



PARLIAMENT OF WESTERN AUSTRALIA

**TWENTY FIFTH REPORT**

**OF THE**

**STANDING COMMITTEE ON LEGISLATION**

**IN RELATION TO THE**

**SPECIAL INVESTIGATION**  
**(COAL CONTRACT) BILL 1993**

**Presented by the Hon Derrick Tomlinson (Chairman)**

**25**  
**APRIL 1994**

**Members of the Committee :**

Hon Derrick Tomlinson, MLC (Chairman)  
Hon Bill Stretch, MLC  
Hon Ross Lightfoot, MLC  
Hon Cheryl Davenport, MLC  
Hon John Cowdell, MLC

**Staff of the Committee :**

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**REPORT OF THE  
STANDING COMMITTEE ON LEGISLATION  
IN RELATION TO THE  
SPECIAL INVESTIGATION (COAL CONTRACT) BILL 1993**

**1. INTRODUCTION**

On Tuesday, March 29, 1994 the Hon Mark Nevill, MLC moved the following motion, which was agreed to by the House :-

**"That the *Special Investigation (Coal Contract) Bill 1993* be referred to the Standing Committee on Legislation for consideration and report."**

**2. ADVICE**

As a result of its examination of the *Special Investigation (Coal Contract) Bill 1993* the Standing Committee on Legislation advises the House that it has two options available :-

- (1) That the *Special Investigation (Coal Contract) Bill 1993* be not proceeded with; or**
- (2) That the *Special Investigation (Coal Contract) Bill 1993* be proceeded with.**

**3. COMMITTEE MEETINGS**

The Standing Committee on Legislation met on the following occasion to examine the Bill :-

Tuesday, April 5, 1994 from 6.15 pm to 7.30 pm  
Monday, April 11, 1994 from 3.11pm to 7.30 pm  
Tuesday, April 12, 1994 from 6.15 pm to 7.30 pm

#### 4. SPECIAL INVESTIGATION (COAL CONTRACT) BILL 1993

The preamble to the *Special Investigation (Coal Contract) Bill 1993* ("Bill") states that this is :-

**"An ACT to provide for the appointment of a special investigator to make inquiry as to, and report upon, certain matters, and for related purposes."**

The nature of the inquiry is outlined in clause 4 of the Bill which states :-

**"(1) The Governor may appoint a person as special investigator to make inquiry as to, and report to the Governor upon, any matter relating to the coal contract that is within the scope of the terms of reference of the inquiry as specified by the Governor."**

The term "coal contract" is defined to mean the transaction referred to in paragraph 20.7.9 of the report of the Royal Commission. Paragraph 20.7.9 states :-

**"A number of complex issues were raised by the material and evidence which the Commission has considered and serious questions have been raised as to the bona fides of the transaction. Accordingly, it is the recommendation of the Commission that the transaction whereby SECWA ordered additional coal from Western Collieries in April 1989 be referred to a body with the power to fully and publicly investigate any allegations arising from that transaction."**

The Bill provides for the appointment of a special investigator as the "body" referred to in the Royal Commission Report as necessary for the investigation of the transaction referred to in paragraph 20.7.9. For the purpose of the inquiry and report, the special investigator is to have the powers of a Royal Commission and the chairman of a Royal Commission, pursuant to the *Royal Commissions Act 1968*. The provisions of the *Royal Commissions Act 1968* are to have effect as if they were enacted in the Bill with such modifications as required, and in terms made applicable to the inquiry (clause 4(2)).

However, clause 4 does not bestow upon the special investigator any greater powers than those contained in the *Royal Commissions Act 1968*. In fact, the provisions of the *Royal Commissions Act 1968* are to be modified to the extent that they be made applicable to the inquiry and report by the special investigator.

Given the fact that the special investigator is to have the powers enjoyed by a Royal Commission, or chairman of a Royal Commission, one might question the need for this legislation. To further illustrate this point one needs only to examine the provisions of sections 5 and 7 of the *Royal Commissions Act 1968* which provide for the appointment and powers of a Royal Commission, namely :-

**"5. Without in any way prejudicing, limiting, or derogating from the power of the Governor to make or authorize any inquiry, or to issue any Commission to make any inquiry, the Governor may, under the Public Seal of the state, appoint any person or persons to be a Royal Commission, generally or upon such terms of appointment as the Governor thinks fit, to inquire into and report upon, and, where so required or authorized by terms of appointment, to make recommendations in respect of any matter specified in the appointment.**

...

**7. Without in any way prejudicing, limiting, or derogating from the power of a Commission in respect of the matter of its inquiry, a Commission may do all such things as are necessary or incidental to the exercise of its function as a Commission and to the performance of its terms of appointment, if any."**

The use of the phrase "or upon such terms of appointment as the Governor thinks fit" clearly indicates the legislature's intention that provision be made for the Governor to limit the terms of appointment of a Royal Commission in circumstances such as those envisaged by the Bill, namely, to investigate the circumstances surrounding a particular legal transaction.

The superfluous nature of the Bill was alluded to during the Second Reading debate on Tuesday, March 29, 1994, when the Minister for Health, the Hon Peter Foss, MLC, made the following comments :-

**"It is not intended to in any way expand the powers of an investigator beyond that of a royal commissioner, but to set a scheme under which he can operate and to say the powers are similar to those of a royal commissioner.**

...

**I am not sure why the royal commissioners did not suggest there be another royal commission. Maybe they thought the idea would put in everybody's mind the full panoply and type of investigation as the Royal Commission into Commercial Activities of Government and Other Matters had.**

...

**The royal commission and special investigator may have similar powers, but a special investigator indicates a more narrow approach as opposed to the broad approach of a royal commission."**

If the special investigator is to be given the powers enjoyed by a Royal Commission, or chairman of the Royal Commission, why cannot a Royal Commission be appointed with specific terms of reference pertinent to the inquiry of matters of the coal contract referred to in paragraph 20.7.9 of the report of the Royal Commission? As stated earlier in this report, section 5 of the *Royal Commissions Act 1968* clearly contemplates a diminution and refinement of the extensive powers of a Royal Commission specific to the inquiry being undertaken.

Specific powers for the production of documents and information are contained within the *Royal Commissions Act 1968*, for example, section 9 provides for the power to summons witnesses and documents and sections 11 and 12 provide for the power to examine a witness under oath or affirmation.

Notwithstanding such powers, access to certain records, documents and information is given to the special investigator by virtue of clauses 5 and 6 of the Bill, and upon completion of the report the records of inquiry shall be subject to clause 7, that is, to the provisions of the *Royal Commission (Custody of Records) Act 1992*. Again, these provisions are superfluous given the fact that such matters are, or can be, provided for in the *Royal Commissions Act 1968*.

Clause 5 provides that any record of the Royal Commission that is in the custody of the Director of Public Prosecutions is to be made available to the special investigator notwithstanding anything in the *Royal Commission (Custody of Records) Act 1992*. Such documents are to be returned to the Director of Public Prosecutions upon completion of the inquiry. This clause was inserted to circumvent the provisions of sections 5 and 11 of the *Royal Commission (Custody of Records) Act 1992*. Section 5 states that :-

**"5. Subject to this Act, after the Royal Commission has delivered its report under the terms of reference the DPP has custody of all the records of the Royal Commission."**

Section 11 outlines the circumstances in which access is to be made available to records of the Royal Commission being in the custody of the Director for Public Prosecutions. However, section 11 fails to provide for circumstances where access to such records is required by a Royal Commission. A simple amendment to the *Royal Commission (Custody Of Records) Act 1992* providing that a Royal Commission is to be granted access to such records would alleviate this problem. Essentially, this is the reason for the inclusion of clause 5 in the Bill.

Clause 6 states that nothing in section 72 of the *State Energy Commission Act 1979* precludes a person from producing any document or divulging any information to the special investigator. The prohibition imposed upon persons referred to in section 72 of the *State Energy Commission Act 1979* from producing any document or divulging any information, of a nature referred to in that section, is made subject to subsection (11) which states that :-

**"(11) Nothing in this section precludes a person from -**

...

**(d) producing a document or divulging information that is required by any other Act to be so produced or divulged."**

Such a provision is contained in the *Royal Commissions Act 1968*, namely, section 9 which states that :-

**"9. The Chairman may cause a summons in writing under his hand to be served upon any person requiring him to attend the Commission, at a time and place named in the summons, and then and there to give evidence and to produce any books, or writings in his custody or control which he is required by the summons to produce."**

Furthermore, section 7 provides that the Commission "may do all such things as are necessary or incidental to the exercise of its function as a Commission and to the performance of its terms of appointment". Again, it appears unnecessary that the Bill should contain clause 6 when in fact both the *State Energy Commission Act 1979* and the *Royal Commissions Act 1968* contemplate the production of such documentation and information.

Matters contained within clause 7 of the Bill relating to the manner in which records and materials held by the special investigator are to be dealt with at the completion of the inquiry and report, can quite simply be included in the terms of appointment of a Royal Commission. There is no necessity for them to be contained in statutory form.

The special investigator's terms of reference have been intentionally omitted from the Bill for reasons outlined by the Hon Peter Foss, MLC, during the second reading debate. The Hon Peter Foss, MLC, commented as follows :-

**"... a royal commission which is appointed pursuant to the Royal prerogative, which I believe most royal commissions are, because it is a creature of the Executive is bound by the rules relating to contempt of court.**

...

**... where the terms of reference are set by the Act of Parliament it is not possible for the rules relating to laws of contempt of the court to apply. It is not possible for a royal commission which has its terms of reference set by the Parliament to be called into question in its inquiries."**

Omission of the terms of reference is justified on the basis that their inclusion would impose no obligation on the part of the special investigator to have regard to questions of contempt of court.

## 5. CONCLUSION

The Standing Committee on Legislation commends the Government for its initiative in promulgating the circumstances surrounding the coal contract, as described in paragraph 20.7.9 of the report of the Royal Commission. Consequently, the Committee is mindful of any recommendation which might impede, rather than expedite, the passage of this Bill through the Legislative Council. It is with this consideration in mind that the Committee suggests to Parliament the following alternative solutions :-

- (1) **That the *Special Investigation (Coal Contract) Bill 1993* be not proceeded with.**

As stated repeatedly throughout this report, inquiry into the circumstances surrounding the coal contract can be served by appointment of a Royal Commission pursuant to the *Royal Commissions Act 1968*. However, amendment to the *Royal Commission (Custody of Records) Act 1992* will be required for the purpose of facilitating access to documents held in custody by the Director of Public Prosecutions.

- (2) **That the *Special Investigation (Coal Contract) Bill 1993* be proceeded with.**

Members of the Committee are aware of the public perception affiliated with the very nature of a royal commission. Consequently, notwithstanding the opportunity to Government available in the *Royal Commissions Act 1968*, the Committee recognises the fact that Parliament may wish to proceed with this investigation by appointing a special investigator rather than by way of a royal commission. In such an event, given the provisions in clause 5, there would be no requirement to amend the *Royal Commission (Custody of Records) Act 1992*.