COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Resolution of disputes with financial service providers within the justice system

(Public)

THURSDAY, 21 MARCH 2019

SYDNEY

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Thursday, 21 March 2019

Members in attendance: Senators Ian Macdonald, Pratt, Watt.

Terms of Reference for the Inquiry:

To inquire into and report on:

The ability of consumers and small businesses to exercise their legal rights through the justice system, and whether there are fair, affordable and appropriate resolution processes to resolve disputes with financial service providers, in particular the big four banks considering:

a. whether the way in which banks and other financial service providers have used the legal system to resolve disputes with consumers and small businesses has reflected fairness and proportionality, including:

i. whether banks and other financial service providers have used the legal system to pressure customers into accepting settlements that did not reflect their legal rights,

ii. whether banks and other financial service providers have pursued legal claims against customers despite being aware of misconduct by their own officers or employees that may mitigate those claims, and

iii. whether banks generally have behaved in a way that meets community standards when dealing with consumers trying to exercise their legal rights;

b. the accessibility and appropriateness of the court system as a forum to resolve these disputes fairly, including:

i. the ability of people in conflict with a large financial institution to attain affordable, quality legal advice and representation,

ii. the cost of legal representation and court fees,

iii. costs risks of unsuccessful litigation, and

iv. the experience of participants in a court process who appear unrepresented;

c. the accessibility and appropriateness of the Australian Financial Complaints Authority (AFCA) as an alternative forum for resolving disputes including:

i. whether the eligibility criteria and compensation thresholds for AFCA warrant change,

ii. whether AFCA has the powers and resources it needs,

iii. whether AFCA faces proper accountability measures, and

iv. whether enhancement to their test case procedures, or other expansions to AFCA's role in law reform, is warranted;

d. the accessibility of community legal centre advice relating to financial matters; and

e. any other related matters.

WITNESSES

CUPITT, Ms Christine, Executive Director, Policy, Australian Banking Association

MINING, Mr Justin, Policy Director, Australian Banking Association

Committee met at 09:10

CHAIR (Senator Pratt): I declare open this public hearing of the Senate Legal and Constitutional Affairs References Committee inquiry into the resolution of disputes with financial service providers within the justice system. This is a public hearing and a *Hansard* transcript of the proceedings is being made. I remind all witnesses that, in giving evidence to the committee, you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer to take evidence in public; however, under the Senate's resolutions, witnesses have the right to request to be heard in camera. It is important that witnesses give the committee notice if they intend to give evidence in camera. The committee may also determine that proceedings take place in private. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. We ask that answers to questions taken on notice today be returned by 28 March.

I now welcome the Australian Banking Association. You provided us submission No. 43. Information on parliamentary privilege and the protection of witnesses and evidence has been given to you. I'd now like to invite the ABA to make a brief opening statement, if you wish to, and then we'll get to questions.

Ms Cupitt: Good morning, Senators. The Australian Banking Association appreciates the opportunity to appear today to provide information on the resolution of disputes with financial service providers. The ABA represents 23 member banks, including major banks, regional banks and international banks. We provide analysis, advice and advocacy for the industry and contribute to the development of public policy on banking and other financial services.

The ABA and our members acknowledge the very real social impacts that the banking industry's failures and misconduct have had on customers, both individuals and small businesses. These failures have been clearly illustrated through the royal commission and have been shown to directly impact the wellbeing of customers, causing individual financial loss as well as more broadly undermining consumer trust and confidence in banking. The banking industry must do better to ensure it is acting in the best interest of its customers and the Australian community. An important part of this is acting fairly and making it easier for customers when things go wrong.

ABA member banks agree that past practices relating to complaints and disputes have not been good enough. We are working to improve the way that banks receive and respond to complaints, with a focus on acting fairly and reasonably and keeping customers informed. ABA member banks have established dedicated customer advocates. These advocates work independently of a bank's business unit to facilitate fair complaint outcomes and act as a voice for customers and small businesses.

The ABA's banking code of practice sets clear rules for how customers can complain and how the bank must act when handling a complaint. Data collected by the banking Code Compliance Monitoring Committee shows that the vast majority of complaints are resolved fairly and in a timely manner through internal dispute resolution. In 2017-18 banks resolved 97 per cent of complaints within 21 days.

For complaints not resolved directly with the bank, the ABA supports customers' rights to access free and fair external dispute resolution. The ABA supported the establishment of the Australian Financial Complaints Authority, as a recommendation of the comprehensive Ramsay review. A one-stop shop, together with substantially increased jurisdictional limits, means that speedy, free external dispute resolution is available to many more Australians. We believe that this will result in a fairer, quicker and easier process for customers and small businesses.

But there is more to do. The ABA supports several further reforms to make complaints handling and dispute resolution fairer and more effective. The ABA welcomes the expansion of AFCA's remit to accept eligible financial complaints back to 2008. Our member banks are committed to working closely with ASIC and AFCA to set these arrangements up as quickly as possible. The ABA strongly supports the royal commission's recommendation to amend the law to require AFSL holders to take reasonable steps to cooperate with AFCA.

The ABA has long been concerned about consumers and small businesses that have been awarded compensation through past EDR schemes but have not been paid. We support the government's announcement

that it will fund $30 million in compensation for customers and small businesses with past unpaid EDR determinations.

The ABA also supports establishing a mandatory prospective compensation scheme of last resort, funded by industry, to compensate consumers and small businesses who suffer losses because of inappropriate financial advice. This is an essential reform to protect consumers. The scheme should be established in line with the principles recommended by the Ramsay review and subsequently endorsed by the royal commission.

Thank you again for the opportunity to appear. We would like to take questions.

CHAIR: Thank you. I'd like to begin by asking about the ABA's policy position and the position of banks around the banks behaving as model litigants in the course of pursuing court cases with customers. Do you believe banks should act as model litigants?

Ms Cupitt: The ABA has not developed an industry position across all of its member banks on behaving as model litigants. The ABA believes that there's merit in each bank considering what that means for their bank in their approach to litigation and dispute resolution, and making a determination individually.

CHAIR: What would you say are the key principles behind being a model litigant?

Mr Mining: There are a number of key principles in that. Obviously you know clients do not have the financial resources and capacity that you do as an institution—and this happens at a governmental level mainly at the moment. It is ensuring that you don't unfairly utilise those resources to hold out access to justice for those customers. I think that would be the overarching principle. Underneath that there would be a number of other principles, and it would really be up to each institution to determine if they would be part of their model litigation policy. I note that one of our member banks made a submission to the inquiry—ANZ. They indicated in their submission that they are pursuing putting in place some principles, including acting as a model litigant in handling disputes.

Senator WATT: Can I just check one thing? Ms Cupitt, does the fact that the ABA doesn't have an overall position on this mean that there are different views amongst your membership about whether banks should be acting as model litigants?

Ms Cupitt: No, I don't believe it reflects that. I think what it reflects is that we've taken the approach that determining whether or not you adopt those principles is really a matter for the institution, having regard to what those principles mean in their business and their approach to litigation.

Senator WATT: But, presumably, there are other issues that the ABA has a whole-of-industry position on. Can you give me a couple of examples—they could be unrelated.

Ms Cupitt: So, certainly, in this context a support for the establishment of AFCA was absolutely an industry-wide position. Support for the compensation caps that were recommended by the Ramsay review was an industry-wide position, but there are many other issues for banking. Some of them relate to competitive issues. Some of them relate to competition law issues, and some of them relate to specific decisions that are best made by the institution, having regard to the features of that institution. And, in this case, we believe that the model litigant decision is best managed by those individual institutions.

Senator WATT: But what differences could there be between banks that justify an individual bank not wanting to be a model litigant?

Ms Cupitt: I think that it's probably more a matter of determining not necessarily that they won't be a model litigant but the best way for them to apply those model litigant policies within their bank. Because of that, we haven't run a process as an industry to determine an industry position.

CHAIR: The kinds of things that arise as obligations for the model litigant are things like dealing with claims promptly, paying legitimate claims without litigation, not taking advantage of a claimant who lacks resources, not relying on a technical defence against a claim, considering alternative dispute resolution, and acting honestly and consistently. That's how the government's supposed to act, and we've had a recent inquiry on the government acting as a model litigant. Surely there should be a universal position on the kinds of things that should be in your banking code.

Ms Cupitt: Certainly many of those elements that you've just referred to, Senator, are in our banking code. We have provisions around free access to internal and external dispute resolution. We have a commitment that banks must be fair and reasonable and keep customers informed as part of managing complaints and disputes.

CHAIR: Yes, but that's not the same as making a commitment to those things within a legal process necessarily.

Ms Cupitt: In terms of litigation?

CHAIR: Yes.

Ms Cupitt: Could I ask that we take that on notice because most of the chapters of the code relate to internal and external dispute resolution, and I can't speak to the breadth of them in relation to litigation.

CHAIR: Thank you. There have been a number of disputes where your members have discovered new victims of misconduct, and that's been highlighted through the royal commission. Some people have said since then that they've been able to easily be compensated and the impact has been manageable; however, in other cases, you've re-examined behaviour and banks have found that they did indeed act improperly or unfairly. But these reviews have been ad hoc, relying on consumers self-identifying. How should banks—and are the ABA aware of any plans among your members to—more comprehensively review past actions during the period examined by the royal commission so that there's more universal identification of those who might have been affected by misconduct?

Ms Cupitt: I think that there are three elements to our response. The first is in relation to individual steps that banks are taking to set up additional processes to review past cases. A number of major banks have set up quite formal processes appointing prominent independent and external people to oversee those, and we can provide some more detail of that in writing. So, those processes are underway. There's also the role that ASIC has played in requiring banks to set up significant remediation programs and ASIC taking a very active role in overseeing the structure of those remediation programs, the principles that those remediation programs must follow and the reporting and governance of those remediation programs.

CHAIR: That doesn't sound quite universal. Does the ABA believe it would be helpful to have an independent retrospective compensation scheme so that all these cases can be worked through methodically?

Ms Cupitt: In terms of a process to look at past cases, we support the action of the government and now AFCA to create a mechanism to hear disputes back to 2008 under the current AFCA jurisdictional limits and under the current AFCA rules. We think that that strikes the right balance in making dispute resolution available to people that haven't had the opportunity to do that in the past in a reasonably certain way.

CHAIR: And you would see that that would involve compensation in some cases, depending on the outcome. But that would exclude people who have been to court already, would it not?

Ms Cupitt: The current proposal does, yes.

CHAIR: But what if there had nevertheless still been wrongdoing? There might have been a failure to act as a model litigant or some other unfairness in the system.

Ms Cupitt: Certainly where there has been a determination made by a court, we believe that any process to reopen those cases would need to be considered very carefully, with particular regard to the community's trust and confidence in the certainty of court determinations and the process of appeal that's available to citizens under our justice system.

Senator WATT: But don't you think, after everything we've learned over the last couple of years, that the community is greatly sceptical of both the conduct of banks and their willingness to use legal proceedings in a certain way? And don't you think, equally, allowing people to relitigate matters, on some conditions, would actually enhance the community's faith in banks and the legal system?

Ms Cupitt: I think as a general principle a proposal like that should be approached with caution, but it would be open to each bank to decide if they wanted to reopen or revisit a determination or process that's been overseen by a court.

Senator WATT: Have any of your members put up their hands yet to agree to that?

Ms Cupitt: I'd be happy to take that on notice. It may be that, as part of the bank based independent reviews that I referred to, there have been instances where that has happened, but we would need to confirm it.

Mr Mining: I would note that, in regard to the government's announcement about expanding AFCA's remit to consider those legacy disputes going back to 1 January 2008, a number of our banks have already been in discussions with AFCA and have given their permission to start examining those matters even before AFCA's remit is extended, from 1 July. So those banks are already in discussions with AFCA on that.

CHAIR: In the context of actions that have been taken in the past—for example, to foreclose on farmers and small-business people in financial hardship, particularly since 2008 where we've seen non-monetary defaults based on leveraging property values; and some of that's been litigated, and people have lost their businesses—how should we go about revisiting those issues?

Ms Cupitt: Certainly, as I said, the bank based reviews may form part of the response to that. Certainly, looking forward, there are a range of measures that the banking industry is taking to ensure that issues like that do

not occur again. Part of that is accepting the recommendations of the royal commission to not apply default interest in those sorts of situations and also the expanded protections in the new banking code to remove non-monetary default clauses, other than those specified in the code that relate to legal issues.

CHAIR: So there's no current commitment at all in terms of revisiting those past practices. Should those past practices be comprehensively reviewed?

Ms Cupitt: I think it's open to each bank to do that as part of their independent bank review programs.

CHAIR: Labor's position is to have an independent dispute scheme. Would it not be simpler to allow those cases to be examined by an independent retrospective scheme with the bank's consent?

Senator IAN MACDONALD: Not that you're being asked to endorse one political party's propositions, or others.

CHAIR: You can put your own propositions to the ABA.

Senator IAN MACDONALD: Okay. It seems an odd way to ask a question.

Mr Mining: The ABA's position on that is that we do have an independent external dispute resolution body, AFCA, who do have the capacity. It's only been running for four months but has already shown a propensity to handle a large volume of matters and will have the capacity to look back at those legacy disputes to 1 January 2008 if they haven't been subject to a determination already. So that is an avenue.

CHAIR: But foreclosure is an excluded issue, is it not, within that? It has had a final legal determination.

Mr Mining: Correct. I was just referring to general complaints and financial issues.

Senator WATT: Already today I've heard, on a number of occasions, you giving evidence that certain things should be left to individual banks to work out: they should be able to review which cases are reopened; they should be able to do this and they should be able to do that. Surely, if we've learnt anything from the banking royal commission, it's that, with the greatest respect, these issues can't be left to individual banks to self-regulate. That is one of the key reasons that we've seen for the gross failures in banking conduct over the last number of years. What gives you any confidence that leaving it to the banks, in the way that you're advocating, will provide a better result than what we've seen in the past?

Ms Cupitt: I'd be happy to come back to you in writing with examples of where the independent banking review processes have results in longstanding and legacy issues. I believe that there is a body of evidence around banks addressing longstanding and legacy cases through these processes and resolving them to the satisfaction of the customer. We can provide some visual examples and evidence of the process.

CHAIR: Do you have questions, Senator Macdonald?

Senator IAN MACDONALD: Yes, I do. Thanks for coming along. You've touched on this. The AFCA has been going for six months. Have your members had time to form a view on the effectiveness or otherwise of AFCA? Are there any early thoughts from the industry? I appreciate that you can't speak for individual banks but speak for the broad industry. Are there any initial thoughts: is this a good system; could it be improved; does it go too far; how much are we relying on governments and so-called independent bodies to look after things, which in many cases should be an individual's responsibility? Have you had any of those sorts of thoughts at this stage?

Mr Mining: The industry remains very supportive of AFCA as the one-stop shop. Out of the Ramsay review, which was a very comprehensive review of the EDR framework, AFCA was established and the banks were very supportive of that establishment. I will stress that it has been operating for only just over four months, but there has been a very clear increase in the number of complaints that are being handled by AFCA and dealt with in an efficient and fair manner, from our understanding thus far. We are very supportive of AFCA having the role, with the government giving it the remit to go back to those disputes from 1 January 2008. A number of ABA member banks, mainly the major banks, have already been in discussions with AFCA on allowing them to start that work even ahead of the 1 July date the government asked for. There's an 18-month review of AFCA's operation that has already been set up. That will be an independent review, recommended by the Ramsay review, that will look into AFCA's operation. I think 18 months will be the time at which we will have a sufficient amount of data and evidence to really understand the role AFCA is playing and any improvements that can be made to it. At this stage, I think the industry is saying that it's only been operating for four months, and we're very hopeful that this provides a much more efficient and effective system for consumers and small businesses, but let's give it a little bit more time to function so we have a little bit more evidence and data to see how it's operating.

Senator IAN MACDONALD: Thanks for that answer. Do you envisage, or does the industry envisage, that insolvencies since 2008 will be looked at? Is that your understanding of what AFCA might be able to do and what the banks will be willing to do? I come from North Queensland, an area that is now under water, but a few years

ago drought and other things led to a lot of rural property foreclosures. Some of it was the customer's own determination to go ahead with a deal that wasn't a very good one, but some of it was encouraged by a particular bank, which I won't name and which is no longer in business, as it turns out. Do you expect that those sorts of decisions will be reviewed, relitigated and turned to? If so, how would you expect they would be dealt with?

Mr Mining: Certainly for those matters that are going back to 1 January 2008 under the expanded remit, if there's a complaint that can be made about a financial firm's actions in an insolvency case and other financial matters, that will be able to be reviewed by AFCA. There are increased compensation limits that AFCA is operating under. As long as it's an eligible complaint that hasn't been subject to a determination, it may very well be able to be handled by AFCA.

Senator IAN MACDONALD: Subject to a determination by a court?

Mr Mining: By a court, yes, or by a previous EDR scheme, like the Financial Ombudsman Service or other predecessor schemes.

Senator IAN MACDONALD: Do you think there's a flaw there? Many people who are facing insolvency really don't have the money to spend on court cases of any sort, nor particularly to get a decent lawyer who might be able to really help them. They're just not financially able—or were not; we're going back three, four or five years.

Mr Mining: The positive of the AFCA system, and EDR schemes generally, that the banks have signed up to is that it's a free system. So those people involved in those cases can take their complaints to AFCA free of charge.

Senator IAN MACDONALD: That's current, if that happened now. I'm talking about reviewing decisions that may have been made or foreclosures that may have happened four, five or six years ago.

Ms Cupitt: Certainly, as I referred to earlier, there are these bank based independent review processes that customers in those situations should be encouraged to avail themselves of. Information about how to access those is available on bank websites, or people can contact the ABA.

Senator IAN MACDONALD: Does the industry have any statistics? A hundred years ago I used to be a lawyer in a small country town. It always amazed me that the banks would force a foreclosure knowing that the bank was going to do very badly out of it. Very often, the small business could have traded its way out partially, if not completely, and have a more ordered closure. I'm just wondering if there are any statistics, where banks do force foreclosures—particularly for small business, and I include rural properties in that—on how much of the money lent the banks actually lost because of what I would term as forced foreclosures. Some would say that, had they been allowed to trade out and close down in a more ordered way, not only the customer but eventually the bank would have been better off. I'm just wondering if there are any statistics on that sort of thing.

Ms Cupitt: Yes. Banks need to report to APRA statistics on foreclosures and losses in relation to credit. We can come back to you with some information about that. But I would also like to add that, as I said in our opening statement, banks agree that past practices have not been good enough. They're going through processes both driven by government and led by industry to ensure that those practices are improved and that those kinds of circumstances don't occur again.

Senator IAN MACDONALD: Does that include the cost of insolvency? Again, from my very limited and ancient experience, where there are insolvencies, the only ones that seem to recover anything from it are the insolvency practitioners—and good luck to them; they do a professional job. Is there any thought within the industry on how that process could be better managed, how sometimes insolvency practitioners could perhaps be better overseen?

Ms Cupitt: There are a couple of elements to that. Firstly, the ABA has created guidelines, which are referred to in our banking code, in relation to the appointment of investigative accountants and insolvency practitioners. We can provide the committee with a copy of those guidelines. That's one part of the solution. Then there are other practices that banks are adopting. In the agricultural context, we fully support nationally consistent farm debt mediation and early offer of mediation as well. Banks have invested significantly in work-out areas within their banks to look at the best way to support their customer in financial hardship either work out or look at a more orderly process for resolving the issue if it's a more intractable issue that can't be resolved.

Senator IAN MACDONALD: I don't want to be the only one in Australia who feels sorry for the banks, but sometimes I've come across cases where people more or less demand that they be lent money. A lovely fellow, a constituent, came to see me, and he admitted he went to his own bank, which knocked him back and said it was stupid. He went to another bank. They knocked him back. He went back to his own bank and tried again. He

really was determined to go ahead with this. He eventually got a fourth bank to lend him the money and then, when it all went belly up, he wanted to sue the bank that lent him the money.

You're in a difficult position on where you draw the line. Are you subject to any form of law or practice where, if you do not lend money to someone who thinks they have a good case, you have some responsibility? Can I walk in and demand that you lend me money on a risky deal?

Ms Cupitt: Firstly, I'd say that banks should always be held to the highest standards, manage their obligations in relation to responsible lending and, where the Credit Code doesn't apply, meet the requirements of being a prudent and diligent banker under the banking code. These are decisions that are for banks, and banks should always be held to the highest standards in making those credit decisions. In a circumstance where a loan has not been made, there are some requirements under the new banking code. One of those requirements is where the customer has paid for a valuation that's being considered as part of the credit application. The customer will receive a copy of that valuation and the instructions to the valuer. Certainly there are obligations to be much more transparent about why a loan is not granted.

CHAIR: In the context of the use of external law firms, we've seen many victims of banking injustices complain about the way external law firms to the banks have conducted themselves. What are members doing to ensure that, when external counsel is used, it is done in accordance with the obligations already in the banking code, and should banks be more proactive in communicating their expectation to external counsel?

Ms Cupitt: The banking code is drafted to apply to the bank. I'm looking for the exact wording, but the concept is that it will apply to the bank and their agents. The banking code is intended to apply to people that are acting on behalf of the bank as well. In terms of the engagement by individual banks and external lawyers, we can't speak to those practices. We can find out and come back to you in writing. But, as a concept, there are a number of circumstances where banks appoint external providers, such as investigative accountants or insolvency practitioners, where we have created guidelines about how that engagement should operate.

CHAIR: Surely that engagement should include options to avoid repossession rather than it just being a one-way pass towards repossession under those circumstances.

Ms Cupitt: I think that is something that the industry, in the vein of having precedent around guidelines for how we appoint third parties, could consider. I can't commit to the specifics of that, but we could certainly consider that.

CHAIR: What can banks do in terms of prioritising avoiding customer harm when evaluating settlement offers? Should a bank place more emphasis on an offer from a customer that allows a family to remain in their home, for example?

Ms Cupitt: Certainly banks continue to evolve and improve their hardship policies. We have provisions in the current code and the new banking code relating to financial hardship, and there are a range of responses that the bank can implement. These are outlined in the code. They certainly look to things like agreeing to interest-only payments for a short period, extending the term of the loan et cetera. These are on page 47 of the code.

CHAIR: Thank you. I'm going to revisit a question linked to what Senator Macdonald asked. We've had some discussion already about the capital requirements in relation to stressed loans. How should we be reconsidering those issues, particularly in a legal context, and also in a historical context? Those are the circumstances under which we've had previous foreclosures, where people would really like to be able to revisit the difficulties they have had. I've spoken to many farmers who were facing very profitable farming seasons but were under pressure from the bank. They were quite able to meet their repayments, even though their property was now undervalued on the market. Many of them experienced foreclosure on their farms. So, No. 1 is the capital requirements, even though people are quite capable of trading through those issues. What do we need to do now, looking forward and looking backwards, to redress those issues?

Ms Cupitt: For loans that come within the scope of the code, the non-monetary covenants in relation to LVR have been removed. Some banks have already made this commitment unilaterally, but the banking code is going to be amended to ban applying default interest, certainly in that scenario and also in other scenarios. Looking forward, we think that those two changes will be significant. In terms of retroactive review of cases, again I would go back to the point that banks, particularly the major banks, are running these large and independent reviews and that customers should avail themselves of those reviews and approach their banks.

CHAIR: You spoke there about the banking code being specifically amended in that regard and you say that some banks have already moved in that direction. You've got some banks also saying that they'd like to act as a model litigant. Why can't that also be part of the banking code? What's your process for putting something in the code versus things that stay outside it?

Ms Cupitt: I suppose we would go to general principles, which I referred to before. There are some decisions and positions that are much better left to individual institutions based on competitive reasons, prohibitions under competition law and also positions that are best managed by the institution having regard to their business, their customer base and their objectives. Where there is an appetite to look at an industry position, we discuss that through ABA working groups. We have a governance process with a number of committees that can approve industry positions. That's our general approach and process.

Senator IAN MACDONALD: You may have to take this on notice; you may not be able to answer it here. I'm from Townsville, where Storm Financial was a major catastrophe involving, dare I say, unfortunately, a couple of banks. It's been litigated to death, but people still are concerned that they haven't received justice. Is that whole Storm situation something that could be reviewed under the AFCA rules, would you think? Is it something that some of the banks are looking at perhaps revisiting? I appreciate you can't speak for individual banks.

Ms Cupitt: If there are Storm clients that have not previously been party to those court actions or approached the FOS, they would be able to participate in that look back to 2008.

Senator IAN MACDONALD: Some took a payout because they didn't have any money to fight it and sort of thought that a little bit's better than nothing, but by any standard some of the payouts weren't terribly fair. Some of them may have even had the seal of approval of a court. Would they be able to relooked at by AFCA, according to your understanding of the AFCA rules?

Ms Cupitt: Where they've been party to one of the large court actions—I understand ASIC had a role in assessing the fairness of those determinations—I don't believe they would be eligible for the 2008 look-back, but certainly, if they have not had access to justice or access to dispute resolution historically, they would be able to do that.

Senator IAN MACDONALD: If they've done something individually with a bank just by themselves and took what they could because there wasn't really much alternative at the time, is that something that might be—

Ms Cupitt: Yes, if the customer's been through internal dispute resolution, I understand that it's still open to them to approach the external dispute resolution provider, AFCA.

CHAIR: I want to go back to the issue of capital requirements. My understanding is that banks need to hold more capital, which is what pushes towards foreclosure. Should banks be willing to wear those risks and costs more often and to avoid customer hardship, and rate it as important, rather than pushing for quick foreclosure?

Ms Cupitt: That's not my understanding of the effect of the capital requirements. I'm not a prudential expert; we can come back to you in writing. My understanding of the prudential requirements is that they generally relate to the approach that the bank would need to take in managing risk across the portfolio. That may relate to the terms under which the loans are provided or it may relate to the price at which the loans are offered.

CHAIR: In that context I'll ask: should banks be willing to wear those costs more often and value avoiding customer hardship more highly, rather than pushing for quick foreclosure to avoid having to hold more capital on a distressed loan? You talked about portfolio loans, but in the case of farming, where you might have a universal phenomenon where property values have dropped relative to the loans against those properties, surely there also has to be an assessment of the overall profitability of those farms, which doesn't seem always to have been factored in in these foreclosure episodes.

Ms Cupitt: Certainly going forward, as a central tenet of our banking code, assisting customers in financial hardship is the priority. We have specific provisions in the code that go to what banks need to do to assist customers in financial hardship.

CHAIR: In making a judgement about profitability relative to the asset price and the debt, should questions of profitability be considered more deeply and broadly in the assessment of small-business and other business loans?

Ms Cupitt: My general reaction to that is that those sorts of judgements and assessments should be made by individual institutions having regard to the requirements that APRA sets for them, the features of their customers and their loan book, and their risk appetite, which is set by the board.

CHAIR: Thank you. My thanks to you both for appearing today on behalf of the ABA.

Ms Cupitt: Thank you, senators.

Mr Mining: Thank you.

DORAN, Ms Rebekah, Member, Australian Consumer Law Committee, Legal Practice Section, Law Council of Australia

MacDONALD, Mr Nathan, Senior Policy Lawyer, Law Council of Australia

WALKER, Ms Mary, Chair, Alternative Dispute Resolution Committee, Federal Litigation and Dispute Resolution Section, Law Council of Australia

Evidence from Mr MacDonald was taken via teleconference—

[09:58]

CHAIR: Welcome. Information on parliamentary privilege and the protection of witnesses has been provided to you. I invite you to make an opening statement.

Ms Walker: The Law Council is grateful for the opportunity to contribute to this inquiry and for the ongoing interest of committee members in important issues relating to access to justice and dispute resolution in the financial sector. The scope of this inquiry is notably broad, and the Law Council has not been in a position to address each aspect of the terms of reference. What we have done is provide a submission that has been reduced to an access to justice lens and has a core focus on the role of legal assistance sector in assisting with disputes with financial services providers. Specifically, the submission highlights that, due to the complexity of many financial disputes, there remains a need for legal advice and representation for consumers who have disputes with financial service entities. However, there are significant barriers to obtaining such advice and representation, particularly in the legal assistance sector.

The Law Council's submission draws on the findings of its 2018 Justice Project, which highlighted that only a small number—less than three per cent—of means-tested legal aid grants for legal representation and dispute resolution in 2016-17 were for civil law matters. This places a notable burden on the broader legal assistance sector, particularly on chronically under-resourced community legal centres, which are left to address the void of legal assistance services for civil law matters. Our submission to this inquiry echoes the recommendations contained in the Justice Project, which called for a significant increase in Commonwealth, state and territory per annum funding for civil law legal assistance services in order to help address unmet legal need and uncertainty regarding funding sources. In this regard, we support the funding proposal put forward by Financial Counselling Australia and the National Association of Community Legal Centres for additional resourcing to create a properly funded network of community financial counselling community legal services. Frontline services for whom you have received submissions in the context of this inquiry such as the Consumer Action Law Centre and the Consumer Credit Legal Service in Western Australia also support this proposal for an injection of funds into the sector. This must be complemented by adequately funded state and territory civil law legal aid services.

The Law Council also wishes to highlight the critical roles of the Australian Financial Complaints Authority, alternative dispute resolution processes and civil litigation in providing different avenues for those who have disputes with financial services to access justice in an effective, efficient and fair manner. In particular, alternative dispute resolution processes such as mediation, conciliation, arbitration and others—such as expert determination decision-making and hybrid processes introduced into specialist courts and tribunals—can assist in the management of power imbalances between parties, of cost and of delay.

Industry supported ADR schemes such as AFCA play a vital role in assisting consumers to resolve complaints or disputes in a forum that is generally faster and cheaper than the formal legal system, and the Law Council remains supportive of AFCA as the primary means of resolving most financial dispute services, particularly low-value claims. Given that AFCA has been operating for less than six months, some time is required to assess its effectiveness and efficiency in dealing with consumer disputes with financial institutions. Further details of the Law Council's views can be found in our written submissions provided for the benefit of the committee. My colleagues and I are now happy to answer any questions the committee may have.

CHAIR: Thank you for the Law Council's, as always, excellent submission. Unsurprisingly, you are the most active submitters to the work of this committee. You highlighted in your opening statement support for more assistance for the legal assistance sector to meet demand for legal support. I want to ask about insurance disputes in relation to (1) access to free legal assistance and contextualising particular issues in terms of support for lifting the cap on insurance disputes, which regularly exceed the $500,000 compensation cap with life insurance, and (2) the compromises that consumers can sometimes be forced to make because of that.

Ms Doran: In relation to insurance disputes, the type of legal assistance that can be provided goes from beginning to end in those matters, including, at the beginning, helping a consumer to understand whether or not they may even be eligible to make a claim under a policy and helping assess the merit of that claim. In life matters

that can be particularly complex, because it often relies on a person's health conditions and matching an understanding of that person's health conditions to what the definitions are under a policy—for example, for total and permanent disability payments. That assistance can carry on right through a dispute in some matters.

In terms of the compensation caps, I am not sure whether the Law Council has put forward a view about that. However, we do see that AFCA is an ideal place to resolve those matters and, if an increase in the compensation cap is required to deal with and facilitate those life disputes, that would be appropriate. Certainly from my experience in dealing with those matters as a solicitor, often clients with insurance disputes are incredibly traumatised, because they've suffered an injury or an accident. In the case of home insurance and in cases where people have been affected by a natural disaster, often they require quite a lot of support—not just in understanding the legal matter but also supporting them through that process so that they don't burn out and give up on the matter.

CHAIR: That makes perfect sense to me.

Ms Walker: Mr MacDonald might also wish to comment.

Mr MacDonald: What Ms Doran said was a terrific account of what some of our services deal with. My understanding is that the Law Council doesn't have a particular position on the question that you've asked but we would certainly agree that AFCA would be a very appropriate forum to deal with those matters. The submission from the Consumer Action Law Centre does make some recommendations around insurance caps, and it might be worth directing the question to them later in the day.

Ms Walker: The only comment that I would like to make is that caps, depending on the size of the cap, can also indicate that there may be some complexity to some of these matters. If there is complexity, they may not necessarily be aligned to a quick consumer type dispute through a dispute resolution process and may require some legal assistance and might also be more suited to some dispute resolution processes that are aligned to the courts and tribunals. So it is a complex issue, not just a monetary cap issue.

CHAIR: That makes sense. The Law Council is actively involved in the consumer credit and legal services that you work with, but there is clearly also a referral pathway with financial counsellors to actively work with the alternative dispute resolution schemes. What role does legal assistance have in both schemes? What do we need to do in relation to what is generally fairly limited civil law legal assistance that is available, other than in consumer law—say, with small business, farmers and many others where there is that power imbalance and where they don't have access to legal assistance?

Ms Walker: I think perhaps a good example is matters that come under the farm debt mediation acts. In New South Wales, Victoria, Queensland and South Australia there's a legislative format; however, in Western Australia it is also a voluntary scheme. These were introduced initially in New South Wales, in 1994, and the essence of these power imbalances and difficulties as to capacity to engage in or access formal dispute resolution services has been at the core. In addition to legal assistance, there are also counselling services and so forth that are run by different agencies, such as the Rural Assistance Authority in New South Wales, and I think experience shows that there are a number of different features in relation to this. There are a number of support structures that are required to assist people who are having barriers to entry. But also, at the other end of it—for example, if they go to a farm debt mediation—there are amendments to the Farm Debt Mediation Act that allow for a cooling-off period to allow farmers who couldn't necessarily obtain legal advice at the time of the mediation to seek legal advice in relation to a finalisation of the matter; they're given an opportunity to obtain that. So I think there are different pathways and methods of providing it. That is one example. I'll hand over to Ms Doran if she's got any further comments.

Ms Doran: You mentioned two schemes in your question. Could I clarify what you were referring to?

CHAIR: Not necessarily two schemes, but to recognise that consumer credit issues are covered currently by consumer legal centres and financial counsellors—

Ms Doran: I understand.

CHAIR: But there's not a publicly funded legal support service for small business, even though the power differential still exists.

Ms Doran: Yes, absolutely. Financial counsellors, community legal centres and legal aid services, and often pro bono services provided by law firms, work incredibly collaboratively to try to cover the field of legal assistance to the extent that we can. Often that requires us to match the level of service with the need of the consumer. For example, it might be that, if the matter is simply that a person is in temporary hardship and they need a temporary arrangement, a financial counsellor would be best placed to do that. I guess there's a range in the level of assistance someone might need. For example, perhaps advice is sufficient. In the cases that I deal with as

a legal aid solicitor, we're dealing with vulnerable clients who will require ongoing representation much of the time. To turn to the small business question, there is certainly a distinct lack of assistance available for small business. There's no question about that. To some extent advice is able to be provided by financial counsellors, particularly where they're sole traders. Legal aid does that on occasion. But ongoing representation is not available.

CHAIR: Can you always tell the difference between small-business issues and consumer credit issues?

Ms Doran: That's a very interesting question.

CHAIR: It can't always be easy to do that. Is there something of a false distinction there when you're dealing with sole traders and the like?

Ms Doran: It's actually a growing level of complexity. I think that was addressed in some of the submissions to the royal commission, particularly as we have an ongoing use of, say, contracting arrangements to replace traditional employment relationships. Even in arrangements that you would think would be standard employment arrangements, such as the trolley collector at a shopping centre, you might see them as a contractor, and that certainly can complicate things. Uber drivers are an example where we've seen matters where there is a blurred line between whether that person is a small business or an individual. In those cases—

CHAIR: And that affects what might at the face of it look like a consumer credit issue but actually pushes them out of eligibility, because it becomes an act of business lending instead of consumer credit.

Ms Doran: It's a complex question. It would turn on the facts as to whether an individual was eligible for legal aid.

CHAIR: But the principle of it should be, looking at circumstances like that, that they should be eligible, surely?

Ms Doran: Yes, that's right. So there are two questions. One is their eligibility for legal assistance, and the other question is which law applies. Often what law applies is the more complex question. There is the National Consumer Credit Protection Act and the National Credit Code. In, say, an example where someone has purchased a car on finance to use for themselves and for Uber driving, there is a complex legal argument there around whether the code applies. Where that person has the vehicle for their livelihood, it's likely that Legal Aid would be assisting that person, subject to all of our other criteria. So it really turns on what that individual's circumstances are. I think where the significant gap is in legal assistance is genuine small business, where they have a very different set of legal problems and a very specific need for legal assistance that, I think, would certainly benefit from specialised legal services.

Ms Walker: Can I just raise an issue in respect of small business commissioners in New South Wales, for example, and Victoria. They do exist in the public sector and can provide advice over the phone, as well as access to pathways to dispute resolution processes. The difficulty that we find, I think, is that there are parameters in which they can work in specific circumstances. I suppose there may be an area or a vacuum in relation to being able to develop that.

CHAIR: Clearly you're supportive of an increase in legal assistance. You'd be aware that the opposition's made an announcement of a levy on the banks that would see legal assistance grow from 40 practising lawyers currently up to about 240. Will that go some way to bridge the gap? Would you also support some of those specialists working with small business?

Ms Walker: The Law Council would welcome any additional capacity to assist consumers in this context.

Ms Doran: I think Nathan may be well placed to answer that question.

Mr MacDonald: Yes. We've come out in support of that particular announcement. It certainly aligns with many of the findings from the Justice Project and also seems to be in tune with many of the recommendations that came out of the Productivity Commission's 2014 report on access to justice, which highlighted a real gap in legal assistance in consumer law matters.

CHAIR: Thank you.

Senator IAN MACDONALD: I'm interested in paragraph 50 of your submission and wonder if you can just elaborate on that. It says:

… AFCA should be constituted such that a matter triaging processes be in place to identify matters of sufficient complexity that warrant the complainant having the option of retaining an independent solicitor from a panel of independent law firms …

Could you just explain that proposal.

Ms Doran: Yes. This proposal was elaborated on in more detail in an earlier submission from the Australian Consumer Law Committee. What it's trying to address is the issue that, particularly with the increasing jurisdictional limit of AFCA and the increasing compensation limit, we're likely to see an increasing number of high-value complaints and complex complaints at the higher end of that spectrum. The Law Council sees that lawyers have an important role to play in assisting consumers, particularly in those really complicated matters where it might be very helpful for a person to narrow the issues in dispute or to undertake very complex calculations in relation to loss. That's particularly the case in financial advice matters, where you might have an ongoing relationship of advice over many years and various complex structures. It can be incredibly difficult and time-consuming to calculate loss in those matters.

The example that's been drawn on in the submission is where financial institutions have instituted, say, a remediation scheme and, in those cases, have set up a panel of solicitors that has allowed consumers to obtain independent legal advice at the cost of the financial adviser. The experience in those matters was that it did help narrow the issues in dispute and help resolve those matters faster. The suggestion here is that there could be a role for independent lawyers to be funded through the financial institutions to help with those complex matters at that high end. At the moment there is no provision for legal costs to be paid in AFCA. By and large that is appropriate, but it does mean that there is potentially a gap in the legal advice being provided to those clients who don't have the means to pay for that financial advice but would find it very difficult to navigate the process on their own.

Senator IAN MACDONALD: You're suggesting that AFCA should set up this independent panel. I'm curious: you talk about a particular bank as a panel. The panel is paid for by the bank, yet it's independent.

Ms Doran: We might leave that question.

Senator IAN MACDONALD: The proposal of the consumer law committee is that AFCA set up and pay an independent panel.

Ms Doran: One option is that there is actually, say, a process—this is the triaging suggestion—where AFCA can identify matters at an early point where it is appropriate for the person to obtain independent advice and for them to be directed to do that. If it turns out that, at a later point where the matter resolves, the bank is found to be at fault—for example, if it's a banking dispute—then the bank could be ordered to pay some of those legal costs.

Senator IAN MACDONALD: And, if the applicant is found to be at fault, should costs be awarded in that instance—although, I guess, if they're in that situation, they're not going to be in a position to pay costs.

Ms Doran: Quite possibly not. I may need to go back to that original submission to look at the detail, unless Nathan is able to elaborate—potentially we could take that detail on notice and bring it back to the committee.

Mr MacDonald: We're happy to take that one on notice—highlighting, as you mentioned, Deputy Chair, that it was a proposal coming out of the consumer law committee. So long as it is framed in those terms, we can take that on notice and get back to you.

Ms Walker: Can I make a comment about some analogous circumstances where there are panels of lawyers that are engaged through different government departments for many purposes. Some of them are as mediators; some of them are in different capacities. Often they are paid for either by the parties equally or by the government departments or through some methodology, but obviously there needs to be some capacity to have independence and capacity to work this within the scheme, and I think there are lots of options that could be looked at to ascertain capacity to pay.

Senator IAN MACDONALD: You as lawyers would agree with me that justice in Australia, or in any civilised Western country, is difficult unless you're either very rich or very poor. How you overcome that without massive government funding, which taxpayers don't always want to contribute to, is an ongoing question. Tell me: what is the role of lawyers in AFCA? Do they have a right of appearance? But you're saying the AFCA cannot make any orders as to costs under current rules.

Ms Doran: No, they don't make any orders as to costs. In the AFCA submission they make a point of noting the value of independent solicitors in the legal assistance sector and financial counselling assistance in the AFCA process. They find that incredibly valuable, particularly for helping those clients who may otherwise find the AFCA process too difficult.

Senator IAN MACDONALD: I see in your submission you make the obvious statement that it has been going for only six months; it's a bit hard to make a determination. Do you know if the Law Council was consulted in relation to the setting up of AFCA?

Ms Doran: Yes.

Senator IAN MACDONALD: Were you reasonably happy with what eventuated at the end of the consultation and consideration process?

Ms Doran: Yes.

Senator IAN MACDONALD: There's a review, I understand, in 18 months, which, no doubt, the society will be keeping a very close eye on. Can I get a broad comment from the Law Council about the rule of law, where the line is between the court system and the rule of law as we know it, and tribunals who may or may not interfere or override or disagree with past court decisions. Am I making myself clear?

Ms Walker: I think a good way to analyse that is to look at the court system and the dispute resolution process there, the provision of the development of precedent, guidance for the community and regulators and so forth, as compared to processes which are outside of the court whether they be external dispute resolution processes or alternative dispute resolution processes such as mediation and so forth.

I think we've matured to a certain extent within the legal profession, in the way the consumers deal with this, to have appropriate processes which allow for, for example, confidentiality in the mediation process and the resolution of the dispute. If they don't resolve it, there is still capacity to go to court in certain circumstances. A lot of the old ombudsman schemes allowed the consumer to still go to a court process; however, industry members were bound to the result during the course of that decision-making in the external dispute resolution schemes.

I think the perspective is that it doesn't cut across the provision of the rule of law. What it is doing is complementing the accessibility of capacity to finalise a dispute. That can be determined or categorised in many different ways; I think that a lot of the court rules now allow for that. I do not think that the court function, as far as providing equality of arms, capacity for procedural fairness and capacity for finalisation of matters, and creating precedent, is challenged by the development of EDRs or dispute resolution processes these days.

Senator IAN MACDONALD: So you class AFCA as a dispute resolution system?

Ms Walker: As an external dispute resolution system, akin to, perhaps, the old ombudsman schemes.

Senator IAN MACDONALD: Yes, which it replaced.

Ms Walker: It's in that character.

Senator IAN MACDONALD: Is it possible for 'appeals' to be taken to the court from decisions of AFCA?

Ms Doran: I wouldn't class it as an appeal. The decision of the ombudsman scheme is binding on the member financial service provider but not on the consumer.

Senator IAN MACDONALD: Is that fair? We all hate the banks now, so any way we can get stuck into them or tax them or charge them is fair game in Australia at the moment. I often ask lawyers: is that fair?

Ms Walker: I'll answer the question by going back to the mid-nineties, when there were mortgage credit ombudsman schemes and ones in alignment with that. They were initiated by the industry; they were schemes with instruments that were signed off on by the equivalent of the banks or lenders. It seems to me that, if they agree to these processes and their development, then they also agree to be bound as part of the terms of the development of these processes. However, the consumers who come are not in the same situation. We've all read and talked about power imbalances and other aspects that come to this. This allows the consumer, whether legally represented or not, in these circumstances to revisit the outcome and determine whether all of the issues that they wished to have redressed have been, and then to go to the traditional court processes if they choose to. There are time lines and so forth in relation to that. That's the way I would answer that question.

Senator IAN MACDONALD: Thanks for that. That's helpful.

Senator WATT: Thanks for your evidence today. Can I ask a few questions about what reforms you think might be necessary to the court system and court processes to improve fairness for consumers. Do you have a view on the current structure of core processes for home repossessions, which usually involve applications made by banks and other financial service providers to the state supreme courts, as to whether that is the fairest and most efficient way to resolve these types of matters?

Ms Walker: I might ask Mr MacDonald to make the first comment in relation to this, thank you.

Mr MacDonald: Thanks for the question. I'm not sure if we have a particular position on what you have described. Our submission, as you know, is far more focused on the broader access to justice principles around AFCA and the legal assistance sector funding.

Senator WATT: I acknowledge that the Law Council may not have a position, but I would be interested in any of your personal experiences about what you see as the pros and the cons of the system as it currently operates.

Ms Walker: I can speak to a wider view of what the administration of justice in the system actually provides through matters such as case management, triage and access to other dispute resolution processes through the court streams. They can be mediation, arbitration, expert referral and some hybrids of these. I think we are moving towards an area where the statistical evidence is showing that matters can be dealt with efficiently and the number of matters that are going through the alternative dispute resolution processes within the courts, whether they are state or federal courts, are showing that there is a capacity for disposal.

There have been some studies—there was one done in the mid-nineties by the civil justice centre in New South Wales—looking at perceptions of fairness and justice in dealing with different dispute resolution processes. Although there was a limited scope in the pool of cases that were looked at in the District Court of New South Wales in 1997, where parties were more intrinsically involved in sitting at the table and engaging in processes their perceptions of fairness and justice were heightened, in the sense that they had more engagement and access.

I think we are now getting to a stage where all of the pathways to dispute resolution need to be looked at and brought together in perhaps a more uniform view. This is my personal view. However, I think that we are not just looking at courts now as a place where there will be initiation of litigation and that is the only pathway. We are not at the end of this journey. There is a lot to be said for it. But we have had this initiative since 1990 in New South Wales and, certainly around that time, in other states and territories.

Ms Doran: I can comment from my practice experience on the issue of home repossessions as well. I can only speak to the jurisdiction of New South Wales, but we have come a long way particularly since the introduction of the National Consumer Credit Protection Act and the code. When I began practising in this area, if somebody wanted to make a hardship application then they had to make it to our state tribunal unless the financial service provider had volunteered themselves to be a member of one of the industry schemes. Now all of the financial service providers are required to be a member of EDR. Also the default notice that is sent to consumers has to have the details of the EDR scheme, and there are internal IDR contacts on it. That has made a difference.

One comment I would make about that home repossession process is that the more that can be done at that front end and at that early point, the less we will see at that very difficult end when somebody is in the Supreme Court. There have been a lot of challenges with that process once the person is at the stage of a judgement being entered against them and the home repossession process being underway. That is because of the centralisation of that through the Supreme Court. Particularly for people in regional and remote areas, engaging with the court in the Sydney Supreme Court is incredibly difficult. I understand that the New South Wales government has recently introduced an online system to deal with those home repossession list matters. I haven't had personal experience—

Senator WATT: Through the Supreme Court, though?

Ms Doran: Yes. It is very specific to that possession list. I don't have personal experience yet with that list, but in principle that seems to be a very good development and should resolve some of those access issues to deal with distance.

Ms Walker: I would reiterate that dealing with these sorts of disputes earlier is obviously the focus. As interest continues to run, equities are eroded and so forth, they are probably an area of target for early resolution, if possible.

Senator WATT: Notwithstanding this change that has been made to add an online component, do you think that these repossession matters could be better handled through an alternative process, rather than Supreme Court applications?

Ms Walker: I don't think the Law Council has a position on that at this time. I can make some personal observations, but I'll go to Mr MacDonald first, if I might.

Mr MacDonald: No, you're correct, Ms Walker. I don't believe we have a position on that particular issue.

Ms Walker: A good example is to look at the farm debt experience, because there are a lot of possession matters very early on being brought into that scheme. I think we need to be mindful not only that we need to be accessing capacity to resolve disputes early but that they may very well need to be accessed outside of the court stream and dealt with internally through the ombudsman schemes or otherwise. However, one of the other problems is: if you have too many barriers to entry for someone who actually needs to be in the Supreme Court then what you're doing is creating more burden. It's a real balance about how these things are dealt with. With my experience in the area of alternative dispute resolution, if you have a particular area that can be targeted and there is a scheme set up particularly for that, they're often very effective. We now have a proliferation of these things. We're at a time when we actually need to step back and say: should we be bringing these in together? I think that's why the AFCA experience, and a review of that in 18 months, would be quite useful.

Senator WATT: Have you got any thoughts on what safeguards could be put in place to prevent financial service providers from using repossession as a first resort and to ensure that it truly is a last resort measure?

Ms Walker: Do you want to answer that one?

Ms Doran: Certainly some of the improvements I mentioned before go to that point. Having the ability for financial institutions to meaningfully engage with a person who is in financial hardship, I think, is really critical, from my casework experience. That's not just offering a stock standard, 'You can have three months of your payments,' but really looking at why the person is in hardship. Is this temporary? Is this long term? What is going to work for you? It's about having staff that are adequately trained to do that, including understanding their obligations under the Banking Code of Practice and the law. It's about not just the staff in financial institutions' hardship sections having that understanding but staff at all entry points for the consumers having that understanding so that, if someone walks into a branch, they're able to get the same hardship response as someone who calls up on the telephone line and as someone who calls up with a financial counsellor to the hardship section. I think those things can all help with that early intervention approach.

I go back to our overarching point around the importance of the availability of financial counselling and legal assistance services: quite often we see people presenting in what appears to be an example of short-term hardship when actually the problem was responsible lending. Being able to identify those people at that early point, when they're starting to be in hardship, is really critical because it can help prevent the matter from escalating and it can help ensure that the consumer obtains the legal redress that they should get and doesn't just go into a temporary plan where they end up selling the house and possibly having a shortfall. We'd like to see that early identification of those matters embedded in AFCA processes as well.

When people are in temporary financial hardships, like if they've lost their job or they're sick, they may well see a financial counsellor or some other community support service. It's not uncommon for us to see people at that early point, not because they come in saying they have a dispute with their financial service provider but because their electricity has been disconnected or they can't put food on their table. The role of the lawyer is then to say, 'Well, actually there's a deeper cause to this problem, and we might be able to help you to resolve it.' I appreciate that doesn't go directly to your question, but—

Senator WATT: No, that's fine. I acknowledge that the Law Council doesn't have a formal position. It would be quite helpful if you could take that on notice and have a bit of a discussion about those couple of points.

Ms Doran: Absolutely.

Senator WATT: What additional safeguards could be put in place to prevent financial service providers from using repossession as a first resort? Secondly, have you got any thoughts on changes to the core processes—for instance, greater use of ADR rather than Supreme Court processes—for repossession types of disputes?

Ms Walker: Yes.

Senator WATT: Thanks.

Ms Doran: One comment I will just make is that, once a statement of claim is lodged in a repossession matter, the matter can still go to AFCA. That generally tends to be the legal advice provided to consumers in those matters. It is only when a judgement is obtained that AFCA is not in a position to handle those disputes. I just wanted to make that clear to the committee.

Senator WATT: Sure. Thanks.

CHAIR: Thank you all very much for your evidence this morning. It has been extremely useful.

BEIGLARI, Ms Dana, Senior Solicitor, Consumer Law, Legal Aid NSW

[10:40]

CHAIR: Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I'd now like to invite you to make a brief opening statement.

Ms Beiglari: Thank you for the opportunity to provide oral evidence in respect of this inquiry. I'd like to provide an oral statement this morning which provides some background about Legal Aid NSW and the unique perspective that we can provide to this inquiry as well as the key focuses for us. Legal Aid NSW provide advice, assistance and representation in civil, family and criminal matters. We have a large, statewide presence and significant experience working in regional areas, with 23 offices in New South Wales and a presence at 221 outreach locations. Our services are targeted at priority client groups experiencing economic and social disadvantage. In particular, we have specialist services and programs to assist victims of family violence, Aboriginal communities, elderly clients, prisoners and young people.

Within our civil law work, consumer issues are the largest matter group. We provided around 8,000 services to do with consumer law issues in 2017-18. Credit and debt issues make up a large volume of our work. These issues might relate to responsible lending concerns with a credit contract, hardship requests or financial services sold inappropriately. The scope of our assistance varies depending on the needs of our clients. We might provide advice about a credit matter, arrange a referral to a financial counsellor or represent a client before the Australian Financial Complaints Authority or, in some cases, in court.

In our view, the dispute resolution system, firstly, should be accessible to all Australian consumers, especially our vulnerable and disadvantaged client base and, secondly, should lead to fair and appropriate outcomes. In our casework experience, the court system provides a number of challenges to our clients in achieving these two outcomes. These challenges and barriers are well documented, most recently through our work at the financial services royal commission. We referred three case studies to the royal commission.

To overcome the challenges, we are strong advocates for robust internal dispute resolution processes within financial service providers as well as the essential role for external dispute resolution to resolve disputes. We also strongly support adequate funding for the legal assistance sector to provide free legal advice about financial services matters. While we recognise the role of the court in resolving some disputes, in the vast majority of cases AFCA is the most appropriate, fair and efficient way for Australian consumers to resolve their dispute. AFCA is a free and independent forum which is accessible. Disputes are resolved on the papers—that is, via telephone, email or letter—which is of great benefit to regionally based clients. AFCA can make a decision based on what's fair in all the circumstances, and the strict rules of evidence do not apply to this forum. AFCA also reports to the regulator about systemic issues that are emerging, and it has a consumer liaison group which can also report systemic issues. AFCA can conduct systemic issues investigations where appropriate. For these reasons, we consider AFCA to be the most appropriate and accessible forum for resolving disputes.

Finally, for financial services disputes, access to free and timely legal advice and presentation is critical. The legal assistance sector, which includes legal aid commissions, community legal centres and financial counsellors, should be adequately and consistently funded to meet this need. This was most recently noted by Commissioner Hayne in his final report to the royal commission. The National Partnership Agreement on Legal Assistance Services provides funding to states and territories to distribute to the legal aid commissions and community legal centres. The agreement supports a legal assistance sector that is integrated, efficient and effective, and mandates collaboration between the legal aid commissions and community legal centres. In our view it's important to have a mixed service model—that is, specialist consumer law teams within legal aid commissions, community legal centres with financial services expertise and financial counsellors all working collaboratively to support Australian consumers to resolve their disputes.

CHAIR: Thank you for your excellent opening statement. With respect to legal assistance, there's a reasonably well-developed, nevertheless under-resourced, legal assistance sector in consumer law and consumer credit. Why is this important relative to other forms of civil disputes?

Ms Beiglari: I think it's important because of the significant impact that a dispute with a financial service provider can have on a consumer's life, including financial hardship, which leads to stress within daily life or an inability to meet everyday living expenses or, in the most extreme case, losing a house that is a home to your family and yourself. It's important, firstly, because of the impact that a dispute with a financial service provider can have on your life and, secondly, because of the complexity of understanding the laws that apply in financial services disputes. Also, navigating which is the most appropriate forum to ventilate those disputes can be done more easily and efficiently with the support of someone within the legal assistance sector.

CHAIR: In that respect, Legal Aid is clearly very broadly involved in a whole range of legal issues—you mentioned family violence, custody and other things. How important is support for these kinds of financial matters when it comes to the links with other kinds of legal disputes when families are under stress?

Ms Beiglari: The link with financial hardship and access to credit and financial services with a person's everyday life is critical. Financial services have become an essential service in people's everyday life. Access to affordable credit and access to insurance is an important part of living in society within Australia. I often find in my casework experience as a solicitor that, if there is one problem that someone presents with—for example, they're having issues with their landlord—then there very often will be an underlying financial hardship that needs to be unpicked.

CHAIR: You might even be dealing with a family breakdown that's actually related to a problem with an inappropriate life insurance product. There are all sorts of different ways that things manifest.

Ms Beiglari: Certainly. Something about financial hardship is that, if you're experiencing financial hardship, it's because something in your life has changed. There might be a relationship breakdown; there might be an illness that's preventing you from working. There's also the secondary component of it where the credit may have been provided to you inappropriately and then that's causing you financial hardship, which, again, could fracture those important parts of your life, like your family or your work or your health.

CHAIR: In that context, the significant expansion of legal assistance and lawyers and the policy need to do that—I guess what you're pointing to is an intrinsic link not only to things like responsible lending but also to things like the way those products are embedded in everyday life and everyday decision-making for people in the workforce, people with families, people who need to keep a roof over their head. In that sense, funding that on a much broader level is important to wellbeing on both sides.

Ms Beiglari: Certainly. Because access to financial services is such an integral part of Australian consumers' lives and can have such devastating impact where a person experiences a change in their circumstances and can't pay or there was the mis-selling of that financial product in the first place, it's very important to have access to a legal assistant sector that can support those Australian consumers.

CHAIR: For example, a prospective levy to pay for those services—where we levy those providing the products—is important, not just for the purpose of managing misconduct but also for recognising that anyone's circumstances can change. When you're using those products, they can come with a big liability and, therefore, banks and financial institutions also need to be responsive in relation to the dramatic circumstances that users of those products can face when things change.

Ms Beiglari: Certainly. I think you make a very good point: the ups and downs of life can happen to anyone, regardless of their social or economic position, so it's very important to have safeguards in place, such as ready access to timely, independent and free legal advice.

CHAIR: What safeguards should be in place to prevent financial services from using repossession as a first resort and to ensure that it's the last resort?

Ms Beiglari: In our submission, we make some comments about our casework experience, showing that, particularly in the context of elderly people going guarantor or entering into a loan, often for the benefit of an adult son or daughter, there can be a tendency for lenders to act quickly to use their legal rights, often in court, but to act slowly when entering into practical hardship arrangements that fit the needs of the individual consumer in the dispute. In terms of safeguards, based on that casework experience, we advocate for robust internal dispute resolution processes that identify the needs of the individual consumer. As I've said in my previous submissions, there needs to be a well-resourced and consistently resourced legal assistance sector to be able to advise people at the earliest stage possible.

CHAIR: In your experience, when it comes to things like repossession where there is a parental guarantor, do they look at going into reverse mortgage type situations to prevent housing insecurity or are they going straight to repossession? And how are they managing the fairness of those kinds of things?

Ms Beiglari: In my experience, sometimes the issue can be complicated, depending on the kind of loan the older person has guaranteed. Where the older person has guaranteed a consumer credit loan, the general hardship provisions would apply under the credit laws. If it's the first situation I described, then the Banking Code of Practice has some checks and balances in place with respect to protecting the guarantee. There are the case studies that we put forward in our submission. In the case study of Ms Flanagan, which we referred to the royal commission, it was not our experience that the lender agreed to the hardship arrangement and a life interest, as we put forward early in the process. It was of great benefit generally, from a casework experience point of view, to

have access to AFCA to be able to ventilate these issues within an external dispute resolution forum rather than court, given the level of disadvantage of the clients we're assisting.

CHAIR: In many cases you could see banks mitigating their losses, but also the hardship is avoided in terms of the loss of the family home.

Ms Beiglari: That's correct. There are also the legal costs and interest that might accrue on the loan and, as you pointed out, stress, not only on the individual but on the family involved as well.

CHAIR: It's very distressing.

Ms Beiglari: Yes; it is very distressing.

CHAIR: As to the social harm caused by home, business and farm repossessions, should it warrant a separate legal process from other civil disputes, involving mandatory dispute resolution or including more informal forums for defendants to actually raise specific legal arguments without a Supreme Court trial and the formality of lodging a defence?

Ms Beiglari: Can I just clarify that the context of your question is in respect of farm disputes and business disputes?

CHAIR: Yes, that's right.

Ms Beiglari: I speak on behalf of Legal Aid; our primary focus is on consumers and not in respect of farm disputes or small business disputes.

CHAIR: Yes, that makes sense. But that must create issues for you where you've got to decide someone's eligibility. You must at times get part way down the path with someone and realise that they're ineligible because, while it might look initially like consumer credit, they might actually have small business loans tied up with it. That must be quite difficult at times. What can we do to better bring those different needs for legal support together?

Ms Beiglari: To return to my example of where, say, an older person has gone guarantor for a business loan: they didn't understand, really, what they were doing; they don't understand the difference between consumer credit and a business loan as to how that affects their legal rights. That is a situation that comes up regularly, and, in fact, came up in the case of Ms Flanagan. The current state of play is that we have different scopes of assistance that we can provide that have different guidelines attached to them. So you could get advice for free from a Legal Aid service in respect of that matter, and you might be able to get small scopes of assistance like contacting the bank to try to advocate an outcome. But, if you were to be represented in court or if you were to be represented in AFCA, you would need a larger scope of assistance from Legal Aid.

CHAIR: Yes.

Ms Beiglari: And our grants division looks at cases that are a little more complex. In Ms Flanagan's case, where there was a business loan that she had guaranteed, we were able to assist her under our loss-of-dwelling guideline, which allows us to assist people where they're at risk of losing their primary residence.

CHAIR: Okay, but it does point to the deeper issues, as you pointed out in our initial discussion, as to the importance of having legal support for fundamental life issues. But that can pretty easily cross over in small business environments, can't it?

Ms Beiglari: Yes, I think it can, from the example that we were discussing. As a general principle, we would support increased legal assistance, particularly in areas where there is some grey—for example, in respect of elderly guarantors who've entered into a financial product for the benefit of a loved one.

CHAIR: Senator Macdonald.

Senator IAN MACDONALD: Just on that last point: I'm pleased you were able to help Ms Flanagan, but doesn't that raise the question of why someone in her situation would have originally gone guarantor? I thought the law was that guarantors had to receive independent legal advice before they signed on the bottom line. Is that not the case?

Ms Beiglari: There is a requirement to receive independent legal advice in the Banking Code of Practice, and again the law may be different depending on whether it's a consumer credit loan or a small business loan. In the case of Ms Flanagan, her instructions to me—and I'm able to speak freely about it because these issues were discussed at the royal commission—were that she had not received that independent legal advice and that she'd not received it in a meaningful way to understand the full set of liabilities and obligations.

Senator IAN MACDONALD: I thought it was mandatory for a guarantor to be independently legally advised, and if that is the case then, if there's a fault, perhaps it's on the private solicitor who advised her?

Ms Beiglari: In our submission—

Senator IAN MACDONALD: I don't really want to talk particularly about Ms Flanagan, although it's a good case. Just generally speaking.

Ms Beiglari: Generally speaking, I would point to some comments we made in our submissions to the interim report of the financial services royal commission, where we provide some examples of how to make that independent advice process a more robust and meaningful process for the individual guarantor. From the top of my head—I'd be happy to provide further detail to the panel—

Senator IAN MACDONALD: But at some stage people have got to take responsibility for their own decisions, or we are going to get to a society where the nanny state government will make all of the decisions for all of us, in which case they'd say to the Ms Flanagans of the world, 'Do not guarantee that money even though it's your favourite son and he desperately needs it for the business.' Where do we draw the line? That's probably not a question I can reasonably ask you. What I can ask you is: is it not mandatory, and, if it isn't, should it be mandatory, for every guarantor to receive advice independently of both the lending institution and the person to whom they are going guarantor?

Ms Beiglari: There is a requirement in the Banking Code of Practice to receive independent advice. Certainly I think that everyone should receive independent advice in respect of going guarantor. I don't have the position that that should cure a lending decision that is not prudent and diligent, as is the requirement in the Banking Code of Practice.

Senator IAN MACDONALD: It's a lending decision that's not prudent. It's also a borrowing decision that's clearly not prudent. The solicitor advising the Ms Flanagans of this world should have said to her, 'Don't touch this with a barge pole.' Perhaps it reflects more on the independent legal profession.

Ms Beiglari: As I mentioned before, I think that there are ways to make that legal advice more meaningful. I think it's also one component of the issue—the lending decision. The second component of the decision is whether to enforce the guarantee in certain circumstances of hardship.

Senator IAN MACDONALD: I accept that second provision. I do understand that. Apparently in Ms Flanagan's case it was her house. I gather from what's said that she may not have been occupying it for a long period of time. What is your recommendation, then, for the parameters or the quality of the advice?

Ms Beiglari: In our submissions to the financial services royal commission we provide detailed information about that. I haven't prepared that for the purposes of today's inquiry because we didn't detail it in our submission, but I'd be very happy to provide that information to the panel.

Senator IAN MACDONALD: What is it? Is it advice to the solicitor saying, 'When you give this advice you must explain to the guarantor all of the downsides and you must explain the cost'—all of that stuff I would have thought any reasonable member of the profession would be doing anyhow? If they're not, they perhaps shouldn't be in the profession.

Ms Beiglari: I would just refer to what we said in our earlier submissions. The gist of it is how to make that more robust. From memory, it was a sharing of information in a more tangible way between the lender and the private solicitor so that they were briefed with the individual circumstances of the situation and so that they could give that advice in a meaningful way.

Senator IAN MACDONALD: I would have thought Ms Flanagan should have been suing her lawyer for not giving her the proper advice.

Ms Beiglari: I would refer to the comment we made throughout the financial services royal commission.

Senator IAN MACDONALD: Perhaps you could let me have that as soon as you can. You are obviously very much in favour of the Australian Financial Complaints Authority. Do you know if Legal Aid Australia, your peak body, was consulted in relation to that setting up?

Ms Beiglari: Legal Aid NSW was certainly consulted. We participated extensively in the Ramsay review, which was about whether the schemes should be formed into one scheme. We were later consulted in respect of the rules and terms of reference of AFCA. We're the greatest consumer advocate user of AFCA.

Senator IAN MACDONALD: Of course. Admittedly, it's only been going for less than six months, but so far it looks okay?

Ms Beiglari: Yes. Our experience so far has been very positive. We advocate for consistent and reliable funding for AFCA as well, particularly in the context of a compensation scheme of last resort or an extension of the ability to bring claims to 2008. It's very important to well resource this important external dispute resolution forum.

Senator IAN MACDONALD: Thanks very much.

CHAIR: I just want to ask, in the context of what Senator Macdonald has already asked, whether you could take on notice—it sounds like you've given some of this information to the royal commission anyway—procedural changes that could be made to repossession proceedings to increase fairness for consumers. Clearly, that might be at the repossession stage, but it might also be earlier to prevent and mitigate it happening.

I want to ask about compensation caps and limits now. The $5,000 cap for non-financial loss and indirect financial loss—I think you've put forward in your submission that that's inadequate; have you?

Ms Beiglari: Yes. That's consistent with our position throughout the Ramsay review about external dispute resolution, where we, along with other consumer advocate organisations, advocated for a higher limit and just the one limit as well so that it's less confusing for consumers, rather than having the $1 million and the $500,000.

CHAIR: You would support an increase to $2 million?

Ms Beiglari: Yes. That's informed in particular by our casework with victims of disasters who are making home insurance claims, for example, who have to rebuild, where the cost of rebuilding may have increased greatly because of new restrictions like bushfire requirements that they have to incorporate into their homes; also by our work through the Mortgage Hardship Service, assisting consumers who are in financial hardship because of the increase in property prices; and then generally in respect of life insurance claims.

CHAIR: In that context, where you're also looking at multiples of losses in relation to misconduct, you talked about AFCA having the power to award penalties that are higher. How would that work in practice in terms of judging what the losses are, and how would AFCA go about doing that work?

Ms Beiglari: The overarching principle there is to award a penalty which then acts as a greater deterrent to traders that engage in unlawful conduct. On the practicalities of how that might in fact be calculated, we'd be happy to work with AFCA, I think, through a consultation process to work out exactly how that would look. I don't have a position on that.

CHAIR: No, but in general terms they're not speculative losses. They should be demonstrable before AFCA in terms of the impact of a particular misconduct but then perhaps also factoring in not just financial hardships but other forms of hardship that have been caused by these losses?

Ms Beiglari: And I think that looking to precedent and how these matters may have been decided by a court in terms of exemplary damages or suits brought by the regulator about misconduct could be useful. Then I'd also just make the point about compensation for non-financial loss, which was another suggestion in our submission. Currently, that's set at $5,000, and our suggestion is that that should be increased.

CHAIR: Your submission called for AFCA to have powers to waive debts where it's just and appropriate to do so. In what kinds of circumstances do you think that should be the case, and what are the criteria? How does that differ from a breach of responsible lending, where debts might be waived, versus a change of circumstance, hardship, type of situation?

Ms Beiglari: In respect of responsible lending, my understanding is that the current remedy—although AFCA has not yet published its position paper about responsible lending—based on the approach of courts and predecessors has been to ask the consumer to account for the benefit that they have received from the finance and for the financial service provider to not profit. For example, they may not be entitled to take fees and charges in respect of that particular contract. The kinds of powers that Legal Aid is advocating for in respect of the ability to waive debts are in the circumstances of long-term financial hardship. AFCA can already forgive a debt, but we are advocating for a specific power where there are circumstances of long-term financial hardship to waive a debt, and we are also asking for a power to order a life interest in circumstances where it is appropriate.

To the second part of your question of what that might look like, what the criteria might look like, I think it comes down to the definition of long-term financial hardship. The Australian Banking Association code of practice that will come in in July, while it doesn't define long-term hardship, there is a part in that which says that we will work with you, the lenders will work with the consumer, where they appear to be in long-term financial hardship and may consider in some circumstances to waive a particular debt. So I think it is important to work with industry on a particular definition of long-term hardship.

In terms of areas that might be useful to look at, the National Hardship Register has done some thinking about long-term financial hardship. There are criteria for people to go on that register. So that could be useful. Also, in the UK, they have been thinking about vulnerability. There was a presentation recently at an Australian Banking Association event about the concepts in the UK around client vulnerability, and there could be some criteria that we draw from that as well.

CHAIR: Thank you for your evidence this morning. It has been extremely useful. We are now going to take a short break.

Proceedings suspended from 11:11 to 11:25

MENNEN, Mr Josh, Principal Lawyer, Maurice Blackburn Lawyers

CHAIR: I now welcome Mr Josh Mennen of Maurice Blackburn Lawyers. Information on parliamentary privilege and the protection of witnesses has been provided to you. I now invite you to make an opening statement after which we will go to questions.

Mr Mennen: Thank you for the opportunity to present this morning. There is something of a crisis of confidence between consumers and Australian service providers. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry invested a great deal of its time and resources in looking into financial service providers' culture and behaviours which fail to meet community expectations or that breach the law. Part of this crisis is related to the consumer's perception of the justice system, which they turn to for assistance in times of difficulties. There needs to be confidence in any justice or compensation system which exists to facilitate the resolution of disputes with the banks, life insurers and general insurers.

Maurice Blackburn's submission to this inquiry makes a number of observations and recommendations aimed at producing a less adversarial, more equitable and consumer-friendly process, more in line with community expectations and less skewed in favour of the side with the bigger chequebook. We need to address the current power asymmetry, which has been noted by Commissioner Hayne, in financial disputes, where consumers find themselves in competition with highly trained and skilled litigators whilst attempting to navigate complex legal processes, often unassisted. We need to stop banks and life insurers delaying payment for legitimate claims, leaving consumers in financial and emotional limbo. To this end, our submission focused on the areas where we believe improvements could be made to ensure a better experience for complainants. We believe that financial services providers, in their dealings with consumers, should be bound by the same or equivalent model litigant obligations that bind government agencies. Our submission offers suggestions for changes to the current damages regime, especially in lowering the thresholds that currently inhibit the granting of punitive damages and general damages for pain and suffering, stress and inconvenience experienced by consumers.

We also suggest changes to the current costs regime. Under the current regime, there are serious cost implications for consumers if they pursue damages through court and their claim is unsuccessful. The disproportionate resources of the consumer versus financial services providers means that financial services providers can afford to suffer defeat—indeed, they make financial provision for defeat—whereas claimants commonly face the menace of bankruptcy in order to have their day in court. This inevitably skews outcomes, and settlement outcomes included.

Our submission also offers suggestions for changes related to the perverse outcomes faced by victims of irresponsible lending, those who lose their legal course of action when they become bankrupt. This is particularly important as hundreds of billions of dollars' worth of interest-only loans are due to convert into principal and interest over the next three years. We also argue that AFCA's loss assessment methodology for irresponsible lending disputes should be based on an analysis of the position the consumer would have been in but for the bank or the broker's misconduct. That was not the methodology used by AFCA's predecessor, the Financial Ombudsman Service.

We note the important role that AFCA will play in the administration of the long-awaited compensation scheme of last resort. Thousands of victims of unlawful and conflicted financial advice have been uncompensated due to the insolvency of their adviser and have been frustrated in pursuing the adviser's professional indemnity insurers directly. We've called for greater accountability and transparency of professional indemnity insurers, including a public register administered through AFCA, and for those insurers to be bound by AFCA determinations. This will also ameliorate the burden on the compensation scheme of last resort, which, under the government's current proposal, is to be partly taxpayer funded. We point out that, despite the stated intention that legacy claims processed through the compensation scheme of last resort would date back to 2008, placing these claims under AFCA's jurisdictions means they become subject to its six-year time limit. However, we welcome AFCA's recent announcement to widen its jurisdiction for a period of time to allow these older complaints. We look forward to seeing more detail on that, and we also welcome the ABA's support for that proposal.

Banks and insurers have a huge task in front of them to win back the faith of consumers. It will involve a new era of transparency and accountability, of clearly managing conflicts of interest, and of taking seriously the institution's duty to act in the best interests of the consumer. Maurice Blackburn hopes that the outcomes of this inquiry help to lead the industry into this new era and produce clear, customer centred findings and recommendations. Thank you.

CHAIR: Thank you. I want to thank you, Mr Mennen, for the excellent way that your submission addresses the terms of reference. We note that you've supported an increase in compensation limits to $2 million for consumers. Why is that inadequate, in your view, in terms of what the real costs of this misconduct might be?

Mr Mennen: A fair and efficient dispute resolution system with low cost for consumers is essential. The fear, the impediment and the time associated with pursuing court proceedings for an ordinary consumer are daunting and put a lot of people with genuine complaints and cases off. People with genuine cases who may be vulnerable and who may not be able to absorb any kind of adverse costs risk associated with court need an institution like AFCA, and some will have cases which involve damages above $500,000. They need to have access to that forum, and I don't see any reason why they should not be able to have it. Two million dollars seems like a reasonable threshold to apply.

CHAIR: Have you got examples in Maurice Blackburn's practice that show what kind of detriment and losses people will actually have suffered?

Mr Mennen: In the fallout from the global financial crisis, thousands of Australians lost enormous amounts of their life savings as a consequence of inappropriate financial advice which was provided by large banking financial advice arms who put them into overly risky investment portfolios through vertically integrated arrangements. There are also those who were advised by smaller operations that may not now be around. These were their retirement savings. These were the funds that were supposed to support them through their superannuation, and they lost them. A lot of them lost it all and, in addition to that, became indebted and may have lost assets. Those damages can very quickly exceed $500,000 and get up towards the higher thresholds.

CHAIR: Even $2 million in that context seems fairly modest. If someone started with an investment that was all their retirement savings and was encouraged to invest that—they might have taken on another loan in the context of that financial advice—and, in the process of that, they lost both their house and their investment, $2 million might buy you a modest house but it's not necessarily going to buy you a comfortable retirement and a house—but you're close to a retirement and a house. How do you see that $2 million fitting the circumstances of people who have been victims of this conduct?

Mr Mennen: I think it's a sensible threshold. We don't see a large number of matters exceeding that $2 million mark. We think that that probably strikes the right balance.

CHAIR: And it stays in the ordinary day-to-day mum-and-dad investments category rather than high-flying investment conduct, to keep it in that kind of threshold, doesn't it?

Mr Mennen: I think once you get above that sort of amount, you're talking about the sorts of losses that sophisticated or wholesale investors may be involved in.

CHAIR: Do you believe these losses and compensation should apply to credit disputes only? I gather you also support it applying to insurance and financial advice disputes as well?

Mr Mennen: We say that it should apply across the board for consumers who have a dispute and a claim for compensation against their financial services provider. I would note that there is no jurisdictional monetary cap in respect of superannuation complaints; that is, complaints by members of super funds against their fund or an associated party. That being an unlimited monetary jurisdiction, I would say that all other matters should come within a cap of around that $2 million mark.

CHAIR: In that context, where do you see issues arising in working out whether something is a consumer dispute, or a business dispute or a commercial dispute? When you look at the cases that you've got—because different law applies in consumer credit and housing versus business—do you see any areas where we can improve justice to people, noting that there are different lending criteria and different things that rest behind both of those issues?

Mr Mennen: To give an example in relation to lending: the National Consumer Credit Protection Act, or the NCCP, doesn't apply in respect of business lending. Unfortunately, there have been instances where we believe brokers or other intermediaries or, indeed, banks have tried to work around that by classifying the loan as a business loan when, in fact, it ought properly to be classified not as a business loan but, rather, as an individual investment loan. When the time comes to make a claim for damages, we sometimes see that they try to rely on that—

CHAIR: They've used that to bypass the responsible lending criteria.

Mr Mennen: That's right; that's the point I'm getting at. A similar thing has happened in the past in relation to financial advice where advisers have sought intentionally to classify people as sophisticated or wholesale

investors to circumvent the obligation to provide a holistic piece of disclosure in the form of a statement of advice.

CHAIR: In what kinds of circumstances might someone have been inappropriately categorised as a wholesale investor?

Mr Mennen: The threshold for a wholesale investor is based on net assets and income. The threshold for a sophisticated investor is based on certification from an accountant to that effect. Having wealth does not necessarily mean that you have financial savvy. The problem has been that there have been people with significant assets and financial savings, particularly through their superannuation, who have been misclassified as being sophisticated or wholesale. That has meant that the disclosure obligations have been lessened.

CHAIR: It is hard to see how anyone could really be treated as a wholesale investor if the investment they are making is a large proportion of their assets, because they won't have mitigated their risks in a broader portfolio. It would seem very strange to classify someone as a wholesale investor under those circumstances, wouldn't it?

Mr Mennen: Yes. The problem with the remuneration regime that we've had—prior to the GFC in particular and before the Future of Financial Advice reforms—was that it was all about getting as much funds under management and trying to supercharge those funds to turn around the greatest profit in order to deliver the best commissions and bonuses to the adviser. So there was a skewed incentive, which was not in the customer's best interest, to classify them as a higher risk or a sophisticated investor.

CHAIR: That makes sense. There is currently a $5,000 cap on non-financial loss and indirect financial loss, and you've advocated that the cap be lifted. Can you characterise the kinds of losses people might be facing that are indirect or non-financial?

Mr Mennen: Pain and suffering, stress and inconvenience are capped at $5,000. On the coalface, we have so many consumers, particularly those who are experiencing mental health difficulties, navigating their way through the AFCA scheme, and a protracted dispute with a financial services provider exacerbates their illness and leaves them and their family in financial limbo. In circumstances where these matters are being drawn out—particularly, I would say, in relation to the delay of insurance payments, which we often see for large insurance benefits where insurers are very slow to assess a claim—it is important that AFCA at least have the power to award significant sums.

CHAIR: As a disincentive for the late payment?

Mr Mennen: Part of it is compensatory for the experience of the consumer but it also has the dual effect of acting as a disincentive for that kind of misconduct.

CHAIR: I can see how financial losses in insurance, for example, might build up with other living costs and the like. What are the non-financial costs in terms of experiences of hardship that people should be compensated for—mental health impacts, stress?

Mr Mennen: I think it comes back to the pain and suffering and the adverse impact on the consumer's health throughout the process.

Senator WATT: I want to ask a couple of questions about professional indemnity insurance. Can you tell us about the current problems that consumers face when their adviser has gone into liquidation and they are looking to recover directly against any professional indemnity insurer?

Mr Mennen: When a financial services customer receives financial advice and then that advice turns out to have been horribly inappropriate and they suffer losses, typically what they would do is they would make a case against the financial adviser. However, if the adviser has gone into liquidation or otherwise cannot meet that claim, it essentially leaves the consumer without recourse.

It is possible, under state and federal statute, to make a claim directly against a professional indemnity insurer—that is, the wrongdoer's insurer. This sort of direct recourse is perfectly reasonable because it is the PI insurer itself that would assume carriage of the matter if the wrongdoer is still in existence. The problem that consumers face is that it is very, very difficult to identify who the professional indemnity insurer is, if they don't come forward, and it can be very difficult to get that information from a liquidator. So this frustrates any recovery attempts that the consumer may make against any professional indemnity insurer.

The compensation scheme of last resort will assist with this problem because it will provide consumers with a means of being compensated even if their adviser has gone bust. However, we believe that there should be greater transparency and accountability by professional indemnity insurers, and we believe that a register should be established through AFCA that identifies AFCA's members against their professional indemnity insurers.

We also believe that there's a good argument to be made that professional indemnity insurers should be bound by AFCA determinations. A consumer should not have to go to court in order to access the entity that would ultimately pay a legitimate claim. So we've advocated for that in our submission. We also believe that this will substantially ameliorate the burden on the compensation scheme of last resort, as I mentioned in my opening.

Senator WATT: How widespread a problem is this—of a financial adviser going into liquidation and then being unable to identify the professional indemnity insurer?

Mr Mennen: Unfortunately, it has been very widespread. I have acted for many individuals who have lost their lifesavings, particularly in the fallout from the global financial crisis, who have had no recourse against the adviser who has gone bust or cannot be found. We have sought to identify the professional indemnity insurer who would otherwise have met the claim and defended the action and been frustrated in our attempts to do that, and in the end we have been unsuccessful.

Senator WATT: Am I right that there is some sort of process where a consumer in this situation can potentially apply to AFCA for details of the insurer or other issues, within a certain period, as long as the insolvent financial service provider remains a member of AFCA?

Mr Mennen: Certainly, a request can be made for that. If the insolvent member is prepared to disclose that information then it could possibly be provided. But my experience has been that they either do not engage at all, because they've become insolvent and are no longer cooperating with any AFCA process, or they decline to provide that information. It may even be that it's a term of their agreement with the professional indemnity insurer not to disclose such information.

Senator IAN MACDONALD: Why don't the liquidators get across that information?

Mr Mennen: I couldn't speak for them as to why that is the case.

Senator IAN MACDONALD: When you've approached them, what have they said to you? Why have they said they can't do it?

Mr Mennen: They have merely said that they decline to provide the information to us.

Senator IAN MACDONALD: It's no skin off their noses.

Mr Mennen: I wouldn't have thought so. But it has been notoriously difficult to get that data. Even when you have that information you still face an uphill battle in having to ask a court to give the consumer direct recourse against the PI insurer.

Senator IAN MACDONALD: I understood from your evidence before that that was now a matter of course. You're saying that's not the case?

Mr Mennen: Only if you know their identity can you make an application to the court to have direct recourse against the professional indemnity insurer.

Senator IAN MACDONALD: You need a court decision to give you permission to have direct access?

Mr Mennen: The remedy is through the court process, not through the AFCA process, because AFCA does not have, among its members, professional indemnity insurers.

Senator IAN MACDONALD: AFCA being the financial agents law society?

Mr Mennen: AFCA is the Australian Financial Complaints Authority—

Senator IAN MACDONALD: Yes—sorry.

Mr Mennen: which is the external dispute resolution body which is—

Senator IAN MACDONALD: Sorry—when you said 'being members', I didn't think individuals would be members of AFCA.

Mr Mennen: AFCA's members are financial services providers—banks, insurers and the like—and they are contractually bound by AFCA's determinations. AFCA's members do not include, however, professional indemnity insurers among its members.

Senator IAN MACDONALD: I see.

CHAIR: In the case where that professional indemnity insurance relates to financial products, there might be a case to bring them in. You could see why health indemnity insurance or others might need to be dealt with elsewhere. Clearly, you are arguing they should be in there.

Mr Mennen: Yes, we are. As I've pointed out, in ordinary circumstances it is the professional indemnity insurer who assumes carriage of the dispute as the respondent. It steps into the wrongdoer's shoes, if you like. We would say that of course the professional indemnity insurer would have all of the usual defences of the wrongdoer

and any defences it itself may have as to denying liability under the professional indemnity policy. So if it says, 'No, the wrongdoer's conduct was outside the terms of our cover,' then it may well not be responsible and it could make that defence. But that process currently does not occur in any way through AFCA or through any other external dispute resolution body.

CHAIR: It doesn't sound like there's been much point in having insurance. In your submission, you talked about disputes going back to 2011, as well as disputes where an FSP has become insolvent, being able to be heard by any retrospective compensation scheme. Could you explain to the committee why?

Mr Mennen: Huge numbers of losses were suffered from 2008 onwards. The recommendation of the Ramsay review into the compensation scheme of last resort was followed by the recommendations of the royal commission, and the government has announced that it will implement the royal commission's recommendations by allowing for the compensation scheme of last resort to compensate people for losses suffered back to 2008. The problem that we identified with that is that there's a 'but', and the 'but' is that you can only make that claim if you come within AFCA's jurisdiction. The issue there is that AFCA's jurisdiction prohibits complaints on the basis that they are more than six years old, so there would be a gap. After identifying that problem in our submission, we saw that AFCA had released a media statement saying that it would allow a one-year grace period for anybody to come forward, even if their complaint was out of AFCA's time limits, from July 2019, and that would be the mechanism which would enable people with claims going back to 2008 to come within AFCA's jurisdiction and bring those claims. We look forward to seeing the details of that, but that is a welcome initiative.

Senator IAN MACDONALD: We're asking you about AFCA rules that we should know ourselves, but clearly we don't, so please bear with us, and thank you for your free advice. So AFCA has a six-year time limit, a six-year limitation period, but then the government said it can go back to 2008. That's the gap you're talking about.

Mr Mennen: That's right. AFCA's terms of reference have varying limitations depending on the nature of the dispute, but the miscellaneous dispute limitation is something to the effect that a complaint is out of time if the consumer should have reasonably become aware of the losses over six years ago. So, at present, that would leave a gap going back to 2013, and then that leaves that gap between 2008 and 2013.

Senator IAN MACDONALD: Again, we should be telling you rather than asking you, but surely the government in making the 2008 announcement must have provided for that?

Mr Mennen: There was no statement in the tabulated response to the royal commission recommendations that addressed that peculiarity.

Senator IAN MACDONALD: But the 2008 announcement came more recently, didn't it?

Mr Mennen: No, that was made days after the royal commission's recommendations came down in a tabulated form.

Senator IAN MACDONALD: Yes, but that was after AFCA had been set up.

Mr Mennen: It was after the establishment of AFCA, which occurred late last year.

Senator IAN MACDONALD: Thank you for raising that. It seems like you've already got some action, but certainly it would seem incredible that the government would go to the extent of extending it to 2008 and then not have the wherewithal where you could do that.

Mr Mennen: I'm not suggesting it was intentional.

Senator IAN MACDONALD: No. As I say, thank you for alerting the government and us to that. That is certainly something we can follow up. You were talking earlier on in your evidence about model litigant rules. As the chair rightly said, we have recently had an inquiry into this. My impression, although it is not agreed with by the government, is that the model litigant rules aren't terribly effective in the government circle. Has your firm had—and I don't want any specifics—specific involvement with actions against governments where the model litigant rules should have applied and perhaps did or didn't?

Mr Mennen: I can't comment on that, because my own practice has not been in litigation with the government, by and large, although I have dealt with some government superannuation schemes and so on. What I can say is that my experience in dealing with financial services providers through the litigation process is very different in terms of the attitude that they typically take to litigation from the sorts of mea culpas and attitudes that we saw on display in the royal commission. We see a much more aggressive approach taken. Indeed, if I were to—

Senator IAN MACDONALD: I accept that. But you are calling, as I understand, for model litigants in the financial sector. What I was just saying to you is that my impression from having an inquiry is that not always do

the model litigant rules work in the government connection, and I was just wondering if you had any experience of that.

Mr Mennen: When I read the model litigant rules and the case law around it, particularly with respect to the imposition of harsher costs orders where those rules have been breached, I see that as a reasonable standard that ought to be applied to financial services providers dealing with consumers. They can deal with one another with any strategies or tactics they wish, but I do believe—

Senator IAN MACDONALD: I agree with you. All I am saying is that I'm not sure that the model litigant rules work in relation to the government.

Mr Mennen: There may well be an enforcement issue, but the rules themselves look sound to me.

CHAIR: Can I ask as a follow-up to that, Senator Macdonald: Mr Mennen, in relation to superannuation, what is the difference when institutions are more likely to behave in a model litigant way, and what are the institutional drivers for that? I think you were comparing superannuation and other forms of services in your comments before.

Mr Mennen: When you are litigating or in a dispute against a superannuation fund as opposed to a bank or an insurance company, there is a different relationship dynamic because the super fund is the trustee and it has fiduciary obligations to the member. So we find that often they are not as adversarial in their approach and want to resolve the matter with their member, whereas, when we are dealing with banks—and retail funds as well, but with banks and life insurers and general insurers—that those considerations don't appear, and we see that they take a more aggressive approach.

CHAIR: Thank you. That makes sense to me. Senator Macdonald, thank you for letting me in there.

Senator IAN MACDONALD: That's fine. Again, Mr Mennen, thank you for your recommendations, most of which, with limited knowledge, I can agree with. I'm concerned as to the professional indemnity insurance. As a lawyer, your Law Society knows who your professional indemnity insurer is—in fact, I'm not even sure if you have a choice on professional indemnity insurance, do you?

Mr Mennen: It depends what state you're in.

Senator IAN MACDONALD: Okay. Some of them the Law Society run, do they? That's my recollection. But, anyhow, the Law Society would know that you do have a professional indemnity insurer, and a litigant would be able to get that from the Law Society?

Mr Mennen: They could ask, and they may be provided with that, but they would have to know to ask—they would need to know to ask that question.

Senator IAN MACDONALD: They'd ask the Law Society. I'm assuming that that's the case without really knowing. But you are saying that, with the financial advisers, there isn't a regulatory professional body like the Law Society that looks after financial advisers that would have that information?

Mr Mennen: That would be ASIC, the corporate regulator. For a licensee to practice, one of the requirements is that it have adequate professional indemnity insurance in place. I don't know the details as to licensees having to disclose information about that professional indemnity—its coverage limits and so on—to ASIC, but I understand that there is a regime of accountability in place. However, at a practical level for a consumer, particularly one without legal representation, knowing to go to AFCA to ask for that information is one thing, and they may well not—

Senator IAN MACDONALD: Yes, but if they're going to sue for professional indemnity they're not going to be unrepresented; they'd go and see Maurice Blackburn or someone like you to do that. Again, we should know this: ASIC, you say, would have the information, but if it's not the case then the committee should ensure in its recommendations that ASIC make that available to people who need to know—that's what you're recommending, I think.

Mr Mennen: We were suggesting that the information be provided on a register through the Australian Financial Complaints Authority, rather than by AFCA, but we're not terribly concerned with that detail.

Senator IAN MACDONALD: What would be the objection to that, do you think? It seems to me to be a no-brainer. I would give that a tick.

Mr Mennen: This debate has not been aired and so we haven't had the benefit of the professional indemnity insurers raising their objections to that, if they have any reasonable objections. Instead, what we've had is silence from them and, really, I would say, a lack of accountability in many thousands, potentially, of cases. Just look at the Financial Ombudsman Service's unpaid determinations: they were in excess of $17 million. There would be professional indemnity insurance arrangements out there in respect of, probably, every one of those claims.

Senator IAN MACDONALD: I'm glad you've raised these things because, clearly, the legislature provided that there must be professional indemnity insurance to cover these sorts of situations, and then you're saying that very often the taxpayers end up paying it out because—

CHAIR: They don't get paid at all.

Senator IAN MACDONALD: the public liability insurer disappears or is silent.

Mr Mennen: At this point in time no-one's paying it out, because the determinations are unenforceable because the PI insurers are not bound by these determinations, which is what we're saying should change. But when a compensation scheme of last resort is implemented it will, under the current proposal, be paid by industry through this fund and by consumers.

Senator IAN MACDONALD: But it should be paid by the insurers, you're saying, rather than by industry?

Mr Mennen: It may be the case that the insurer has a proper and reasonable defence—

Senator IAN MACDONALD: Yes, of course.

Mr Mennen: but there should be an opportunity for that insurer to be held accountable through AFCA.

Senator IAN MACDONALD: Thank you again for raising that. You say that the CSLR should have rights of subrogation. Just remind me what 'CSLR' is.

Mr Mennen: 'Compensation scheme of last resort'.

Senator IAN MACDONALD: Oh, right. Thank you.

Mr Mennen: It's a clunky acronym.

Senator IAN MACDONALD: Yes. Your last recommendation is that professional indemnity insurers should be required to become members of AFCA—and that's fair enough—but, if we can identify them in the way that you're suggesting, with the register, and if the rules currently say they can be sued directly, without the bankrupt intermediary, that wouldn't necessarily require them to be members, would it?

Mr Mennen: No, they don't have to be members in order to be a party to litigation but, again, that is not an ideal form of legal recourse for a consumer to have to take in order to hold the PI insurer accountable.

Senator IAN MACDONALD: Finally, could I clarify your suggestion. If AFCA determined that there was wrongful advice that should be dealt with in some way or other, you're saying that if the PI insurers are part of that then they cannot challenge the ruling of AFCA?

Mr Mennen: There are two parts to that. One is the extent to which they would participate in the AFCA process, and the other part is the extent to which any party has a right of appeal or may seek review of an AFCA determination. On the first point, my view is that actually determinations will be better and more just if professional indemnity insurers are involved, because they will not be ex parte and there will be a proper process.

Senator IAN MACDONALD: I understand that, yes.

Mr Mennen: On the second point, currently the only right of appeal through AFCA is in respect of superannuation complaints. It is only in relation to superannuation complaints that a party may appeal to the Federal Court on a question of law. One of the points that we have made in our submission is that we believe that any EDR scheme of the size that we're dealing with with AFCA should have accountability before the courts in order for it to attract the necessary degree of public confidence. At the moment, an appeal against a non-superannuation AFCA decision would be permissible only where there is fraud, dishonesty or lack of good faith by AFCA. We have had situations where we've appealed against its predecessor, the Financial Ombudsman Service, and the court, even though it agreed with us that the determination of the Financial Ombudsman Service was wrong, disagreed that it had the power to conduct a judicial review. This is a problem, because we're dealing with very important issues here and, whilst a court should not be able to re-examine the facts, points of law should be able to be subject to judicial review.

Senator IAN MACDONALD: Points of law, yes. It gets to the stage of where you stop the review process, but on points of law I've got no objection to that. And that's what you're suggesting?

Mr Mennen: Yes.

Senator IAN MACDONALD: Thanks for that.

CHAIR: We will need to move along very shortly, but I just want to deal with the question of disincentivising legal action under the National Consumer Credit Protection Act because of the statutory time limit, because you've noted the ambiguity there. You would see that disincentivising legal action under that act?

Mr Mennen: Yes. One of the issues at the moment is that we've got this admirable piece of legislation in the form of the NCCP, which was supposed to prevent us from having widespread irresponsible lending. Unfortunately, whilst the legislation is good, there has been an enforcement problem, and we have, we believe, seen widespread irresponsible lending. We believe that was demonstrated through the royal commission.

One of the issues is that the delay between the act of giving the irresponsible credit and the damages being suffered can be quite lengthy, particularly when you're dealing with interest-only loans, which may have a maturity period of five years or more. So our concern is that people who suffer their losses more than, say, six years after the breach may not be able to recover those losses, because the breach occurred more than six years prior. The explanatory memorandum to the NCCP gives some comfort to consumers. It says that the cause of action arises when the loss is suffered. However, that is not made explicit in the legislation, so we would recommend that that be cleared up.

CHAIR: Through legislation?

Mr Mennen: Yes.

CHAIR: Thank you, that's helpful. The social harm caused by home, business and farm repossessions—what's your position on what kind of legal process should cover those, relative to other civil disputes? We've seen that there are different legal frameworks for business loans versus consumer credit, but it's been quite difficult sometimes to tell the difference between the two. We've heard examples of where people have been treated as a business but really they're employed; therefore, the credit that they've been given is an unsuitable product, when they should have been given consumer credit rather than it being treated as a business loan. What should we be doing to bring the two issues together, both in terms of lending practices and in terms of dispute resolution?

Mr Mennen: I agree broadly with the evidence by Legal Aid NSW, before me. I believe that there is a need for there to be early intervention and early recognition of financial hardship before the problem gets out of hand and you are looking at bankruptcy. I think that the relationship between the bank, the broker and the financial-counselling community is important. I think that financial counsellors need to work very closely with people with legal expertise, in the community sector in particular, so I would very much welcome the 'fairness fund' proposal to boost funding for financial counselling and legal services to try to intervene to make sure that the potential damage is mitigated at an early point. It may well be that the consumer has too much debt and is going to need to sell down assets in order to manage that, but it's much easier to do that if you get in early and manage it. One of the problems that I have seen is that, when people have raised hardship issues in the Financial Ombudsman Service—before AFCA—the focus has very much been on that issue and trying to renegotiate the contractual variation, rather than looking at the root cause, which is that fundamentally they were given too much credit and that there is in fact a case to be explored for irresponsible lending.

I would just point out as well that one of the serious problems with the bankruptcy laws as they stand is that, when consumers become bankrupt, they lose their legal causes of action against the bank which has given them irresponsible amounts of credit.

CHAIR: Okay, I wasn't aware of that.

Senator IAN MACDONALD: Say that again?

Mr Mennen: At the moment, under current bankruptcy law, a consumer who becomes bankrupt loses their legal causes of action. That is a form of property, which vests in their creditors.

Senator IAN MACDONALD: A liquidator can step into the shoes of the—

Mr Mennen: Correct. The trustee in bankruptcy assumes ownership of that property but, in my experience, would very rarely, if ever, pursue an irresponsible-lending claim. There are exclusions in the Bankruptcy Act against certain assets, like superannuation, vesting in creditors. We would say that rights of action under lending should also be exempted.

Senator IAN MACDONALD: Is that one of your recommendations?

Mr Mennen: It is.

Senator IAN MACDONALD: It's recommendation 3, is it? Yes, 3.

CHAIR: I've had a question come through from someone who's made a submission to the committee. It's about how irresponsible lending should be dealt with and how you think it should be dealt with by AFCA. Legal Aid were talking earlier about someone needing to account for the full debt, and not a waiver of debt as per the AFCA determination. Do you have any views about how that's operating now?

Mr Mennen: We do have an issue with the methodology for assessing losses that the Financial Ombudsman Service adopted. We don't know yet whether AFCA is going to adopt the same loss methodologies, but we do

have a concern with that in that where somebody has borrowed money to invest in property and that property declined in value they are not able to claim those losses on a 'but for' analysis as against the lender. On the other hand, they would have any compensation reduced by benefits that they obtained from the property—say, for example, if they received rental income. We say that that is a contradiction and that there should be a 'but for' test applied to determining compensatory damages. We also say that there should be more-significant damages awarded where we are dealing with a consumer with a special disadvantage.

CHAIR: Is that something that would need to be dealt via government legislation to change the current formulation of those rules?

Mr Mennen: We think that AFCA itself could introduce a loss assessment methodology along the lines of what I've described.

CHAIR: Without changing the law?

Mr Mennen: Yes.

CHAIR: Okay, thank you. I'd like to thank you for your evidence this afternoon. It's been very helpful.

CARNELL, Ms Kate, Australian Small Business and Family Enterprise Ombudsman

SCOTT, Ms Anne, Principal Adviser, Advocacy, Australian Small Business and Family Enterprise Ombudsman

Evidence was taken via teleconference—

[12:18]

CHAIR: Welcome. Ms Carnell, would you like to make an opening statement?

Ms Carnell: Our submission stands. The only thing I'd like to add to our submission is that what we've learnt over the last few months in the work that we do in this space, which is quite significant, is just how many providers of financial services are not covered by any code of conduct, are not members of AFCA and have no obvious dispute resolution or compensation methods or approaches. These are financial service providers that provide services to business, or in the commercial space, rather than in the consumer space. In the consumer space, of course, because they're covered by the NCCP, there are a range of requirements there. But, because small businesses aren't in that space, there is no requirement for many of those. We were speaking to a very reputable broker that we do some work with from time to time, and she was saying that she deals with 46, I think, different financial service providers and only, I think, six were actually members of AFCA. It's important to remember that the Banking Code of Practice only applies to members of the Australian Banking Association. There are 23 of those, which is a pretty small number. The recently signed code of conduct for fintech providers—

Ms Scott: Balance sheet lenders.

Ms Carnell: which is only for balance sheet lenders in the fintech space, as Anne has just said—so not the full fintech space but just balance sheet lenders in the online arena—has been signed by seven of the big providers, but that means there are literally a couple of hundred out there that are not signatories to the code. If they're not signatories to the code, there's no requirement to be a member of AFCA or to comply with the code of conduct for fintech providers. So I think the real message is that there are a lot of providers in the financial service arena with whom there is no obvious capacity to resolve disputes at all. Anne, do you want to make a comment?

Ms Scott: One of the important points of this finance broker that we've been discussing with is that it's not transparent and clear to a small business borrower at the outset, when they're entering into a contract with a financial service provider, if they actually are covered by a code of conduct or have access to external dispute resolution. Unfortunately, they only really worry about this when something goes wrong. We've recently had two particular cases—Kate would be across the details, because this is in the assistance part of the office—with two companies where some of the financial service providers are members of AFCA, and we've had a much better response helping small businesses out with a particular dispute. Where the financial service provider has not had access to external dispute resolution or AFCA, those problems have been very much more difficult to resolve.

Ms Carnell: The two issues—they've been in the media—are with Viewble and REBL, with the financial service providers for leasing agents. Fundamentally, in that space some of them are members and some of them aren't. So it's a bit of a raffle for the small businesses involved as to whether they've got anywhere to go at all.

Ms Scott: The difference in these particular cases means that AFCA has ceased the payments these small businesses need to be making for no service that's being provided, whereas, for the ones signed up to a financial service provider with no external dispute resolution, these small businesses are facing regular monthly or weekly payments for a service that they don't receive that will be ongoing for several years.

CHAIR: Wow! In terms of fixing that issue, it would seem reasonable that anyone lending money but not services, in a sense—because you might be in credit and waiting for payment for a service received—should be required to be a member of AFCA. What other kinds of firms should be required to be members?

Ms Carnell: Financial service providers generally, so leasing agents, people who provide leases and financing agreements around goods, services and equipment—those sorts of people. So it's not just a more traditional lending entity; it's about people who provide financial services to small businesses.

Ms Scott: Which is a great array. They're definitely not all traditional banking.

Ms Carnell: They don't necessarily take deposits, so they're not ADIs. Mind you, some of them are, but they are at least registered with ASIC.

CHAIR: Surely, though, it's your job as ombudsman to do that work. Is it a lack of powers in your—

Ms Carnell: Our job to do what?

CHAIR: To look at the disputes and provide guidance on them?

Ms Carnell: We certainly do that on behalf of small businesses. These people, if they're companies, are subject to corporations law; there's no doubt. I think the financial service providers are usually companies. But if there's no law, they've got no code of conduct or they're not registered with ASIC, the issue for us is: based on what requirements can we require a financial service provider in that space to do anything? We have a capacity to name and shame under certain circumstances.

CHAIR: I can understand that, Ms Carnell, from the point of view of finance, but if you're talking about a leasing agent, surely the issues embedded in there aren't going to necessarily be covered appropriately by a code of conduct that's been written for financial services?

Ms Carnell: There's the contract that a small business has entered into with a finance company to provide finance. In the case we were talking about before, Viewble, it was to provide finance for a television that was going to show ads in their shop or business. So they entered into a contract with a financial service provider. They obviously had to comply with the contract, but the contract had lots of fine print and, in our view, had some unfair contract terms, but it didn't have any dispute resolution clauses at all. So the reality in those scenarios is that—if the small business has a problem, if the company is not required to have dispute resolution clauses in the contract, if the company is not registered with ASIC and if it is not a member of AFCA—there are not many places to go.

CHAIR: Thank you for clarifying that.

Ms Scott: We can certainly undertake mediation under certain circumstances, but we have no means to offer any form of compensation.

CHAIR: Essentially, though, you're talking about services that should, nevertheless, be characterised as lending. Even though it's not a broad range of business-to-business services you're talking about, you're still constraining it to business lending, which could be a leasing arrangement between businesses?

Ms Scott: Yes, the financial company providing the financial aspect of that.

Ms Carnell: So we're not talking about normal provision of goods and services between two businesses. We're talking about resolution of disputes with actual financial service providers. There are a whole range of them—there are the invoice financiers et cetera—but, fundamentally, they're providing money or goods, like televisions or whatever, based upon a financial transaction with a small business.

CHAIR: So how do you differentiate between lending and someone who is struggling to pay an invoice for one of their suppliers?

Ms Carnell: They're really different transactions. We are talking about true financial service providers. They are providing financial services. If it's a leasing arrangement, they fundamentally provide a leasing agreement which allows the small business to have access to goods, usually, but sometimes services so that the small business gets the software, television or whatever it is, and the provider of those televisions or software is paid by the financial service provider and the small business pays back the finance company. So it's a financial transaction; it's not a purchasing agreement.

CHAIR: I can understand that, but it's not necessarily that different from the long struggle we've had in consumer law to get things like Radio Rentals treated as a loan—

Ms Carnell: It is exactly the same.

Ms Scott: It's the same.

CHAIR: Thank you for that clarification. That's helpful, because I think we're still struggling in some parts to get those other things dealt with in consumer law in the same way in which you are arguing that they need to be dealt with for small businesses in terms of the nature of the fairness of the contract when it comes to things that have leasing arrangements attached to them and how they are dealt with.

Ms Scott: The things that aren't well known are the full array of financial service providers that provide services to small businesses, and then also what is not well known is the lack of protection that small businesses have as a consequence.

Ms Carnell: Remember, small businesses don't get cooling-off periods—none of those things that consumers have. It has been a long battle to get good consumer protection up. I am just making the comment that all of the protections that have been hard won over many years are not available to small businesses, yet small businesses are often just mum-and-dad operations. In fact, 75 per cent of the 2.1 million small businesses we have in Australia are either sole operators or operations with under five employees.

CHAIR: We've got a limit currently on legal assistance for farmers and small businesspeople. What kind of legal advice should people have access to? Should it be similar to the community legal centre models that are available?

Ms Carnell: I suppose, first and foremost, if you are running a business it is really important that you do have access to professional advice. We don't want to produce a scenario where small businesses think they don't need to have an accountant, shall we say, or a financial adviser of some description. So it is really important that part of the requirements of running a business is a requirement to comply with the law, the ATO and all the other stuff. I will put that aside and then say that, with the legal system generally, the dilemma we have is that legal advice is expensive, but we would always encourage small businesses to get legal advice whenever possible. It is a really great initiative that both sides of our political arena have promised or are implementing small business advice centres, which is a reasonably new initiative run off the back of Curtin in Western Australia. This is a good step in the right direction for those very small businesses who simply can't afford to get legal advice.

The dilemma we have is that small businesses regularly enter into these sorts of contracts or arrangements without legal advice, even when the contract might say, 'At clause 473 you should seek legal advice before you sign this contract.' The real dilemma here is in the cut and thrust of running a small business, in going and finding someone who can give you legal advice and handing over the contract. Getting contractual advice just actually doesn't happen.

Ms Scott: And then there is the 'likelihood' that they'll find somebody locally who has the right expertise. We all know that lawyers specialise in different areas. Small businesses don't always pick people that have the right sort of expertise there and, even if they do get legal advice in these contracts, they may well sign it because they've got Buckley's of changing any of the clauses anyway.

CHAIR: Yes, and generally those independent legal advice centres and community legal centres would be dealing with disputes, but really you're emphasising also the need for that timely advice in entering into contracts to start with.

Ms Carnell: Absolutely. Sorry, disputes are a different issue. There are small-business commissioners in at least four states who handle small-business complaints, and of course my office handles assistance cases where they are national in nature, with multinational companies and so on. So we handle disputes, but the problem with a dispute is that, if these financial service providers have contracts that, in our view, aren't fair and have all the get-out-of-jail clauses under the sun for the company, and they're not members of AFCA, then, with all of the dispute resolution providers like us and the small-business commissioners and even the administrative appeals tribunals, there are really long time lines for many small-business disputes, which don't work for small businesses. If it's going to be nine months before a case is heard and it's going to cost $1,000, it's sometimes not an appropriate way to go. Remember, the dilemma is that mediation works when both sides are keen to mediate. It doesn't work very well when a big company is saying: 'We've got a contract. We've complied with it.' We will say things like, 'But clauses 10, 20, 30 and whatever are unfair contract terms.' They'll say, 'Take us to court.'

CHAIR: Thank you.

Ms Scott: Can I just note—

CHAIR: Sorry, we've got limited time now. We might just move on so that we've got time to ask all the questions that we've got. Your submission talks about a doubling of the credit facility limit to $10 million, with a proportionate increase in compensation. Why is that change necessary?

Ms Scott: We conducted a small-business loans inquiry back in 2016, which was reported in 2017, which found that the FOS cap was significantly out of date. That was the cap for people eligible to put a dispute into FOS and then the compensation that was payable if they had a binding decision that there was misconduct or something was inappropriate. The issue for us was that, when you look at small businesses and the sorts of money they need to run their small business, the caps at that stage were very, very low. In our inquiry, we put credit facilities up to $5 million—we welcome AFCA having that $5 million—but the problem is that the banks are now stalling on adopting that $5 million definition, except for NAB, which means that there's a $1 million definition under the unfair-contract-terms legislation; there's a $3 million definition in small-business lending contracts with the banks; and AFCA is dealing with $5 million. If you've got a high-capital-intensive business like a farm, they have well over $5 million in terms of a commercial loan. So our concern here is to bring the credit facility up, which is proportionate to what genuine small businesses need for running a business, and that the compensation then is commensurate with that amount of loan.

Ms Carnell: If you think about it, if I'm a small builder building a block of flats, I'm likely to have exposure of more than $5 million at certain stages during the proposal. If I'm a high-tech manufacturer, at certain stages during my business my exposure could easily be more than $5 million.

Ms Scott: If you're looking at some of the microbrewing companies around Newcastle or some in Victoria that are going gangbusters at setting up a microbrewery, the amount of capital they need to set up a brewery and keep up with demand is greater than that.

CHAIR: Thank you.

Senator IAN MACDONALD: Thanks very much for your written submission and what you've just been telling us. Can I get your view on AFCA. I appreciate it's only been going for less than six months. Were you consulted in relation to AFCA, its rules and regulations and its establishment?

Ms Carnell: We were involved in the Ramsay inquiry. We had input into Ramsay, which, of course, produced the one-stop shop. It was an approach that we believed was pretty important. We are also very pleased that, just recently, AFCA has appointed a small-business ombudsman who will focus on small-business complaints, because they are different from consumer complaints and should be seen as such.

Senator IAN MACDONALD: I accept that; I think you've made that point. After four or five months of operation, are there other powers or rules or regulations that you think should apply to this group, or are you, at this early stage—and I appreciate it's an early stage—reasonably happy with its operations and what it's doing?

Ms Scott: We have frequent consultation and regular catch-ups with AFCA, David Locke and the other members. It's going very well. We are very happy with the data that they're collecting. The issue that has come about in the set-up of AFCA is: we still have an issue regarding bank related disputes with third parties such as valuers, receivers and insolvency professionals. They are outside the scope of AFCA at the moment—for very good reason, perhaps. The issue is that there are a lot of disputes around insolvency which have nowhere to go. AFCA is monitoring that for us, and we will be reviewing that going forward.

Ms Carnell: It's a huge problem. When you think about it, with a very large percentage of disputes with small business, the issue of investigative accountants, valuers and insolvency practitioners—we probably have as many issues with them as we do with the banks themselves, except we've got nowhere to go with them at all.

Ms Scott: They might be members of an association and there might be codes of conduct, but there is no access to external dispute resolution or compensation. That would be even when the bank has procured that service on behalf of the borrower and the borrower pays for it. The problem there is there's a revolving door. If you've got a problem with a valuation, the bank will tell you to go back to the valuer, but the valuer will tell you that you've got to go back to the bank.

Senator IAN MACDONALD: Thanks very much for that. That's very useful.

CHAIR: I've got one last question. I want to ask you about the capital requirements that banks have, and whether you think banks sometimes pursue repossession action more aggressively because of those requirements. That's a discussion that we had with the ABA this morning.

Ms Carnell: When you talk about capital requirements, do you mean APRA's capital requirements of banks?

CHAIR: Yes.

Ms Carnell: We believe APRA's capital requirements of banks have produced a very large percentage of the problems in the system at the moment. As we know, APRA is one of the most conservative regulators in the world. As I think the Productivity Commission and others have shown, banks are incentivised to reduce risk on their loan books, because it costs them more. We certainly found, during our inquiry into small-business loans, that a range of the behaviour of banks was based upon the financial incentive to reduce the risk related to their loan book. That was particularly evident in the CommBank takeover of Bankwest and the ANZ takeover of Landmark. There is no doubt that ANZ and CommBank—and, let's be fair, others as well—took action because it was financially in their interests to do so.

CHAIR: In other words, they pursued businesses and treated them as troublesome or impaired assets when essentially they otherwise would have been fine. Even though those businesses would have met the thresholds, the banks were essentially looking for businesses to target in order to improve that particular part of their loan book.

Ms Scott: No. I would say that was too simplistic. Banks need to be able to manage their risk in order to be able to lend. The issue will be if you've got a borrower whose business itself may be running okay but, through no fault of their own, other factors—there might be external environmental factors such as a natural disaster or a government decision, like with live cattle exports—indicate that that loan is in a high-risk category. It's entirely appropriate for a bank to manage that risk. Where the code of conduct is silent is about what decision-making is taking into account: 'Do we stand by this borrower and go into restructuring to support that business going forward, which may or may not be successful?—and that obviously puts the bank at a greater risk and therefore a greater cost—'or do we go to a quicker way out, where we just undertake recovery action and get the loan off the

book?' If a bank feels it's overexposed in a particular geographical area or a sector that has a problem—an external factor going wrong—then its tendency will be to go towards 'How can we make the loan book balance?' rather than looking at individual business loans and saying, 'Can we go forward supporting restructuring this business?' because it will cost them more to do so.

Ms Carnell: Really simply, what we're saying is that banks often move against people who haven't missed a repayment, simply to manage the risk on their own books, and they use non-financial default clauses to achieve that outcome.

CHAIR: Surely we should be looking to protect people against that kind of action where they are meeting their repayments, provided they're not meeting their repayments by accumulating debt elsewhere.

Ms Carnell: Yes. The work that we did in our inquiry into small-business loans put forward a range of recommendations, including getting rid of non-financial default clauses and so on. What's happened is that the banks have improved their contracts in terms of getting rid of—

Ms Scott: The big four.

Ms Carnell: The big four, yes. That still needs to be run down to the smaller guys. The problem with the current banking code is that—if you have a quick look at clause 151 and clause 154—it still has in it catch-all clauses that fundamentally allow the banks to do anything they like. Although they have said they have moved on non-financial default clauses, they have an out. So they'll say, 'We won't move on these sorts of things unless we believe we have to to manage our own risk.'

Ms Scott: ASIC in fact have put in their report 565 that unilateral variation clauses should not be in bank contracts, and yet the code of conduct that ASIC has approved under its regulatory framework 183 has that very clause in it, which is: at any point, for a decision that a bank thinks is reasonable, they can do whatever they like.

CHAIR: In other words, the banking code of conduct should change to take account of the importance of restructuring or other things as opposed to foreclosure.

Ms Scott: And it should also align with legislation on things such as unfair contract terms.

Ms Carnell: We absolutely agree with your last statement. We tried to get the ABA to put a clause in the banking code with regard to restructuring rather than foreclosure and also alerting customers to the fact that they have been moved into the risk area of the bank, which is the area of the bank that fundamentally is there to get the money back. But none of that is there in the current code or in the contract.

Ms Scott: We have customers who found out after two years that they had been in the high-risk restructuring area for two years.

Ms Carnell: And that was just as the bank started to move on them.

CHAIR: That's extraordinary. Thank you both for your evidence today. It has been extremely useful. If you have any supplementary information feel free to put it forward to us.

KREPP, Mr Selwyn, Private capacity

[12:50]

CHAIR: Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Krepp: I currently reside in Flemington, in Melbourne, and my occupation is probably 'a disposed-of resort manager'.

CHAIR: I invite you to make an opening statement.

Mr Krepp: I welcome the opportunity to speak to you. I am a former merchant banker in the Asia-Pacific region and I have spent time in commercial banking in Australia. I was honoured with a Commonwealth award in the Pacific region for services in banking and also contributions to the community, reflecting dedication, professionalism and the financial sector.

My fall from grace was in 2013. In the absence of any arrears, breaches or defaults, our family business, which was in postcode 4870, was foreclosed by one of the big four banks. The bank foreclosed without any court orders or any court processes. There were no orders whatsoever. The bank never got court orders—nor would they have got court orders, because of our position of no arrears, no defaults and no breaches, and there were no extraneous circumstances in the area that we were living in. They would never have got court orders, because we actually had a loan extension for our lending. It went through until October 2013, and we were foreclosed in February 2013. Having paid income tax the previous year, holding evidence of refinance and an ability to pay down the loan and additional unencumbered real estate to cover our securities if required, premature foreclosure came about in February 2013, in the absence of any orders and without the prescribed necessary borrower and guarantor consultations. I hold documentary evidence of our facility as having its term and loan contract extended in 2013.

Disingenuous receivers were appointed by the bank, resulting in receivership, including missing moneys, underselling of corporate assets, unlawful use of corporate funds by receivers and statutory noncompliance—all with the bank's knowledge. Over 250 accounting anomalies and irregularities occurred during receivership. The bank released corporate assets in the underselling process and created loan residual debts—noting that they didn't have any court orders in the first place to foreclose on us. The bank allowed the receivers to sell the business, in addition to the listed assets in the letter of appointment, which meant that the receivers returned to us a gutted company—and I was expected to generate income to pay off procedural debts in excess of $2.9 million.

Without any guarantor consultation, the guarantors are now required to pay this money, without the bank exercising any equitable duty of care and receivers not applying best efforts and best endeavours. It simply did not happen. Unscrupulous lawyers and same-for-same legal representatives were involved for all parties. We contend that a conflict of interest was prima facie in our affairs. Bankers and receivers have cross-referencing indemnity for their own personal protection. All costs and fees were funded and charged back to our own accounts with the company under realisation costs. Receivers costs in excess of $345,000 are without particularisation of the expenses. Similarly, other expenses totalling in excess of $86,000 remain without itemisation.

I've met with the bank CEO. Action points were taken away from our meeting by the bank on all occasions but never dutifully answered or responded to. I attended all royal commission hearings in Melbourne, Brisbane and Sydney into misconduct. I witnessed senior bank executives stating that their systems were broken and staff had let them down. I experienced bank CEOs clearly saying that they should have done more for their customers, and here I am with a letter dated 1 March 2019 from the office of the CEO, and it says on page 2, paragraph 1: 'I have requested your file be handled from here by our Group Credit Structuring team to continue the bank's usual processes of recovery.' Statements made by the bank at the financial services royal commission and at the HEC, the House Economics Committee, which I attended, are proving to be lip-service only and include a magnitude of false narratives. Policies, relief and corrective measures have not been deployed, as told through the various inquiries. I've attended bank AGMs and I've asked questions of the chair. What is stated is not what is delivered. I asked why. Questions on notice were, again, never actioned. CEOs, past and present, will not reply to our letters with requests for information. The chairman of the board will not respond to shareholder queries. The GM of Group Customer Relations was similar; they will not answer our correspondence. They all hide behind the corporate banner.

Banks are not honourable. They do not take ownership. They conceal material facts. They also capitalise on opportunism. They're not fair and reasonable in the spirit of customer negotiations, they excel in advantage-taking in what should be reasonably disclosed, and they benefit by legal injury. I am now faced again with recovery action, as per the bank's letter. I'm unable to afford legal representation to match the bank's legal team. As a family, we are crimeless victims. Breaches exist with my financial service provider and their performance. I have

identified to the bank on no fewer than 30 occasions the disparity in their actions, their conduct and my documentation. I've communicated to them on the various breaches of the Corporations Act, the NCCP and the Code of Banking Practice, plus the failure of their code of conduct, whilst they also ignore 'know your customer' legislation. Breaches have significantly also been included in the release of confidential information and borrower privacy.

Regarding letters of acknowledgement and responses I have received from my bank, I hold 17 written apologies for bad behaviours and poor performances, including correspondence from the CEO. That still hasn't stopped them from wanting to commence their recovery process. Documentation is a challenge. Requests are held in excess of seven or eight months to get anything actioned. Regarding permissions on external fraud investigations to the bank's nominated agency, again there was no response.

Banks are not delivering to the law. Many of their past wrongdoings have developed a culture of greed and they're not acting in a responsible or accountable manner as good corporate citizens. Banks have lost trust and respect from customers based on poor and bad behaviours, plus they have paid retainers to legal firms to maintain loyalty to banks. This occurs at the risk of permanent damage to victims over the long-term.

In summary, initially our funding was comprised of institutional moneys, with various terms and conditions, as opposed to a retail loan for a retail family venture. Obviously, the bank's irresponsible lending became questionable, but there was no response. There is convenient impairment of loans with no defaults, no arrears, no breaches and no court orders. They engage dishonest and disingenuous receivers. Unscrupulous lawyers, acting for all parties, are out to win at all cost. Residual loan debts were created by underselling our corporate assets. The bank will not provide copied documents. The bank will not freely respond to questioning. Abuse of process to borrowers and guarantors is common. Self-omission of record-keeping, broken systems and incompetent staff are on file. And banks want to realise on my personal assets for their bad banking, created by them, to compensate them for their errors.

The ability and capacity to engage legal representation causes additional hurt and pain in a climate of inadequate resourcing. An imbalance exists for all bank victims. Morals, ethics and good citizen behaviours are void when dealing with banks. Goodwill and good faith are unheard-of when negotiating with financial service providers. It all becomes greed and out to win at all costs. Antecedents, character and loan history are a minor contributor to outcomes. Processes are abused and enjoyed by financial service providers acting in a position of dominance with unlimited resources to continue their plight of supremacy. Programs of model litigant by Bank Warriors Australia and liquidity of arms are all keen to pursue it to gain fairness and processes across the financial industry. Again, three out of the four banks have said yes to using model litigant in their standard processes. Adoption must be uniform across the financial sector. Any questions?

CHAIR: Plenty, thank you. In your submission, you canvas a broad range of issues that deal not only with your own circumstances but with many of the other banking victims. In order to get a bit of clarity and use your situation as a bit of a case example, can you describe for us why you believe you ended up in a dispute with your bank and what steps you have been through to try and resolve that.

Senator IAN MACDONALD: Can I just add, from what you said at the opening—perhaps I've missed something—but why did they—

Mr Krepp: They considered that the loan term had expired regardless of me holding documentation to the contrary.

Senator IAN MACDONALD: How can they do that?

Mr Krepp: That's a question you might be able to help me with—how can they do that, exactly. They are in denial.

Senator IAN MACDONALD: I am sorry, Mr Krepp. We must be missing some factor. If you've got all the documentation, perhaps you should have gone and seen the previous witnesses and got them onto the job or something, because it seems you would have an open-and-shut case.

Mr Krepp: I share your views and I would like to think the same.

Senator IAN MACDONALD: So why did they say they terminated you? Did they not like the way you did your hair? Did they hate your grandmother or something?

Mr Krepp: No. Their response was, 'The facility has expired,' and they transferred the letter of appointment for the receivers.

Senator IAN MACDONALD: But you did not owe them any money, you had an unencumbered property as security and you had paid all your debt.

Mr Krepp: I had refinanced—no arrears, no defaults, no breaches—and the letter of appointment clearly states an 'expired loan facility'.

Senator IAN MACDONALD: You said you had letters of apology and you have been to see the bank, so how did they explain it away?

Mr Krepp: A lot of letters of apology relate to other bad conduct, other misdemeanours—whatever else they've done. As for the issues on foreclosure, they took the action points away and never dutifully responded to them.

Senator IAN MACDONALD: But I think you said you saw the CEO. He looked you in the eye and said what? Did he say, 'Sorry, I don't like the colour of your hair'?

Mr Krepp: I looked him in the eye not once but on four or five occasions.

Senator IAN MACDONALD: So what did he say?

Mr Krepp: He took away the action points and said they would get back to me. And when they got back to me, it was exactly as per this letter from 1 March: 'I understand this is not the outcome you are looking for. I have requested your file be handled by our group structuring team to continue the bank's usual processes of recovery.'

CHAIR: Can I ask you what your view is about why you may have been targeted in this way?

Mr Krepp: It could very well have been the postcode—4870—which is Far North Queensland. It could also have been that we were in the hospitality industry.

CHAIR: We've had some discussion with the previous witness where we talked about the risk ratings that businesses have and that, therefore, particular loans might get targeted in order to meet the prudential requirements of the balance sheet of a bank and that particular sectors and particular areas might get targeted because they are deemed as being slightly more risky. What's your perception of it?

Senator IAN MACDONALD: I wouldn't think Cairns and the tourism industry in Cairns would be a risk area. As you know, I come from up that way.

Mr Krepp: Hence the reason I quoted the postcode. They did express that they could no longer provide a facility for doing reviews of the account. That was fine. I had refinanced. I had money to pay down the loan and I had unencumbered properties. We'd paid tax the previous year. Personally, I'm in a favourable position with my tax. As to why they foreclosed, in the absence of any court orders—and we never got court orders—

Senator IAN MACDONALD: Did you name the bank?

Mr Krepp: I'm happy to name the bank for you. It happens to be the CBA.

Senator IAN MACDONALD: Okay. You would seem to have a classic case for the new authority to look into.

Mr Krepp: I think we probably exceed it because of the dollar value.

Senator IAN MACDONALD: How much is involved in round figures?

Mr Krepp: We're looking at debts in excess of five, effectively.

Senator IAN MACDONALD: $5 million?

Mr Krepp: Yes.

Senator WATT: Can you refresh our memories—apart from trying to resolve the issue with the bank directly, which obviously hasn't been successful, what other steps have you taken? Have you sought legal advice? Have you started legal action? Have you gone to ombudsmen? What else have you done?

Mr Krepp: In respect of recourse, unfortunately the amount exceeded the FOS's discretion, as it does now with AFCA. I took legal advice. Because the assets were generally undersold in value—and that's a common statement made by many people; I've got examples that were undersold in value—I was required to make a submission to the bank on two occasions, which cost me, off the reserve I had, in excess of $150,000 to employ two solicitors and a forensic accountant to comply within the time frame. Having spent $150,000, I made two submissions to the CBA, one dated 4 May 2015 and the other 21 June 2015, and both of those submissions were met with no response.

I now believe that all I did was provide them with a platform of knowledge of what I'd known and what I was able to glean from the way the receiver remedied the business in my absence. I plucked all that information from ASIC from the payments and receipts forms, 524s, and I was able to reconstruct it. When I brought this information to their attention they then bullied and bludgeoned me into accepting a deed of compromise and forbearance. They even wrangled in my nephew's wife, who was not a property owner or a guarantor. She was

also included in the deed. Once upon a time she and I had had a loan, but she no longer owned property and she was never a beneficiary of the company. She was roped into executing the deed.

I had very few options. I was given no room to move. I was financially embarrassed, having spent $150,000 of my last earnings. I had a deed that was executed. I didn't complete the settlement because it wasn't what I wanted. It wasn't fair. It wasn't reasonable. The position was that I was told that unless I signed it they were going to sell me up. I had a solicitor with me at the time—and it's a rather sad tale. When it was due for settlement, he met with me and said: What are you going to do? You've got to settle it.' I said: 'Why should I settle when we're victims? We've done nothing wrong.' It's broken down the relationship with my family, with my son, because he thinks I've lost everything. My solicitor who came around to meet with me took his own life on 5 or 6 March 2016 believing that he had been done over by a corrupt system. I've been able to maintain our status, and now I'm faced with this.

I have met with them—I've met with the CEO in Canberra at the House Economics Committee; I met with him at the AGM on 7 November in Brisbane; I met with him on 16 January at his office; I saw him again on the House Economics Committee on 8 March—

CHAIR: Indeed you did.

Mr Krepp: and I've probably seen him since, and it's, 'We'll get back to you in writing,' and that's what they write to you—a letter saying that they're going to do recoveries on you. I'd done nothing wrong—no arrears; no defaults; no breaches. They gutted the company, to their own satisfaction. And that's why we're here.

CHAIR: When they've taken that action before any evidence of a problem in the company, it's very hard to unpick, after the event, when the asset itself has been destroyed.

Mr Krepp: I probably—though not realising, through not being able to afford help, that they had no court orders—should have sent the receivers packing. But I respected that they were the mortgagee and so forth or whatever the case might be. So that's why I'm looking down the barrel at the moment. I've got correspondence with the CEO at the moment, and that has not been answered. And that's not uncommon. The correspondence has been there since a couple of weeks ago, and it's not uncommon for them not to answer correspondence. Even their general manager of customer relations—they deny as to answering correspondence, as do the board as to answering correspondence. A question you asked me, Senator Pratt, a little earlier, was along the lines of: 'What went wrong? Why aren't they answering?' I'm not confident, hand on heart, that the CBA is being run by the CEO or by the chair, when they won't give you correspondence.

Senator IAN MACDONALD: Sorry? Say that again?

Mr Krepp: I'm not confident that the CEO of the CBA and/or the chair are in control of what's happening.

Senator IAN MACDONALD: So who is in control?

Mr Krepp: I tend to look at: some of the correspondence is very legalistic, and they're trying not to use legalistics. They've told me quite clearly that they've sent my file out to be externally reviewed. My theory on that is: if you send rubbish out, you'll get rubbish back, if you don't tell them the whole facts.

CHAIR: So can I ask what you think should've been done to resolve the dispute earlier? One of the things that has been put forward to us is that it should be impossible to move into foreclosure-type proceedings without putting a dispute resolution process in place first.

Mr Krepp: I would agree to and endorse that. As I said, I had refinance arranged to activate. I had money to pay down the loan. I had unencumbered properties as security if they thought that there was a security risk. I paid tax the previous year, trading exceptionally well.

CHAIR: What steps should be taken now, given what was resolved in the meantime? What resolution do you propose in your own circumstances?

Mr Krepp: Firstly, I expect the recovery process to be backed off. I know remediation is on everybody's mind, and I'm happy to meet with them on remediation. They haven't asked me to do any calculations as to that. When you're operating a business and you've got an adjusted net profit—and don't get me wrong: we worked hard, 24/7, eight days a week, my nephew, my son and I, running our business; we minimised our outgoings and maximised our incomings.

CHAIR: So you still own the business—

Mr Krepp: No. The business was completely gutted, and I only got a company back.

CHAIR: Yes.

Mr Krepp: I think that, at the time, what the bank should have done was to, at least, negotiate with us and/or speak to our guarantors. That did not happen.

Senator IAN MACDONALD: Did you have guarantors?

Mr Krepp: It was a company, and I was the guarantor—I and my son were.

CHAIR: Can I ask you what advice you've got for people in disputes with banks in the future?

Mr Krepp: My advice would be: you have to validate that what they're proposing and what they're doing is legal. As it is, they rolled us without any court orders—something I was unaware of at the time. So my advice would be to meet with them. And I did. I went to meet with the bank to discuss it. They take everything on notice, but they're not honourable and they take nothing on ownership. Straightaway, as was said earlier today at this hearing, you need to be proactive and you need to try and put a stake in the sand.

CHAIR: When it comes to foreclosing on someone, surely it should require a court process.

Mr Krepp: I would have to say yes because, if it didn't, you'd find that foreclosures would come from all angles. If there was a court process, they would possibly review it and assess it in a different light. They would need to produce and provide to the court proof of debt. That was never provided.

CHAIR: So you could trigger a dispute resolution process first and it might end up in a legal outcome, by way of example.

Mr Krepp: Exactly. Court orders would be paramount and foremost.

CHAIR: The enormous impact that this has had on you, your family and, indeed, your associates is apparent. I thank you for your evidence but also very much acknowledge the role that you've played in supporting other victims. I hope you take some comfort from the strong networks you've helped to form for people who are seeking justice. Are there any other questions from the committee?

Senator IAN MACDONALD: I asked a few questions and I might speak to Mr Krepp privately later, but I'm not quite sure how this helps us with this particular inquiry.

Mr Krepp: Possibly from the justice point of view—it was overlooked, ignored and sidestepped.

Senator IAN MACDONALD: You tried to get into Hayne but you weren't called?

Mr Krepp: Most definitely and, unfortunately, whilst the royal commission and the Hayne process were excellent, there were a number of activities that were not covered. For example, in the small-to-medium enterprise sector, very limited information was passed off at hearing No. 3 in Melbourne. All it covered off was, basically, irresponsible lending. There was nothing in respect of premature foreclosures, falsified documents, fraud documents or redress. With hand on heart, I can assure you quite comfortably that I can name people, including CBA clients and customers, who have had fraudulent documentation done. When I say 'fraudulent', I'm an ex-banker. I wouldn't be making that statement if I couldn't—

Senator IAN MACDONALD: And I'm conscious of some of the Storm allegations.

Mr Krepp: There were policies swapped in and out. I've seen cut-and-paste documentation.

Senator IAN MACDONALD: I've had some evidence of cut-and-paste signatures.

Mr Krepp: Can I ask you the question: what's your interpretation of cut-and-paste signatures on a document?

Senator IAN MACDONALD: They're fraudulently done by a junior bank officer to get the commission on the loan or something.

Mr Krepp: But, if the original document's there, why do you have to do it with the fraudulent one?

Senator IAN MACDONALD: I'm going into things that people told me about Storm, which you'd be conscious of.

Mr Krepp: I appreciate that. What I'm saying is that the Hayne inquiry didn't dig deep enough. I would call it incomplete in respect of small-to-medium enterprises.

Senator IAN MACDONALD: Justice Hayne assures us that he or his senior staff read every submission, which I assume includes yours. Certainly, we'd have been there for the next 10 years if they called everyone to give evidence. It just seems an incredible situation to me. As a lawyer 100 years ago, I always appreciate there are two sides to every argument, but from what you tell us it just seems incredible. This question is again not really relevant to our inquiry, but was it originally the Commonwealth Bank or Bankwest?

Mr Krepp: Commonwealth Bank. Possibly one of the things I did fail to identify is that initially it was with another bank and they lured us to get our business, not on one occasion or two occasions but on three occasions. They were domiciled directly opposite to where we were trading, on Lake Street, Cairns. My son and I stepped up our shareholding and bought the business. Because my prime real estate was with CBA, I was happy, but they

lured us and quoted us on three occasions for the business. To find out later that they rolled us wasn't very comfortable. I'd been with CBA for 20-odd years or 30 years or something.

Senator IAN MACDONALD: There's not much loyalty in banks these days. There used to be once.

Mr Krepp: Exactly. That's why I showed you that I was acknowledged for professionalism, being honest and everything else. It's a Commonwealth award granted to me in the Asia-Pacific region for services to banking, being an ex-banker. I endorse what you said. They certainly wouldn't earn them today.

CHAIR: Thank you very much for your evidence.

Proceedings suspended from 13:20 to 14:15

BRODY, Mr Gerard, Chief Executive Officer, Consumer Action Law Centre

CHAIR: Good afternoon, everyone, as we reconvene our hearing on the resolution of disputes with financial service providers within the justice system. I'm now pleased to welcome the Consumer Action Law Centre. Mr Brody, information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I'd now like to invite you to make a brief opening statement, and then we'll move to questions, thank you.

Mr Brody: Thank you, Chair. Good afternoon and thank you for the opportunity to appear today on behalf of Consumer Action. Consumer Action is an independent, not-for-profit, community legal centre based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Alongside our legal advice, Consumer Action are the Victorian operator of the National Debt Helpline, which is nationally recognised as the first point of telephone contact in Victoria for anyone seeking financial counselling.

We regularly assist vulnerable Victorians in their disputes with financial service providers. Our team of financial counsellors assisted over 4,000 people last year who were struggling with credit card debts, making irresponsible lending the top issue. Our legal team also assisted many clients, including a number as witnesses to the banking royal commission, and our policy and campaign team were invited to provide submissions on a range of topics that the commission examined. As such, our centre witnesses firsthand how early legal advice and financial-counselling assistance benefit our clients.

We find that most disputes with financial service providers and consumers usually start in a bank's internal dispute resolution or hardship team. These processes can be difficult for consumers to navigate on their own, especially those who are experiencing vulnerability or disadvantage. Statistics from an ASIC report looking at the consumer experience with financial sector internal dispute resolution processes show that 80 per cent experience at least one obstacle during that process, and nearly 20 per cent of complainants never reach a resolution. If things are not resolved through internal dispute resolution, we find that many people either abandon their complaint or proceed to external dispute resolution services such as AFCA.

Early legal assistance for people navigating the complex hardship IDR and EDR frameworks is vital. For those who cannot afford to pay a lawyer, community legal centres provide a crucial service for them to access expert advice and assistance. In this respect, community legal centres are able to restore some balance in favour of everyday Australians when they come up against problems with their bank. Timely legal assistance and advice can also prevent matters from either dropping out of the system or resolving negatively or ending up in the courts.

We find that the courts are an inaccessible forum for clients we help. Courts are inevitably slow, expensive and complex. For someone experiencing vulnerability, it is an intimidating prospect, and it's inaccessible without access to legal advice and representation. The national peak body for community legal centres has found that significant barriers exist for people trying to access free legal assistance. About 160,000 people were turned away from CLCs in 2016, missing out on the help they needed.

Our submission is that resolution of disputes with financial service providers can be aided by an effective and integrated community legal sector that works alongside financial counsellors and other community service providers. To ensure that the financial sector is fair, we need to equip community legal centres with the resources they need to assist the community and fight for appropriate resolution of disputes with financial services. Increased and predictable CLC funding is long overdue.

We also need to make sure that individuals and families have the best chance of successfully resolving their disputes on their own without relying on existing courts and tribunals. EDR schemes such as AFCA offer a far more accessible and often more appropriate forum to resolve consumer disputes with financial service providers.

It's obviously very early days in the life of AFCA, which only commenced late last year. However, at this stage it is important to ensure that the rules are right so that it is able to work as effectively as it can. We have already seen significant gaps in AFCA membership. For example, debt management firms, debt agreement administrators and buy-now pay-later firms are not required to provide their customers access to dispute resolution through AFCA. Our caseworkers see the harm caused by these financial service providers and a lack of avenues to resolve disputes when they arise. We strongly recommend urgent legislative reforms to require these firms to join AFCA.

Our written submission canvasses a number of other tweaks which we think should be made to the AFCA rules, including increased compensation thresholds to ensure that people are not forced into the courts, just because of the size of their claim. Australians witnessed throughout the banking royal commission that big banks have very little to fear from doing the wrong thing. Equipping AFCA with the appropriate powers and resources will level the playing field and ensure consumers with disputes have access to justice and are appropriately remediated.

To summarise: our view is that the court system is rarely an accessible forum for consumers to resolve disputes with their financial service providers, particularly if a consumer is experiencing vulnerability and disadvantage. This poses a barrier to justice. While our submission recommends improvements to the accessibility of courts and tribunals and also to processes such as model litigant obligations on those entities, the reality is that, for most people, particularly those without access to free legal advice and representation, courts will never be as accessible as the external dispute resolution schemes.

CHAIR: Thank you, Mr Brody, for your excellent written submission and for your evidence this afternoon. I've got a lot of questions but, given that in my experience I've seen both consumer legal centres and financial councillors use alternative dispute resolution practices, I wanted to ask at the outset what the difference is between what a financial counsellor might do in working with a client to get an alternative dispute resolution versus when you might pick it up.

Mr Brody: Financial counsellors' expertise lies in the rights people have when they experience debts—the rights around accessing financial hardship assistance from creditors, the rights around responsible lending and the rights in various industry codes of practice. They play an important role in informing people about those rights and the forums and ways in which they can get justice. That might include negotiating payment arrangements. It might identify something that an ombudsman scheme might investigate. They can do a lot of really good work without the assistance of lawyers. Lawyers are probably required where a dispute is more complex. Maybe the contract has some particular complexity associated with it, or there are unfair fees which might require a more complex legal argument or advice in relation to them. Financial counsellors will often refer matters to lawyers for that sort of advice. It might mean that they continue to represent the client in their dispute and it might mean that they hand the matter over to lawyers to act on behalf of them. It's just the same way, though, when people go to lawyers. They might find that there are matters that are related to negotiation around debts that are better suited to a financial counsellor. So I think having the two professions' work really integrated is a way to best support people.

CHAIR: Thank you. That is helpful. Your submission raises the question of whether the withholding of documents is an essential part of how financial service providers are at times falling short of community standards. You also talk about model litigants. The provision of documents is an important part of being a model litigant, but when you raised that question you were not just talking about the courts; you were also talking about the process overall, weren't you?

Mr Brody: Absolutely, from the first time a consumer raises a complaint all the way through to an ombudsman scheme process. Even if a matter does go to court, there is a need for a financial service provider to cooperate fully with the dispute. One of the frustrations we find, even at the very initial stages of trying to advise people about their rights, is that financial service providers are either unwilling or unable to provide relevant documentation. An example might be if someone comes to us with a large debt to a bank—it might be a personal loan—we need to understand what their financial situation was at the time they entered into that loan. What information did the bank collect? We try to go to the bank and ask them about their suitability assessments. The banks are sometimes unwilling or unable to provide that sort of documentation.

CHAIR: So you would not know, for example, whether someone had been truthful at the time they had taken out that loan? And you would hope to see that the evidence showed they had been and the question of the liability for that would fall on the bank. How does that work?

Mr Brody: The banks have their own obligations—

CHAIR: Is that irrespective of the evidence that you provide them with as a customer?

Mr Brody: Yes. Obviously, they would ask questions of a customer as part of the application process. But banks have their own obligations to inquire into and verify somebody's financial situation, so they should be getting documentation from the customer to verify their financial position and documenting their lending decision that the loan aligns with the requirements and objectives of the consumer, and that is often not done very well.

CHAIR: So the obligation needs to be more than providing documents to AFCA. Is providing that documentation—all relevant documents and that decision-making process to AFCA—enough or should organisations like yours have access to it as well?

Mr Brody: It should be available any time someone makes a complaint. I must say that some of those documents, under the existing credit laws, are required at law already for the banks to provide but they seem unwilling to.

CHAIR: I have certainly dealt with the Consumer Credit Legal Service in Western Australia. They were raising a very difficult case where someone had had inappropriate lending and where, after repeated requests, they

had not been provided the documents about the capacity of the person who took out a credit card to repay it at the time. It was quite pervasive, the manner in which the institutions were not replying to that request for information. So are you saying that request for information is currently obligatory but is not being complied with?

Mr Brody: I am; that's right.

CHAIR: So the obligation in and of itself is not enough. Should it be a condition of the licence or should there be fines? What would be a way of dealing with that?

Mr Brody: The royal commission did make some recommendations around financial service providers being required to cooperate with AFCA. I think that is one important mechanism. The proposal is that that would become a licensing condition, and recent law reforms mean that licensing conditions or the general obligations that apply to financial service providers—

CHAIR: But surely that should apply not just in relation to AFCA but that a condition of licensing with AFCA should be providing information to somewhere like the Consumer Credit Legal Service, because that's what a model litigant would be required to do if you were in court? But if you were still in the process of deciding whether there is a case or not, that information would still be relevant.

Mr Brody: Absolutely. So I think that proposal of the royal commission could be expanded on by having those general obligations improved by requiring licensees to comply with internal dispute resolution standards, which would include providing all relevant documentation relating to a dispute to it.

CHAIR: Your submission, I note, supports an increase to AFCA compensation limits of $2 million. Why do you believe that is necessary?

Mr Brody: There are a couple of reasons. One is that the existing compensation limits, and even the new ones that apply to AFCA, are quite confusing to understand on one level, and there are different sorts of caps and limits depending on the type of complainant—whether they are a consumer or a small business—and different levels depending on different types of dispute. We think a uniform threshold would reduce the confusion faced by consumers, industry and advisers. We think the $2 million that now applies to small business should apply across to consumers. We are aware of different sorts of complaints. Even in the areas like insurance complaints, where, if you have a total loss or some other significant damage to property, the claim might be quite significant and might actually exceed the thresholds that exist today.

CHAIR: Thank you. In your submission, you've talked about the use of debt collectors and bankruptcy, noting that people can lose their home over a $5,000 credit card debt. Can I ask about legal action about lending misconduct. You've raised that issue in here. How should things like that be remedied?

Mr Brody: That's a really good question. There are probably a couple of things that could be done. With the issue that you're talking about, what we see in our casework is that someone may have been provided with a credit card. Maybe at that stage it was provided in breach of responsible lending. Nevertheless, they used that credit and have difficulty repaying it. It then goes into arrears. Some time later, the bank decides to sell that debt because it feels like it can't recover it, and a debt purchaser business purchases that debt and seeks recovery. Sometimes those debt purchasers then take legal action to recover it, so they would use a magistrates court default judgement process, and then it would proceed to bankruptcy action. The significant risk we see for our clients is when they own their own home. Having bankruptcy action take place can really put their home at risk. Often it's the most vulnerable and marginalised people I'm talking about. Despite the best efforts of the creditor to contact them and engage with them, they're not able to engage. They might be living in the community but with significant mental health or other disability. So what we've seen happen is that the bankruptcy action happens. A trustee is appointed. Fees then accumulate, and what was a $5,000 credit card debt could be expanded to $60,000 or $70,000, and they could risk losing their home.

To resolve that, I think there are a couple of things that could happen. One of the first things that could be done is that the threshold for a creditor to petition for bankruptcy could be increased substantially from $5,000. I don't think any bank thinks that it wants to make someone homeless over a $5,000 debt, and I think that even the banks and debt purchasers would support that. I think that banks themselves could take more responsibility for the conduct of the purchasers who purchase their debt books. I don't think banks should be able to give away responsibility at that stage just because they've sold a debt. Banks could, for example, require through their contracts with debt purchasers that they come back to seek approval before taking legal action, or they could set some standards around that. They might say, 'Actually, it's inappropriate to use legal action to seek recovery from someone whose sole source of income is Centrelink.' So there are a range of things that could be done by the banks themselves.

I also think, as I mentioned with this case at the beginning, that, if it was irresponsibly lent to begin with, that person might have a remedy on that actual debt, which they've lost because it's now gone into bankruptcy. I think that the bankruptcy regime could be improved so that people's claims in that regard aren't lost or vested in the trustee at the point of bankruptcy.

CHAIR: Thank you. That's very helpful. You've talked about Centrelink recipients where that's their sole income. In relation to legal assistance, I note that you currently don't have the capacity to meet demand with financial disputes. What level of expansion do you think we need to see in order to meet the need that's been identified?

Mr Brody: That's a really difficult question for me to answer, and I think we'd have to do some significant analysis of that unmet legal need in the community to identify that. Many people should be able to resolve their disputes without resort to a lawyer. I'm not saying that every kind of dispute—

CHAIR: Yes. In this sense, we're probably also talking about financial counsellors.

Mr Brody: Yes, that's right. All I can say is that a substantial injection is required. If you look at some of the statistics about who gives up on complaints, the ASIC report that was released just last year on internal dispute resolution suggests that up to half of people give up on their complaint. If they had access to some assistance and some advice, that might spur them on to pursue their complaint. I think that is one measure, but we probably need to do some more analysis about unmet legal need to really determine how much legal advice assistance needs to be provided.

CHAIR: Your submission recommends that AFCA membership should be made compulsory for debt management firms and credit repair firms, small-business lenders and buy now, pay later providers. Why, in your experience, is that necessary?

Mr Brody: As our submission outlined, we consider that the external dispute resolution schemes are a much more effective, affordable and accessible place for resolving disputes. Consumers have legitimate disputes against those sorts of providers, and currently they are not required by law to be members of the scheme. So, if they want to pursue a complaint, that can really reduce the options to go to a court or a tribunal.

CHAIR: You deal with consumer credit but you mentioned small-business lenders. What are the consequences for you as an organisation in being able to differentiate between consumer credit issues and small business? How well is the system responding to that?

Mr Brody: There are gaps. I will mention a couple of things. When we say that small-business lenders are not required to be members of AFCA, if they are also a lender that provides consumer credit they are required to be a member of AFCA but if they are solely giving loans to small business there is no requirement. Banks, with respect to their small-business lending, are required to be members of AFCA but a lender that is only giving small-business loans isn't required.

CHAIR: We heard evidence from Kate Carnell about that today. For small-business and business lending there is a different regime around the rights attached to that lending than exists for consumers. How do you work out whether someone does or doesn't have a remedy, whether the kind of loan they have is the right kind of loan for their circumstances and whether people are denied access to consumer justice because they have the wrong kind of loan?

Mr Brody: That happens a lot. The consumer credit laws say that, if the purpose of the loan is for personal or domestic purposes predominantly, it should be regulated by the consumer credit laws. But we often see loans structured, written up, as business loans even though the consumer's purpose for the loan is for a domestic or personal purpose. For example, they might buy a car for their own use but the loan is written up as a business loan. That is a particular problem to resolve if the lender subsequently isn't a member of AFCA. They may have legitimate claims to make, but they're hard to exercise because they don't go to AFCA.

We also see some merging between consumer and small-business purposes. Rideshare is a perfect example. That business model is that people are using their personal car on the side, on the gig, to make some extra income, which might be a business purpose. So the line between small business and consumer is blurred. We would like to see small-business loans being caught by the same rules of consumer credit. That would, I think, advantage people borrowing for small-business purposes in improving their rights and also reduce this arbitrage that could be undertaken by credit providers to structure loans as small-business loans rather than consumer credit loans.

CHAIR: I want to ask about repossessions. What safeguards should be in place to prevent financial service providers from using repossession as a first resort and to ensure that it is a last resort? I guess that relates to people's obligations under AFCA.

Mr Brody: I think that lenders should use repossession only as a very last resort and they should take all steps—as they are obligated to do under their own codes of practice—to offer assistance to people in financial difficulty. Those regimes should be exhausted in every possible way first before any repossession is thought about. I was recalling earlier that one of our really experienced lawyers in my office actually started his career in the UK and, when he moved to Australia maybe about 10 years ago, the thing that struck him so significantly about our approach to home repossession was that the home repossession process can happen without someone being required to appear before a court or a decision-maker. If you're disengaged and you don't engage, it will default through to a home repossession scenario. His view was that that is unfair; you should be able to have your say before.

So I do think we need to create that system where people are pushed into a fair dispute resolution process to resolve that before it escalates to repossession. People should also be referred to advice, particularly financial counselling. Sometimes home repossession is the way; people are not going to be able to keep their home. They don't have the income to make repayments. That happens, but it's much better for the borrower and, frankly, the creditor if the borrower is able to make their own decision to sell before a repossession and not lose as many costs, and that's more likely to happen if they have good advice from a financial counsellor before those steps.

CHAIR: Okay. It sounds like there's a lot in common with small business lending and even larger business lending in relation to that question of when people know that they're actually in danger of having their home repossessed and the manner in which that's triggered. In terms of civil law assistance available in sectors other than consumer law and consumer credit, we've seen through the evidence in this inquiry a reflection of the importance of the need for greater levels of legal assistance for consumer credit disputes as opposed to other civil disputes. You're probably aware of Labor's proposal to increase financial rights lawyers in legal assistance from 40 to 240. I assume you're very supportive of that change.

Mr Brody: Absolutely. I think it's a wonderful announcement. To take it a bit further: at the moment, the existing community lawyers tend to focus on consumer credit and insurance. These are the issues that probably affect the lower income cohorts of people who need legal assistance. There are other types of disputes for which we simply don't have the resources. If there is an injection of resources into our sector, we could be better able to respond to them. They are things like financial planning, investment disputes, superannuation disputes, small business lending disputes and so on.

CHAIR: So you would see the capacity to apply those community legal resources not only to consumer issues in the low-income and vulnerable spectrum but as a way of enhancing consumer rights within a consumer context and a business context.

Mr Brody: Yes, I would. I think there are real gaps in access to justice. When the Productivity Commission examined access to justice, they pointed to what they called the 'missing middle'. If you're really poor, you might get legal aid or community legal centres. If you're wealthy, you can afford to pay for your lawyers. But there is a missing middle out there with people who still don't get access to justice, because they don't have access to that advice and assistance.

CHAIR: Good. I can quote you in our report on that. That's a very nice way of framing it.

Senator IAN MACDONALD: You could have quoted me; I said the same thing earlier!

CHAIR: You did indeed, Senator Macdonald. I'm assuming on that basis that you'll support a majority report of this committee.

Senator IAN MACDONALD: If I had $100 for every committee hearing we've had where people have asked for more funding for legal aid—which I agree with—I'd be a millionaire by now. The trouble is governments of all persuasions, both state and federal, and we keep hearing this. For reasons best known to them, which is that they've got to raise the money from somewhere, it never seems to happen. So I'm grateful to hear of your promise at election time that this is going to be increased.

CHAIR: That's because we've announced a banking levy that will pay for these.

Senator IAN MACDONALD: All right. I'm delighted to hear you're going to do that—put some resources—

CHAIR: But I hope that means you'll support a majority report.

Senator IAN MACDONALD: Put some taxes on which the banks will pass on to someone else, so someone will pay. But we're not here to argue about Labor Party policy; it's a parliamentary inquiry.

CHAIR: We're here to ask questions, but, frankly, it is a relevant debate.

Senator IAN MACDONALD: Yes.

CHAIR: In that context, when you look at your experience, Mr Brody, where you've got a banking sector that's making profits from responsible lending, or even at times irresponsible lending, but also where good practice is turning bad because of a change in the fortunes of the person using those products—they might lose a job; they might get sick—what do you think is the obligation of banks and lenders to play a role in looking at hardship; sorting out those vulnerabilities and finding the easiest and best path possible through that time of hardship? It would be justifiable, wouldn't you think, because they're making money off those lending practices, for there to be a role for them in funding the support required for that?

Mr Brody: I actually think that quite a number of industries benefit directly from financial counselling and early legal assistance. The banks and the credit providers are a key example. When someone gets early advice and there is a meaningful way out, it's more likely that they're going to make repayments and that the credit provider will get paid. The same can occur in the utilities or telco areas. Those are the types of industries where financial counsellors are commonly supporting people around their debts. That assistance actually helps not only the individual but it also often helps the business get paid or resolve the situation in a much less costly way than it otherwise would through repeated debt collection.

CHAIR: ASIC is currently paid for by a levy. Do other countries also have levies to pay for the kind of advice that organisations like yours provides?

Mr Brody: Yes. My understanding is that there is an industry levy in the UK that funds the Financial Conduct Authority, which is the equivalent of ASIC. The same levy in the UK also funds debt advice in that country, which is the same as financial counselling.

CHAIR: We've touched on court processes for home repossessions. I think it was you who talked about how you might not even be before the court before that stuff is commenced. My understanding is that applications to state supreme courts do need to be made. Is that right?

Mr Brody: That's right.

CHAIR: At what point should the early dispute resolution processes come into play? You're saying, essentially, that people are being taken to court before they've been forced to have a real conversation with their bank about the nature of the problem.

Mr Brody: I think that any time any credit provider is using a court process to recover debt—it doesn't really matter what sort of debt it is—they should be required to inform the customer of their right to go to the ombudsman service. But, more than that, I think the court should be creating a process to facilitate that being transferred to that system. At the moment, of course, credit providers are required to inform people, but people tend not to read everything. So I think it needs a more interventionist approach, which would mean the court could actually assist. That would benefit the courts as well. They have enough cases as it is. They would probably prefer that matters not proceed through the courts. They could take an interventionist role to make sure that before a case goes too far down the court pathway it is stayed and referred to somewhere like AFCA to be resolved, if it's possible to resolve it, before it advances to any sort of court process.

CHAIR: Thank you. Senator Macdonald, do you have any questions?

Senator IAN MACDONALD: I have just a couple, Chair, and you raised a couple of mine. Mr Brody, I'm looking at your recommendations. Recommendation 4 says:

> … Increase the bankruptcy threshold for a creditor's petition to, at a minimum, $30,000 to ensure people don't face bankruptcy and losing their homes over small unsecured debts.

You rightly mentioned in your oral evidence someone losing their home without even being aware that that was happening, which I appreciate, understand and accept. How can you enforce repayment of a loan? If I give you a loan of $5,000 and you don't pay me back, how can I ever get my money back if I can't threaten to make you bankrupt?

Mr Brody: If it were an unsecured debt, if you can't use an alternative dispute resolution process to come to an arrangement and you decide to take the matter to court, you would go to the Magistrates' Court of Victoria first and get a judgement there. At that point there are a range of enforcement mechanisms available to a creditor.

Senator IAN MACDONALD: When I was a lawyer, it used to be a warrant of execution, which was the same as selling it up. Or you could garnish their wage or you could have a public examination, which usually got people to—I'm talking 50 years ago, mind you. So you can do all that?

Mr Brody: That's right; there are other options.

Senator IAN MACDONALD: So you can sell the house under a warrant of execution?

Mr Brody: You could do that. The point is that the bankruptcy process adds a lot of unnecessary cost to the parties.

Senator IAN MACDONALD: Yes, I agree.

Mr Brody: What the availability of that option does, particularly for debt purchasers—they choose that option because it's simple for them, rather than thinking, 'Maybe we can go through an alternative dispute resolution process and come to some sort of arrangement.'

Senator IAN MACDONALD: All right; you've convinced me on that. You were talking about raising the minimum to $30,000. Are you saying that, below $30,000, you should use these alternative processes?

Mr Brody: That's right.

Senator IAN MACDONALD: You could leave it at $5,000 but still in some way encourage the other processes, which I can't believe anyone wouldn't go through.

Mr Brody: It's worth noting that that $5,000 was put in place in, I think, 2008. Before that, it was $2,000 set in, I think, 1966. At the very least, we should increasing that amount for indexation. If we'd started at the $2,000 level in 1966, it would be a lot higher than $5,000 today.

Senator IAN MACDONALD: This committee, in another form, did have some inquiries into changes to the bankruptcy and debt collection regime, which I hope have improved things. I'll go to your recommendation 6:

Where misconduct is detected, the lender should review other customer files that might also have been affected …

Can you just elaborate on that? If a lending institution is found to be wrong in that case, then should they be required to review automatically any other case where the same applied?

Mr Brody: The example that probably makes the most sense is a mortgage broker. If a lender discovers, after a complaint from a borrower, that a mortgage broker has made fraudulent applications on behalf of a borrower, and they resolve that matter, the obligation should be on the lender to look at every other matter that that mortgage broker has brought to the bank and assess whether they have dug up similar conduct across other sorts of files.

Senator IAN MACDONALD: You are suggesting that mortgage brokers—and I know this was mentioned at the royal commission—fill in forms, and people sign them without reading them. Is that what happens?

Mr Brody: That is our experience. I think people believe that mortgage brokers are acting in their best interests, even though there is currently no legal obligation around that. They're told by a mortgage broker, 'This is what we've got to put in the form to get the lender to approve the loan'—

Senator IAN MACDONALD: Although the borrower knows that it's a lie?

Mr Brody: I don't know—

Senator IAN MACDONALD: 'You only earn $20,000 a year but let's say it's $120,000 a year. That way you will get the loan.'

Mr Brody: In many cases the borrowers don't even know what's put on documents or they don't clearly understand—

Senator IAN MACDONALD: Do you think that we should have an education system for individuals that says, 'Don't sign anything without at least reading it'?

Mr Brody: I think that education is obviously very important. Financial literacy education is very important. But the reality is that the levels of literacy and numeracy, and document literacy, in Australia are poor. Forty per cent of Australians do not have the document literacy to fill in a basic tax form.

Senator IAN MACDONALD: Forty per cent?

Mr Brody: That's right. That's what the Australian Bureau of Statistics says.

Senator IAN MACDONALD: Then perhaps we should be dealing with literacy and numeracy in Australia rather than with bankruptcy.

Mr Brody: In addition, I think that, recognising the reality we live in, putting appropriate obligations on those accepting forms to ensure that they are correct is also an appropriate way to protect people.

Senator IAN MACDONALD: Every kid today goes to at least grade 12, and a great percentage go to university, and you say 40 per cent of them aren't capable of filling in a form. The tax return is slightly different because it's not a simple form.

CHAIR: Nor is a credit contract.

Mr Brody: Nor is a credit contract, indeed. That's what the evidence from the Australian Bureau of Statistics says.

Senator IAN MACDONALD: Incredible. Well, as I say, perhaps we should be concentrating on other things. Your recommendation says, 'Require the following firms to maintain membership of the Australian Financial Complaints Authority'—has that been suggested, do you know, to either the government or the authority?

Mr Brody: Yes, it has been. In relation to the debt management firms and debt agreement administrators, the review undertaken by Ian Ramsay that led to the creation of AFCA did recommend that these providers be included within AFCA. The government did indicate that they thought that was a good idea, but they haven't actually taken any action to make it happen. There was also a report of an inquiry by the Senate Economics Committee, released just a couple of weeks ago, that made a broader recommendation around those providers and also some of the buy-now pay-later providers that they should also be members of external dispute resolution schemes.

CHAIR: Can I just clarify. You would include credit repair companies, and by 'debt collectors' you also mean debt agreement administrators?

Mr Brody: Yes, that's right. In 'debt management'—some people call them debt vultures—I include credit repair companies, debt negotiation companies, debt agreement brokers and personal budgeting services.

CHAIR: Sorry, just give me something I can quote in our report. Essentially, you're saying—

Senator IAN MACDONALD: It's in recommendation 10.

CHAIR: that AFCA should have as its membership all of those providers that work in debt in any way whatsoever?

Mr Brody: Yes, that's right.

Senator IAN MACDONALD: What you've mentioned in recommendation 10?

Mr Brody: That's right.

CHAIR: Yes. In that context, it should therefore clearly be a government requirement that that membership be required?

Mr Brody: Yes, that's what I'm saying. In fact, and to be fair, some of those providers have voluntarily joined AFCA, and that's a good thing. I think joining AFCA should be a requirement, because it's only voluntary, but alongside the requirement to join AFCA we also need a regulatory system that puts rules on those providers so that, if somebody does have a complaint, they can use those rules to ensure that the dispute resolution system treats them fairly.

CHAIR: You could do it as an obligation to join and participate, but you should not be able to opt out, by not being a member, from those dispute resolution processes or the obligations attached to those processes?

Mr Brody: Yes, you should not be able to opt out.

Senator IAN MACDONALD: Do you want me to continue?

CHAIR: You keep going, Senator Macdonald. My apologies for interrupting you. I was very interested in your line of questioning.

Senator IAN MACDONALD: I'm happy, but have you finished that line of questioning?

CHAIR: Yes, I have.

Senator IAN MACDONALD: That's fine, thank you. Recommendation 13 is about the Family Court.

Mr Brody: Yes.

Senator IAN MACDONALD: You probably know much more about the Family Court system than I do, which wouldn't require much knowledge from you, but aren't the types of examples you gave in your submission matters that would be dealt with in the Family Court?

Mr Brody: The Family Court will deal with disputes between the partners, the family partners, the separating partners. It's not the best place to resolve a dispute with a financial service provider. The concern that we're raising here is that, if a property matter has been through the Family Court and the Family Court has made orders around the resolution of property, people should not be stopped from also taking a complaint to AFCA about the conduct of the financial services provider in relation to the financial products underlying the property matters. There are a couple of case studies.

Senator IAN MACDONALD: Yes, I was looking at those.

Mr Brody: You've seen those—yes.

Senator IAN MACDONALD: Where the father-in-law's name is on the title, wouldn't it have been in the authority of the Family Court to say, 'This is what happens to the house, but one of the things that's going to happen is the father-in-law's name has to be taken off the deed'?

Mr Brody: The Family Court would need to determine issues related to the credit legislation and financial industry codes of practice, and that's not their area of expertise.

Senator IAN MACDONALD: What concerns me is you have a tribunal that then apparently overrides orders of the Family Court. Whether they were taken into account is a matter for the litigants to that, but one would have thought that the parties to that would have said, 'Hang on, we can't deal with the house, because the father-in-law's name's on the deed; we need the court to either remove that or make some other arrangement.'

Mr Brody: What we're suggesting here is that, when these matters are at the Family Court and questions about rights to do with credit laws or financial industry codes of practice arise, the matter could be stayed at that point or adjourned at that point and referred to AFCA to resolve those issues, and then it could come back to the Family Court to resolve the residual family law property issues between the parties. The problem with proceeding to resolve the dispute through the Family Court is that those credit rights are not ventilated in that jurisdiction. We're not seeking to upset the family law court orders. We'd like to do this before it gets to family law court orders.

Senator IAN MACDONALD: All right. As I say, I don't know enough about family law these days, but I would have thought the Family Court is better placed to have all matters resolved, including those, rather than a financial tribunal before or after the event.

Mr Brody: That may be one option, but the reality of our casework experience is that we're not aware of any cases where rights to do with credit legislation have been heard or considered in the Family Court. It's often too late to resolve it.

Senator IAN MACDONALD: Thank you for that. My concern is the rule of law and, if a court is making a decision and it's an appropriate jurisdiction for that court, having other tribunals overriding the authority—

Mr Brody: I understand your point. We're not upsetting that when a family law court has made a court order. We're trying to establish a process earlier in the dispute resolution so that the alternative way can be inserted to resolve the rights around lenders, banks and so forth, before resolving the substantive family law court issue.

Senator IAN MACDONALD: I'd be interested to discuss case studies 1 and 2. Perhaps this is not the right time. Quickly moving on, regarding recommendations 18, 19 and 20, has AFCA been going for long enough for those recommendations to be clearly thought through?

Mr Brody: It is early on in AFCA's processes, and I think that we're making these recommendations, really, to AFCA—that, as it's setting itself up and creating its right processes, it should take this into consideration. We're not suggesting, at the moment, any sort of legislative change in those areas. But, as AFCA's processes and policies are established, those are the matters that we think should be considered.

Senator IAN MACDONALD: Finally from me, just on recommendation 19: your experience to date has suggested that they are taking a narrow approach to the definition of a dispute—is that right?

Mr Brody: This sometimes happened previously under the Financial Ombudsman Service. For example, someone might raise that they're in financial hardship, so it's considered to be a financial hardship dispute, and the resolution of that is to resolve some sort of payment arrangement, whereas underlying the initial transaction might have been some irresponsible lending that wasn't necessarily investigated. We would like to see a dispute resolution service take a proactive, investigatory approach and look at all available claims that might relate to the consumer's complaint and not narrow it to just a one-off.

Senator IAN MACDONALD: Thanks for that. Thanks, Chair.

CHAIR: Mr Brody, thank you for your excellent evidence this afternoon and your terrific submission.

Mr Brody: Thank you so much.

CHAIR: It's been a pleasure.

LOCKE, Mr David, Chief Ombudsman and Chief Executive Officer, Australian Financial Complaints Authority

SMITH, Dr June, Lead Ombudsman, Investments, Australian Financial Complaints Authority

[15:06]

CHAIR: Welcome.

Mr Locke: Good afternoon, Chair, and good afternoon, committee.

CHAIR: Is there anything you would like to add as to the capacity in which you appear?

Dr Smith: I am the Lead Ombudsman, superannuation, advice, investments and life insurance, at the Australian Financial Complaints Authority.

CHAIR: I have before me some words that relate to officers of the Commonwealth, but I'm sure you're reasonably familiar with those provisions—

Mr Locke: Yes.

CHAIR: No problem. Feel free to make your opening statement.

Mr Locke: Thank you. AFCA welcomes the opportunity to provide evidence to the inquiry today. As you'll be aware, we are a new, independent ombudsman scheme for the financial sector. We've only been operating for a little over four months, having started on 1 November 2018. We are an independent not-for-profit organisation, established by statute. We have an independent chair in the Hon. Helen Coonan, and then a bifurcated board with five representatives with consumer advocacy experience and five with financial services industry experience.

ASIC provides an oversight role in respect of AFCA. It authorises the EDR scheme, it approves our rules and has to approve any changes to the scheme, and it has the power to issue AFCA with directions and regulatory requirements.

We're not a government body, and so we do not report to parliament through Senate estimates. However, we recognise that we play an important public role and it's critical that AFCA operates and is seen to operate in a way that is fair, transparent and accountable. We report quarterly to ASIC. We publish all our decisions—currently, in an anonymised way. But, from 1 July this year, we will be publishing the names of the financial firms involved, and every six months we will be publishing detailed reports on our work as to what we're seeing and systemic issues we're identifying, and also comparative tables of financial firms and the level and nature of complaints that are coming to us. This is the third Senate committee appearance we've made in as many months, and we welcome the parliamentary scrutiny that this provides.

We currently have over 37,000 members, and they comprise financial firms, from very large banks and insurers right through to small financial advisers. Any financial firm that holds an Australian financial services licence has to be a member of AFCA. Similarly, all approved credit representatives have to be members of AFCA. They all pay fees for membership and they pay further fees according to the number of disputes that are brought to us by consumers and small business. In the same way as other industry ombudsman schemes work in Australia and overseas, the industry funds the service so that it is entirely free for consumers and small business owners who choose to bring their disputes to us. This is really important in terms of access to justice, because what we know is that if there are fees they pose a barrier, particularly to people who are most vulnerable and least likely to use the service.

The challenge, of course, is that there is, in the minds of some, the impression that we are not, and cannot be, independent if we're funded by industry. This is in fact untrue. It's understandable that people may have that view, but it is in fact untrue. We are independent. We stand on the side of fairness and the test that we have to apply in considering every case is what we believe is fair in all the circumstances of the case. We have to call our decisions as we see them, without fear or favour. This is the guiding and fundamental principle by which I, the board and the senior team are leading the organisation.

For consumers and small businesses, AFCA provides a simple, independent and free alternative to going to court. Court proceedings, as you've heard today, are of course prohibitively expensive and sometimes painfully slow. They come with risks that mean they're really not an option not only for most individuals but also for most small-business owners. Individuals who have a dispute with a large financial firm are often in a real David and Goliath struggle. This can go on for months and years, and the stress and challenges that that brings can be immense. We exist to provide a free, more accessible alternative. We help create redress and help address the power imbalance through our inquisitorial processes to get to the bottom of the dispute and ensure a fair outcome.

Consumers and small businesses can come to AFCA with matters relating to banking and finance, general insurance, life insurance, investments and advice, and, for the very first time, superannuation. Compared with predecessor schemes, AFCA has broader jurisdiction on the claims it can consider and the compensation it can award. AFCA's rules explain what we can and cannot consider, the thresholds, the compensation limits, and the time limits—all of which are part of the inquiry today. They are all really modelled on the findings of the Ramsay review, led by Professor Ian Ramsay.

You can only bring a case to AFCA if you've received a financial service from an AFCA member and you've suffered loss. As you've heard from Mr Brody, some financial businesses are currently not required to hold an Australian financial or credit licence, and therefore they do not have to be members of AFCA. These include the debt management firms and advice firms, and we've seen a proliferation of these in recent times. The buy now, pay later providers are also not required to be members—a number are members, but they've chosen to be—and there are also others, as you've heard from Ms Carnell, who provide credit facilities exclusively to small businesses. We believe that these are clear regulatory gaps. We believe they do need to be addressed. We believe that by requiring all of these firms and providers to be members of AFCA, and also having a proper licensing and regulatory regime in respect of some of these unlicensed parts of the sector, much greater protections could be provided to consumers and small businesses.

The committee's terms of reference ask whether AFCA has the powers and resources it needs and whether its thresholds are appropriate. As I've said, we've been operating for less than five months, and we believe it needs to be given some time before we have a strong evidence base to support significant changes. Built into the legislation that established AFCA is an independent review to be established by the minister, after we've been operating for 18 months. I have to say, though, that the financial thresholds and compensation limits are complicated. It isn't straightforward. Actually, if you are designing a system like this where you want to ensure access to justice, the simpler those rules are the easier it is for people to actually bring cases. The thresholds and compensation limits were set before the Hayne royal commission, before we actually understood the nature and extent of some of the issues that we've been exposed to through that inquiry. We understand why there could be fresh consideration of those levels now.

We're open to making further adjustments to our rules and remit as well as our processes to ensure that we meet community expectations and the standards of fairness that are required and to ensure that AFCA itself is operating in line with the model litigant rules as well as holding our members to them. We are wholly focused on delivering fairness to consumers and small businesses and also, of course, treating industry fairly. On Monday of this week, we started a consultation into rules changes required to implement changes to AFCA's authorisation. AFCA's authorisation has already been changed by the Treasurer to enable us to hear unresolved complaints by consumers and small businesses for conduct going back to 1 January 2008. We are working on the basis that we will be hearing those matters from 1 July this year, and so there is a four-week consultation on an addendum to the rules.

We receive between 800 and 900 calls a day into AFCA and we get between 200 and 300 disputes a day. What we have seen is a real demand for the service and an awful lot of consumers who have been treated poorly by the financial services sector, in some circumstances over a number of years. In just four months of operation, we have received 23,681 complaints, which is a 42 per cent increase in the numbers that the predecessor schemes were receiving. We have already resolved 49 per cent of those matters, and we are working our way through the rest. We have awarded—or the amount that has been obtained by consumers and small businesses as a result of that work—$54.38 million in compensation, and our current average time for resolution of complaints is 29 days.

AFCA plays an important role not just in resolving individual disputes but in the identification and reporting of systemic issues and also serious contraventions by firms. Since 1 November last year, we have opened 39 investigations into potential systemic issues that we have identified and we have eight investigations into serious contraventions of the law. We have also continued with 56 investigations that we already had in train into definite systemic issues identified by the predecessor schemes. The most common sorts of issues we see in these cases is where the firm has been involved in misleading conduct. As an example, one systemic issue affected 2.3 million consumers and related to the cancellation of insurance policies. Our action has required the financial firm to take steps to appropriately inform consumers so they have a clear understanding of when their policy would lapse and are able to take appropriate action.

Our strategic intent includes influencing the behaviour of financial firms to improve standards and practice and ensure that they engage with dispute resolution obligations. We are assessing how we can better articulate our approach to fairness, and we are reviewing our approaches to ensure that they always lead to fair and consistent outcomes. This project will focus on our decision-making processes, including procedural fairness and

substantive fairness, and our assessment of complaints to determine whether a financial firm is engaged in fair conduct and fair treatment in the provision of services to a customer.

We are a new organisation but we are already reviewing our end-to-end complaint-handling processes to make sure they are effective, easy to use and fair. I have to say that a lot more needs to be done to make sure that we are a more accessible service, particularly to communities who have traditionally not used AFCA, because of language needs, health needs, cultural backgrounds or other vulnerabilities.

The practices uncovered by the royal commission have adversely affected hundreds of thousands of people across Australia. It has resulted in not only a high demand for our service but also a very significant demand for the services of community legal centres and financial counsellors. Every hour, every day, every week, we are referring thousands of individuals who are contacting us to financial counsellors and to community legal centres. The challenge we have is that we know from our callers and from the contact back and also from our engagement with these services that there is not, of course, universal coverage and they do not have the resources to be able cope with many of the demands.

We also know that many small businesses are really struggling, and small-business owners often have nowhere to go to get legal advice. They often approach their accountant or their bookkeeper, but these community legal centres are prioritising services on individual consumers in most need, but actually that means that small businesses very often have got nowhere to go and they very often do struggle to even pursue matters. So this huge work that needs to be done is one of the reasons we have appointed a lead ombudsman for small business and we are working in that space to try and increase the skills and capacity internally for us to be able to help as well.

Improving access to independent community based lawyers in Australia's most disadvantaged communities, including Aboriginal and Torres Strait Islander communities, people experiencing domestic and family violence or those with disability and with people with English literacy issues, is critical. We see that consistently and the evidence of the royal commission showed in some circumstances predatory behaviour by financial firms, particularly with Aboriginal communities, and we saw appalling behaviour with regards to some individuals who had disabilities as well. The evidence that is coming before the royal commission into aged-care services at the moment also demonstrates some of those issues. As I said, we refer clients to community legal centres and what we know is there are often long delays, consumers financial problems are exacerbated and their personal wellbeing suffers and that is not through any lack of effort or diligence on the part of the community legal centres.

Finally, we think that community legal centres and financial counsellors do play an important role. We are an apolitical organisation but we would support any measures from any of their political parties to ensure that those services are funded adequately now and in the future in a sustainable way. That is all I was going to say by way of introduction, but Dr Smith and I are happy to answer any questions.

CHAIR: I will begin by asking you about the policy settings here. You are an independent organisation. You have said that questions around thresholds for complaints on caps in findings are, in large part, a question for government but you have outlined that there are problems with them. If you were in my shoes, deliberating on these questions, surely there should be some direction from within government to support you in fixing that problem?

Mr Locke: There are a number of issues with the threshold. For superannuation matters, the jurisdiction is unlimited but for other matters involving individual consumers, we can consider matters where the financial loss is up to $1 million but we can make an award of only half a million dollars, and then there are separate thresholds within that, so there is a non-financial loss threshold of $5,000. Straight away, before we even talk about small businesses and primary producers and different thresholds there, you can already see that there are a number of different tests that have to be applied in the context of that.

Dr Smith: There are seven compensation caps alone in relation to the limits that would apply just to compensation and then you've got the jurisdictional cap as well—how much loss—over which a consumer cannot bring a complaint to us. There have been many conversations around the compensation caps, for example, in relation to life insurance matters. We can see that the cap related to monthly income protection insurance, for example, is $13,400 per month for that stream of products. We have had only two that have been outside that limit in their time at AFCA, which is less than five months, as have you have heard.

But it might help if I gave an example of why that particular monetary cap can be unfair to a consumer. At the moment we have one complaint we are looking at where the amount is about $1.25 million. The complainant has income protection cover and that started on 3 October 2015. The amount of benefit he is entitled to receive each month would mean that currently his dispute stands at $882,954. However, that accumulates every month, so, if we extrapolate it out, based on those amounts his claim will be worth $2.25 million by August 2023, when he

turns 65. So, indeed, the $13,400 cap is quite limiting and even the $1 million cap does preclude some people who may even be on the average monthly earnings from raising and then pursuing their claim before AFCA.

CHAIR: Particularly regarding life insurance, if you're insured over a period of time but you're quite young, you have a catastrophic injury and for some reason that doesn't get paid out, that $1 million cap does seem contrary to the purpose of the insurance to start with.

Dr Smith: The overarching principle of the scheme should be that it's simple and easy to use, and one of the factors which makes it complex is the way in which we need to test and assess, up-front, each of these caps and their application to every complaint. We also have one that relates to a life cover benefit, so there's a deceased amount. That is $1,300,000. Again, we can exercise discretion to allow these matters in over the cap, and we also now make it mandatory that we ask the financial firm for its consent to deal with these matters if it's over the cap, but, again, if the principle of the scheme is that it be simple and easy to use, moves towards one monetary cap and one jurisdictional limit would be—

CHAIR: Whether it's $500,000 or $1 million, it seems to me that, if as a life insurer you were going to be obliged to pay out more than $500,000 just to meet the terms of the policy, you'd be looking to push it into dispute resolution anyway. Surely the value of the policy and what the expected outcome might have been under that policy should be a relevant factor in deciding whether a cap should apply at all.

Dr Smith: The distinction between the values and the existing monetary and compensation caps could be removed because that difference can be confusing and it does leave a clear gap between the loss that might have been associated with the conduct and that which can be compensated. In doing so, there may be a $2 million cap, for example, which looks at all loss—direct, indirect, non-financial—within the one cap rather than through a distinction between four and five different heads of loss.

Mr Locke: I think it's fair to say that, with the Ramsay review, the representations that the Financial Ombudsman Service made at that time were actually to have a single cap, not to have these two thresholds, with financial loss and then the compensation limit being less. The representations that were made to Ramsay at that time were to have a single limit. That wasn't accepted, following consultation—and there was obviously extensive consultation at that time.

CHAIR: What kinds of disputes might exceed that $500,000 cap? Life insurance would be one of them.

Dr Smith: If we also look at financial advice disputes that we see and assess, there are many related to self-managed superannuation fund advice, for example, and investment in property. There are also many who are moving towards retirement who may have investments that are well over that $500,000. In remediation programs that we've conducted with financial firms, those caps are usually waived, and, whilst we haven't seen many matters that have been outside of our terms of reference in relation to the caps, we do feel that might be because consumers are self-selecting. They know what the cap is and, therefore, they don't come to AFCA.

Mr Locke: Or, if they are getting financial advice, they're getting financial advice that they can't go to AFCA, which would be, on the face of it, correct.

Dr Smith: Bear in mind that those caps actually apply per claim. So it could be an advice matter, for example, where every statement of advice is a claim if there is inappropriate advice given in every one of those and, therefore, the caps apply to the claim, not to the whole matter.

CHAIR: Does that mean there are multiple caps and you add them up?

Dr Smith: Correct.

CHAIR: So you could be looking at $4 million or $6 million—

Dr Smith: Indeed.

Mr Locke: In some circumstances, you may, yes.

CHAIR: or $10 million for multiple acts. In that context, if you've got a cap of something like $2 million for credit insurance, financial advice, non-financial loss and indirect financial loss, does that start to get somewhat more realistic than the current $500,000?

Mr Locke: We haven't seen a huge number of cases that have actually come to us where we've had to refuse on the basis of those financial thresholds. But it is very early days, and of course we won't see the ones who are self-selecting or being advised not to come to us. But to give you a proper evidence base to say, 'This is how many would be coming in; this is what the impacts would be,' to be honest, we don't have that at the moment.

CHAIR: But, in terms of saying that there are people suffering, you could acknowledge that there are people who would have suffered losses above that and who might otherwise be ineligible?

Mr Locke: Yes, and I would say that I think the $5,000 limit in respect of non-financial loss is too low. There are situations where we've actually exercised discretion to go above that, but we're seeing many situations with pain, suffering and distress that have been caused as a result of, in some circumstances, very poor conduct and very poor behaviour, and it is at times a bit woeful.

Dr Smith: That includes the limit for consequential loss and also for professional costs and travel. In those instances we do have a discretion, and we have awarded up to $30,000 for professional costs. But $5,000 for professional costs is quite low if the matter is complex or if the financial firm is pursuing it vigorously, defending and taking particular technical points on law as well. Whilst we have the ability to award additional professional costs, and we do, the limit can be a barrier to consumers fully accessing the service and being able to articulate and pursue their claim.

CHAIR: Thank you; that's helpful. One of the issues that's been put to us by the Consumer Credit Legal Service and the Consumer Action Law Centre—and I've spoken to them about individual cases to which this problem pertains—is where they've asked for documentation in order to bring a case to the ombudsman, or now to you in AFCA, but the financial institutions involved have not met their obligations on the provision of documentation in relation to their relationship with their customer. What are you doing about this issue? Are there things that need to change in rules or legislation to ensure that documents are provided in a timely manner to you and also to those representing them in community legal services or financial counsellors?

Dr Smith: Traditionally, the schemes have had an inquisitorial approach, and that means that we do request that relevant documentation be provided to us and then that is exchanged with the consumer. In circumstances where we feel that a firm is not providing those documents, we have traditionally used an adverse warning letter, where we have advised the firm that if those documents are not provided we may form the view that they are adverse to their case and, therefore, hear the matter and determine them in favour of the consumer. But we understood, through the royal commission, and acknowledged that there were circumstances where materials clearly hadn't been provided to the predecessor schemes and where the engagement of the firms had been to obfuscate. We have used the systemic issues power, historically, as well and reported misconduct by firms in not providing us with documentation and cooperating with EDR. But we are fully supportive of the amendment to section 912A in relation to cooperation with AFCA and a firm having to use reasonable means to provide documentation and to cooperate with the service—and we would use that not only in relation to documents in the dispute but also in relation to the provision of documentation associated with the professional indemnity insurance policy that may be in place, the current levels of that and whether or not there have been notifications of claims.

Mr Locke: It is completely unacceptable for a financial firm to fail to provide documents that are relevant to AFCA, and it is completely unacceptable to be misled about the existence of documents. Certainly two of the case studies that Commissioner Hayne looked at exposed that very conduct. In my view, that is disgraceful and something that AFCA will call out in the strongest possible terms. Your question, though, is not about AFCA; it is really about the earlier stage when the individual consumer representative—

CHAIR: Yes; to work out whether or not there is a case.

Mr Locke: I think in those situations, the financial firms are already obliged, as Mr Brody said, to provide documentation. If they don't, I think that that is relevant if we are looking at the issue of what is fair in all the circumstances when matters come through to us. I would support anything that reinforces that obligation on financial firms to provide that documentation.

As I've said, if you are an individual up against a very large organisation, very often they have all the lawyers, they have all the documents and they have all the power and information, and you may not have these records yourself. It should be paramount that they act in an appropriate way and, as has been said, I think the model litigant responsibilities again should be how financial firms are conducting themselves, in the same way as it should be how AFCA is conducting itself.

CHAIR: In the context of the request for documentation, I've seen the evidence myself firsthand of the delay in responding to requests from the local consumer credit legal service in WA, where banks have not responded in a timely manner. They already have an obligation. What is it that we should be doing to ensure that that obligation is met? We could put in a regime where there is a notifications process whereby anyone requesting documentation registers that request with you and, if it is not complied with, you've then got that on your books for future reference—I'm assuming at the moment that you are relying on the emails and the evidence of those organisations months down the track—and you can have a conversation and say, 'I can see that the bank took a long time to comply with this request or didn't comply.' If you have to work out whether or not there is a case to be answered, it is getting closer and closer to you before someone's representative has even had a chance to look at it.

Dr Smith: One of the mechanisms for the provision of documents to consumers now is through industry codes of practice. That includes, for example, life insurance claims where you have to provide not only the reasons for why the claim has been denied but also any document that has actually been relied on in relation to that. As you would know, those codes of the practice are under review at the moment in relation to which provisions may be enforceable at law against the firm itself. In the ABA code of practice those types of code obligations exist.

CHAIR: A code obligation, if it is not legislated or enforced in some way or if there are different codes applying in different places, seems like a perfect recipe for companies to drag their feet, noting that even the most experienced community legal centre lawyer is going to have differentiate between different codes of practice in different kinds of groupings of companies. What should we be doing to fix that?

Dr Smith: I think those provisions could be reviewed and extended. Also, in relation to the cooperation with the EDR scheme—and in section 912A(1) there are provisions to have effective and reasonable IDR and EDR obligations, and this is tied to Regulatory Guide 165, as you know—there could be amendments to ensure that those obligations include the provision to consumers of documentation that relates to their claim at an earlier stage.

CHAIR: Surely in any consumer situation, people should have a right to their own documentation, irrespective of which industry it is—whether it's insurance, superannuation or health.

Mr Locke: I would agree with that but we may not be the best people to be advising in the context of the mechanism by which this may be achieved. Certainly in the context of AFCA we can talk about how that could be done, but, more broadly—

CHAIR: But the principle should be that people have access to any information that a company holds about them that's relevant to them.

Dr Smith: Bear in mind we also handle complaints related to the Office of the Information Commissioner and that many of these documents are subject to the privacy obligations as well.

CHAIR: Indeed. Thank you.

Senator IAN MACDONALD: Thanks for coming along today and helping us out. Have you been here most of the day?

Mr Locke: We've been listening the whole day but we've been here since about one o'clock.

Senator IAN MACDONALD: You would have heard the evidence about public indemnity insurance for financial advisers and the inability of victims to actually find out who the insurer is. Apparently you're allowed to take direct action against the insurer if you can find out who it is. Do you have any comment on that? Is it something you could help with? The suggestion was that for financial providers there should be a register of who their public indemnity insurer is so that, in the case of them going belly up, the victim could sue the insurer privately.

Dr Smith: Certainly one of the challenges we have at the service is in ensuring that our determinations, our decisions, are paid, and one of the mechanisms that financial advisers and other licensees rely on is professional indemnity insurance. Under the law, they're required to have adequate compensation arrangements, and those matters need to be reported to the regulator. We have considered whether or not there may be a change to the rules to ensure that we are provided with certificates of currency. We often deal with the regulator now to obtain that information.

Senator IAN MACDONALD: Who's the regulator?

Mr Locke: ASIC.

Dr Smith: We often deal with ASIC now in relation to obtaining that information from the firms if it can't be provided to us. There is another mechanism that could be considered. They're clearly not members of the Australian Financial Complaints Authority at the moment but they do provide financial services to small businesses, particularly those small firms that rely on that insurance, and if they were members of the Australian Financial Complaints Authority they could be joined to complaints and be subject to our processes.

Senator IAN MACDONALD: So what you're saying is that you're looking at that?

Mr Locke: The position is that ASIC have that information and—

Senator IAN MACDONALD: But the evidence to us is that it's difficult to get from ASIC.

Mr Locke: We will ask for it if we think that it's relevant to the issue that we're considering, but one of the things that is under consideration by AFCA is whether we require that information to be provided, in which case it could be made available to consumers. I think what I would say is that it's something that we're looking at.

Senator IAN MACDONALD: Okay. I think you'll find that this committee will be recommending that that happen at least, and doing that unanimously, I'd suggest.

Mr Locke: As Dr Smith has said, there is an issue as well about whether the professional indemnity firms themselves should actually be members of AFCA as well.

Senator IAN MACDONALD: Which way you do it doesn't matter. It seems incredible that these public indemnity insurers can escape liability simply because they're not known.

Mr Locke: Yes.

Senator IAN MACDONALD: It then means, of course, that the taxpayer, under compensation of last resort, has to pay out, rather than the insurer who has been paid a premium to pay out. So I'd certainly urge you to look at that, as I'm sure the committee will.

Did you hear the evidence of Maurice Blackburn at all—

Mr Locke: I have, Senator.

Senator IAN MACDONALD: or have you read their submission? Maurice Blackburn, because of their reported—I don't know whether this is true—political affiliations, are not someone I would normally quote, but I think their submission in this case was very, very good. They made a number of recommendations, all of—

Senator WATT: I'll wear that as a badge of honour, Senator Macdonald—a recommendation from you!

Senator IAN MACDONALD: Well, I reckon that—

CHAIR: Senator Watt used to work for them.

Senator WATT: I did.

Senator IAN MACDONALD: Oh, did you? Well I take that back then!

Senator WATT: I think you've called me an ambulance chaser from Maurice Blackburn, even though I never did personal injury law—but that's another story.

Senator IAN MACDONALD: I was only quoting what your colleagues in Brisbane told me! But we won't go into that. Yes, I thought it was a very good submission, with recommendations that I, with my very, very limited and outdated knowledge, thought were seriously very good. What I would ask you, perhaps on notice to save time, is to indicate which of those seven recommendations by Maurice Blackburn could not be adopted because of technicalities or the legislation, or should not be adopted for policy or other reasons. For example, the last one, recommendation 7, talks about professional indemnity insurers. That reminds me; I think I was calling them public professional indemnity insurers. So could you take that on notice—

Dr Smith: Yes.

Senator IAN MACDONALD: and let the committee know. I don't want you to go to a great deal of effort. For some you might say, 'Under current legislation, that's not possible, but an amendment to the act could make it possible,' or 'We don't think this is at all doable because of X, Y, Z.'

Mr Locke: We're very happy to take that on notice and to provide that. There was some evidence that was given by Maurice Blackburn with regard to these legacy disputes and what was covered, and I would just like to clarify the position on that because I'm not sure that was entirely correct. The matters that we will be able to consider from 1 July this year will be any financial disputes involving an AFCA member where the issue that gave rise to the dispute was on or after 1 January 2008. I think they were talking about a six- year period, but actually what we're looking at is going back to 1 January 2008. All those matters will be able to come to AFCA if they're within the current AFCA financial thresholds or the definition of 'small business'. The only exceptions will be if the matter has already been resolved by the court, if it was dealt with by the predecessor EDR schemes or if the consumer has already settled the matter. So any of those outstanding matters—and we believe there will be tens of thousands that wouldn't have been within the jurisdiction of the predecessor schemes—will be able to brought from 1 July this year. We think that that's incredibly positive because it will enable many people who didn't get justice, who didn't get their matters properly looked at, to come to AFCA for us to consider those matters and work through those. But I think some of the evidence was about a six-year period, and that wasn't quite right.

Senator IAN MACDONALD: I don't want to verbal them, but my understanding was that they said that your rules provided that you could go back only six years—your limitation period was six years—whereas the government or you, whoever it was, has now decided that you will go back to the first—

Mr Locke: That's right. There's a consultation paper on a change to our rules that was issued on Monday, and that's the effect that it will have—back to 1 January 2008.

Senator IAN MACDONALD: Okay, but I think Maurice Blackburn was highlighting that, by government decree or by your consultation process, you're going to go back to 2008, but that your rules specifically provided you could go back only six years.

Mr Locke: The rules are changing, in fact, to enable us to do that.

Dr Smith: That's what we're consulting on—the change to the rules to let that happen.

Senator IAN MACDONALD: Okay. That's excellent. You said in your evidence that the cap on the amount you can deal with, which is $500,000, can be waived by the parties. Is that right?

Mr Locke: It can.

Senator IAN MACDONALD: So, if someone had a $5 million dispute with a bank, and the bank were agreeable, you could deal with that?

Mr Locke: We can. The bank will not necessarily be agreeable, though—but, certainly, if they are. The approach that we're taking at AFCA is a variation, really, on the approach of the predecessor schemes. I start with the assumption that, if someone is bringing a dispute, this is something we should be doing our best to try and handle, and we start with the assumption that it's within our jurisdiction unless there is a very good reason that it's outside it. If it's just over the financial limits, then what we are doing now is going to the financial firm and saying, 'We think we can resolve this,' and we're seeking their consent. Part of the reason I'm doing that is I want to be able to ensure that, if the thresholds are looked at either in 18 months or sooner, I have an evidence base and can say, 'We've been to bank Y 800 times and they've refused in all of these circumstances,' or, 'They've accepted some of these and haven't accepted others.' We are trying to handle any matter that we possibly can. When we look at the matters that are excluded, the No. 1 issue at the moment, the 28 per cent that are being excluded are where no financial service was provided.

Senator IAN MACDONALD: Hang on; you're answering a question that I haven't asked.

Mr Locke: It's a danger with me! I'll try and restrain myself.

Senator IAN MACDONALD: We have limited time.

Dr Smith: Bear in mind that the facility limit for small-business credit facilities, primary producer and non-primary, is $5 million under our current jurisdictional limits. It's the compensation cap that's two-in-one on those matters. We were talking about most non-superannuation type matters—for example, investments and financial advice—that would fall under a compensation cap of $500,000, to be clear.

Mr Locke: Or insurance matters, even with small business.

Senator IAN MACDONALD: You're not here to deal with individual cases as you sit at a Senate committee hearing but you may have heard the evidence, given publicly and openly, of a previous witness, Mr Selwyn Krepp, who would not fit within your rules at the moment. As I said to Mr Krepp publicly, I've been around long enough to know that there are two sides to every argument. His story, at face value, is an incredible story. The Commonwealth Bank, according to his evidence, seems to have taken a very belligerent and quite unfair approach. If someone in that category—not particularly Mr Krepp—came to you, do you approach the other party and say, 'It's over the limit,' or, 'Look, this is really a commercial transaction'? Or is it up to the applicant to try and get those caps waived?

Mr Locke: At AFCA, the practice now is that we would approach the financial institution and ask them to agree to consider the matter. That's the practice that we now take. That wasn't the practice of the predecessor organisations; it would have been just to rule it out.

Senator IAN MACDONALD: I know you're very busy but I think I've just got you another customer.

Mr Locke: I'm actually seeing Mr Krepp on Monday.

Senator IAN MACDONALD: Are you? Okay, fine. There were some recommendations of the Consumer Action Law Centre that I thought had some merit. They acknowledge that you had been in operation for only four or five months and that you could hardly start recommending changes then. I don't want to put any great clerical task to you but I identified recommendations 4, 6, 10, 13, 18, 19 and 20, and had some discussion with the law centre about those. Could you have a look at those recommendations and possibly have a look at the explanation given by the centre of why it did them, and, in your ongoing review, which I understand that you are doing, see if there is any merit in any of those recommendations that you might be able to usefully take some comments from?

Mr Locke: We will take that on notice. There are a number of recommendations in that submission that we wholeheartedly support, and there are a few that we think need a bit of further consideration. We will take that on notice and provide that to the committee.

Senator IAN MACDONALD: Thank you.

Senator WATT: Thanks for joining us today. I want to ask a couple of things about the processes that AFCA uses. We've alluded to some of this already. Some consumers have noted that they don't feel that AFCA, or at least its predecessor organisations, has been sufficiently rigorous in applying an inquisitorial mentality to its task and has not worked to identify potential claims or courses of action that may be open to applicants based on the general facts presented. Do you think that that's a fair criticism, and is there anything that's planned, as AFCA is being established, to ensure that this is different in the future?

Mr Locke: I'm sure, with an organisation of this size and the number of cases, that there will be cases where that may well be the case. Clearly my role is to ensure that we are doing the best possible job and that we are actually applying a proper inquisitorial approach to every single case and trying to get to the very bottom of what the issue is and trying to resolve that in a fair way. There is a whole range of work that we're doing around the fairness piece, because this is really what's at the heart of this. There are process issues as well, but fundamentally it's: are we really treating the parties fairly in the consideration of this? One of the pieces of work that I commissioned, as a new chief executive, is a piece of work that's being led by Professor John McMillan, former Commonwealth Ombudsman. That is a review of a couple of hundred cases from AFCA, to look at decision-making. We've particularly looked at cases that people have raised that may be problematic or where the predecessor organisations may not have got that right. We're doing forensic reviews in respect of that. I wouldn't mind if Dr Smith just answered some of the other points we're doing on the fairness piece.

Dr Smith: The fairness project has two elements. It's how decision-makers are actually engaging in our role to ensure that there is fairness, and that includes the opportunity to be heard. We do have inquisitorial processes. Indeed, I was in a meeting this week where the financial firm challenged that we had perhaps reframed the original dispute to include issues that they felt had not been canvassed earlier on. The other important part of the fairness project for us is: what do community standards look like now and what constitutes fairness between the financial firm and the consumer in that commercial relationship? We've commissioned the University of Melbourne to assist us with a review of what constitutes fair service and fair treatment in that relationship and then distil that into a set of simple criteria that our decision-makers can use to ensure consistency and predictability of decisions going forward. That's because we have two mandates. One is to ensure we make decisions that are fair in all the circumstances, having regard not only to the law but also to good industry practice and to community standards, and that superannuation trustees, indeed, only make decisions under their trustees that are fair and reasonable in the circumstances. An example of that would be: what criteria might we use when looking at proposed unfair contract terms in a life insurance dispute and how might they apply? In a market trading matter, what would we say are the criteria against which we would assess whether a firm had exercised discretion under those terms and conditions to take an adverse decision against a consumer? So we are mapping what constitutes fair service and fair treatment in that context, using the benefit and expertise of the University of Melbourne to do so.

Mr Locke: We're also investing a lot of time and money into training staff, because it's about the individual staff on the front line who are handling these disputes and the quality of that and also the messages and priorities that are coming from the top of the organisation. I am very clear that process must not be king, that it is actually about the fairness of the decision. It's the fairness of the outcome and treatment that takes priority. Although I want us to deal with things in a timely way, the key performance indicators in timeliness and all of that must not be the priority. It must be the quality of the decision-making. It must be how the parties have been treated. So I think it's a work in progress. I wouldn't say it's perfect. But my priority is to ensure that, day in and day out, that's what we are delivering. That's what we've got to do.

Senator WATT: That's very heartening to hear. Would you agree, though, that there possibly is a need for some change to AFCA's rules and processes to make clear that it's AFCA's role to assist applicants to determine potential claims that they may have based on the facts of the dispute as they are presented, recognising that applicants often lack the legal knowledge to identify courses of actions and remedies that are available to them?

Mr Locke: We already recognise that. I don't actually think there is a need to change the rules to do that. I think what's needed is to ensure that the leadership of the organisation are consistently doing—

Senator WATT: So you think the processes are in place and it is a matter of the culture—

Mr Locke: I think the processes are in place, although we are changing processes. I am very much trying to devise the new processes around the consumer, particularly vulnerable consumers. They are just simple changes. For example, the practice has been that once a matter gets resolved the first thing that happens is the case gets closed and then there is an expectation that the parties will sort out the payment. That, to me, is not right. We should be not closing matters until we know that the consumer has received the payment and that the matter has

been properly settled. So there are a number of issues like that that we are already changing. I think it is about training and holding the leadership to account—

CHAIR: But there would be nothing wrong with putting that in your rules.

Mr Locke: There would be nothing wrong with that, no.

Dr Smith: There is a little bit that mandates that AFCA assist consumers to articulate their dispute.

CHAIR: So there is a rule that—

Mr Locke: There is already a rule.

CHAIR: Which rule is that?

Dr Smith: If you will bear with me, we will get you that rule.

CHAIR: That would be great. Take it on notice.

Mr Locke: Yes, we will provide you with that rule.

CHAIR: In the meantime, I'll ask this. There are cases that may have been excluded from the Financial Ombudsman Service or the CIO in the past on the basis that the applicant had no claim or where the CIO made a determination in favour of the financial service provider without considering claims that were reasonably open to the applicant on the facts. That might be in cases where the applicant can now demonstrate that such claims were reasonably open to them. Would you support a review of these cases being conducted by an independent retrospective compensation scheme?

Mr Locke: The first part of the question was really about matters that may have been turned away, effectively, or ruled out by FOS or CIO. For all of those matters it will be possible for them to be brought under the changes that are already being made to the rules. The second part is: what about what we can't consider? What AFCA is prevented from considering is a case that was previously dealt with by FOS or CIO. That's if there was a determination or a settlement. Certainly if the predecessor organisations got that wrong then of course I would have no objection to that being reconsidered and determined. I don't think that it would be appropriate for AFCA to do that or for AFCA's rules to be changed to do that. But if that were to be done by—

CHAIR: An independent retrospective compensation scheme—would you be open to the role of that?

Mr Locke: Commissioner Hayne didn't recommend that. One of the things Commissioner Hayne could have done was recommend that change. I think there are challenges if you are reopening matters that perhaps have gone to court or perhaps have been dealt with through the ombudsman scheme. I don't think it is entirely without problems. But, fundamentally, I start from the standpoint of what is fair for consumers. If things were got wrong then I think they should be set right.

CHAIR: Yes, okay. Thank you. That might include cases that have had what seems like a legal resolution before the court, such as even bankruptcy proceedings, whereby it seems legally resolved but the initial misconduct was never addressed in that court finding.

Mr Locke: I really think it is a decision for government to make as to whether they wish to do that. We're an apolitical organisation, and I don't want to bring us into that policy position.

CHAIR: No.

Mr Locke: I start from the standpoint of what's fair for consumers.

CHAIR: Yes, and whether the injustice itself was addressed or not.

Mr Locke: And I start from the standpoint that if there is injustice then, the sooner that's set right, the better. But I do think it's really a matter for government rather than for us.

CHAIR: Thank you.

Dr Smith: Senator, with the rules that you asked for before, A.2.1 was the principles underpinning the scheme, and A.3.2 outlines that AFCA is to assist complainants to submit a complaint. Then there is guidance in our operational guidelines around what that actually means, and that includes reference to the inquisitorial processes and the assistance in articulating that complaint throughout the process.

CHAIR: In other words, would you take that to mean that it is AFCA's role to assist applicants to frame their claims?

Dr Smith: Absolutely.

Mr Locke: Absolutely.

CHAIR: You don't think that needs to be more specific? Would you welcome any clarification that that's the case?

Mr Locke: I don't think it needs clarification, but if the decision were to change the rules then we would have no objection to that. But I don't think it's necessary.

CHAIR: Do you require the consent of the financial service provider in that case?

Mr Locke: No, there's no requirement.

CHAIR: Thank you. In relation to retrospective compensation schemes to consider past cases if there were an error of law that had been made by FOS or the Credit and Investments Ombudsman, you believe any such scheme should be located independently of AFCA, and that's a decision for government.

Mr Locke: I think it's a decision for government, but, if you're looking to reopen decisions of the predecessor schemes, I can see why that would not be done by AFCA. But I do think AFCA does have a role in considering matters that haven't been properly considered.

CHAIR: Yes, previously. If you like, we would need to work out how we deal retrospectively with the law in some cases.

Mr Locke: There are a range of issues that would need to be thought through with regard to that.

CHAIR: Yes. You note in your submission the important role that the legal assistance sector provides, and you support a stable, ongoing resourcing of the legal assistance sector. Can you outline how that sector currently assists AFCA with its work—both community legal centres and financial counsellors, and anyone else that's relevant?

Dr Smith: Certainly. We have many consumers who have had the assistance of either a financial counsellor—for example, with our hardship complaints—or a community services lawyer either in lodging and articulating a complaint up-front or in representing that consumer throughout the process. We are able to make awards for professional costs incurred as a result of that, which would include travel time or particular costs that might have been incurred in that representation. Indeed, in the remediation programs that many of the major institutions have established and run, they have provided a facility for consumers to access $5,000 to seek independent legal advice in relation to an offer of settlement that might be made.

Mr Locke: Every day, we are referring hundreds of people, to be honest, to these services. A lot of people will contact us, perhaps because they've seen some reference to us. They may have had a decision that tells them to come to us, or it may just be through word of mouth. But what we realise from talking to them is either that they need to get some help from a financial counsellor or that it appears that there is a legal issue and they really need to go and see a lawyer about this. The challenge is that, if you go to an ordinary high street firm, they won't necessarily have the expertise to be able to deal with these matters. So we refer a lot of people through to community action or to the sister organisations in WA, New South Wales and elsewhere. We have a lot of engagement with them as well. We've set up a consumer panel. We attend and present at all the conferences. We know the vital service that they provide. It's absolutely vital for people. Financial problems and financial hardship lead to a huge amount of relationship breakdown and to high levels of mental and physical health issues. We regularly get callers who are suicidal and callers who are extremely distressed.

We are not the right body to see those individuals face to face and try and work out the issues. As well as being referred to Lifeline and counselling service, people really do need expert advice. So I think it is absolutely critical, and it's a key component of the system. As I said, we can make our services much more accessible and much more outward facing, and we're certainly going to do that, but many very vulnerable consumers are always going to need help to be able to work through this.

CHAIR: There are schemes in other countries whereby industry is levied to pay for independent financial counselling and advice. Would you see that proposition as being viable in Australia without compromising the independence of that advice? By way of example, the UK has a scheme, which at times has been criticised for its industry involvement, but other parts of it seem to be working very well in being levied by industry but not being compromised by that funding source.

Mr Locke: As you can tell, I'm from the UK originally, and I have an understanding of how this scheme works in the UK. I believe that although there are issues it does fundamentally work pretty well. We have made submissions to both the royal commission and other Senate committees with regard to this and we have made reference to that scheme as a model of how some of these services could be funded. Ultimately, though, it is a matter for government to determine how these matters are funded, not for us to comment, but what we would say is there is a need for these services to be funded properly.

CHAIR: You would have noted that the opposition has put forward a policy in this regard. Have you heard any response from the government about whether they're prepared to levy industry to pay for those?

Mr Locke: I think you'd have to ask the government that.

CHAIR: I thank you both very much for your time this afternoon. That draws our proceedings to a close. Thank you, everybody, for a very worthwhile day of hearing.

Mr Locke: Thank you.

Dr Smith: Thank you.

CHAIR: Thank you, Senator Macdonald. Thank you, Sean. Thank you, Hansard. Thank you, everybody. Thank you to all our witnesses and those who've made submissions.

Committee adjourned at 16:12