

# WHAT DOES A ROYAL COMMISSION INTO THE FINANCIAL SERVICES INDUSTRY MEAN FOR YOU?

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Legal Briefings - By **Michael Vrisakis and Sarah Yu**

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On 30 November 2017, the Federal Government announced that it will establish a Royal Commission into the alleged misconduct in Australia's banking, superannuation and financial services industry.

The Government has stated that "the Royal Commission will take a conventional, focussed approach. It will not be a never-ending lawyers' picnic." It is therefore timely to consider what the Royal Commission will mean for you.

## WHAT DOES THE ROYAL COMMISSION MEAN FOR YOU?

As outlined below, the Commission has extensive powers, and non-compliance with the Commission's requests can result in serious penalties. Accordingly, cooperating with the Commission during the course of its inquiry will be integral.

You should consider designing and implementing a plan to respond to any summonses for witnesses, including directors, officers and employees, and documents. The plan should address:

- procedures for claiming LPP, which should be made at the time the document is summonsed; and
- whether and when directors, officers and employees should consider obtaining separate

legal representation.

## PROPOSED TERMS OF REFERENCE

The [draft terms of reference](#) set out the matters into which the Commission must inquire, including:

- the nature, extent and effect of any misconduct;
- any conduct, practices, behaviour or business activities that fall below community standards and expectations;
- whether any findings of misconduct or sub-standard conduct are attributable to issues of culture, governance practices, risk management, recruitment or remuneration practices; and
- the effectiveness of mechanisms for redress for consumers who suffer detriment.

In particular, in relation to the superannuation industry, the Commission proposes to inquire into the use of superannuation members' retirement savings and whether that use fails to meet community standards and expectations or is otherwise not in the best interest of members.

More broadly, the Commission will consider:

- the adequacy of existing laws and policies in relation to the provision of financial services, industry practice and forms of industry self-regulation;
- the effectiveness of the regulators; and
- whether any further changes to the law, industry practice or the regulators are necessary.

The Commission must submit a final report within 12 months, containing its findings and any recommendations.

# POWERS OF THE COMMISSION

The Commission is granted a wide range of coercive powers under the *Royal Commissions Act 1902* (Cth) (**RCA**). Some of the key powers of the Commission include the power to:

- summon you as a witness to appear before the Commission to give evidence;
- require or summon you to produce certain documents. This includes the power to summon the production of documents that are subject to legal professional privilege (**LPP**); and
- apply for a search warrant if there are reasonable grounds to believe that if a summons were issued for the production of a certain thing, the thing might be concealed, lost, mutilated or destroyed.

If you fail to appear as a witness or produce a required document without a reasonable excuse for non-compliance, you are likely to face serious consequences, including heavy fines and imprisonment.

## PROFESSIONAL INDEMNITY INSURANCE

Costs of responding to the Commission may be covered for you as an individual or your company (under professional indemnity, statutory liability and/or directors' and officers' liability insurance). This will usually depend on the scope of the definition of 'claim' or 'investigation' and whether it applies to general industry inquiries. If there is coverage, you will need to be mindful of policy conditions in relation to insurer consent and the making of admissions.

## REASONABLE EXCUSES FOR NON-COMPLIANCE

### LPP

While the Commission has the power to require or summon you to produce a document that is subject to LPP, LPP may be a reasonable excuse for refusing or failing to produce the document if:

- a court has found the document to be subject to LPP; or
- you have made a claim that the document is subject to LPP to the member of the Commission who required its production within the time allowed for its production. If

such a claim is made, the member may decide whether to accept or reject the claim.

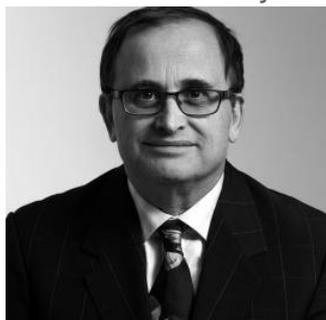
## **SELF-INCRIMINATION**

As a general rule, it is not a reasonable excuse for you to fail to answer a question that answering the question might tend to incriminate you or make you liable to a penalty. Similarly, self-incrimination is not a reasonable excuse for you to fail to produce a required document.

We will continue to track the development of the Royal Commission, including the final terms of reference of the Commission, and provide you with relevant updates.

## **KEY CONTACTS**

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**MICHAEL VRISAKIS**  
PARTNER, SYDNEY

+61 2 9322 4411  
Michael.Vrisakis@hsf.com

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