



**AUSTRALIAN BANKERS'
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Ms Elizabeth de Hoog
Small Business Ombudsman and Procurement Unit
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email to: small.business@treasury.gov.au

Dear Ms de Hoog,

Small Business and Family Enterprise Ombudsman (SBFEO)

Thank you for the opportunity for me to briefly discuss this initiative with you on 22 May and for the additional time you provided for the Australian Bankers' Association (ABA) to provide its feedback in more detail.

As you would be aware the ABA is the peak national body representing banks which are authorised by the Australian Prudential Regulation Authority to carry on the business of banking in Australia. The ABA's members include the four major banks, former regional banks that now operate on a national scale and banks that are Australian banks representing their overseas parent banks.

1. Context

The ABA's approach to this initiative is to emphasise that the vast majority of small businesses are bank customers. Our members provide a wide range of banking services to small businesses. Banks also provide a series of support measures for their consumer and small business customers. Historically these measures have been provided under self-regulatory arrangements including the Code of Banking Practice and the predecessor to the Financial Ombudsman Service (FOS), the Australian Banking Industry Ombudsman, which was established by the banking industry in 1989.

Since then, legislation under Chapter 7 of the Corporations Act in 2000 (FSR) and under the National Consumer Credit Protection Act 2009 (NCCP) introduced licensing regimes, administered by the Australian Securities and Investments Commission (ASIC), for banks and other financial services providers to have available appropriate internal complaint handling mechanisms and access to an ASIC approved external dispute resolution scheme approved by ASIC, such as FOS, to provide a dispute resolution service.

FOS has jurisdiction to handle certain consumer and small business disputes with financial services providers where the customer's complaint to their provider has not been resolved to the customer's satisfaction.

In addition, since 2003 the ABA's Code of Banking Practice has been in place to cover both individual and small business customers in their banking relationships with subscriber banks. The Code also includes a requirement for those banks to provide appropriate complaint handling arrangements and access to an independent external dispute resolution service which is predominantly available with FOS.

Further, in New South Wales, Queensland and Victoria there are mandatory farm debt mediation laws that in general provide for a debt mediation or resolution process for farmers whose farms may be exposed to enforcement action. The process is compulsory prior to security enforcement for farming properties pursuant to this legislation. In South Australia, the ABA understands that there is a voluntary process under agreement with the SA Farmers Federation, financial institutions and the relevant SA Government Department.

It will be important in developing the detailed policy settings for the SBFEO that all of these arrangements are able to stand independently of the proposed Ombudsman services and that at most the Ombudsman would act as the Discussion Paper states as a 'concierge' or referral service to and not as a participant in these arrangements.

In terms of the government's desire to cut red tape, the ABA's preference is for there to be a clear and consistent process. This would not be achieved by running a process through multiple public sector departments and agencies which in our view would be inefficient, confusing for participants and likely to increase the costs of providing the incumbent complaint handling and dispute resolution services.

Several questions arose in reading the Treasury Discussion Paper for the SBFEO initiative which are outlined in the several paragraphs below.

1.1. Definition of 'small business'

For the purposes of the FSR legislation, the definition of a small business is the same as the definition used by the Australian Bureau of Statistics (ABS) which is an employee numbers test. The FSR draws a difference between a small business that is a 'retail client' where the licensing obligations for providing complaint handling and dispute resolution services are to apply to the retail client. The tests of whether a small business is covered under the FSR as a retail client include a product value test, a sophisticated customer test certified by a qualified accountant or the fact that the small business is a professional investor.

The Code of Banking Practice uses the ABS test for a small business but in the case of banking services that are regulated under the FSR, the retail client test in the FSR.

It is important to understand that many farming businesses fall within the meaning of a small business under the Code of Banking Practice which means they have access to the complaint handling and dispute resolution services provided under the Code.

The ABA is concerned to ensure, in order to avoid confusion, for the proposed definition of a small business for the purposes of the SBFEO is consistent with the current definitions in place under financial and banking services legislative and Code of Banking Practice arrangements.

1.2. Deregulation

The reference in the Discussion Paper to deregulation for small business enterprises is supported by the ABA and there is a mutual interest for those enterprises and the ABA's members in seeing a reduction and the avoidance of 'red tape' arising from this SBFEO initiative.

1.3. A 'conciierge' role

Above the ABA mentioned the importance of the current financial services and banking complaint handling and dispute resolution services, including the relevant farm debt mediation legislative and self-regulatory arrangements, to stand independently of the SBFEO so that in those cases the role of the SBFEO would be at most a 'conciierge' or referral service to and not as a participant in these arrangements.

It follows that the ABA would not expect the SBFEO to become an 'appeal' mechanism for a small business that is dissatisfied with the decision of a bank on a complaint by the business where the business has recourse to FOS. Similarly, to avoid 'forum shopping' a small business would not be able to 'appeal' an outcome from the SBFEO to, for example, FOS.

Otherwise, it will be necessary to understand and for the government to explain how and in what manner the SBFEO would involve itself in these arrangements and avoid adding delay, costs and possibly 'red tape' to what are well settled industry arrangements.

1.4. Debts due to and from businesses.

Consideration will need to be given by a SBFEO to the operation of insolvent trading and debt recovery laws and procedures with these debts. The ABA believes that care should be taken to consider these aspects if the SBFEO is to involve itself in small business payments as a debtor and as a creditor. Ideally, unless a debt is disputed on clear and substantive legal grounds, a dispute over the debt, for example a delay in payment, should not be drawn into a complaint or dispute resolution theatre established by industry. However, this aspect may have an interest for governments in seeking to resolve the timing of payments by a government as a debtor to a small business.

1.5. Small Business Commissioners and Small Business Ombudsman

There is the risk of public confusion and by small businesses with the description of these offices and the role that each performs where one may be a State based role and the Ombudsman an Australian government nominated official.

These roles should, be clearly defined on a national consistency basis so that there is less risk of confusion, duplication, overlap and potential cost. This would be consistent with the government's deregulation and national consistency policy agendas. It would make the model more straightforward for governments to operate clearly and consistently.

1.6. Complaint and dispute

In ASIC's Regulatory Guide 165 'Licensing: Internal and external dispute resolution', the distinction between a complaint and a dispute has been clarified and simplified so that a 'dispute' can mean either.

The ABA has adopted the same approach in the Code of Banking Practice so that a dispute means a complaint to the bank by its customer that has not been immediately resolved.

FOS uses only the expression 'dispute' which is described as 'an expression of dissatisfaction with a Financial Services Provider'.

The ABA believes that there should be this consistency of expression where the role of the SBFEO is to be described.

2. Concluding comment

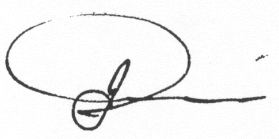
The ABA is supportive of the government's objective in providing a structured dispute handling service for small businesses while in cases where these services are already available, notably for financial

services disputes, the SBFEO is able to act as a concierge for the small business which may be unaware of the arrangements or how to avail itself of them and to refer the business accordingly.

As there appears to be a lot of detail to be developed to establish the SBFEO, for example, defining what is a 'small business' for the purposes of the scheme, the ABA proposes to establish a small working group of member banks that could assist Treasury in the development of the more detailed model for the SBFEO. We would also work with small business peak body representatives on some of these details.

I propose contacting you to explore with you how the contribution the ABA can make to the next stage of the consultation process can be achieved.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Ian Gilbert', written over a light grey rectangular background.

Ian Gilbert