

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 (TSC), 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. Let's not forget [the National Audit Office reports that UK taxpayers](#) provided over £1.1 trillion in support to UK banks, including £532 billion to recapitalise Lloyds and RBS and £106 billion to nationalise Northern Rock and Bradford and Bingley. Some banks have used taxpayers' money to fight legal cases when they know that they have done wrong but that their victims do not have the resources to take them all the way through courts.

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 that businesses and the financial industry will 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](#).
- We endorse the evidence and recommendation in Simon Walkers "eligibility" proposal to increase the turnover threshold from £6.5m to £10.0m.
- 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. (Annex P.8) A clean break and fresh start are required. The FCA should place 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 has a track record of dubious decisions⁶ and no appeal process.
 - Its powers are limited. For example, it cannot compel witnesses or insist on the disclosure of evidence. It is not equipped to deal with claims from the directors and shareholders of insolvent businesses.
 - The challenges of FOS restructuring after the drop in PPI claims next year 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

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](#)

this limit need to have a judicial basis for decisions⁷⁸. Therefore, a Financial Services Tribunal is required to assess claims above this level.

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
- 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 Financial Services Tribunal).

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 this country. Businesses and the taxpayer kept institutions afloat whilst they were 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 all the parameters of the scheme, which must be 100% independent.
- 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 3rd December.

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](#)

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's Senior Managers and Certification Regime \(SM&CR\)](#) and the case moves to independent dispute resolution.

Key Points

A. Complaints are eligible from 1 May 1997 with “light touch” financial regulation AND for those SMEs which have a turnover of less than £10M (*as per Simon Walker’s recommendations rather than the £6.5M in PS18/21*) and below only one of either the headcount threshold of 50 employees or the balance sheet total threshold of £5m.

B. Claims are admissible from both solvent companies and companies made Insolvent by Banks. This includes any shareholders/directors of businesses that were insolvent and did not have their claims assigned on to them (in this case, the IP may have accepted redress that went back to the bank). This would also include businesses/shareholders /directors who have had debts sold on to third parties. Of particular note are CYBG and Ulster (RBS), who have sold their entire CRE portfolio to Cerberus.

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.

C. A maximum compensation limit of £10M, except when it is unanimous view of all three members of the Financial Services Panel that a higher award is appropriate in an individual case and where the initial claim is supported by a forensic accounting submission to the Financial Services Tribunal.

D. Where a claim moves to “independent” dispute resolution, businesses/claimants which continue to trade with a claim of less than £600,000 have the choice of whether they proceed to a Financial Services Tribunal or the Ombudsman (*FCA: predicated on S228.2 – “fair and reasonable in all circumstances of the case” grounds*).

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

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](#)

5. Public Inquiry/Truth and Reconciliation

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 348 of FSMA 2000
- 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 the regulatory environment
- Recommendations for LPA receiver reform, including the regulatory environment
- Recommendations for managing conflicts of interest
- Recommendations for resolving disputes with IPs, solicitors, LPA receivers, etc
- Recommendations re contractual issues
- Holding to account those responsible for the malpractice.

Without the above, the APPG does not believe that Simon Walker's proposals for a formal "reconciliation and closure" event¹⁵ has any substantive merit.

Co-Chairs:

Kevin Hollinrake MP and the Rt Hon Norman Lamb MP

Vice-Chairs:

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

Contact Points:

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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](#)

ANNEX

1. Restitution/Legacy:

In the [‘Investigation of Business Banking Fraud’](#) debate, held on 9 October 2018, the Economic Secretary to the Treasury John Glen MP stated:

“I am very grateful to my hon. and gallant Friend for his contributions, which I shall address in a moment. I will also set out some of the changes that have taken place, but let me say from the outset that the cases that have been raised today all demonstrate that, whatever mechanisms we have implemented—from the tripartite regulation of banks and the financial system to the redress schemes of recent years—the banks need to deal with the very real legacy of this issue. Simon Walker’s review for UK Finance must listen to what has been said today about that legacy, which will not go away unless the banks face up to and take responsibility for what happened in the past.”

On 23 October 2018 Simon Walker, in [his Oral Evidence](#) session to the TSC stated:
Q378 Charlie Elphicke Mr Walker, small businesses in my constituency of Dover and Deal think that the banks have taken them for a ride and ripped them massively. Are they right to feel that?

Simon Walker: At the time of the global financial crisis, that was certainly right. That did happen – I do not think I pulled my punches on this – and the banks engaged in shameful behaviour at that time. That has largely stopped. By now the situation is considerably better. That is partly a fact of better regulation and greater powers for the FCA. It is partly a sense of public pressure and a sense of shame that a number of banks rightfully feel about their behaviour at that time. Yes, your constituents are right. I do not think it is happening to nearly that extent now, but I believe we need remedies so that, if it arises in the future, your constituents would have a fast and cheap remedy that would come up with a fair outcome.”

In relation to Legacy disputes he then stated in his oral evidence

Q413 Simon Walker: With respect, we could not have a tribunal that goes back and looks at the incidents of that era, terrible though they were. We have to try to come up with some sort of remedy; something that will help. You are absolutely right that a lot of people lost a lot of money, and most of all, the taxpayer lost an enormous amount of money. My particular concern is that SMEs suffered grievously in that period, because they were often relatively easy targets, and that is what I want to stop happening in the future. It is really important that the relationship between banks and the SME community is normalised. SMEs need to be able to borrow and get working capital to be able to fund themselves for growth, and not a lot of that is happening at the moment.

While it is terribly important that we say how terrible those events were and try to put them behind us, I am keen that we move on to a situation where we have a remedy vehicle built for the future, not for these past misfortunes—these past tragedies—which I fear often cannot be put right. I very much regret that situation, but because laws were not broken, I cannot see a way around that, and I do not think anyone else can either. This country rightly does not like retrospective legislation, and I do not think anyone would see that as appropriate.

Q420 The all-party parliamentary group on fair business banking suggests that 90% of the complaints it deals with fall outside the Australian threshold, which you set as the long-term goal, of £600,000. Is it not the case that, almost by definition, your solution will not catch a lot of the cases that are attributed? Is that a fair criticism?

Simon Walker: With respect, the APPG's cases are largely historic. That is not to say they ought to be downplayed or in any way criticised, but they are not the issues that are arising today. Most of the issues that arose as a result of the global financial crisis involved commercial property—loans that were taken out that simply would not be available today. So there is no prospect of small and medium-sized businesses borrowing, as they did, ahead of a property crash on a highly unsecured basis and then being pounced on by banks that need to clean up their balance sheets. That is why I understand and deeply sympathise with and have met a lot of the victims of that era. However, that is not happening now. I would be more inclined to go along with the FCA's judgment that we are really talking about 50 or so high-value complaints per year that would be getting to this body. Even if that rose somewhat, we need an organisation that can cope with it. My concern is next time rather than now, but we have got to have a system that is fit for purpose now.

Q429 Chair: In response to one of your questions to Mr Hosie, I think you were saying that for practical reasons there had to be a time limitation to access to redress. Were you clear about that? Is that what you were trying to say?

Simon Walker: For the past or for current cases? The Financial Ombudsman Service at the moment operates a kind of six and three-year time limit, where something has to have happened within the past three years, but six years if the original cause of the complaint happened in the past six years and someone only became aware of it in the last three years—I think I've got that right. That sort of parameter seems sensible to me. There comes a point at which you cannot go back for decades.

Q430 Chair: The point that I suppose one would challenge you on is that the financial crisis was in 2008, which is now 10 years ago, and therefore if you are saying six years, there is a limitation to redress.

Simon Walker: Yes; that is why I am suggesting that limited exception to deal with legacy cases that have not been dealt with. There are quite a number of those, and I believe that the banks have an obligation to set that in place.

2. Financial Services Tribunal:

The APPG for Fair Business Banking welcomes the [Treasury Select Committee \(TSC\) on SME Finance report](#) recommendations which includes:

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. The Treasury should also consider drawing upon the expertise of the Law Commission to aid its consideration of this issue. Taken together, these changes will ensure that the UK's small businesses will no longer be denied justice, as so many have been in the past. We must introduce a system for dispute resolution and redress that gives the UK's SMEs the confidence to engage with financial services providers, safe in the knowledge that they are not vulnerable to exploitation and mistreatment.

139. In response to previous instances of mistreatment of SMEs, the FCA has worked with banks to establish 'ad hoc' voluntary complaints and redress schemes. It is very hard for the Committee and the wider public to have confidence in such schemes, when their design and operation is ultimately at the discretion of the banks responsible for mistreating their customers. The Committee agrees with Andrew Bailey, Chief Executive of the FCA, that the deficiencies of voluntary redress schemes serve to highlight the need for standing complaints and compensation arrangements for SMEs.

Financial Ombudsman Service – extracts from research/Fols by Mr Jim Shannon MP (DUP)

From: "XXXXXXXXXXXXXXXXXX" <XXXXXX.XXXXX@financial-ombudsman.org.uk>
To: "jim.shannon1@btopenworld.com" <jim.shannon1@btopenworld.com>
Sent: Thursday, 29 March 2018, 16:58
Subject: response to your query

Dear Mr Shannon

Thank you for your question about our handling of complaints brought to us by micro-enterprises. We understand that this is an area that you are particularly interested in and we share your appreciation of the importance of this area. We also understand that you are looking for further information to inform your response to the Financial Conduct Authority's consultation CP 18/3, which includes proposals to introduce a new category of eligible complainants 'small businesses', that will join micro-enterprises in being able to bring complaints to the ombudsman service. While the decision over whether to introduce the new category of eligible complainants is for the FCA, we are of course happy to help you in your considerations.

In each of the last two financial years, we have received between 4000 and 5000 complaints from micro-enterprises (and in addition we also consider complaints from sole traders which may be categorised as individual complaints). As you might imagine, these vary considerably in the complexity of the issues involved. Many of them will be very similar to the kinds of complaints that we receive from individual consumers. In 2016/17, just under 30% of new complaints from micro-enterprises were about issues with their current accounts, many of which would not be more complex than complaints that individuals bring to us.

Of course, there are complaints about financial businesses that are brought to us by micro-enterprises that are amongst the most complex cases that we consider here at the ombudsman service, such as those about SWAPs (although it should be noted that the number of SWAPs cases has been declining in recent years). At present we have seven adjudicators and 12 ombudsman who generally look at these cases – although there are others who are also able to look at these complaints if it were required. As a demand-led organisation we keep the level of resource that we need under review and work flexibly to resolve complaints with the minimum formality. Our ombudsmen are our most senior and experienced decision makers and you will be able to speak to some of them when you visit the service.

The FCA's consultation paper contains proposals for us to look at complaints from small businesses about actions or failures to act occurring on or after 1 December 2018. The FCA estimates that this will involve around an additional 370-1,255 complaints per year. While the decision is for the FCA, we are planning for this to be implemented and are putting arrangements in place to handle these cases. We are keen to work with key stakeholders to discuss our approach and will keep the resource and expertise required under review – so we would welcome the views of you and your colleagues on your upcoming visit to the ombudsman service.

If you are able to let us know the full list of who you would like to join you in visiting the service and what they would like to cover then we can look at what is possible and send an agenda over for you to consider. You will of course understand that it wouldn't be appropriate for us, as an independent body, to discuss the details of individual complaints with you or your colleagues on your visit.

Yours sincerely

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