The Institute of Public Accountants

Submission to the Treasury on EDR Review: ASBFEO Report recs 11 and 13

IPA INSTITUTE OF PUBLIC ACCOUNTANTS

Partnership beyond numbers

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The Secretariat
EDR Review
The Treasury
Langton Crescent
PARKES ACT 2600

By email: EDRreview@treasury.gov.au

Dear Sir/Madam

EDR Review: Consideration of ASBFEO Small Business Loans Inquiry Report recommendations 11 and 13

The Institute of Public Accountants (IPA), one of the three professional accounting bodies in Australia, welcomes the opportunity to make a further contribution to the EDR Review, and to have participated in the recent roundtable on this important issue.

We refer to our submission to the Review and reiterate our view that the FOS and CIO, and preferably the SCT, should be merged into one entity.

Recommendation 11:

We note that recommendation 11 of the ASBFEO Small Business Loans Inquiry Report recommends that the banking industry fund a 'one-stop-shop' with a dedicated small business unit with the expertise to enable it to consider disputes relating to a credit facility limit up to $5 million.

The IPA agrees with this recommendation.

We suggest that the 'one-stop-shop' should operate within the new merged entity and note that the Report does not make it clear where the 'one-stop-shop' should sit and whether it should be an entirely new entity or operate within another entity or organisation. If the Government decides against one merged entity then we suggest it should operate within FOS (or the new FOS) as a specialised unit.

We also agree that the 'one-stop-shop', wherever it sits, should be funded by the banks. Also, the limit of $5 million is appropriate given that this would capture 98 per cent of small business disputes.

Recommendation 13:

Recommendation 13 of the Report states that EDR should be expanded to include disputes with third parties that have been appointed by the bank, such as valuers, investigative accountants, receivers and also to deal with farm mediation matters.

Whilst we have no objections to this recommendation in principle, we believe that it would need to be specifically drafted to ensure that these third parties are in fact captured in practice; and that liability for any subsequent payment or settlement is made clear.

Some of the issues for consideration would include defining the third parties. Would it include a prescriptive list or be wide enough to capture anyone engaged by a bank with respect to a loan arrangement. We would suggest that it needs to be widely drafted and not prescriptive (though a non-exhaustive list may be acceptable) in order to capture anyone engaged in almost any capacity by the bank relating to the loan facility.

Also, in terms of definition, how would 'third party' be defined in terms of the legal capacity of the third party. Would it cover agents, contractors, sub-contractors, employees of these and so on. Agents have quite different legal responsibility to the principal than contractors. How would these legal aspects be changed or impacted and would they need to be overridden by new legislation.

If banks engage these third parties in their capacity as agents or contractors (rather than employees) then the contractual arrangement would need to be considered in terms of who is liable for any compensation, settlements, and payments to the client/customer/consumer. If these agreements contain indemnity and waiver clauses (as many would) then it might be that the ultimate liability rests with the third party rather than the bank, especially in the case of negligence. If the parties are not able to settle the dispute then this would become an issue, especially if the bank also refused to settle/pay on the basis that fault lay with the third party and they could rely on an indemnity. If the bank indemnifies the third party then it is not as much of an issue.

An unfortunate outcome would occur where the dispute is prolonged and made more complex with the 'buck being passed around' because of the contractual arrangements between the bank and the third party. It may not always be simple to separate the dispute into the consumer and the third party without involving the bank to some extent.

We note on page 39 of the Report, that recommendation 8 relates to valuers and recommending that consumers be given a choice, a copy of valuation instructions and a copy of the report. Whilst this will help to alleviate some of the issues, it also refers to the banks convening panels of valuation firms with one of the big four also having an in-house team of valuers, who deal with non-residential valuations. On page 41 it states that 'valuation firms are sensitive to litigation by lending institutions'. This means that the larger firms are allocating more resources to risk management and adhering to industry standards. Page 43 relates to the 'independence of valuers'.

All of this underpins the need to ensure that if third parties such as valuers are to be included in the EDR process then careful consideration needs to be given as to how this will impact the relationship (legal, financial, ethical, regulatory) between the three parties and between the bank and the third party; and what changes need to be made to these relationships, which may be long held and even lucrative. The other major issue is who will be held ultimately responsible.

If the policy intention is to hold the bank ultimately responsible for the actions of its third parties, despite any legal arrangement between the bank and the third party, and despite the legal capacity or entity of the third party, then this would need to be made very clear in legislation.

We note that the ASBFEO Report does not go into detail on these points.

The Report states that the implication for the banks is to encourage them to more closely monitor the actions of third parties they appoint. Whilst we believe this is a worthwhile sentiment, it is likely that more than encouragement will be needed.

Recommendations 9 and 10 starting on page 44 of the Report relate to investigative accountants. Whilst we agree with these recommendations, we point them out as further evidence of the difficulty of capturing third parties. In this case, investigative accountants are usually appointed by the bank to act in the best interests of the bank in protecting its assets.

If you require further information or wish to discuss any of the above, please don't hesitate to contact Vicki Stylianou at vicki.stylianou@publicaccountants.org.au or on mobile 0419 942 733.

Yours faithfully

Vicki Stylianou
Executive General Manager
Institute of Public Accountants