

Banking & Finance - Bulletin 55 September 2007

In this issue:

Merger of External Dispute Resolution Schemes

- Update on proposed merger of EDR schemes

Privacy

- Disclosure of customer's information to government agencies

Essential Banking Law and Practice

- Abstract of a new article by Elisabeth Wentworth, Special Counsel to the Ombudsman

** 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).*

Merger of External Dispute Resolution Schemes

On 31 August 2007, Mr Peter E Daly, AM, the Chair of both the Insurance Ombudsman Service Limited (IOS) Board and the Financial Industry Complaints Service Limited (FICS) Board, with the Chairman of the Board of the Banking and Financial Services Ombudsman Limited (BFSO), Professor the Hon Michael Lavarch, announced that agreement in principle to the merger of those three schemes had been reached.

In depth consultation with the stakeholders of the three schemes on how the merger can be achieved so as to maintain balance in the interests of consumers and the financial services industry will commence in the near future.

It is intended the new scheme will provide dispute resolution services for over 90% of all the disputes which arise in relation to the provision of financial services in Australia. The new scheme would provide a "one stop shop" for the vast majority of consumer and small business disputes between the community and financial services providers. It would have a strong commitment to fair and practical resolution of financial services disputes and the provision of information about financial services products.

In a joint press release, both Mr Daly and Professor Lavarch provided support for the merger. With regard to the BFSO Board, Professor Lavarch said:

"The Board of the BFSO has been supportive of greater co-operation between the three schemes for many years and sees the establishment of a single scheme as serving the interests of both participants in the financial services market and consumers of those services."

It is hoped that, subject to the regulatory and other requirements, the new scheme will be operating from 1 July 2008.

Background Material

BFSO was established in 1990. It handles around 7,000 disputes per year and receives 35,000 telephone calls about its financial services provider members, which include a range of deposit taking institutions and other financial services providers.

FICS handles around 1,400 disputes per annum and 11,000 phone contacts. It has a range of members, including funds managers, stockbrokers, financial planners and other providers of financial advice and services.

IOS was established in 1993 and handles around 1,800 disputes per annum and 75,000 telephone contacts. IOS provides information about the availability of general insurance products and handles disputes about those products when they have not been satisfactorily resolved in house by the insurers.

The full press release is available at www.bfso.org.au.

Disclosure of Customer's Information to Government Agencies

This office frequently receives queries or complaints from customers when their financial service provider has released information about their accounts to a government agency in response to a notice issued by that office purportedly exercising its statutory powers.

Customers generally complain that the financial service provider breached its obligations of confidentiality or privacy by disclosing their financial information to the government agency without their consent or without verifying the legality of the notice. It is the view of this office that a response by a financial service provider to a notice served by a government agency is not a breach of any obligation the financial service provider owes to its customer. Following is the rationale for our view.

Confidentiality and Privacy

A financial service provider owes a duty to its customer to keep confidential the information it has pertaining to the customer and their financial affairs. A financial service provider is also obliged to comply with the National Privacy Principles established under the *Privacy Amendment (Private Sector) Act 2000 (Cth)* ("Private Sector Act"). The two regimes co-exist.

Duty of Confidentiality

A financial service provider's duty to keep its customer's information confidential is not absolute, but is qualified by four exceptions:

- where disclosure is required by law;
- where there is a duty to the public to disclose;
- where the interests of the bank require disclosure; and
- where the disclosure is made with the express or implied consent of the customer.

Notices served by government agencies using their statutory powers to gather information compel a recipient at law to disclose information. A failure to do so usually amounts to an offence under the relevant legislation.

When serving a notice using its coercive information-gathering powers, there is no obligation on a government agency to disclose in the notice any information regarding the investigation, including any reason why an investigation has to be commenced or continued. In fact, to provide any information may be a breach by the government agency of its own obligations of confidentiality. Generally, a government agency may identify the possible offence or, in the case of less specifically directed investigations, the statutory basis on which the information is sought.

Therefore, when a notice is received, a recipient is not required to determine if the government body has validly triggered its information gathering powers under its relevant statute. Further, a recipient would usually not be entitled to the information by which it could make this determination. The recipient is only required to ensure that the statutory power the government agency asserts to invoke actually exists.

Therefore the service of a notice by a government agency will compel a financial service provider at law to disclose its customer's information. The financial service provider must merely satisfy itself that the government agency has the statutory power to compulsorily gather information that it asserts.

National Privacy Principles

Principle 2 of the National Privacy Principles prevents an organisation from using or disclosing personal information about an individual unless:

“(g) the use or disclosure is required or authorised by or under law”.

It is the view of this office that notices served by government agencies using their statutory powers to gather information legally compel a financial service provider to produce the requested information.

Extent of Disclosure

When served with a notice compelling disclosure of a customer's financial information, a financial service provider must ensure it only produces information falling within the description or parameter of the request. A financial service provider is still under a legal obligation to maintain the confidentiality of a customer's information, insofar as it does not fall within the ambit of the statutory notice.

Essential Banking Law and Practice

Elisabeth Wentworth, Special Counsel to the Ombudsman, gave a paper recently on *Essential Banking Law and Practice* as part of the Law Institute of Victoria's Young Lawyer Lecture Series. You can download a copy of the paper on the [BFSO website](#).

The paper is not intended to be a summary of banking law and practice, nor is it intended as legal advice: anyone needing such advice should seek assistance from a legal practitioner. It is intended to provide, however:

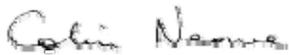
- An overview of some of the legal characteristics of banks and their relationship with their customers;
- A summary of the regulatory framework within which they operate; and
- An outline of some of the legal issues that arise for consideration by lawyers advising banks or their customers.

The sections of the paper are:

- What is banking law?
- What is a bank?
- Modern Australian definitions under the Banking Act and the Cheques Act
- The regulatory framework
- The banker-customer relationship:

- What is the basis of the banker-customer relationship?
- The normal incidents of the relationship
- What are the customer's duties
- Does the bank a duty of care?
- Does the bank owe a fiduciary duty?
- Is there a duty to disclose?
- Other sources of liability
- The 'special wives' equity
- Dispute resolution and the Code of Banking Practice
- The work of the BFSO
- Advising clients using an External Dispute Resolution Scheme
- Further reading.

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



Colin Neave
Banking and Financial Services Ombudsman