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** On 1 July 2008, the Banking & Financial Services Ombudsman (BFSO), Financial Industry Complaints Service (FICS) and Insurance Ombudsman Service (IOS) merged to form the Financial Ombudsman Service (FOS).*

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Privacy

In March 2001, we released Bulletin 28, dealing with banks' duties of confidentiality and privacy.

That bulletin preceded the introduction of the *National Privacy Principles* (the "NPPs"), which took effect from 21 December 2001. Until that date, banks owed a common law duty of confidentiality to customers and had obligations under Part IIIA of the *Privacy Act 1988* (Commonwealth) ("the Act") to protect consumer credit information and, in particular, credit reporting.

The introduction of NPPs expanded the obligations of banks, (which fall under the definition of "organisations" in the Act), requiring them to provide a much broader range of privacy protections. Bulletin 28 provided a discussion of the principles, as BFSO considered they would apply and be interpreted when they took effect.

The NPPs, which have now been in operation for over five years, have been reviewed by the Privacy Commissioner and are now the subject of a further review by the Australian Law Reform Commission.

Since Bulletin 28, BFSO has considered a broad range of privacy disputes relating to the NPPs and Part IIIA. This Bulletin will provide details of some of those disputes and their outcomes.

We also deal with credit reporting and provide details of disputes that we have considered in that area.

BFSO jurisdiction to deal with privacy disputes

An individual who believes that an act or omission of a member has breached his or her privacy may lodge a dispute with the Federal Privacy Commissioner or with BFSO.

BFSO's jurisdiction to consider such a dispute arises from the Terms of Reference governing the scheme. Clause 5.3 of the Terms of Reference provide that in order to lodge such a dispute, the disputant must be a natural person and the subject of the dispute must be *personal information*, which is defined in the same terms as under the Act. That is:

> *"information or opinion (including information or an opinion forming part of a data base), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can be reasonably ascertained, from the information or opinion."*

The National Privacy Principles

The NPPs set down minimum requirements for the collection and handling by organisations of personal information.

They deal with:

- Collection;
- Use and Disclosure;
- Data quality;
- Data security;
- Openness;
- Access and correction;
- Identifiers;
- Anonymity;
- Transborder data flows; and
- Sensitive information.

BFSO has considered disputes relating to collection (including that of sensitive information), use and disclosure, data quality and security, access and correction and anonymity.

Collection

The Collection principle limits the collection of information by an organisation to that which is necessary for one or more of the functions of that organisation. Collection is required to be done by lawful and fair means and reasonable steps to be taken to advise the individual about the collection.

BFSO has received and considered a number of disputes concerning collection of information by financial services providers.

Where the ability of a financial services provider to collect information is disputed by an individual, BFSO takes into account the functions and activities of the provider and its explanation as to why the collection of the disputed information is considered by it to be necessary in the context of those functions and activities.

Any personal information which the financial services provider cannot demonstrate to fall within that which is necessary would need to be removed from the provider's records and steps taken to ensure that further information of that kind is not collected.

Where the information is sensitive information, we look to whether the financial services provider can demonstrate that the collection was required or authorised by law, or is necessary for the establishment or defence of a legal or equitable claim. In the absence of either, then consent will be required from the individual. The lack of consent would generally mean that the provider would need to remove the disputed information from its records.

<u>Identification to cash cheques</u>

One issue which has been raised in disputes is the requirement of financial services providers for identification from an individual presenting an open cheque payable to cash or bearer at the drawer's bank. The claim made to this office was that the collection of such information breaches the NPPs because it is not necessary for the functions and activities of the bank and that cashing a cheque should be able to be done anonymously.

Thus, the issue touches on both the Collection and Anonymity principles.

Our Bulletin 41 (March 2004) sets out the BFSO's view that the taking of identification from a person presenting a cheque for cash payment is necessary for one or more of the functions and activities of the drawer's bank. In summary, our view is that the paying bank is entitled to collect information about the person to whom funds are paid in order to protect itself in the event of forgery or mistaken payment. We consider that in such cases it is not reasonable or practicable for the bank to be required to allow the payee to conduct the transaction anonymously.

Names and contact details of third parties required on credit applications

It is common practice for credit providers to require applicants for credit to provide names and contact details of relatives or friends in the application form.

The Collection principle requires organisations, where reasonable and practicable, to collect information about individuals only from those individuals. Where information about an individual is collected from someone else, reasonable steps must be taken to ensure that the individual is made aware of the matters set out in Principle 1.3. These include the contact details of the organisation, why the information has been collected and what it will be used for.

BFSO is aware that some credit providers ask the applicants who provide third party information to advise the third parties of that fact. This appears to be a practical way of complying with the requirements of Principle 1.3, without placing the privacy of the credit applicant at any risk.

Collection of sensitive information without consent and without adequate notice of collection

Where the information concerned is *sensitive information*[1] the ability of an organisation to collect is further limited. In the case of an organisation such as a financial services provider, this collection is generally limited to that which the individual consents, where the collection is required by law, or where it is necessary for the establishment, exercise or defence of a legal or equitable claim.

During the course of an investigation by BFSO about another matter, Mr P became aware that his bank had, during the course of assessing a loan application, collected health information about him and placed that information on his file. He said that the bank had neither sought his consent, nor advised him of the collection and what the bank intended to do with the information.

Mr P had been asked to provide information about his income, which included worker's compensation payments. Mr P had taken a document to the bank, which showed his income in

[1] For the purposes of the Privacy Act, *sensitive information* is information about an individual's racial or ethnic origin, political opinions, membership of a political association, professional or trade association or trade union, religious or philosophical beliefs, sexual preferences or practices, criminal record, or health.

one section, but also contained information about his health in other sections. The BFSO Case Manager found that Mr P had authorised the bank to make a copy of only the income section. However, the bank had copied the entire document without advising Mr P. Mr P became aware of this during the course of the investigation and was embarrassed.

The Case Manager found that the bank had acted in contravention of the Collection and Sensitive Information principles and awarded compensation of $500 for the embarrassment suffered by Mr P.

Use and Disclosure

The most common principle about which BFSO receives disputes is *Principle 2: Use and Disclosure*.

Claims made to BFSO range from cases in which correspondence is sent to wrong addresses to serious breaches in which individuals say their personal safety is put at risk.

Many cases investigated by BFSO where a breach is found, appear to have resulted from failure to use up-to-date information, carelessness and, in some cases, misplaced attempts by staff to assist family members or friends of the customer.

The distinction between use and disclosure

While use and disclosure are dealt with in the same principle, this office takes the view that the passing of information within an organisation by its employees as part of their duties (in performing the legitimate functions and activities of the organisation) is *use* of the information, rather than disclosure.

Ms S made an application for an investment property loan with her financial services provider. Very soon after making the application and while it was being assessed, she lost her job. Ms S informed the manager of the branch at which she lodged her application that she was no longer employed. She said that she had asked the manager not to pass this information to the loans area, because she felt that her application would be declined.

The branch manager informed the loans assessment area of Ms S's employment situation and the application was declined. Ms S claimed that the manager had breached her privacy by disclosing the information.

BFSO considered that the information had been collected by the branch manager in her capacity as an employee of the organisation and that the passing of the information to the loans assessment area was a use of that information. The collection was considered necessary for a function of the bank; that is, it was necessary to properly assess Ms S's capacity to repay the loan. The use of the information, in assessing the application, was in accordance with the purpose of collection.

Of course, it is appropriate in such cases to advise the customer prior to passing on such information that it will be used in this way.

Wrongly addressed correspondence

BFSO has received complaints about correspondence, including account statements, being sent to incorrect addresses.

This can happen for a number of reasons, including failing to update records, mistakenly using an old or incorrect address even where records are up-to-date, and by mistakenly linking a customer to the incorrect address.

Incorrectly addressed correspondence will not automatically give rise to a requirement to pay compensation. Where mail is returned to the financial services provider unopened, then it may be difficult for the customer to demonstrate loss. However, where it can be demonstrated that a financial loss has flowed from the error – such as financial costs associated with the delay in receiving the correspondence - compensation may be warranted.

Compensation for non-financial loss, including embarrassment, stress and inconvenience is not commonly awarded for such cases, but may be appropriate where it might reasonably be expected that a third party might open the mail.

Mr N had the same first and last names as his uncle. Both banked with the same bank, but they had different addresses.

Due to bank error, Mr N's account statements were sent to his uncle's address and his uncle opened them. Mr N said that this caused him stress and embarrassment, after his uncle discussed the accounts with Mr N's parents.

The Case Manager found that, in the circumstances, it was reasonable to expect that Mr N's uncle would open the correspondence and that the information would be disclosed to him, causing embarrassment to Mr N.

The bank offered compensation of $750 and this was accepted by Mr N.

BFSO has also considered cases where wrongly addressed mail has led to serious repercussions for the customer. These quite serious cases are relatively uncommon. However, where a financial services provider is on notice of potential danger or conflict where information about a customer is revealed to a third party, then compensation may be substantial where such information is disclosed in breach of the NPPs.

Ms D was engaged in acrimonious family law property proceedings with her then husband, Mr D. Ms D said that she was afraid of Mr D and had taken steps to change her name and relocate so that he could not find her.

Ms D wrote to her financial services provider to inform it of her new address and her desire to have her name change reflected in certificates of title, loan contracts and mortgages for properties she owned. She explained in the letter that she was afraid of her husband and described him in quite unflattering terms, describing her fear of him. The financial services provider wrote back to Ms D to advise that her name change could be noted on the documents,

but where those documents related to jointly owned properties, or joint loans, Mr D would need to be advised. Ms D then abandoned her plan to change her name.

Ms D said that she was met at home one day by two police officers and Mr D, who accused her of fraud. The police officers provided Ms D with copies of her letter to the financial services provider about her desire to change her name and the financial services provider's response. They told her that Mr D had provided these documents to them.

The Case Manager found that Mr D could only have obtained the documents from the financial services provider, although the particular circumstances of disclosure could not be established. However, there was no information to suggest that there been any requirement for the bank to produce the documents to court, nor in response to any request from any person. Accordingly, the case manager considered that the financial services provider had not demonstrated that the disclosure was in accordance with the NPPs.

Ms D said that, as a result of the disclosure and the violent reaction of Mr D, she had to obtain an Apprehended Violence Order and relocate to another town. She also claimed for a subsequent move and submitted that the financial services provider should pay for another move in the future.

The financial services provider offered to pay $2,000 for the stress and inconvenience caused by the disclosure and a further $3,000 to meet the costs the initial move. BFSO found that there was no information to demonstrate that the second move, or the intended third move, could be attributed to the disclosure by the financial services provider and found that, if these moves were necessary, they were caused by other factors unrelated to that disclosure.

The offer of $5,000 was accepted by Ms D after the issuing of a Recommendation by the Ombudsman.

Access and correction

Principle 6 of the NPPs provides that an organisation must, at the request of an individual about whom it holds information, provide access to the information, unless a stated exception applies.

There are numerous exceptions to the requirement to provide access that these exceptions include where access would pose a threat to the life or health of a person or would have an unreasonable impact on the privacy of a person.

BFSO has received complaints from individuals who have been denied access to joint account information, particularly loan applications, with the reason provided for refusal being a perceived breach of privacy.

In the case where two parties have jointly completed an application form for a loan and/or jointly hold an account, it is difficult to see how denying access to account or application information to one party on the basis of a perceived breach of privacy to the other would be justified.

This reason has also been cited where individuals against whom debt recovery action has been initiated claim that applications for such credit have fraudulently been made

in their names and seek access to application forms to verify their suspicions or prove that the application was not made by them.

Financial services providers need to be mindful that, when such requests are made for access to information, personal information includes "*information or opinion … whether true or not"* about an individual.

Accordingly, it is the view of BFSO that, where a financial services provider asserts that an individual is its customer, the individual is entitled to access information that the provider holds or purports to hold about him or her.

Part IIIA – Credit Information

Part IIIA of the Act deals with credit information about individuals and places restrictions on the access to and disclosure of such information.

Credit is defined in the Act as:

> *"… a loan sought or obtained by an individual from a credit provider in the course of the credit provider carrying on a business or undertaking as a credit provider, being a loan that is intended to be used wholly or primarily for domestic, family or household purposes."*

Part IIIA also deals with credit reporting and is supplemented by the *Credit Reporting Code of Conduct*, issued by the Privacy Commissioner.

A credit report is defined in the Act as:

> *… any record or information, whether in a written, oral or other form, that:*
>
> *(a) is being or has been prepared by a credit reporting agency; and*
>
> *(b) has any bearing on an individual's:*
>
> *(i) eligibility to be provided with credit; or*
>
> *(ii) history in relation to credit; or*
>
> *(iii) capacity to repay credit; and*
>
> *(c) is used, has been used or has the capacity to be used for the purpose of serving as a factor in establishing an individual's eligibility for credit.*

Credit reports typically contain information that identifies individuals who have applied for credit, together with details of credit enquiries made by those individuals. Credit reports may also contain details of defaults in relation to credit contracts and, in some cases, "serious credit infringements".

Each year, BFSO receives and investigates a number of disputes about credit reporting. The most common cause for complaint is default or serious credit infringement listings.

<u>Default listings</u>

Complaints about default listings include claims that the credit provider failed to give warning about the intention to list, listing incorrect amounts and failing to properly update a default listing after payment is made.

Credit defaults can only be listed where the amount listed is overdue by at least 60 days and a demand has been made for payment. BFSO's view is that, where a credit provider intends to list a default the intention to list should be brought to the attention of the individual at the time that the demand for payment is made.

BFSO also takes the view that the amount listed should be limited to the amount which can be demonstrated to have been overdue for 60 days.

In our *Bulletin 34* we stated our position on the issue of the amount that can be listed and the timing of a listing as follows:

> "…it is our view that a credit provider is only entitled to list the amount of the payment that is overdue *if the payment listed* is overdue for 60 days or more and the credit provider has sent a written notice to the customer's last known address which:
>
> - advises the customer of *the overdue payment* subsequently listed; and
> - requests payment of the amount outstanding."

In a recent submission to the Australian Law Reform Commission's review of the Credit Reporting provisions of the Act, BFSO said that the Act and/ or the Credit Reporting Code of Conduct ("the Code") should be amended to make clear provision that the amount of the debt reported must be 60 days overdue at the time that the listing is made.

BFSO would, however, support a provision to the effect that further arrears that have accrued since the default notice was sent can be added, providing the majority of the amount listed has been overdue for the full 60 days.

Where a credit provider relies on an acceleration clause in a contract to demand that the remaining loan balance be repaid by a customer, we are of the view that the Act and/or Code that the full amount must have been demanded by the credit provider and remain unpaid for 60 days from the date of expiry of the demand before a listing may be made and that this should be made clear and unambiguous in the Act and Code.

Serious Credit Infringement listings

The Act defines serious credit infringements as:

> **"**… an act done by a person:
>
> (a) that involves fraudulently obtaining credit, or attempting fraudulently to obtain credit; or
>
> (b) that involves fraudulently evading the person's obligations in relation to credit, or attempting fraudulently to evade those obligations; or
>
> (c) that a reasonable person would consider indicates an intention, on the part of the first-mentioned person, no longer to comply with the first-mentioned person's obligations in relation to credit."

The listing by a credit provider of a serious credit infringement has serious ramifications for the individual concerned. The listing remains on file for seven years and the prospect of the person obtaining further credit during that time is greatly reduced. It is our experience that an individual with a serious credit infringement listing may not be able to obtain credit from any mainstream lender while the listing is in place.

The process for reporting a serious credit infringement listing is much simpler than that for reporting a default. While the default listing requires the debt to be 60 days or more overdue and for recovery action to have commenced, no such requirements exist for serious credit infringements.

We understand that the industry practice provides that a person can be considered to have committed a serious credit infringement if the credit provider is unable to contact that person, regardless of the period of time that repayment is overdue. The listing appears to have become over-used for debtors who are unable to be contacted, even temporarily.

By way of example, BFSO has received disputes as follows:

- from an individual who had a serious credit infringement listed on his credit information file while away from home on an eight-week work-related trip. During that time, the individual was listed as a "clearout" in relation to a credit card account that remained unpaid for approximately two months. The listing was not amended or removed when the individual returned to his home and paid the account. He remained unaware of the listing for approximately two years, despite having applied for (and in each case, was declined) eight loans;
- about a listing made by a mercantile agency which purchased a debt four years after the last contact between the credit provider and the individual. The listing was made 18 months after the purchase of the debt, on the basis that mail sent to the address at which the individual had held five and half years earlier had been returned to sender. No attempt was made to locate the individual at any other address, by looking at telephone directories, electoral rolls or similar. The member advised that such steps to try to locate the debtor were not considered necessary; and
- from an individual who had recently moved but had failed to notify the credit provider at the time. The overdue amount was less than 60 days overdue and no recovery action had commenced.

In our view, none of the above examples satisfies any of the definitions of serious credit infringement.

In its submission to the Australian Law Reform Commission, BFSO expressed the view that it is not appropriate for any listing to be made claiming fraud unless the individual has been found guilty of a fraud offence by a court.

BFSO expressed concern that fraud is grouped under the same "heading" as cases where the credit provider forms the view that the individual has indicated an intention to no longer comply with credit obligations.

In relation to listings indicating that the credit provider has formed the view that the individual no longer intends to comply with credit obligations, it is the view of BFSO that simply being unable to locate an individual cannot form the basis of a "reasonable opinion" that the individual has indicated an intention to no longer comply with the credit contract.

It is also our experience that the information on which this view is based may simply be the return of mail. In our view, this approach appears to be inconsistent with the need for such a listing to be based on what "a reasonable person" would consider an indication to no longer comply with credit obligations and is, instead, subjective.

BFSO will consider disputes about credit listings, including serious credit infringements, on a case-by-case basis. Where BFSO considers that such a listing was not warranted in the particular circumstances, consideration will be given to whether compensation should be paid to the individual.

Given the seriousness of a claim that an individual has committed a serious credit infringement and the potential embarrassment, inconvenience and inability to secure further finance, compensation for incorrect listings can be high, as the following case study indicates.

Mr B incurred a debt on his credit card account, after using it to assist his son to make a purchase. The son made some payments, but then lost his job.

Mr B contacted the credit provider and agreed to repay the debt as soon as he was able. He suffered poor health and had to leave work, but continued to make payments. In some months, he was unable to make payments due to lack of funds, but he kept the credit provider informed of his financial situation and promised to make a payment in full by a particular date. The credit provider then listed Mr B's debt as a serious credit infringement. The debt was discharged as promised, but the listing was not updated.

Mr B subsequently applied for store credit to make a purchase and was refused. He found this particularly embarrassing, as he had known the store owner for many years.

Some time later, Mr B applied for a loan from a bank and was again declined. Two subsequent applications were also declined, despite him being in a good financial situation, with no other debts.

Mr B described his acute embarrassment upon discovering that the store manager and bank manager to whom he had made his unsuccessful applications for credit had seen the serious credit infringement listing and had refused credit to him accordingly.

Mr B and the credit provider entered into negotiations to resolve the dispute. The credit provider offered $7,000 in compensation and this was accepted by Mr B.

Debt Collection Bulletin Update

In Bulletin 47 we discussed the new Debt Collection Guideline for Collectors and Creditors, released by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) in October 2005.

In relation to contact with a debtor following bankruptcy, the 2005 Debt Collection Guideline provides that the creditor or a debt collector must stop all informal collection activity against a bankrupt for an unsecured debt. We expressed the view that as all contact with a debtor who has become bankrupt or entered into an arrangement under the Bankruptcy Act must cease, it is not appropriate for financial services providers who are members of the BFSO scheme to assign the debt. The risk in assignment of such a debt is that contact with the debtor will take place when it should have stopped because the debt is not clearly identified as subject to Bankruptcy Act administration.

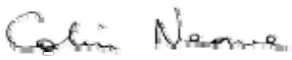
We have recently considered whether assignment might be allowable under certain narrow conditions and the following sets out our approach.

All collection activity with a debtor who has become bankrupt or entered into an arrangement under the Bankruptcy Act must cease. BFSO members should not assign a debt which is under Bankruptcy Act administration unless the debt is clearly and correctly identified as subject to a Part IV (Bankruptcy), Part IX or Part X administration and the assignment is subject to the condition that the assignee:

- will not contact a debtor unless required by law;
- will not make contact with the debtor for collection purposes while the administration is in place;
- will only make contact with the debtor for collection purposes after the administration ceases if the bankruptcy has been annulled or if a Part IX or Part X arrangement has been terminated for non-compliance;
- acknowledges that termination of a bankruptcy by discharge releases the debtor from all provable debts; and
- complies with applicable legislation and guidelines and the views of the BFSO in relation to applicable requirements and good industry practice expressed in our Bulletins from time to time.

A member who assigns a debt which is under Bankruptcy legislation may still be liable for non-financial loss if it was reasonably foreseeable that contact with the debtor might take place when it should have stopped.

As is always the case, we welcome feedback on this Bulletin.



Colin Neave
Banking and Financial Services Ombudsman