

**2017**

**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**People of Australia's Commission of Inquiry (Banking and Financial Services) Bill  
2017**

**EXPLANATORY MEMORANDUM  
and  
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Circulated by authority of  
Hon Bob Katter MP

## **People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017**

### **OUTLINE**

The *People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017 (the Bill)* provides for the establishment of a Commission of Inquiry. The Bill invests the People of Australia's Commission of Inquiry with the full powers of a Royal Commission as laid out in the *Royal Commissions Act 1902*. The Commission of Inquiry will inquire into unethical, unlawful and improper conduct in the banking, financial services and related sectors.

The purpose of the Bill is to fully expose and shine the light of public scrutiny on the unethical and unlawful conduct/practices in the banking and financial services industries and to put forward recommendations for reform.

Particular concern has been raised in relation to the conduct of service providers in the banking, superannuation, insurance and other financial services sectors.

Responding to numerous media reports, whistleblower disclosures and cases raised with Members of Parliament and Senators, there have been 37 reviews and inquiries into banking and financial services since 2010. However, none of these past reviews/inquiries have had the level of powers of a Royal Commission. These past reviews/inquiries have often not been independent, have been politicised and have had limited scopes of inquiry. This has led to little, or no, reform to the sector, nor justice for the victims. Nor has this led to the spotlighting of the malpractices, shortcomings and injustices of current financial practices.

The Commission of Inquiry will have the full powers of the *Royal Commissions Act 1902* plus additional powers related to protecting whistleblowers. The Commission of Inquiry will report to the Parliament, as opposed to a Royal Commission which reports to the Executive arm of Government.

## **FINANCIAL IMPACT**

The Bill will have no financial impact. An appropriation will need to be separately made to fund the Commission.

## **NOTES ON CLAUSES**

### **PART 1 – PRELIMINARY**

#### **Clause 1 – Short title**

This clause provides that the short title of the Act be the *People of Australia’s Commission of Inquiry (Banking and Financial Services) Act 2017*.

#### **Clause 2 – Commencement**

This clause provides for sections 1 and 2 of the Act to commence on the day it receives Royal Assent. This clause provides that sections 3 to 20 commence on the day the Consolidated Revenue Fund is appropriated under an Act to the Treasury to fund the People of Australia’s Commission of Inquiry (Banking and Financial Services).

#### **Clause 3 — Simplified outline of this Act**

This clause contains a simplified outline of the proposed Act, intended as a guide to the general scheme and effect of the Act.

#### **Clause 4 – Definitions**

This section defines key terms to ensure they have a consistent meaning across the Act

A number of definitions are important to the Commission of Inquiry’s Terms of Reference. These are set out below:

A ***banking or financial services provider*** means an entity that provides banking or financial services, including:

- An entity that carries on a banking business in Australia;
- An entity that carries on a financial services business in Australia. This would include financial services relating to superannuation;

- An entity that carries on the business of undertaking liability, by way of insurance, in respect of any loss or damage. This includes a general insurer and an entity that carries on a life insurance business;
- An entity that engages in a credit activity.

This definition captures, amongst other things, entities that carry on the business of banking, superannuation, insurance (including life insurance) or providing credit.

The definition of ***unethical conduct*** catches conduct that is not necessarily unlawful, but could be construed as unethical or improper. The definition extends to the generation of profits in a manner that unreasonably disadvantages consumers or is detrimental to the Australian economy. The definition also extends to the remuneration of company employees in circumstances where this does not reflect the value of their work done or services provided. Unreasonable business practices or business practices that are detrimental to the Australian economy, or have the potential to be detrimental to the Australian economy, also fall within this definition. Any other unethical conduct is also caught by the definition.

The definition of ***unlawful conduct*** includes four kinds of conduct:

- conduct that constitutes an offence under a law of the Commonwealth, or of a State or Territory;
- conduct that constitutes a contravention of a civil penalty provision under a law of the Commonwealth, or of a State or Territory;
- conduct that would attract any other penalty under a law of the Commonwealth, or a State or Territory, including a breach of a standard or licence condition; and
- conduct that is not in accordance with duties under the general law, including duties in equity.

This definition catches breaches of criminal and civil laws, breaches of professional standards, breaches of licence conditions, and conduct that is not in accordance with the general law. Conduct that is not in accordance with general law includes conduct that is not in accordance with the common law or equity.

## **PART 2 – ESTABLISHING THE PEOPLE OF AUSTRALIA’S COMMISSION OF INQUIRY (BANKING AND FINANCIAL SERVICES)**

### **Clause 5 – People of Australia’s Commission of Inquiry (Banking and Financial Services) is established**

This clause 5 establishes a Commission of Inquiry, to be known as the People of Australia’s Commission of Inquiry (Banking and Financial Services). The Commission is to be constituted of 6 Commissioners, consisting of 3 current or former Judges and 3 representatives of the Australian community. The appointment of the Commissioners, including the Presiding Member of the Commission, is to be made by a committee of the House of Representatives.

The committee is to consist of a member of the House of Representatives nominated by:

- The Prime Minister; and
- The Leader of the Opposition; and
- A member of the Australian Greens Party; and
- A member of the Nick Xenophon Team; and
- A member of Katter’s Australian Party.

The nominated person must be a member of the House of Representatives, however if the relevant political party does not have a member in the House of Representatives, then a Senator of that party may be nominated.

This clause also establishes that a decision of the committee can only be made by the agreement of a majority of its members.

### **Clause 6 - Terms of Reference**

The terms of reference set the scope of the Commission’s Inquiry. The matters that the Commission must inquire into are:

- Whether banking or financial services providers are engaged in unethical or unlawful conduct. If so, the Commission must investigate the nature of that conduct.
- Whether there are appropriate safeguards and means of oversight to ensure that banking or financial services providers do not engage in unethical or unlawful conduct. This includes a review of current laws, a review of regulating agencies,

and whether there are alternative means of dispute resolution available to consumers.

- The fairness and propriety of current contractual practices, including the rights of consumers and the responsibilities of banking or financial services providers.
- Whether the conduct and practices of banking or financial services providers are failing to facilitate a fair and commercially conducive business framework.
- Any matter incidental to the above listed terms of reference.

### **Clause 7 – Report to the Parliament**

This clause requires the Commission to submit a report containing the Commission's findings of fact and its recommendations to the Speaker of the House of Representatives. If the Commission is of the opinion that its findings or conclusions could result in an unfair trial, prejudice an investigation, reveal the identity of a confidential source of information (or allow a person to ascertain the existence or identity of that source), or prejudice the safety or reputation of a person, then the Commission may submit those findings or conclusions in a separate report. The report is to be submitted within 2 years of the commencement of the section unless this period is extended.

After the report is submitted, the Speaker of the House of Representatives must cause copies of the report (other than the separate report) to be laid before both houses of parliament as soon as practicable.

The Minister must table the Government's response to the report within 6 months after copies of the report are laid before the House of Representatives. This is designed to encourage discussion of the Committee's recommendations and legislative reform.

### **Clause 8 – Extending the period within which the Commission may report**

The Commission may request an extension to the period within which it is to report by giving written notice to the Speaker of the House of Representatives. The Speaker must convene a committee of members, which is to consist of persons nominated by the persons/entities listed in the clause. The Committee may extend the reporting period by agreement of a majority of its members.

**PART 3 – POWERS OF THE PEOPLE OF AUSTRALIA’S COMMISSION OF INQUIRY**  
**(BANKING AND FINANCIAL SERVICES)**

**Clause 9 – Hearings**

This clause enables the Commission to determine its own procedures and to hold hearings.

**Clause 10 – Commission not bound by the rules of evidence**

This clause provides that the Commission is not bound by the rules of evidence.

**Clause 11 – Application of the *Royal Commissions Act 1902***

This clause provides that the *Royal Commissions Act 1902* and the *Royal Commissions Regulations* apply to the Commission as if it were a Royal Commission. They also apply to the Commissioners as if they were members of a Royal Commission.

By incorporating the *Royal Commissions Act 1902* and the *Royal Commissions Regulations* into this Act, the Commission of Inquiry is given the same powers as a Royal Commission. This includes, amongst other things, the power to summon witnesses, take evidence, inspect and retain documents, and the power to authorise a person to apply for a search warrant.

A number of offences and penalties are also incorporated and will apply to the Commission of Inquiry. Examples of these provisions include offences relating to claims for legal professional privilege, the arrest of witnesses who are summoned before the Commission but fail to appear, the provision of false or misleading evidence, bribery of witnesses, destruction of documents or other evidence, preventing witnesses from attending hearings of the Commission and contempt.

If a body corporate is convicted of an offence against the *Royal Commissions Act 1902*, a court may impose a pecuniary penalty not exceeding 10 times the amount of the maximum pecuniary penalty that could be imposed by a court on an individual convicted of the same offence.

This clause also provides for the Governor-General to make regulations amending the *Royal Commissions Regulations*. This is necessary as the *Royal Commissions Regulations* apply to this Act.

### **Clause 12 – Application of Commonwealth Laws**

This clause clarifies that the law of the Commonwealth applies to the Commission in the same way as it would apply in relation to a Royal Commission.

## **PART 4 – PROTECTING WHISTLEBLOWERS**

### **Clause 13 – Disclosures qualifying for whistleblower protection**

This clause outlines categories of persons who may qualify for whistleblower protection under this Part in relation to the disclosure of information. A discloser of information will qualify for whistleblower protection if they inform the Commission of their name, make the disclosure in good faith, and believe that the information may assist the Commission to perform its functions or duties.

### **Clause 14 – Whistleblower protection for disclosures that qualify**

This clause provides that a person who makes a disclosure that qualifies for whistleblower protection under this Part cannot be subject to any civil or criminal liability for making the disclosure, and that no contractual or other remedy/right may be exercised against the person on the basis of their disclosure. This provision is designed to protect persons who might have information relevant to the Commission's inquiries but who are otherwise prevented from revealing this information. Such a situation might arise where a contract, to which the discloser is a party, is terminated on the basis that the disclosure of information constitutes a breach of the contract.

A similar protection applies to an employee whose contract of employment is terminated on the basis of the employee's disclosure. In such a situation a court may order that the employee be reinstated to their position or a position at a comparable level.

If information is disclosed which qualifies for protection under this Part, that information is not admissible in evidence against the individual in criminal proceedings or in proceedings for the imposition of a penalty. An exception to this is if the proceedings are in respect of the falsity of information.

### **Clause 15 – Victimisation of whistleblowers prohibited**

This clause inserts a series of offences prohibiting the victimisation of whistleblowers.

Subsection (1) makes it an offence to actually cause detriment to another person because that other person made a disclosure that qualifies for protection under this Part.

Subsection (2) makes it an offence to threaten to cause detriment to another person, including a third person, because that other person made or may make a disclosure that qualifies for protection under this Part. Threats can be express, implied, conditional or unconditional and it is not necessary to prove that the person threatened actually feared the threat would be carried out.

### **Clause 16 – Right to compensation**

This clause provides that if a person commits an offense under subsection 15(1) or (2) or an offence against Part 2.4 of the *Criminal Code* in relation to subsection 15(1) or (2), and another person suffers damage because of that conduct, then that person is liable to compensate the other person for the damage caused. This provision is aimed at ensuring that persons who are subject to conduct that constitutes an offence are not left in a financially worse position as a result of their decision to provide information to the Commission.

## **PART 5 – OTHER MATTERS**

### **Clause 17 – Staff**

This clause enables the Commission to employ such persons as it considers necessary for the performance of its functions and the exercise of its powers. The Commission may determine the terms and conditions upon which an employee is to be employed.

### **Clause 18 – Authority to disclose information to ASIC and APRA**

This clause permits the Commission to disclose information obtained by the Commission to ASIC or APRA if the information relates, or may relate, to a failure to comply with a law of the Commonwealth administered by ASIC or APRA.

The authority under this section is in addition to the authority given to the Commission to disclose information under section 6P of the *Royal Commissions Act 1902*.

**Clause 19 - Legal and financial assistance**

This clause allows a person who appears before the Commission to apply for legal or financial assistance. The Commission may authorise the provision to that person of such legal or financial assistance in respect of that person's appearance as the Commission determines. Such assistance can be provided if the Commission is satisfied that it would cause substantial hardship to the person if their application for assistance was refused or if the circumstances of the case are of such a nature that the application should be granted.

The Commission can authorise that assistance be granted on a conditional or unconditional basis. The Minister must ensure that any legal or financial assistance that is authorised by the Commission is provided. Any legal or financial assistance authorised by the Commission is to be paid for out of moneys appropriated by the Parliament for the purposes of the Commission.

**Clause 20 - Regulations**

This clause permits the Governor-General to make regulations with respect to this Act.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

### **People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017**

The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Bill/Disallowable Legislative Instrument**

The Bill seeks to establish a Commission of Inquiry into the banking and financial services sector. That inquiry will report to Parliament on particular matters within its terms of reference.

The intent of the Bill is to respond to misconduct that has recently been exposed in the banking and financial services sector.

#### **Human rights implications**

The Bill does not contravene any of the applicable rights or freedoms.

The Bill deals with the legal rights of witnesses who are summonsed to appear as witnesses or surrender documents or information to the Commission. In applying the provisions of the *Royal Commissions Act 1902*, this Bill imports the same rights and protections that are given to witnesses in Commonwealth Royal Commissions and judicial trials generally, which have been found to be compatible with human rights and freedoms.

The People of Australia's Commission of Inquiry (Banking and Financial Services) will be presided over by six individuals including three Judges. The presiding Judges will ensure

that procedural fairness is accorded at all times to witnesses before the Commission, further ensuring that human rights and freedoms are upheld.

Part 4 of this Bill specifically protects persons giving evidence as whistleblowers. This Part engages with evidence that has the potential to implicate the safety or reputation of witnesses, expose the identity of a confidential source and prejudice a fair trial or an investigation. Consequently such information is not to be publicly disclosed. The People of Australia's Commission of Inquiry (Banking and Financial Services) established by this Bill will have the power to hold private hearings to ensure the rights of witnesses are protected. The additional whistleblower protections are a prudent measure in addressing a lack in the coverage of protections in the *Royal Commissions Act* to whistleblowing activity, and so enhance the human rights protections provided by this Bill.

Additionally, the establishment of the People of Australia's Commission of Inquiry (Banking and Financial Services) ensures that those who have undergone financial hardship due to another's unlawful misconduct will have access to justice and a platform from which to pursue their rights.

## **Conclusion**

The Bill is compatible with human rights. This Bill seeks to establish a People of Australia's Commission of Inquiry (Banking and Financial Services), with protections for rights comparable to those of a Royal Commission, which have a long history of compatibility with human rights.

**Hon Bob Katter MP**