

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

SUBMISSION

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**HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON
ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS INQUIRY
INTO COMMUNITY STORES IN REMOTE INDIGENOUS COMMUNITIES**

Introduction

ASIC welcomes the inquiry into community stores in remote Indigenous communities. This submission is made by ASIC noting that the Committee has expressed a particular interest in the following:

- The regulation of consumer credit issues, such as 'book up' practices; and
- The effectiveness of private, public and community store models.

Consumer issues

There has been little systemic research on the issue of consumer issues in relation to community stores, with the notable exception of McDonnell and Martin (2002) *Indigenous community stores in the 'frontier economy': Some competition and consumer issues*, CAEPR Discussion Paper No 234/2002. This research was commissioned by the Australian Competition and Consumer Commission (ACCC) in light of growing awareness of the special needs of Indigenous people as a disadvantaged and culturally distinct, but also heterogeneous, group in Australian society.

The research highlighted the special characteristics of Indigenous communities which make individuals and local businesses susceptible to commercial exploitation, and which inhibit competitive processes from delivering benefits enjoyed by other communities. It found that the factors that may inhibit the operation of competitive markets in remote communities include: high transportation costs; the limited number of stores in remote communities; store governance issues which may prevent the efficient operation of stores and community governance issues which may operate as a barrier to the entry of new stores; Indigenous cultural understandings and expectations about how stores should operate; high labour costs in remote

communities; and land rights legislation which may operate as a legislative barrier to the entry of firms onto Indigenous land.¹

Where ASIC fits into the regulatory picture

ASIC regulates both companies and financial services. We also have a statutory mandate to promote the confident and informed participation of consumers and investors in the financial system.

Responsibility for the corporate regulation of indigenous businesses is currently spread across a number of different Commonwealth, State and Territory agencies, including ASIC, the Office of the Registrar of Indigenous Corporations (ORIC), and State and Territory Business Affairs agencies.

In addition to being a corporate regulator, ASIC assumed Commonwealth responsibility for consumer protection in relation to financial services on 1 July 1998, and for some limited aspects of consumer credit on 10 March 2002. In particular, the ASIC Act prohibits conduct that is misleading or deceptive or unconscionable in relation to credit products and services. The nature of this new jurisdiction meant that ASIC had greater responsibility for service delivery to indigenous consumers, particularly in relation to consumer credit areas such as car loans and book up.² The transfer of regulation of credit from State and Territory agencies to ASIC (from 1 November 2009) is going to increase this workload. This transition will see ASIC take the regulatory reins over home loans, personal loans, credit cards, overdrafts, lines of credit and book-up and other products and services – together, some 20% of all financial services in Australia.

ASIC's consumer protection role

An important part of our legislative objectives is to promote confident and informed participation of consumers in the financial system. ASIC produces targeted information and resources for different sections of the community, including resources for Indigenous Australians. Our Indigenous consumer strategy has three key elements: consumer education/financial literacy; combating exploitative business activity; and working with mainstream providers to improve practices and practical access.

To achieve these goals in remote communities we increasingly rely on collaborative partnerships with businesses, consumers, consumer representatives, and other regulators to create a shared sense of purpose through collaborative agenda setting, and more effective interventions through engagement of multiple parties. One example of how our work has impacted on the operation of remote community stores

¹ McDonnell's and Martin's paper highlighted the need for Trade Practices Act compliance education to be directed specifically at store managers. In 2006, the ACCC produced *FairStore* - a best practice guide for stores serving remote and Indigenous communities.

² Responsibility for regulation of all consumer credit is currently shared between ASIC and State and Territory Governments (through their respective Fair Trading offices). This will change on 1 November 2009 when full responsibility will transfer to ASIC.

is in relation to the practice of book up (short term credit provided by traders or merchants).

Book up is an arrangement whereby a store offers short term credit to customers, usually for the purpose of purchasing goods but sometimes allied with a loan when the customer does not have any money left in their account until pension day, provided the customer hands over their debit card, or “keycard” to the store together with their personal identification number (PIN). The store then uses its EFTPOS facility to debit the customers account on the customers social security pay day.

ASIC's 2002 report *Book Up: Some Consumer Problems* found that the practice of book up was widespread amongst remote community stores and often secured by the trader retaining the debit card and PIN of the customer. ASIC found examples of traders holding over 300 debit cards and PINs of Aboriginal customers.

Book up is not of itself an illegal or unconscionable practice. The obtaining of credit is often of benefit in the short term to Indigenous people who have run out of money. It enables them to get basic goods as well as other goods that are important to them.

Whilst there is an argument that book up may be a problem in the long term for Indigenous persons who use it as it promotes a dependency on credit, determining whether a book up facility in a particular store can be considered unconscionable conduct requires considering all the circumstances surrounding the way the store practises book up. One example of where the practice of the book up may amount to unconscionable conduct is when stores do not operate a book up facility in a sufficiently transparent way for consumers to feel confident that they are being treated fairly and the amount of repayment requested or taken is correct.

In 2005 ASIC wrote to the Australian Bankers' Association and the CEOs of the seven major banks in Australia regarding book up and suggested a review of the banks' general terms and conditions for agreements with merchants for EFTPOS. Banking terms and conditions and the EFT Code prohibit a customer from disclosing their debit or credit card PIN to anyone, but most banks did not (then) prohibit a merchant from asking for the PIN or requiring it to be disclosed as part of a book up arrangement. As a result of ASIC's lobbying, many of the main banks now prohibit a merchant from doing this i.e. their merchant agreements prohibit the request or retention of a personal identification number.³

In the same year, ASIC organised a book up forum in Alice Springs for major financial institutions and banking industry representative bodies. The aim of the forum was to discuss problems associated with book up and banking services in remote communities and to come up with some common agreed approaches. One of the suggested responses was to develop materials on book up that would help people dealing with book up problems. As a result, ASIC developed *Dealing with Book Up: a Guide*, in consultation with key stakeholders.

³ One bank also restricts the retention of a customer's card. The four major banks have made the change nationally. One bank has made the change to NT merchants only.

ASIC's book up guide was published in 2006. It identifies possible options for dealing with the problems of book up, including a proposal to develop materials that would assist people dealing with book up problems.⁴ This guide is a comprehensive resource for anyone working on developing responses to book up in Indigenous communities. The guide was developed in consultation with a wide range of stakeholders and details what communities and organisations across Australia have done to control or eliminate book up. The guide also contains suggestions for alternative ways of managing money and information about how the law applies to book up and who can help. It includes a community action survey, draft contract terms for store managers, a fold-out book up map with problems and solutions, and a simple presentation on compact disc that can be used to increase awareness and get a discussion going about book up.

ASIC's book up guide has been well received, widely distributed and re-printed. ASIC has also subsequently published a smaller version of the guide titled *Book Up: Key Facts*. Both publications are available on the Indigenous portal of our consumer website at www.fido.gov.au.

Since releasing these publications, ASIC has undertaken a considerable amount of community education work in relation to book up systems associated with purchasing goods in remote community stores. ASIC staff visited over 115 remote communities in the NT, WA, Qld, SA and NSW in the last two years.

ASIC's publications and financial literacy materials have proved to be a valuable resource for government agencies, community leaders, financial counsellors, non-government organisations, private businesses and others in the business of helping Indigenous communities deal with problems associated with book up.

While many community stores have improved their book up systems, book up still remains a significant policy issue in most States and Territories and ASIC supports the need for a consistent regulatory approach to book up. The transfer of regulation of all consumer credit from State and Territory agencies to ASIC on 1 November 2009 is likely to provide new opportunities to achieve a consistent regulatory approach. However, it should be noted that the enforcement of existing credit laws in relation to book up practices is extremely difficult in remote communities. Banks also have a role to play in enforcing their merchant agreements.

ASIC's corporate regulation role

Community stores can be conducted using a variety of organisational forms, including corporate and non-corporate forms. Corporations can be registered with ASIC or ORIC. Many stores operate as incorporated associations under the relevant Associations Act which applies in the State or Territory in which they operate. Non-corporate forms of association include sole traders, partnerships, trusts and joint ventures.

⁴ In the same year, the ACCC produced *FairStore* - a best practice guide for stores serving remote and Indigenous communities.

Companies registered with ASIC can be further divided into types and classes – the types being proprietary and public companies. The classes of proprietary companies are (a) limited by shares and (b) unlimited with share capital. The classes of public companies are (a) limited by shares, (b) limited by guarantee, (c) unlimited with share capital and (d) no liability.

Governance issues can often be complex, particularly where there are several different types of incorporation, and overlapping jurisdictions and individuals. Some community stores use more than one form of association and, within that group, a mix of corporate and non-corporate bodies. For example, the shareholders of a proprietary company limited by shares may be an ORIC company or an association. A proprietary company may also act as the trustee of a trust and enter into a management agreement with another entity to run a store.

This can lead to confusion about who owns a community store, where a person can obtain information from about the store (ie. which State, Territory or Commonwealth agency can information be obtained from), and what a person's rights are in relation to the management of that store.

Governance issues can further be complicated by competing interests of different clans and different cultural perceptions and understanding of the roles and function of the various corporations.

There are many different models of community stores in operation. ASIC recognises that there is a huge diversity of experience of Indigenous consumers and businesses. However, it is clear to us that many Indigenous community members do not understand the legal structure of the corporations that operate community stores and are not aware of where they can access information from about those corporations. They also have difficulties in understanding how the corporations operate, their rights as members of the corporations that operate community stores, and rights as consumers who use those stores. Key to the governance problems faced by most community stores is a lack of accountability.

As a corporate regulator, ASIC's role in relation to community stores in remote Indigenous communities is fairly minimal – for example, we are responsible for regulating less than 10% of all community stores operating in the Northern Territory.⁵ However, we work closely with ORIC, and State and Territory Government Business Affairs agencies to deal with corporate governance issues associated with remote community stores.

McDonnell and Martin (2002) contend that the way community stores are governed has clear implications for consumer rights and the general welfare of Indigenous consumers. Their research found that governance structures were a larger impediment to the efficient operations of community stores than transportations costs and that governance is a major issue for enhancing Indigenous welfare in remote communities.

McDonnell and Martin contend there is often a stark contrast between the supposed legal corporate governance structure of store committees and the way that most

⁵ Most community stores in the Northern Territory, for example, are registered under the Northern Territory *Associations Act* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*

operate in reality. Their research highlighted problems such as lack of transparency in the way the store is operated, lack of accountability by the manager to the store committee, disagreements concerning distribution of store profits, bad debts, and committee costs.

ASIC's early⁶ and on-going work in this area has focused on improving corporate governance and capacity in Indigenous organisations. We have participated in training sessions, when requested, with Indigenous organisations and people delivering services to Indigenous communities. ASIC has participated in training focused on the skills required to run Indigenous organisations properly – how to start, build and control commercial enterprises. As a corporate regulator, we also assess complaints about Indigenous organisations and regularly provide information to members about their rights.

There is an on-going need for information sessions and training programs that are culturally and corporately effective, and there are many entities (both Government and private) that are providing such programs. There is also a need for independent assessment of the effectiveness of these programs.

ASIC believes there is a need for a whole-of-government, whole-of-community approach to the development and implementation of suitable training programs. We are responding to these challenges through joint initiatives with ORIC, the Australian Taxation Office (ATO) and other relevant Commonwealth, State and Territory Government agencies.

In 2009, ASIC had the opportunity to collaborate with ORIC in the delivery of 'Building Better Stores' governance training to the boards of remote community stores in the NT. This type of training is expensive to deliver and requires teaching expertise to deliver effectively. It also needs to be able to be delivered over a long period of time in a sustained manner. Generally, this does not appear to be something that is able to be resourced regularly by agencies that are responsible for the incorporation of stores – with the exception, perhaps, of ORIC.

If remote community stores were incorporated under one jurisdiction, this may result in less business costs, better training opportunities and a more consistent regulatory approach.

Financial literacy initiatives

ASIC has always had a statutory mandate to promote the confident and informed participation of consumers and investors in the financial system. However, arising out of the Government's decision to transfer to ASIC national responsibility for financial literacy and the functions and operations of the Financial Literacy Foundation from 1 July 2008, ASIC now has an expanded financial literacy mandate. Our aim is to improve the financial literacy of Australians, including Indigenous Australians, and to assist them to develop the attitudes and behaviours needed to achieve better financial outcomes.

⁶ In 1999 we produced a publication titled *Company Directors Guide for Aboriginal People*.

Improving financial literacy of Indigenous Australians is critical to achieving and sustaining the Government's goal of closing the gap between Indigenous and non-Indigenous employment within the next decade.

ASIC's strategic program of education and information for Indigenous consumers and investors could be greatly enhanced by working in partnership with community stores on specific education campaigns, such as teaching people how to spend money responsibly. Community stores often operate in ways which go far beyond the commercial role usually ascribed to such ventures (especially in regard to the provision of supplementary banking, postal, cultural and social services) and could greatly assist with such education campaigns.

We are particularly interested in the potential of community stores like Outback Stores and the Arnhem Land Progress Association (which, together, are responsible for managing the commercial operations of approximately 40 stores across the NT) to communicate financial consumer messages via their network of stores.

ASIC is also exploring financial literacy initiatives in schools serving Indigenous communities, and we have piloted some initiatives in remote schools in the NT.⁷ There is a great opportunity for community stores to get involved in these initiatives but stores will, of course, need to be adequately resourced in order to do this.

Summary

While ASIC is not funded to pro-actively monitor consumer and governance matters arising in remote communities, we have been proactive in developing relationships with legal aid agencies, financial counselling services and Indigenous organisations that operate in remote communities, including the operators of large community stores such as the Arnhem Land Progress Association and Outback Stores. Some of our indigenous consumer education strategies have been directed towards such organisations. This has allowed potential breaches to be reported by these organisations rather than via Indigenous consumers themselves and, as a result, there has been an increase in the number of complaints that are being referred to us.

We have been pro-active in monitoring book-up issues across Australia (particularly in the NT) and intervening in exploitative business activity when that activity falls within our jurisdiction. We work closely with State and Territory Governments (through their respective Fair Trading offices) and the Australian Competition and Consumer Commission in relation to activities that cross regulatory jurisdictions. We also work closely with ORIC and the ATO in relation to store governance issues.

Community stores are often the main socioeconomic enterprise in their communities. We have observed many stores are operating in a professional, efficient and legal manner. We have also observed many struggling and failed stores (including a store and model that we highlighted in our 2006 publication on book up as being

⁷ ASIC has run a *Moola Matters* financial literacy schools competition in the NT for the past five years for year 7 to 12 students. Entrants are required to design a poster or multimedia design which conveyed a consumer message about money or finance. ASIC received over 100 entries from across the NT in 2008 and 5 of the 9 winners were Indigenous students from remote schools.

innovative), and stores that have been resurrected after a period of administration and change of management. ASIC also licenses and regulates the insolvency practitioners that are appointed to all types of corporate forms – ASIC and ORIC corporations and State and Territory associations.

We are heartened by some of the newer store models and management structures that are emerging and the better training opportunities that those models appear to be providing for directors, management committee members, shareholders and other stakeholders.

The way that community stores are operated can have a dramatic impact on the welfare of the populations they service and ASIC therefore recognises the importance of this inquiry and supports its terms of reference.