

**Submission
No 113**

**INQUIRY INTO INQUIRY INTO ELDER ABUSE IN NEW
SOUTH WALES**

Organisation: Australian Bankers' Association

Name: Mr Steven Munchenberg

Date received: 7/03/2016

04 March 2016

Hon Greg Donnelly MLC
Committee Chair
NSW Legislative Council General Purpose Standing Committee No.2
Parliament House
Macquarie Street
Sydney NSW 2000
By email GPSC2@parliament.nsw.gov.au

Dear Mr Donnelly

Inquiry into elder abuse in New South Wales

The Australian Bankers' Association (**ABA**) appreciates the opportunity to make a submission to the NSW Legislative Council's General Purpose Standing Committee No. 2 inquiry into elder abuse in New South Wales.

With the active participation of 25 member banks in Australia, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services.

The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy, and to ensure Australia's banking customers continue to benefit from a stable, competitive accessible banking industry.

Introductory comments

According to the Intergenerational Report, Australia faces the challenges of a growing and ageing population that is expected to reach nearly 40 million by 2055 with nearly a quarter of that over the age of 65.¹ In addition to Australia's ageing population, there is a likelihood that Australia will see a rise in the number of cases of elder abuse.

The ABA recognises that elder abuse is a serious issue for the community with far reaching consequences for individuals and their families. We believe that elder abuse is an issue requiring a partnership response from Government, business and community.

For the purposes of this inquiry, the ABA will focus our submission on the financial abuse form of elder abuse, with a particular focus on how banks help prevent financial abuse as well as highlighting some of the challenges faced by banks and recommendations for the Committee to consider.

National approach required

To strive for better outcomes for older Australians, the ABA believes that a national review into elder abuse is required. A nationally consistent approach will assist banks, and other organisations, in dealing with meeting the various laws as well as the expectations of their customers and their agents across jurisdictions, improve collaboration between relevant agencies and will fundamentally provide greater certainty for customers. In light of the above comments, the ABA welcomes the recent Federal Government announcement of the formal inquiry into elder abuse.² This will look to examine the laws and frameworks to safeguard the older Australians from misuse and abuse.

¹ 2015 Intergenerational Report. Australian Government. <http://www.challengeofchange.gov.au/>

² <https://www.attorneygeneral.gov.au/Speeches/Pages/2016/FirstQuarter/24-February-2016-Address-at-the-National-Elder-Abuse-Conference-Pullman-on-the-Park-Melbourne.aspx>



Strong banks – strong Australia

Financial abuse and the role of banks

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

First, banks must ensure that they do not breach their legal obligations, including under privacy laws, in the act of responding to, and managing, a possible or actual instance of financial abuse. From a bank perspective, banks must assume that a customer can transact until a point to which the law, and medical profession, say this is not the case. Banks must act on the instructions of their customers. If a customer makes a decision to withdraw money, transfer money or property, etc, a bank is obliged to assume this decision has been made with the knowledge and authority of their customer.

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

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

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

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

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

Industry guidance

With the challenges raised above, the banking industry has developed the following industry guidelines on financial abuse (part of the ABA’s Financial Abuse Initiative)³:

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

Banking product and service solutions

Banks have a number of product and service solutions to assist customers put in place appropriate measures to help protect themselves yet retain their financial independence. Examples of these product and service solutions include:

³ <http://www.bankers.asn.au/consumers/financial-abuse-prevention>



- Joint accounts which can include a co-signatory account⁴, two-to-sign account⁵ or linked accounts.⁶
- Arrangements that enable a third party to be authorised to access the account. Some account arrangements can be tailored to limit or allow certain access and/or transaction types. For example, some authorisations can be limited so that the third party is able to access the account, but not transact on the account.
- Upon request, other account services are also available, including hard copy account statements in larger print, reduced maximum daily withdrawal limits, transaction and transfer restrictions, direct debits for regular payments, and SMS or email alerts to remind customers about their account balance, transactions and payments.

Formal arrangements

Banks encourage formal substituted decision making arrangements and supported decision making arrangements. While these arrangements provide the bank with clear instructions, and ensure banks are able to better service their customers' needs, a key risk for financial abuse of older persons is the inconsistencies in the regimes governing these instruments across the States and Territories.

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

- Formal arrangements should be consistent and uniform across jurisdictions. While the laws in each jurisdiction are broadly similar, there remain differences that our members, customers and their substituted decision-makers are required to understand.⁷ These differences cause unnecessary complexity and contribute to unnecessary business costs, including training for staff and communications for customers. Additionally, it can cause other risks where lack of awareness about the specific instrument could result in inappropriate application and/or powers being exceeded, or alternatively, expectations not being met with regards to the use of the instrument.
- Formal arrangements should be recognised across jurisdictions and be transferrable without the need for new arrangements to be put in place. Mutual recognition of instruments will provide ease of process for customers who move interstate and eliminate uncertainty with the use of instruments.
- Formal arrangements should be registered so that banks (and other financial institutions, organisations, companies and service providers) can more easily establish the authenticity and currency of the instrument.

Informal arrangements

Conversely, banks discourage customers adopting informal arrangements. Informal arrangements can include providing a PIN or other access code to a trusted third party (such as spouse or family member) to conduct banking transactions on their behalf. These arrangements may leave customers vulnerable to financial abuse and exposed to significant risks. For example, if an unauthorised transaction is conducted on their account and the bank is aware that the customer has breached their terms and conditions by providing their PIN or access code to another person, then they may also lose their protections under the e-Payments Code and be liable for any loss.

⁴ Co-signatory account – either the customer or third party is able to operate the account.

⁵ Two-to-sign account – both the customer and the third party are able to authorise transactions.

⁶ Linked accounts – different accounts or facilities which are linked together to help better manage day-to-day transactions and bill payments, savings and loans. Linked accounts make it easier to transfer money between accounts using Internet or digital banking channels.

⁷ For example, the laws across the States and Territories may have different names for different powers, and different formats, capacity testing, witnessing and execution processes (e.g. the instrument may or may not need to be registered with the appropriate State or Territory agency to take effect).



Strong banks – strong Australia

Consumer education

Financial abuse is a community problem. Information and education are key to reducing the risks and consequences of abuse. Raising awareness with bank customers can help prevent problems. As part of the Financial Abuse Initiative⁸, the ABA developed consumer fact sheets to help raise awareness of financial abuse and provide customers with some tips about how they can protect themselves.

The ABA has also worked with various organisations to raise awareness of financial abuse as well as support research, including:

- Alzheimer’s Australia on the “Is it Dementia” website (<http://isitdementia.com.au>). The website includes six different training modules across different sectors. The banking sector training module provides videos to be incorporated into existing training programs.
- Capacity Australia to build on existing training programs and to provide an interactive training module covering financial abuse.
- The University of Western Sydney, Cognitive Decline Partnership Centre and Council of the Ageing NSW on their research report, “Policies and Practices of Financial Institutions around substitute decision making.”

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

Conclusion

The ABA recognises that Australia’s changing demographics, such as the ageing population, presents a number of challenges for Australia in terms of government, business and community service delivery now and into the future.

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

- Whole of Government and community response coordinating efforts across Australia.
- Advocating for the Australian Government to harmonise laws, develop a national register for formal arrangements and develop nationally-recognised instruments.
- Improved information and education, including a national community awareness campaign.

The ABA looks forward to the outcomes of the inquiry into elder abuse in NSW.

If you have any questions, please contact Lena Rizk, Policy Manager – Retail Policy on [REDACTED] or [REDACTED]

[REDACTED]
Steven Münchenberg
Chief Executive Officer
[REDACTED]

⁸ <http://www.bankers.asn.au/consumers/financial-abuse-prevention>