28 April 2020

The Manager Consumer Policy Unit
Consumer and Corporations Policy Division, Markets Group
The Treasury, Langton Crescent
PARKES ACT 2600

Dear Sir/Madam,

I thank The Treasury for providing me an opportunity to file this submission into your review of Unfair Contract Term (UCT) Protections for small businesses and farmers.

Enhancements to unfair contract term (UCT) protections are important because one party to an agreement does not have a right to change the contract with the second party. This paper demonstrates how there have been unfair contracts between banks and their customers since 2004 and these UCT protections have not been addressed.

In fact, these UCT protections have damaged a considerable number of individual and small business customers where banks have relied on the court to resolve disputes which, under the loan contracts, banks are required to have decision in place that would deal with dispute free of charge.

The following attached documents will assist The Treasury in understanding the series nature of this problem since August 2003.

Part A: Australian Bankers' Problematic Code - Submission 61 – Attachments 1 & 2

Part A (published in *The impairment of Customers Loans* in August 2015) demonstrates the need for UCT to be treated as a legal and there should be penalties to strengthen the deterrence for small businesses when banks use standard form contract.

Attachment 1 in this paper explains how the government did not fully consider the effects of banking self-regulation, and claims the damage caused to customers has been considerable. It includes a section on the Financial Ombudsman Service (FOS) and the Code Compliance Monitoring Committee (CCMC), stating that standard form contracts in Australia are unfair.

Attachment 2 reveals that the relationship between the subscribing banks and their customers is unconscionable and unfair. This attachment refers to the conduct of the Code Compliance Monitoring Committee (CCMC) members, as being bound by a *Wicked Constitution*. A copy of this document, which was commissioned by the ABA and senior bank licensees, is included with the 2004 Code in Part C of this paper claims that this is a serious problem.

Part B: Performance of ASIC and the Small Business Ministers

Part B (*The Performance of the Australian Securities and Investment Commission (ASIC)* published in January 2014) provides evidence that small businesses and farmers experienced financial difficulties without UCT protections.

Chris Priestley claims the bank referred to in his Senate Inquiry submission was not a prudent and diligent lender. The bank took a stern position that the drought faced by his family in Northern NSW was understandable, as this was a remote area. The droughts suffered by the River Staation Partnership were reported to be natural disasters.

River Staation Partnership wrote to the Federal Minister for Small Business, the Hon Brendan O'Connor MP regarding the financial difficulties they suffered. In response, the Minister claimed, *'While I sympathise with the difficulties you are facing the Government generally does not intervene in contract disputes between financial institution and customers.'*

The Federal Minister for Small Business, the Hon Brendan O'Connor MP knew or should have known there are several million small businesses and farmers. All, in 2012, lost their rights to have complaints investigated by subscribing banks free of charge.

Part C: Lending to Primary Production Customers (s77)

Part C demonstrates the commitment by banks to comply with the 2004 Code was deceptive and misleading if small businesses believed the Code Compliance Monitoring Committee would monitor subscribing banks' compliance under the Code.

This submission was published in June 2017 and is the first occasion when the 2004 Code and the Code Compliance Monitoring Committee Association's Constitution was published. It reinforced earlier submissions The Australian Bankers' Problematic Code which was filed by *The Council of Small Business Organisations of Australia*.

Despite the earlier submission published in December 2010 raising allegations that the Code was governed by unfair contract terms, the constitution has never been published as the 6 leading banks used the UCT, what was more disturbing was that the banks had been changing loan contract terms since February 2004 without being prosecuted.

Part D: Australian Standards

Part D refers to AS 4269-1995 and Commonwealth Government approved AS ISO 10002-2006. Both required subscribing banks to have an internal process for handling dispute with customers, and this process will be *free of charge.*

When small business customers signed loan contracts with subscribing banks, the customers must have been provided a copy of the facility offer, the bank general standard terms, and the Code of Banking Practice. There is no evidence that when customers signed a facility bound by the bank's standard terms, the Code, the Australian Standard, and other relevant documents were provided to them.

The *Unfair Contract Terms – A Guide for Businesses and Legal Practitioners* of March 2016 states *"in deciding whether a term in a standard form consumer contract is unfair, the court or tribunal will apply the three -limbed test for unfairness . . ."*. This document notes the UCT protections for small businesses can be dealt with at a tribunal, however, few small businesses could resolve disputes at tribunal because of the limitations placed on small businesses.

Part E: The 2004 Code of Banking Practice with footnotes

The 2004 Code of Banking Practice with footnotes sets out the shortcomings that small business customers have been required to deal with when signing loan contracts without UCT protections.

The Revised 2003 Code and the Modified 2004 version are similar. The ABA and Code subscribing banks claimed banking codes were voluntary, which set standards for good banking practice.

In September and October 2004, the ABA and the CCMC made public statements that the code was a binding agreement, despite both relying on protections in the constitution. The constitution was introduced by the ABA and subscribing banks following the Taskforce in the Industry Self-regulation in August 2000, which stated:

The Taskforce considers monitoring is crucial good practice in self-regulation. Monitoring ensures that the scheme is addressing specific problems within an industry. The Taskforce recognises that the role of government in monitoring will depend on the circumstances.

In light of the commitment made by the Federal Government in 2003 to allow subscribing banks to be self-regulated could only be justified if the monitoring procedure was controlled by ASIC, APRA or similar independent government authorities.

Summation

This paper deals with The Treasury's Enhancements to UCT Protections discussion paper. The attached documents demonstrate how subscribing banks, since 2003, have obtained profits whilst in breach of loan contracts, causing many thousands of small business customers financial difficulties.

To substantiate this paper, ASIC in November 2019 stated:

ASIC's view is that conduct engaged in while the earlier version of the Code was in operation will be assessed for compliance against the previous version of the Code, and conduct engaged

in under a continuing facility since the new Code's commencement will be assessed for compliance against the new Code. ASIC's approval of the new Banking Code of Practice does not have the effect of changing the terms and conditions of existing contractual agreements to the detriment of banking customers and guarantors.

This ASIC comment fits with the submission filed by George Gilligan, Senior Research Fellow; Jasper Hedges, Research Fellow; Paul Ali, Associate Professor; Helen Bird, Senior Research Associate; Andrew Godwin, Senior Lecturer; and Ian Ramsay, Harold Ford Professor of Commercial Law, Melbourne Law School, The University of Melbourne.

In the January 2016 submission, pp. 260-282, Regulating by numbers: the trend towards increasing empiricism in enforcement reporting by financial regulators, they claimed that *"As the impacts of globalisation increase and intensify, regulation has become an increasingly important mechanism to mediate the tensions between societies, their economies and the environment. As the Organisation for Economic Cooperation and Development (OECD) emphasises, regulatory infrastructures and mechanisms are crucial in managing how the domains of politics and the market interact."*

In 2019, the Banking Royal Commissioner outlined, in his final report, that '*institution and individuals need to:*

- *obey the law;*
- *not mislead or deceive;*
- *act fairly;*
- *provide services that are fit for purpose;*
- *deliver services with reasonable care and skills; and*
- *when acting for another, to do so in the best interests of that other*.

The decision by governments to allow banks to operate without UCT protections allow the banks to obtain the financial advantages by changing contract terms. This paper suggests that where there is evidence subscribing banks changed loan contract terms, the agreement between the bank and its customer should be voided.

Should you require any further information or supporting documents, please contact the writer.

Yours sincerely,

Archer Field

Research

Tasmanian Small Businesses Council