FINANCIAL OMBUDSMAN SERVICE

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Disaster Response

From all accounts, financial services providers responded well to the initial crisis arising from the Victorian bushfires. Financial services providers established disaster hot lines and developed effective responses to customer's immediate financial difficulties. It appears that financial services providers ensured customers could access their monies notwithstanding the loss of identity and financial records. As a consequence, we experienced no noticeable increase in the number of disputes in the immediate aftermath.

We congratulate financial services providers on their timely and appropriate responses to the bushfire crisis. The absence of complaints suggests that financial services providers have robust systems which could be quickly implemented to meet customers' needs. Well done!

Consequential concerns are now arising such as victims who are underinsured or whose livelihood is adversely affected. These customers may need to restructure loans or discuss their capacity to meet future mortgage repayments with their credit provider. As these consequential problems arise, people are being referred to the FOS Helpline 1800 337 444 and we will continue to refer those people to the dedicated telephone numbers financial services providers provided at the start of the crisis. We therefore request any financial services provider who may be considering closing its crisis line to discuss this with us prior to doing so, in the knowledge that we will be requiring alternate contact details where these customers can receive expedited attention.

Legal Action and Disputes Lodged with the Financial Ombudsman Service

In the face of the global economic crisis, we reminded financial services providers of our approach to financial difficulty in Bulletin 60. One of the issues the current financial downturn raises is the possibility of an increase in the incidence of legal proceedings commenced by financial service providers to recover debt. It is therefore timely to ensure financial services providers' processes reflect good industry practice and the requirements that underpin the effective operation of FOS as an alternative to the courts.

Legal proceedings

Once a dispute has been lodged with our office, the financial services provider should not commence legal proceedings against its customer in respect of the same subject matter.

As a member of FOS, the member consents to FOS being the forum for consideration of a matter brought by its customer that falls within the FOS Terms of Reference.

If proceedings are commenced by a financial services provider after FOS has received a dispute, the financial services provider must discontinue the proceedings at its own cost.

If proceedings are issued by the financial services provider after the dispute is received by FOS and before we have informed the financial services provider that we have received the dispute, the issue of whether this is at the cost of the financial services provider will be considered on a case by case basis. FOS will take into account all of the circumstances of the case including whether such costs are able to be passed on to the borrower under the relevant contract and whether the costs have been reasonably and properly incurred.

Commencement of proceedings

In determining whether proceedings have already commenced before a dispute is lodged at our office, the Ombudsman recognises that proceedings commence when an originating process, such as a Complaint, Writ or Statement of Claim, is filed in court.

In some cases, a disputant will lodge a dispute after the originating process has been filed and before it has been served. As the proceedings have formally commenced, the Ombudsman has no jurisdiction to consider these disputes.

On occasion, a financial services provider may nevertheless choose to consent to the Ombudsman considering the dispute even though proceedings have formally commenced. This is primarily a matter between the financial services provider and the disputant. The financial services provider is not obliged to discontinue the proceedings and the Ombudsman cannot compel a financial services provider to consent to us considering the dispute.

In the interests of promoting resolution of a dispute which is the subject of proceedings that have been issued but not served, we will usually take the step of asking the financial services provider whether they will consent to FOS considering the complaint, rather than the court, on the basis that the proceedings are at the very first stage.

Equally, if a disputant:

- lodges their dispute with FOS when they have already commenced legal proceedings against the financial services provider elsewhere, or
- commences legal proceedings in another forum, after lodging their dispute with FOS,

we will not be able to consider the dispute.

Our process

Where it appears that legal proceedings have commenced when we receive a dispute, we will write to the financial services provider asking:

- Whether it has issued legal proceedings against the disputant. If so, we will ask for a copy of the proceedings;
- Whether the legal proceedings have been served. If so, we will ask for a copy of the affidavit of service; and
- If the legal proceedings have not been served, whether the financial services provider agrees to take no further steps in the legal proceedings to enable us to consider the dispute.

We ask financial services providers to respond to this request within seven days. Because time is of the essence in legal proceedings, it is important that financial services providers give priority to these requests and respond to them as a matter of urgency.

We will review the documentation relating to legal proceedings on foot so that we can consider whether the parties and the event giving rise to the legal proceedings are the same as the dispute lodged with us. If this is the case, we will be unable to consider the dispute.

Judgments in other forums

The Ombudsman does not have the power to overturn a court judgment or go behind a decision obtained in another forum. Therefore, the Ombudsman will not consider a dispute if it has already been formally considered in another forum.

This also means that if a financial services provider has obtained judgment for a debt owed by a disputant and the disputant is having difficulty paying the judgment debt, FOS is unable to consider a complaint that the financial services provider should not pursue the legal enforcement remedies available to it.

However, if there were proceedings on foot and these proceedings were discontinued without either settlement being reached or judgment being obtained, we would expect the financial services provider to consent to FOS considering the dispute on the basis that there has been no judgment made by the court.

It should also be noted that, where judgement for possession of a property has been obtained and the property has been sold by the mortgagee, we will consider a dispute as to whether that sale has been made in accordance with the mortgagee's obligations (refer to Bulletin 38). The judgment for possession will not of itself prevent us from considering such a dispute because the obligations on a mortgagee exercising a power of sale are independent of the judgment.

Section 80 Notice & Early Release of Superannuation

Where a disputant is applying to the Australian Prudential and Regulation Authority ("APRA") for early release of superannuation in order to repay a debt in part or in full, APRA may require that a default notice under section 80 of the Uniform Consumer Credit Code ("UCCC") is issued by the financial services provider.

As the section 80 default notice is issued with the consent of the disputant as part of a strategy to resolve a dispute, we would not consider the issuing of a section 80 notice in these circumstances to be a breach of the Guideline. However, no further action should be taken on the expiry of that notice while our file remains open.

Of course, financial services providers should seek to assist in other ways before accessing superannuation, and should not encourage customers to do so if it will not rectify the arrears situation but instead merely delays an inevitable sale.

Responding to Requests for Information

We have recently received correspondence from trustees appointed under relevant State and Territory legislation to administer the affairs of individuals who the Court has assessed currently do not have the capacity to do so themselves, who have expressed concern about the reticence of financial services providers to provide them with financial information about the protected person.

Financial services providers are reminded that a Court or Tribunal order appointing a trustee or guardian under legislation such as the *Guardianship and Administration Act*

1986 (Vic) and the *Guardianship Act 1987 (NSW)* effectively places the appointed trustee in the shoes of the protected person, and the appointee has the authority to do on the protected person's behalf the same kind and types of things that the protected person could do for themselves if they had the requisite legal capacity. Therefore, if an appointee provides evidence of their appointment to the affairs of a customer, a financial services provider should treat the appointee's instructions as if they were directly from the customer.

Trustees have raised concerns about financial services providers not providing details of joint bank accounts without the consent of the other joint account holder. If the other joint account holder is not co-operative, the protected person may remain in a financially disadvantaged position or may not receive their correct entitlements from organisations such as Centrelink.

Further, a financial services provider's reluctance to accept a trustee's instructions to stop transactions on an account, even if only for a limited time to enable the trustee to seek injunctive relief, can present an opportunity for the other joint account holder to withdraw the entire proceeds of the account. This can lead to financial abuse of the vulnerable, including the elderly. In the event that a trustee lodges a dispute with our office, and from our investigation we conclude that a financial services provider did not respond appropriately to the trustee's request for information or the trustee's valid mandate, it is likely that we will find the financial services provider liable for losses incurred by the protected person and the trustee acting on their behalf.

Chargebacks - Recent Case Studies

While we generally consider that members are aware of their obligation to process chargebacks when a right exists, we consider the following case studies are of interest because of the particular issues that were raised by the circumstances of each dispute.

Cancellation of travel club contract during cooling-off period

On 11 December 2007 the disputant attended a presentation made by a travel club organisation and was persuaded to pay a deposit of $1,500 on a contract for full financial services providership. The $1,500 was paid by MasterCard. The disputant regretted his decision almost immediately. He contacted the Department of Fair Trading in his state and was told that a "cooling-off' period applied to that type of contract. On 14 December 2007, within the cooling-off period, he sent a registered letter to the travel club to cancel the contract and to request reimbursement of the deposit. The travel club did not refund $1,500 to him.

The disputant then contacted his bank and requested the $1,500 charge be reversed. He provided the bank with copies of the cancellation letter, the transaction voucher and a signed Credit Card Authority he gave to the travel club. The bank said it could not assist him, and suggested he go back to the merchant or to the consumer authority in his state, because:

1. He acknowledged participation in the transaction, so the bank could not chargeback the transaction as unauthorised;

2. Where cancellation policies and procedures were involved, the bank could not credit his account unless the merchant issued a credit voucher.

The disputant went to the Consumer Tribunal in his State, which ordered the travel club to pay $1,500 to the disputant on 12 September 2008. The order was worthless because the travel club had disappeared from the nominated address. The disputant then lodged a dispute with our office. The bank again declined to help the disputant, saying it could not act without a valid credit voucher from the merchant.

The case manager took the view that, because the disputant had cancelled the contract, the bank should have taken into account that the merchant had a legal obligation to issue a credit voucher. The Ombudsman's Banking Adviser reviewed the dispute and agreed that the bank could have exercised a chargeback right under Reason code 4860 – Credit Not Processed. The Banking Adviser also considered that the bank had not complied with its Code of Banking Practice obligation to claim a chargeback right where one existed for the most appropriate reason.

The case manager put these views to the bank, which agreed to refund $1,500 to the disputant without a formal Finding being prepared.

Unauthorised MOTO transactions not charged back – EFT Code implications

The disputant was approached by a business associate (Mr B) for help with a temporary lack of funds. The disputant agreed and, on 18 December 2006, rang a computer supply firm and authorised it to use his card number for a one-off payment to Mr B's account. A month later, on 19 January 2007 he rang a telecom firm and again authorised the use of his card number to make a one-off payment to Mr B's account. Mr B was present in the room during both phone calls.

Between 24 January and 30 March 2007, Mr B used his knowledge of the disputant's card details to charge $54,173 to the disputant's card on 12 separate occasions. Eight transactions totalling $40,000 were to the telecom firm; there were four other transactions totalling $14,173 including another one to the computer supply firm.

The disputant realised that Mr B had made an unauthorised transaction when he received his January statement. His first action was to confront Mr B, who promised to pay him back. The cheque bounced, as did subsequent cheques. There was a similarly fruitless confrontation when the February statement arrived showing more unauthorised transactions. The disputant finally informed the card issuer about the unauthorised transactions at the end of March 2007. The card issuer's response was that it was his problem, not theirs, and that he would have to sort it out with Mr B.

The disputant lodged his dispute with our office at the end of July 2007. Initially, the card issuer justified its position not to refund by saying that its definition of 'fraudulent' related only to "…unauthorised unrecognised charges from an unknown merchant that a cardholder had no knowledge of and/or association with whatsoever prior to and at

the time transactions were processed to the account". However, a few weeks later the card issuer charged back the $40,000 in telecom transactions, but did nothing about the four remaining transactions. Consequently, the case had to be investigated.

As the four remaining transactions were phone-based MOTO transactions, they came within the coverage of the EFT Code. The case manager issued a Finding that brought the card issuer's attention to clause 5.11 of the EFT Code, which has the effect that an account institution cannot hold an account holder liable for any unauthorised transactions that the account institution could have charged back if it had exercised any relevant rights it had under the rules of the card scheme at the time the complaint was made. End Note 21 clarifies that the clause does not require the account institution to exercise such rights, but it cannot hold the account holder liable if it does not exercise the rights. The case manager said that he was satisfied that the card issuer did have a right to charge back the four remaining transactions when it was notified that they were unauthorised at the end of March 2007. Consequently, clause 5.11 operated to prevent the the card issuer, as the account institution under the provisions of the EFT Code, from allocating liability for those transactions to the disputant.

The Finding asked the card issuer to refund $14,173 to the disputant plus the subsequent interest charges on that amount. Both parties accepted the Finding.

Attempt to cancel charge for airline tickets when cheaper carrier found

Mrs W booked tickets with a travel agent for her family to fly to South America via Lan Chile. She signed an Authorisation for Credit Card Charge ("the Authorisation") on 10 January 2007, giving details of her then Visa card ("the old Visa card"). Lan Chile processed a debit of $9,567 on 30 January 2007. The charge appeared on a new Visa account because Mrs W had closed the old Visa card account in the meantime. Mrs W and her family travelled to South America on 31 January 2007 with Air Lineas. These tickets had been purchased by her husband who had found a cheaper deal with another travel agent.

Mrs W disputed the transaction with her bank on 7 March 2007, which requested information from the acquiring bank. The travel agent provided information to show that Mrs W was aware of the penalties on non-refundable tickets, that she was aware that the tickets were issued and ready for collection, and that she had signed the Authorisation form after she received her itinerary. Mrs W's bank concluded that she had authorised the transaction and that no chargeback right existed.

Mrs W lodged a dispute, saying that she should not be liable to pay for the Lan Chile tickets because she claimed to have authorised the travel agent to debit her account for refundable tickets only, because her bank had ignored her instructions not to process any transaction received from 'the merchant', and because her bank had told her that if she cancelled the old Visa card and open a new Visa card account she would be safeguarded against the transaction occurring.

The case manager's investigation centred around Mrs W's claim that she was authorising the account to be debited for refundable tickets only. The travel agent's Booking Terms and Conditions had a clear statement that all cancelled bookings would incur charges up to 100%. Although her signature on the Authorisation appeared just below an

acknowledgement that she had read, understood and agreed to be bound by the Terms and Conditions, Mrs W claimed not to have received them. However, the travel agent was able to show that the Terms and Conditions had been printed out as part of a tax invoice generated on the same day as the Authorisation. The tax invoice also clearly stated that: "Before and After Departure Ticket is Non Refundable". Accordingly the case manager was satisfied that Mrs W had agreed to purchase non-refundable tickets.

The case manager also considered Mrs W's claim that she was told by the bank that she could avoid the transaction if she closed the old Visa account and opened a new Visa account. The bank said its notes of a call made on 17 January 2007 had no reference to Mrs W specifically referring to the travel agent transaction, only that she wanted to close the account. Mrs W provided a brief handwritten note she made on 17 January which stated: "Closed…no pending…24 hour turnaround". Mrs W also provided a detailed account of the phone call that she said she typed up on 17 January that included comments that she had explained in detail what had happened and that the bank officer recommended her to open a new Visa card to avoid the transaction occurring. However, on the weight of information, the case manager concluded that the detailed note had been created after the event, and the case manager was not satisfied that the bank had ever represented to Mrs W that she could avoid the transaction.

The Finding was that Mrs W was liable for the credit card transaction.

As a general observation, it is our view that the closure of a credit card account does not invalidate transactions that have been made on that account prior to its closure. Therefore, a debt still exists between the cardholder and their credit provider for the values of those transactions, and we accept that the most convenient way to account for those transactions is for the credit provider to apply the value of the transactions to the customer's new credit card account.

Submissions on the Proposed Terms of Reference

Following a consultation process that began with the publication of an Issues Paper in August 2008 and which involved further consultation with industry and consumer representatives, internal stakeholders and Advisory Committees, the Financial Ombudsman Service Proposed Terms of Reference have now been published and can be viewed on our website by clicking on the following link: ~~www.fos.org.au/proposedtor~~.

Interested parties may make written submissions about the Proposed Terms of Reference by the close of business on Monday 20 April 2009. All submissions will be published on our website and those that wish to comment on the initial round of submissions are invited to do so by Thursday 28 May 2009.

Submissions and replies can be directed to:

Mr Phil Khoury
The Navigator Company Pty Ltd
C/- Financial Ombudsman Service
GPO Box 3
Melbourne VIC 3001

Financial Ombudsman Service Conference 11 – 12 June 2009

The inaugural Financial Ombudsman Service Conference will be held at the Crown Promenade Hotel, Melbourne, on 11 and 12 June 2009.

In keeping with the conference's theme "Financial services – the changing landscape", the program includes panel discussions on the proposed Terms of Reference and the Commonwealth's initiatives in the financial services sector.

Banking & Finance will also have two interactive sessions in which we will be facilitating discussion on issues emerging as a consequence of the changed economic conditions

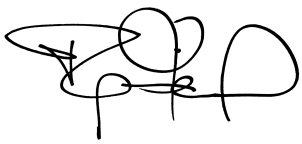
Full details on the program, cost and registration form are available on our website by clicking on the following link: www.fos.org.au/conference.

We hope to see you there!

A Fond Farewell

Readers are advised that this is the last Bulletin. After 61 editions, it is time to bid a fond farewell. Our Communications Team is working on a new concept for keeping you informed of topical issues across the whole of the Financial Ombudsman Service. Look out for the Financial Ombudsman Service Circular No.1 in June 2009!

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



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