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Access to Justice  
Productivity Commission  
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## **Access to Justice Arrangements**

The Australian Bankers' Association (ABA) is pleased to have the opportunity to contribute to this inquiry.

We are grateful for the additional time within which to provide our views and apologise for any inconvenience.

This submission will focus on a few specific aspects of the inquiry that are of particular relevance to our members. Those aspects are:

1. Retail banks obligations to provide internal and external dispute resolution (EDR) services at no cost to the customer.
2. Implications of increased legislative EDR requirements on financial services providers.
3. Unregulated "for profit" dispute handling intermediaries.
4. Third party litigation funding.
5. Tax deductibility of legal expenses.

### **1. The ABA**

The ABA is the peak national body representing banks that are authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia. The ABA's membership of 25 banks comprises the four major banks, former regional banks that now operate nationally, foreign banks that are represented and carry on banking business in Australia as Australian banks and a mutual bank.

### **2. Key inquiry focus by the ABA**

#### **2.1. Retail banks obligations to provide internal and external dispute resolution (EDR) services at no cost to the customer**

Banks and certain other financial services providers (FSPs) are required under relevant legislation to provide internal (IDR) and external (EDR) dispute resolution services to certain classes of customers.

Examples of these legislative requirements can be found under the National Consumer Credit Protection Act 2009, Chapter 7 of the Corporations Act 2001 and, more recently, in amendments to the Privacy Act 1988 that will commence on 12 March 2014.

Further, since 1993 the Code of Banking Practice has obliged subscribing banks to provide these services at no cost to the customer.

Generally, these services provide a free, readily accessible means of customer access to a specialised form of justice.

The EDR mechanism becomes available when the FSP has been unable to settle a customer complaint through its IDR service, provided the dispute falls within the EDR scheme's terms of reference.

The predecessor to the banks' Financial Ombudsman Service (FOS) was established by the banking industry in 1989. FOS is able to handle disputes received from individual and small business customers of banks. FOS' decisions are based on the law including the law of contract together with consideration of what is assessed to be good banking practice and fairness in the particular circumstances of the case. These criteria provide a dispute resolution service of far wider scope than through a court which is limited in its decision making to the law.

In the case of banks and other FSPs the EDR schemes are approved under legislation and regulated by the Australian Securities and Investments Commission (ASIC) which has provided regulatory guidance, for example to FOS, on its Terms of Reference and certain other matters.

FOS must conform to six broadly agreed benchmarks governing the FOS scheme:

1. Accessibility
2. Independence
3. Accountability
4. Effectiveness
5. Efficiency and
6. Fairness.

ABA members and customers alike value the EDR service as an alternative mechanism of access to justice.

It is important that this inquiry recognises this value and of the need to ensure that the performance and costs of industry based dispute resolution arrangements are kept in mind where regulation is developed regarding their availability including any impacts on their operational capacities.

## **2.2. Implications of increased legislative EDR requirements on financial services providers**

The significantly increased mandatory role of EDR for banks and other FSPs can create tension in the capacity of schemes to manage the number of disputes they receive for the processing and resolution of these disputes. This is due in part to the increased public awareness of the availability of these schemes.

Earlier this year the Commonwealth Consumer's Affairs Advisory Council (CCAAC) conducted its review of the six EDR Benchmarks. A report of the review has yet to be made available. Submissions, including the ABA's submission, to this review can be found at <http://ccaac.gov.au/2013/04/24/review-of-the-benchmarks-for-industry-based-customer-dispute-resolution-schemes/>.

Further, the FOS is currently being independently reviewed. Submissions to this review are available at [http://www.fos.org.au/centric/home\\_page/news/independent\\_review\\_of\\_fos.jsp](http://www.fos.org.au/centric/home_page/news/independent_review_of_fos.jsp) which include the ABA's submission.

The Annual Review (report) of the FOS scheme for 2012 – 2103 is available on the same website under "Publications". This publication includes data about the scheme's operations.

While there are significant benefits for industry and consumers with industry based dispute resolution schemes, it is important to bear in mind that from a regulatory perspective they are funded by industry and that regulatory measures affecting the schemes need to be kept in proportion to the services the schemes provide and the costs to industry of providing them.

In its submission to the CCAAC, the ABA proposed a possible benchmarking mechanism for industry based EDR schemes.

Currently there are little, if any, comparisons made across industry-based and funded EDR schemes.

An annual report on the comparative performances and productivity of industry-based schemes would support the Accountability benchmark which could help drive efficiencies, improve customer experiences and reduce costs to the respective industries.

Suitable metrics would need to be developed to ensure comparisons between schemes are reasonable and realistic including the nature of the industry, the type of simple and complex disputes that a scheme handles, the number of members and disputes, the funding and resourcing of a scheme and key criteria associated with the processing of disputes.

This inquiry might wish to consider this suggestion.

### **2.3. Unregulated "for profit" dispute handling intermediaries**

There are certain businesses that profit from providing dispute handling and representative services to consumers in connection with the availability of EDR schemes. Some of these providers operate at significant cost to those consumers with questionable claims for success, other conduct and resulting outcomes.

The ABA is aware of widespread concerns among EDR scheme members, schemes themselves, consumer advocacy groups and regulators about certain "fee for service" consumer complaint aggregation services, in particular businesses known as credit repair companies.

This inquiry provides an opportunity for consideration whether fee based representation of the consumer without any independent assessment of the suitability of the consumer's representative is in the interests of the consumer's access to an industry-based EDR scheme. The Accessibility benchmark promotes access for a consumer to a scheme on an equitable basis which should include whether the cost and the services provided by a consumer's representative meets this objective.

Currently, ASIC is considering a range of these types of providers to better understand their business models and to determine whether some form of consumer protection regulation may be necessary covering these businesses.

### **2.4. Third party litigation funding**

Third party litigation funding is growing in Australia. Overseas experience suggests that as these funders are commercial businesses there should be confidence for consumers who agree to become involved with these services, often in conjunction with class actions, that the providers are appropriately regulated.

Currently, for example, there do not appear to be protections for consumers in the event that they are subject to an adverse costs order and the indemnity provided to them by the third party funder is not able to be relied upon.

The ABA notes the submission made to this inquiry by the US Chamber Institute for Legal Reform which provides some helpful insight into the issues<sup>1</sup>.

## **2.5. Tax deductibility of legal expenses**

The ABA notes that banks may need to resort to litigation to recover loan funds from customers who default in their repayment obligations or to recover possession of property provided as security for loans.

The costs of legal proceedings to recover monies due to banks are a necessary and ordinary business expense that ought to be tax deductible. Recovery actions are a part of the management of lending risk.

If part of the cost of recovery of loans funds is not able to be tax deducted the pricing of lending risk could change.

Suggestions that tax deductibility of litigation expenses is in some way an incentive for a business to pursue litigation do not take account of the reputational consequences, the supervision of proceedings by the court and the potential for adverse costs orders for a litigant pursuing unmeritorious claims.

On other hand, banks can be defendants in litigation. This litigation could be the subject of a class action on behalf of a class of individuals with a law firm funded by a third party litigation funder. It is assumed that while not being a named party to the litigation, the litigation funder would seek to tax deduct its funding expenses associated with the relevant litigation including expenses associated with implementing its commercial strategy in the pre-litigation period and litigation phase which is aimed at bringing a defendant to settlement.

Tax deductibility of a business' costs in defending litigation is a legitimate and necessary tax deductible expense.

To say again, the ABA appreciates this opportunity to participate in this inquiry and would be pleased to meet with the Commission to discuss this submission as necessary.

Yours sincerely,

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Ian Gilbert

<sup>1</sup> See [http://www.pc.gov.au/data/assets/pdf\\_file/0019/129115/sub025-access-justice.pdf](http://www.pc.gov.au/data/assets/pdf_file/0019/129115/sub025-access-justice.pdf)