



Law Council
OF AUSTRALIA

Office of the President

2 April 2019

Senator Louise Pratt
Chair, Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator Pratt

Resolution of disputes with financial service providers within the justice system

1. The Law Council is grateful for the opportunity to contribute further to the inquiry by the Senate Legal and Constitutional Affairs References Committee (**the Committee**) into the resolution of disputes with financial service providers within the justice system.
2. As you are aware, in addition to the provision of a written submission on 8 March 2019 the Law Council also appeared at a public hearing of the Committee on 21 March 2019. At that hearing, questions relating to the following three topics were taken on notice:
 - details of a proposal for the Australian Financial Complaints Authority (**AFCA**) to establish an independent panel of lawyers to assist in certain complex matters;
 - additional safeguards that could be put in place to prevent financial service providers from using repossession as a first resort; and
 - thoughts on changes to legal process in relation to housing repossession matters, including greater use of alternative dispute resolution.
3. Further responses to these matters raised at the public hearing are provided below.

Establishment of an independent expert panel

4. The Law Council's Australian Consumer Law Committee (**ACLCLC**) has previously raised the prospect of a process by which AFCA can direct an applicant to obtain independent legal advice at the cost of the financial service provider. This proposal by ACLCLC was based on an acknowledgement that in disputes involving complex financial advice, complex products or complex loss calculations, the costs of obtaining legal advice and independent accounting advice where required can be significant and in some cases prohibitive.

5. Further particulars of this proposal of the ACLC can be found in an earlier submission by the Law Council to The Treasury in relation to its 2017 consultation on improving dispute resolution in the financial system.¹ This submission is provided to the Committee as Attachment A.

Safeguards to prevent financial service providers from using repossession as a first resort

6. In the course of the public hearing, Senator Watt asked if the Law Council had considered whether there were any additional safeguards that could be put in place to prevent financial service providers from using repossession as a first resort.
7. The Law Council is not in a position to provide a comprehensive response to this question, as it is not possible to undertake the required consultation with its Constituent Bodies within the available timeframe. Repossession proceedings occur in state and territory courts, which each have their own process and procedure.
8. However, in terms of general comments on safeguards, the Law Council emphasises the role of alternative dispute resolution as a primary means of resolving most financial services disputes and notes the importance of those in default with financial service providers to be given early advice and support.
9. It is also critical that role of early and accessible legal advice is acknowledged. Financial disputes, particularly those arising out of inappropriate financial advice, are often complex due to the volume of materials under review and the length of time the subject financial services have been provided. The matters which arise can often be difficult for individual consumers to articulate or to progress without legal assistance.
10. The difficulties for those facing financial hardship to obtain civil legal assistance is highlighted in the Law Council's initial submission to this inquiry. It is reiterated that there is urgent need for an adequately resourced legal assistance sector and accessible financial counselling services for consumers to receive advice on their rights and options at the earliest possible stage as this can often prevent matters from escalating to actions such as repossession.
11. As noted in the Law Council's initial written submission to the Committee, the Law Council supports calls to create a properly funded network of community financial counselling and community legal services.² This should be complemented by adequately funded state and territory civil law Legal Aid services, noting that Legal Aid's national reach enables it to assist some of the most vulnerable people and communities in Australia.

Greater use of alternative dispute resolution in housing repossession matters

12. As noted above, the Law Council is unable to provide a comprehensive position to this issue in the timeframe provided as it requires detailed consultation with membership.
13. The Law Council is supportive in-principle of any proposal to increase the use of alternative dispute resolution in housing repossession matters, on the condition that such processes are fair and developed with the needs of the individual consumer in

¹ Law Council of Australia 'Improving dispute resolution in the financial system' (14 June 2017), <www.lawcouncil.asn.au/resources/submissions/improving-dispute-resolution-in-the-financial-system>, [55]-[57].

² Law Council of Australia 'Resolution of disputes with financial services providers within the justice system' (8 March 2019) <<https://www.lawcouncil.asn.au/resources/submissions/resolution-of-disputes-with-financial-services-providers-within-the-justice-system>>, [34].

mind. The AFCA requirement that financial service providers must cease enforcement action once a complaint is made is of great benefit to ensuring matters can be resolved through an appropriate ADR process rather than through repossession proceedings. Many matters resolve through AFCA once legal proceedings have commenced. The Law Council notes however, that the role of the private legal profession remains critical and complementary to the successful operation of external dispute resolution schemes such as AFCA.

14. The Australian Banking Association Banking Code of Practice retains obligations on banks and financial service providers to publish, and make readily available, information about internal and external dispute resolution processes. In addition to providing information about dispute resolution processes, it is critical that financial institutions meaningfully engage with a person who is in financial hardship at an early stage to allow for a gradual approach to enforcement that allows a consumer to be aware of their rights and access appropriate assistance before matters escalate.

Thank you for the opportunity to provide further input to this inquiry. If you require further information or clarification, please contact Dr Natasha Molt, Director of Policy, on (02) 6246 3754 or at natasha.molt@lawcouncil.asn.au in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

Arthur Moses SC
President