Why the External Dispute Resolution regime is hurting capital availability in Australia

A White Paper presented by the
mortgage lending industry to

The Parliamentary Joint Committee on
Corporations and Financial Services

and

The Senate Economics Legislation Committee

30 April 2012

BRANSGROVES
LAWYERS

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Commissioning Lenders

1. This paper was commissioned by mortgage lenders who collectively have $5.3 billion dollars invested in mortgages in Australia (the Commissioning Lenders).

2. The Commissioning Lenders do not wish to be publically identified for fear of bureaucratic retaliation. Indeed the gravamen of this paper is that a lender's ability to enforce mortgages has been wrongly placed in the hands of bureaucrats with unfettered arbitrary power instead of being subject to the law, and lenders fear the arbitrary exercise of that power.

3. All Commissioning Lenders have provided written confirmation of their instructions to Bransgroves Lawyers to publish this paper in the form annexed to this report. Those instructions, have been audited by Robert Neilson Partners ("the Auditor") against the last audited accounts of each Commissioning Lender. The Auditor's certification of the combined size of the loan books of the Commissioning Lender's is annexed to this report.

Executive summary

4. Recent statutory[1] and regulatory changes[2] have resulted in the court's jurisdiction to hear mortgage enforcement matters being ousted and the rule of law disregarded. The replacement regime gives mortgage lenders no certainty that they can enforce mortgages in a timely manner, or at all. The practical effect is that lenders are now increasingly unable to calculate risk when making loans and accordingly increasingly cannot justify risking their own or investor's capital.

5. Legislation needs to be passed which reforms the External Dispute Resolution ("EDR") regime so that:

    a) EDR schemes can only consider complaints on grounds of breaches of the law, or of codes of practice to which the Member has subscribed;

    b) EDR schemes can only suspend or expel a member by initiating proceedings in the Federal Court;

    c) EDR schemes must determine complaints within 60 days of receiving them (or the complaint will be deemed to be dismissed);

    d) EDR schemes must publish reasons for their determinations, and follow their own reasoning in prior determinations unless they have been overruled on appeal by a court of law;

    e) EDR schemes are prohibited from preventing a lender from approaching the courts to enforce mortgages which are in default;

    f) The determinations of EDR schemes can be appealed on their merits, in the Administrative Appeals Tribunal;

[1] The *National Consumer Credit Protection Act* 2009 requires lenders wanting to make regulated loans to obtain an Australian Financial Services Licence and join a EDR scheme.
[2] The release of Regulatory Guide 139.

g) Those making determinations on behalf of EDR schemes must be legally qualified;

h) The quantum of disputes that can be heard, and the relief that can be granted, by an EDR scheme is restricted to $5,000.

Regulatory Guide 139

6. Regulatory Guide 139, issued by ASIC in April 2011, marked a radical departure from the rule of law by obliging External Dispute Resolution ("EDR") schemes to use their Terms of Reference to oust the jurisdiction of the courts for dealing with mortgage enforcement disputes. Paragraph 72 reading:

> *The Terms of Reference of an EDR scheme must require that legal proceedings by scheme members should not be commenced where a complaint or dispute has been lodged with the scheme...*[3]

7. This was explained by ASIC, in paragraph 74:

> *Commencing legal proceedings in relation to a complaint or dispute lodged at EDR creates the potential for scheme members to undermine the EDR process. There is also the possibility that the same complaint or dispute will be dealt with in two competing forums, wasting time and resources.*

8. This explanation ignores the fact that EDR schemes only have coercive powers over Members. They have no authority to order a borrower to give possession of property to the lender. Thus they cannot be considered a *competing forum* because they provide no forum at all for the claims of lenders.

9. ASIC, at paragraph 77, effectively invites borrowers who have defaulted on their mortgages, to frustrate enforcement proceedings by lodging a complaint:

> *Where legal proceedings that relate to debt recovery proceedings have already commenced and a complainant or disputant takes their complaint or dispute to an EDR scheme, the Terms of Reference must require the member not to pursue the legal proceedings beyond the minimum necessary to preserve its legal rights.*

10. ASIC, at paragraph 85, requires that the Terms of Reference of EDR schemes allow complaints from retail clients, which includes 'small businesses' these being businesses employing fewer than 100 people (manufacturing businesses) or 20 people otherwise. This encompasses the majority of all commercial mortgage lending.

11. The Regulatory Guide purports to be a guide for those who would set up a EDR scheme. However, there have only every been two EDR schemes available to Lenders, the Financial Ombudsmen's Service ("FOS") and Credit Ombudsmen's Service Limited ("COSL"). It is submitted the Regulatory Guide was intended

[3] Two exceptions are provided, if the claim is a 'test case' or is about to become time-barred.

primarily to provide regulatory backing for existing practices of the COSL and FOS, the legality of which were being questioned.

Ousting the jurisdiction of the courts

> *A home serves as a physical shelter, but also in its representation in the form of a title, it can be burdened to obtain finance, to obtain credit, or to further investment or to become an address where one becomes accountable. But that requires that around the assets you build a legal system which people can access. It just so happens that in most developing countries, to enter the law is a huge problem. For example, in Peru, it used to take 22 years to title a home in the outskirts of Lima. In Egypt, to title a sand dune and obtain a home takes you 17 years working eight hours a day, and in the Philippines, it can take up to 52 years.*
>
> Hernando De Soto[4]

12. The EDR regime, as currently formulated, ousts the jurisdiction of the Courts, this is because lenders are obliged to join an EDR scheme[5] and face expulsion from the scheme if they do not comply with its requirements[6]. One of the strict requirements of both schemes (as mandated by RG 139) is that lenders do not approach the courts when a complaint is on foot, or prosecute existing proceedings if a complaint is made[7]. Even if the mortgage is a wasting asset (due to accumulated interest arrears increasing an anticipated shortfall), there is no provision to allow the lender to enforce their loan.

13. This means that lenders do not have a *legal system which they can access.* They are deliberately denied access to the legal system and denied any quasi-judicial remedies by the alternative, which would allow them to enforce their mortgage.

An EDR determination outranks a Court of Law

> *If the Dispute is subsequently decided by FOS and becomes binding upon the Financial Services Provider, the Financial Services Provider will abandon any aspect of proceedings against the Applicant that are inconsistent with that decision.*
>
> Clause 13.1(c) of the FOS Terms of Reference

> *The Member must not...initiate or resume enforcement action; or seek judgment for the debt or take possession of an asset securing the debt; which is inconsistent with a decision by COSL in the Complainant's favour*
>
> Rule 9.6(f) of the COSL Terms of Reference

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[4] Commenting on his book *The Mystery of Capital: Why Capitalism Succeeds in the West and Fails Everywhere Else* on PBS Newshour 17 October 2000.
[5] Except in rare circumstances.
[6] Clause 13.7 of the FOS Terms of Reference and Rule 27.1(b)(ii) of COSL Rules (Terms of Reference).
[7] Rule 17.2 of COSL Rules (Terms of Reference) and Clause 13.1 of the FOS Terms of Reference.

14. The jurisdiction claimed by FOS is identical to that claimed by the Courts of Chancery before the Acts of Judicature. The parallel tribunal achieves effective superiority by forbidding litigants from approaching the courts of law to assert their legal rights if they conflict with its decrees.

15. This is a very alarming development. The complaints against the injustice of the Courts of Chancery resulted in painful reform over 200 years until they became judicial courts of principle, their decisions no longer *varied with the length of the Chancellors foot*. This innovation of FOS is therefore a retrograde step. It exposes the rights of property once more to arbitrary and uncertain outcomes, based on an un-codified concept of *fairness*.

Constitutional validity of the ouster

16. The ouster of the jurisdiction of the courts, is an unusual state of affairs in a free society. Over the previous five hundred years checks and balances have evolved to safeguard the rights of property and the person. The EDR regime as it is currently constituted transgresses three important checks and balances:

    a) the restriction of the exercise of judicial power to the law courts;

    b) the exercise of judicial power within the framework of the principle of *stare decisis* (whereby courts are bound to follow the earlier decisions);

    c) The right of appeal.

17. The Australian Constitution recognises the importance of reserving the exercise of judicial power to courts. Article 71 provides:

    > *The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.*

18. The effect of RG 139 is to give judicial power to extra-judicial bodies in breach of the Constitution.

19. The situation is quite different to a situation where a body that is voluntarily joined, exercises quasi-judicial power, ultimately enforced by the sanction of expulsion. This is because the law mandates that lenders, with only few exceptions, join an EDR scheme.

Fairness in all the circumstances…

20. When disputes are determined through the application of previously fixed and known law, by a judge who acts as a technician applying the fixed law to the facts, it is known as the rule of law. The Terms of Reference of FOS and COSL both

[8]".

21. Students of history know that whenever arbitrators have been asked to determine people's property and personal rights based on "what in their opinion is fair in all the circumstances", rank injustice has always followed. This is because one person's conception of what is fair differs markedly from another and so it amounts to the rule of man rather than the rule of law.

> *For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws.*
>
> John Locke[9]

22. A state of affairs where property rights are determined according to what is considered "fair" by an unjudicial figure is abhorrent to the basic tenets of the rule of law:

> *The rule of law means that government must never coerce an individual except in the enforcement of a known rule, it constitutes a limitation on the powers of all government, including the powers of the legislature.*
>
> Friedrich Hayek[10]

23. The effect of the EDR regime, as currently constituted, both in theory and practice, is that lenders are being coerced to abandon property rights on the basis of unknown and unknowable rules of conduct retrospectively determined.

Intentional disregard for legal rights

24. In deciding in what is *fair in all the circumstances* FOS promises to *have regard to legal principles*[11]. However it does not promise to uphold the legal rights of Members. Instead it makes it very clear that not only is it entitled to make determinations that breach Members' legal rights, but also that those members will then be prohibited from asserting those rights through the courts:

> *If the Dispute is subsequently decided by FOS and becomes binding upon the Financial Services Provider, the Financial Services Provider will abandon any aspect of proceedings against the Applicant that are inconsistent with that decision*[12].

[8] Clause 8.2 of the FOS Terms of Reference and Rule 1.3 and 12.1(d) of COSL Rules (Terms of Reference).
[9] *Two Treatise of Government*, 1689
[10] *The Constitution of Liberty*, 1960
[11] Clause 8.2(a) of the FOS Terms of Reference
[12] Clause 13.1(c) of the FOS Terms of Reference

25. In deciding in what is *fair in all the circumstances* COSL only promises to have regard to *legal requirements or rights provided by law to the Complainant*[13]. It pointedly declines to have regard to the legal rights of Members.

Intentional undermining of property rights

26. The FOS Terms of Reference prevent Lenders from protecting their property rights during the complaints process:

> *Where an Applicant lodges a dispute with FOS, the Financial Services Provider… must not take any action…to protect any assets securing a debt…while FOS is dealing with the Dispute*[14].

27. This harsh denial of property rights has had very onerous effects. One Lender found that the borrowers had used the complaint period (more than 2 years and counting at the time of writing) to demolish the house which stood on the security property. Pursuant to this rule it could take no steps to prevent the demolition, including the obtaining of a court injunction.

EDR Schemes usurp the power to vary commercial loans

28. The Federal Parliament recently enacted the *National Consumer Credit Act 2009* from which the *National Credit Code* ("the NCC") gains its authority. Under the NCC lenders on *consumer* loans are obliged to consider applications for variation of terms on the grounds of financial hardship. FOS believes the legislation did not go far enough and maintains it has jurisdiction to compel lenders to give genuine consideration to hardship requests on *commercial* loans.[15]

29. This is a worrying development for Lenders, particularly those lending to development companies on construction projects. Lenders make risk assessments whereby they calculate a margin of safety to ensure they can sell a property without losing capital if the borrower defaults. These underwriting decisions are based on a myriad of factors and critical commercial considerations. Any interference in this process, any suggestion that the assessment of risk is in the hands of a government, or quasi-government body, will, and is, causing lenders to refrain from lending within the jurisdiction.

30. FOS maintains that commercial borrowers should always be entitled to suggest a re-opening the contract, and that FOS has the power to decide whether the lender's reasons are *legitimate considerations and are referable to a particular customers circumstances*.[16] The vagary of this test in practice gives FOS the power to make commercial decisions on the risk of granting further indulgences.

31. A further blow to lenders, who hope to have their contracts upheld, is the policy of EDR schemes to force lenders to agree to variation by delaying the determination of disputes. In one case a developer company, in default of a construction loan, wanted to force the lender to lend it more money. The lender could not afford to

[13] Rule 12.1(a) of COSL Rules (Terms of Reference).
[14] Clause 13.1(a)(iii) of the FOS Terms of Reference
[15] FOS Circular 2 April 2010 *Dealing with customers in financial difficulty: small business*
[16] FOS Circular 2 April 2010 *Dealing with customers in financial difficulty: small business*

risk further capital and the result was a stalemate that has lasted more than two years. In that case FOS summed up its attitude in a letter to the lender:

> *Our aim is for financial difficulty disputes to be resolved by agreement being reached between the parties, through negotiation or conciliation wherever possible, with the power to vary being used as a last resort.*

32. Where in a jurisdiction:

    a) Commercial loans terms are no longer to be fixed obligations, but instead are to be considered plastic; and

    b) disputes over whether or not refusal to vary terms, including applications for further funds, are determined by EDR rather than the owner of the capital;

    c) where such disputes are dragging out for in excess of 18 months on constructions loans, which have very fine tolerances and potential for large losses in the event of delay.

    the point is reached where lenders will no longer consider it a safe to loan money.

Determinations are encouraged to be arbitrary

33. FOS and COSL determinations are encouraged to be arbitrary by expressly declining to be bound by their own earlier decisions[17]. Thus unlike a Court which is bound by precedent, or the ATO which issues and is bound by its own rulings. EDR schemes present lenders with the inability to arrange their affairs on the basis of predictable outcomes. This is because instead of a body of precedent and fixed principles, lenders are confronted with the fluid notion of the *fairness doctrine*.

34. The arbitrary nature of the decisions is cloaked by reference to the enforcement of "good industry practice"[18]. However there is no effort by either FOS or COSL to catalogue or define what these practices are, instead they are created on a case by case basis as justification for their determinations require.

35. By claiming jurisdiction to entertaining complaints that a lender "acted unfairly towards the Complainant"[19], Terms of Reference ensure that nothing is fixed or knowable in advance. Unlike a court of law, where a recognized tort, contract or law must be first infringed, a charge of unfairness could be anything. In practice defaulting borrowers who are asked to repay their mortgages have brought the charge of unfairness. These complaints are then seriously entertained while the *legal rights* of the Lender are ignored. This offends the ancient maxim, *nulla crimen sine lege* (no crime without a law) which is critical component of:

    a) the rule of law;

[17] Clause 8.2(d) of the FOS Terms of Reference and Rule 38.1 of COSL Rules (Terms of Reference).
[18] Clause 8.2(d) of the FOS Terms of Reference and Rule 12.1(c) of COSL Rules (Terms of Reference).
[19] Rule 7.1(d) of COSL Rules (Terms of Reference)

b) the natural law;

c) commercial certainty.

No time limit means no certainty on the return date of capital

36. One of the biggest grievances lenders have is that complaints can drag on for years while interest accruing increases the loan-to-value ratio beyond what the lender originally calculated its risk upon.

37. Neither COSL or FOS have a strict time limit for the determination of disputes. Unlike a court of law they are utterly unconcerned with the prospect of a wasting asset. FOS wrote to one lender, whose mortgage has been tied up in their process for over a year:

> *Arrears on a facility or eroding security will not in itself warrant prioritizing the dispute over other disputes which were lodged prior in time. In the interests of fairness to all users (and not just your investors), my office processes each dispute in the order in which they are received.*

Why Mortgage Lenders need certainty

38. When property rights are known in advance it encourages the owners of money to venture capital pursuant to contracts they know the law will enforce. One of the greatest leaps of faith in a market economy is in the advancing of large sums of money against the security of real property. Simply put if lenders cannot be certain they will get their capital back, or obtain a return on their capital, they will not lend.

39. The celebrated Peruvian economist Hernando De Soto, in his book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere*, explained that Third World countries are mired in poverty because no one can lend against real property and be sure they can enforce the contract in the event of default. He wrote:

> *All these qualities grow out of modern property law. It is the law that detaches and fixes the economic potential of assets as a value separate from the material assets themselves and allows humans to discover and realize that potential…It is the representation of assets fixed in legal property documents that gives them the powers to create surplus value.*[20]

40. By denying mortgage lenders access to the law courts, Regulatory Guide 139 is denying borrowers access to capital. It is placing Australian borrowers in the same position as borrowers in the Third World. When people cannot refinance they are forced to sell, when people cannot borrow, they must give up the dream of owning a house or a business.

> *There is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which has prevailed here… the degree of the certainty of the law must be judged by the*

[20] Page 165, 2001 edition.

disputes which do not lead to litigation because the outcome is practically certain as soon as the legal position is examined. It is the cases that never come before the courts, not those that do, that are the measure of the certainty of the law.

Friedrich Hayek[21]

41. Hayek's formula is turned on its head under the EDR scheme, as currently constituted. Instead of unmeritorious claimants being deterred by the certainty that the decision will go against them, they are encouraged to make unmeritorious claims because:

    a) The fluid concept of *fairness* holds out the very real prospect they will obtain some unjustified relief;

    b) They are not obliged to accept any determination that goes against them (it is a one way bet);

    c) They do not have to pay the lender's costs of meeting the complaint if the lender is successful;

    d) If they are in a negative-equity situation they can retain possession of the property for years by dragging out the complaint and staying on the property rent free.

Absence of accountability

42. Lenders who try to approach the courts to enforce rights contrary to the determination of either body can be expelled[22].

43. Lenders who are required to belong to an EDR Scheme (and most lenders are) are subject to expulsion (an extreme sanction) without any recourse, hearing or appeal. This puts the EDR schemes in a position to intimidate members and make unjust requirements of them in breach of Natural Justice.

44. COSL and FOS each grant themselves total immunity from liability[23].

45. In the course of striving to make EDR scheme's independent, Regulatory Guide 139 has the effect of making them unaccountable. This includes the requirements:

    Scheme's Terms of Reference must not allow members a power of veto where changing the Constitution or Terms of Reference of a scheme is involved.

    Scheme must be independent of the industry or industries that provide its funding and constitute its membership.

[21] *The Constitution of Liberty*, 1960
[22] Clause 13.7 of the FOS Terms of Reference and Rule 27.1(b)(ii) of COSL Rules (Terms of Reference).
[23] Clause 13.5 of the FOS Terms of Reference and Rule 43.1 of COSL Rules (Terms of Reference).

The decision-making processes and the administration of a scheme must be independent of those sectors of industry that fall within its jurisdiction and that provide its funding".

46. In practice this creates an unaccountable body which, industry experience has shown, is staffed by those with anti-lender bias. This is because lenders have been warned off any attempt to control the body, of which they are the members, and which they pay for - by ASIC, in the name of independence.

47. The so-called "overseeing bodies" referred to by ASIC in RG 139 are in fact the EDR scheme's own boards.

48. COSL makes it clear that it considers itself a law unto itself in its Terms of Reference[24]:

The Credit Ombudsman and staff of COSL are:

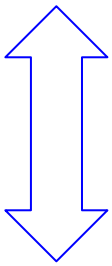
a) Entirely responsible for the handling and determination of complaints; and

b) Accountable only to the COSL Board.

The proper role of an Ombudsmen's Service

49. The proper role of an Ombudsmen's service is to deal with complaints – not disputes. A dispute is over a large sum of money and is dealt with by the courts, a complaint is over a trifling sum of money and is dealt with by an ombudsman.

50. The rationale is that when dealing with property rights of any significant value property rights must be protected by the elaborate safeguards of a court of law. When dealing with trifling sums the complainant is always at a disadvantage as it is prohibitively expensive to go to court, the ombudsmen levels the playing field. The abandonment of the judicial safeguards is seen as acceptable because the stakes involved are so low.



State hierarchy	Federal hierarchy
High Court	High Court
Supreme Court	Federal Court
District Court	Federal Magistrates Court
Magistrates Court	Ombudsmen
Ombudsmen	

51. The EDR scheme, as currently formulated, turns this on its head. By forbidding lenders to approach the law courts to assert legal rights in conflict with the decrees an EDR provider effectively claims a jurisdiction superior to even the High Court.

[24] Rule 2.3

52. In most states only the Supreme Court has the power to grant possession of land pursuant to a mortgage. Yet FOS claims the power to *release the security for a debt*[25].

53. Guarantees are strict legal obligations which underpin the vast majority of business mortgages and yet FOS claims the power to set aside guarantees in full if they do not exceed $280,000[26].

Recommendations

54. It is submitted that the following reforms will address the problems with the current EDR regime and enhance its utility to consumers. It is submitted that these reforms would most appropriately be made by way of an amendment to the Corporations Act.

A. Restriction of jurisdiction

55. EDR schemes should have their jurisdiction carefully defined so that they are limited to considering (and determining) complaints that lenders have breached:

    a) the law (including licence conditions); or

    b) a code of practice to which the lender has voluntarily subscribed.

56. This reform would remove abstract concepts such as *fairness* from the jurisdiction of the EDR schemes. Lenders will in future know before they lend what behaviour will be sanctioned and will be able to tailor their activities so as to avoid sanction. Borrowers will know that unless the lender has breached a known law or code of practice they will be unable to obtain relief.

57. This certainty of outcome for both sides will:

    a) encourage lending; and

    b) reduce the backlog of complaints by reducing the number unmeritorious complaints.

B. Expulsion of members should require proceedings in Federal Court

58. Membership with an EDR scheme (and there are only two of them) is compulsory for most lenders. Therefore expulsion can currently amount to an extreme sanction putting a lender out of business. It is inappropriate that such a sanction should be decided by a body which acts as both prosecutor and judge, with no hearing and no right of appeal, no rules of evidence, no regard for the lender's legal rights, and based upon unlimited powers to trigger a right of expulsion. This reform is designed to place Members of EDR schemes in the same position as anyone else in a democracy with the rule of law, that is to say they can only suffer a severe sanction through due process of the law.

[25] Clause 9.1(b) of the FOS Terms of Reference.
[26] Circular 2 issued April 2010 published under documents www.fos.org.au

C. EDR schemes must determine complaints within 60 days

59. This proposal for reform will:

    a) Require EDR schemes to determine complaints within 60 days of first receiving the complaint;

    b) Deem complaints not determined within the deadline as having been dismissed;

    c) Render EDR schemes liable to having their approval revoked by the Minister if they accumulate excessive deemed refusals;

    d) Require Members to respond to complaints and requests for further information within 2 weeks; and

    e) Render Members liable to expulsion for failure to provide responses and information within deadlines.

60. The tendency of EDR schemes to force settlements on lenders that breach their legal rights by delaying the determination of disputes will be countered by this reform. The backlogs experienced by both EDR schemes will clear quickly.

D. EDR schemes must publish their reasons and follow precedent

61. Under this proposal written reasons for each determination would be published on the Internet and the EDR scheme would be bound to follow its own reasoning in earlier determinations. This would lead to a body of case law forming that would allow lenders and complainants alike to predict the outcome of a complaint and, in the case of lenders, change procedures so as to avoid adverse determinations in the future.

E. Blocking access to the courts should be prohibited

62. It is proposed that EDR schemes be expressly prohibited from preventing their Members from accessing the court system. This will ensure that lenders will be certain that if a borrower defaults they will be able to enforce their legal rights.

F. Appeal on the merits to the AAT

63. It is proposed that the determinations of EDR schemes should be appealed on their merits, in the Administrative Appeals Tribunal. It is proposed that the proper respondent to any such complaint would be the Ombudsmen. This would ensure that the EDR schemes, like all tribunals granted coercive power over the property rights, would be subject to appeal.

G. Determinations should be made by legally qualified persons

64. It is proposed that the quasi-judicial role of the ombudsmen and his delegates for determination be filled only by trained lawyers. This will ensure that the focus on legal rights and accurate application of industry codes.

H. The quantum of relief should be restricted to $5,000.

65. It is proposed that the legislation use the expression complaint, rather than dispute, as this will reinforce the basic principle that commercial disputes in a free country are resolved in court. Further that the quantum of relief the EDR schemes should have the power to award should be limited to $5,000. This will ensure that larger claims are brought through the court system.

Instructions

To Bransgroves Lawyers ("Bransgroves")

From Ltd ("the Lender")

Date

Size of loan book $ As shown on last audited accounts.

1. The Lender, having been authorised by its board of directors, provides these instructions to Bransgroves Lawyers.

2. Bransgroves is instructed to keep the Lender's identity strictly confidential. The Lender instructs Bransgroves to assert solicitor-client privilege should any court order jeopardise that confidentiality.

3. If Bransgroves obtains instructions from other lenders in materially identical form to these, and if the combined size of the loan books of all participating lenders exceeds $5 billion ($5,000,000,000) then Bransgroves is authorised to:

    a) Appoint an registered auditor to audit its instructions;

    b) On the condition that the auditor first executes a satisfactory confidentiality deed, provide the auditor with a copy of these instructions;

    c) Present, on the Lender's behalf (and on behalf of other Lender's whose loan books collectively exceed $5 billion), the paper entitled *Why the External Dispute Resolution regime is hurting capital availability in Australia,* along with the certificate of audit, to The Parliamentary Joint Committee on Corporations and Financial Services and The Senate Economics Legislation Committee, and pursue its distribution through the media and Internet.

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REPORT OF FACTUAL FINDINGS
TO BRANSGROVES LAWYERS

We have been requested to confirm the accuracy of the total value, as shown on their last audited accounts, of the loan books of the companies from whom Bransgroves Lawyers have received instructions to present the White Paper "*Why the External Dispute Resolution regime is hurting capital availability in Australia*" to the Parliamentary Joint Committee on Corporations and Financial Services and the Senate Economics Legislation Committee of the Australian Federal Parliament. It is intended that this report be annexed to the White Paper when presented.

The procedures we performed were as follows:

1. Reviewed instructions received from each company;

2. Contacted the companies to confirm the instructions were issued;

3. Obtained copies of latest published audited financial statements; and

4. Confirm the value of the loan book balances disclosed in those financial statements.

Based on the procedures set out above we confirm that the total of the value of loan book balances of companies from which instructions have been received, prior to any impairment charges, is **$5,314,060,688**

Because the above procedures do not constitute either a reasonable or limited assurance engagement we provide no assurance on the total loan book value.

While all care has been taken in this investigation, we expressly disclaim, and do not accept any responsibility, or liability, to any party who chooses to rely on this report.

The attached schedule sets out further information in respect of this report.

Robert Nielson Partners

Robert Nielson
Date: 27 April 2012

SCHEDULE TO REPORT OF FACTUAL FINDINGS
TO BRANSGROVES LAWYERS

Responsibility for the Procedures Agreed
Bransgroves Lawyers is responsible for the adequacy or otherwise of the procedures agreed to be performed by us and for determining whether the factual findings provided by us, in combination with any other information obtained, provide a reasonable basis for any conclusions which you or other intended users wish to draw on the subject matter.

Assurance Practitioner's Responsibility
Our responsibility is to report factual findings obtained from conducting the procedures agreed. We conducted the engagement in accordance with Standard on Related Services ASRS 4400 *Agreed-Upon Procedures Engagements to Report Factual Findings*. We have complied with ethical requirements equivalent to those applicable to Other Assurance Engagements.