

BFSO Bulletin 44

December 2004

In this issue: *Change of jurisdictional limit to
\$250,000 from 1 December 2004*

*Independent Review of the Banking
and Financial Services Ombudsman
Scheme*

Foreign currency transactions



BULLETIN

Banking and
Financial Services
Ombudsman Limited
GPO Box 3
Melbourne 3001
Tel: 1300 78 08 08
Fax: (03)9613 7345

www.bfso.org.au

A.B.N. 48 050 070 034

Increase of jurisdictional limit to \$250,000

The Banking and Financial Services Ombudsman's Terms of Reference have been amended to increase the amount of compensation which can be awarded from \$150,000 to \$250,000. The increase in the limit only applies to events that occur on or after 1 December 2004. Generally, where the dispute relates to a breach of contract, the event is the date the breach occurs. For claims of misleading and deceptive conduct, the date of event is the day the conduct occurs. Members will be asked to consent to BFSO considering cases where the loss is between \$150,000 and \$250,000 in appropriate circumstances where the event occurred before 1 December 2004.

Independent Review of Scheme

As discussed in Bulletin 42 in May 2004 the Board of the BFSO Scheme commissioned an independent review of the operations and procedures of the Scheme. The review was required by clause 4.3(c) of the Constitution of BFSO Limited which calls for a triennial assessment of the Scheme's operations and procedures.

The principal finding of the Review Report is that the Scheme operates in a successful manner and is highly regarded by its stakeholders. It demonstrably satisfies each of the Australian Securities & Investment Commission's Policy Statement 139 benchmarks applying to the Scheme.

The Review Report contains a series of recommendations which are directed towards incremental improvements in the Scheme's operations by suggesting minor refinements or shifts in emphasis to process and policy. The recommendations have been reviewed and a response to each recommendation has been developed by the Board.

The Review Report and the Board's response to each recommendation are available on our [website](#). If a hard copy of either document is required, a request can be made to Ms Sally Reeves (telephone 03 9613 7301 or email sreeves@bfsso.org.au).

Foreign Currency Transactions

Each year a comparatively small number of disputes concerning foreign currency transactions of various types are considered by this office. While the numbers of disputes are small we find that they are often complex and require careful investigation into the relevant circumstances. In addition, it is common for advice to be required from both the Legal and Banking Advisers.

While some consumers are very experienced in dealing with foreign currencies for a variety of purposes, many others are not. It is often those with little or no experience with these transactions who find there is a discrepancy between their expectations and the eventual outcome. In many cases it is clear to us that the consumer has assumed that the bank will know what is best and so are not sufficiently informed about the options presented and/or the instructions they give to the bank.

In some cases it is apparent that the staff dealing with these transactions have only a limited knowledge themselves. This can mean that the information and sometimes advice provided is misleading or that the staff are unable to identify a consumer who has a mistaken understanding.

The case studies below illustrate the variety of circumstances which can arise and how we have approached them.

Suspicious Overseas Bank Cheque

Mr A's business sold vehicles over the internet and received an expression of interest via email from a potential customer based overseas. Subsequently, the potential customer sent a bank cheque to Mr A issued by a Canadian bank for CAD 189,692.42 to pay for two vehicles.

Mr A was suspicious about the cheque and asked his daughter, Ms A, to take the cheque to the bank. Ms A asked the bank to check the authenticity of the cheque before banking it. She said that the bank teller said this was not necessary. The cheque was converted to Australian dollars, after Ms A accepted the relevant exchange rate, and the funds were credited to the business account.

Eleven days later the bank told Mr A that the cheque was a counterfeit and, due to a fluctuation in the exchange rate, Mr A was liable for the exchange rate loss of almost AUD 11,000. The vehicles had not been sent.

The bank said that it had explained the procedure for negotiating the cheque to Ms A. Ms A also signed a transaction advice which stated that, if the cheque

was dishonoured, the selling rate applicable on the date of dishonour would be applied by the bank. Therefore, it considered that it had acted appropriately.

As a gesture of good will, the bank offered to refund 50% of the exchange rate loss.

The Case Manager obtained advice from the Ombudsman's Banking Adviser about good industry practice. The Banking Adviser's opinion was that, given Ms A had expressed doubts about the authenticity of the cheque, it would have been good banking practice for the bank to give her the option of sending the cheque on a "for collection basis". This would have avoided any exchange rate loss because the cheque would not have been converted when the cheque was presented.

The Case Manager discussed the Banking Adviser's opinion with the bank which confirmed that it had not sent the cheque for collection. The bank resolved the matter by refunding the exchange rate loss and associated fees to Mr A's business account.

Disclosure of Use of a Correspondent Bank

Mr B's solicitor instructed the bank to transfer AUD 50,000 by telegraphic transfer to Mr B's account in Belgrade. Mr B needed the funds to complete the purchase of a property in Belgrade in three days time.

Mr B said that the transfer was delayed and sought reimbursement of AUD 2,570 in costs he said were caused by the delay in settlement, plus interest on the funds.

Mr B also said that he considered the receipt provided by the bank to his solicitor to be misleading because it indicated that the transfer would be made directly to his account in Belgrade. He said that the bank did not disclose that it would use an intermediary to transfer the funds and that the intermediary bank could charge a fee of AUD 750.

The bank refused Mr B's request for compensation on the basis that it had acted correctly in processing the telegraphic transfer and in accordance with the Conditions of Purchase, which stated that the bank may use the services of another bank to give effect to an applicant's instructions.

Ultimately it was not necessary to deal with the question of delay. The Case Manager identified the central issue as being whether the bank was required to verbally advise Mr B through his solicitor that a correspondent bank would be used and to advise of the

charges which the correspondent bank would levy.

The Case Manager issued a Finding to the parties after obtaining advice about the case from the Ombudsman's Legal Counsel and Banking Adviser. The Finding concluded that:

1. The bank's telegraphic transfer documentation was not misleading. Specifically, it did not represent that the money would be sent directly to Mr B's bank in Belgrade;
2. The bank was protected by the Conditions of Purchase detailed in the telegraphic transfer receipt as they disclosed that the bank may use the services of another bank in sending the funds to Mr B's bank and therefore that fees would be payable;
3. While good industry practice required that the bank advise a telegraphic transfer applicant that a correspondent bank would be used to transfer the funds, the bank was not under any legal obligation to do so, unless the customer asked a specific question about this issue; and
4. Therefore, the bank was not liable to reimburse Mr B for the costs claimed.

Instructions for an International Money Transfer

Ms C, who was living in the United Kingdom, sent her mother an email asking her to transfer AUD 100,000 from her Australian account to her UK account. The funds were required by Ms C so that she could complete a contract in the UK. Accordingly, Mrs C

attended the bank on behalf of her daughter and completed a form for an International Money Transfer instructing the bank to transfer the equivalent of AUD 100,000 in Pounds Sterling to Ms C's UK account ("Transfer Instructions"). Mrs C

conducted the transaction for her daughter in her capacity as Attorney.

The dispute arose because Ms C had wanted the funds sent in AUD but acting on the Transfer Instructions signed by Mrs C, the bank sent the funds in Pounds Sterling.

Ms C argued that the bank should not have converted the funds into Pounds Sterling as they could not be paid into the Australian dollar account for which they were destined. She requested compensation of approximately AUD 783 to cover that part of the exchange rate loss which she had to bear.

The bank refused to refund the requested amount on the basis that:

- It was entitled to rely on the Transfer Instructions signed by Mrs C;
- Mrs C was given the opportunity to clarify the instructions with her daughter but elected to proceed on the day she attended the bank;
- It was not given a copy of the relevant contract note which showed that the funds should have been sent in AUD; and
- It had already absorbed AUD 1,000 of the exchange rate loss.

The case was referred to the Ombudsman's Legal Counsel who provided her assessment of the dispute. Her view was that:

1. Ms C's Attorney was empowered to instruct the bank to convert the funds;
2. It appeared that the email instructions, which were given to the bank officer, were not read thoroughly or the bank officer did not appreciate that the UK account was an Australian dollar account. The problem may have been avoided if this document had been read with care;
3. However, as Mrs C told the Legal Counsel that the Transfer Instructions were consistent with the verbal instructions she gave, she was not prepared to conclude in those circumstances that the bank was obliged to examine Ms C's instructions for any discrepancy. The Banking Adviser did not believe that in this case the failure to check the Transfer Instructions further amounted to poor banking practice; and
4. Accordingly, there was no basis to conclude that compensation was payable.

Counterfeit Foreign Currency

Mr D purchased USD 750 from the bank and subsequently travelled to Africa. Guards at the Zambia / Tanzanian border told him that a note which he offered for payment was counterfeit. Mr D was arrested and imprisoned for two days. Mr D sought compensation for the financial and non financial loss which he suffered during his trip.

The bank said that its staff carefully examined foreign currency notes which were presented to it for any discrepancies. There was no information showing that the notes purchased by Mr D were counterfeit and so it declined the claim.

The central issue raised in this case was whether this office was able to

determine whether the notes issued by the bank to Mr D were counterfeit.

After obtaining legal advice about this issue, information from the bank was gathered including information showing that:

- There had been no other complaints about counterfeit notes lodged with the bank in Mr D's state in the three month period before and after Mr D purchased his notes;
- Both its branches and clearing centres checked notes for authenticity. This included an eye check and a check of the feel of the notes. The bank also used Bank of America and American Express to clear surplus notes and it believed they also undertook authenticity checks; and

- The bank has an ongoing alert on US currency and the bank's instruction to staff was to be careful when negotiating USD.

We wrote to Mr D setting out the further information provided by the bank, expressing the view that the information raised questions about what could be reasonably established on the available information and whether BFSO was the appropriate forum to resolve the matter.

The letter asked Mr D for further information to support his contention that the currency was counterfeit. Mr D did not respond to this letter and the case was discontinued.

Material Alteration of Foreign Cheque

Mr & Mrs E lodged a cheque for USD15,000 in November 2002 and another for USD20,000 in March 2003 with the bank.

The first cheque was cleared after approximately four weeks. The second cheque was returned unrepresented four weeks after deposit as there had been a handwritten alteration and the bank's agent chose not to present the cheque. The cheque was then represented four weeks later by Mr & Mrs E and took six weeks and one day to clear.

The alteration to the second cheque consisted of a handwritten amendment to the pre-printed address of the drawer. The bank had sent the cheque for collection to its US agent. Under the terms of the agreement between the bank and the US agent, the agent was required to bear all liability in the event that there was a later claim that a paid cheque was fraudulent or otherwise

invalid. The US agent elected not to present the cheque with the altered address because of the risk of later dishonour. The cheque was returned to Mr & Mrs E who presented it again for collection. The cheque was paid after it was presented by the US agent to the drawer's bank and contact was made with the drawer by her bank to confirm she had changed her address.

Mr & Mrs E claimed loss resulting from a fall in interest rates between the date of lodgement and the date the funds were credited to the account. They also claimed consequential business loss, consequential medical damage and loss of interest as a result of the delay in receiving the cleared funds.

The Case Manager considered the duty owed to Mr & Mrs E by the bank in clearing a foreign currency cheque and whether the bank breached any such duty which caused the disputants to

suffer loss or damage. The Case Manager also considered the bank's argument that the provisions of the US Uniform Commercial Code meant that the agent was entitled to refuse to present the cheque.

The article which dealt with alterations said relevantly that an alteration meant an unauthorised change in an instrument that purported to modify in any respect the obligation of a party or an unauthorised addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

The Finding concluded that:

1. At the time each cheque was lodged for collection, Mr & Mrs E were aware that clearance of foreign currency cheques may take between four and six weeks;
2. The bank did not breach any duty owed to the disputants in clearing the first cheque and so no loss could be claimed for the four week clearance time;
3. The bank did however breach the duty owed when clearing the second cheque as it delayed in presenting the second cheque to the drawer's bank. The breach arose because:
 - (a) Having accepted the cheque for collection in Australia, the bank was obliged to present or return it promptly. Here, the bank did not return it to Mr & Mrs E Australia and, because of the decision of its agent, the bank failed to present the cheque at all the first time; and
 - (b) The alteration on the second cheque did not amount to an alteration for the purposes of the US code and so it ought to have been presented on the first collection. If that had been done it appeared more likely than not that it would have been paid in the same way as it had been on the second presentation, albeit with some additional delay;
4. Mr & Mrs E were entitled to compensation for both financial and non financial loss comprising exchange rate differences, loss of interest on surplus proceeds, refund of fees and interest and an award of AUD 1,250 for non financial loss; and
5. The disputants were unable to substantiate their claim for consequential business loss. Their claim for consequential medical damage could not be dealt with by the Ombudsman as it fell outside the Terms of Reference. Mr & Mrs E appealed and the Ombudsman confirmed the Finding in his Recommendation.

Issues featured in our Bulletins this year

Bulletin No.	Date	Subjects
41	March 2004	<ul style="list-style-type: none"> ☆ Disability and Incapacity Issues ☆ Update to Bulletin 40: Disclosure of termination listing process ☆ Identification requirements for cashing cheques - privacy issues
42	June 2004	<ul style="list-style-type: none"> ☆ Independent Review of the Scheme Costs associated with mortgagee sales ☆ UN Forum on online dispute resolution
43	September 2004	<ul style="list-style-type: none"> ☆ Credit card and electronic payment systems ☆ Proportionate Liability for Misleading Conduct ☆ New Chairman of the Board of BFSO Ltd

☆ ☆ ☆

Seasons Greetings

☆ ☆ ☆

**The office of the Banking and Financial Services Ombudsman
takes this opportunity
to wish all readers the compliments of the season**

Colin Neave

**Colin Neave
Banking and Financial Services Ombudsman**