

**Senate Standing Committee on Economics**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Budget Estimates

4 – 6 June 2013

**Question: BET 6-7**

**Topic: Suspension Clauses**

**Hansard Page: Tuesday 4 June 2013, Page 88**

**Senator EGGLESTON asked:**

**Senator EGGLESTON:** I would like to talk about suspension clauses. I was on the Bankwest inquiry when the committee looked into this. Evidence was given to the committee that many Bankwest customers found themselves in a position where their businesses were being sold to repay debt under suspension causes and sometimes so-called low-doc loans. Many of these owners regarded what was happening to them as totally unfair. They felt that they should not have been in default and there was no valid reason for the foreclosures. It has been claimed, as I said, that CBA and Bankwest were relying on suspension clauses and low-doc loans to suspend customers' rights against deceptive and unconscionable conduct by the banks in closing them down and selling their assets.

I understand that ASIC has been asked to inquire into the role of suspension clauses in the Bankwest takeover by CBA. Does ASIC believe that there is a gap in the legislative and administrative framework for the supervision of the Australian banking system in protecting bank customers against unreasonable conduct by banks?<sup>1</sup> Should there be an investigation into the conduct of officers and employees of the Commonwealth Bank in the Bankwest matter to determine whether or not bank officers breached financial service laws, especially as many remain in senior positions?<sup>2</sup> As I said, the question is whether there is a gap in the legislative and administrative arrangements for the supervision of Australian banks in protecting bank customers against unreasonable conduct by banks. I would like to put that and some other questions on notice and I wish to table a background document which has been provided to me. I will await ASIC's response with interest and I will follow it up at the next round of estimates.

**CHAIR:** In terms of tabling the document, I will have a look at that before I agree to accept it. I will advise you later.

---

<sup>1</sup> BET 6

<sup>2</sup> BET 7

## Senate Standing Committee on Economics

### ANSWERS TO QUESTIONS ON NOTICE

#### Treasury Portfolio

Budget Estimates

4 – 6 June 2013

#### Answers:

6. ASIC understands that "suspension clauses" in loan contracts are intended to prevent any attempt to delay due payment by "suspending" any rights of a borrower or guarantor against the lender by way of set-off or counterclaim until after the loan has been repaid. Courts have upheld the validity of suspension clauses on many occasions. However in the recent decision of [O'Brien v Bank of Western Australia Ltd](#) [2013] NSWCA 71 the New South Wales Court of Appeal concluded that the suspension clauses in O'Brien's loan contract were not applicable as there was a reasonable argument that the Bank had not made out the case that the loan was in fact due and payable, because it appeared that it may have made representations to the effect that it would roll the loan over. The Court also commented [Para 114] that "*suspension/preservation clauses do not preclude raising claims for the grant of relief for misleading and deceptive or unconscionable conduct that may operate retrospectively such that the foundation on which those clauses would operate would not have arisen or would have disappeared by the time demand was made under the Guarantees*".

This Court decision demonstrates that individual borrowers or guarantors, who want to argue a case of misleading and deceptive or unconscionable conduct or that the loan is not due and payable, have an opportunity to argue their case prior to the lender obtaining judgment, even where there are suspension clauses.

Protections for business lending customers, including prohibitions on misleading and deceptive or unconscionable conduct, arise under the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Whether particular conduct is misleading or unconscionable generally turns on the specific facts of each transaction. In addition, the courts generally impose a high bar in commercial circumstances when a party is seeking to establish unconscionable conduct. Consumers should therefore seek their own legal advice about their own specific circumstances. The unfair contract terms provisions of the ASIC Act which apply more broadly to void unfair terms in standard form contracts do not apply to commercial loan contracts.

Business lending is not regulated under the *National Consumer Credit Protection Act 2009* (the National Credit Act) which imposes specific obligations on credit providers in relation to responsible lending, pre-contractual disclosure and enforcement of consumer credit contracts in default. The National Credit Act provides that a Court may make changes to consumer credit contracts on the grounds of borrower hardship, reopen unjust transactions, and review unconscionable charges.

In December 2012 Treasury released an exposure draft of the *National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill 2012* for public consultation proposing reforms to the regulation of small business lending. However, in February 2013 the Government advised that any reforms to small business lending would be deferred as consultation indicated a need to further examine a number of key issues, including whether the benefits of regulating small business lending could be delivered in a more targeted and effective way.

## Senate Standing Committee on Economics

### ANSWERS TO QUESTIONS ON NOTICE

#### Treasury Portfolio

#### Budget Estimates

4 – 6 June 2013

7. ASIC has received a number of allegations of misconduct relating to the enforcement of commercial loans made by Bankwest prior to its takeover by CBA in 2008, including concerns about the actions of receivers and managers.

ASIC assesses each allegation it receives to determine what, if any action is appropriate. Further details of how ASIC deals with allegations of misconduct are set out in [Information Sheet 153](#).

One potential course of action is commencement of an investigation with a view to possible enforcement action. ASIC is not obliged to commence an investigation into all matters brought to its attention, and ASIC is not in a position to take enforcement action in relation to all alleged breaches of the laws it administers. ASIC considers a range of factors when deciding whether to commence an investigation with a view to possible enforcement action, including strategic significance, benefits of pursuing misconduct, whether there are alternative courses of action and other issues specific to each case, including whether there is evidence which would be admissible in court. Additional information about ASIC's approach to enforcement is set out in [Information Sheet 151](#).

On the basis of the information assessed to date, ASIC has not commenced an investigation into the conduct of the CBA or Bankwest. ASIC will continue to assess any additional information which may come to hand.

ASIC generally does not act for individuals and we encourage affected commercial clients to consider alternative options such as lodging disputes with external dispute resolution schemes or taking their own legal action. We recommend that individuals seek their own professional advice in this regard. Additional information about ASIC's approach to involvement in private court proceedings is set out in Information Sheet 180.