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Royal Commissions and Other Legislation  
Amendment Bill 2001

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No. 42 2001–02

Royal Commissions and Other Legislation Amendment Bill  
2001

Nathan Hancock  
Law and Bills Digest Group  
30 August 2001

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# Royal Commissions and Other Legislation Amendment Bill 2001

**Date Introduced:** 23 August 2001

**House:** House of Representatives

**Portfolio:** Prime Minister and Cabinet

**Commencement:** Royal Assent.

## Purpose

To amend

- the *Australian Securities and Investments Commission Act 2001* (the ASIC Act)
- the *Financial Transaction Reports Act 1988* (the FTR Act)
- the *Royal Commissions Act 1902* (the RCs Act)

to facilitate the transfer of information among the Australian Investment and Securities Commission (ASIC), AUSTRAC Royal Commissions and Attorneys-General.

## Background

### HIH Collapse and ASIC Investigation

On 27 February 2001, ASIC announced that it was conducting an investigation into HIH's market disclosure.<sup>1</sup> Trading in HIH shares was suspended on the same day and has not resumed. HIH went into provisional liquidation on 15 March and was formally liquidated on 27 August. Since announcing the initial investigation ASIC has broadened its investigation to cover other potential breaches of the Corporations Law such as whether the company had been trading while insolvent and whether there has been any breach of directors' duties. ASIC has said that the matters involved are complex and that its investigation is likely to take many months.

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On 16 May, ASIC Chairman David Knott announced that:

we have initiated an investigation strategy that clearly differentiates between prospective criminal and civil avenues of enquiry. We are well advanced in assembling a specialist team of investigators, drawing on both internal resources and external experts. These include specialist actuarial, auditing, claims management and insolvency skills. While the size and composition of the investigating team will remain confidential, it promises to be the biggest ever assembled by ASIC.<sup>2</sup>

In the 2001–02 Federal Budget, ASIC was provided with additional funding of \$5 million over two years to assist with its investigation of HIH.

On 24 May, ASIC commenced proceedings under the Corporations Law against former CEO Mr Williams, chief financial officer Mr Fodera and former director, Mr Adler. ASIC also sought asset preservation orders under the Corporations Law.

It is important to note that these proceedings are not directly related to the failure of HIH. They relate to the investment of \$10 million by HIH in a company called Pacific Eagle Equities (Pacific Eagle) in June 2000. However, it is equally important to note that these proceedings may reveal information that would assist other inquiries and that these proceedings may only be the first of many undertaken by ASIC in relation to HIH.

### **HIH Royal Commission**

On 18 June the Prime Minister announced the establishment of the HIH Royal Commission to 'inquire into the reasons for, and the circumstances surrounding, the failure of HIH prior to the appointment of the provisional liquidators on 15 March 2001'.<sup>3</sup> The Terms of Reference expressly noted that ASIC was 'also investigating certain matters surrounding the failure of HIH' and required the Commissioner, Justice Neville Owen, 'to the extent practicable' to 'cooperate with ASIC', avoiding 'duplication of ASIC's investigation' and 'any adverse impact on any civil or criminal proceeding arising out of ASIC's investigation'.

The Terms of Reference reveal underlying concerns regarding the overlap and possible conflicts in the powers and functions of the Royal Commission and the investigation. Some of these concerns were voiced in a newspaper article by Stephen Donaghue:

If [ASIC] lays charges, the [royal] commission will not be permitted to use its coercive powers to question any witnesses against whom charges have been laid, because such questioning (even in private) would constitute contempt of court. The laying of charges would therefore seriously impede the commission's ability to conduct its own investigation. If ASIC delays the decision to lay charges, it will become harder to obtain a conviction when charges are eventually laid. That is because answers or documents a witness is required to give to a Royal Commission cannot be used against that witness in subsequent court proceedings. This protection is significantly wider than the protection that operates during ASIC investigations.<sup>4</sup>

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Essentially, the argument is that a Royal Commission, as an instrument of the executive, cannot interfere with a civil or criminal proceeding being undertaken by the judiciary. Conversely, there is a statutory requirement that evidence given to a Royal Commission cannot be used against the witness in any subsequent civil or criminal proceedings.

Arguably, there is a need for cooperation between ASIC and the HIH Royal Commission.

### **Postponement**

The most obvious approach is to have one of the bodies postpone its inquiry. The potential for overlap between the two inquiries led at least one commentator to suggest that ASIC would have little scope to investigate HIH while the HIH Royal Commission is on foot: 'outside its present action on the creation and trading of ... pacific eagle trust, its work is now on hold until next September [2002] when the Royal Commission is due to finish'.<sup>5</sup> (However, given the observations by Donaghue, it would seem to make more sense if the HIH Royal Commission postponed its inquiry until the ASIC investigation was complete.)

Donaghue suggested an approach in which ASIC identifies the identity and role of persons involved, the Royal Commission then uses the information to make findings on individual misconduct and concentrates on other terms of reference.

The virtue of this approach is not only that it forestalls the outcomes above, but that it arms the HIH Royal Commission with the far broader powers of ASIC to compel witnesses irrespective of privileges or subsequent civil or criminal liability. However, the difficulty with the 'tri-continental' approach is that it may involve significant delays in the ASIC investigation and/or the HIH Royal Commission. Moreover, it does not prevent the possibility that information may inadvertently be given in evidence to the HIH Royal Commission which cannot then be used by ASIC in subsequent proceedings.

Either way, postponement does not seem very likely. First, the draft Terms of Reference for the HIH Royal Commission and ASIC's own media statements<sup>6</sup> state clearly that the inquiries will need to cooperate, suggesting that they will have overlapping timeframes. Second, as indicated, ASIC has been given extra funding in the current financial year.

What is needed is a relationship between ASIC and the HIH Royal Commission which enables information to pass readily between the bodies, facilitating both inquiries.

### **This Bill**

The Bill essentially deals with the transfer of information. It does not address the issues associated with the potential conflicts that may arise as a result of information being led in evidence to the HIH Royal Commission rather than the ASIC investigation.

The following discussion traces the similarities and differences in the regimes which apply to the ASIC investigation and the HIH Royal Commission relating to the powers to compel witnesses and the use of evidence in subsequent civil or criminal proceedings.

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## Courts, Compelling Witnesses and Privileges

Courts have the power to compel witnesses to answer questions and produce documents. However, this power is limited by the operation of certain privileges and immunities. The key privileges are legal professional privilege and the privilege against self-incrimination.

### Legal Professional Privilege

Legal professional privilege protects a range of confidential communications made between lawyers and clients.<sup>7</sup> Traditionally, it protects communications in the context of actual or anticipated legal proceedings. It also protects other communications between lawyers and clients, provided they pass 'as professional communications in a professional capacity'.<sup>8</sup> Moreover it may protect communications between lawyers and third parties, 'but only when they are prepared for, or in contemplation of, existing or anticipated litigation, or for the purpose of ... obtaining evidence with reference to such litigation'.<sup>9</sup>

The key issue is whether a communication is made for the purpose of the client being provided with legal advice for legal proceedings. The 'sole purpose' test has been replaced with a 'dominant purpose' test in legislation.<sup>10</sup> A document which has been prepared with a view to its being used to assist impending litigation may be privileged, even if it is never used.<sup>11</sup> A document may remain privileged even if it is disclosed to an opponent.<sup>12</sup>

Traditionally, the reason for the privilege was understood to be the 'maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship'.<sup>13</sup> The modern reason is its 'tendency to broaden the operation of the rule of law as well as to enhance the individual's capacity to secure its protection'.<sup>14</sup> It is essentially the need to ensure that there is a freedom and candour of communication between lawyer and client:

[I]ts justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice.<sup>15</sup>

### Privilege Against Self-Incrimination

The privilege against self-incrimination is fundamental. It protects an accused who is required 'to produce documents which tend to implicate that person in the commission of the offence charged'.<sup>16</sup> It extends to protect a person from revealing anything which may lead to the discovery of adverse evidence not in the person's possession or power.<sup>17</sup>

Various reasons have been put forward for the privilege. It has been said that it is a human right 'based on the desire to protect personal freedom and human dignity'.<sup>18</sup> In more pragmatic terms it has been said that it is a significant element in the accusatorial system of justice. It follows from the propositions that 'the prosecution must prove the guilt of the prisoner'<sup>19</sup> and that 'an accused is not bound to incriminate himself'.<sup>20</sup> A middle ground seems to be the proposition that the privilege provides for a 'fair state-individual balance'

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in the conduct of criminal proceedings. To some extent the reason for the privilege may also be based on the public interest in the administration of justice:

it is important for the proper administration of justice, not only that would-be witnesses are ... protected from the risk of any incrimination or penalty as they give their evidence. It is thought that without such protections witnesses might be loath to come forward to give evidence and, although reliance on the privilege will sometimes obstruct the course of justice in the case in which it is claimed, and may militate against the discovery of crimes which ought, in the public interest, to be traced, this is probably sufficient justification for protecting a witness from exposing himself to the peril of criminal proceedings.<sup>21</sup>

### Commissions, Compelling Witnesses and Privileges

To a degree, Royal Commissions and commissions of inquiry have the power to compel witnesses to answer questions and produce documents. While Royal Commissions may be established by the executive, the executive cannot confer these powers unilaterally. They must be conferred by statute and are therefore subject to restraints on legislative power.

The *Royal Commissions Act 1902* (the RCs Act) gives Royal Commissions the power to compel witnesses, backed by a power to punish witnesses for contempt. Similarly, the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) gives ASIC the ability to compel witnesses, backed by criminal penalties for failure to comply. Witnesses must answer questions and produce documents unless they have a reasonable excuse. In very limited circumstances, witnesses may object on the ground of relevance.

### Privileges

Generally, both privileges apply to Royal Commissions and executive inquiries. Thus, it has been said that the privilege against self-incrimination is 'too fundamental a bulwark of liberty to be categorised simply as a rule of evidence applicable to judicial or quasi-judicial proceedings'<sup>22</sup> and must therefore be applicable to non-judicial proceedings.<sup>23</sup> It was originally considered that legal professional privilege was confined to judicial or quasi-judicial proceedings.<sup>24</sup> However, it is clear that the privilege is more than a rule of evidence or procedure and is part of the substantive common law.<sup>25</sup> On this basis, it has the power to affect disclosure outside the judicial or quasi-judicial sphere. However, while it may extend to extra-judicial proceedings, its content varies according to the nature of the document for which protection is sought and the context in which production is sought.<sup>26</sup>

However, it is equally clear that both privileges may be confined or abrogated by statute.<sup>27</sup> While neither privilege can be abrogated except by a clear statutory intention evidenced by express words or necessary implication,<sup>28</sup> some Acts have clearly and effectively done so.

The RCs Act and the ASIC Act both abrogate the privilege against self-incrimination. While a person may refuse to comply with a direction if he or she has a reasonable excuse:

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- *RCs Act*: it is unreasonable not to answer a question or produce a document where that 'might tend to incriminate a person' unless the matter in question relates to an offence for which the person has been charged but which has not been finalised.<sup>29</sup>
- *ASIC Act*: it is unreasonable not to answer a question or produce a document where that 'might tend to incriminate the person *or* make the person liable to a penalty' *even if* charges are pending.<sup>30</sup> In this context 'penalty' includes any penalty arising out of criminal or civil proceedings, provided the burden imposed is truly intended to punish the person rather than to prevent some threat to the public interest.<sup>31</sup>

While there was once some doubt regarding the application of legal professional privilege to ASIC investigations,<sup>32</sup> the ASIC Act now preserves the privilege in statutory form. The RCs Act is silent on this issue. The privilege is expressly abrogated in Victoria.<sup>33</sup>

### Use of Compelled Evidence

One might expect that where a privilege is abrogated, any evidence that a witness is compelled to give would be protected in subsequent proceedings. This would respect both the public interest in disclosure at Royal Commissions and the public interest in the administration of justice and protection of human rights in the courts.

#### General

Historically, evidence given to a Royal Commission was presumed to be admissible in subsequent legal proceedings.<sup>34</sup> However, it may be more accurate to say that the issue turns upon construction of the relevant statute.<sup>35</sup> The difficulty is that 'Australian statutes ... rarely express guidance in relation to the admissibility of compelled evidence'.<sup>36</sup> Moreover, while some statutes expressly deal with *inadmissibility* it is often incorrectly assumed that the statutory abrogation of a privilege necessarily implies that the evidence obtained by the Royal Commission is *not* admissible in subsequent proceedings.<sup>37</sup>

The RCs Act and the ASIC Act deal with compelled evidence in disparate ways:

- *RCs Act*: evidence is *not* admissible *against that witness* 'in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory'.<sup>38</sup> (In this context 'civil or criminal proceedings' includes administrative proceedings.<sup>39</sup>)
- *ASIC Act*: evidence *is* admissible, subject to some exceptions, in 'a proceeding' against the witness.<sup>40</sup> It is admissible notwithstanding that the witness is absent.<sup>41</sup>

#### Use in *Any* Proceedings

The prohibition against use of compelled evidence 'in any civil or criminal proceedings' is a significant limitation not only on the courts but on the Royal Commissions themselves. It poses a significant obstacle to any government which seeks to prosecute conduct that is discovered as a result of the activities of a Royal Commission. It effectively prevents a

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Royal Commission from investigating matters which may form the basis of subsequent civil or criminal proceedings. For this reason, it is at the heart of the concerns expressed by Donaghue above regarding cooperation between ASIC and the HIH Royal Commission.

Donaghue suggests that the solution is to conduct joint Royal Commissions in which Commonwealth and State Governments issue letters patent to the same commissioner. Thus, the commissioner is able to use the coercive powers of the State legislation, rather than the Commonwealth legislation, and therefore avoid any 'potential inconvenience'.<sup>42</sup>

However, this approach would not seem to be able to get around the blanket immunity. The problem was clearly illustrated by the circumstances surrounding the *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (1981–1984) conducted by Frank Costigan QC. Following the Royal Commission, the Victorian Government sought successfully to prosecute two of the witnesses for perjury. However, the conviction was set aside following an appeal to the High Court which upheld the blanket prohibition in the Commonwealth *Royal Commissions Act 1902*.<sup>43</sup> The Commonwealth law effectively overrode the contrary State law, even though simultaneous letters patent were issued and the Victorian legislation permitted perjury prosecutions.

## Observations

Clearly, there is a need for cooperation between ASIC and the HIH Royal Commission. The measures in this Bill will assist in this regard. However, it is unclear how both inquiries will operate effectively and avoid *any* 'potential inconvenience' described above. As a practical matter, the paths of the ASIC investigation and the HIH Royal Commission are likely to cross at some point in the future. It may not be sufficient simply to permit the bodies to exchange information or to direct Justice Owen to conduct the commission with a view to avoiding adverse impacts on subsequent civil or criminal proceedings. Nor would it seem to be sufficient for governments to issue simultaneous letters patent. The Commonwealth may need to reconsider the blanket immunity in the Commonwealth Act.

## Main Provisions

### ASIC Act

Section 127 of the ASIC Act deals with confidentiality of information obtained by ASIC. ASIC must take 'all reasonable measures' to protect from unauthorised use or disclosure:

- confidential information: information which has been given to ASIC in confidence in relation to the performance of functions and exercise of its powers, and
- 'protected information': information which has been given to or obtained by ASIC in accordance with section 12A<sup>44</sup> relating to a person or body regulated by ASIC

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Subsection 127(2) permits disclosure of information 'as required or permitted by a law of the Commonwealth or a prescribed law of a State or ... Territory'. Such disclosure is taken to be 'authorised use and disclosure' for the purposes of the ASIC Act.

Subsection 127(2A) grants the same permission in respect of disclosure to the Minister, the Departmental Secretary and to APRA.

**Proposed subsection 127(2B)** permits disclosure to a Royal Commission under the *Royal Commissions Act 1902*. The ASIC Chairperson may impose conditions on the disclosure of information (**proposed subsection 127(2C)**).

### FTR Act

Part IV of the FTR Act deals with confidentiality of information obtained under the FTR Act. No Director, staff member, customs officer, police officer or consultant may 'make a record of any [such] information', or 'divulge or communicate to any person any [such] information' except in accordance with the FTR Act (section 25).

Section 27 provides for disclosure of 'FTR information' or information relating to reports of 'significant cash transactions' (cash transactions greater than A\$10 000). The Australian Tax Office effectively has access to FTR information *as of right* (paragraph 271(1)(a)). The Director of AUSTRAC may confer the same right on other agencies including the Australian Customs Service, a 'revenue authority of a State or Territory', and a 'law enforcement agency' for the performance of its functions (paragraphs 271(1)(b)-(ca)).

Generally, 'law enforcement agency' means the National Crime Authority, the Australian Federal Police and the 'Australian Securities Commission' (ASIC) (subsection 27(14)). However, the phrase also includes, or has been extended to include:

- the Police Force of a State
- the New South Wales Crime Commission
- the Independent Commission Against Corruption of New South Wales<sup>45</sup>
- the Criminal Justice Commission of Queensland<sup>46</sup>
- the Royal Commission into the New South Wales Police Service<sup>47</sup>
- the Police Integrity Commission,<sup>48</sup> and
- the Australian Bureau of Criminal Intelligence (paragraphs 27(16)(a)–(g)).<sup>49</sup>

The agencies' access rights are extended to their key officers (subsection 27(17)).

**Proposed paragraph 27(16)(ea)** includes within 'law enforcement agency' a Royal Commission 'whose terms of reference include inquiry into whether unlawful conduct

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(*however described*) has occurred' (emphasis added). **Proposed subsection 27(17)** extends access rights to the Royal Commission(ers), staff members and counsel assisting.

### Royal Commissions Act

Section 6P of the Royal Commissions Act permits Commissions to disclose information to various bodies if, 'in the opinion of the Commission it is appropriate to do so'.

It may disclose information that relates or may relate to an offence to various persons including a Commonwealth, State or Territory Attorney-General, Police Commissioner or 'authority or person responsible for the administration or enforcement of the [relevant] law' (subsection 6P(1)). It may disclose information that it considers relates to an inquiry by another Commission or by the National Crime Authority (subsections 6P(2) and (2A)).

**Item 5** seeks to amend subsection 6P(1) to extend the breadth of the discretion from 'information that relates, or that may relate, to the commission of an offence, or evidence of the commission of an offence, against a law of the Commonwealth, of a State or of a Territory' to 'information that relates, or that may relate, to a *contravention of a law, or evidence of a contravention of a law*, of the Commonwealth, of a State or of a Territory'.

Thus, the amendment captures conduct which is unlawful rather than conduct which constitutes an offence under Commonwealth, State or Territory law.

**Proposed subsection 6P(1A)** makes it clear that 'a contravention of a law', or unlawful conduct means a contravention which may involve a criminal penalty, civil penalty or administrative penalty.

## Concluding Comments

The possibility of conflict between the inquiries, and therefore the implication that the HIH Royal Commission could raise more issues than it resolves, is significant particularly considering the estimated costs associated with the conduct of the Commission. At least one commentator has suggested that it will cost \$40,000 per day or \$20m in total.<sup>50</sup>

It is extremely difficult for an outsider to estimate the costs of a Royal Commission. Key issues with respect to cost are the structure and composition of the commission and its duration. Cost will be affected by the proportion of time allocated to research, hearings, drafting, publication, etc. It will also be affected by the location and venue, extent of travel, number of witnesses called, etc. In addition, it may be affected by witness expenses<sup>51</sup> and the extent to which the Royal Commission agrees to pay legal costs of witnesses on the basis that they may (ultimately) expose themselves to legal liability. A comparative table showing the costs of various federal Royal Commissions is included in Appendix B.

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## Endnote

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- 1 The Corporations Law requires listed companies to disclose to the market information that a reasonable person would expect to have a material effect on the price or value of its securities (section 1001A).
- 2 David Knott, 'HIH Insurance investigation', *Media Release*, 16/05/01.
- 3 Prime Minister, 'HIH Royal Commission', *Media Release*, 18/06/01.
- 4 Stephen Donaghue, 'HIH: why only ASIC can catch the guilty', *The Age*, 20/06/01.
- 5 John Durie, 'ASIC may as well sit on its hands', *Australian Financial Review*, June 19 2001
- 6 Australian Securities and Investments Commission, 'ASIC welcomes announcement of HIH Royal Commissioner', *Media Release*, 18/06/01.
- 7 *Grant v Downs* (1976) 135 CLR 374; *Baker v Campbell* (1983) 153 CLR 52
- 8 *Baker v Campbell* (1983) 153 CLR 52, per Dawson J at p. 128.
- 9 Suzanne McNicol, *The Law of Privilege*, Law Book Company, 1992, p. 46. See also *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44.
- 10 For example, *Evidence Act 1995* (Cth), section 119:  

**119.** Evidence is not to be *adduced* if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication made between the client and another person, or between a lawyer acting for the client and another person, that was made; or

(b) the contents of a confidential document that was prepared;

for the *dominant purpose* of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceedings before the court) in which the client is or may be ... a party.
- 11 *TPC v Sterling* (1979) 36 FLR 244 and see *Southwark Water Co v Quick* (1978) 3 QBD 315.
- 12 *Hooker Corporation Ltd v Darling Harbour Authority* (1987) 9 NSWLR 538; *Key International Drilling Co Ltd v TNT Bulkships Corporation Pty Ltd* [1989] WAR 280.
- 13 *Baker v Campbell* (1983) 153 CLR 52, per Dawson J at p. 128.
- 14 *Waterford v Commonwealth* (1986-1987) 163 CLR 54, per Brennan at 74, referring to *Sankey v Whitlam* (1978) 142 CLR at pp. 39, 58-59, 95-96.
- 15 *Baker v Campbell* (1983) 153 CLR 52, per Dawson J at p. 128.
- 16 *Environmental Protection Authority v Caltex Refining Co. Pty. Ltd.* (1993) 118 ALR 392.
- 17 *Hamilton v Oades* (1989) 166 CLR 486 at pp. 503, 508.
- 18 *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 per Murphy J at 150.

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- 19 *Woolmington v Director of Public Prosecutions* [1935] AC 462, per Viscount Sankey LJ at 481.
- 20 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 per Isaacs J at pp. 549-550.
- 21 Byrne & Heydon, *Cross on Evidence*, 4<sup>th</sup> Australian Edition, Butterworths, Sydney, 1991, p. 687.
- 22 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at p 340.
- 23 *Sorby v Commonwealth* (1983) 152 CLR 281 at p. 309; *Pyneboard Pty Ltd v Trade Practices Commission*, op. cit., at p. 341; *Controlled Consultants Pty Ltd v CAC* (1985) 156 CLR 385, at p. 389.
- 24 *Parry-Jones v Law Society* [1969] 1 CH 1; *Brayley v Wilton* [1976] 2 NSWLR 495; *Crowley v Murphy* (1981) 34 ALR 496; *O'Reilly v Commissioners of the State Bank of Victoria* (1982) 153 CLR 1.
- 25 *Baker v Campbell* (1983) 153 CLR 52.
- 26 *Egan v Chadwick* [1999] NSWCA 176, reported in 46 NSWLR 563.
- 27 Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, Sydney, 2001, pp. 94–97 and pp. 106–108; Suzanne McNicol, *The Law of Privilege*, Law Book Company, 1992, pp. 241–273.
- 28 Self incrimination: *Hamilton v Oades* (1989) 166 CLR 486; *Sorby v Commonwealth* (1983) 152 CLR 281; *Police Service Board v Morris* (1985) 156 CLR 397; *Commission Against Corruption (NSW) v Yuill* (1991) 172 CLR 319. Legal professional privilege: *Baker v Campbell* (1983) 153 CLR 52; *Balog v ICAC* (1990) 169 CLR 625; *Re Compass Airlines Pty Ltd* (1992) 109 ALR 119.
- 29 *Royal Commissions Act 1902*, section 6A.
- 30 *Australian Securities and Investments Commission Act 2001*, section 68.
- 31 *Australian Securities Commission v Kippe* (1996) 137 ALR 423, per Von Doussa, Cooper and Tamberlin JJ at pp. 430–431. In that case, the Federal Court rejected an argument that a power to issue a 'banning order' under the *Australian Securities Commission Act 1989* was a provision for the imposition of a penalty: 'The immediate and direct legal effect intended by a banning order is not to impose a penalty or punishment on the person concerned, but to be preventative in that it removes a perceived threat to the public interest and to public confidence in the securities and futures industry by removing a that person from participation therein', at p. 431.
- 32 In *Commission Against Corruption (NSW) v Yuill*, op. cit. the High Court effectively held that the Companies Code, the predecessor of the Corporations Law had impliedly abrogated the privilege by providing express provision for its protection in subsequent proceedings (per Brennan, Dawson and Toohey JJ) and, perhaps, by abrogating the privilege against self-incrimination (per Dawson J). Both of these measures suggested an understanding that the privilege did not apply and/or an intention that it was to be abrogated. Thus, Donaghue concludes that the privilege is abrogated by the ASIC Act: Donaghue, op. cit., p 109.

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- 33 Royal Commissions in Victoria are given the power to compel witnesses irrespective of legal professional privilege: *Evidence Act 1958* (Vic) section 19D. The provision was upheld in *Esso Australia Resources Ltd v Dawson* (1999) 162 ALR 79 at p. 86
- 34 *R v Scott* (1856) 169 ER 909; *R v Coote* (1873) LR 4 PC 599.
- 35 *Commissioners of Customs and Excise v Harz* [1967] 1 AC 760.
- 36 Donaghue, op. cit., p. 202.
- 37 Ibid, p. 203.
- 38 *Royal Commissions Act 1902*, section 6DD. This is not to say that the statements or documents may not be used for limited purposes. For example, a statement *might* be admissible as a prior inconsistent statement provided it is used solely for the purpose of attacking the credibility of the witness rather than proving an incriminating fact: See Donaghue, op. cit., pp. 212–213 discussing the Canadian case of *R v Kuldip* (1990) 61 CCC (3d) 385.
- 39 *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141, at p. 147.
- 40 *Australian Securities and Investments Commission Act 2001*, section 76.
- 41 Ibid, section 77.
- 42 Donaghue, op. cit., p. 33.
- 43 *Giannarelli v R* (1983) 154 CLR 212.
- 44 Section 12A confers 'other functions and powers' on ASIC which include powers conferred under insurance and superannuation legislation, 'monitoring and promoting market integrity and consumer protection' in the 'payments system' (the system that governs cheque clearing, electronic funds transfers, etc. among financial institutions).
- 45 *Crimes Legislation Amendment Act (No. 2) 1991*, section 15.
- 46 Ibid.
- 47 *Royal Commission into the New South Wales Police Service (Access to Information) Act 1994*, Schedule, item 2.
- 48 *Telecommunications (Interception) and Listening Device Amendment Act 1997*, Schedule 4, item 4.
- 49 Ibid.
- <sup>50</sup>. Mark Skulley and Bill Pheasant, 'Commission to set taxpayers back \$20m for starters', *Australian Financial Review*, 22/05/01.
- <sup>51</sup>. A Royal Commissioner may pay witness expenses from the monies appropriated for the commission *Royal Commissions Act 1902*, section 8.

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## Appendix A

### HIH Royal Commission: Proposed Terms of Reference

The Commissioner will into the reasons for, and the circumstances surrounding, the failure of HIH prior to the appointment of the provisional liquidators on 15 March 2001.

In particular, he will inquire into:

- (a) whether, and if so the extent to which, decisions or actions of HIH or any of its directors, officers, employees, auditors, actuaries, advisers or agents:
  - (i) contributed to the failure of HIH; or
  - (ii) involved undesirable corporate governance practices, including any failure to make desirable disclosures regarding the financial position of HIH;
- (b) whether those decisions or actions might have constituted a breach of any law of the Commonwealth, a State or a Territory and, if so, whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency;
- (c) the appropriateness of the manner in which powers were exercised and responsibilities and obligations were discharged under Commonwealth legislation;
- (d) the appropriateness of the manner in which powers were exercised and responsibilities and obligations were discharged under State or Territory legislation; and
- (e) the adequacy and appropriateness of arrangements for the regulation and prudential supervision of general insurance at Commonwealth, State and Territory levels, taking into account his findings in relation to the matters referred to in the preceding paragraphs and other relevant matters, including:
  - (i) Commonwealth arrangements before and after the Financial System Inquiry reforms; and
  - (ii) different State and Territory statutory insurance and tax regimes.

...

Noting that the Australian Securities and Investments Commission (ASIC) is also investigating certain matters surrounding the failure of HIH, the Commissioner will, to the extent practicable, co-operate with ASIC and conduct his inquiry with a view to avoiding:

- (a) any duplication of ASIC's investigation; and
- (b) any adverse impact on any civil or criminal proceeding arising out of ASIC's investigation.

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## Appendix B<sup>1</sup>

Period	Cost	
	Actual	Real <sup>2</sup>
<b>Whitlam 1972-1975</b>		
Statements of Lieutenant Commander Cabban (1 June 1967-13 March 1968)	\$0.371m	\$3.0m
Great Barrier Reef Petroleum Drilling (5 May 1970-30 October 1974)	\$0.771m	\$4.8m
Aboriginal Land Rights (8 February 1973-3 May 1974)	\$0.048m	\$0.3m
Australian Post Office (22 February 1973-19 April 1974)	\$0.360m	\$1.9m
Land Tenures (4 May 1973-24 March 1976)	\$0.224m	\$1.0m
Petroleum (12 September 1973-1 November 1976)	\$1.768m	\$7.9m
Maritime Industry (25 September 1973-25 June 1976)	\$0.595m	\$2.7m
FM Broadcasting (27 November 1973-8 March 1974)	\$0.047m	\$0.3m
Transport to and from Tasmania (10 April 1974-5 March 1976)	\$0.501m	\$2.1m
Australian Government Administration (6 June 1974-22 July 1976)	\$2.038m	\$8.4m
Intelligence and Security (21 August 1974-21 April 1977)	\$0.672m	\$2.6m
Human Relationships (21 August 1974-21 November 1977)	\$1.032m	\$4.0m
Alleged Payments to Maritime Unions (5 September 1974-23 April 1976)	\$0.225m	\$0.9m
Aboriginal/Police Incidents in W.A. (staffed by W.A. Government) (23 April 1975-13 April 1976)	\$0.161m	\$0.6m

1 Information is gathered predominantly from Answers to Questions on Notice, for example Senator John Button, Answer to Question No. 682 of 1984, Senate, Debates, 22/10/84, p. 2164.

2 Expressed in 2000-01 dollars. Converted to real terms using the implicit price deflator for financial year(s) that approximate the dates of each Royal Commission.

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Norfolk Island (15 May 1975-15 October 1976)	\$0.220m	\$0.8m
<b>Fraser 1975-83</b>		
Royal Commission into Drugs (13 October 1977-21 December 1979)	\$3.219m	\$9.5m
Royal Commission into Matters in Relation to Electoral Redistribution of Queensland in 1977 (24 April 1978-3 August 1978)	\$0.188m	\$0.6m
Royal Commission into the Efficiency and Administration of Hospitals (29 August 1979-29 December 1980)	\$1.237m	\$3.2m
Royal Commission into Christmas Island, Phosphate Industry (20 December 1979-15 February 1980)	\$0.054m	\$0.1m
Royal Commission into the Activities of the Australian Building Construction Employees' and Builders Labourers' Federation (staffed by Victorian Government) (20 August 1981-27 May 1982)	\$0.046m	\$0.1m
Royal Commission into the Australian Meat Industry (1981-1982)	\$1.144m	\$2.5m
Royal Commission of Inquiry into Drug Trafficking (1981-1983)	\$9.410m	\$19.6 m
Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1981-1984)	\$14.401 m	\$28.7 m
<b>Hawke/Keating 1983-1996</b>		
Commission of Inquiry into the Current Health Status of the Australian Population (Llewellyn-Jones (Chair); 7 members; March 1985-October 1986)		
Commission of Inquiry into the Lemonthyme and Southern Forests (Helsham (Chair); 3 members; May 1987-May 1988)	\$2.181m	\$3.1m
Commission of Inquiry into the Shoalwater Bay Training Area (Woodward (Chair); 3 members; May 1993-May 1994)	\$0.000m	\$0.0m
Royal Commission of Inquiry into the Leasing by the Commonwealth of Accommodation in Centenary House (Morling (Chair); 1 member; May 1994-...)	\$0.204m	\$0.2m
Royal Commission into Aboriginal Deaths in Custody (Muirhead-Johnston (Chair); 5 members; October 1987-May 1991)	\$32.366 m	\$41.6 m

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Royal Commission into British Nuclear Tests in Australia between 1952-1963 (McClelland (Chair); 3 members; July 1984-November 1985)	\$3.510m	\$6.1m
Royal Commission into Grain Storage Handling and Transport (McColl (Chair); 1 member; October 1986-February 1988)	\$2.203m	\$3.3m
Royal Commission of Inquiry into Alleged Telephone Interceptions (Stewart (Chair); 1 member; March 1985-December 1985)	\$0.658m	\$1.1m
Royal Commission of Inquiry into Chamberlain Convictions (Morling (Chair); 1 member; April 1986-June 1987)		
Royal Commission of Inquiry into the Activities of the Nugen Hand Group (Stewart (Chair); 1 member March 1984-May 1985)	\$1.931m	\$3.4m
Royal Commission of Inquiry into the Compensation Arising from the Social Security Conspiracy Prosecutions (Mitchell (Chair); 1 member; February 1986-June 1986)	\$1.632m	\$2.7m
Royal Commission on Australia's Security and Intelligence Agencies (Hope (Chair); 1 member; May 1983-August 1983)	\$2.317m	\$4.4m
Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam (Evatt (Chair); 1 member; May 1983-August 1985)	\$3.878m	\$7.0m
Commission of Inquiry into the Australian Secret Intelligence Service (Samuels and Codd; 15 March 1994-21 February 1995)	\$5.700m	\$6.4m
<b>Howard 1996-Present</b>		
Stolen Generations Inquiry	\$1.685m	
Commission of Inquiry into the Relations Between the CAA and Seaview Air (Staunton; 1994-8 October 1996)	\$8.066m	\$9.0m

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