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19 September 2019

[redacted]

By email only: [redacted]

Dear [redacted]

Official Information Act #19.026 – Interest rate swaps

1. We refer to your request received on 22 August 2019, in response to our letter of 2 August 2019, for further information about the Commerce Commission's (Commission) 2012/2013 investigation into banks' marketing, promoting and selling interest rate swaps to rural customers during the time period from 2005 to 2009:

   1.1 how the Commission settled on the $25.17 million settlement figure, in particular in relation to the total estimated losses from the complainant farmers;

   1.2 copies of summary documents which show the overall picture of the total estimated losses from complainant farmers;

   1.3 for the Commission to reconsider its decision to withhold customer specific assessments.

2. We have treated this as a request for information under the Official Information Act 1982 (OIA).

Our response

3. We have decided to grant paragraph [1.1] of your request and decline paragraphs [1.2] and [1.3] of your request.

4. We have declined paragraphs [1.2] and [1.3] of your request for the following reasons:

   4.1 to protect the privacy of natural persons (the complainant farmers), under section 9(2)(a) of the OIA;

4.2 to prevent prejudice to the supply of similar information, or information from the same source, where it is the public interest that such information should continue to be supplied to the Commission, under section 9(2)(ba)(i) of the OIA;

4.3 to maintain legal professional privilege, under section 9(2)(h) of the OIA; and

4.4 to prevent prejudice to the maintenance of the law (the Commission's ability to effectively conduct and settle matters in future), under section 6(c) of the OIA.

5. For paragraphs [4.1] to [4.3], we consider that good reason exists for withholding the information, and this is not outweighed by other considerations which would make it desirable, in the public interest, to make the information available (section 9(1) of the OIA).

Paragraph [1.1] - settlement figure and total estimated losses

6. The Commission did not assess the specific individual loss caused to each complainant through entering into the interest rates swaps. As outlined in our letter of 2 August 2019 (paragraph [8]), each person's loss depended on customer-specific factual considerations such as: the extent of their reliance on bank-supplied information, and what banking arrangement each person would be likely to have entered into if they had not bought swaps (with evidence needed to show the difference in performance of those arrangements against the swaps.)

7. These customer-specific factual matters were highly complex and inherently individualised. It was beyond the achievable scope of the Commission's public-enforcement role to seek to establish thousands of individualised losses. Accordingly, our settlement methodology was necessarily more simplified, and focussed (as described in at paragraph 9 of our letter of 2 August) on achieving compensation towards the direct losses suffered by way of margin movements or the payment of break fees.

8. The Commission also took into account a number of other factors in assessing whether the settlement figure and terms were appropriate. We have outlined these below.

Adjustment of direct break fee and margin losses

9. Having established customer-specific direct losses, we then accepted some adjustments from those total direct losses to account for the inherent litigation risks that could delay or reduce the bank's exposure to being ordered to make compensation. These adjustments were made for factors like:

9.1 The likely lengthy delay in having the three cases heard in court.

9.2 The importance in the case of direct customer testimony, and difficulties accurately recalling long-ago events.

9.3 The stress to customers from delay in receiving compensation, and from having to give testimony at a hearing.

9.4 Available defences to the banks, including limitation defences.[1]

9.5 Eligibility for compensation – we were committed to ensuring that settlement should provide a payment offer for each complainant, to the extent that it could be demonstrated they were a swap customer and to the extent they had not already achieved some redress from the bank. This all-inclusive approach was registered in terms of the overall quantum of the payment fund that the banks would make available to complainants. It was the reality that some complainants might have received less than what they considered to be their full loss, but conversely they were not subject to the litigation risk as to proof and losses.

10. Overall, the Commission's objective in reaching a settlement with the banks was to ensure that a payment offer was made available to all eligible complainants, at a level that compared favourably and credibly to what a Court might have ordered but allowing for some litigation risk as to proof and losses as discussed above.

Further information

11. If you are not satisfied with the Commission's response to your OIA request, section 28(3) of the OIA provides you with the right to ask an Ombudsman to investigate and review this response. However, we would welcome the opportunity to discuss any concerns with you first.

12. Please note the Commission will be publishing this response to your request on our website. Your personal details will be redacted from the published response.

13. Please do not hesitate to contact oia@comcom.govt.nz if you have any questions about this request.

Yours sincerely

Mary Sheppard
OIA Coordinator

[1] A proceeding for loss or damage arising from a Fair Trading Act 1986 breach must be brought within 3 years of that loss becoming reasonably discoverable. The Commission cannot recover compensation for a complainant who would themselves be out of time to bring proceedings. For example, for almost all ANZ customers the effect of the representations made by the bank (both as to margin increases and early termination amounts) were apparent by at least early 2009; the customers' causes of action accordingly arguably expired in early 2012.