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Professor Rosalind Croucher
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Dear Professor Croucher,

Equality, capacity and disability – supported decision making

The Australian Bankers' Association (ABA) welcomes the opportunity to provide comments on the Australian Law Reform Commission's Discussion Paper *Equality, Capacity and Disability in Commonwealth Laws*.

Introductory comments

The ABA and our member banks watch over the needs of banking customers, including older people and people with a disability. While banks have a number of procedures for dealing with, and products and services available for, their older customers and customers with a disability, substituted decision making and "instituted supported decision making arrangements" means that bank customers may have a third party transacting on their behalf or assisting them complete their banking transactions.

Banks not only take seriously their legal obligations with regards to meeting their obligations under the *Disability Discrimination Act 1992* (DDA) and the *Age Discrimination Act 2004* which prohibit discrimination based on disability or age, but also their other legal, business and operational obligations to ensure their customers are able to complete their banking transactions easily, safely and securely.

Specifically, the DDA makes it unlawful to provide goods, services and facilities which discriminate against a person on the grounds of their disability, including by refusing to provide those goods, services or facilities either through conditions or the manner in which those goods, services or facilities are provided¹. Banks offer products, services and facilities that meet customer needs as well as take into account the special needs customers may have.

The ABA's Code of Banking Practice recognises the needs of older persons and customers with a disability to have access to transaction services and commits banks to taking reasonable measures to enhance their access to those services². Additionally, there are a number of industry standards and guidelines to assist banking accessibility. Individual banks have various customer service commitments, including Disability Action Plans (DAPs) and other service charters as well as policies, practices, business rules and product and service solutions to assist certain customers.

The ABA notes that the National Decision-Making Principles are based on the principle that every adult has the right to make decisions that affect their life and to have those decisions respected and to have the necessary support to make, communicate and participate in decisions that affect their life.

¹ Section 24, *Disability Discrimination Act 1992*.

² Clause 7, Code of Banking Practice. <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice>

The discussion paper proposes that the ABA should encourage banks to acknowledge supported decision making and issue guidelines recognising that:

- Customers should be presumed to have the ability to make decisions about access to banking services unless there is cause to assume otherwise;
- Where there is such cause, then customers may be capable of making and communicating decisions concerning banking services, where they have access to necessary support;
- Customers are entitled to support in making and communicating decisions; and
- Banks should recognise supporters and respond to their requests, where possible and consistent with other legal duties and/or industry guidelines.

Banks have already embedded the values of the National Decision-Making Principles into the way in which they deal with their customers. Customers are assumed to be able to make financial decisions and have access to various products, services and tools to assist them make those decisions, operate their accounts, and manage their money and finances. Banks will assume that their customers are capable and have the capacity to make their own financial decisions, unless there is cause to assume otherwise. Banks have worked hard to ensure they meet their obligations under various laws, industry standards and guidelines to promote banking accessibility, including their products and services, branches and other banking channels, and financial information.

Therefore, the ABA does not believe that industry guidelines are necessary to encourage banks to recognise supported decision making. Banks have already implemented policies, practices, and business rules as well as provided products, services and tools as solutions to assist customers with special needs. Substituted decision making and “instituted supported decision making arrangements” are already accommodated for in retail banking and finance.

Additionally, the ABA does not believe that it is appropriate for banks to have to establish a mandatory supporters or representatives model. Alternatively, banks should be able to decide how best to provide products, services and tools and meet their various legal, business and operational obligations. Banks need to retain the flexibility to implement policies, practices, business rules and product and service solutions consistent with these obligations and in considering the extent to which they are able to recognise and act upon the decisions of third parties given the circumstances.

Specific comments

Banks face a number of legal obligations. Banks are not only bound by privacy laws and responsible lending obligations, but a duty of confidentiality with their customers prohibiting disclosure of the customer's financial affairs without consent or in accordance with law. Contractually banks are obliged to act on the instructions of their customer (the customer mandate) or others formally appointed as a third party to act on behalf of their customer (attorneys or court-appointed administrators). Customers are obliged not to disclose their account details to others, including Personal Identification Number (PIN) or other access codes.

Furthermore, it should be noted that banks face various legal obligations which restrict banks from dealing with others not formally appointed or verified, such as identification requirements associated with anti-money laundering and counter-terrorist financing, meaning banks are bound to ensure they know their customer (including an appointed third party) and validate that transactions are made by the customer or the appointed third party.

Banks also ensure their customers and their businesses are protected by illegal or other threats to the banking system and their customers, including fraud, identity theft, financial abuse, and other potential security risks. Due to these obligations, there will be circumstances where banks are unable to recognise and act upon the decisions of supporters or other representatives unless these people have been validly appointed, and are formally able to act for the customer, within frameworks recognised by the law.

The banking industry strongly supports formal arrangements rather than informal arrangements and approaches as these maintain customer protections and rights. This protection applies not only in retail banking and finance, but to all facets of the relevant customer's life. In appointing, for example, a third party to act for them under a power of attorney, the customer implements an authority which will not only be recognised by banks, but also by other service providers and others with whom the customer will have dealings.

However, banks also recognise the special needs of their customers and their customer's interests in maintaining financial independence and autonomy for as long as possible, and therefore, banks have variously implemented arrangements and approaches which promote substituted decision making and "instituted supported decision making arrangements".

Substituted decision making – formal arrangements

Bank customers who have in place formal arrangements for a third party to act on their behalf, such as a power of attorney, enable an agent to conduct their banking business or specific banking and financial transactions (where the instrument is limited). Similarly, bank customers may have in place an order whereby an administrator or guardian is given authority by a tribunal to act on behalf of a customer who has been determined not to have capacity to make their own financial decisions.

The banking industry believes that formal arrangements provide appropriate mechanisms for third parties to act on behalf of bank customers and ensure that customers, third parties and banks are protected and acting lawfully. However, formal arrangements may not always be appropriate for all customers and in all circumstances. We understand that some bank customers want to maintain their financial independence and autonomy and formal arrangements result in the bank customer having another person act on their behalf.

Furthermore, while banks take great efforts to ensure their customers can conduct their banking transactions in a timely and efficient manner and that the person acting on their behalf is genuine and the instrument or authority they present is authentic, there are some practical impediments we consider cause not only problems for banks and other service providers, but also for customers (as outlined below).

Supported decision making

The ABA is concerned about supported decision making or co-decision making arrangements that do not establish clear boundaries for all parties. We are also concerned about customers entering arrangements with others, especially where customers knowingly or unknowingly breach their contract with the bank and/or give up their consumer rights and protections.

While we recognise the desire to implement these kinds of arrangements, there could be significant and substantial practical and legal implications which would need to be well thought through. For example, there has been a suggestion made by some community groups for a model where certain everyday banking decisions could be undertaken by people with decision making disabilities, but larger financial decisions would be subject to greater third party oversight. This model would be extremely problematic from a business and operational perspective. Furthermore, it would be problematic for individuals where lack of clarity around roles or ambiguity regarding rights and protections would result.

The ABA believes that supported decision making or co-decision making may expose individuals to liability and legal risks, rather than provide them with greater financial independence and autonomy, decision making freedom and flexibility. Additionally, it is inappropriate for banks and other service providers to be expected to identify or determine the capacity of their customers. Banks are not in a position (or qualified) to establish (or question) whether a customer has capacity or not. Therefore, we consider that supported decision making in a retail banking and finance context would need to establish clear roles and not undermine legal and business requirements or consumer rights and protections. Furthermore, we consider that governments should take greater efforts to promote the use of legitimate processes for substitute decision making by removing impediments to the use of powers of attorney and promoting the use of powers of attorney by Australians, and across Australia.

With this in mind, banks have introduced product and service solutions to assist customers have supported decision making without exposing these customers, or their banks, to liability and legal risks (referred to as "instituted supported decision making arrangements"). Banks have also adopted policies and practices to assist their customers, especially people with a disability and older people, engage with their bank and complete their banking transactions. Some alternative and third party arrangements may present certain liability and legal risks, however, in the interests of assisting customers, banks have taken these risks in order to assist their customers with eligibility for these alternative arrangements based on the impact of the customer's disability.

Products and services

Bank customers are able to structure their banking and financial affairs so that a trusted third party has access to their bank account. For example, a customer can set up their bank accounts in a number of ways to enable a third party to assist them with their banking transactions.

A joint account can include a co-signatory account, two-to-sign account or linked account. A co-signatory account means that either the customer or the third party is able to operate the account, a two-to-sign account means both the customer and the third party are required to authorise transactions, and linked accounts are 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.

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

A customer with special needs or concerns who has made contact with their bank by visiting their bank branch or via other channels, such as the bank's call centre, can discuss any special banking customer service needs and can request different arrangements be put in place to suit their needs. Banks that are generally aware of their customers' special needs or concerns will seek to manage them and tailor their customers' banking and financial arrangements accordingly. For example, setting up a banking relationship with their local bank branch may assist a customer in maintaining their financial independence and autonomy by alleviating the immediate need for third party interventions and reducing the potential for financial abuse.

Third party services or tools

Bank customers can put in place arrangements with third party service providers to assist them conduct their banking transactions. For example, a customer who is hearing impaired can utilise the services of third parties to make contact with their bank, such as via the National Relay Service. Additionally, bank customers can use assistive technologies to assist them conduct their banking transactions. For example, a customer who is vision impaired can access Internet banking using screen readers and speech recognition software to complete their transactions with their bank. Customers can request alternative arrangements, such as two-factor authentication methods, if the standard approach adopted by their bank to enhance account security causes difficulties for them. Third party services, tools and measures such as these can assist all customers maintain their financial independence and autonomy.

Informal decision making and support network

Bank customers may also put in place informal arrangements with a third party, such as a spouse or family member or member of their support network (i.e. friend or carer, social worker), to assist them with their banking transactions. Often these arrangements are referred to as "family agreements". While some people may prefer informal arrangements, in particular customers who may feel less familiar with using emerging technologies, such arrangements may leave them more vulnerable to fraud, exploitation and financial abuse, even by their trusted third party.

ASIC's E-Payments Code states that account holders will not be held liable for transactions which are not authorised by the user. However, if a customer gives their PIN or other access codes to another person and there are unauthorised transactions, the customer may be liable for those transactions³.

Even though banks appreciate that some people may prefer informal arrangements as opposed to formal arrangements and the possible motivations for maintaining informal arrangements in terms of financial independence, autonomy and decision making freedom, we are concerned about customers entering informal arrangements, especially where customers knowingly or unknowingly breach their contract with the bank and/or give up their consumer rights and protections.

Informal arrangements pose a higher risk to the customer and may adversely impact on their contractual arrangements with their bank. Furthermore, informal arrangements impact on a bank's ability to manage its relationship with their customer and cause unnecessary delays in processing transactions. Instead formal arrangements and "instituted supported decision making arrangements" should be strongly encouraged as these mechanisms provide the bank with clear instructions and minimises the risk of the customer breaching the terms of their contract and exposing themselves to financial risks.

Banking industry initiatives

Industry guidelines

The ABA has published a number of industry standards and guidelines to assist customers with their retail banking and promote awareness about banking efficiently, safely and securely, including:

- ABA's voluntary industry standards on electronic banking have been developed to improve accessibility of electronic banking and help people with disabilities and older people use electronic banking channels.
- ABA's guiding principles on accessible authentication has been developed to ensure that all customers, including people with disabilities and older people, are able to access and manage their finances independently, securely and effectively and to ensure the access needs of people with disabilities and older people are considered in the deployment of authentication technologies.
- ABA's industry guideline on responding to requests from a power of attorney or court-appointed administrator has specifically been prepared to ensure that customers, their substitute decision-makers and bank staff understand these arrangements.
- ABA's industry guideline on protecting vulnerable customers from potential financial abuse has specifically been prepared to explain what financial abuse can look like, how it can impact customers, especially people with disabilities or older people, and the bank's relationships with their customers and how bank staff can respond.

Financial literacy and customer education

The ABA and our member banks deliver a number of financial literacy programs and activities to bank customers and the broader community to improve awareness and understanding of retail banking. For example, the booklet *Smarter Banking: Make the most of your money* has been revised to take account of developments in retail banking and emerging customer needs, such as a step-by-step guide to assist customers who are unfamiliar with Internet banking. The booklet *Smarter Banking: Know your banking rights and responsibilities* has recently been published to provide bank customers with information about their consumer rights and responsibilities, including banking accessibility. Other financial literacy materials and activities provide information for older people and people with disabilities. Financial literacy initiatives such as these can assist customers with disabilities and older people especially better understand how they can manage their money and structure their banking and financial affairs so that they maintain their financial independence and autonomy, protect themselves from financial risk, and limit the need for third party interventions.

³ [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ePayments-Code-as-amended-from-1-July-2012.pdf/\\$file/ePayments-Code-as-amended-from-1-July-2012.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ePayments-Code-as-amended-from-1-July-2012.pdf/$file/ePayments-Code-as-amended-from-1-July-2012.pdf)

Staff training

The ABA has been working with a number of disability community representatives to develop training modules to support staff training programs. For example, the “Is It Dementia” website⁴ was developed by Alzheimer’s Australia with assistance from the ABA. This banking training module provides a resource to assist improve understanding of dementia and financial abuse. Other training and research projects are currently being developed which build on this training module and banks’ existing training programs to include relevant information about decision making disabilities, capacity, financial abuse, customer preferences and needs, differences between instruments, authorities and orders, third party arrangements, identification and verification procedures, and authentication of instruments.

Recommendation

The ABA does not support mandating supported decision making in a retail banking and finance context or prescribing guidelines that standardise supported decision making for banks and other financial institutions.

There are legitimate concerns with supported decision making in a retail banking and finance context, and it is for these reasons that banks have established various “instituted supported decision making arrangements” and solutions for their customers. Banks should retain the ability to determine what approaches and practices are relevant for their customers and their legal and business needs in order to assist their customers to manage their money and finances, access their accounts and facilities, and complete their banking transactions. For example, some banks already allow customers to have another party assisting them with their banking transactions and financial decisions, however, in these situations the customer must ultimately make the decision and complete the transaction.

The customer mandate must be respected and upheld by the bank. Customer identification and authentication of accounts must be maintained as well as confirmed and conducted by the customer. Personal and financial information must be protected and confidentiality and privacy standards preserved.

Additional recommendations

In addition to promoting “instituted supported decision making arrangements”, the ABA believes there are a number of changes needed to promote better substituted decision making and supported decision making, which would provide greater access and confidence in these arrangements.

Formal arrangements

- Formal arrangements should be consistent and uniform across jurisdictions. We support harmonisation of instruments and guidance about instruments being provided so there are clear instructions to attorneys and agents and clear information for individuals so they can make informed decisions appropriate to their circumstances. For example, guidance should assist in preparing and executing a power of attorney, limiting the use of instruments, choosing an attorney, and acting on instruments of an attorney. Uniformity and harmonisation would provide integrity and improve the ability for instruments to effectively be used to facilitate banking transactions. However, greater harmonisation should not compromise the ability for individuals to put in place different instruments for different purposes.
- Formal arrangements should be recognised across jurisdictions and be transferrable without the need for new arrangements to be put in place. Progress should be made towards mutual recognition of power of attorney instruments. We support further coordinated national action on this and would like this effort extended specifically to naming and execution processes, and to court-appointed decision makers (administrators and guardians). This would make things easier for customers who move interstate, or who own property interstate, or who want to appoint a substitute decision maker interstate. Mutual recognition is important in order to eliminate uncertainty with the use of instruments.

⁴ <http://isitdementia.com.au>

- Formal arrangements should be registered, on a national central register, so that banks can more easily establish the validity, authenticity and currency of the instrument/document. We support clearer, consistent legal arrangements as providing certainty to customers and their substitute decision-makers as well as reducing the regulatory and administrative complexities and compliance burden on banks (and other service providers). A central register would enable better verification of instruments.
- Alternative formal arrangements, such as a “supporting attorney” model, if introduced should make it clear there is a satisfactory third party acting in good faith and established without any irregular impact on the customer’s rights and protections. We consider that a supporting attorney should be an appointment just like any other power of attorney. Importantly, a bank or other service provider should be certain the supporting attorney is authorised and is not making decisions for the customer, rather they are assisting the customer in the making a decision. A bank should not be expected to act in the role of a supporting attorney.

Supported decision making

Arrangements for minors who become adults

- Arrangements for minors who become adults who do not have capacity should strike a balance between ensuring appropriate protections and minimising administrative complexities for their carers. We support efforts to encourage carers to consider putting in place suitable alternative arrangements prior to the child’s 18th birthday and fairer treatment of minors who become adults. However, arrangements should not impose unnecessarily burdensome processes on carers of adults, and in particular, in order to establish arrangements, especially when the carer is a parent.

Third party service providers

- Professional third party service providers and government carers should be recognised in the law to make sure that customers and banks and other businesses are protected in their dealings with third party service providers, such as the National Relay Service, government-funded carers, etc. This would make it clear that customers can rely on these services to assist them with their banking transactions without compromising their rights and consumer protections.

Instituted supported decision making arrangements

- Instituted supported decision making arrangements, including bank products and services, which provide solutions for assisted banking (as outlined above) should be accepted as appropriate mechanisms to promote supported decision making in a retail banking and finance context. Product and service solutions enable banks to manage their liability and legal risks as well as manage their customer’s interests and needs without exposing them to unacceptable liability and legal risks and financial risks.

Community education campaign

- A national community education and awareness raising campaign should highlight the importance of individuals putting in place appropriate arrangements for their circumstances and needs, including supported decision making and substituted decision making. For example, while some people are aware that they should have a will and an estate plan so that their estates can be administered and distributed to their beneficiaries upon their death, many people do not plan adequately for the possibility of losing mental capacity through illness, injury or accident and suffering a lifetime disability. An information package should accompany the community education campaign and include information on good financial practices, such as a brochure could include information on managing a bank account and money on behalf of someone (e.g. generic information about financial responsibilities), differences between instruments and orders, requirements to open and operate banking products (e.g. ID and proof of legal right), business protocols for dealing with legal and banking matters and available support services (e.g. counselling or community support services, relevant authorities, consumer protection agencies, and legal support services), and financial abuse. Additionally, a broad scale professional and community training approach should accompany the community education campaign to provide more detailed information for carers and supporters. A national consumer education campaign would raise awareness and facilitate the use of formal arrangements, accepted alternative arrangements, and supported decision making (where appropriate).

Concluding comments

The ABA and our member banks recognise 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. It is vital that governments, businesses and community groups take actions to address and prepare for these challenges, raise awareness of these issues, identify mechanisms which support individual's making their own decisions and being assisted to make decisions (when needed and where appropriate), and put in place strategies for minimising the potential problems associated with supported decision making. Banks and other financial institutions should look at how they can implement accepted alternative arrangements for their customers which support the financial independence and autonomy of Australians as well as promote the confidence of bank customers in the accessibility of retail banking and finance.

Yours sincerely,

A handwritten signature in black ink that reads "Diane Tate". The signature is written in a cursive, flowing style.

Diane Tate