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Dr Warren Mundy
Presiding Commissioner
Productivity Commission
Access to Justice Arrangements
LB2 Collins Street East
Melbourne Vic 8003

By email to: access.justice@pc.gov.au

Dear Dr Mundy,

Access to Justice Arrangements Draft Report April 2014

The Australian Bankers' Association (ABA) is pleased to have the further opportunity to provide its views to this inquiry, on this occasion, the April 2014 Draft Report. The Commission is commended for the overall quality of its Draft Report which adds a deeper and thoughtful dimension to the future of Australia's access to justice arrangements.

In the ABA's December 2013 submission, we made submissions about five aspects of the existing access to justice arrangements. For convenience, we have provided our comments in response to the Draft Report under the same headings that were listed under the ABA's key inquiry focus.

There are two further matters which have been included which are the issues of contingency fees and the proposal for pro bono coordinators to be incorporated into industry associations.

1. Key Inquiry Focus by the ABA

1.1. Retail banks obligations to provide internal and external dispute resolution services at no cost to the consumer

1.1.1 Services and outcomes of ombudsman

The Draft Report is correct in stating that at the Financial Ombudsman Service (FOS) the further you engage in the dispute process the longer it takes and the more the member must pay. It is correct to say that it becomes more costly for the industry member in the course of a dispute handling process. Delay of itself can often be to the cost of a bank (and possibly to the cost of the disputant) if the dispute concerns the right of a bank to recover its loan from the disputant. Further, delay is not necessarily due to a member's delay. Delay can be on the part of a disputant by not providing information in a timely way or a delay on the part of the scheme itself in conducting the dispute resolution process. This is discussed further in 1.1.2.

EDR schemes such as FOS have large numbers of disputes, some of which can be complex and time consuming and a percentage of these may fall outside the jurisdiction of the scheme. Making this assessment alone can result in delay while this is carried out and a decision is made.

While early settlement may reduce the costs of a dispute that a member might otherwise bear, costs structures at sequential stages of a dispute resolution's progress are a more significant factor. As the process escalates, so does the cost to the member.

Recently, an independent review of the FOS resulted in a wide range of recommendations for improving the scheme's service including attending to case backlogs, simplifying some disputes processes and reducing the time that the scheme takes to determine whether a dispute falls beyond the scheme's terms of reference and what process should follow that determination. The report of the independent review and the response of the scheme's board are available at http://www.fos.org.au/about-us/independent-reviews/

1.1.2 Community awareness of EDR scheme's

The Draft Report considers that if a significant portion of unmet legal need is to be met by existing ombudsmen, reforms are required to increase community awareness of their services and improve the efficiency with which they resolve complaints.

The ABA believes that the community of financial services consumers and small businesses are well aware of the FOS scheme without any need to further promote the service.

Certain regulatory notices are required under legislation to contain prominent statements about the availability of FOS to entertain a dispute after a customer's complaint had not been addressed by their financial services provider to the customer's satisfaction.

Further the ABA's Code of Banking Practice and ASIC's ePayments Code contain provisions that require the subscribing bank to provide information to its retail customers about the availability of its complaint handling and dispute resolution services.

The latest Annual Review of the FOS indicates the level of service the FOS scheme provides and is evidence of the broad community awareness of the scheme's services.

Please see http://annualreview.fos.org.au/#folio=1

In the case of FOS, the ABA does not consider there is need for further promotion of the scheme, particularly if this were to be recommended by way of advertising. The wealth of information that is available which reaches consumers in promoting the scheme's services is considered satisfactory.

It is noted that FOS is supervised by a representative board and is ultimately accountable to ASIC, the regulator.

Some of the data reported at page 282 of the Draft Report on the timeliness of dispute resolution will vary significantly in the case of individual schemes even if overall, in aggregate, these data indicate a positive result.

The Commission is directed to the independent review of the FOS scheme cited above which provides a comparison of the Commission's figures with the FOS scheme which is in the course of redressing the incidence of case backlogs in a positive and constructive way along with the other recommendations coming from the review.

Finally, the costs to members of a scheme for individual dispute resolution cases which are referred to in figures on page 284 of the Draft Report appear to have been calculated by dividing a total cost factor by the number of disputes across a variety of schemes to arrive at an individual cost per case.

The ABA notes the request for more specific data. The ABA is informed that the individual costs cited on page 284 of the Draft Report, those figures are not representative of its members' experience and that, overall, the costs per case have been far greater than are reported in the Draft Report.

1.2. Implications of increased legislative EDR requirements on financial services providers.

The ABA refers to its comments in its December 2013 submission and to the comments made above in 1.1.1 of this submission. While strongly supporting the banking industry's contribution to independent dispute resolution primarily through the FOS scheme, the point here is to introduce a note of caution in moving to extending further significant reliance on industry funded alternative dispute resolution schemes without a deeper investigation into the implications for consumers and industry if this were to occur and particularly the terms of reference which determine the jurisdiction of a scheme.

1.3. Unregulated "for profit" dispute handling intermediaries

ASIC is making progress with its analysis of this market activity and will produce a report about these activities in due course.

In the meantime, the ABA is content to await the next step in ASIC's process.

1.4. Third party litigation funding

The ABA agrees with the Commission's draft recommendations at 18.2 of the Draft Report that:

> *Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards. Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.*
>
> *Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this recommendation by the Commonwealth Government after consultation with relevant stakeholders.*

The ABA adds that it is important to understand that some of these entities were granted a government supported exemption from the implications that a litigation funding scheme may have been constituted as a managed investment scheme. In at least one case, a third party litigation funder had acquired an Australian Financial Services Licence (AFSL) issue by the financial services regulator ASIC which included coverage for its authorised representative(s).

The ABA sees no reason why such a scheme should not operate on a competitively neutral basis as for other financial services licensees and be regulated in the same way including under the regulatory guidance publications issued by ASIC for AFSL holders.

Further, a significant matter for consumers of these funding arrangements is the question of the avoidance or management of conflicts of interests and the issue of whom, in reality, is the client of the participating law firm.

1.5. Contingency fees

The ABA has a concern with Draft Recommendation 18.1 by the Commission about permitting lawyers to charge litigants contingency fees, or as the Commission describes them, "damages-based fees" -

Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements. The restrictions should be removed for most civil matters, with the prohibition

on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.

In support of the Draft Recommendation the Commission has drawn on arguments supporting the removal of the prohibition on lawyers charging contingency fees provided in opinions of the legal fraternity and the fact that several overseas jurisdictions permit lawyers to do so.

The ABA believes that this analysis falls short of making the case for the introduction of contingency fees based billings.

Central to access to justice are the interests of the litigant.

There is the potential for conflict between the interests of the client and the lawyer with the selection of billing models due to differing merits and potential outcomes of cases. For example, a meritorious case with the probability of a significant award of damages could lead the lawyer to opt for a high contingency fee basis of billing whereas the client's interest could be better served with a negotiated conditional billing and possibly an uplift. On the other hand, the interests of the client with a higher risk case with a prospective smaller award of damages could better be served with a contingency fee basis of billing.

These are issues that require fuller analysis which should include looking beyond simply disclosure models.

There is also the question of what the overseas experience has been with adverse selection of cases, related billing models and the interests of the client. This is best analysed from research into factual experience rather than from hypotheses from interested parties about possible conflicts and their resolution.

Further, there is the question of a combined funding model where there is a third party litigation funder and the lawyer who charges the client on a contingency fee basis which is a similar model used for remuneration by the litigation funder.

The ABA concludes that it will be critically important if Australia were to move down this path that the overseas experience with contingency fees is investigated not simply from a lawyer's and client's viewpoints but further from an economic perspective. For example, what can be drawn from the overseas experience that could affect the dynamics of litigation in Australia and the likely impacts on business and their personnel?

1.6. Tax deductibility of legal expenses

The ABA agrees with the Commission's Draft Recommendation 15.1 that

The Commission recommends that no change be made to existing tax deductibility of legal expenses.

1.7. Pro Bono

The ABA wishes to respond briefly to the Commission's Information Request 23.2

> *The Commission seeks views on the potential for industry pro bono 'coordinators' to alleviate conflicts of interest for pro bono providers. Which, if any, industries should this apply to? Where should the 'coordinators' be housed? What should their relationship be with the industry? Are there barriers that would limit or prevent their effectiveness? If so, can they be circumvented or removed without affecting the relationship between law firms and their corporate client?*

The ABA's members support pro bono services, particularly for disadvantaged litigants.

It has been suggested to the ABA that law firms that are members of a bank's panel of acceptable law firms which act for the bank may be overly sensitive to taking on a pro bono client in a case involving the

bank as it is perceived by members of the firm that this could detrimentally affect the firm's future relationship with the bank concerned.

The ABA has sought views of some of its members about this.

The ABA understands that, as a general practice, a bank would generally accept that where a panel law firm takes on pro bono matters which may give rise to a conflict, this would not jeopardise the law firm's relationship with the bank. It is customary for the bank to require under its panel lawyer terms of engagement that a firm seeks the bank's consent before acting in any contentious matter against the bank. It would be rare for the bank to decline.

This approach is very much for each bank to make its own decision on a case-by-case basis particularly as the matter has been considered by banks which have developed their own policies accordingly.

In replying to Information Request 23.2, the ABA's view is that as our members have arrangements in place to deal with these issues individually and on a case-by-case basis it would be unnecessary and a potential duplication for the ABA itself to seek to intervene and act in a "coordinator" role.

Further and incidentally, the ABA is not structured in terms of its nature, role, operation and resourcing to fulfil the role of "coordinator" to which Information Request 23.2 suggests it might fill.

The ABA will follow the course of this inquiry with interest.

Yours sincerely,

Ian Gilbert