



Consultation on small business dispute resolution

Response from the Tasmanian Small Business Council - August 2016

The Tasmanian Small Business Council is pleased to place before the board of the Financial Ombudsman Service its views on the various matters raised in the recently published consultation paper.

While contributing to this paper the TSBC wish the directors of the FOS to note that in the interests of fairness and equity between borrowers and their bank lender there is an inherent failing in the dispute resolution process. This failure results from the fact, undisputed by the regulators, that the standard form bank lending agreement fails the basic test of a fair agreement as set out by the Australian Competition and Consumer Commission (ACCC) and will also fail the test of fairness which will become effective in the Unfair Contracts legislation to take effect from 12 November 2016.

It is not possible to achieve an equitable outcome when one party to the agreement has total power over the other. This is the effect of the terminology in the banks' standard form lending agreements. For clarity on this point we enclose a paper headed "Why we must regulate unfair contract terms" recently published by a coalition of consumer advocacy groups under the auspices of the Consumers' Federation of Australia in conjunction with the Australian Consumers' Association.

It is further noted that through the wording of the Code of Banking Practice the banks have developed a self-managed process to enable them to use the FOS as a pawn in a process to deceive their customers.

Should the directors of the FOS have any doubt about the manner in which their service is able to be abused by the bankers we will be happy to provide further detail or appear before a meeting of the FOS board to explain the details.

Geoff Fader

Chair, Tasmanian Small Business Council

27 August, 2016

TSBC Responses:

Definition of small business

The TSBC believes that the FOS should continue to use the Australian Bureau of Statistics widely recognised definitions of small business. We also believe that there should be clarity around the descriptor and thus as the FOS is dealing with complaints related to failures under the Australian Bankers' Association Code of Banking Practice the definition should be compatible and thus include primary producers and home loan borrowers. This is specifically relevant as banks almost always require that there be a mortgage over the residential property of a small business borrower so as to provide a guarantee for the loan.

Monetary and compensation limits (1.1)

While the proposed increase is supported there is no argument presented to suggest that there should be a limit. A dispute between a lender and borrower is related to a specific transaction and therefore if the lender chooses to lend to a particular borrower a specific sum of money then it is **that sum of money which is in dispute** and not some lesser amount that the FOS may choose to ascribe to the matter. While arguably the funding parties for the FOS may wish to see their potential liability limited such a notion has no place in arriving at an equitable resolution between the parties.

Equally the compensation should relate to the level of damage inflicted upon the borrower by the unfair or in appropriate practices visited upon the borrower by the lender. As noted above funding parties may wish to apply limits to contain their exposure but if found guilty of inappropriate behaviour, in the interests of equity **the penalty should relate directly to the impact of that malpractice.**

Debt recovery proceedings should be prohibited while any matter of any monetary amount is subject to adjudication by the FOS.

Attendance at compulsory conferences (1.2)

Attendance of all relevant parties should be compulsory. Without full knowledge it is not possible for FOS to make informed and equitable decisions.

Specific section to provide for SBCF disputes (1.3)

The TSBC endorses changes that may be required to the Terms of Reference which will clarify and simplify procedures and documentation related to resolving small business disputes.

Credit Contract/credit facility" (2.1)

TSBC agrees with the proposal to replace "Credit Contract with "credit facility"

For the same reasons as set out above the possible impact on lenders is irrelevant to the matters of equity and fairness which determine the purpose of the Financial Ombudsman Service.

Groups of related bodies corporate (3.1)

TSBC agrees with the proposal which will aid clarity and consistency.

For the same reasons as set out above the possible impact on lenders is irrelevant to the matters of equity and fairness which determine the purpose of the Financial Ombudsman Service.

Expanded small business jurisdiction (4.1)

The development of a specific unit “staffed by case workers and decision makers with strong expertise in dealing with small business disputes” is supported and applauded.

Introducing a funding model which might involve a “small business levy” is incompatible with the general funding model of the FOS. Further it is noted that as only around 30% of small businesses are incorporated the FOS is in the majority of cases dealing with individuals. There seems to be no logical argument to suggest that one individual should be treated differently to any other individual because he/she is managing an enterprise.

If a decision is made to introduce the expanded small business jurisdiction there seems no reason to delay commencement. Ideally commencement should coincide with the date at which the new unfair contracts legislation becomes effective for financial agreements applicable to small businesses.

Traditional trustee company services (5)

The Tasmanian Small Business Council does not have expertise in this area but it seems that the proposal is both logical and will simplify the work of the FOS thus aiding speedy dispute resolution.

Updates and other amendments (6)

It would appear that the proposals 6.1 to 6.5 are logical consequences of proposed current and earlier changes to the TOR and are thus supported.

Reformatting (7)

(As above)