to assist in their investigations of matters arising from the Trade Union Royal Commission.

Details of the Regulation are set out in Attachment A.

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commenced the day after it was registered.

## **REGULATORY IMPACT STATEMENT**

The Office of Best Practice Regulation (OBPR) has been consulted and has advised that a regulatory impact statement is not required.

## **CONSULTATION**

Under section 17 of the *Legislative Instruments Act 2003*, consultation must occur before legislative instruments are made, unless it is unnecessary or inappropriate to do so as set out in section 18 of the *Legislative Instruments Act 2003*. Relevant agencies including the Trade Union Royal Commission and law enforcement agencies were consulted. The Regulation is machinery in nature and, therefore, further consultation is unnecessary under section 18 of the *Legislative Instruments Act 2003*.

### **Statement of Compatibility with Human Rights**

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

#### **Overview**

The purpose of the Regulation is to amend the *Royal Commissions Regulations 2001* (the Principal Regulations) in relation to the custody and use of records of the Trade Union Royal Commission.

The Regulation applies to all records of the Trade Union Royal Commission, except for records relating to the administration and financial management of the Royal Commission, and publicly available records. The Regulation specifies that the applicable records are to be kept in the custody of the Secretary of the Department of the Prime Minister and Cabinet (PM&C). The Regulation also:

- enables the Secretary of PM&C, upon request, to give a certified copy of a record back to the individual/body who produced it to the Royal Commission; and
- enables law enforcement agencies (and agencies responsible for advising a Commonwealth or State or Territory Minister) to access and use the records of the Trade Union Royal Commission to assist in their investigations (or in their advice to their Minister).

The Regulation is machinery in nature and is provided for in section 9 of the *Royal Commissions Act 1902*.

#### **Human Rights Implications**

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*.

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)
- 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 Regulation engages Article 14(3)(g) of the ICCPR which specifies that in the determination of criminal charges, an individual is not to be compelled to testify against themselves or to confess guilt.

Section 6A of the *Royal Commissions Act 1902* (the Act) specifically abrogates the privilege against self-incrimination. Section 6A of the *Royal Commissions 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. The section does not apply if the production or answer might tend to incriminate the person in relation to continuing criminal or penalty proceedings.

Section 6DD of the Act also 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 in ‘any civil or criminal proceedings’ in any Australian court, unless the proceedings are for an offence against the *Royal Commissions Act*.

The combined effect of sections 6A and 6DD is that evidence otherwise subject to the privilege against self-incrimination may be used in subsequent proceedings in certain circumstances (such as further investigations; in proceedings brought against another person; or in administrative or disciplinary proceedings).

The current Regulation will enable information gathered by the Trade Union Royal Commission, in circumstances where the witness was not afforded the privilege from self-incrimination, to be accessed and used by law enforcement agencies. This access and use of information is reasonable, necessary and appropriate. While Royal Commissions serve the important function of inquiring into matters of public interest, they do not have powers to prosecute civil or criminal wrongdoing. Provision of access to the Royal Commission’s records is the only way by which criminal and civil offences can be further investigated and prosecuted.

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

The Regulation also engages article 17 of the ICCPR which outlines that no one shall be subjected to arbitrary or unlawful interference with their privacy, family or home.

The Trade Union Royal Commission found that there is widespread, deep-seated misconduct across a wide variety of unions and industries. The Commission has produced two confidential volumes (one in each of the Interim and Final Reports) which contain information on threats and acts of violence against individuals who gave evidence to the

Royal Commission. The Regulation facilitates the access and use of this information by law enforcement agencies to further investigate and prosecute wrongdoing. Thus, individuals who are, or have been, the victims of unlawful interference may have their complaints investigated and offenders brought to justice. Accordingly, through the provision of the Royal Commission's records to law enforcement agencies, the Regulation promotes freedom from arbitrary or unlawful interference.

## **Conclusion**

The Regulation is compatible with human rights because it advances the protection of human rights, in particular the right to be free from arbitrary or unlawful interference, and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

***Royal Commissions Amendment Regulation 2016 (No. 1)***

**Section 1 – Name**

This section provides that the title of the Regulation is *Royal Commissions Amendment Regulation 2016 (No. 1)*.

**Section 2 – Commencement**

This section provides that the Regulation commences on the day after it is registered.

**Section 3 - Authority**

This section provides that the Regulation is made under the *Royal Commissions Act 1902*.

**Section 4 – Schedules**

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

**Schedule 1 – Amendments**

***Item 1 – Regulation 4***

This item inserts in existing Regulation 4 a definition for the Royal Commission into Trade Union Governance and Corruption.

***Item 2 – Regulation 8***

This item repeals the existing heading of ‘Custody and use of records of Oil-for-Food Inquiry’ and substitutes it with ‘Custody and use of records – Oil-for-Food Inquiry’.

***Item 3 – After Regulation 8***

This item inserts new regulation 9 (Custody and use of records – Royal Commission into Trade Union Governance and Corruption).

This item provides that regulation 9 applies in relation to the Royal Commission records of the Trade Union Royal Commission, except for records relating to the administration and financial management of the Royal Commission, and publicly available records.

Subregulation 9(2) provides that all other Trade Union Royal Commission records are to be kept in the custody of the Secretary of the Department of the Prime Minister and Cabinet.

Subregulation 9(3) sets out the circumstances in which the Secretary of the Department of the Prime Minister and Cabinet must give a certified copy of a record in his or her custody to the owner of that record. The circumstances are that the record has not been returned to the owner and that the owner requests a certified copy.

Subregulation 9(4) provides that, for subregulation (3), until a certified copy is provided to the owner, the Secretary of the Department of the Prime Minister and Cabinet must provide the owner, or a person authorised by the owner, reasonable access to the record for the purposes of inspecting, making copies or taking extracts.

Subregulations 9(5) and 9(6) set out the circumstances in which the Secretary of the Department of the Prime Minister and Cabinet may give some or all of those records in his or her custody, or allow access to some or all of those records, to certain persons or bodies. The circumstances are limited to those in which relevant persons or bodies are persons or bodies:

- performing a function relating to law enforcement purposes (as defined in the Act); or
- responsible for advising a Minister of the Commonwealth, of a State or of a Territory about the administration of a law of the Commonwealth, that State or that Territory. This is intended to cover not only persons and bodies which investigate or prosecute but also those which, whilst they may not formally investigate, prosecute or administer legislation, should properly be included in the Principal Regulations because they advise their relevant Minister about administration of a law, including its enforcement.

Subregulation 9(7) indicates that the Regulations do not limit the circumstances in which the Secretary of the Department of the Prime Minister and Cabinet may give, or allow access to, a record of the Royal Commission.

Subregulation 9(8) makes it clear that the Regulations do not limit the circumstances in which the Secretary of the Department of the Prime Minister and Cabinet may use the records of the Trade Union Royal Commission for the purpose of exercising his or her powers and functions. This subregulation also makes it clear that the Regulations do not limit the circumstances in which the Secretary of the Department of the Prime Minister and Cabinet can provide the records to a public office holder or public authority for the purposes of exercising their functions and powers.