



HOUSE OF COMMONS

LONDON SW1A 0AA

12th November 2018

The Budget 2018 Red Book contained the following message to the banking industry:

*“5.9 ... The government also expects the banking industry to set out its response to the recommendations in Simon Walker’s report on **alternative dispute resolution** for SMEs by the end of November. This includes responding to its recommendations for a voluntary dispute resolution mechanism for SMEs outside the FOS remit, but below £10 million turnover, and to set up a process that can address **unresolved historical complaints**.”*

Mr Walker’s report, which was commissioned by your trade body, UK Finance, recognises that SMEs fall into a gap between our courts and the current Financial Ombudsman Service (FOS), and they are therefore denied access to justice when claiming against banks. As a result, Mr Walker has recommended that the FOS operate a new ‘super ombudsman’ service for SMEs, which will have jurisdiction to award up to £600,000.

Mr Walker’s report represents a major step forward for the All-Party Parliamentary Group (APPG) on Fair Business Banking and for SMEs. This summer, the APPG produced its own report that identified the same problem of access to justice for SMEs and proposed a Financial Services Tribunal to fill that gap. In October, the Treasury Select Committee (TSC) published its report into SME Finance, which reached the same conclusion. The same month, the FCA also recognised SMEs’ access to justice problem and responded with proposals to extend the existing FOS jurisdiction to award claims up to £350,000. The Chancellor has asked for the industry’s response to Mr Walker’s report by the end of this month, as government also recognises that filling the gap in SME access to justice is key to restoring confidence amongst the business community.

The Gap that Remains

Whilst we welcome the FCA and Walker Review proposals to expand the FOS, this will still leave a significant gap for many businesses who need to resolve a dispute with their bank. As the FCA’s consultation paper on SME access to the Financial Ombudsman Service sets out, even a settlement limit of £400,000 would only cover an additional 16% of the cases not captured by the current limit. A £600,000 limit (the Australian level) would leave 59% of complaints unresolved – these cases are the ones with the most employees and therefore have the largest social impact. Likewise, unregulated entities that fall outside the regulatory perimeter would also not be captured.

We agree with the TSC that it would be reckless and dangerous to ignore the remaining gap, and that it is the responsibility of industry leaders, regulators, parliamentarians and government to show leadership and foresight to ensure that businesses are adequately equipped to deal with the next financial crisis.

Social Responsibility and Public Interest

For many years, our group has been a dogged advocate for the SMEs' cause because we believed it was in the public interest that their problem was recognised. Having got to that point, however, our understanding of the public interest moves on. Our APPG is now focused on ensuring that the solution to the problem of access to justice is the best one for all stakeholders in the sector, not just for the SMEs. Our APPG's objective, after all, is to achieve *fair* business banking.

This is why I write to you today. We believe that Mr Walker's suggestion of a sole 'super ombudsman' for SMEs will not achieve the best outcome for society and the industry as a whole; neither for the demand or supply sides. We are joined in this view by the FCA, which made this submission to the TSC:

"23. We have publicly stated our support for a tribunal that could deal with disputes that fall outside the ombudsman service's remit. We see a role for both an extended ombudsman service and a tribunal, as they meet different needs."

The TSC accepted this submission and came to the following conclusion in its report:

"138. The Committee therefore recommends that the Treasury brings forward proposals for the creation of a Financial Services Tribunal. This must be accompanied by an amendment to s138D of the Financial Services and Markets Act 2000 to enhance the legal rights of SMEs."

Our APPG believes that the FCA and the TSC are right to see a role for a Financial Services Tribunal in filling the gap that now exists in access to justice for SMEs. As we have always maintained, there is a complementary role for both an extended ombudsman and a tribunal.

We note that Mr Walker has acknowledged that a tribunal should be considered in the future if the proposed system doesn't work. He also stated in front of the TSC that this will only be known during the next financial crisis. We do not feel it is socially responsible to accept a short-term solution that may or may not work during the next crisis; we need a firm road-map to a full solution.

Benefits for the Financial Services Industry and UK Plc

Our APPG is anxious that the industry should hear the arguments about how the supply side would benefit from a tribunal. It is for this reason that I am writing to you directly.

I will restrict myself to just one key benefit that a tribunal would have for the industry over a super-ombudsman. We think its importance cannot be over-stated. A tribunal would have jurisdiction to hear applications not just from the demand side, but from the supply side: i.e. from the banks themselves. The banks would want to make applications to the tribunal, because a tribunal's product is different from the product of an ombudsman. A tribunal would produce case law, i.e. definitive interpretations of the regulations with which banks must comply. The case law would be a source of clarity in regulation that does not exist at present – anywhere in the world.

Much has been said about the gap in dispute resolution that SMEs face. But in our view, our banks also suffer from a gap in dispute resolution - and as they suffer so do we all. We are accustomed to Parliament passing laws and our courts clarifying ambiguities or uncertainty about what those laws mean in real life through the case law they produce. That system is tried and tested. However, our

financial sector is today governed more by regulation than legislation. And yet, there exists nowhere within the regulatory structure the equivalent of our courts – a place where market participants can go to resolve ambiguities in regulation or uncertainty as to what regulations mean to the daily business of banks. A tribunal would be a new element of the regulatory structure which can provide that regulatory clarity.

The APPG therefore believes that a tribunal would help the industry cut the costs (including opportunity costs) of complying with regulation that is currently unclear. The clarity of regulation that a tribunal's case law would create would increase the industry's profits. A tribunal's role as a dispute resolution forum for SMEs would increase confidence amongst SMEs about taking on bank debt, as it would provide an answer to the question 'what if something goes wrong?'. This question has been in SMEs' minds ever since the financial crisis and has been suppressing demand. Increased confidence amongst SMEs would lead to growth in demand for bank lending and therefore an increase in the industry's revenues.

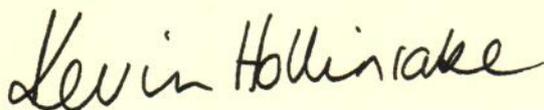
Truth, Reconciliation and Restitution

We are delighted that government is backing a dispute resolution and restitution mechanism that will deal with past cases. It is important that any system set up is independent and has the support of key stakeholders including the APPG, groups representing SMEs and professional dispute resolution bodies such as the CI Arb. The APPG looks forward to working with all stakeholders to produce a system that is not only independent but fair to all parties, and which has the confidence of the APPG, Parliament and businesses and ensures that lessons are learned so that we safeguard UK Plc for the future.

There is much to be said on the issues I raise above, and a short time-frame in which to say them before the end-of-month deadline the Chancellor has set. The Chancellor has asked for the industry's proposals for dealing with both historical and future SME disputes. To that end, I attach an Appendix to this letter, which sets out our APPG's proposal for systems to resolve both historical and future disputes, both of which we believe will produce the benefits for the industry that we describe above.

I would be very happy to meet to discuss the above if you wish and very much look forward to hearing from you.

Kind Regards,



Kevin Hollinrake MP
Co-Chair of the All-Party Parliamentary Group on Fair Business Banking



Introduction

We have an opportunity to secure the future relationship between businesses and their lenders, and the decisions we take in these next months will define the landscape for businesses in the UK for years—even decades—to come. It is imperative that we get these next steps right, and that we don't wait for the next crisis to discover that we squandered this opportunity.

We maintain our position, supported by the FCA and the Treasury Select Committee, that both a robust tribunal **and** an extended ombudsman are required and are complementary. This has overwhelming cross-party support in the House.

We would be foolish and naïve to say that abuses of power will never occur again, and we agree with the TSC that it would be reckless and irresponsible to ignore the overwhelming evidence that confronts us at this point in time. Parliamentarians and Government have a critical role to play in providing a comprehensive solution for the future.

There are many difficult issues that simply will never be addressed by an ombudsman. Insolvent businesses, disputes with financial institutions that operate outside the regulatory perimeter and large and therefore complex claims. Over 90% of the cases the APPG sees have claim values greater than £600,000.

Crucially, it is time for industry to demonstrate to the country that it is not afraid of being held to account for its behaviour, and that it is committed to not just the rhetoric of social responsibility, but to action. We have been told many times since the financial crisis that 'things have changed'. If that is the case, then there is nothing to fear from a tribunal. This is about social responsibility, and the financial services industry must demonstrate leadership here. Confidence in the sector is of paramount importance, and this will not be achieved with institutions shirking from their responsibilities. We encourage them to step up to the plate and show the country they are ready to move forward.

It is only with the tackling of these issues and the introduction of a Financial Services Tribunal will business and the financial industry be able to move forward and focus on what they do best: using capital, knowledge and experience to enable business development and economic prosperity.

Our greatest danger now is only extending the FOS, and ignoring the difficult disputes that would be dealt with by a tribunal.

The enclosed position statement from the APPG outlines a framework of proposals to deal with the following issues that pervade the business banking sector:

1. How to deal with the legacy cases where the individuals involved are yet to access justice that is fair and accessible.
2. How we can future-proof dispute resolution for businesses in the UK to ensure that future generations of entrepreneurs are protected from business banking abuses.

The APPG's Position:

This statement follows the release of reports into dispute resolution for businesses in the UK from the [Treasury Select Committee \(TSC\)](#), [Simon Walker](#), the [Financial Conduct Authority \(FCA\) Policy Statement PS18/21](#) and the APPG on Fair Business Banking's [Fair Business Banking for All](#) report.

The APPG maintains the position that we require a robust, judicial process for dispute resolution in the form of a tribunal. We are delighted that we have broad support from the TSC, the FCA, SME Alliance, the Small Business Commissioner, Federation of Small Businesses and individual financial institutions.

The key points are as follows:

1. Extension of the Ombudsman

- The APPG supports the expansion to the remit of an Ombudsman as proposed by both the [FCA](#) and in [Simon Walker's report](#).
- The APPG supports the FCA's proposals¹ to create a separate, ring-fenced, specialist unit to handle complaints from SME customers. Any specialist unit that is set up must not be staffed by the current staff from the FOS. A clean break and fresh start are required. The FCA should consider placing this unit within its own remit, separate from the FOS.
- The system must have the necessary specialist knowledge and skills to deal with more complex business banking cases and it needs to be supported by a panel of experts who can support SME complaints.
- We share the concerns of the TSC² and many others³⁴ that:
 - the ombudsman as it stands is not up to this job, and that the FOS does not currently command the confidence required to proceed with a new mandate. John Glen MP noted this in his TSC evidence session⁵.
 - The FOS have a track record of dubious decisions⁶.
 - Its powers are limited. For example, it cannot compel witnesses or insist on disclosure of evidence. It is not equipped to deal with claims from the directors and shareholders of insolvent businesses.
 - The challenges of restructuring after the drop in PPI claims will be substantive and we remained concerned about their ability to adequately scale up to effectively deal with business customers.
- The settlement limit of £350,000 (FCA) or £600,000 (Simon Walker) are below the level of compensation claims in around 90% of the cases we deal with. It is accepted that claims above this limit need to have a judicial basis for decisions⁷⁸. Therefore, a Financial Services Tribunal is required to assess claims above this level.

¹ [FCA, SME access to the Financial Ombudsman Service – near-final rules, p.15 Side Box, 16 October 2018](#)

² [Treasury Committee, SME Finance, paragraph 131-134, 26 October 2018](#)

³ [Treasury Committee, SME Finance Inquiry Oral Evidence Session HC805, Q369-375](#)

⁴ [Treasury Committee, SME Finance, paragraph 92, 26 October 2018](#)

⁵ [Treasury Committee, Oral Evidence: SME Finance, HC 805, Q297, 27 June 2018](#)

⁶ [Treasury Committee, SME Finance Inquiry Oral Evidence Session HC805, Q369-375](#)

⁷ [Treasury Committee, RBS GRG and its treatment of SMEs Oral Evidence Session HC, Q192, 30 January 2018](#)

⁸ [Treasury Committee, SME Finance Inquiry Oral Evidence Session HC805, Q387, 23 October 2018](#)

2. Financial Services Tribunal

The APPG welcomes the public support of key stakeholders including the TSC, the FCA, SME Alliance, the FSB, TSB bank, Metro bank and the Small Business Commissioner.

The APPG has set out the key characteristics that a tribunal requires to be effective⁹. These include:

- The extension of s138D of FSMA (2000) to include limited companies and partnerships;
- All decisions taken through lens of any public promises/codes of conduct;
- Qualified one-way cost shifting;
- Inquisitorial powers;
- Panel professional advisors and system to assist with compilation of claims at point of entry and to filter egregious claims;
- Ability to capture unregulated activity of firms that provide finance but sit outside the regulatory perimeter;
- £10m+ compensation claim limit;
- Access for guarantors;
- Access for shareholders/directors of insolvent companies (This will be set out in detail by the APPG in its comprehensive proposals for the framework of the tribunal).
- No use of non-disclosure agreements to prevent victims speaking about their experiences.

The introduction of a tribunal and an enhancement to the legal rights of SMEs will require legislative time, but as stated by the Treasury Select Committee *“there is strong cross-party support for the creation of a Financial Services Tribunal and the Government must not hesitate when it comes to bringing forward the appropriate legislation, even at a time when there may be other significant demands on parliamentary time”*.¹⁰

3. Restitution/Legacy Cases

Justice delayed is justice denied. It is now an accepted fact that the landscape of dispute resolution for businesses is fundamentally flawed and has been for decades. This has been taken advantage of by financial institutions and reached its peak during the aftermath of the financial crisis. The taxpayer bailed out institutions, and banks shored up their balance sheets on the back of the SMEs in country. Businesses and the taxpayer kept institutions afloat whilst being pushed to the wall. It is only right that there is compensation for the pain and loss inflicted.

The APPG supports the following:

Construction:

- A steering committee of key stakeholders, including the APPG, is set up to identify the parameters of the scheme, which must be 100% independent and will not be bound by statute of limitations.
- The APPG is working on a detailed proposal for a voluntary, but legally binding, adjudication mechanism with the banks, based on a Financial Services Tribunal, that will provide a credible and fair method of dealing with the cases from the past and will also act as a pilot during the legislative time required to establish a tribunal. This will be available for stakeholder review after w/c 12th November.

⁹ [APPG on Fair Business Banking, Fair Business Banking for All, July 2018](#)

¹⁰ [Treasury Committee, SME Finance, 26 October 2018](#)

- Banks are given a period of 6 months to process complaints through their normal complaints system. There will be no judge, jury and executioner internal redress schemes such as the Griggs Review and GRG Review.
- For those cases that are not resolved within this six month timeframe, there will be a duty of disclosure of documentation by the Banks, which will be in accordance with the legal Civil Procedure Rules (CPR) 31¹¹, 31A¹² and 31B¹³ and certified by the appropriate person under the FCA Senior Managers and Certification Regime (SM&CR) and the case moves to formal and binding arbitration.
- A settlement limit of £10m+
- The extension of s138D of FSMA (2000) to include limited companies and partnerships;
- No use of non-disclosure agreements to prevent victims speaking about their experiences.

Eligibility:

- Often cases of mistreatment e.g. in a turnaround unit, began as an initial mis-sale. Any scheme must take account of this and complaints should reach back to the introduction of FSMA in December 2001.
- The scheme must be open to cases that have been considered by all other means including by FOS, ad-hoc redress schemes and the court processes.
- Access for guarantors who were previously disenfranchised from previous complaints mechanisms.
- Access for shareholders/directors of insolvent companies who were previously disenfranchised from previous complaints mechanisms.
- A stay in proceedings against businesses currently in dispute.

Further statement re eligibility of insolvent businesses:

The issue of insolvent businesses bringing claims was discussed in 2014 by Vince Cable when he was business secretary: *"We are now working on unresolved issues surrounding the mis-selling scandal, including how businesses have been forced to close because of the products the banks sold in the first place....This includes deciphering who will be able to help the businesses in administration, when their assets have been taken away from them, and who will be in charge of finding a solution for them. This hasn't been done before."*¹⁴ This issue has never been resolved, and the issues extend not only to IRHPs, but also to RBS GRG and any other situation where a company was made insolvent. This clearly requires a solution now.

4. Data Collation

- The APPG supports Simon Walker's proposal for a real-time data collation system
- As the APPG supports both ombudsman and a tribunal, the system will require a single point of entry, with signposting to other options after that point based on individual cases

5. Public Inquiry/Truth and Reconciliation

¹¹ [Ministry of Justice, Civil Procedure Rules, Part 31](#)

¹² [Ministry of Justice, Civil Procedure Rules, Part 31a](#)

¹³ [Ministry of Justice, Civil Procedure Rules, Part 31b](#)

¹⁴ [International Business Times, Vince Cable mis-selling derivatives to SMEs: Vince Cable says scandal is 'tip of iceberg', 1 July 2014](#)

The primary issue faced by the APPG has been the treatment of businesses in distress. The cause of this distress was quite often the behaviour of banks or a direct result of the mis-selling. There have been no reforms to this system and it remains open to mis-use and abuse. It is imperative that there is a forensic examination of this eco-system with a full cross-departmental statutory public inquiry, which must include the input of the APPG in terms of parameters. The Inquiry will have a particular emphasis on:

- Triggers for financial distress and entry into turnaround units
- Creditor misconduct and the rights of shareholders and directors to challenge
- The role of LPA Receivers, Insolvency Practitioners, Solicitors, Valuers and conflict of interest including assignment of claims by IPs for actions against creditors and the use of gagging clauses
- Section 348d of FSMA
- Sale of debt to 3rd parties
- The role of senior management in the malpractice.

Outcomes

- Comprehensive industry standards for turnaround units with agreed gating factors
- Recommendations for insolvency reform, including regulatory environment
- Recommendations for LPA receiver reform, including regulator environment
- Recommendations for managing conflict of interest
- Recommendations for resolving disputes with IPs, solicitors, LPA receivers, etc
- Recommendations re contractual issues
- Holding to account those responsible for the malpractice.

The APPG does not believe that Simon Walker's proposals for a formal "reconciliation and closure" event¹⁵ have any substantive merit.

Co-Chairs:

Kevin Hollinrake MP and the Rt Hon Norman Lamb MP

Vice-Chairs:

The Earl of Lindsay, Lord Cromwell, Rt Hon Sammy Wilson MP, Dr Lisa Cameron MP, Martin Whitfield MP, Luke Graham MP and Stephen Kerr MP

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An All-Party Parliamentary Group (APPG) is an interest group that occupies a strategic and effective position within Parliament. It is cross-party, with a minimum number of parliamentarians from the Government and the official opposition, and cross-house, made up of both peers and MPs. The APPG on Fair Business Banking is a platform through which businesses, professionals and trade bodies can discuss issues regarding commercial banking and its role in the life cycle of a business, and through which parliamentarians can access information on banking, finance and related issues, including business rescue and insolvency, on behalf of constituents. As a cross-party group, the APPG is an effective vehicle to effect meaningful change via the Parliamentary system. The Group's status is that of an APPG is bound by the rules set out by [The Office of the Parliamentary Commissioner for Standards](#). It does not have charitable status, or official status in the House, nor is it funded by Parliament. It relies wholly on the participation and contribution of parliamentarians, industry members and stakeholders committed to creating a strong platform for business in the UK to thrive. The APPG is co-ordinated and administered via the APPG on Fair Business Banking Secretariat.

¹⁵ [Simon Walker, Review into the complaints and ADR landscape of the UK's ME market, p.22, 23 October 2018](#)