



**DRAFT TERMS OF REFERENCE FOR A ROYAL COMMISSION-
INTO AUSTRALIA'S BANKING FINANCIAL INSTITUTIONS AND THEIR
AGENTS.**

10th November 2016

Prepared as a draft by Senator Culleton in Consultation.

NOW THEREFORE We do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you, to inquire into the manner in which financial institutions carrying on business within Australia exercise their powers in relation to security instruments entered into between themselves and their loan customers, their management of events of default arising under those instruments, the circumstances in which and the way in which they deal with those events of default in conjunction with their own obligations under any relevant or applicable standards concerning the carrying on of the business of banking within Australia, their associations and dealings with insolvency practitioners, bank agents, appointed receivers, Trustees and real valuers in the carrying out of these functions.

In particular, and without limiting the scope of your inquiry, you are to inquire into and report back as a Commission of inquiry concerning the following matters:

- a. whether financial institutions and governments should take steps and if so what steps, so as to better afford protection to customers of financial institutions who have entered into credit contracts with financial institutions concerning loan and insurance agreements;
- b. the use of revaluations and reliance upon security valuations of real property as a basis for triggering and loan to value ratio defaults under a customer's banking facility, where a customer's payment arrangements are otherwise within terms, and there has been no monetary default;
- c. the entry into deeds of forbearance between a financial institution and a customer in circumstances of an allegation of default under a loan facility, but which were entered into by a financial institution and a customer purport to forgive the financial institution for any prior acts of maladministration or unlawful behaviour concerning the customer's facility prior to the date upon which the facility was entered into;
- d. the use of Investigating Accountants to inquire into a customer's business or loan facility and which party should be liable for those costs, in circumstances in which the financial institution seeks a review of the facility or alleges that the customer is in default of their obligations under their facility;
- e. any practice within the community of Australia's financial institutions to appoint an investigating accountant who has inquired into the financial performance of a customer, to then act as a receiver over the assets of that customer in calling in and realising its assets on the instructions of the financial institution against the alleged indebtedness;

f. whether as a matter of substance or of practical effect, the conduct of a receivers where appointed in relation to the customer of a financial institution is to act as an agent of the customer, or as the agent of the institution that appointed the receiver, and if so whether there is a need for regulatory change;

g. the relationship between financial institutions, investigative accountants, receivers, valuers, and lawyers acting for financial institutions, and the extent to which those persons should be entitled to and the extent to which a financial institution should be entitled to recover those costs from their customers, or whether a form of capping as to those costs should be applied;

h. the effectiveness of any domestic or international government or private agents including ASIC and APRA in respect of their functions as regulator;

i. the integrity, where called or brought into question, of evidence previously provided to Inquiries carried on under the auspices of the Senate of the Commonwealth of Australia, or the Parliament of the Commonwealth of Australia, by Australia's financial institutions, their agents and officers, within the last five -5- years;

j. whether or not it is appropriate for financial institutions to be forced to comply with banking standards formulated internationally and the extent to which those banking standards impact upon customers within Australia, in circumstances which are not otherwise relevant to local economic issues;

k. the effect of compliance;

l. any recommendations for compensatory arrangements or legislative change arising out of any matter identified in the course of the Commission's investigations and inquiries;

m. what the respective financial institutions and governments should do to address, or to alleviate the impact of past and future conduct by financial institutions concerning the manner in which and the way in which they seek to enforce their security agreements, including, in particular, in ensuring justice for customers through the provision of redress by those institutions, or by Government should the financial institutions not properly and adequately do so;

n. to investigate and to report on such processes as may be required for the referral for investigation and prosecution of financial institutions and their employees, agents and officers, in respect of any matters of relevant that the Commission in the course of its inquiries, identifies.

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate, including recommendations about any policy, legislative, administrative or structural reforms.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, We direct you, for the purposes of your inquiry and recommendations, to have regard to the following matters:

a. the experience of people directly or indirectly affected by the practices of financial institutions carrying on business within Australia with respect to the matters that your inquiries identify;

b. the employment of investigative accountants, receivers, valuers and lawyers by financial institutions whose fees are then charged to customers of the financial institution but in circumstances where the financial institution who does not pay those fees has an involvement in the arrangements under which such persons will be remunerated and the level of that remuneration;

c. the need to focus your inquiry and recommendations on systemic issues, recognising nevertheless that you will be informed by individual cases and may need to make referrals to appropriate authorities in individual cases;

d. the adequacy and appropriateness of the responses by financial institutions, ASIC and by APRA and their officials, to reports and information about allegations, incidents or risks of the inappropriate exercise of powers within security agreements within Australia between a customer or a group of customers and a financial institution;

e. any changes to laws, policies, practices and systems that could be improved over time so as to enable the ability of institutions and governments to better protect against and to respond to the manner in which financial institutions deal with their customers pursuant to security agreements.

AND We further declare that you are not required by these Our Letters Patent to inquire, or to continue to inquire, into a particular matter to the extent that you are satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, We direct you, for the purposes of your inquiry and recommendations, to consider the following matters, and We authorise you to take (or refrain from taking) any action that you consider appropriate arising out of your consideration:

f. the need to establish mechanisms to facilitate the timely communication of information, or the furnishing of evidence, documents or things, in accordance with section 6P of the *Royal Commissions Act 1902* or any other relevant law, including, for example, for the purpose of enabling the timely investigation and prosecution of offences;

g. the need to establish investigation units to support your inquiry;

h. the need to ensure that evidence that may be received by you that identifies particular individuals as having been involved in the misuses of powers by a financial institution where contained within a security agreement and related matters, is dealt with both expeditiously and efficiently and in a way that does not prejudice current or future criminal or civil proceedings or other contemporaneous inquiries;

i. the need to establish appropriate arrangements in relation to current and previous inquiries, in Australia and elsewhere, for evidence and information to be shared with you in ways consistent with relevant obligations so that the work of those inquiries, including, with any necessary consents, the testimony of witnesses, can be taken into account by you in a way that avoids unnecessary duplication, improves efficiency and avoids unnecessary trauma to witnesses;

j. the need to ensure that financial institutions and other parties are given a sufficient opportunity to respond to requests and requirements for information, documents and things, including, for example, having regard to any need to obtain archived material.

AND We appoint you, Robert Dubler SC, to be the Chair of the Commission.

AND We declare that you are a relevant Commission for the purposes of sections 4 and 5 of the *Royal Commissions Act 1902*.

AND We declare that you are authorised to conduct your inquiry into any matter under these Our Letters Patent in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission, or under any order or appointment, made by any of Our Governors of the States or by the Government of any of Our Territories.

AND We declare that in these Our Letters Patent:

customer includes the primary borrower, any guarantor, and any security provider in respect of any security agreement, issued by any financial institution and which is otherwise an agreement relevant to and coming within the terms of reference of this Commission for the purposes of its inquiries;

financial institution means a business or organisation carrying on business of banking within Australia as a bank or as a financial institution providing a financial service or dealing with financial products as defined with Section 5 of the Australian Security and Investments Commission Act 2001 (Cth);

government means any government including the Government of Australia, or of a State or Territory, and includes any non-government institution that undertakes, or has undertaken, activities on behalf of a government.

law means a law of the Commonwealth or of a State or Territory.

official, of an institution, includes:

- i. any representative (however described) of the institution or a related entity; and
- ii. any person or organisation employed by the financial institution to carry on a task or to effect a certain thing in relation to the provision of any contract of credit or the bringing of claims by the financial institution in respect of a security agreement;
- iii. any member, officer, employee, associate, contractor or volunteer (however described) of the institution or a related entity; and
- iv. any person, or any member, officer, employee, associate, contractor or volunteer (however described) of a body or other entity, who provides services to, or for, the institution or a related entity; and
- v. any other person who you consider is, or should be treated as if the person were an official of the institution.

related matters means any unlawful, unethical or improper treatment of a customer that is, either generally or in any particular instance, connected or associated with the financial institution and the exercise of rights under a security agreement by the financial institution.

AND We:

A. require you to begin your inquiry as soon as practicable, and

B. require you to make your inquiry as expeditiously as possible; and

C. require you to submit to Our Governor-General:

i. first and as soon as possible, and in any event not later than 30 June 2017 (or such later date as Our Prime Minister may, by notice in the *Gazette*, fix on your recommendation), an initial report of the results of your inquiry, the recommendations for early consideration you may consider appropriate to make in this initial report, and your recommendation for the date, not later than 30 June 2017, to be fixed for the submission of your final report; and

ii. then and as soon as possible, and in any event not later than the date Our Prime Minister may, by notice in the *Gazette*, fix on your recommendation, your final report of the results of your inquiry and your recommendations; and

iii. authorise you to submit to Our Governor-General any additional interim reports that you consider appropriate.

IN WITNESS, We have caused these Our Letters to be made Patent.

WITNESS Peter Cosgrove, Governor-General of the Commonwealth of Australia.

Dated 10 November 2016

Governor-General

By His Excellency's Command

Prime Minister

ENTERED ON RECORD by me in Register of Patents No. _____, page _____, on

Secretary to the Federal Executive Council

