

# FOLEY'S | LIST

## AFTER A ROYAL COMMISSION:

Proceeds of Crime & Civil Penalties

Author: Simon McGregor

Date: 13 February, 2018

**© Copyright 2018**

This work is copyright. Apart from any permitted use under the *Copyright Act 1968*, no part may be reproduced or copied in any form without the permission of the Author.

Requests and inquiries concerning reproduction and rights should be addressed to the author c/- [annabolger@foleys.com.au](mailto:annabolger@foleys.com.au) or T 613-9225 6387.

## After a Royal Commission: Proceeds of Crime & Civil Penalties

1. The Financial Services Royal Commission may communicate information, including documents and evidence, gathered in the course of its inquiry to a wide range of destinations: Part 5 of the *Royal Commission Act 1902* (Cth)('the Act').<sup>1</sup>
2. Whilst admissions made in the course of, and Findings by, the Commission are not strictly binding in subsequent proceedings,<sup>2</sup> practitioners would be wise to assume they will be hard to avoid.
3. Coercive evidential procedures, the right to silence, penalty privilege and derivative use of evidence in subsequent proceedings are topics of interest both to this Commissioner himself, and his former Court.<sup>3</sup>
4. Express referrals:
  - (a) Investigations & Public Purpose Litigation:
    - (1) Political:
      - (A) Federal & State Attorney Generals.
      - (B) Potential redress schemes.
    - (2) Criminal:
      - (A) Federal & State.
      - (B) Special Prosecutors, Australian Crime Commission, DPPs, other law enforcement agency.

---

<sup>1</sup> The operative version of the Act for this Commission commenced 1 May 2016, when the 'private sessions' powers were added for the Institutional Abuse commission.

<sup>2</sup> See s7C of the Act.

<sup>3</sup> For instance, see *AFP v Zhao & Anor* [2015] HCA 5, (2015) 255 CLR 46 at [45], *Lee v The Queen* (2014) 253 CLR 455, [45], *X7 v Australian Crime Commission* (2013) 248 CLR 92, [53] & [124].

- (C) Certain modern offences have very low standards of proof:
    - (I) e.g. Section 400.9 of the *Criminal Code 1995* (Cth) ‘dealing in property reasonably suspected of being proceeds of crime’.
    - (D) Profit motivated convictions, even if only proven to a civil standard, or even mere suspicions, can trigger asset forfeiture.<sup>4</sup>
    - (E) *Sentencing Act* compensation or restitution applications are available against institutions and are on the rise.
  - (3) Civil & Administrative:
    - (A) Australian Securities & Investment Commission (ASIC);
    - (B) Australian Competition and Consumer Commission (ACCC);
    - (C) Ombuds (Federal & State);
    - (D) Disciplinary & Licensing reviews.
  - (4) Bear in mind that there is a window of opportunity to negotiate penalties with your opponent before seeking judicial approval.
5. Private Litigation :
- (a) Breaches of Directors Duties; Shareholder actions;
  - (b) Breaches of Fiduciary Duties;
  - (c) Breaches of Contract;
  - (d) Negligence and Negligent misstatement;
  - (e) Misleading and deceptive conduct;
  - (f) Consumer litigation.
6. Class Actions.

---

<sup>4</sup> *Proceeds of Crime Act 2002* (Cth) and or the *Confiscation Act 1997* (Vic).

7. Tactical Considerations:
  - (a) Conflicts of interest;
  - (b) *Harman* obligations, privilege and use immunities, and whether any conduct has waived those rights;
  - (c) Admissibility contests;
  - (d) Discretionary exclusion, Uniform *Evidence Act* protective certificates;
  - (e) Reputational and marketplace consequences, and the *Briginshaw* standard of proof.
  - (f) The reach of equitable remedies such as rectification, tracing and estoppel.
  - (g) Pseudonym or suppression orders under the *Open Courts Act*.
  
8. Bear in mind that ‘spin off’ litigation is a particularly unique form of our craft. Be open minded and practical. Keep referring back to first principles when things look novel, and do not jump to conclusions.



**Simon McGregor**

Barrister

Foley's List

Liability limited by a scheme approved under Professional Standards Legislation.

**6 February 2018**