Australian Banking Association

05 March 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam

Inquiry into resolution of disputes with financial service providers within the justice system

The Australian Banking Association (**ABA**) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs References Committee's inquiry into resolution of disputes with financial services providers within the justice system.

With the active participation of 23 member banks in Australia, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and the community, to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

Resolving disputes fairly and quickly when things go wrong

The banking industry is mindful of the very real social impacts of its failures and misconduct on its customers, which have been laid bare through the work of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry (the 'Royal Commission').

This has directly impacted on the wellbeing of individuals and caused, in many cases, financial loss, as well as having undermined broader consumer trust and confidence in financial services. The banking industry acknowledges that it must do better to ensure outcomes that are in the best interests of consumers to regain the trust of the Australian community.

ABA member banks have committed to and are taking significant steps to change their processes and culture to ensure there is no repeat of the cases heard at the Royal Commission.

Dispute resolution processes in the banking industry

The banking industry is committed to making it easier for customers when things go wrong.

Banks are working to provide effective and efficient complaint handling and dispute resolution to improve consumer outcomes. This approach is focused on having complaints or disputes between a bank and a customer resolved as fairly and quickly as possible through the internal dispute resolution (**IDR**) or external dispute resolution (**EDR**) framework.

From the industry's perspective, commencing litigation against a customer is rare and typically a last resort as it is an expensive and lengthy process for all parties.

Internal Dispute Resolution

When a customer or small business is unhappy with a bank product or service, the first step is to contact the bank to try and resolve it through a free and transparent IDR process. Under the ABA's

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Banking Code of Practice ('the Banking Code'), ABA member banks have clear obligations in how they handle these complaints[1], including:

- having free and accessible IDR processes, that comply with ASIC guidelines, available to customers and small businesses
- publicising information about their IDR processes through branches, telephone banking services and digital platforms
- acting fair and reasonably when handling complaints, including a commitment to keeping a customer or small business informed of the progress of a complaint and providing the name of the contact person within the bank
- providing written responses to complaint investigations, including information on the outcome, the right to take the matter to an EDR provider and the provider's contact details
- commitments on resolution of complaints within specific timeframes – if a complaint is not resolved within 45 days, the bank has obligations to provide you reasons with for the delay, to inform you of the date an outcome is reasonably expected and give monthly updates on progress.[2]

IDR programs are an important element of the bank's overall relationship with its customers and they manage a wide variety of complaints, including those that have not resulted in monetary loss. The vast majority of customers have their complaints successfully resolved at the IDR level.

The Banking Code's Compliance Monitoring Committee (CCMC) reports that subscribing member banks required to provide reporting to the CCMC under the current 2013 Code recorded 1,130,037 complaints in 2017-18, which was a decrease of 6% on the previous year. Banks resolved 91% of complaints within 5 business days and 97% within 21 business days.

In the same year, 11,396 disputes about banks proceeded to case management at the Financial Ombudsman Service (**FOS**), which represents just a fraction of the total number of customer complaints about banks.

Customer Advocates

In 2016, ABA member banks took a significant step in improving their IDR practices with the establishment of a dedicated Customer Advocate in each bank to ensure that customers and small businesses have a voice in the dispute resolution process, and that complaints are appropriately escalated and dealt with in a timely manner.

Chapter 48 of the 2019 Banking Code requires ABA members banks to have a Customer Advocate in place. The ABA has also developed guiding principles[3] to guide banks on how a Customer Advocate can be implemented within their bank, covering retail and small business customers and all core business banking business. Some key aspects of these principles include:

- the Customer Advocate role is to make it easier for customers to rectify a situation when things go wrong by enhancing existing complaints processes
- the Customer Advocate's responsibilities include identifying systemic issues or problems as well as implementing, overseeing and reviewing remediation processes
- the Customer Advocate is to provide assistance to vulnerable or disadvantaged customers when dealing with a bank's complaints processes
- the Customer Advocate is to be a "customer voice" in the bank
- the Customer Advocate must be actively endorsed by management and operate separately from the bank's business units

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[1] See Chapters 46 to 48, *Banking Code of Practice 2019*.
[2] As required by ASIC's RG165, available at: https://download.asic.gov.au/media/4772056/rg165-published-18-june-2018.pdf
[3] Australian Banking Association, 'Guiding Principles – Customer Advocate', available at: https://www.ausbanking.org.au/images/uploads/ArticleDocuments/149/ABA-Customer%20Advocate%20Guiding%20Principles-FINAL.pdf

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- decisions of the Customer Advocate are binding on the bank.

The objective of this work is for banks to take more responsibility for resolving customer complaints fairly and more quickly than in the past.

External Dispute Resolution

While ABA member banks resolve the vast majority of complaints through their IDR processes, we recognise and support the right of customers and small businesses to have their complaints heard outside of the bank through an independent EDR scheme.

It is important the EDR scheme works as efficiently and quickly as possible to resolve disputes and achieve fair outcomes, and to show that justice has been done. It is critical that the scheme is open to all consumers, including those who cannot readily and fairly access a court or tribunal. We also note that once a dispute is lodged with an EDR scheme, banks are prevented from commencing or continuing formal recovery action until the matter is resolved.

AFCA

On 1 November 2018, the Australian Financial Complaints Authority (**AFCA**) commenced operation as a “one stop shop” for external resolution of eligible consumer and small business disputes across all areas of retail financial services including banking, insurance and superannuation. It replaced the three existing EDR bodies – the FOS, the Credit Investments Ombudsman and the Superannuation Complaints Tribunal.

The Government’s decision to establish AFCA followed the 2017 Ramsay Review into how Australia’s external dispute resolution framework could be improved[4]. This independent and comprehensive review made a series of recommendations on the creation of a single EDR scheme, which formed the basis of the establishment of AFCA.

The ABA was strongly supportive of the establishment of AFCA from its inception as a recommendation of the Ramsay Review. It is an important step in streamlining the complaints process and in providing a quicker resolution of issues for customers. AFCA has several advantages, including:

- **Easier process for consumers and small business:** consumers and small businesses can go to one place to resolve any kind of financial complaint
- **Increased jurisdiction:** AFCA operates under significantly higher monetary limits and compensation caps than the previous schemes:

Type of claim	Previous limits	New AFCA limits
Most non-superannuation disputes	Monetary limit: $500,000 Compensation cap: $323,500	Monetary limit: $1 million Compensation cap: $500,000
Small business credit facility	Facility limit: $2 million Compensation cap: $323,500	Facility limit: $5 million Compensation cap: $1 million
Small business credit facility – primary producer business	Facility limit: $2 million Compensation cap: $323,500	Facility limit: $5 million Compensation cap: $2 million
Dispute about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor’s primary place of residence	Monetary limit: $500,00 Facility limit for small business: $2 million Compensation cap: $323,500	No monetary limit Facility limit for small business $5 million No compensation cap

[4] See Review of the financial system external dispute resolution and complaints framework, 3 April 2017; Professor Ian Ramsay (Ramsay Review), available at: https://static.treasury.gov.au/uploads/sites/1/2017/06/R2016-002_EDR-Review-Final-report.pdf

- **Expanded small business coverage:** AFCA rules deem an eligible small business as a business under 100 employees, a significant increase from the 20 employee threshold under the predecessor schemes – this means that AFCA now can consider matters involving over an estimated 97% of Australian businesses
- **Increased expertise and resourcing:** AFCA provides increased expertise and resourcing with 550 staff, 28 panel members, 22 ombudsman, 14 adjudicators and a dedicated Small Business Lead Ombudsman to deliver quicker and improved outcomes
- **Accountable and independent**: AFCA has governance arrangements to ensure it is independent and accountable:
    - AFCA Board consists of an independent Chair and an equal number of consumer and industry directors
    - Decision panels are made up of an independent ombudsman, a consumer panel member and an industry panel member
    - AFCA required to commission regular independent reviews – with the first scheduled for 18 months after the commencement of its operations in 2020
    - having an independent assessor to consider complaints about the standard of AFCA's service.

The ABA and our member banks are committed to ensuring that AFCA operates well now and into the future. The ABA supports targeted reforms that will further strengthen AFCA (see below).

Customer remediation

Where more than one customer is affected by an issue, which is systemic in nature, it is vital to have a robust remediation process in place to reimburse customers for loss or detriment.

In 2016, as part of the comprehensive Better Banking program, ABA member banks committed to strengthening each bank's customer remediation practices in line with ASIC's guidance on addressing large scale problems in relation to financial advice contained in RG256.

ABA member banks have now implemented ASIC's guidance across their remediation programs dealing with any large-scale issue, not just those related to financial advice. This serves to make the process much more transparent, efficient and fair.

Further reform

The banking industry is committed to making it easier for customers when things go wrong and we provide our support for several further reforms to provide for fairer and more effective complaint handling and dispute resolution.

AFCA

AFCA has been open and accepting complaints from consumers and small businesses since 1 November 2018. While it has been operational for a short time, the ABA believes that AFCA is already establishing itself as an effective EDR body for consumers and small businesses.

Given the need to address failures identified by the Royal Commission, the ABA supports some further reforms to increase the effectiveness of AFCA, including:

- expanding the remit of AFCA to accept applications for certain types of disputes dating back to 1 January 2008, and
- requiring AFSL holders to co-operate with AFCA resolution of complaints.

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AFCA to consider past disputes

The ABA welcomes AFCA's announcement that it will be accepting eligible financial complaints for conduct that occurred after 1 January 2008 and have not been previously considered but had fallen outside of the period allowed under the AFCA Rules.[5] This will extend coverage to the period examined by the Royal Commission and implements a commitment made by the Government in its response to the final report.

AFCA's remit has been expanded to accept these eligible legacy complaints for a period of 12 months from 1 July 2019.[6] The ABA and our member banks are committed to working closely with ASIC and AFCA to assist in implementing this reform quickly, fairly and effectively.

The ABA believes that this period of 12 months strikes an appropriate balance between ensuring those eligible customers and small businesses can access justice and potential redress whilst providing clear timeframes and resource demands for all participants.

The ABA also supports limiting the consideration of past disputes by AFCA to those that have not previously been determined through an EDR process or other means, such as a Court judgment or Settlement Deed. This approach is consistent with the findings of the Ramsay Review and the Royal Commission and ensures appropriate access to redress for past issues, but does not undermine the important principle of finality of ombudsman determinations or introduce administrative law issues.

In its comprehensive review, the Ramsay Review panel carefully considered the issue of redress for past disputes and recommended against re-examining cases that have already had access to redress:

> *"The Panel also considers that consumers and small businesses who have had access to dispute resolution before an EDR body, court or tribunal, or who have reached a legally binding settlement, have had access to redress. The Panel does not consider that there would be merit in providing further access to redress in these situations, even if it was legally possible."*[7]

The Ramsay Review panel formed this position on several grounds[8]:

- a consumer or small business who has received a determination or decision from an EDR body, court of tribunal has already had access to redress
- "there are significant legal and other limitations on reopening past disputes with a finalised deed of settlement or a final court judgment (which has no further avenues of appeal)"
- "to allow otherwise would undermine certainty in legal process and the meaning of the law".

Commissioner Hayne also considered the issue and agreed with the Ramsay Review's finding:

> *"...the panel accept, and I agree, that there would be no merit in allowing further access to redress in any case where the consumer or small business concerned has already resorted to dispute resolution by a court, tribunal or EDR body or has settled the dispute."*[9]

The ABA acknowledges that AFCA will face significant additional resourcing demands to consider these legacy disputes and that these costs will appropriately need to be borne by industry.

Co-operation with AFCA

The Royal Commission recommended that section 912A of the *Corporations Act* 2001 (Cth) should be amended to require AFSL holders to take reasonable steps to co-operate with AFCA in its resolution of

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[5] AFCA, 'AFCA to accept legacy financial complaints from 1 July 2019', 20 February 2019, available at: https://www.afca.org.au/news/media-releases/afca-to-accept-legacy-financial-complaints-from-1-july-2019/

[6] AFCA, 'AFCA to accept legacy financial complaints from 1 July 2019', available at https://www.afca.org.au/news/media-releases/afca-to-accept-legacy-financial-complaints-from-1-july-2019/

[7] Ramsay Review, p8.

[8] Ramsay Review, pp145-146.

[9] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 'Final Report', p487, available at: https://static.treasury.gov.au/uploads/sites/1/2019/02/fsrc-volume1.pdf (Royal Commission)

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particular disputes, including by making available all relevant documents and records relating to issues in dispute.[10]

The ABA supports the implementation of this recommendation and acknowledges the Commissioner's view that the proposed change would give statutory force to the "promises that AFSL holders have made to the EDR body, and will allow ASIC to take action if those promises are not kept".[11]

This builds on the existing requirement in the AFCA Rules that a 'financial firm' must comply with an AFCA request unless it has a reasonable excuse. Under AFCA rule A.18, a failure to comply can be considered a "serious breach" and a financial firm may be referred to the AFCA Board with the possibility of it being expelled as a member. This would have serious implications for that financial firm given AFCA membership is an AFSL licence condition.

Unpaid determinations

The ABA has long been concerned about consumers and small businesses that have been awarded compensation through the existing EDR framework but have not been paid. The industry recognises that this can have significant impact on those consumers and small businesses and can undermine confidence in dispute resolution processes and the financial system more broadly.

The licensees who have not met their consumer compensation obligations and have existing unpaid determinations are clearly responsible for their misconduct. However, as the Ramsay Review identified, most cases involving legacy unpaid EDR determinations related to financial firms that were no longer operating or were insolvent.[12]

The ABA therefore supports the Government's announcement in its response to the Royal Commission that it will fund $30 million in compensation owed to the almost 300 impacted consumers and small businesses. Government funding of these past determinations is in line with the Ramsay Review panel's view that it "may not be either appropriate or desirable that current industry participants be required to fund compensation arising from determinations against former industry participants".[13]

The ABA supports this approach because it is inequitable for the customers and shareholders of those currently in the industry to pay for the misconduct of those no longer in the industry, particularly as the Richard St John recommendations[14] to strengthen arrangements for compensation of consumers of financial services, relating to adequacy of professional indemnity insurance coverage and requirements of AFSL holders have not been implemented in regulatory and enforcement settings.

The Government's compensation scheme is an appropriate means of compensating those customers and small businesses, as well as establishing the foundation for a forward-looking compensation scheme that can be funded by industry.

Compensation scheme of last resort

The ABA supports establishing a mandatory, prospective compensation scheme of last resort **(CSLR)** that covers consumers and small businesses that have suffered losses because of inappropriate financial advice or poor conduct in circumstances where a financial adviser has failed to maintain adequate compensation arrangements, and/or their business has become bankrupt or insolvent.

While it is unlikely bank customers would need to seek redress from a CSLR, we believe that this is an essential reform to re-build trust in the financial services sector and ensure consumers of financial products are treated fairly, have adequate information, and avenues for redress and protection.

In its supplementary report, the Ramsay Review recommended the establishment of an industry funded, 'limited and carefully targeted' CSLR. The panel found that initially it should only apply to financial advice failures and apply only prospectively. In its final report, the Royal Commission

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[10] Royal Commission, Recommendation 4.11.
[11] Royal Commission, p317.
[12] Ramsay Review, p6-7.
[13] Ramsay Review, p121.
[14] *Compensation arrangements for consumers of financial services – Report by Richard St. John* (April 2012), available at: http://futureofadvice.treasury.gov.au/content/consultation/compensation_arrangements_report/downloads/Final_Report_CACFS.pdf

recommended that the CSLR should be established based on the principles outlined in the Ramsay Review. The Government has indicated that it will establish a CSLR in line with the model proposed by the Ramsay Review and the Royal Commission but proposes extending it to cover disputes beyond financial advice failures. The ABA has concerns about extending the CSLR beyond financial advice failures. These concerns relate to the ongoing viability of a broader scheme, cross-subsidisation (notwithstanding potential siloed funding structures) and the variation is business risk profiles and mandated risk management requirements across the financial services sector. All stakeholders, including regulators, industry and consumer representatives should be consulted on the impact of a broader scheme.

The ABA remains committed to working with all stakeholders to establish a comprehensive and effective CSLR.

Financial counselling

The ABA notes that in its response to the final report of the Royal Commission, the Government has announced a review into the co-ordination and funding of financial counselling services by the Department of Social Services in consultation with Treasury and the Department of Prime Minister and Cabinet.

We acknowledge the role that financial counselling services play in assisting consumers to access appropriate advice to lodge disputes and seek redress within the financial sector. The ABA intends to provide a detailed submission to the Government's upcoming review.

Yours faithfully

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