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Senator Peter Whish-Wilson
Parliament House
Canberra ACT 2600

By email: senator.whish-wilson@aph.gov.au

Dear Senator Whish-Wilson

PARLIAMENTARY COMMISSION OF INQUIRY INTO THE FINANCIAL SECTOR

You have asked for advice on the establishment of a statutory commission of inquiry into the financial sector, presumably as an alternative to a Royal Commission.

The fundamental point to stress about such inquiries is that they are created by statute and are necessarily creatures of the executive government because of that. The structure of constitutional government in Australia divides power between the three arms of government: legislative, executive and judicial. While the legislature enacts laws, all statutes so enacted are administered by the executive government. The Administrative Arrangements Order attributes responsibility for all Commonwealth statutes to individual portfolio ministers to administer them. Even the *Parliamentary Privileges Act 1987* is administered by a minister of state (the Attorney-General), as is the *Parliamentary Precincts Act 1988* (the Minister for Finance) and the *Parliamentary Presiding Officers Act 1965* (the Prime Minister).

The *Parliamentary Commission of Inquiry Act 1986* was so-named because of its function, not because it represented an alternative mode of inquiry that could be used instead of a Royal Commission, but reporting to the Parliament rather than the Governor-General. The Parliamentary Commission of inquiry was established to inquire and advise the Parliament whether any conduct of Mr Justice Murphy was such as to amount, in its opinion, to proved misbehaviour within the meaning of section 72 of the Constitution. It was set up to enable the two Houses to perform their specific constitutional function in relation to the removal of judges of Chapter III courts. This is a role for the Parliament, not the executive.

Although the Crown has a prerogative power to establish commissions of inquiry, the general practice is for Royal Commissions to be established under the *Royal Commissions Act 1902*. Where Letters Patent are issued for an inquiry relating to the peace, order and good government of the Commonwealth, or any public purpose or power of the Commonwealth,

the Act provides for specific powers and immunities of such inquiries. It also creates offences to protect the operations of a Royal Commission against recalcitrant or mendacious witnesses, or against those who would seek to harm or interfere with witnesses. Such powers and protections replicate the inquiry powers available to the Houses under the law of parliamentary privilege and their contempt jurisdiction, but they are enforceable in the courts.

Putting aside the specific purpose of the 1986 Parliamentary Commission of Inquiry legislation, it would be open to the Parliament to establish a commission of inquiry, to give it appropriate powers and immunities and to require it to report to the Houses rather than the executive government, provided the inquiry was within the powers of the Commonwealth as reflected in the Constitution. Any such commission would have the powers that the Parliament saw fit to give to it. They might replicate those of a Royal Commission or a parliamentary committee or be specifically designed for a particular purpose.

Similarly, the terms of reference would be those specified in the statute or by any mechanism nominated by the statute to devise them. For argument's sake, the statute could provide for the Parliamentary Joint Committee on Corporations and Financial Services to recommend terms of reference which, if adopted by both Houses, would become the terms of reference for the inquiry. The simplest course, however, would be to specify the terms of reference in the statute.

If such a statute were passed, even without the support of the Government, it would be a clear indication that the two Houses of the Parliament, as constituted by elected representatives, were in support of the inquiry. Any government would find it difficult to resist the views of both Houses in this form.

That said, the parliamentary, constitutional or procedural barriers or challenges are numerous.

The legislation establishing the commission (if passed) could be challenged for validity by anyone with standing. Even if it were quite clear that the establishment of the commission was within Commonwealth power and there were no constitutionally objectionable provisions in the legislation (such as any attempt to acquire property on other than just terms, for example), costly interference could be run by interests opposed to such an inquiry. Recourse could be had to litigation at every step to frustrate the commission if the opponents were determined and deep-pocketed enough, including challenges by individual witnesses, not to mention challenges to the appointment of commissioners in the first place. Identification of appropriate commissioners would be problematic and those with the requisite expertise would be vulnerable to conflict of interest claims for any previous involvement with the industry.

The first barrier, however, is that the legislation has to pass both Houses. If it is not supported by the Government, there may be difficulties in having it programmed for debate in the House of Representatives. Members of the House who have spoken about crossing the floor on the substantive issue may nonetheless be reluctant to vote against their party on a procedural question to suspend standing orders or provide debating time for the bill.

How the commission is to be funded is a critical question. The 1986 commission was funded by a standing appropriation but the legislation was proposed by the government in any case, so funding of the commission was not an issue.

An appropriation cannot be initiated in the Senate because of section 53 of the Constitution, and cannot be initiated by a non-executive member of the House of Representatives because of standing orders of the House precluding it. Any appropriation is required to be recommended by message from the Governor-General in accordance with section 56 of the Constitution. Such messages are only issued on advice of the executive government.

If the bill were to be introduced in the Senate, the usual workaround would be a clause providing for funds for the commission to be appropriated by the Parliament for the purpose. The expectation is that the necessary funds would then be appropriated in the annual appropriation Acts. However, a government cannot be compelled to include amounts in an appropriation Act, and cannot be compelled to spend money that is appropriated. If the government does not support the commission, therefore, there is a risk that it may not be funded although, as noted above, it would be politically difficult for any government to resist the views of both Houses expressed in legislative form.

There would also be further challenges but the ones identified so far are likely to be the most significant barriers to the proposition.

The alternative would be a parliamentary inquiry by a committee of one or both Houses. Its actions would no doubt be contested by the industry, but resolution of the contests would largely remain a matter for the Houses or House concerned and be dealt with at a political level rather than through the courts.

Please let me know if I can provide any further assistance.

Yours sincerely



(Rosemary Laing)