



**AUSTRALIAN BANKERS'
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Ms Anne Scott
Principal Adviser
Small Business, Competition and Consumer Policy
Markets Group
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Ms Scott,

Australian Small Business and Family Enterprise Ombudsman Bill 2015

The Australian Bankers' Association (ABA) is pleased to have the opportunity to provide comments on the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (Bill) and the accompanying Explanatory Materials. We support the principle of an independent advocate for small business.

We appreciated and found very helpful the opportunity you provided for Amanda Pullinger and myself to discuss this matter with you and your colleagues on 18 March 2015.

The ABA is the peak national body representing 24 member banks which are authorised by the Australian Prudential Regulation Authority (APRA) to provide banking business in Australia. The ABA's membership comprises the four major banks, former regional banks which operate on a national scale, mutual banks and foreign banks operating as Australian banks.

1. Context

It is important to recognise that banks have established complaints and disputes handling practices which have been in place for many years. Generally speaking, these complaint and dispute handling arrangements are provided to individual and small business customers of banks. These services are provided free to the customer.

There are two independent organisations which provide dispute resolution services to which banks and other financial services institutions may subscribe - the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO).

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 the late 1980s.

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 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 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 Queensland and in South Australia there are currently voluntary processes in place. The ABA also notes that the Federal Government is working with the banking industry and agricultural stakeholders to establish a nationally consistent and mandatory approach to farm debt mediation.

The ABA contends that the detailed regulatory settings under the Bill should be clear that all of these dispute resolution arrangements are able to stand independently of the proposed Ombudsman services and that at most the Ombudsman would act as a 'concierge' or referral service to and not as a participant in the dispute resolution arrangements.

2. Specific Concerns

2.1. Small business definition

Clause 5 of the Bill broadly defines a small business or family enterprise as having fewer than 100 employees or annual revenue of \$5 million or less. The ABA understands that it is the Government's intention to provide the Ombudsman with the scope to support a large number of small enterprises, however, the current definition is broader and inconsistent with existing accepted definitions for example those used by the Treasury, the Australian Taxation Office (ATO) and other government agencies within Australia and included in financial services legislation. The broader definition has the potential to create significant confusion and uncertainty across administrative, operational and regulatory boundaries.

For example, most state based Small Business Commissioners use the Australian Bureau of Statistics (ABS) definition of small business, as an actively trading business with 0-19 employees. As noted in our previous submission relevant financial and banking services legislative and Code of Banking Practice arrangements define small business according to the ABS definition. The ATO defines a small business entity as a business with less than \$2 million aggregated turnover.

The ABA believes use of both the ABS and ATO definitions, an actively trading business with 0–19 employees or less than \$2 million in aggregated turnover, would provide sufficient scope for the work of the Ombudsman. According the 2014 ABS Australian Industry figures companies employing 1-19 people account for 97.4% of businesses and companies with a turnover of \$2 million or under account for 93.6% of businesses.

But for the purposes of external dispute resolution (EDR) in the banking and financial services industry, this definition would not be consistent with the small business definition used by the FOS.

In this submission the ABA recommends that the Bill should not extend the Ombudsman's jurisdiction to overlap with the legislative based EDR arrangements in the banking and financial services industry including those of FOS.

Further the broad definition will require the proposed Ombudsman to provide services to companies that fall outside the 'intent' or 'spirit' of the legalisation i.e. a company could have less than 100 employees and under \$5 million in revenue and be publically listed entity. Significant demand from medium sized enterprises could reduce the ability of the Ombudsman to provide services to small business.

2.2. Meaning of “relevant legislation, policies and practices”

The meaning of ‘relevant legislation, policies and practices’ as defined in clause 35 is extremely broad and potentially overlaps with the role of financial services regulators, for example, Australian Securities and Investment Commission (ASIC). The ABA recommends that the Bill includes a clause that excludes the Ombudsman’s jurisdiction where a regulator has jurisdiction.

Otherwise, here will be a potential for duplication and inconsistency of regulatory oversight and activity. This would be very likely where the Minister exercises discretion under clause 42 of the Bill to refer a matter to the Ombudsman for inquiry.

The Explanatory Materials make reference to the inclusion of ‘industry codes’. It needs to be made clear in the legislation that the reference to industry codes, as explained by Treasury, refers to industry codes approved by the Australian Competition and Consumer Commission (ACCC) such as the Franchising and does not include voluntary self-regulatory industry codes such as the Code of Banking Practice.

2.3. The advocacy function

Clause 36 proposes that the Ombudsman’s can initiate or conduct research and inquiries on the effect of relevant legislation, policies and practices on small businesses, and how these might be improved. Coupled with a very broad the power for the Ombudsman to require production of information and documents on 10 business days’ notice, these powers should be more specifically cast. The ABA does not envisage the role of the Ombudsman to be similar to the role of a regulator. Rather the ABA sees the role as more facilitative and acting as a concierge for small businesses to point them in the right direction in cases of problems. The powers which are broadly defined have the potential to be misconceived and exercised inappropriately. The ABA recommends that the powers are tied more directly to a specific issue so as to avoid a ‘fishing expedition’ type review of industry.

Clause 37 outlines the power to require for individuals to provide information or documents within 10 business days. In addition to the comments above concerning the exercise of this power, from a banking perspective 10 days may not provide sufficient time for the collection and provision of information to the Ombudsman. Information in relation to small businesses is often held at different locations, in different database and file types, etc. In the event the Ombudsman has jurisdiction for a dispute, we would suggest extending this to 30 days or clear provision for extensions should be made.

The ABA questions the independence of the Ombudsman given the reporting relationship and power of the Minister as outlined in clauses 40, 41 and 42 which provide a potential risk of political interference in the work of the Ombudsman and a resulting inappropriate exercise of power.

We note favourably that commercial in confidence, protection against self-incrimination and legal professional privilege are retained in the Bill.

2.4. The assistance function – dispute resolution

The ABA understands that the Government’s intention is for small business disputes to continue to be handled under the existing private sector dispute resolution schemes such as FOS and CIO. In banking and financial services, the role of IDR is central to the dispute handling process and is the subject of regulation administered by ASIC. For the avoidance of doubt the ABA suggest that Clause 69 of the Bill makes it clear that in respect of a dispute between a small business and a financial institution, the Ombudsman must refer the dispute to the financial institution’s IDR process in the first instance. If the dispute has been dealt with by the financial institution but the small business remains unsatisfied, the Ombudsman should refer the dispute to the ASIC approved scheme of which the financial institution is a member.

For reasons of consistency, the incidental powers under clause 71 of the Bill which provide for the Ombudsman to give assistance by making recommendations on how the dispute may be managed should not be exercisable in these circumstances.

Treasury agrees that industry based EDR schemes should not be within the Ombudsman's scope and will consider the ABA's views for a more explicit power for referring a dispute to FOS and to avoid a disputant forum shopping or using the Ombudsman as an "appeal" mechanism from a determination of a financial services sector EDR scheme such as FOS.

It will be important that the Ombudsman when acting as a concierge ensures that a dispute of a small business with a bank is promptly referred to the bank concerned to handle through its IDR processes or, if those processes have been exhausted to the relevant EDR scheme of which the bank is a member. Small business disputes with a bank often concern either debt recovery action or enforcement of loan security due to default by the business under the terms of its financing contract with the bank. Experience has shown that delays in the processing of these disputes often can result in material detriment to the small business.

The ABA recommends that the Bill includes a provision that the Ombudsman must expeditiously refer such a dispute to the bank or the relevant EDR scheme. This might be achieved with an amendment to clauses 69 and 71 of the Bill.

Further, if the dispute does not fall with the terms of reference of the relevant EDR scheme, it is recommended that the Bill require the Ombudsman to expedite the resolution of the dispute if the bank is directed to cease recovery action while the dispute is under consideration. In addition, there would be a similar concern if a significant period of time elapsed while the Ombudsman were to make its recommendation as to the management of the dispute or where there is a delay in a review process of that decision to the AAT.

The ABA requests that these aspects are taken into consideration in the Bill and recommends further stakeholder consultation is undertaken.

If you have any queries please contact Ian Gilbert, Director, Banking Services Regulation, tel 03 9852 7976, email: igilbert@bankers.asn.au or Amanda Pullinger, Policy Consultant, Retail Policy tel: 02 8298 0411, email: apullinger@bankers.asn.au.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Ian Gilbert', written in a cursive style.

Ian Gilbert