



Strong banks – strong Australia

15 March 2017

Professor Ian Ramsay
Chair, Independent Expert Panel
c/o EDR Review Secretariat
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600
By email: EDRreview@treasury.gov.au

Dear Professor Ramsay

Review of financial system's external dispute resolution and complaints framework – supplementary response to Interim Report

The Australian Bankers' Association (**ABA**) welcomes the opportunity to provide additional comments to the Independent Expert Panel's review of the financial system external dispute resolution framework (Review)¹ following the consultation roundtables convened Wednesday 15 March.

This letter is in addition to our response to the Interim Report dated 1 February 2017, the ABAs response to the issues paper dated 10 October 2016, and our supplementary response on the design features of a last resort compensation scheme, dated 14 November 2016.

With the active participation of 25 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.

Recommendations of the small business and family enterprise ombudsman

We refer to the Panel's confirmation at the roundtables that it will expressly consider recommendations 11 and 13 of the Small Business Loans Inquiry Report by the Small Business and Family Enterprise Ombudsman. We have set out specific comments on those recommendations below.

Recommendation 11

- 11) The banking industry must fund an external dispute resolution one-stop-shop with a dedicated small business unit that has appropriate expertise to resolve disputes relating to a credit facility limit up to \$5 million.**

The EDR process should be simple and easy for customers to access, navigate and understand. A revised EDR framework, which the banking industry supports, should include an integrated single ombudsman for financial and credit disputes (other than claims within the terms of reference on the Superannuation Complaints Tribunal or a future Superannuation Ombudsman).

That integrated, single ombudsman, which will be funded by levies on members, should provide an experience that is closer to a 'one stop shop'.

¹ <https://consult.treasury.gov.au/financial-system-division/dispute-resolution/>



To further improve access, The ABA supports broadening access to EDR by small business through the following jurisdictional limits:

- Small businesses should be able to bring credit disputes up to the value of \$1 million
- The EDR scheme should be able to make awards in relation to credit disputes up to \$1 million, and
- The credit facility limit should be \$3 million and the business otherwise meets the definition of a ‘small business’.

A \$3 million lending threshold will capture a very high percentage of small businesses, with one major bank estimating a \$3 million total facility limit would include 98% of the total number of all their business customers (including institutional customers).

Businesses with lending above \$3 million tend to be larger and more sophisticated businesses, with more complex lending arrangements and the ability to access legal advice, and the court system if necessary, to resolve disputes.

The ABA notes that only Australian Financial Services (**AFS**) licensees, unlicensed product issuers, unlicensed secondary sellers, Australian credit licensees and credit representatives are required to participate in an EDR scheme. Some commercial credit providers, who lend to small businesses but do not provide consumer credit, are currently not required to be members of an EDR scheme. Consequently, where a small business borrower is unable to resolve a dispute with a credit provider who is not a member of an EDR scheme they have no alternative but to take the matter to court which, for many small businesses, will be prohibitively expensive.

We suggest that the Panel consider options to ensure small businesses have access to an EDR scheme in respect of all financial services they receive. This would ensure the EDR scheme provides a true ‘one-stop-shop’ service to small business customers and a genuine alternative to the courts.²

However, we do not believe it is necessary to extend the national consumer credit protection (**NCCP**) law to small business for this purpose as the needs and requirements of small business borrowers differ from individual customers. Rather, we suggest that the Panel review other options for expanding EDR membership requirements to ensure that all credit providers providing services to small business customers are required to be members of an EDR scheme.

Alternatively, the Panel could consider increased disclosure requirements to give greater prominence to the fact EDR is not currently available with loans from particular lenders.

Recommendation 13

- 13) External dispute resolution schemes must be expanded to include disputes with third parties that have been appointed by the bank, such as valuers, investigating accountants and receivers, and to borrowers who have previously undertaken farm debt mediation.**

Third parties

The ABA has a number of concerns about this recommendation.

Firstly, it is not clear how compulsory participation in an EDR process for third parties might be achieved or what the benefits would be. Currently FOS’ powers to compel participation in the FOS process are based on a contractual agreement between FOS and its members, driven by obligations set out in the *Corporations Act* and *National Consumer Credit Protection Act*. Further clarification is

² We note that the majority of members support non ACL lenders being members of an EDR scheme, some members have policy concerns about this approach to improving EDR access for small business.



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required as to how valuers, investigating accountants and receivers will be compelled to be an EDR member.

Banks would have significant concerns about the principle and practicality of requirements being placed on banks to ensure the participation of those entities in the EDR process, or assuming liability where an EDR determination is made against the third party.

Secondly, valuers, investigative accountants and receivers are contracted to provide an expert and independent opinion to a bank, based on specific subject matter expertise and methodologies. It is not clear what criteria an EDR scheme would use to assess or re-evaluate a professional opinion provided on a point-in-time basis. The EDR scheme would require a qualified expert to reassess the information retrospective basis.

Thirdly, if independent expert opinions were subject to scrutiny through an EDR process, it is likely that the cost and complexity of providing the opinions will increase. Further, banks would not want to see a matter resolved with a customer only to have the customer seek to revisit the issue by lodging a dispute against third party. In the EDR environment, where access is free for consumers, there is little deterrent for consumers to seek to lodge disputes against as many parties as possible.

Finally, these third parties are professional advisers and are subject to separate legal and professional obligations in their own right. They are bound by the ethical and professional standards requirements of their own professional bodies, e.g. the Australian Property Institute, Australian Restructuring, Insolvency and Turnaround Association, Institute of Chartered Accountants Australia, CPA Australia. In addition, receivers and insolvency practitioners are also bound by specific provisions of the *Corporations Act* and are regulated by ASIC.

Farm debt mediation

The ABA supports a nationally consistent approach to farm debt mediation (FDM). FDM is a specialised EDR process, tailored to deal with the nature and complexity of farm debt disputes. Where a farmer has been through the FDM process and reached an agreement with their bank in relation to a facility, allowing subsequent complaints to FOS about the same facility will undermine any agreement reached during the FDM process and prolong the ultimate resolution of the farmer's concerns.

The ABA believes that customers should only get access to one EDR process. We recommend instead that farmers should be given the option to make an informed decision about which dispute resolution form they wish to access.

Integration of ombudsman schemes for financial and credit disputes

Simple, accessible and effective EDR plays a valuable role in enabling retail and small business customers (together, 'customers') to bring and resolve disputes with financial services providers.

The ABA believes that EDR offers an important and accessible alternative to the court system as it is free for customers to access, does not require formal legal representation, and resolves disputes in a less adversarial way than the court system.

The ABA supports moving to one industry ombudsman scheme for financial product and credit disputes. The advantages of one integrated scheme include simplicity for consumers and the ability to rationalise one aspect of the complex regulatory and co regulatory framework that sits around financial and credit services.

We encourage the Panel to consider an integration mechanism that prioritises efficiency and manages costs, in particular to manage the impact on fees for small business EDR members, such as financial planners and mortgage brokers.



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Standardised IDR Reporting

The ABA supports, in principle, the recommendation for FSPs to publish information and report to ASIC on their IDR activity and the outcomes customers receive in relation to IDR complaints.

We suggest that the design of any further reporting obligations takes into account the recommendations arising from other Government reviews and processes.

We also suggest that the design of any further reporting obligations takes into account existing reporting obligations (e.g. Code of Banking Practice, General Insurance Code of Practice, etc), and seek to utilise existing reporting for this purpose.

We note that there will be significant complexity and costs to industry in developing systems to provide information in a form determined by ASIC. Given that there is currently no standardised format for IDR reporting, industry will need sufficient time to both consult on any new form and implement any required changes. The form of IDR reporting should be flexible and technology neutral.

If the Panel would like to discuss any of the matters raised in this submission, please contact either myself or Christine Cupitt, Policy Director – Retail Policy on (02) 8298 0416 or christine.cupitt@bankers.asn.au.

Yours sincerely

A handwritten signature in black ink that reads 'Diane Tate'. The signature is written in a cursive, flowing style.

Diane Tate
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