

# Cotulla Trust

Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

## Supplementary Submission 119

To keep this simple I have prepared this submission on the basis of the terms listed below:

Terms of reference of this Joint Committee:

- the general regulatory environment for these products and services
- the need for any legislative or regulatory change

### Background

As detailed in the original submission, our share portfolio was used by the Bendigo and Adelaide Bank / Leverage Equities as collateral on a margin loan for a client of the Banks.

Bendigo and Adelaide Bank / Leverage Equities have confirmed that their client has no association with the Cotulla Trust, when it entered into this margin loan and its client Cotulla Pty Ltd identified by ACN 102 786 309 was acting in its own capacity at all times.

Bendigo and Adelaide Bank /Leverage Equities have stated that they have done nothing wrong and that Ord Minnett is responsible for transferring the assets to them . They appear to be trying to take no responsibility for the fact that they entered into a Third Party Mortgage which is prohibited under the universal ( applicable in all States of Australia) Consumer Credit Code Section 44 – Third Party Mortgage Prohibited.

Bendigo and Adelaide Bank are also trying to rewrite history as it was their officers that signed both sides of the mortgage contracts and that their compliance procedures that failed.

Bendigo and Adelaide Bank / Leverage Equities have advised us that their compliance procedures do not include the following:

- Proof of Ownership of assets.
  - They do not check with the share register to find out who owns the assets

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- They do not ask for copies of income tax returns to confirm that the entity that owns the assets has the income to support the loan
- They don't ask for copies of BAS statements to confirm that the client is tax compliant and has the ability to pay the loan
- They don't check to see if the client has an ABN or TFN identifier ie tax compliant
- They don't check to see if the clients ABN or TFN match the records of the holder/owner of the shares registered with the share registry.

In other words the only compliance they do is to check the ACN identifier with the details on the ASIC website and a credit check.

When you obtain an ABN the nine digit ACN is normally imbedded into the ABN. In this case Bendigo and Adelaide Bank was able to look at the ACN of their client and the ABN registered on their own share register and confirm that the nine digit ACN was embedded in the ABN number of the registered owner of the shares being the Cotulla Trust identified by ABN 57 369110515.

Bendigo And Adelaide Banks Client ACN	ACN 102 786 309
Cotulla Trusts ABN Identifier	ABN 57 369 110 515

Numbers that Match will be left blank

xx xxx xxx xxx

Not a single number of the nine digit ACN matches any of the Digits in the ABN. So one is tempted to ask how Adelaide and Bendigo Bank / Leverage Equities found a match.

Also the ASIC website will normally list the ABN number on its details if it belongs to that entity. ASIC website does not list any ABN for the Bendigo and Adelaide Banks Client, which just confirms again that they were in a full state of knowledge regarding the fact that the identifiers registered on the share registry did not match their clients details.

Yet they proceed to enter into the Third Party Mortgage in the knowledge that this was in breach of Consumer Credit Code - section 44.

## **The General Regulatory Environment for these Products and Services**

During our investigation into this matter, we contacted AUSTRAC about the problem that we had encountered with the Bendigo and Adelaide Bank / Leverage Equities of opening up an account in a false name.

The reason for this was because they are the regulator of the following acts of legislation

- Financial Transaction Reports Act 1988
- AML & CTF Act 2006

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## The Legislation

When one reads the legislation you find that the legislation is very comprehensive and blends with the additional legislation that governs the securities industry.

All the legislators that we spoke to are fixated in their domain and are not working as one to address the problems as they occur. A good case in point is the ASX, they have stated that they are only required to be compliant with the Corporations Act 2001 and that no other legislation affects their operation. As such they have issued guidelines that are only compliant with ASX/ASTC Rules and the Corporation Act 2001.

These ASX/ASTC guidelines are not compliant with the other legislation namely

- AML & CTF Act 2006
- Financial Transaction Reports Act 1988
- Australian Tax Legislation
- Consumer Credit Code for margin lending
- To name but just a few

Unfortunately a Cash dealer defined under The Financial Transaction Reports Act 1988 is in fact a Participant /Stock Broker and its operation is strictly governed by all of the abovementioned legislation

For example :

The Financial Transaction Reports Act 1988 states the following

### 21 Identification references

- (1) An identification reference for a signatory to an account is a written reference by an acceptable referee, signed by the referee and setting out the name to be used by the signatory in relation to the account and stating that:
  - (a) the referee has known the signatory for the period specified in the reference;
  - (b) during the whole of that period, or for so much of that period as is specified in the reference, the signatory has been commonly known by that name; and
  - (c) the referee has examined:
    - (i) a specified primary identification document for the signatory in that name;
    - (ii) a specified secondary identification document for the signatory in that name and a specified primary identification document for the signatory in a former name of the person; or
    - (iii) only a specified secondary identification document for the signatory in that name.
- (2) An identification reference for a person by an acceptable referee shall also set out:
  - (a) the name, address and occupation of the referee and the basis on which the referee claims to be an acceptable referee;
  - (b) if the reference states that the referee examined a primary identification document for the person in a name different from the name to be used by the person in relation to the account—the explanation that the person gave the referee for the difference in names;
  - (c) if the reference states that the referee examined only a secondary identification document for the person—the explanation that the person gave the referee for the failure to produce a primary identification document; and
  - (d) the required details of the identification document or documents examined by the referee.

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- (3) An identification reference for a person by an acceptable referee shall be signed by the person in the presence of the referee and shall contain a statement by the referee to the effect that the reference was so signed.
- (3A) An acceptable referee, or any other person, must not:
  - (a) intentionally make a statement in an identification reference, reckless as to the fact that the statement is false or misleading in a material particular; or
  - (b) intentionally omit from an identification reference any matter or thing, reckless as to the fact that without the matter or thing the reference is misleading in a material particular.

Penalty: Imprisonment for 4 years.

Note: Subsection 4B(2) of the *Crimes Act 1914* allows a court to impose in respect of an offence an appropriate fine instead of, or in addition to, a term of imprisonment. The maximum fine that a court can impose on an individual is worked out by multiplying the maximum term of imprisonment (in months) by 5, and then multiplying the resulting number by the amount of a penalty unit. The amount of a penalty unit is stated in section 4AA of that Act.

- (4) For the purposes of this Act, a failure by a person to produce a primary identification document shall not be taken to be sufficiently explained merely by the assertion that a primary identification document is not presently available to the person if the person could obtain a primary identification document within a reasonable time if the person took reasonable steps to obtain it.
- (5) Nothing in subsection (4) shall be taken to require a person to apply for the issue of a citizenship certificate or a passport.

In our case the Bendigo and Adelaide Bank have confirmed that they never obtained the adequate reference as required by the Financial Transaction Reports Act 1988 which states that they are required to obtain primary identification by way of reference

The ASX/ASTC rules do not address this legislation.

## 24 Opening account etc. in false name

- (1) A person shall not open an account with a cash dealer in a false name.
- (2) A person shall not operate an account with a cash dealer in a false name.
- (2A) A person must not operate, or authorise the operation of, an account with a cash dealer if the account is in a false name.
- (3) Where a person is commonly known by 2 or more different names, the person shall not use one of those names in opening an account with a cash dealer unless the person has previously disclosed the other name or names to the cash dealer.
- (4) Where a person is commonly known by 2 or more different names, the person shall not use one of those names in operating an account with a cash dealer unless the person has previously disclosed the other name or names to the cash dealer.
- (5) Where a person using a particular name in dealings with a cash dealer discloses to the dealer a different name or different names by which the person is commonly known, the dealer shall make a record of the disclosure and shall, upon request in writing from the AUSTRAC CEO, give the AUSTRAC CEO a copy of that record.
- (6) A person who contravenes subsection (1), (2), (2A), (3), (4) or (5) is guilty of an offence against this subsection punishable, upon conviction, by imprisonment for not more than 2 years.

If the participant follows the ASX/ASTC guidelines dealing with Formal Trusts and Self Managed Super Funds, then the cash dealer would be in breach of the above mentioned legislation.

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## **What action has AUSTRAC done to address this**

The answer to this question is easy Nothing. With the introduction of the AML & CTF Act 2006 they had the perfect opportunity to fix these issues.

What we have now is a position in which the Brokers are attempting to bridge the various legislation governing their operation without a coordinated approach by the regulators.

For example all SMSF and formal trusts are now required to have full details of the beneficiaries. Yet the ASX has not updated their documentation requirements to the CHESS Sponsorship agreements to reflect these changes.

## **The need for any Legislative or Regulatory Change**

The first change that should occur is for the regulators to become accountable for their failing to regulate. In our case the regulator never looked into our complaint or dealt with the matter. This is unacceptable as the first sign of a problem in the system is when you get a complaint.

The ASX needs to be audited by the regulators ie the Tax Office , Austrac etc to confirm that the ASX and others are compliant with all legislation and not just the Corporation Act.

Risk manage changes in legislation so that these changes can be outlined to all parties and then implemented as soon as these changes come into force. This is the responsibility of the regulator to make sure that the changes are implemented

## **In Summary**

Regulators have to investigate complaints that are made to them, if it had occurred in this case then this systemic problem about correct identification of account holders would have been addressed.

But what appears to be the case is that no action is taken until we get a government enquire. The people have a right to expect that the regulators will proactively regulate and carry out an audit on the participants to find out if their procedures are compliant with legislation

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We also demand that action is taken by the regulator AUSTRAC to enforce its legislation on the following so that they become compliant with the legislation.

- ASX
- Ord Minnett
- Bendigo and Adelaide Bank / Leverage Equities

Also we would like to receive information from AUSTRAC on what they have done to address our problem

Best regards

The Trustee for Cotulla Trust

The Guardian of the Cotulla Trust