

Chapter 3

Committee view

3.1 This chapter sets out the committee's response to the evidence received and provides its recommendations.

Funding for the legal assistance and financial counselling sectors

3.2 The committee notes that although no recommendations were made by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) in respect of funding for the legal assistance and financial counselling sectors, Commissioner Hayne identified an 'asymmetry of knowledge and power between consumers and financial services entities'.¹ Commissioner Hayne also identified the significance that assistance from these services can have in determining the outcome of a financial dispute.²

3.3 In light of the importance of legal assistance and financial counselling services, the committee is concerned by evidence suggesting current funding levels fall short of what is required to meet demand for these services. The committee is also concerned by evidence from consumers indicating they have had difficulty in accessing such services.

3.4 The committee considers there is a clear and pressing need to provide legal assistance and financial counselling services with more funding, and thereby go some way to providing consumers and small businesses with the assistance they need when they find themselves in a dispute with a financial service provider. This added funding would also serve to complement the implementation of the outcomes of the Royal Commission.

3.5 The committee is persuaded by the recommendations of the Consumer Action Law Centre (CALC) and Financial Counselling Australia that increased resourcing to the legal assistance and financial counselling sectors should come from an industry levy.

3.6 The committee considers that a levy is the most effective way to respond to the findings of the Royal Commission. Such a levy could apply to financial institutions that are in the top 100 companies on the ASX. This would include a number of banks which were the subject of complaints from individuals submitting to this inquiry.

Recommendation 1

3.7 The committee recommends that the Australian Government establish an industry levy, to apply to the largest financial institutions on the ASX, that would

1 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission), *Final Report*, February 2018, p. 490.

2 Royal Commission, *Final Report*, February 2018, p. 491.

raise funds for the legal assistance and financial counselling sectors to enable these sectors to provide assistance to consumers and small businesses that have disputes with financial service providers.

3.8 The committee agrees that there is a real gap in legal assistance for small businesses, and that based on the evidence to this inquiry, access to legal assistance services should also be improved for small businesses.

Recommendation 2

3.9 The committee recommends that the Australian Government improve access to legal assistance services for small businesses.

The conduct of financial service providers within the justice system

3.10 The committee was disappointed to learn that the Australian Banking Association (ABA) has not developed an industry position across all of its member banks in regard to ABA members acting as model litigants. The committee notes that the ABA considers this to be a matter for each individual institution.

3.11 The committee was also concerned by evidence of misuse of the justice system by financial service providers in the process of internal dispute resolution (IDR), external dispute resolution (EDR) and in the court system.

3.12 The committee acknowledges the overwhelming evidence received that supported banks acting as model litigants. The committee agrees with this evidence, and considers that Australian Credit Licence (ACL) holders should comply with model litigant obligations in all of their dealings with customers—that is, through IDR, EDR and in the court system.

Recommendation 3

3.13 The committee recommends that the Australian Government require Australian Credit Licence holders to comply with model litigant obligations throughout the internal and external dispute resolution processes, as well as any proceedings in the courts.

3.14 The committee agrees with evidence from the Australian Financial Complaints Authority (AFCA), set out in chapter 2, that the failure to provide documentation relevant to AFCA, or the provision of misleading information about the existence of such documents, is unacceptable.

3.15 The committee considers that Recommendation 4.11 of the Royal Commission should be implemented. That is, section 912A of the *Corporations Act 2001*:

...should be amended to require that [Australian Financial Services Licence] holders take reasonable steps to co-operate with AFCA in its resolution of particular disputes, including, in particular, by making available to AFCA all relevant documents and records relating to issues in dispute.³

3 Royal Commission, *Final Report*, February 2018, p. 34.

3.16 The committee notes that the Australian Government agrees that an obligation should be placed on Australian Financial Service Licence holders 'to take reasonable steps' to cooperate with AFCA in the resolution of disputes, 'including making available to AFCA all relevant documents and records relating to the issues in dispute'.⁴

Recommendation 4

3.17 The committee recommends that the Australian Government immediately implement recommendation 4.11 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

3.18 The committee agrees with Maurice Blackburn Lawyers that the existing provisions of the *Bankruptcy Act 1966* (Bankruptcy Act) enable a 'perverse outcome' such that an irresponsible lender causing bankruptcy 'may have an interest in the cause or action against itself'.⁵

3.19 The committee considers that consumers should be able to pursue actions against irresponsible lenders who may have caused their bankruptcy, and that the Bankruptcy Act should be amended to preserve accrued rights to pursue action under the *National Consumer Credit Protection Act 2009*, and under the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001*, as property of the bankrupt that are quarantined from bankruptcy and do not vest in the Trustee in bankruptcy.

Recommendation 5

3.20 The committee recommends that the Australian Government amend the *Bankruptcy Act 1966* to prevent causes of action relating to consumer credit protections from vesting in the trustee in bankruptcy.

3.21 The committee was concerned to hear that some customers are forced into court proceedings for repossession of their homes without adequate regard to their personal circumstances, causing them extreme financial and personal hardship.

3.22 The committee agrees with evidence indicating that alternative dispute resolution, namely mediation, can help avoid costly and adversarial proceedings and lead to a fairer outcome for customers.

3.23 The committee considers that there are a number of steps that could be taken at an earlier stage in the repossession process, such as:

- establishing a new mediation section at AFCA to conduct farm debt mediations, and a new bank-initiated mediation stream for consumer and small business loans. This would be open to banks with customers whose cases the bank believes may end in repossession (for instance, where default notices are issued on loans secured against or guaranteed by family homes);

4 Australian Government, *Government response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, February 2019, p. 26.

5 Maurice Blackburn Lawyers, *Submission 47*, p. 9.

- requiring banks (through the *Banking Code of Practice* or legislation) to initiate a mediation through this new AFCA process before bringing repossession proceedings against a family home; and
- requiring banks (through the *Banking Code of Practice* or legislation) to give preference and due consideration to reasonable proposals put forward by customers to restructure debts, pay down parts of debts and/or trade out of temporary financial difficulty when a customer is in financial difficulty and a loan secured by or guaranteed by a family home is in default.

Recommendation 6

3.24 The committee recommends that the Australian Government improve home repossession processes by requiring that creditors engage with customers at an earlier stage. This could involve:

- (a) establishing a new mediation section at the Australian Financial Complaints Authority (AFCA) to conduct farm debt mediations, and a new bank-initiated mediation stream for consumer and small business loans;**
- (b) requiring banks to initiate a mediation through this new AFCA process before bringing repossession proceedings against a family home; and**
- (c) requiring banks to give preference and due consideration to reasonable proposals put forward by customers to restructure debts, pay down parts of debts and/or trade out of temporary financial difficulty when a customer is in financial difficulty and a loan secured by or guaranteed by a family home is in default.**

Changes to AFCA

3.25 The committee acknowledges that AFCA will be subject to an independent, statutory review after a period of 18 months from the commencement of its operation.⁶

3.26 The committee notes that the review will take into account 'feedback, provided by complainants under the AFCA scheme...relating to whether their complaints were resolved in a way that was fair, efficient, timely and independent',⁷ and must include an examination of the appropriateness of limits on:

- (a) the value of claims that may be made under the AFCA scheme (within the meaning of Chapter 7 of the Corporations Act 2001 as amended by this Act); and
- (b) the value of remedies that may be determined under that scheme;

6 *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (AFCA Act), ss. 4(1).

7 AFCA Act, ss. 4(2).

in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses.⁸

3.27 The committee supports the creation of AFCA, and is encouraged by AFCA's commitment shown during the inquiry to improving and ensuring access to justice, and its determination to understand structural problems in this regard.

3.28 However, as AFCA has itself suggested, some of the parameters in which it operates should be revised. The committee considers that some of these parameters can be revised now, rather than in 18 months.

3.29 First, the committee is concerned by the evidence received which suggests victims may not be able to access AFCA, or may not be able to receive adequate compensation for the financial and non-financial loss suffered at the hands of irresponsible financial service providers, or those that are acting illegally.

3.30 The committee agrees with CALC and the Financial Rights Legal Centre that the compensation cap for consumers and small businesses should be increased, and that compensation for non-financial loss should be considered and awarded within the compensation limit for financial loss.

3.31 The committee therefore considers that the compensation caps available for AFCA for consumers should be increased from \$500 000 to \$2 million, including in respect of credit, insurance and financial advice disputes.

3.32 Further, the committee considers that the sub-limits on indirect financial loss and for non-financial loss should be removed.

Recommendation 7

3.33 The committee recommends that the Australian Government:

- **increase the current compensation cap available to consumers through the Australian Financial Complaints Authority (AFCA) to \$2 million, including for credit, insurance and financial advice disputes; and**
- **remove the sub-limit on compensation available to consumers through AFCA for indirect financial loss and for non-financial loss.**

3.34 Secondly, the committee agrees with evidence suggesting there are gaps in the membership of AFCA, which prevents access to justice for customers whose financial service providers are not members of AFCA.

3.35 To this end, the committee considers that the Australian Government must act urgently to remediate this issue, and extend the membership of AFCA to debt management firms, registered Debt Agreement Administrators, 'buy now pay later' providers, FinTechs and emerging players, small business lenders, and professional indemnity insurers of financial service providers.

3.36 The committee notes that in a recent report examining financial hardship, the Senate Economics References Committee recommended that all credit and debt

8 AFCA Act, ss. 4(3).

management, repair and negotiation firms that are not currently licensed by AFCA be required to become members of AFCA.⁹

Recommendation 8

3.37 The committee recommends that the Australian Government extend the membership of the Australian Financial Complaints Authority to:

- **debt management firms;**
- **registered Debt Agreement Administrators;**
- **'buy now pay later' providers;**
- **FinTechs and emerging players;**
- **small business lenders; and**
- **professional indemnity insurers of financial service providers.**

3.38 The committee is concerned by evidence suggesting that victims of irresponsible financial service providers, or victims of illegal activity by financial service providers, may not be able to access AFCA on the basis of AFCA's current eligibility criteria.

3.39 The committee notes that Mr David Locke of AFCA identified that the current eligibility criteria thresholds, like the compensation caps referred to in Recommendation 7 above, were put in place before the Royal Commission, and that he considered there could be a reconsideration of those thresholds on the basis of evidence presented to the Royal Commission.

3.40 The committee therefore considers that it is imperative that the eligibility criteria to make a claim through AFCA is extended, and that this extension is made in consultation with AFCA and other stakeholders, such as the Australian Small Business and Family Enterprise Ombudsman.

Recommendation 9

3.41 The committee recommends that the Australian Government consider extending the loan facility limits for small businesses and farmers who wish to make a claim through the Australian Financial Complaints Authority (AFCA), in consultation with AFCA and other relevant stakeholders.

Compensation

3.42 The committee is encouraged by the work undertaken by the Review of the financial system external dispute resolution and complaints framework and the Royal Commission in respect of the establishment of a compensation scheme of last resort.

3.43 The committee considers that banking victims must be provided with an opportunity to have their cases reheard, including in circumstances in which they may

9 Senate Economics Reference Committee, *Credit and financial services targeted at Australians at risk of financial hardship*, 22 February 2019, Recommendation 8.

have previously missed out on compensation owing to a flawed decision by an ombudsman, or an abuse of the court process by a financial service provider.

3.44 To that end, the committee would like to see the establishment of a retrospective compensation scheme, independent of AFCA, which would allow victims of alleged misconduct by banks who received in the past an external dispute resolution determination or court judgment that was manifestly unjust to apply to the scheme to have the matter reviewed with the consent of the bank.

Recommendation 10

3.45 The committee recommends the establishment of a retrospective compensation scheme independent of the Australian Financial Complaints Authority to allow victims of alleged misconduct by banks who received a past external dispute resolution determination or court judgment that was manifestly unjust to apply to the scheme to have the matter reviewed with the consent of the bank.

**Senator the Hon Louise Pratt
Chair**

