

5 June 2015

Mr Peter Rogers
Research Director
Communities, Disability Services and Domestic and Family Violence Prevention Committee
Parliament House, George Street
BRISBANE QLD 4000
Email: CDSDFVPC@parliament.qld.gov.au

Dear Mr Rogers,

The adequacy of existing financial protections for Queensland's seniors

The Australian Bankers' Association (**ABA**) appreciates the opportunity to provide comments to the inquiry into the adequacy of existing financial protections for Queensland's seniors.

With the active participation of 23 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 to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

In making this submission, the ABA has focussed on financial abuse from a banking perspective, as well as addressing various items set out in the Terms of Reference.

1. National approach required

First, the ABA believes that issues regarding the adequacy of existing financial protections for seniors requires national attention. Accordingly, we consider these matters should be addressed at a national level as opposed to State-by-State approaches to ensure consistency, avoid the disparate processes and procedures, and strive for better outcomes for seniors across Australia.

Second, and quite importantly, it should be recognised that banks are national organisations, and therefore, banks generally apply internal policies and procedures across the operations of the bank Australia-wide. Differences across jurisdictions means that banks are required to invest unnecessarily in complicated compliance systems and additional staff training, which adds to the administrative burden and costs for banks in dealing with meeting the various laws as well as the expectations of their customers and their agents across jurisdictions.

Third, it should be recognised that many Australians are not well equipped to be dealing with the challenges often associated with getting older themselves or a family member getting older. There are many legal, financial and social issues which need to be given close consideration and important financial, medical and lifestyle decisions may be required. It is incumbent on Government to raise awareness of the importance of making sure people have in place arrangements to suit their circumstances and needs, including a will, power of attorney, and other estate planning arrangements. We recognise that some State Governments have recently conducted consumer education campaigns, however, we consider that a national consumer education campaign is necessary and would be consistent with the Government's promotion of the Intergenerational Report and the findings about Australia's ageing population.

For these reasons, the ABA would welcome a lead by Queensland to advocate for a national review of the adequacy of existing financial protections for seniors, building on the findings of the House of Representatives Standing Committee Legal and Constitutional Affairs inquiry into *Older People and the Law* conducted in 2007¹.

Recommendation

The Committee recommend issues regarding the adequacy of existing financial protections be addressed as a national issue with a view to harmonising laws, introducing a national register for formal arrangements and conducting a national consumer education campaign to raise awareness and help Australians better plan for the future and protect themselves from financial abuse.

2. Partnership approach

According to the Intergenerational Report, Australia faces the challenges of a growing and ageing population that is expected to reach nearly 40 million by 2055 with nearly a quarter of that over the age of 65². In addition to Australia's ageing population, there is a likelihood that Australia will see a rise in the number of cases of financial abuse involving older people.

The World Health Organization (**WHO**) defines financial abuse of an older person as "the illegal or improper exploitation or use of funds or resources of the older person." The Financial Ombudsman Service (**FOS**) also has a definition for financial abuse which highlights the main concept of financial abuse as being the vulnerability of the older person in combination with the detriment that results from the improper conduct of another person³.

Financial abuse generally involves family members, with the abuse arising within the home or institutional care of an older person and involving a violation of a relationship of trust.

The ABA does not know the extent of the problem of financial abuse. Banking industry data indicates a very low numbers of complaints relating to older people, and even lower relating to possible financial abuse. It may be that reports made to community organisations or the police do not result in formal investigation or contact being made with a bank or financial institution, or alternatively, is addressed as an incidence of fraud of a customer, rather than a case of financial abuse of an older person.

However, the ABA recognises that financial abuse is a serious issue for the community with far reaching consequences for individuals and their families. Australia's ageing population means that financial abuse is an issue requiring a partnership response from Government, business and community.

Recommendation

The Committee recommend a partnership response from Government, business and community. This may involve establishing a Taskforce (involving representatives from these sectors) to identify the current issues and possible solutions. This may also be a matter for the Council of Australian Governments (**COAG**) to ensure cross jurisdictional coordination and collaboration.

3. Role of the banking and financial services industry in ensuring adequate safeguards for seniors in relation to financial decision making

The ABA notes that while the financial exploitation of a vulnerable person is a deeply challenging area for the banking and financial services industry, banks play a significant role in ensuring adequate safeguards in relation to financial decision making.

First, banks must ensure that they do not breach their legal obligations, including under privacy laws, in the act of responding to, and managing, a possible or actual instance of financial abuse.

From a bank perspective, banks must assume that a customer can transact until a point to which the law, and medical profession, say this is not the case. Banks must act on the instructions of their customers. If a customer makes a

¹ http://www.apf.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=/laca/olderpeople/report.htm

² 2015 *Intergenerational Report*. Australian Government. <http://www.challengeofchange.gov.au/>

³ *BFSO Bulletin 56: Financial Abuse of the Vulnerable Older Person*. Financial Services Ombudsman.

December 2007. http://www.fos.org.au/centric/home_page/publications/bulletins/banking_finance_bulletins.jsp

decision to withdraw money, transfer money or property, etc, a bank is obliged to assume this decision has been made with the knowledge and authority of their customer.

In addition, banks have to be very careful not to discriminate against people based on age or disability. Where a third party exerts "undue influence", it is difficult for a bank to establish without asserting some form of subjective judgement. A response by a bank may "discriminate" against their customer.

Second, financial abuse tends to be a breach of a relationship of trust, for example, a family member acting as an agent. A bank has a legal obligation to act in accordance with the authority as contained in an instrument or order. Financial abuse may be perpetrated by someone that has the legal authority to make decisions on behalf of the older person.

The bank-customer relationship is a contractual relationship in which the bank is not at liberty to permit transactions on the customers' account without the customer's mandate. Therefore, a person presenting as an agent of the customer imposes an obligation on the bank to authenticate the arrangement. Recognition by a bank that the authority of a third person to act on behalf of a bank customer, whether the customer is an older person or otherwise, is a key liability issue for banks. The duty to authenticate the authority to act as agent as well as establish the identity of the agent needs to be carefully and strictly exercised.

Third, financial abuse is often complex and difficult to ascertain. It is difficult to distinguish between an unwise but legitimate financial transaction from an exploitative transaction. For example, 'implausible reasons for banking activity', this is difficult to ascertain; and 'undue pressure', this is open to subjective judgement. Assumptions may be offensive. Actions may discriminate. Banks cannot prevent customers from making informed, but ill-advised decisions.

Ultimately, banks need to be careful to ensure that any measures do not disadvantage older people through the diminution of trust in third parties acting in good faith and in the best interests of the older person.

With this in mind, the banking industry developed the following industry guidelines on financial abuse (part of the ABA's Financial Abuse Initiative):

- **Protecting vulnerable customers from potential financial abuse:** As a framework to banks, this industry guideline explains what financial abuse can look like, how it can impact customers and the bank's relationships with their customers, and how banks' staff can respond.
- **Responding to requests from a power of attorney or court-appointed administrator:** This industry guideline explains how these different legal arrangements work across Australia, how they are used by bank customers and their substitute decision-makers, and provides a framework for how banks should respond to these arrangements.

The ABA also prepared some consumer fact sheets to help raise awareness of financial abuse and provide customers with some tips about how they can protect themselves.

The ABA has also worked with Alzheimer's Australia and Capacity Australia on developing tools to assist staff training with regards to financial abuse⁴ (see below for more details).

Four, banks have a number of product and service solutions to assist customers better manage their finances and adopt supported decision making approaches (as opposed to substituted decision making). These arrangements help customers put in place appropriate measures to help protect themselves yet retain their financial independence. Examples of these product and service solutions include:

A **joint account** which can include a co-signatory account, two-to-sign account or linked account:

- *Co-signatory account* – either the customer or third party is able to operate the account;
- *Two-to-sign account* – both the customer and the third party are able to authorise transactions; and
- *Linked accounts* – different accounts or facilities which are linked together to help better manage day-to-day transactions and bill payments, savings and loans. Linked accounts make it easier to transfer money between accounts using Internet or digital banking channels.

⁴ <http://www.bankers.asn.au/Consumers/Financial-abuse-prevention>

Additionally, banks variously offer arrangements to enable a third party to be authorised to access the account. Some account arrangements can be tailored to limit or allow certain access and/or transaction types. For example, some authorisations can be limited so that the third party is able to access the account, but not transact on the account. Upon request other account services are also available to assist customers better manage their money and finances, including hard copy account statements in larger print, reduced maximum daily withdrawal limits, transaction and transfer restrictions, direct debits for regular payments, and SMS or email alerts to remind customers about their account balance, transactions and payments. Services such as these can assist customers maintain their financial independence and autonomy.

Five, banks discourage customers adopting informal arrangements. While some people may prefer informal arrangements, such arrangements may leave them vulnerable to fraud, exploitation and financial abuse, even by their trusted third party (such as spouse or family member). Informal arrangements can include providing a PIN or other access code to a third party to conduct banking transactions on their behalf. Such practice can expose customers to significant risks. For example, if an unauthorised transaction is conducted on their account and the bank is aware that the customer has breached their terms and conditions by providing their PIN or access code to another person, then they may also lose their protections under the e-Payments Code and be liable for any loss. Banks regularly promote the need for customers to retain their personal and financial information in a secure place.

However, banks strongly encourage formal substituted decision making arrangements and supported decision making arrangements, as these mechanisms provide the bank with clear instructions, minimises the risk of the customer breaching their contractual obligations, and ensure banks are able to better service their customers' needs. Customers should speak to their bank about putting in place an arrangement that best suits their needs and eliminates exposure to financial risks.

4. Financial abuse and the law – what is needed?

During the inquiry into *Older People and the Law* conducted by the House of Representatives Standing Committee Legal and Constitutional Affairs, the ABA and a number of other stakeholders raised concerns with difficulties in verifying the authenticity and currency of powers of attorney, the lack of harmonisation of laws and instruments across jurisdictions, and the lack of a national register.

Since this time, our member banks have noted an increased use of formal arrangements and the number of substitute decision making instruments being presented by third parties. The industry is concerned that the ageing population in Australia will mean that the use of formal arrangements is only likely to become more prevalent.

The ABA recommends that the following changes should take place to ensure the interests' of the older population are adequately protected:

Consistency and uniformity

Formal arrangements should be consistent and uniform across jurisdictions. Supporting guidance about instruments should provide clear instructions to attorneys and agents and provide clear information to individuals so they can make informed decisions appropriate to their circumstances.

The ABA believes that a national approach is required to reduce regulatory and administrative complexity and promote consistency of legal obligations and practices across Australia.

While the laws in each jurisdiction and the processes for appointing attorneys, agents and administrators are broadly similar, there remain differences that our member banks, customers and their substituted decision-makers are required to understand. For example, the laws across the States and Territories may have different names for different powers, and different formats, capacity testing, witnessing and execution processes (e.g. the instrument may or may not need to be registered with the appropriate State or Territory agency to take effect).

As a result, it may take a while for our member banks (and other financial institutions, organisations, companies and service providers) to process and verify authorities. These differences cause unnecessary complexity and contribute to unnecessary business costs, including training for staff and communications for customers. Additionally, it can cause other risks where lack of awareness about the specific instrument could result in inappropriate application and/or powers being exceeded, or alternatively, expectations not being met with regards to the use of the instrument.

Portability and transferability

Formal arrangements should be recognised across jurisdictions and be transferrable without the need for new arrangements to be put in place.

The ABA believes that progress should be made towards mutual recognition of power of attorney instruments. This is important as it will provide ease of process for customers who move interstate and eliminate uncertainty with the use of instruments.

Legitimacy – a national register

Formal arrangements should be registered so that banks can more easily establish the authenticity and currency of the instrument.

Currently, the ability of our member banks to verify the authority of an enduring power of attorney or court-appointed administrator is unclear and cumbersome. For example, there is no national register to which we can verify the authenticity of powers presented. Banks have experienced incidents where transactions have been delayed due to the need to verify an instrument and this has caused adverse consequences for the individual, the bank or both (such as, a delay in settling a property transaction causing additional costs or a delay in completing a market transaction and adverse movements in prices). Lack of a national register exposes people to the risk of financial abuse as well as the risk of unfavourable outcomes with regards to their transactions.

The ABA believes that clearer, consistent legal arrangements would provide certainty to customers and their substituted decision-makers, and reduce the regulatory and administrative complexities and compliance burden on industry.

Recommendation

The Committee recommend that the Queensland Government advocate for the Australian Government to harmonise laws, introduce a national register for formal arrangements and develop nationally-recognised instruments.

5. Consumer education

Financial abuse is a community problem. Information and education are key to reducing the risks of abuse as well as the consequences. Families and the community should have better information about the problem. In addition to raising awareness with bank staff, the ABA believes raising awareness of this issue with bank customers is equally important, as education can help prevent problems.

The ABA has been working with various organisations to raise awareness of financial abuse as well as support research into this area.

In 2013, the ABA worked with Alzheimer's Australia on the "Is it Dementia" website (<http://isitdementia.com.au>). The website includes six different training modules across different sectors. The banking sector training module provides several videos to be incorporated into existing training programs.

This year, the ABA worked with Capacity Australia, to build on existing training programs and to provide an interactive training module covering financial abuse.

The ABA is also working with COTA and academia to assess current formal, and informal decision making. This research will be important to help identify areas that need further reform or action.

The ABA would be happy to support the Australian Government and other organisations in developing and supporting national awareness raising campaigns to deal with financial abuse, in particular of older persons.

Recommendation

The Committee recommends that the Australian Government develop a national consumer education campaign to raise awareness of financial abuse of older Australians.

6. Financial literacy – seniors

The ABA believes that it is important that older Australians have the skills necessary to manage their money and structure their banking and financial affairs so that they maintain their financial independence and autonomy, protect themselves from financial risk and limit the need for third party interventions.

The ABA has a suite of financial literacy materials available on our website, providing general information that can be used by all members of the community and bank customers.⁵ Furthermore, individual banks have developed dedicated resources and programs targeted towards older people.

The ABA is interested in learning about specific areas that would be helpful to provide more information, particularly for older Australians, and is committed to refining our publications and materials to ensure that these resources are useful for older Australians.

Recommendation

The Committee recommends that the Australian Government continue to fund and develop national initiatives to promote financial literacy for older Australians.

7. Concluding comments

The ABA strongly believes that a multi-dimensional and shared (government, business and community) response is required to address the adequacy of existing financial protections for older Australians, specifically in relation to financial abuse.

In summary, the ABA believes this will involve a comprehensive and coordinated approach involving the following:

- Improved information and education, including a national community awareness raising campaign;
- Whole of Government and community response coordinating efforts across Australia;
- Advocating for the Australian Government to harmonise laws, develop a national register for formal arrangements and develop nationally-recognised instruments; and
- Improved collaboration between agencies/authorities, including protocols for agencies, standardised forms and supporting guidance, and better coordination and resourcing of law enforcement in this area.

The ABA looks forward to the outcomes of the inquiry into the adequacy of existing financial protections for Queensland's seniors.

The ABA would be happy to discuss any of the items raised in this submission with you further. If you have any queries, please contact me or Lena Rizk, Policy Manager – Retail Policy, on [REDACTED]

Yours sincerely,

[REDACTED]

Diane Tate

⁵ <http://www.bankers.asn.au/Consumers/Financial-Literacy>