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A submission to comment on the recommendations of the Financial System Inquiry Final Report.

My interest and accordingly my submission are in relation to **Recommendations 34 and 36** of the Financial System Inquiry (FSI).

I lodged a submission to the FSI in relation to both of these recommendations. I followed this submission with a meeting with Mr. Murray and a supplementary submission to the FSI.

I am very pleased to see that the FSI has made recommendations that support the significant matters that I addressed in my submissions and representations.

Recommendation 34

Support Governments process to extend unfair contract term protections to small business.

Encourage industry to develop standards on the use of non-monetary default conditions.

Recommendation 34 of the FSI makes the following comments:

1. Supports the Governments current inquiry into extending unfair contract terms (UCT) protection in standard term contracts, to small business.
2. Recognises that this extension of protection to small business will not capture UCT in non-standard contract terms.
3. Encourages ASIC to improve protections for small business from the use of UCT and non-monetary default covenants.
4. Encourages the banking industry to ***"adjust its code of practice"*** in relation to the use of non-monetary conditions of default.

5. Require banks to provide sufficient notice of an ***"intention to enforce which could give a borrower reasonable time to obtain alternative financing."***

The fact that the FSI makes the point that any extension of UCT protections to small business ***"would not prevent unfair contract terms in non-standard contracts"*** implies that more consideration needs to be given to this matter. This can be done by extending the current UCT review to include non-standard contracts as well as restricting the use of UCT and non-monetary conditions of default, as mentioned in Recommendation 34 of the FSI.

I fully support Recommendation 34 of the FSI and would encourage the Government to act to implement this recommendation. This would help provide protection for small business from the imbalance of power that exists in transactions between banks and small business.

Recommendation 36

Consult on possible amendments to the external administration regime to provide additional flexibility for businesses in financial difficulty.

Recommendation 36 of the FSI makes the following comments:

1. Recommends that the Government conduct stakeholder consultation in regard to "safe harbour" provisions that permit restructuring efforts for firms in financial difficulty without evoking external administration processes.
2. Recognises that Government consultation has commenced in relation to situations where owners of small and medium sized enterprises face personal bankruptcy if their incorporated business fails.
3. Acknowledges that complaints and dispute resolution processes relating to external administration could be improved.

I fully support Recommendation 36 from the FSI and would encourage the Government to act to implement this recommendation. It's not easy to start and run a small business. Australian entrepreneurs, who take the risks to do so, should be given encouragement and support. It is these individuals who employ 80% of the Australian work force. It is these individuals that create growth and prosperity that all Australians enjoy.

However, entrepreneurs are not born with all the skills and experience that is required to run a successful business. Sometimes they make mistakes and fail. Sometimes they fail due to causes beyond their control, such as a failed debtor, a recession, a global financial crisis or a bank calling in a loan even though the business is paying its interest payments. (See Recommendation 34 above)

We need to have a much higher regard and respect for the entrepreneurs in Australia. If they fail, then they need to be encouraged to try again. The second time around with vastly more experience these people will be far more likely to prosper, grow and employ others. Our current laws operate in a way that generally destroys the failed entrepreneur or makes it extremely difficult to try again.

Once a receiver has been appointed to a company, the receiver has all the control. Generally the receiver is appointed by the secured creditor, usually a bank. The receiver will then sell off the assets of the company and charge very substantial fees along the way. These fees are paid from the assets of the company. If there is a shortfall to the bank, then it is generally bank policy to bankrupt the directors of the company and anyone who has given a personal guarantee. In this process, the directors will loose their family home and all their possessions. The directors of the failed company are then under the financial control of a Trustee in Bankruptcy. This is similar to having a probation officer. The failed director needs to report to their trustee on a regular basis so that the Trustee can determine the income of the bankrupt director. If the bankrupt is earning more that a subsistence income, this person will need to contribute money to his bankrupt estate for the benefit of the creditors, usually the bank. This trustee maintains financial control over the bankrupt for 3 years and has the power to extend the period in 3-year intervals, if the trustee chooses to do so.

This is how our entrepreneurs are treated and it is shameful. We need to have laws and policies to allow and encourage these people to dust themselves off and to try again. By comparison, while Australian laws treat our failed entrepreneurs almost as criminals, American laws reflect an appreciation of the value small business people bring to their society and do not condemn them for failed efforts.

Again, I fully support Recommendation 36 from the FSI and would encourage the Government to act to implement this recommendation.

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