

# COTULLA TRUST

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

1 July 2009

Dear Sir,

The following submission has been prepared on the experience and knowledge gained over a three year period that includes extensive research, the obtaining of a Private Tax Ruling and very substantial dealings through written correspondence with various stakeholders within the securities/share trading industry that has included:

- Directors and Officers of the Australian Securities Exchange Limited.
- Executive Management and Officers of Ord Minnett Limited
- Executive and Investigative Officers of the Financial Industry Complaints Service Limited.
- Senior Executive (Assistant Commissioner Level) and Officers of the Australian Taxation Office.
- Directors and Senior Executive of The Bendigo and Adelaide Bank limited representing Leverage Equities Limited a wholly owned subsidiary of Bendigo and Adelaide Bank.
- Officers and Investigators of The Australian Prudential Regulating Authority.
- Officers and Investigators of AUSTRAC.
- Federal Government Ombudsman.

## ***Terms of reference***

- \*The role played by commissioned Agents (usually being Stock broking firms or the Stock broking Arms) of Lending Institutions such as Banks that provide the services of Share Leveraging, their modus operandi in regard to product sales and advice, including the potential for conflicts of interest, the need for appropriate disclosure, and remuneration models for financial advisers.  
\*Changed with respect to the committee to provide clarity,
- The committee will investigate the involvement of the banking and finance industry in providing finance for investors in and through Storm Financial, Opes Prime and other similar businesses, and the practices of banks and other financial institutions in relation to margin lending associated with those businesses.

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## **Third Party Mortgages.**

The committee needs to extensively examine both the Banks and Margin Lenders practice of Third Party Mortgages. It should be noted that most of the share margin lenders in the Australian Market are subsidiaries of the Australian retail Bank sector.

As a subsidiary of a Bank these margin lenders are required under legislation to act in accordance with the Banking Act and other related legislations and treaties such as the Bankers' Association Code of Banking Practice of 2003 – which requires its signatories to comply with the Law that includes, but is not limited to, the Australian Uniform Credit Laws Agreement 1993 which under Consumer Credit Code - SECT 44 clearly and simply states that:

Third party mortgages are prohibited as described in section (1) being:

“A credit provider must not enter into a mortgage to secure obligations under a credit contract unless each mortgagor is a debtor under the contract or a guarantor under a related guarantee.”

The Margin lenders in the Opes Prime and Storm Financial should have been in a full state of knowledge of their obligations and responsibilities to comply with the legislation in place:

- The Uniform Credit Code that includes:
  - Consumer Credit (Victoria) Act 1995 - SECT 14 - False or misleading statements
  - CONSUMER CREDIT CODE - SECT 44 - Third party mortgages prohibited
- A New Tax System (Australian Business Numbers) Sect 23 – Misuse of ABN
- Corporation Act 2001
- AML & CTF Act 2006
- Financial Transactions Reporting Act 1988

## **Leverage Equities Limited.**

Our case is a good example of how the position of commercial gain was prioritized at the expense of compliance with the law and the compliance procedures at the margin lender.

The Cotulla Trust is a holder of a share portfolio made up of 4 core shareholdings. For ease of understanding we will refer to the 15,000 Adelaide Bank shares that the Trust owns and is the registered owner on the Adelaide Bank Share register (in which the share register confirms that the holder details are as follows

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**Entity type:** Trust  
**Holder's ABN:** ABN 57 369 110 515  
**HIN:** XXXXXXXXX  
**Legal Name:** Trustee of the Cotulla Trust (in the format as directed by ASX/ASTC Guidelines and the Share Registry Association Australia, SRAA website requirements)

The share register forwarded a confirmation to the Cotulla Trust detailing this information and confirming that the shares were registered against the Trusts ABN 57 369 110 515 as the holder for withholding Tax purposes— copy attached.

In accordance with its obligations under the tax legislation the Adelaide Bank Share registry advised the Australian Tax Office that the holders ABN 57 369 110 515 and TFN have been registered with it.

## **Obtaining a Commercial Gain under Questionable Circumstances**

Leverage Equities in the course of its normal business activities entered into a commercial relationship with the entity Cotulla Pty Ltd when it was acting in its own personal capacity, meaning that in this instance Leverage Equities were dealing with Cotulla Pty Ltd in its own identity and not that of a Trustee of a Trust.

This in fact has been confirmed by Ms Kathleen Gallagher an officer of Bendigo and Adelaide Bank via an Email dated the 8<sup>th</sup> October 2009 where she stated that

*“Leveraged Equities transacted with Cotulla Pty Ltd in its own right, not as trustee for the Cotulla Trust. All proper processes were undertaken”.*

The Cotulla Trust then questioned Bendigo and Adelaide Bank /Leverage Equities about this situation as it was apparent that the Trusts shares had been used by Leverage Equities as collateral for the mortgage with their Client, without any thought as to check to see if their client actually owned the shares they were mortgaging.

It is now very apparent that the sole motivation of Bendigo and Adelaide Bank /Leverage Equities for this transaction was purely profit driven with no regard for either proper Bank Practice or the Law especially if it got in the way of making a commercial gain.

## **KYC – Know Your Client**

The Cotulla Trust asked Bendigo and Adelaide Bank /Leverage Equities what KYC due diligence they carried out to ascertain and verify the identity of their client and the owner of the assets (shares)

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The Banks response through their Mr. Oataway (Company Secretary) advised that **NO KYC** was undertaken by Bendigo and Adelaide Bank / Leverage Equities as it was not required to do so. In the same response Mr. Oataway further advised that they had checked the ASIC register which does not show ABN Registrations as this is on the ATO Website under the ABR section.

It is assumed that the Bendigo and Adelaide Bank/ Leverage Equities client would have completed at least one financial year's accounts (one usually needs to show proof of capability to repay to a lender before they will lend you money.) It is further assumed that Bendigo and Adelaide Bank / Leverage Equities would have asked and obtained a copy of this report and an income tax return.

We do know that the signed off financial report for Cotulla Pty Ltd in its capacity as a Trustee of the Cotulla Trust showed that it had assets of \$1.00 and no income.

To date Bendigo and Adelaide Bank/ Leverage Equities have not disputed this fact and it would seem strange not to have asked and obtained a copy from their client at that time.

Which begs one to ask, what have Share Leveraging organizations done to ensure that they have been operating in full compliance with the Law as we don't see Bendigo and Adelaide Bank/Leverage equities operating any different to the others here in Australia when opening accounts

With this in mind, the Anti Money Laundering and Counter Terrorism Financing Act 2006 (AML & CTF Act 2006) requires the Bendigo and Adelaide Bank/Leverage Equities to both obtain and in turn maintain full information from/on their client, consequently Bendigo and Adelaide Bank/ Leverage Equities would have been obliged to obtain all of the documentation mentioned below to comply with this Act as they did not close the account until 26 February 2008, however they have stated that they did not.

In other words they did not carry out any form of due diligence to ensure that they complied with their own requirements to comply with their own Loan arrangements for their loan book or the Law despite the law requiring them to do so.

Any reasonable banker would have checked the following:

- Their clients:
  1. **ABN identifier**- the Australian Business Register ([www.abr.government.gov.au](http://www.abr.government.gov.au)) has no record of Cotulla Pty Ltd. Clearly looking up a website is too difficult to do.
  2. **TFN identifier** – Bendigo and Adelaide Bank/ Leverage Equities never asked their client for documentary proof that their client was tax compliant. This is most interesting as they are claiming that their client had a \$700,000 share portfolio but had never paid any Tax or any documentation on where the shares came from, further to that by not checking, they could claim that there was no reason to instruct their

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share registry to withhold Tax thus ensuring that they got the maximum possible dividend return hence profit on the Loan transaction.

- **The Share registries** – confirmed that the registered holder was a Trust and that its ABN and TFN identifiers had been registered. Mr. Oataway advised that Bendigo and Adelaide Bank never check with the share registry regarding ownership of these shares and that they are not required to check the ownership of any shares with the share registry. The Levergae Equities website claims that they have over 4 billion in loans, so one can assume that none of these shares were checked to see who the actual owner is  
Put simply, that is like a Bank entering into a mortgage on a house and not obtaining documentary proof from the Land Titles office who actually owns the property.
- **Income Tax Return** – Bendigo and Adelaide Bank have confirmed that they do not have a copy of any Income Tax Return for their client for the duration of the loan which is five (5) years. As none exist.
- **Dividend Statements** – Bendigo and Adelaide Bank have confirmed that they do not have any copies of these documents which state that ABN and TFN identifiers of the holder have been quoted. This is most interesting as it was the dividend payments that were paying the interest on the loan, one would think that any prudent banker/credit provider would check to see if their client had income to service the loan. But of course as they had full knowledge that their client did not have a TFN or ABN these documents would contradict their stated position and make it difficult to obtain a commercial gain by extending a mortgage and defrauding the commonwealth of withholding tax.
- **Annual Return**- Bendigo and Adelaide Bank/ Leverage Equities client had signed an annual return showing assets of \$1.00 and no income. Yet the Bendigo and Adelaide Bank /Leverage Equities still entered into a mortgage with this company.
- **BAS statements** – Bendigo and Adelaide Bank / Leverage Equities client in its own right has never completed any BAS statements or submitted them to the Australian Tax Office as confirmed by an audit undertaken by the ATO at the Cotulla trusts request. Again it is such a simple document to ask for from your client it does not seem logical not to ask for it unless you knew your client was unable to supply it. But that raises a number of questions about ethical behaviour of the banker/credit provider regarding money laundering and tax avoidance
- **Application form**: this appears to be the only document that Bendigo and Adelaide Bank /Leverage Equities has.

Of special note, when the Cotulla Trust asked for an unsanitised copy of this document to enable it to be forensically test (copy provided previously to the Cotulla trust had been sanitized to obliterate the ABN and TFN identifiers endorsed thereon) the Bendigo and Adelaide Bank refused as it is a fair assumption that the ABN and TFN identifiers contained therein belonged to the Cotulla Trust.

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- **CHESS Sponsorship Agreement** – this document allows the Broker/Lender/Bank to hold the property (Share Portfolio) under its sponsorship on the CHESS sub register, however the signing of this document is executed by officers of Leverage Equities on both sides ie on behalf of both the Lender and the Borrower (under a power of attorney) which clearly is a conflict of interest.

## **The Cotulla Trust identified by ABN 57 369 110 515 was able to supply the following Documentation.**

During its discussions with the Bendigo and Adelaide Bank / Leverage Equities the Cotulla Trust provided unchallengeable documentary proof that established that the shares portfolio that was leveraged was the property of the Cotulla Trust and who by all parties' admission had no relationship whatsoever to the leveraging transaction, these included:

THE Cotulla trust provided

- **ABN identifier** – copies of correspondence from the ATO confirming the issuance of the ABN 57 369 110 515. This ABN is the identifier endorsed on all Share registry records and is unique. its use is governed by the A New Tax System (Australian Business Numbers) section 23 misuse of ABN
- **TFN identifier** – copies of the correspondence from the ATO confirming the issuance of the TFN. This TFN is the identifier endorsed on all Share registry records as the owner/holder of the shares
- **Income Tax Return** –a copy of its Income Tax Return confirming that the shares have been declared to the ATO and Tax paid
- **BAS Statements** –a copy of the BAS statements and a dividend statements from ithe Adelaide Bank Share registry and others stating that the Cotulla Trust to be the owner of the shares and that ABN and TFN identifiers have been registered and withholding tax exempted..
- **Annual Return** –a copy of its annual return showing the shares as an asset of the trust and matching the Income Tax return
- **Share register conformation** –a copy of the Share register confirmation that the shares belong to the holder identified by ABN 57 369 110 515 (the Trust's ABN)
- **Private Tax Ruling 79705** –a copy of a Private Tax Ruling obtained by the Cotulla Trust regarding the misuse of its ABN 57 369 110 515 by Ord Minnett Limited which clearly Bendigo and Adelaide Bank/Leverade Equities followed on with the continual misuse of the Trust's ABN identifier for commercial gain.

## **Third Party mortgage**

The Cotulla Trust was astounded to discover that a mortgage was taken over its assets by the Bendigo and Adelaide Bank /Leverage Equities without the authority of the Cotulla Trust (registered holder.)

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The Bendigo and Adelaide Bank / Leverage Equities have confirmed that the Cotulla Trust (the registered Holder) is not noted as a guarantor or debtor on the mortgage contract. Yet as the registered holder/owner of the asset being mortgaged the law requires their name to be on the mortgagee documentation. It is NOT.

The attached Private Tax ruling 79705 confirms that the Cotulla Trust is a legal entity as defined in the tax legislation.

In effect the Bendigo and Adelaide Bank / Leverage Equities have entered into a Third Party Mortgage which is prohibited under the Consumer Credit Code Sect 44

## **CONSUMER CREDIT CODE - SECT 44**

### **44 Third party mortgages prohibited**

- (1) A credit provider must not enter into a mortgage to secure obligations under a credit contract unless each mortgagor is a debtor under the contract or a guarantor under a related guarantee.
- (2) A credit provider must not enter into a mortgage to secure obligations under a guarantee unless each mortgagor is a guarantor under the guarantee or a debtor under the related credit contract.
- (3) A mortgage which does not comply with this section is unenforceable.
- (4) The Court may, on the application of a party to a mortgage that is unenforceable because of this section, order that the credit provider takes such steps as are necessary to discharge the mortgage.
- (5) In this section, a reference to a credit contract or guarantee includes a reference to a proposed credit contract or proposed guarantee

## **Withholding Tax**

It has been conclusively established that the Bendigo and Adelaide Bank /Leverage Equities illegally transferred the share portfolio belonging to the Cotulla Trust identified by ABN 57 369 110 515 to their client without the approval of the Cotulla Trust.

So not only has the Cotulla Trust suffered a loss but so has the Commonwealth of Australia lost the withholding Tax payable as a result of this illegal action.

As Bendigo and Adelaide Bank / Leverage Equities continued misusing the ABN and TFN identifiers during their sponsorship for a number of years (5). The Share registers continued to use the ABN and TFN identifiers of the Cotulla Trust to exempt the holder/ owner from withholding Tax as their

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records maintained that the owner was the entity identified by ABN 57 369 110 515 (Legal Name The Trustee for Cotulla Trust – Trading Name Cotulla Trust).

The Tax legislation requires the share registries to withhold tax at the top marginal rate on dividend payments unless the holder/owner has an ABN or TFN identifier registered against the holding (Shares).

As Bendigo and Adelaide Bank / Leverage Equities knew (as their compliance procedures would have identified this) that their client did not have an ABN or TFN . But they appear to have needed the full dividend to be paid so that their client could service its loan to Bendigo and Adelaide Bank/ Leverage Equities (profit at all cost appears to be the motivator).

It also appears that they then misused the Cotulla Trusts ABN and TFN identifier so that withholding tax would not be applied. If this was not the case one, would have expected them, to rectify the situation when they received the Private Tax Ruling 79705. They have now had this tax ruling for over one year now and they have done nothing to fix this problem or pay the ATO the withholding tax applicable.

## **Commission overrides the need for Ethical Behavior at Bendigo and Adelaide Bank / Leverage Equities**

The website of the Bendigo and Adelaide Bank talks about its corporate governance and its code of conduct. Unfortunately the written word and the contents of the website are worlds apart.

For example section 25.1 of the Code of Banking Practice that states

### **25 Provision of credit**

**25.1** Before we offer or give you a credit facility (or increase an existing credit facility), we will exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and in forming our opinion about your ability to repay it.

As Bendigo and Adelaide Bank / Leverage Equities had a copy of their client's annual report showing assets of \$1.00 and no income we are interested to know how their client was to repay the bank.

Also what type of prudent Banker/credit provider would not look at who owns the asset, particularly as all they had to do was to look at their own share registry to obtain the details? Let's hope that on their home mortgage book that they took the time to ask the Land Titles Office who owned the houses they were going to lend to



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## In Summary

As the Bendigo and Adelaide Bank has been happy to obtain the Australian Government Guarantee to help them in this GFC then they should do the honorable thing and request that the ATO perform an audit on Leverage Equities regarding their mistreatment of withholding Tax. As they have proof via the Private Tax Ruling 79705 that something is wrong at Leverage Equities.

Bendigo and Adelaide Bank have repeatedly stated that they are operating to the industry standard. Clearly the industry standard does not comply with the legislation in place and that the industry CBA and ANZ have confirmed that problems may exist.

The directors of Bendigo and Adelaide Bank appear to have failed in their corporate governance and they need to explain this to the shareholders and others and should be held accountable for any civil action that may be taken against them in their personal capacity.

But first they need to fix the existing problems that they have created. As they have not only presided over but have encouraged the pursuit of profits over corporate governance which has led us to this problem, like the one with the Cotulla Trust and the industry problems at Storm and Opes Prime.

We would also ask that the committee requests Bendigo and Adelaide Bank to answer our question honestly without the false and misleading statements that we have received so far. Then we can fix the problem we find ourselves in due to their compliance failures.

Yours Sincerely,

A handwritten signature in blue ink, appearing to be 'D. J. H. H.', is written on a light yellow background.

A Trustee of the Cotulla Trust

The Guardian of the Cotulla Trust