



Unfair Contract Terms – Protection for Small Businesses

This submission responds to the Treasury prepared Unfair Contract Terms Consultation Paper, May 2014.

The Tasmanian Small Business Council is the recognised peak body representing the small business community in Tasmania. There are some 32,000 small businesses in Tasmania which collectively employ or provide livelihood for approximately 110,000 people. Small businesses account for 96% of all businesses in Tasmania.

The author of this submission, Geoff Fader, is the chair of the Tasmanian Small Business Council and also chair of Rural Business Tasmania the organisation that delivers the Rural Financial Counselling Service in Tasmania on behalf of the Australian Government. Approximately 17% of all small businesses in Tasmania are engaged in primary industry or agriculture and thus it is relevant that the interests of these two significant small business areas are considered in tandem.

Page 12 of the consultation paper notes a number of terms that may be regarded as unfair in consumer standard form contracts. It is noteworthy that in the context of this submission the examples provided relate to **contracts that by the design of their authors (the banks) have been extended into the small business sector.**

The examples presented for consideration are the NAB 'Farmer's Choice Package Agreement' – version effective 31 May 2014 - and the "General Standard Terms" of a common banking "Facility Offer" Copies of both these standard form agreements are included with this submission.

For convenience we quote the sections of the documents that we consider to be offensive both to the small business or primary industry customer and to the notions of fairness and equity in contractual undertakings.

NAB Farmers Choice Package Agreement Contract Clauses 12

Clause 12 Variations to this Agreement

The Bank can at any time:

- (a) vary the MABL or the MABL reduction option;*
- (b) introduce a new fee or charge;*

- (c) vary the amount of fee or charge, the way in which it is calculated or when it is charged;*
- (d) vary the Bank's Lending Indicator Rate and margin as set out in the Details;*
- (e) change any of the other provisions of this Agreement as a result of a change to any law affecting this Agreement; and*
- (f) change any of the other provision of this Agreement.*

The Bank will notify you of any changes it makes under clauses (A) to (F) as follows;

(g) the Bank will give you at least 30 days prior written notice if it introduces a new fee or charge (other than government charges), unless it cannot reasonably locate you;

(h) the Bank will notify you of the introduction of, or any change to, a government charge payable by you by writing to you or by advertisement in the national or local media, unless the government has publicised the introduction of the charge;

(i) the Bank will notify you of any change that relates to a change in the interest rate that is not set by it (such as money market rate or some other external reference rate) by writing to you or by advertisement in the national press or local media within a reasonable period of the change being made, unless another entity has publicised the change; and

(j) the Bank will notify you of any other variation by writing to you or by advertisement in the national or local media no later than the date the variation takes effect.

Any variation pursuant to this does not create a new agreement.

In regard to the "General Standard Terms" of a common "Banking Facilities Offer"

Clause 3 General

3.3 We may introduce new fees and charges at any time. When we do we will provide written notice of the introduction at least 30 days before the fee or charge takes effect.

We may vary fees or charges at any time. When we do we will notify you in writing or by newspaper advertisement no later than the day on which the variation takes effect.

The borrowing Agreement between Bank and Customer is a contract. It is generally considered that a contract is entered into freely by both parties for the purpose of achieving a resultant benefit to both. Thus one may ask what options are available to the borrower if the changes made by the bank are detrimental to achieving the previously understood outcome.

The answer lies in the following clause contained in the Farmer's Choice Package:

Clause 7 Cancellation of this agreement

The bank may choose to cancel this Agreement by written notice to you if:

- (a) you are in default under or in breach of any agreement for Financial Accommodation which you have with the Bank, whether or not it forms part of this Package, or any Security which supports such accommodation; or*
- (b) if you breach any of the terms and conditions of this Agreement.*

You may choose to cancel this agreement, if you give the Bank written notice of your intention to cancel this agreement.

In the “General Standard Terms” of the “Facilities Offer” a “Break Event” triggers a series of penalties that includes:

Clause 11 what we can do

11.1 If you are in default:

- (a) We no longer need to provide any facility; and*
- (b) The sum of the **total amount owing** for all facilities is payable on demand.*

Further clauses include harsh penalties. (See details in the attachment)

It is clear that a borrower who wished to withdraw from an Agreement is substantially disadvantaged and would also face the cost of establishing an alternative funding arrangement.

This submission therefore asserts that the arrangements that banks have instituted, and chosen to extend to include small businesses, are harsh and unconscionable (potentially unjust) and therefore should be considered as “unfair terms” as contained in a standard form business contract.

One might consider mitigation of any claim of “unfair and unconscionable” due to the fact that the Agreements cited in this paper also contain consumer protection clauses on the basis that the Agreements provide the borrower with a course of redress under the Code of Banking Practice which includes the statement:

Clause 35.7

- (a) we have a dispute resolution process*
- (b) it is available for all complaints*
- (c) other than those that are resolved to your satisfaction.*

The Code and supporting publicity, purports to offer consumer and small business borrower’s evidence of the banks intention to provide fair trading and an opportunity for redress (See details in the following “Competition Policy Review” submission)

It is asserted that rather than provide some level of consumer protection that the Code of Banking Practice and the processes for the management and implementation of the Code have been carefully crafted to render it worthless to consumers and small businesses while providing a further avenue to entrench the Banks superior position.

Set out below are some extracts from the submission recently made to the “Competition Policy Review” which demonstrate the depth and level of what appears to be fraudulent behaviour by the chief executive officers of the sixteen Code Subscribing Banks that put their signatures to the Constitution of the Code Compliance Monitors Committee Association.

Thank you for receiving this submission.

Geoff Fader
Chair, Tasmanian Small Business Council
25 August 2014

Competition Policy Review – Submission (Extracts)

The Tasmanian Small Business Council is pleased to offer input to the Competition Policy Review.

The subject of this submission is the practices of the Australian Banks that abuse their market power and act in a way that reduces competition and inhibits productivity to the disadvantage of small businesses in Australia.

1. The sixteen major banks that comprise the Australian Bankers’ Association purport to offer industry based self regulation to their borrowers by virtue of the Code of Banking Practice (The Code) which claims to provide a process for consideration and redress in the event that a borrower may have been unfairly treated by any member bank. The references in The Code are

Clause 35.7 (a) “We have a dispute resolution process”

(b) “It is available for all complaints”

(c) “Other than those that are resolved to your satisfaction”

2. The Code of Banking Practice is a component of every lending contract and is thus a condition of the lending agreement.
3. The Code and supporting publicity purports to offer borrowers evidence of the bank’s intention to provide fair trading and an opportunity for redress.

4. The banks fail to disclose the methodology for consideration of customer complaints that may be made against member banks and the fact that the “Constitution” under which the “Code Compliance Monitors” are appointed, **restricts the Monitors from complying with the terms of the Code of Banking Practice.**
5. Notwithstanding the conditions set out in The Code, which comprises part of the customer contract, the banks have the power to silence any complainant at will.
6. The Code purports to protect consumers while it is used by the banks to protect themselves.

The accompanying notes titled *“Australian Bankers’ Association Problematic Banking Code Part 2 Competition Policy Review”* which reviews the 20 February 2014 Code Compliance Monitors Committee Association Constitution, demonstrate that there is virtually no chance that the 16 subscribing banks would ever be found to have breached the code by the Code Compliance Monitors.

The document “Problematic Banking Code Report Number 1” which is also attached, demonstrates how the banks have created a process which enables them to **use the Code to protect themselves against the malpractice of their own employees.**

We invite the Review to examine both this submission and the proposal therein and the comprehensive submission on this subject made by the Council of Small Business Organisations of Australia to the Senate Economics Committee Inquiry into Banking in October 2010 and accepted as submission number 90 by that Committee.

During the years 2003 to 2013 inclusive every small business (or consumer) that entered into a borrowing contract with the banks was denied fairness, equity and possible redress and the banks knowingly and deliberately acted in a manner that is demonstrated by the report to be unconscionable. Extrapolation of complaints data published by banks during this period suggests that some 2.5 million complaints were received by banks of which only a few hundred were considered by the Code Compliance Monitors and only one finding was recorded against a bank.

It is estimated that more than 90% of the small business loan agreements signed by the subscribing banks between 2003 and 2013 are still in place today.

It is also noted that in 1991, the Martin Committee recommended that banks appoint independent monitors to ensure complaints handling is a *“cheap, speedy, fair and access able alternative to traditional courts”*

The Tasmanian Small Business Council notes the various “small business position” statements set out in the attached document titled *“Australian Bankers’ Association Problematic Code Part 2 Competition Policy Review”* and recommend them for consideration by the Review.

In the event that the Competition Policy Review members would like more detail or further explanation the Tasmanian Small Business Council would welcome the opportunity to address you in

person on this subject and its implications for any Australian small business that enters into a borrowing agreement with a bank.

A relatively simple solution for any person that may wish to borrow from Australian banks may be found in the "Banking Amendment (Banking Code of Conduct) Bill 2012 which was introduced into the Australian Parliament by Mr Andrew Wilkie MP, Member for Denison, in June 2012. The Wilkie Bill is intended to ensure that a modified code (or contract) could not be weakened by a dual-contract that allows (CCMC) members to not "*investigate and make a determination on any allegation by any person that the bank has breached the code*" in clause 34(b)(11) of The Code

The Tasmanian Small Business Council presents the suggestion to the Review that there is a need for legislation to be reviewed so "fit and proper" governance principles are applied to self regulatory codes to ensure that they are properly administered and enforced in banking; this affects 22.49 million Australians and 2.4 million small businesses.

Thank you for receiving this submission.

Geoff Fader

Chairperson

Tasmanian Small Business Council

4 July 2014

Attachment:

Australian Bankers' Association Problematic Code Part 2 Report to Tasmanian Small business Council

Related documents:

ABA Code of Banking Practice (A)

Small Business Standard Facility Offer (B)

Australian Bankers' Association "Problematic Code" Report (C)

Wilkie Bill (D)

CCMC Constitution (E)