Tasmanian Small Business Council responses to questions from Committee Members

Questions:

Please find below some written questions on notice from the committee. Please note that these questions are in addition to any questions you took on notice at the hearing.

In responding to these questions I note that the matters raised in the Tasmanian Small Business Council (TSBC) Submission (submission no. 61) are an Australia-wide concern, not just Tasmania. Our work in this area was first recorded in the Council of Small Business of Australia (COSBOA) submission lodged with the Senate Economics Committee Enquiry into Completion within the Australian Banking Sector 2010.

In response to questions 1 and 2 we have not been collecting data. Our organisation simply does not have the resources necessary to do so. However, our members are sufficiently concerned that their rights have been compromised. Data from the Australian Bureau of Statistics states there are 2.5 million small businesses and 130,000 farmers in Australia. It is bank practice to require small business loans to be supported by residential property mortgages, which are made under the bank's standard form agreements.

It is reasonable to conclude that almost every small business loan is at risk to the unconscionable practices of banks. These same conditions apply to residential home loans, meaning that the concerns expressed in Submission number 61 relate to the many millions of Australian home owners. It is further noted that banks choose to charge higher interest rates for what they call 'Business Loans' even though the security is the same as for a residential home loan. It is perhaps not coincidental that the scales of interest and charges for such loans are similar between the major banks.

1. Do you have an estimate of the number of small businesses in Tasmania that claim to have been affected adversely by inappropriate bank practices?

   No

2. In your submission you allege that banks have avoided legal obligations towards 2.5m Australian small businesses and 130,000 primary industry enterprises:

   a. do you have an estimate of what proportion of those small businesses and industry enterprises are in Tasmania;

      No. An informed estimate would suggest that it is proportionately equal to the population distribution between states. However it is known that Tasmania has a higher percentage of small businesses that are primary producers (14%) than any other state.

   b. do you have an estimate of what proportion of those avoided legal obligations relate to non-monetary default of loans; and

c. are you aware of whether any of those cases relate to Bankwest or Landmark customers.

No. The TSBC submission is not focused upon individual cases, rather the processes by which the banking sector has engineered its procedures to enable it to subvert the promised fairness in its dealings with bank customers.

We note that persons who have lodged individual complaints to such organisations as ACCC and ASIC have been told that these regulators do not deal with individual cases but rather seek to address systemic activity. It is therefore the intent of the TSBC submission to demonstrate the processes used by banks in a systemic manner to disadvantage their customers.

3. In your submission [page 19], you have identified concerns about the accessibility of valuation reports that are kept confidential by banks when loan customers are required to pay for valuation reports. Do you have any recommendations on feasible approaches that would appropriately protect the rights of both banks and customers, while making valuation reports accessible to customers?

The answer to this question most probably lies in the simple concept of procedural fairness. By what justification can someone be required to pay for a good or service which is then not made available to them? Under current arrangements, and in the terms of the standard form agreements, the customers are denied their reasonable rights. It would be for the banks to demonstrate how they would be disadvantaged by making the content of an independent valuation available. This practice is unfair and a prima face breach of the Code of Banking Practice which promises to treat the customer "fairly". TSBC suggests a suitable alternative to the current standard form banking contract, would be for the banks and its customers to have an independent valuation carried out at regular or agreed periods.

4. In your submission [page 12] you raised concerns about the accountability of the Financial Ombudsman Service. Could you elaborate on those points and include any suggestions you have for improving the accountability arrangements?

The Financial Ombudsman Service (FOS) is a 'forum' under the terms of both the Constitution (and the later, Mandate) of the Code Compliance Monitors Committee. Therefore any person who takes their complaint to the FOS is abrogating their right to have the complaint heard by the CCMC, as the compliance monitors are unable to hear complaints referred to the FOS. Bank contracts should include a statement that notifies customers they do not have a right to have code breaches investigated by the CCMC if they go to the FOS or other forums. All bank contracts should include a copy of the Code of Banking Practice.

5. A concern you identified in your submission [page 13] about the Financial Ombudsman Service relates to the limits on claim size. Could you elaborate on those points and

include any suggestions you have for improving the Financial Ombudsman Service, including changes to the limits on claim size?

The limits on claim size available from the FOS disadvantage a claimant to the benefit of the bank. The claim size may be relevant to some individual loans, but places unreasonable limits on the majority of small businesses loans. There appears to be no reasonable argument to suggest that a decision by the FOS that a bank has erred in its actions to the detriment of a claimant should not be compensated in full. Compensation of an amount less than the damages caused by the banks, only adds to the unconscionable situation. The FOS limitations allow banks to avoid the risks of their own unconscionable and dishonest conduct at the expense small business and indivuals.

6. In your submission [page 23] you raised concerns about the proposed changes unfair contract terms for small business. Could you elaborate on those points and include any suggestions you have for improving the unfair contract terms provisions?

   This issue has been partly resolved by a decision in The Senate to amend the legislation and increase the limits below which contracts must be fair in the eyes of the law. It has since been announced that the Government will agree to the amended terms. The proposed new upper limits for contract periods of one year is $300,000 and for contracts of periods of between one and five years is $1,000,000.

   It is noted that where a residential dwelling or residential farm property is the basis of the security for a small business loan these limits may well be exceeded. This will not cover the majority of small businesses, especially in Tasmania with its high proportion of primary producers.

   More generally, it is unclear why there should be any legal authority for unfair terms in any contract regardless of value.

Question on the day

This answer responds to a request from a member of the Committee made to Mr Field after the completion of the hearing day on Friday 16 October 2015. It provides further information on the subject in the TSBC report that was challenged by Mr Doogan, the Chair of the Code Compliance Monitors.

I understand that the question was to obtain clarification of the difference between the 2004 'Constitution' of the CCMC and the 2013 'Mandate' under which they now operate?

In 2003 the bank chief executives of code-subscribing banks formed an association (the CCMCA), which prepared a constitution that set out the CCMC's duties. The CCMC was appointed and indemnified by the banks to carry out certain duties. These duties limited the CCMC's powers as noted in the TSBC's submission to your committee. This included rights for banks to direct a complaint to other *forums* – a

practice used by banks to ensure that code breaches could not be investigated by the CCMC, nor could banks be named and shamed.

The constitution introduced in 2004 was not made available to bank customers or the public for eight years. It came into the hands of the TSBC through a group of small businesses. They filed code breach complaints about subscribing banks' conduct in 2006 that were not investigated. These businesses were given a copy of the Constitution in 2012, as justification for the CCMC's failure to investigate code breaches.

In 2010, the Council of Small Business of Australia (COSBOA) in co-operation with the TSBC filed a submission with the Senate Economics Committee Enquiry into Competition within the Australian Banking Sector (Submission Number 90) It alleged banking practices were unconscionable, as the banks appeared to have an arrangement in place with the CCMC to not investigate code breaches.

In 2012/13, presumably as a result of the previously unpublished Constitution being withheld from customers, the Australian Bankers' Association (ABA) revised the terms of the Code and included a 'mandate' for the CCMC, which now formed part of the revised code. The terms of the contract with individuals and small business customers are now public. While it still tasks the CCMC with the responsibility "to investigate, and make a determination on any allegation from any person ..." it also continues to limit their investigative powers in the same way as the previous constitution did.

Clauses in the Mandate state:

> 6.2. (a) The CCMC must not commence a compliance investigation in the following circumstances:
>
> > (ii) if the CCMC is, or becomes, aware that the allegation is being or will be heard by another *forum* ...
> >
> > (iii) if the CCMC is, or becomes, aware that the allegation has been heard, by another *forum* ...

The CCMC have now been granted general discretion not to "investigate, and to make a determination on any allegation from any person that [banks] have breached the Code". The new clause states:

> 6.3. CCMC's discretion in relation to compliance investigations
>
> > (a) Further to clause 6.2, the CCMC may decide, at any stage prior to making a determination, that it is not appropriate to investigate or continue to investigate a matter commenced under clause 6.1. In making this decision, the CCMC may take into account anything it considers reasonable and appropriate ...

There is also an instruction for the CCMC to cease investigation of a complaint as set out in:

> Clause 6.3.
>
> > (b) "if in the course of conducting a compliance investigation the CCMC considers that 6.3(a)(iii) or 6.3(a)(iv) apply, the CCMC must not continue to investigate the allegation"

While it was appropriate for Mr Doogan to draw attention to the changes made by the ABA and the bank's instructions under which the CCMC operates, the limitation to its powers of investigation remain a concern to the TSBC and small business customers generally.

The limitations preclude the CCMC from having "to investigate, and make a determination, on any allegation from any person". On this basis it becomes clear that the CCMC does not have the independent authority to carry out the duties ascribed to them in the Code of Banking Practice.

Geoff Fader
Chair
Tasmanian Small Business Council
6 November 2015