



ASIC

Australian Securities & Investments Commission

Our Reference: CCU-10\0471

24 January 2011

Dr Evan Jones
Faculty of Arts
Department of Political Economy
Mereweather Building H04
University of Sydney NSW 2006

TONY D'ALOISIO
Chairman

Level 5, 100 Market Street, Sydney
GPO Box 9827 Sydney NSW 2001
DX 653 Sydney

Telephone: + 61 2 9911 2002
Facsimile: +61 2 9911 2010

Dear Dr Jones

Business to business unconscionability

Thank you for your letter dated 3 December 2010. We note your concerns about allegations of unconscionable conduct by banks against small business and farmer customers and ASIC's handling of these complaints.

Leaving aside present legal remedies available to businesses, you may be aware that the Government is considering law reform relating to credit for small business. In July 2010, Minister Bowen announced the release of a green paper on Phase Two of the COAG Credit Reform Agenda. Among other things, Phase 2 of the credit reforms includes considering how lending to small businesses should be regulated in the future.

Treasury is currently consulting with industry and consumer groups on how small business lending and the other reforms being considered as part of this Credit Reform Agenda should be implemented. From Minister Bowen's announcement, we understand that any legislation relating to small business lending will be in place by mid-2012. We would encourage you to provide your views as part of that consultation process (if you have not already).

Taking action for unconscionable conduct under the current law

As we have previously stated in our past correspondence with you, ASIC assesses every complaint we receive. Broadly speaking, this is first to determine whether the conduct complained of falls within ASIC's regulatory jurisdiction. This is likely to be the case for credit provided to small businesses and farmers. Secondly, we consider whether it is in the public interest for ASIC to exercise its discretion to investigate and take action in relation to a particular matter.

While ASIC considers every complaint we receive, we do not have the resources to undertake a formal investigation or take legal proceedings regarding every complaint. For example, in the financial year 2009/2010 ASIC received 13,372 complaints about alleged misconduct by a company or individual. Accordingly, when we exercise our discretion to conduct an investigation or take action in relation to a matter, we have regard to a number of factors, such as:

- what legal action would be appropriate for us to take. Action available to us in relation to a complaint about small business lending is limited to those in Division 2, Part 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), e.g. unconscionable and misleading and deceptive conduct. The unconscionability provisions tend to be specific to the individual circumstances of a particular case rather than being capable of application to a broad class of persons in a single legal action. Of course, the provisions in the *National Credit Act* and *Corporations Act 2001* do not currently apply to small business lending;
- whether any evidence of alleged misconduct is likely to be sufficient to found a legal action and be admissible in Court;
- whether there is evidence of systemic concerns. This in part depends on the quality of the evidence received for individual complaints;
- whether persons affected by the alleged misconduct have easy access to other means of resolving the dispute that are quicker and cheaper than the legal system (such as remedies under dispute resolution schemes or Codes of Conduct); and
- our strategic regulatory priorities.

The factors listed above are not exhaustive and any decision that ASIC investigate a matter or take legal action is made on the merits of the particular case.

Availability of External Dispute Resolution (EDR) and other complaint avenues

Significantly, in addition to taking action through the courts or complaining to ASIC, there are other avenues through which a small business owner may be able to seek redress if they believe a bank has engaged in unconscionable conduct in the bank's dealings with them.

EDR

The two EDR schemes currently approved by ASIC, the Financial Ombudsman Service (FOS) and the Credit Ombudsman Service Limited (COSL), can hear complaints made by small businesses in relation to credit transactions and other financial services. This is in addition to their ability to hear complaints by retail customers. Most banks are a member of FOS and non-bank lenders may either be a member of FOS or COSL (or occasionally, both).

Presently, FOS can hear complaints where the value of the complaint is less than \$500,000. It can make an award of up to \$280,000. COSL can hear claims where the value of the complaint is less than \$500,000 and make an award of up to \$250,000 (this will increase to \$280,000 on 1 January 2012).

Australian Bankers Association's (ABA's) Code of Banking Practice

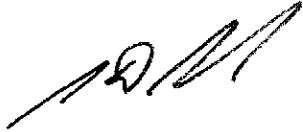
If a consumer or small business feels that conduct engaged in by a bank towards them is in breach of the ABA's Code of Banking Practice, they can also make a complaint against them to the Code Compliance and Monitoring Committee (CCMC). The CCMC investigates complaints that banks are not meeting their obligations under the Code. If the CCMC establishes that a bank has breached its obligations under the Code, it may ask the bank to take remedial action, or give undertakings as to its future conduct (if the breach has not already been addressed). However, the CCMC cannot look at claims for financial loss.

As mentioned earlier, we encourage you to provide comments to Treasury on Phase 2 of its Credit Reform Agenda. While the closing date for submissions has passed, we understand Treasury is still consulting with industry and consumer groups on how small business lending should be regulated.

Submissions can be made to consumercrreditgreenpaper@treasury.gov.au. Further information is available at <http://www.treasury.gov.au/contentitem.asp?NavId=038&ContentID=1852>.

If there is anything you wish to discuss, please contact John Price, Senior Executive Leader, Strategy and Policy on (03) 9280 3639.

Yours sincerely

A handwritten signature in black ink, appearing to read 'T. D'Aloisio', written in a cursive style.

Tony D'Aloisio
Chairman