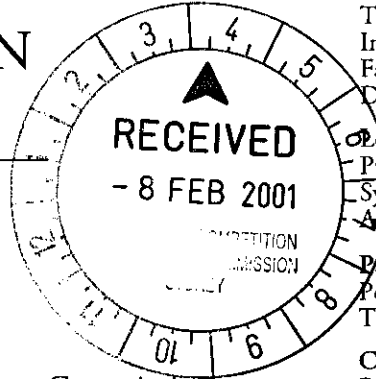




BLAKE DAWSON WALDRON
L A W Y E R S



Level 37
Grosvenor Place
225 George Street
Sydney NSW 2000

legal.info@bdw.com.au

Telephone (02) 9258 6000
Int + 61 2 9258 6000
Fax (02) 9258 6999
DX 355 Sydney

Packed Bag N6
PO Grosvenor Place
Sydney NSW 2000
Australia

Partner
Peter Armitage
Telephone (02) 9258 6119

Contact
Richard Westmoreland
Telephone (02) 9258 6353

Our reference
PJA.RHW

The Regional Director
Australian Competition and Consumer Commission
Level 5, Skygardens
Castlereagh Street
SYDNEY NSW 2000

8 February 2001

Dear Regional Director

Broadway Credit Union Limited – potential third line force

We act for the above company and on its behalf enclose a Form G Exclusive Dealing Notification, together with our client's cheque for \$1000 made payable to the Commission.

Would you please acknowledge receipt of this letter on the attached copy.

The Confidential Attachment to this notification contains a commercially sensitive analysis of Broadway Credit Union's loan portfolio. Pursuant to section 95(2) of the *Trade Practices Act* ("Act"), our client requests that the information contained in this annexure be treated as confidential. It should not be disclosed to any third party without our client's consent. Our client also requests that this information be excluded from the register kept under section 95(1) of the Act.

Please contact the writer if there is any further information you require or any matter you wish to discuss in connection with this notification

Yours faithfully

Richard Westmoreland

SYDNEY
MELBOURNE
BRISBANE
PERTH
CANBERRA
LONDON
PORT MORESBY
JAKARTA
SHANGHAI
HONG KONG

111434972

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974 - Sub-section 93(1)

EXCLUSIVE DEALING

NOTIFICATION

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in sub-sections 47(6) or (7) of that Act in which the person giving notice proposes to engage.

1. (a) **Name of person giving notice**

Broadway Credit Union Limited, ARBN 65 087 649 812 ("**Broadway**")

(b) **Short description of business carried on by that person**

Credit union

(c) **Address in Australia for service of documents on that person**

Ms Gabby Potrykus
Assistant General Manager
Broadway Credit Union Limited
8-14 Broadway
Sydney NSW 2007

2. (a) **Description of the goods or services in relation to the supply or acquisition of which this notice relates**

Lending in respect of which Broadway requires security.

(b) **Description of the conduct or proposed conduct**

When Broadway proposes to lend money and take security in respect of that lending (for example, a third party guarantee, or a mortgage or charge over property of a borrower or guarantor) it requires the borrower and, if different, the person (or persons) providing the security to obtain independent legal advice in respect of the effect of the documents they are signing.

Section 6 of the *Conveyancers Licensing Act 1995* (NSW) authorises licensed conveyancers who hold a full licence to provide legal advice in respect of some types of security documents. Broadway, however, requires advice in respect of loan and security documents to be provided by a solicitor.

2.

(c) **Benefits of the Proposed Conduct**

See Annexure.

3. (a) **Class or classes of persons to which the conduct relates**

Persons providing security in respect of loans made by Broadway.

(b) **Number of those persons -**

See Annexure

(c) **Where number of persons stated in items 3(b)(i) is less than 50, their names and addresses**

N/A

4. **Name and address of persons authorised by the person giving this notice to provide additional information in relation to this notice**

Peter Armitage
Blake Dawson Waldron
Lawyers
Level 37
Grosvenor Place
225 George Street
Sydney, NSW, 2000

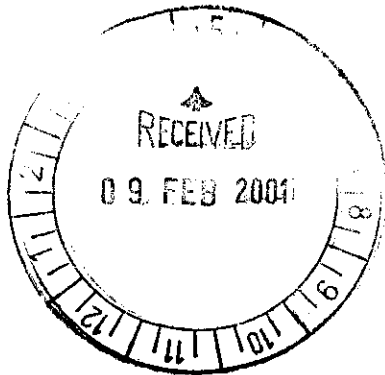
Telephone: (02) 9258 6119
Facsimile: (02) 9258 6999

Richard Westmoreland
Blake Dawson Waldron
Lawyers
Level 37
Grosvenor Place
225 George Street
Sydney, NSW, 2000

Telephone: (02) 9258 6353
Facsimile: (02) 9258 6999

Dated

8 February 2001



Signed on behalf of the person giving this notice

Peter Armitage

(Signature)

PETER JAMES ARMITAGE

(Full Name)

Partner - Blake Dawson

(Description)

Waldron

Annexure to Notification by Broadway Credit Union

Broadway is a small independent credit union, with a full time staff of 6 people, and a total staff of only 7. It is a "not for profit" organisation, run as a mutual for the benefit of its members (i.e, its borrowers and depositors).

No anti-competitive effect

Broadway lends for personal loan, small business loans, and home loans. As at 7 February 2001, Broadway's entire loan portfolio consisted of 531 loans, and was valued at approximately \$92.5 million.

During the year 1 February 2000 to 31 January 2001, Broadway processed a total of 104 mortgage secured loan applications, and requested 29 guarantors and 185 borrowers to obtain independent legal advice (the number of borrowers requested to obtain advice is higher than the number of loan applications processed because, where there are joint borrowers, each borrower is requested to obtain his or her own advice to ensure that one is not being improperly influenced by the other).

During this same period, the total loan funds advanced by Broadway was approximately \$40 million. By contrast, the Australian Bureau of Statistics estimates that total secured residential lending in Australia for the year 1 December 1999 to 30 November 2000 (the most recent figures available) was in excess of \$70 billion¹. This means that, even if all of Broadway's lending was secured residential lending, its share of this type of lending in Australia would be less than 0.06%.

Broadway's size is therefore such that its policies in respect of the obtaining of advice are incapable of having any effect in any relevant market.

Broadway's obligation to ensure that its customers are properly advised

A series of cases in Australia and elsewhere has determined that, where a security provider may be under a 'special disability', a lender has an obligation to take reasonable steps to ensure that that security provider understands the nature of the transaction they are entering into, and enters into the transaction voluntarily.²

In *Yerkey v Jones* the High Court endorsed the approach that a lender should seek to ensure that the person providing the relevant security has obtained advice that is "competent, independent and disinterested"³ Many cases since have cited *Yerkey v Jones* and endorsed this approach.

¹ Australian Bureau of Statistics, *Lending Finance November 2000*, released 19 January 2001

² For example, *Yerkey v Jones* (1939) 63 CLR 649, *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447, *Garcia v National Australia Bank Limited* (1998) 155 614,

³ *ibid*, at 685-6

Similarly, the *Consumer Credit Code* (which is incorporated as law in New South Wales by the *Consumer Credit Act 1995*) places an obligation on a lender to ensure, among other things –

- (a) that the provisions of a mortgage or guarantee are accurately explained to a borrower, mortgagor or debtor⁴; and
- (b) adequate measures are taken to ensure that a borrower, mortgagor or debtor understands the nature and implications of the transaction they are entering into⁵.

This is an obligation that Broadway takes seriously. Broadway is therefore concerned to ensure that all of its customers obtain appropriate advice in respect of their loan and security documents.

Why does Broadway specify solicitors' advice?

Section 6 of the *Conveyancers Licensing Act* authorises registered conveyancers who hold an unrestricted licence to carry on "conveyancing work" without committing an offence under Part 3A of the *Legal Profession Act 1987*. The uncertainties in respect of the scope of this authority are discussed below.

A significant proportion of Broadway's lending is to borrowers who would be unable to borrow from a bank, or which is secured over assets that other lenders do not accept as security. For example, Broadway is one of the few lenders that will lend at bank or near bank interest rates on the security of company title units, or on the security of assets that are held within family discretionary trusts. A more detailed analysis of Broadway's loan portfolio is set out in the Confidential Attachment to this notification.

In New South Wales, in addition to training in contracts and real property law, to be admitted to practice, a solicitor must have studied the personal property law, company law and equity law (including compulsory units in equitable rights, titles and interests and unconscionable transactions)⁶. Licensed conveyancers are not required to have studied these areas.

Broadway believes that the special issues that many of its customers face creates a particular obligation to ensure that those customers properly understand the obligations they are taking on, and the way that their loan and security documents will operate. Broadway believes that the extra training that solicitors have in the areas listed above these means that they are commonly better equipped than a registered conveyancer to recognise the particular issues that many of Broadway's customers face, and, in light of these issues, to explain how the relevant loan and security documents operate. (For example, a knowledge of company law is likely to be necessary in order for an adviser to explain how security over a company title building unit will operate. Similarly, a knowledge of equity and trusts is likely to be necessary in order to explain to the trustee of a family trust who is giving third party security how the security given over the assets in that trust will impact on the trustee's rights and powers).

⁴ section 70(i)

⁵ section 70(k)

⁶ Legal Practitioners Transitional Admission Rules, Rule 94 and Schedule 5

Nearly all of Broadway's borrowers are introduced to Broadway through brokers. A broker therefore conducts the initial interviews with most of Broadway's borrowers and prepares the borrower's loan application. Broadway therefore often does not have the personal contact with borrowers and security providers that banks and other lenders may have. This increases the reliance that Broadway must place on independent advisers in order to ensure that its customers understand the nature of the obligation they are entering into, and the effect of the documents they are signing.

In these circumstances, if a borrower or security provider has been advised by a solicitor, Broadway knows that the solicitor is bound by the terms of Rule 45 of the Solicitors' Rules, published by the New South Wales Law Society. Rule 45.6 of these rules sets out a list of matters that a solicitor must explain when he or she advises a borrower or security provider. Therefore, by requesting that a customer obtain advice from a solicitor, Broadway knows that it is ensuring that each of these issues will be explained to the customer. Registered conveyancers are not obliged in the same way to ensure that certain minimum matters are explained to their clients. A copy of Rule 45.6 is attached to this notification as Attachment 2

Public Benefit

By requesting that a solicitor's advice be obtained by borrowers and security providers, Broadway believes that it ensures to the greatest possible degree that those borrowers and security providers, many of whom have particular needs, properly understand their obligations before entering into them.

In addition, Broadway is one of the very few financial institutions that will lend at bank or near bank interest rates to borrower that banks will often refuse. Broadway believes that it is able to do this because of the particularly careful approach that it adopts to ensuring that borrowers and security providers properly understand their obligations. Requiring solicitors' advice is part of this careful approach.

Broadway's policy of requiring solicitors' advice is therefore one of the elements that means that affordable finance is available for homes and businesses to borrowers who would otherwise have to pay higher interest rates, or who would not be able to obtain finance at all.

Circumstances where Broadway would be unlikely to be prepared to lend in the absence of solicitors' advice include:

- business loans, where security for the loan is provided by the parents of the borrower;
- loans to borrowers who have previously experienced difficulty in repaying debts. Often such borrowers have had difficulties in the past through no fault of their own; for example, because of family break-ups, inability to work caused by illness, or through death of a family bread winner;
- residential loans for the purchase of a company title building units.

What does the *Conveyancers Licensing Act* authorise conveyancers to do?

In addition to believing that advice from solicitors provides a greater level of protection to both Broadway and to security providers, Broadway is concerned that there is real doubt that registered conveyancers are authorised by the *Registered Conveyancers Act* to provide advice in

respect of some types of security documents. By stipulating that advice be obtained from a solicitor, Broadway believes that it is in many cases doing no more than identifying the class of person that is entitled at law to provide the relevant advice.

Section 6 of the *Conveyancers Licensing Act* authorises registered conveyancers who hold a full licence to carry on "conveyancing work" without committing an offence under Part 3A of the *Legal Profession Act 1987*. Broadly, section 4 of the *Conveyancers Licensing Act* then defines "conveyancing work" to mean legal work carried out in connection with any transaction which creates, varies, transfers or extinguishes a legal or equitable interest in any real or personal property, expressly including the granting of mortgages. The full text of sections 4 and 6 is set out in Attachment 1 to this annexure.

The application of section 4 to different types of security documents is considered below:

Mortgages. It is clear from the section 4 definition of "conveyancing work" that licensed conveyancers are authorised to review mortgage documents. Mortgages in respect of certain non-residential properties, however, are excluded from the definition. Also, Broadway uses separate loan and mortgage documents. It not clear that the provision of advice in respect of a 'stand alone' loan agreement falls within the section 4 definition of "conveyancing work".

Guarantees It is not clear that section 4 extends to guarantees documents - a guarantee is not a mortgage, does not create a legal or equitable interest in property, and is not consequential or ancillary to a sale of land or business in the same way as is, say, preparation and registration of title documents (cf the examples cited in section 4(2)(b)).

The provision of advice in relation to guarantees is a matter that has received considerable attention from the courts over a number of years. At the time the *Conveyancers Licensing Act* was enacted, the practice by lenders of requiring solicitors' certificates in respect of guarantee documents was at least as well established (and probably more established) as the practice of requiring certificates in relation to mortgages. In this context, if advice in respect of guarantees was intended by the parliament to fall within the section 4 definition of "conveyancing work" it is surprising that, in contrast to mortgages, section 4 contains no reference to guarantee documents. Broadway therefore believes that there is a real likelihood that provision of advice in respect of guarantees is not included in the definition of "conveyancing work".

Company Charges A fixed charge creates an interest in the relevant property. As with a guarantee, however, a floating charge does not create a legal or equitable interest in property until crystallised, and is not necessarily consequential or ancillary to a sale of land or business. It is therefore not clear that advice in respect of a floating charge would come within the definition of "conveyancing work".

In addition to these uncertainties, conveyancers who completed their training prior to 1997 and who have not completed an approved bridging course are only entitled to hold only a restricted

licence. This licence does not confer on these conveyancers the broader authority described above⁷.

The uncertainties described above make it difficult for Broadway to know when licensed conveyancers are entitled to provide advice in respect of particular loan or security documentation, and when they are not. If this uncertainty could be overcome, Broadway may be able to accept certificates on the basis of advice from different classes of professional, depending on the documents required to be reviewed, the circumstances in which each security is being provided, and therefore whether or not a particular conveyancer is authorised to provide the relevant advice. Broadway believes, however, that such a policy would be likely to cause confusion among borrowers, and would be difficult and expensive to implement. Because Broadway is a mutual, the costs of implementing such a procedure could not be absorbed by shareholders, and would instead need to be passed on to borrowers.

⁷ Conveyancers Licensing Order 1999, Schedule 1

Attachment 1 - Sections 4 and 6 of Conveyancers Licensing Act 1995

6 Effect of licence

- (1) A licensee is not guilty of an offence under Part 3A (Unqualified Practitioners) of the Legal Profession Act 1987 in respect of conveyancing work that the licensee carries out in accordance with this Act, the regulations and the conditions of the licence.
- (2) This section does not permit a licensee to do anything, or to allow anything to be done, that is calculated to imply that the licensee is qualified to act as a solicitor.

4 Conveyancing work

- (3) For the purposes of this Act, conveyancing work is legal work carried out in connection with any transaction that creates, varies, transfers or extinguishes a legal or equitable interest in any real or personal property, such as (for example) any of the following transactions:
 - (a) a sale or lease of land,
 - (b) the sale of a business (including the sale of goodwill and stock-in-trade), whether or not a sale or lease of land or any other transaction involving land is involved,
 - (c) the grant of a mortgage or other charge.
- (4) Without limiting subsection (1), conveyancing work includes:
 - (a) legal work involved in preparing any document (such as an agreement, conveyance, transfer, lease or mortgage) that is necessary to give effect to any such transaction, and
 - (b) legal work (such as the giving of advice or the preparation, perusal, exchange or registration of documents) that is consequential or ancillary to any such transaction, and
 - (c) any other legal work that is prescribed by the regulations as constituting conveyancing work for the purposes of this Act .
- (5) However, conveyancing work does not include the carrying out of any work for the purpose of:
 - (a) a mortgage on non-residential property where the amount secured by the mortgage exceeds 7 million dollars (with non-residential property being any property that is not residential property for the purposes of Division 8 of Part 4 of the Conveyancing Act 1919), or
 - (b) commencing or maintaining legal proceedings, or
 - (c) establishing a corporation or varying the memorandum or articles of association of a corporation, or
 - (d) creating, varying or extinguishing a trust, or
 - (e) preparing a testamentary instrument, or
 - (f) giving investment or financial advice, or
 - (g) investing money otherwise than as provided for by Division 2 of this Act ,

and does not include any work that is prescribed by the regulations as not constituting conveyancing work for the purposes of this Act .

Attachment 2 – Rule 45.6 of the NSW Solicitors' Rules

45.6.1 The solicitor should advise a proposed signatory of those matters that the solicitor, in exercising the professional skill and judgment called for in the circumstances of the particular case, considers appropriate.

45.6.2 Without limiting the generality of 45.6.1, when advising a borrower, the solicitor should, where necessary, advise the borrower that:-

45.6.2.1 by signing the documents the borrower will be liable for regular payments of interest and repayment of the amount of the loan at the due date;

45.6.2.2 if the borrower fails to make any payment on time, the lender can charge a higher rate of interest, and the lender's costs of rectifying that failure;

45.6.2.3 if the borrower fails to comply with any of the terms and conditions of the loan including the obligations to pay principal or interest,

- the lender can sue the borrower personally; and- the lender may take possession of the borrower's property; and- after notice, sell it to recover the amount owing together with interest and other costs including solicitor's costs, the costs of selling the property and the costs of maintaining the property; and- if the proceeds of sale of the borrower's property are insufficient to satisfy the debt to the lender, the lender can sue the borrower for the deficit; and

45.6.2.4 if the Consumer Credit Code applies, additional obligations, rights and remedies may apply as set out in the loan documents.

45.6.3 Without limiting the generality of 45.6.1, when advising a guarantor, the solicitor should, where necessary, advise the guarantor that:-

45.6.3.1 if the borrower fails to make any payment on time, the guarantor will be liable to remedy that failure, and that could involve the guarantor in payment to the lender of all amounts owed by the borrower to the lender including principal, interest, default interest and the lender's costs of rectifying the default;

45.6.3.2 if the guarantor fails to remedy any failure by the borrower to comply with the terms and conditions of the loan in any way, including the obligation to pay principal, interest, default interest, or other charges,

- the lender can sue the guarantor personally; and
- can take possession of the guarantor's property secured to the lender and sell it to recover the amount owing together with interest and other costs, including solicitor's costs, the costs of selling the property and the costs of maintaining the property; and
- if the proceeds of sale of the guarantor's property are insufficient to satisfy the debt to the lender, the lender can sue the guarantor for the deficit;

45.6.3.3 if the guarantor is a proposed signatory to documents under which the guarantor's liability can be increased, that fact, and the extent of the possible increase, and of any restriction or limitation of the guarantor's rights or obligations in relation to the security and any other party to the documents;

45.6.3.4 the lender can exercise its rights against the guarantor even if it has not pursued the borrower;

45.6.3.5 the liability of the guarantor is limited to a specified sum, or is unlimited (whichever is the case) and may be affected by cross guarantees; and

45.6.3.6 if the Consumer Credit Code applies, additional obligations, rights and remedies may apply as set out in the loan documents.

45.6.4 In any case, the solicitor must advise the proposed signatory that:

45.6.4.1 the solicitor does not profess any qualification to give financial (as distinct from legal) advice; and

45.6.4.2 if the proposed signatory has any questions about any financial aspect of the transaction or the documents, the proposed signatory should consult an accountant or other financial counsellor of the proposed signatory's choice before signing the documents.

Confidentiality Granted to
Annexure 1.

P/R doc no - 001/3994

w/f doc no - 001/3907

conf doc no - 001/4391