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Banking and Financial Services Ombudsman Limited

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22 December 2004

Federal Privacy Commissioner
GPO Box 5218
Sydney NSW 2001

Dear Madam

Review of the Private Sector Provisions of the
Commonwealth Privacy Act 1988

I enclose a joint submission prepared by my office in conjunction with the Energy and Water Ombudsman (Victoria), Financial Industry Complaints Service, Insurance Ombudsman Service Ltd and Telecommunications Industry Ombudsman in response to the Issues Paper released for the purposes of the Review of the Private Sector Provisions of the Commonwealth Privacy Act 1988.

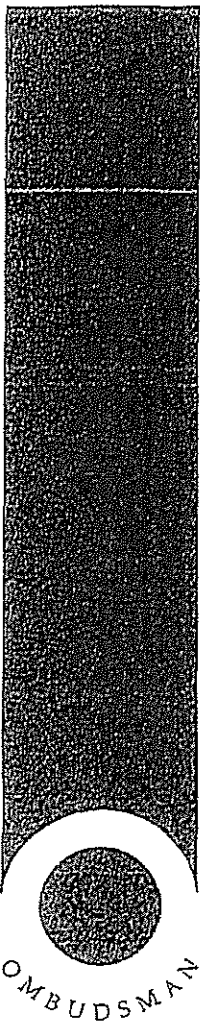
If you have any queries in relation to the submission, please contact Jillian Brewer on (03) 9613 7343.

Yours faithfully



Colin Neave
Banking and Financial Services Ombudsman

enc.



**REVIEW OF THE PRIVATE SECTOR
PROVISIONS OF THE
COMMONWEALTH PRIVACY ACT
1988:**

ISSUES PAPER

October 2004

**JOINT SUBMISSION
BY ADR SCHEMES**

Banking and Financial Services Ombudsman Ltd

Energy and Water Ombudsman (Victoria)

Financial Industry Complaints Service

Insurance Ombudsman Service Ltd

Telecommunications Industry Ombudsman

December 2004

Joint submission of Alternative Dispute Resolution Schemes

Participants

The submission is made in response to the Issues Paper: Review of the private sector provisions of the Commonwealth Privacy Act 1998 (Issues Paper). It is made jointly by the following Alternative Dispute Resolution (ADR) schemes:

- Banking and Financial Services Ombudsman Limited (BFSO)
- Insurance Ombudsman Service Limited (IOS)
- Financial Industry Complaints Service Limited (FICS)
- Telecommunications Industry Ombudsman (TIO)
- Energy and Water Ombudsman (Victoria) (EWOV)

Issues addressed

This submission does not seek to address all of the issues set out in the 'Framework for assessing issues' on page 12 of the discussion paper and raised in the Issues Paper. It focuses on striking an appropriate balance between privacy and competing social interests [Framework item 4] including the interests of Australian consumers and small business in efficient and effective dispute resolution through alternative dispute resolution schemes.

In particular, it discusses the impact of compliance with the National Privacy Principles (NPPs) on the work of a number of dispute resolution schemes and makes suggestions for changes, in the form of amendments to the Act, to allow personal information to be more efficiently collected, used and disclosed by ADR schemes and to permit disclosure of personal information to an ADR scheme for the purposes of dispute resolution.

Amendments sought

- Amendment to Principle 1 (Collection) to relieve an ADR Scheme of the requirement to inform an individual of the fact of collection, where to do so would prejudice an obligation of privacy owed to a party to the dispute.

- Amendment to Principle 2 (Use and Disclosure) to permit the use by and disclosure to ADR schemes of personal information for the purposes of dispute resolution.
- Amendment to Principle 10 (Sensitive Information) to broaden paragraph 10.1(e) to permit collection of sensitive information where necessary for the investigation or resolution of a claim, made to an alternative dispute resolution service.

The submission is, in essence, that ADR schemes should be given a limited exemption in relation to compliance with the National Privacy Principles.

Similar considerations would also be relevant to other dispute resolution schemes.

Submission format

This submission contains:

- Background information about ADR schemes and their role;
- A general description of their work;
- A general discussion of the impact of the NPPs on the operation of ADR schemes;
- A discussion of the impact of the specific principles in respect of which amendment is sought; and
- A detailed description of the role and processes of each scheme participating in this submission together with details, including examples, of the impact of the NPPs on that scheme's work.

Background

ADR Schemes

ADR schemes have been established in a number of sectors over the last 15 years, including financial services, telecommunications and energy and water. They developed in response to a need to provide an affordable and flexible alternative to the courts for consumers and small businesses seeking redress against industry sector members.

Industry based dispute resolution schemes operate under Commonwealth Benchmarks (1997 Benchmarks for Industry Based

Customer Dispute Resolution Schemes), and are required to meet a number of requirements including that they be:

- Accessible;
- Independent;
- Fair;
- Accountable;
- Efficient; and
- Effective.

Schemes in the financial services sector (BFSO, IOS, FICS and others) operate under the requirements of the Australian Securities and Investments Commission (ASIC) Policy Statement 139. They are approved external dispute resolution schemes for the purposes of section 912A of the *Corporations Act 2001 (Cth)*, which requires financial services licensees to belong to an approved scheme. EWOV members are members by virtue of a mix of licence and legislative requirements. The TIO operates under the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Service Standard) Act 1999*.

The integration of ADR schemes into the regulatory framework and their growth indicates recognition by government, industry and consumer representatives of their importance to Australian consumers and small business and to the efficient and effective resolution of disputes.

The work of ADR schemes

In general terms, the work of ADR schemes is the referral, consideration and resolution of disputes, taking into account the legal rights and obligations of the parties, good industry practice and fairness in all the circumstances. They do so in the context of an obligation of confidentiality to the parties, similar to the confidentiality of mediation. Although alternative dispute resolution techniques, such as facilitated negotiation and conciliation, are used, the schemes also perform a decision-making role. The services of the schemes are free to consumers and small business.

If disputes are not otherwise resolved, ADR schemes will investigate the claims made; consider information provided by both parties; ask for relevant documents and information to be provided; assess information received against specified criteria, including the law; and make a decision which is provided in writing with reasons. Final decisions are binding on the industry member but not on the customer, who does not lose the right to take the dispute to a court or tribunal. The decision is

in the nature of an expert opinion, which one party agrees, by contract with the scheme, to accept.

ADR schemes are bound by the principles of procedural fairness and the decision-making process is analogous to that of a tribunal. Issues investigated will include whether the industry member is in breach of a particular law, enforceable code or standards of good practice. In some cases the relevant circumstances may indicate unlawful activity by third parties, which has impacted on the rights and obligations of the disputant.

The provision of all relevant information to an investigator is essential to the full understanding of a dispute, and to a fair and proper outcome. ADR schemes, the members, and the parties who bring complaints, all benefit from the full consideration of all relevant facts in the dispute, in the same manner as all relevant information must be considered by courts and tribunals in assessing disputes.

Unlike courts or tribunals, however, the rules imposed by the *Privacy Act 1988* and, in particular, the National Privacy Principles, currently apply to ADR schemes.

In some circumstances, an ADR scheme may be required or permitted to refer conduct of concern arising out of a complaint (such as systemic issues or serious misconduct) to either the relevant regulatory authority or to the relevant professional or industry associations to consider disciplinary investigations or proceedings. These bodies include (but are not limited to) ASIC, the Financial Planning Association and the ASX. Where this occurs, it necessarily involves providing to those bodies personal information regarding a complainant and possibly regarding third parties to a complaint.

Impact of the National Privacy Principles on the operation of ADR Schemes

Since December 2001, the NPPs have impacted on the operations of ADR Schemes, both as organisations subject to the NPPs and also in their role in investigating and determining disputes.

ADR schemes receive complaints about member organisations from both individuals and businesses. Some schemes take complaints by telephone, and others by letter or on-line.

As organisations which collect and use personal information, the Schemes are required by Principles 1.3 and 1.4 to take reasonable steps to advise individuals of the collection of information, and how the

information will be handled, and to collect, where practicable, from the individual.

Following discussions with ADR schemes in 2001, the Privacy Commissioner released Information Sheets and Notes as a form of guidance for the schemes and their members. While these notes, particularly numbers 7 and 18, are helpful, they do not provide any legislative protection to the Schemes, which rely on full and frank disclosure of information by disputants and members, and use such information in dispute resolution. In particular, there are some residual areas of uncertainty about:

- the extent of the ability to collect and use personal information;
- the extent of the requirements in relation to notifying third parties about information indirectly collected; and
- obligations in relation to the collection and use of sensitive information.

For example, ADR schemes rely on Information Sheet 7 (issued by the Privacy Commissioner in 2001) regarding the use and disclosure of information for law enforcement and regulatory purposes. The Information Sheet advises that self-regulatory agencies, such as the TIO and the BFSO are authorities to which an organisation may report unlawful activity. There is, however, a residual concern, because the Privacy Act itself provides no express authority for such information to be provided to or collected by ADR schemes. The Information Sheet does not provide particular comfort to an ADR scheme which holds information which may not show unlawful activity but which is nevertheless necessary for the proper resolution of a dispute.

The status of ADR schemes as organisations fully subject to the NPPs can make members and others asked to provide information reluctant to do so, for fear of breaching privacy laws. Members have, on occasions, refused to provide information necessary to investigate a claim, on the basis that privacy of third parties would be breached.

These uncertainties, together with an awareness of and concern for compliance with obligations under the NPPs, have impacted upon the efficiency of the ADR schemes and may have an impact on their effectiveness.

Collection and Use of Personal Information: general processes

Strict compliance with NPP 1 (Collection) and NPP 2 (Use and Disclosure) can delay the processing of information provided. Information is collected by ADR schemes for the purpose of dispute resolution. It may be collected simply for referral to the relevant member to enable the member to resolve a dispute. In cases where resolution cannot be achieved by a member, information may be used for an investigation.

Unlike many organisations which are subject to the National Privacy Principles, ADR schemes are not often able to determine in advance what information they will collect. To a large degree, disputants and members send what they consider to be relevant to the resolution of the dispute. Ultimately, the information provided may or may not be relevant to resolution of a dispute.

The letter or telephone call originating a complaint will usually reveal whether or not the complaint falls within the jurisdiction of the Scheme. If the complaint does fall within jurisdiction, the matter will progress through a stage of consultation with the relevant member, aiming to have the member resolve the complaint at an early stage. The scheme advises the disputant that information concerning their dispute will be provided to the member, and in turn by the member to the scheme, and seeks their authority to do this.

At later stages in the investigation process, if information needs to be provided to or sought from others (such as handwriting analysis or external advisers' opinions) the disputant can be notified in advance.

In other cases, the member may provide information about the disputant or third parties, either because such information is contained on the relevant file, or because the member considers the information relevant to the issues in dispute. Prior to the member providing the information, the disputant is not in a position to advise whether he or she expressly consents to the specific information being provided.

Collection Use and Disclosure: Third Party Information

In many instances, disputes will mention third parties who are not themselves in dispute with the relevant member. These third parties may be mentioned because they are somehow involved in the account, claim or receipt of service or because their actions or circumstances are perceived by the complainant to be relevant to or affected by the

complaint. Often it is difficult to know at the time that the information is received whether it will ultimately prove to be relevant.

Dealing with information about third parties can be particularly problematic. Under the NPPs, the schemes (as "organisations") are required to take *reasonable steps* to advise all individuals about whom they collect information about its collection, use and disclosure of such information, regardless of the source of the information.

The schemes do not usually inform third parties to disputes of the fact of collection of information about them on the basis that to do so would not be reasonable because it would compromise the confidentiality of the dispute and breach obligations of confidentiality owed to the parties.

In interpreting the obligation to take reasonable steps, the ADR schemes rely to a large degree on the advice of the Privacy Commissioner's office in Information Sheet number 18:

"If an organisation has collected information about an individual and ensuring the individual's awareness of the NPP 1.3 matters would breach an organisation's duty of confidence, then generally it will be reasonable not to take steps to ensure awareness."

However, this advice is untested in any court, and it remains a matter of concern that a third party to a dispute could raise a complaint that an ADR scheme has failed to comply with Principle 1.3 and the use and disclosure principles because he or she was never made aware of collection of personal information.

Collection, Use and Disclosure: Sensitive Information

The collection of sensitive information about third parties is also problematic. While Principle 10 permits the collection of sensitive information about an individual if the collection is necessary for the establishment, exercise or defence of a legal or equitable claim, it is not always possible to know at the time of collection whether or not it falls into this exception.

Many disputes brought to ADR schemes are from or about people with mental or physical illnesses. Determinations and negotiated settlements often take into consideration health information or other sensitive information about a disputant or another person. For example, where a disputant's ability to operate an account is affected by illness (either suffered by that person or within that person's family), such

considerations are relevant to a determination and may need to be communicated to a member in order to effect a resolution to a dispute.

Mental or physical illness or incapacity of a person are sometimes relevant to issues in dispute, but may be communicated by third parties, because the individual cannot bring his or her own dispute.

Summary

ADR schemes play an important role in the effective, efficient and fair resolution of disputes between Australian consumers and small businesses. They provide an inexpensive and informal alternative to the courts for the resolution of disputes, a service which is in the social and legal interests of consumers and small business and which has had a positive impact on industry standards, not only in service provision but also in the resolution by industry of disputes with their customers. The importance of their role has been recognised by their integration into the regulatory framework for a number of industry sectors, including financial services, telecommunications and energy and water service provision.

The schemes are aware of the need to and concerned to ensure that they respect the privacy of individuals whose information is provided to them. The schemes are concerned to ensure that they comply with the National Privacy Principles, in addition to their obligations of confidentiality to the parties to a dispute.

There are, however, some uncertainties about the application of the NPPs to do with collection, use and disclosure of personal information and sensitive information. In the interests of providing an efficient and effective service, properly balanced against rights of privacy, an amendment to the Privacy Act is required to expressly exempt ADR schemes from the full application of NPPs 1 and 2. This will, it is submitted, do no more than formalise the recognition, in Information Sheets, 7 and 18, of the particular issues that arise for ADR schemes in complying with the NPPs.

In order to remove uncertainty regarding collection, use and disclosure of sensitive information by dispute resolution schemes, it is submitted that the broadening of Principle 10.1(e) to include as permitted purposes, collection for the investigation and resolution of claims made to ADR schemes.

The participants in this submission are happy to discuss the wording of the proposed amendments with the Privacy Commissioner and with

other ADR schemes affected by the same issues, and to provide further information if required.

**Participant ADR schemes:
Role, processes and the impact of the NPPs on
their work**

Summary table: Participants in this submission

Scheme	Areas of coverage	Statutory basis / related legislation	Jurisdiction limit	No of written disputes 2003/2004
BFSO	Banks & other financial services providers, related corporations, distribution channels	Approved under Part 7 Corporations Act by ASIC	\$250,000	5,859
EWOV	Electricity, natural gas and water providers in Victoria	Licence condition: electricity members, gas members, retailers. Legislative requirement: Melbourne Water, Regional Urban Water Authorities, Rural Water Authorities and Rural Urban Water Authorities. Electricity Industry Act 2000 (Vic) Gas Industry Act 2001 (Vic) Essential Services Legislation Dispute Resolution Act 2001 (Vic)	A jurisdictional limit only applies to Binding Decisions: it is \$20,000 or, if all parties agree, up to \$50,000.	EWOV has no Constitutional requirement for written disputes. <ul style="list-style-type: none"> • 10,658 Enquiries • 3,109 Complaints • 94% received by telephone • 6% received in writing (letter / fax / email / website)
FICS	Complaints relating to members of the financial services industry, including life insurance, managed investments, some friendly societies, financial advice, stock broking, investment advice and sales of financial or investment products.	Approved under Part 7 Corporations Act by ASIC	1. Insurance lump sum products and advice: \$250,000 2. Insurance income stream products and advice: \$6,000 per month or total payable under the policy is less than \$250,000 3. Other: \$100,000	1,038 [2003 calendar year figure]
IOS	(APRA) approved general insurance companies, re-insurers underwriting agents and related entities of member companies.	Approved under Part 7 Corporations Act by ASIC	Binding limit \$150,000 Recommendations up to \$290,000	1810 disputes

Joint submission by ADR Schemes

Scheme	Areas of coverage	Statutory basis / related legislation	Jurisdiction limit	No of written disputes 2003/2004
TIO	Telecommunications providers; Internet Services Providers; Carriage Service providers; Carriers	Telecommunications (Consumer Protection and Service Standards) Act 1999; Telecommunications Act 1997	Determination: \$10,000 Recommendation: \$50,000	9,260

Banking and Financial Services Ombudsman

Description of the scheme

The Banking and Financial Services Ombudsman scheme (BFSO) is an independent dispute resolution service which considers and seeks to resolve disputes between Australian financial services providers and their individual and small business customers. It is an alternative to litigation and free to individuals and small business. Its members include Australian banks and their related corporations, Australian subsidiaries of foreign banks, foreign banks with Australian operations and other Australian financial services providers.

The BFSO is approved by the Australian Securities and Investments Commission (ASIC) as an external dispute resolution scheme for financial services licensees under Part 7 of the *Corporations Act 2001* (Cth). Membership of an approved scheme is a licence requirement.

The BFSO operates under published Terms of Reference and is overseen by a Board of Directors which has three industry and three public interest representatives, and an independent Chairman.

The BFSO receives, considers and seeks to resolve disputes between consumers and small business and financial services providers. Disputes may involve claims of:

- breach of contract, including the contractual duty to provide services with care and skill;
- misleading or deceptive conduct;
- unconscionable conduct;
- breach of the provisions of the Consumer Credit Code;
- breach of the Code of Banking Practice;
- inappropriate allocation of liability for an unauthorised electronic funds transfer under the EFT Code; and
- breach of an obligation of confidentiality.

In addition to the resolution of disputes received, the BFSO has the power to identify and resolve systemic issues; issues apparent from disputes that will have a material effect on a class of individuals or small businesses beyond the parties to the dispute. This aspect of the work of the BFSO may involve compensation being paid to large numbers of individuals who will benefit from the investigation and resolution of a systemic issue even though they may not have lodged a dispute.

The subject matter of disputes can include:

- unauthorised withdrawals from bank accounts;
- the giving of a loan or the taking of a guarantee;
- representations made to customers in loan interviews or in correspondence;
- errors in the application of a fee;
- action taken in enforcement of an alleged debt.

The Ombudsman can make a recommendation or determination of up to \$250,000¹ to compensate a disputant for any direct loss caused by a member's act or omission. A determination is binding on the member.

The BFSO publishes its procedures, its policies (approach to particular issues raised by cases) and guidelines to its Terms of Reference.²

The aim of the BFSO is to provide an independent and prompt resolution of disputes having regard to:

- law;
- applicable industry codes or guidelines;
- good industry practice; and
- fairness in all the circumstances.

The BFSO receives telephone enquiries and written disputes, which are referred to the relevant financial services member. Unresolved disputes are investigated and may then be resolved by facilitated negotiation or a written decision.

Decision making

If a dispute is not otherwise resolved by agreement between the parties, a written decision will be made. Decisions are made in three stages:

- Case Manager Finding: written decision setting out the issues; information considered; an assessment of the information; and conclusions as to liability and compensation. Not binding unless accepted by both parties and may be appealed by either party, in which case the matter goes to the Ombudsman;

¹ The jurisdictional limit increased from \$150,000 to \$250,000 from 1 December 2004.

² www.bfso.org.au. For a detailed description of the BFSO and its operations, see BFSO review, Background Paper, available on the website.

- Ombudsman's Recommendation: written decision setting out the outcome of the Ombudsman's review of the dispute. Not binding unless accepted by both parties;
- Determination: confirmation of the Recommendation. Issued if the Recommendation is accepted by the disputant but not by the financial services provider. Binding on the financial services provider.

Of disputes resolved in the year 2003/2004 and within jurisdiction:

- 90.1% were resolved to the disputant's satisfaction by compensation or explanation without investigation and after the dispute was referred to the member;
- 6% were resolved after a Finding, 1.9% by negotiated settlement, 0.4% after a conciliation conference and 1.7% after a Recommendation. No formal Determinations were required as all Recommendations were accepted by the financial services providers concerned;
- Compensation paid to disputants and notified to BFSO (not always notified) comprised \$4,958,097 (compensation for financial loss) and \$112,504.62 (compensation for non-financial loss)

Collection and use of personal information: general processes and impact of NPPs

Introduction

Consumers lodge disputes about their financial services provider to BFSO in writing, either by mail or on-line. Receipt of the dispute and referral to the financial services provider involves both the collection from and disclosure of information to the financial services provider. Although the sending of the dispute to the BFSO implies consent to the provision of information to and collection of information from the financial services provider, express written authority is sought from the disputant for the collection and disclosure.

To a large degree, the BFSO does not choose the information that it collects. In addition to providing details about the financial product or

service and the actions of the financial services provider, disputants often provide:

- Sensitive information about themselves;
- Personal information about third parties; and sometimes,
- Sensitive information about third parties.

While BFSO has procedures to identify, record and deal with such information, BFSO has no control over the information provided by disputants and an assessment has to be made, at an early stage, about the relevance or likely relevance of such information.

The personal, sensitive and third party information may be clearly irrelevant, possibly irrelevant or clearly relevant to the resolution of the dispute. In the latter categories, it is necessary for the BFSO to collect, use and disclose information that is covered by the NPPs.

If the sensitive or third party information is clearly irrelevant, our procedures involve blacking out or deleting the information or returning irrelevant documentation to the disputant so that we do not continue to hold it.

This is time-consuming and may be disconcerting to the disputant. The disputant's perception of the relevance of the information may be quite different to that of the BFSO. There have been cases where disputants have formed an adverse view about the willingness of the BFSO to consider a dispute because of the return of sensitive or third party information that the disputant believes is relevant. In other cases, disputants have continued to send the information, despite a request not to do so.

In addition, concern about compliance with the NPPs, including ensuring that only relevant information is held, may lead to the premature deletion or return of information the relevance of which only becomes apparent at a later stage in the investigation.

Statistical information: Sensitive and third party information

A high proportion of cases received by the BFSO involve the provision to it of sensitive and third party information. Since the introduction of the NPPs, the BFSO has identified cases where such information is provided.

Period from 21/12/2001 to 30/11/2004 all cases:

- 19,153 cases in total were received
- 1,364 cases, or 7.1%, involved third party information;
- 737 cases, or 3.8%, involved sensitive information
- A number of the above cases, 219, involved both;
- In total, 10.9% of all cases involved third party and/or sensitive information.

The proportions are significantly higher for those cases which are otherwise unresolved and go into investigation.

Period from 1/07/2003 to 30/06/2004: Cases in investigation

- 383 cases were formally investigated;
- 60 cases, or 15.7% involved third party information;
- 40 cases, or 10.4% involved sensitive information
- A number of cases, 20, involved both
- In total, 26.1% of cases in investigation involved third party and/or sensitive information.

Collection, Use and Disclosure: Third party information

Disputants often send information about persons who are not themselves parties to the dispute. They may do so because they consider the individual:

- caused or contributed to the matters in dispute;
- has been affected by the matters in dispute; or
- can provide information.

Similarly a financial services provider may provide information about third parties who are not in dispute, because that information is relevant to the dispute, or because the third party's accounts or dealings with the financial services provider are relevant to the disputant's. This is almost always the case with joint accounts where only one account holder lodges a dispute – although in some cases, the financial services provider has refused to provide relevant joint account information because of NPP concerns.

When information about third parties is provided, whether unsolicited or at the request of the BFSO, the BFSO is required, under NPP 1.3 to take reasonable steps to inform the individual of the collection and other matters set out.

Taking steps to inform the third party of the fact of collection, and other required matters may be difficult for a number of reasons:

- the BFSO is required to maintain the confidentiality of the disputant;
- to inform the third party may lead, in some cases, to family breakdown or violence and seriously inhibit the willingness of the disputant to continue with the dispute;
- the BFSO is unlikely to have contact details for the third party.

When we think it is reasonable to do so, we ask the disputant to inform the third party that information has been provided and the BFSO has prepared a brochure to assist the disputant in doing so. This may, in some cases, place the disputant in a difficult position. In other cases the BFSO relies on Information Sheet 18, which provides that in some cases, the reasonable course is to do nothing to inform the third party.

In some cases, the financial services provider will refuse to provide relevant third party information because of privacy concerns. The BFSO acknowledges that financial services providers have obligations to third parties under the common law and the NPPs, and there may be some circumstances where providing information to our office, without obtaining a third party's consent, would involve a breach of the NPPs because there is no exemption in the Principles for disclosure to a dispute resolution scheme.

Examples of where third party information is necessary to determine a dispute

Electronic Funds Transfer (EFT) Cases

An example of the use of third party information is in EFT cases, where withdrawals or purchases using internet or phone banking, or a debit or credit card are disputed by the cardholder and/or account owner. Although the conduct may be that of a third party the decision is whether liability to pay or bear the loss should be allocated to the financial services provider or to the disputant.

Often the determination of liability requires an investigation into whether it is more likely than not that the disputant made the

transactions, or whether some other person did so, particularly where the device used (such as an ATM card) is not lost or stolen.

Questions may need to be asked whether anyone else could have accessed the account. From the information received about people who may have used the card, an assessment is made as to whether it is likely that the disputant voluntarily disclosed the personal identification number (PIN) or that it became known to that person by some other means. BFSO does not use the information to determine criminal or civil liability on the part of any person who may have used the device.

Other unauthorised withdrawals or conduct

If a financial services provider has acted on the signature or authority of a third party not authorised to transact on behalf of a disputant, the financial services provider may be liable to the disputant for any loss. Family and business relationships are often important in the context of such a dispute.

For example, claims of forgery, or withdrawal of funds contrary to a bank authority are sometimes claimed and often the claim concerns the actions of a family member, employee or business colleague. Sometimes an allegation is initially unsupported by information, although it may be confirmed by investigation that the relevant signature was forged or the withdrawal of funds unauthorised.

In many cases, a claim that an unlawful activity has occurred is not the subject of any criminal charge or conviction and it is not the role of the BFSO, nor would it be fair, to make any determination that a particular third party has engaged in unlawful activity. Where third party conduct is relevant but identification of that third party might be prejudicial to them, the BFSO will not identify that third party. Nevertheless, the fact that unlawful conduct of a third party has probably occurred will often be relevant to the rights and obligations of the parties to the dispute before the BFSO.

BFSO relies on Information Sheet 7 issued to by Privacy Commissioner, that:

"Relevant persons or authorities to which an organisation may report unlawful activity include but are not limited to ...

- *self-regulatory authorities such as the Australian Stock Exchange, the Telecommunications Industry Ombudsman and the Banking Industry Ombudsman."*

However, in the absence of such a provision in the relevant legislation/ principles, financial services providers can be reluctant to

provide such information which may indicate actions contrary to authorities or instructions.

Cases where third party information is not essential, but is desirable in order to resolve a dispute

Not all disputes brought to BFSO are determined by way of Finding or Recommendation. It is common for disputes to be resolved by negotiated settlement between the parties, having regard to available information.

Sometimes, information about third parties can be taken into account, although the information has no bearing on the legal rights and obligations of the parties. For example, the particular circumstances of family members (such as their health) may explain why certain actions were taken or why decisions were made.

In these cases, information provided could not be said to have been necessary to determine the legal claim. Both the disputants and the bank, however, may consider the information relevant to consideration of how the account should be handled in future, and the information may be instrumental in resolving the dispute.

For example, in cases where the dispute is about the granting of a loan that may have been beyond the disputant's capacity to repay, the negotiated resolution of the dispute may include a reduction in the loan amount and a repayment plan. Information about family members, including any medical conditions and resulting responsibilities for the disputant, may be relevant to determining an appropriate repayment plan.

Collection, Use and Disclosure: Sensitive information

When a disputant sends sensitive information about him or herself and that information is considered to be potentially relevant to the determination of the dispute, the BFSO seeks confirmation from the disputant that the information is intended to be provided to the financial services provider before taking further action. This is done to minimise the risk of a later claim that the information was disclosed in breach of the NPPs.

It is, however, time-consuming. Although disputants invariably consent to the disclosure, the process delays what is otherwise a quick

turn-around time between receiving a dispute and referring it to the financial services provider for a response.

Where legal action has been threatened against the disputant, the delay in processing this consent may result in court action being commenced by the financial services provider, because it is unaware that a dispute has been lodged with the BFSO. The BFSO cannot consider a dispute if legal proceedings have been commenced before the financial services provider is notified of the dispute.

The BFSO treats all sensitive information with care. While we aim to limit the amount of sensitive information that is collected to that which is strictly necessary in order to deal with the matters in dispute between the disputant and the member, it is not possible or desirable to refuse to deal with sensitive information about third parties where to do so would result in less than full consideration of the issues in dispute.

Cases where sensitive information is relevant include:

- Disputes brought by a family member or friend on behalf of a disputant, where the claim is that the disputant lacks capacity because of a mental illness or degenerative condition and has been unduly influenced by a third party in making withdrawals or otherwise dealing with their property;
- Disputes about whether a loan or guarantee was unconscionable because it may have involved the exploitation of a disability on the part of the disputant;
- Disputes where the medical condition of a family member, is relevant to the degree of stress and inconvenience suffered as a result of an error or omission of the financial services provider, particularly where the disputant is the primary carer of that family member.

Summary

The work of the BFSO necessarily involves the collection and use of third party and sensitive information. Such information will often be relevant to the resolution of disputes between financial services and their customers.

The National Privacy Principles have had considerable impact on the processes of the BFSO to the detriment, we submit, of disputants who have a legitimate interest in the timely and effective resolution of disputes with financial services providers.

Energy and Water Ombudsman (Victoria)

Description of the scheme

The role of the Energy and Water Ombudsman (Victoria) (EWOV) is to provide an accessible, independent complaint resolution service to domestic and small business customers of electricity, gas and water providers in Victoria. These providers are a mix of private and public sector providers and are known as members of EWOV.

For electricity members, membership of the EWOV Scheme is by virtue of the dispute resolution clause of each distribution, retail and transmission licence, issued under the *Electricity Industry Act 2000* (Vic).

For gas members, membership is by virtue of the dispute resolution clause of each gas retail and distribution licence, issued under *the Gas Industry Act 2001* (Vic).

For water members, membership is by virtue of the dispute resolution clause of metropolitan water retail licences, and under a legislative requirement of the *Essential Services Legislation (Dispute Resolution) Act 2000* (Vic) for Melbourne Water Corporation, Regional Urban Water Authorities, Rural Water Authorities and Rural Urban Water Authorities.

EWOV's jurisdiction is set out in EWOV's Charter. The subject matter of Enquiries and Complaints includes:

- the provision and supply of electricity, gas and water services;
- bills;
- credit and payment services;
- disconnections and restrictions;
- refundable advances (security deposits);
- land and property issues relating to these services.

The Ombudsman accepts complaints from people in relation to member provider services. A complaint which falls within the jurisdiction of the Ombudsman is raised with the relevant member provider to give it an opportunity to resolve the complaint. If the member provider and the customer do not resolve the complaint, the Ombudsman may investigate and reach a determination (Binding Decision) as to how the complaint should be resolved. The Ombudsman can make a Binding

Decision to the value of \$20,000 or, if all parties agree, up to \$50,000. Binding Decisions are binding on the EWOV member.

EWOV is overseen by a Board of Directors, comprising four industry representatives, four consumer representatives and an independent Chairperson.

Case outcomes and decision making

EWOV receives most matters as Enquiries. Most Enquiries are referred back to the EWOV member so as to provide an opportunity for the matter to be directly resolved.

Of the Complaints received by EWOV, the vast majority are conciliated.

EWOV's case outcomes in 2003/2004 are summarised below:

In 2003/2004, EWOV received 10,658 Enquiries. Of these:

- 49% (5,210 customers) were referred to a higher level representative at the provider, allowing the EWOV member a second opportunity to directly resolve the customer's issue;
- 38% (4,042 customers) were referred back to the EWOV member, as the customer had not given the member an opportunity to resolve their issue;
- 7% (753 customers) involved providing the customer with general information, for example, about relevant codes or guidelines;
- 6% (653 customers) involved referring the customer to another organisation as the customer's Enquiry was outside of EWOV's role.

In 2003/2004, EWOV closed 3,123 Complaints. Of these:

- 96% (3,000) were conciliated;
- 2% (67) were upgraded to another case level
- 1% (44) were closed on the basis that further investigation was not warranted
- less than 1% (8) were withdrawn by the customer
- less than 1% (3) were found to be out of jurisdiction
- there was one Binding Decision made by the Ombudsman.

Collection and use of personal information: general processes and impact of NPPs

Introduction

The vast majority of customers contact EWOV by telephone (94% in 2003/2004). There is no requirement to lodge a complaint with EWOV in writing. As such, compared to other ADR schemes that require all complaints to be made in writing, it is somewhat easier for EWOV to decide which information it should be collecting from complainants.

Information is collected, used and disclosed by EWOV in accordance with EWOV's Privacy Policy, which complies with the National Privacy Principles. A copy of EWOV's Privacy Policy is on EWOV's website (www.ewov.com.au). The correspondence that EWOV sends to customers refers to EWOV's Privacy Policy.

EWOV Ltd is subject to the *Privacy Act 1988* (Cth). Some EWOV members (electricity and gas members and the metropolitan water retailers) are also subject to the *Privacy Act 1988* (Cth). Other EWOV members (Melbourne Water, Regional Urban Water Authorities, Rural Water Authorities and Rural Urban Water Authorities) are subject to the *Information Privacy Act 2000* (Vic).

Statistical information: Sensitive and third party information

Since the introduction of the NPPs, EWOV has noted cases involving sensitive or third party information, as summarised below.

Period from 21/12/2001 to 30/11/2004: all cases (Enquiries and Complaints)

- 39,904 cases (Enquiries and Complaints) were received in total
- 457 cases, or 1.1%, were noted as involving third party information
- 661 cases, or 1.7%, were noted as involving sensitive information
- 46 cases were noted as involving both third party and sensitive information
- In total, 2.8% of all cases were noted as involving third party and/or sensitive information.

The proportions are slightly higher for Complaints received by EWOV for investigation.

Period from 1/07/2003 to 30/06/2004: Complaints received for investigation

- 3,109 Complaints were received for investigation
- 78 Complaints, or 2.5%, were noted as involving third party information
- 98 Complaints, or 3.2% were noted as involving sensitive information
- 9 Complaints were noted as involving both third party and sensitive information
- In total, 5.7% of Complaints received for investigation were noted as involving third party and/or sensitive information.

Collection, Use and Disclosure: Third party information

Information about a third party may be provided by the complainant or by the EWOV member where they believe the third party:

- caused or contributed to the matters in dispute;
- has been affected by the matters in dispute; or
- can provide information.

Where information about a third party is provided, EWOV follows the process that is set out in its Privacy Policy, as follows:

- The Conciliator handling the Complaint reviews the information received and determines whether the information about the third party is personal information;
- If the information about the third party is personal information, the Conciliator will assess it to determine whether it is necessary to understand or resolve the Complaint;
- If the Conciliator determines that the Complaint can be handled without the information, it will be deleted from the Complaint;
- If the Conciliator considers that the information can be de-identified, then the Conciliator will take steps to remove all information that identifies who the third party is, before using the information;

- If the Conciliator considers that the third party information is necessary in the resolution of the Complaint, the Conciliator may ask the complainant or EWOV member to advise the other person that the information has been provided and why. If possible, the third party's consent is requested and it will be suggested that the third party provide the information him or herself; or
- If the Conciliator determines that it is not reasonable for the complainant or EWOV member to advise the other person that the information has been provided and why, no steps will be taken. Such a determination may be reached in cases where the third party is alleged to have acted unlawfully, where it is apparent that there is conflict between the complainant and the third party or where disclosure of the complaint to the third party would exacerbate the complaint or cause a potential threat to the safety of an individual.

The above process can be time-consuming, particularly where a Complaint is complex and a lot of material has been provided.

By way of illustration, third party information may be provided to EWOV by complainants and / or EWOV members in the following types of cases:

- electricity, gas and water billing cases involving joint accounts;
- electricity, gas and water billing cases where the complainant states they were not residing in the property during the disputed billing period;
- electricity, gas and water cases involving the transposition of account numbers, meter numbers and site addresses;
- electricity, gas and water cases where the complainant has received bills relating to the previous resident;
- electricity and gas cases involving marketing activity (door-to-door sales or phone sales) to persons not named on the account;
- electricity and gas cases involving errors that may result in the wrong property being switched to a different electricity or gas retailer;
- water billing cases where several customers share the one meter;
- water cases where a customer's property is supplied via another customer's water service pipe.

Collection, Use and Disclosure: Sensitive information

Most of the sensitive information received by EWOV relates to an individual's health.

EWOV's Privacy Policy provides that:

- Where a complainant provides sensitive information about him or herself to EWOV, consent to the collection and use of such information for dispute resolution purposes may be assumed.
- Where a complainant or an EWOV member provides sensitive information about another person, EWOV will ask the complainant or EWOV member to seek consent of the third party, if to do so would not compromise the health, safety or privacy of the complainant or another person.
- Where a complainant advises EWOV that a medical practitioner, counsellor or similar can provide supporting information, EWOV will ask the complainant to seek and provide the information in writing.

By way of illustration, sensitive information may be provided to EWOV by complainants, EWOV members or third parties (such as financial counsellors, acting as the customer's authorised representative) in the following types of cases:

- electricity, gas or water cases involving account arrears and issues such as physical or mental illness, or drug, alcohol or gambling issues;
- electricity or gas disconnection cases or water restriction cases involving customers who are experiencing financial hardship;
- electricity or gas cases where it is claimed the customer's account was switched to another retailer without explicit informed consent and that the customer was incapable of providing such consent.

Summary

The National Privacy Principles (NPPs) have not impacted upon EWOV's operations to the same extent as they have evidently impacted upon some other ADR schemes' operations (BFSO, FICS, etc). This is because EWOV receives most matters by telephone and because of the nature of the complaints received by those other ADR schemes.

However, EWOV supports the amendments to the NPPs that are recommended in this joint submission.

EWOV supports these amendments as they will provide greater clarity and certainty for ADR schemes in relation to their privacy law obligations.

Financial Industry Complaints Service

Description of the scheme

The Financial Industry Complaints Service (FICS) is an independent dispute resolution service which considers and seeks to resolve disputes between consumers and members of the financial services industry, including life insurance, managed investments, some friendly societies, financial advice, stock broking, investment advice and sales of financial or investment products. It is an alternative to litigation, and free to consumers. Its members include life insurers, funds managers, friendly societies, stockbrokers, financial planners, pooled superannuation trusts, timeshare operators and other Australian financial services providers.

FICS is approved by the Australian Securities and Investments Commission (ASIC) as an external dispute resolution scheme for financial services licensees under Part 7 of the *Corporations Act 2001* (Cth). Membership of an approved scheme is a licence requirement for financial services providers dealing with retail clients.

FICS operates under its Rules and is overseen by a Board of Directors which has three industry and three consumer representatives, and an independent Chair.

FICS receives, considers and seeks to resolve disputes between consumers and small business and financial services providers. Disputes may involve claims of:

- breach of contract, including the contractual duty to provide services with care and skill;
- inappropriate advice;
- non-disclosure or misrepresentation of product details, risk, fees/charges or commissions;
- poor communication or miscommunication;
- poor service;
- denial of claim under a life insurance policy; and
- breach of an obligation of confidentiality; and
- disputes regarding policy terms and conditions.

In addition to the resolution of disputes received, FICS has the power to identify and raise systemic issues or issues of serious misconduct; and

to report issues of concern to the government regulator (ASIC) or the relevant professional or industry disciplinary body.

In cases where the dispute is not resolved by agreement between the parties, the FICS Panel or Adjudicator can make a Determination of up to its jurisdictional limit³ to compensate a complainant for any loss caused directly by a member's act or omission, or to direct such other redress as may be appropriate. A determination is binding on the member.

FICS publishes its procedures, its Panel and Adjudicator decisions and its Rules. These along with other information about the service are available on FICS's website, at www.fics.asn.au.

The aim of FICS is to provide an independent and prompt resolution of complaints having regard to:

- law;
- applicable industry codes of practice;
- good industry practice; and
- fairness in all the circumstances.

FICS receives telephone enquiries and written complaints. If a complaint has not been raised with the relevant member of the Service, it is first referred to that member. Unresolved complaints are investigated and may then be resolved by facilitated negotiation or a written decision.

Decision making

If a dispute is not otherwise resolved by agreement between the parties, a written decision will be made. Decisions are made either by a Panel of three members (complaints involving more than \$30,000) or an Adjudicator (complaints involving \$30,000 or less). The Panel is composed of an independent and legally qualified Chair, an industry representative appointed by the relevant industry association, and a consumer representative.

³ The jurisdictional limits are at present \$250,000 in complaints involving lump sum life insurance products of advice; \$6,000 per month in complaints involving income stream life insurance products of advice (or more where the total payable under the policy will not exceed \$250,000); and \$100,000 in disputes involving financial services other than life insurance. These limits are currently under review as part of a review of the FICS Rules more generally.

Of complaints resolved in the year 2003:

- 7.8% were either not referred to the member (because the complainant withdrew or did not authorise FICS to investigate), or were subsequently withdrawn by the complainant;
- 12.1% fell outside FICS's jurisdiction to deal with complaints;
- 61.6% were resolved by negotiated settlement or after a conciliation conference;
- 18.5% were resolved by formal decision of the Panel or Adjudicator.

Collection and use of personal information: general processes and impact of NPPs

Introduction

Consumers lodge complaints about their financial services provider to FICS in writing, by mail. Receipt of the dispute and referral to the financial services provider involves both the collection from and disclosure of information to the financial services provider. While sending the complaint to FICS implies consent to the provision of information to and collection of information from the financial services provider, express written authority is sought from the complainant for the collection and disclosure; this is set out in the "Summary of Complaint and Authority to Proceed" form which complainants are required to complete and sign.

To a large degree, FICS does not choose the information that it collects. In addition to providing details about the financial product or service and the actions of the financial services provider, disputants often provide:

- Sensitive information about themselves;
- Personal information about third parties; and (infrequently)
- Sensitive information about third parties.

FICS has no control over the information provided by complainants. In the material sent to potential complainants with the "Summary of Complaint and Authority to Proceed" form, the complainant's attention is drawn to FICS's privacy policy and they are requested to forward third party information only if it is relevant, and to inform the third party of this.

The personal, sensitive and third party information may be clearly irrelevant, possibly relevant or clearly relevant to the resolution of the complaint. Whether or not the information is ultimately relevant to the complaint, it is necessary for FICS to collect, use and disclose information that is covered by the NPPs.

Under its Rules, FICS must afford procedural fairness to the parties to a complaint, which involves collecting using and disclosing information (including third party information) provided by either a complainant or a member to other parties to the dispute. It may also provide information to regulatory authorities or professional or industry associations in appropriate cases. If third party information is identified and either it or the identity of the third party is clearly irrelevant, our procedures involve blacking out or deleting the information or (as appropriate) blacking out or deleting the identifying details.

Collection, Use and Disclosure: Third party information

Complainants often send information about persons who are not themselves parties to the dispute ("third parties"). They may do so because they consider the third party:

- caused or contributed to the matters in dispute;
- has been affected by the matters in dispute;
- provides a basis for comparison from which to highlight the complainant's own situation; or
- can provide information relevant to the complaint.

Similarly a financial services provider may provide information about third parties who are not in dispute, because that information is relevant to the dispute, or because the third party's accounts or dealings with the financial services provider are relevant to the disputant's. This is almost always the case with joint accounts where only one account holder lodges a dispute – although in some cases, the financial services

provider has refused to provide relevant joint account information because of NPP concerns.

When information about third parties is provided, whether unsolicited or at the request of FICS, FICS is required, under NPP 1.3 to take reasonable steps to inform the individual of the collection and other matters set out.

Taking steps to inform the third party of the fact of collection, and other required matters may be difficult for a number of reasons:

- FICS is required to maintain the confidentiality of the disputant;
- to inform the third party may lead, in some cases, to adverse consequences inhibit the willingness of the disputant to continue with the dispute;
- FICS may not have contact details for the third party.

As indicated above, we ask the complainant to inform the third party that information has been provided and FICS has prepared a brochure to forward to the third party. This may, in some cases, place the disputant in a difficult position, and FICS does not police compliance with this request. FICS relies on Information Sheet 18, which provides that in some cases, the reasonable course is to do nothing to inform the third party.

In some cases, the financial services provider will refuse to provide relevant third party information because of privacy concerns. FICS acknowledges that financial services providers have obligations to third parties under the common law and the NPPs, and there may be some circumstances where providing information to our office, without obtaining a third party's consent, would involve a breach of the NPPs because there is no exemption in the Principles for disclosure to a dispute resolution scheme.

Where the information is not relevant to the complaint but is contained in documents which are otherwise relevant, FICS encourages members to provide the documents with the sections containing irrelevant third party information deleted. Where the information in question is relevant but the identity of the third party is not, FICS encourages its members to provide the information with identifying details deleted.

Examples of where third party information is necessary to determine a dispute

Income stream life insurance claims disputes involving income derived from a business

An example of the use of third party information is in claims disputes relating to an income protection policy, where the benefit payable is calculated by reference to income derived by the complainant before and after the claim, and the amount of that income is in dispute. In cases where the complainant's income is derived from a business run in conjunction with others, ascertaining the complainant's income may require consideration of the business's financial affairs, including the affairs of its other participants.

Disputes involving allegations regarding third party conduct

Frequently, a complaint against a member of FICS which is an investment adviser, life insurer or securities dealer will involve allegations against a third party who dealt with the complainant in the third party's capacity as an agent or authorised representative of the member. Such authorised representatives or agents are not directly parties to the complaint as they are not members of FICS, and they may have also severed their relationship with the member since the events to which the complaint relates.

Less frequently, a complaint may involve allegations regarding the conduct of third parties not connected to the member, for example when a complainant alleges that a member acted on instructions from some other person who had no authority from the complainant (for example, a former spouse).

Often the determination of liability requires an investigation into the conduct of the third party.

Collection, Use and Disclosure: Sensitive information

FICS commonly receives sensitive information in complaints where the state of the complainant's health – or the reason for the death of a person – is relevant to a claim for income protection, lump sum disablement, recovery or death benefits and the complaint relates to a dispute over that claim.

In some cases, complainants (or their representatives) may also provide sensitive information relevant to the stress and inconvenience suffered and which they attribute to the conduct of the financial services provider.

FICS treats all sensitive information with care. However, it is not possible or desirable to refuse to deal with sensitive information where to do so would result in less than full consideration of the issues in dispute.

Summary

The work of FICS necessarily involves the collection and use of third party and sensitive information. Such information will often be relevant to the resolution of disputes between financial services and their customers.

The National Privacy Principles have had considerable impact on the processes of FICS to the detriment, we submit, of disputants who have a legitimate interest in the timely and effective resolution of disputes with financial services providers.

Insurance Ombudsman Service Limited

Description of the Service

The Insurance Ombudsman Service Limited (IOS) is an incorporated entity which acts as the administrative arm of the Insurance Ombudsman Service (Service). The Service is an independent dispute resolution service which considers and seeks to resolve disputes between consumers and members of IOS. IOS was previously known as Insurance Enquiries and Complaints Limited (IEC) and its members are Australian Prudential Regulation Authority (APRA) approved general insurance companies, re-insurers underwriting agents and related entities of member companies.

The Service is approved by the Australian Securities and Investments Commission (ASIC) as an external dispute resolution scheme for financial services licensees under Part 7 of the *Corporations Act 2001* (Cth). Membership of an approved scheme is a licence requirement for financial services providers dealing with retail clients.

The Service operates under its Terms of Reference and is overseen by a Board of Directors which has three industry, three consumer representatives, and an independent Chairman.

The Service operates as an alternative to courts but its activities and functions are similar in many respects to courts or tribunals. IOS is an incorporated entity (and therefore an organisation "under the *Privacy Act 1988*"), it does not act as a business, it does not make any profit from its activities and the service is cost free to consumers.

The IOS responds to general enquiries about insurance and considers and seeks to resolve disputes between retail consumers or small businesses (limited by definition) and financial services providers. The Service has jurisdiction to deal with personal lines domestic general insurance products such as motor, home building and contents, personal accident, consumer credit, travel, residential strata title, medical indemnity insurance, personal insurance and small business (limited by definition).

The Service receives telephone enquiries and complaints verbally and in writing. If a dispute has not been raised with the relevant member of the Service, it is first referred to that member so the member may examine the issues and deal with the dispute under its Internal Dispute

Resolution (IDR) processes. Unresolved disputes are investigated by the Service and may then be resolved by facilitated negotiation or a written decision.

The Service can make binding determinations on members up to \$150,000 and make recommendations up to \$290,000 but consumers are not bound by the determinations being free to seek legal or other recourse.

The aim of the Service is to provide an independent and prompt resolution of disputes having regard to:

- law;
- applicable industry codes of practice;
- good insurance practice; and
- what is fair and reasonable in all the circumstances.

Disputes may involve issues relating to:

- policy terms and conditions;
- indemnity for cover;
- breach of contract, including the contractual duty to provide services with care and skill;
- non-disclosure or misrepresentation;
- fraud;
- quantum;
- inappropriate advice;
- poor communication or miscommunication;
- poor service.

The Service publishes its Terms of Reference, Determinations, Annual Reports, Updates, Briefs, Practice Notes and other publications.⁴

The IOS also has the power to identify and resolve systemic issues; issues apparent from disputes that will have a material effect on a class of individuals or small businesses beyond the parties to the dispute.

⁴ For a detailed description of IOS and its operations, see www.insuranceombudsman.com.au

In addition to the resolution of disputes the IOS administers the General Insurance Code of Practice and the General Insurance Information Privacy Code.

Decision making

If a dispute is not otherwise resolved by agreement between the parties or a facilitated conciliation by IOS Case Managers a written decision is made by independent decision-makers namely the Panel, Referee or Adjudicator. Decisions are made either by a Panel of three members (disputes involving sums more than \$5,000), a Referee (where fraud is alleged) or an Adjudicator (disputes involving sums not exceeding \$5,000). The Panel comprises an independent and legally qualified Chair, an insurance industry representative, and a consumer representative.

The Service responded to 67,545 enquiries and complaints and resolved 1810 disputes in the year 2003/2004. Of the 1810 disputes

- 30% were found in favour of the consumer
- 14 % were settled
- 49% were found in favour of the member
- 6% were unsuitable for resolution
- 1% were withdrawn

Exchange of Information

The Service's Terms of Reference require that both parties to the dispute exchange all information relied upon in support of their respective cases with limited qualifications. In the event either party chooses or refuses to exchange certain information with the other party then the Service cannot rely upon that information in determining the dispute.

Collection and use of personal information: general processes and impact of NPPs

Introduction

Applicants lodge complaints about their financial services provider with the Service either verbally or in writing, but must lodge disputes in writing. Receipt of complaints and disputes and referral to the financial services provider involves both the collection from and disclosure of information to the financial services provider. Although

the sending of the dispute to the Service implies consent to the provision of information to and collection of information from the financial services provider, express written authority is sought from the applicant for the collection and disclosure.

To a large degree, the Service does not choose the information that it collects as under the Terms of Reference parties to the dispute are required to provide and exchange all information at hand. In addition to providing details about the financial product or service and the actions of the financial services provider, applicants often provide:

- Sensitive information about themselves;
- Personal information about third parties; and sometimes
- Sensitive information about third parties.

While IOS has procedures to identify, record and deal with such information, IOS has no control over the information provided by the parties and an assessment has to be made, at an early stage, about the relevance or likely relevance of such information. However in material sent to the parties IOS draws attention to our privacy policy and they are requested to forward third party information only if it is relevant, and to inform the third party of this.

The personal, sensitive and third party information may be clearly irrelevant, possibly irrelevant or clearly relevant to the resolution of the dispute. In the latter categories, it is necessary for the IOS to collect, use and disclose information that is covered by the NPPs.

If the sensitive or third party information is clearly irrelevant, our procedures involve blacking out or deleting the information or returning irrelevant documentation to the applicant so that we do not continue to hold it.

To ensure compliance with the legislation IOS reviews all information received and determines whether the information about the third party is personal information; determine its relevance to the resolution of the dispute; de-identify irrelevant information; where information is relevant ensure the appropriate consents have been provided by the third party.

The above process can be time-consuming, particularly where a Dispute is complex and a lot of material has been provided.

The return of material to an applicant may be disconcerting to them. The applicant's perception of the relevance of the information may be

quite different to that of the IOS. There have been cases where applicants have formed an adverse view about the willingness of the IOS to consider a dispute because of the return of sensitive or third party information that the applicant believes is relevant.

In addition, concern about compliance with the NPPs, including ensuring that only relevant information is held, may lead to the premature deletion or return of information the relevance of which only becomes apparent at a later stage in the investigation.

Statistical information: Sensitive and third party information

A high proportion of cases received by the IOS involve the provision to it of sensitive and third party information.

In all cases where fraud is alleged either party to the dispute may need to rely on third party and/or sensitive information and over time this has represented up to 15 % of disputes referred to the Service.

In disputes involving personal accident, consumer credit and travel sensitive information and/or third party information is often relied on and this represents 23 % of disputes referred to the Service.

In all other classes of business sensitive and third party information may also be relevant to the fair resolution of disputes in many instances.

Collection, Use and Disclosure: Third party information

Applicants often send information about persons who are not themselves parties to the dispute. They may do so because they consider the individual:

- caused or contributed to the matters in dispute;
- has been affected by the matters in dispute; or
- can provide information relevant to the dispute; or
- provides a basis for comparison from which to highlight the applicant's own situation.

Similarly, a financial services provider may provide information about third parties who are not in dispute, because that information is relevant to the dispute or dealings between the financial services provider and third parties are relevant to the applicant's dispute. This

is almost always the case with joint policyholders or previously joint policyholders, where only one policyholder lodges a dispute – although in some cases, the financial services provider has refused to provide relevant joint account information because of NPP concerns.

When information about third parties is provided, whether unsolicited or at the request of the IOS, the IOS is required, under NPP 1.3 to take reasonable steps to inform the individual of the collection and other matters set out.

Taking steps to inform the third party of the fact of collection, and other required matters may be difficult for a number of reasons:

- the IOS is required to maintain the confidentiality of the applicant;
- to inform the third party may lead, in some cases, to family breakdown or violence and seriously inhibit the willingness of the applicant to continue with the dispute;
- the IOS is unlikely to have contact details for the third party.

As indicated above we ask the applicant to inform the third party that information has been provided and the IOS has prepared an information sheet to assist the applicant. This may, in some cases, place the applicant in a difficult position as the third party may not consent to the release of relevant information. In other cases the IOS relies on Information Sheet 18, which provides that in some cases, the reasonable course is to do nothing to inform the third party.

In some cases, the financial services provider will refuse to provide relevant third party information because of privacy concerns. The IOS acknowledges that financial services providers have obligations to third parties under the common law and the NPPs, and there may be some circumstances where providing information to our office, without obtaining a third party's consent, would involve a breach of the NPPs because there is no exemption in the Principles for disclosure to a dispute resolution scheme. This has impacted on the Service resolving disputes fairly, efficiently and effectively.

The Privacy Principles and Guidelines cause tensions with the Service's Terms of Reference which requires that there is a full exchange of information between the parties, procedural fairness and compliance with ASIC Policy Statement 139. This in turn may in some instances result in the Service making decisions that are not based on all the relevant available information which may result in an inequitable outcome to one or both parties.

Where the information is not relevant to the complaint but is contained in documents which are otherwise relevant, IOS encourages members to provide the documents with the sections containing irrelevant third party information deleted. Where the information in question is relevant but the identity of the third party is not, the Service encourages its members to provide the information with identifying details deleted.

Examples of where third party information is necessary to determine a dispute

Where fraudulent conduct is alleged

Information from third parties is particularly relevant in resolving disputes where fraud has been alleged or where expert opinion and witness statements are relied upon. In all cases where fraud has been alleged, investigators are appointed and numerous witness' statements are obtained and relied upon by insurance companies. Conversely applicants rely upon statements provided by friends and family to verify their whereabouts and in support of their version of events.

In many cases members deny liability for a claim on the basis that an unlawful activity has taken place by a member of the family or friend but where there is no criminal charge or conviction. It is not the role of the IOS, nor would it be fair, to make any determination that a particular third party has engaged in unlawful activity however the issue will often be relevant to the rights and obligations of the parties to the dispute before the IOS. Where third party conduct is relevant but identification of that third party might be prejudicial to them, the IOS will not identify that third party.

Disputes involving allegations regarding third party conduct

Frequently, a dispute against a member of IOS will involve allegations against a third party who dealt with the applicant as an agent or authorised representative of the member. Such authorised representatives or agents are not directly parties to the dispute as they are not members of IOS, and they may have also severed their relationship with the member since the events to which the dispute relates.

Allegations of forgery are sometimes raised and often the claim concerns the actions of an agent of the member in the completion of the application for insurance. Sometimes an allegation is initially unsupported by information, although it may be confirmed by investigation that the relevant signature was forged.

A dispute may also involve allegations regarding the conduct of third parties not connected to the member, for example when an applicant alleges that a member acted on instructions from some other person who had no authority from the applicant (for example, a former spouse). In those cases the determination of liability requires an investigation into the conduct of the third party.

IOS relies on Information Sheet 7 issued by Privacy Commissioner, that:

"Relevant persons or authorities to which an organisation may report unlawful activity include but are not limited to ..."

Disputes involving medico-legal issues

In disputes involving personal accident policies consumer credit policies and travel policies, both parties to the dispute may rely on several medico-legal opinions. Assessors' reports are also relied upon in most disputes and frequently parties to the dispute rely upon other types of experts. In this regard the Service relies upon information provided by third parties in almost every single dispute and most of this information would contain personal information and in some instances sensitive information about individuals.

Collection, Use and Disclosure: Sensitive information

IOS commonly receives sensitive information in disputes where the state of the applicant's health – or the reason for the death of a person – is relevant to a claim for income protection, lump sum disablement, medical benefits, repatriation expenses, recovery or death benefits.

In some cases, applicants (or their representatives) may also provide sensitive information relevant to the stress and inconvenience suffered and which they attribute to the conduct of the financial services provider.

The IOS seeks confirmation from the applicant that the information is intended to be provided to the financial services provider before taking further action. This is done to minimise the risk of a later claim that the information was disclosed in breach of the NPPs.

It is, however, time-consuming. Although applicants invariably consent to the disclosure, the process delays what is otherwise a quick turn-around time between receiving a dispute and referring it to the financial services provider for a response.

The IOS treats all sensitive information with care and we aim to limit the amount of sensitive information that is collected to that which is strictly necessary in order to deal with the matters in dispute between the parties. However, it is not possible or desirable to refuse to deal with sensitive information about third parties where to do so would result in less than full consideration of the issues in dispute.

Summary

The work of the IOS necessarily involves the collection and use of third party and sensitive information. Such information will often be relevant to the resolution of disputes between financial service providers and their consumers.

The National Privacy Principles have had considerable impact on the processes of the IOS to the detriment, we submit, of applicants who have a legitimate interest in the timely and effective resolution of disputes with financial services providers.

Telecommunications Industry Ombudsman

Description of the scheme

The Telecommunications Industry Ombudsman is a free and independent alternative dispute resolution scheme for small business and residential consumers in Australia who have a complaint about their telephone or Internet service.

Established in 1993 by the Commonwealth Government, the TIO is independent of industry, the government and consumer organisations. The TIO is authorised to investigate complaints about the provision or supply of telephone or Internet services

The role and powers of the TIO is set out in the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. The TIO has the authority to make Binding Decisions (up to the value of \$10,000) that are legally binding upon the telecommunications company, and Recommendations (up to the value of \$50,000).

The TIO also has the power to exercise its discretion not to investigate a case further if it is of the view that all relevant facts in the matter have been considered.

The TIO cannot take up complaints that are more than 12 months old (except in special circumstances), or if legal proceedings have commenced.

The TIO may only investigate a complaint if:

- The consumer has given the service provider a reasonable opportunity to address the complaint;
- The complaint is made within 12 months of the consumer becoming aware of the circumstances surrounding the complaint (The time limit may be extended by a further 12 months in certain cases);
- Legal proceedings have not commenced;
- The complaint is made in good faith; and
- The complaint is within the TIO's jurisdiction (set out below).

The TIO has jurisdiction to investigate complaints about:

- The standard telephone service;
- Mobile services;
- Internet access;
- Pay-phones;
- Delays in telephone connections;
- Printed and electronic White Pages;
- Fault repair;
- Privacy;
- Land access; and
- Breaches of the Customer Service Guarantee and Industry Codes of Practice.

The TIO cannot investigate complaints concerning:

- The setting of tariffs for carriage services;
- Privately-owned telecommunications equipment, other than the rented handset supplied with a basic phone service and mobile handsets sold as a part of a bundled contract;
- Cabling, except cabling up to the rented handset;
- Business directories (however, the TIO does have an agreement with Yellow Pages that allows us to help resolve some complaints);
- Matters of telecommunications policy and Universal Service Obligation policy;
- The 000 emergency service;
- Anti-competitive behaviour or restrictive business practices; or
- The content of 'information services', eg. 1900 numbers and Internet content.

The TIO is an industry-funded scheme, deriving its income solely from members who are charged fees for complaint resolution services provided by the TIO. Members consist of telecommunications carriers, telephone carriage providers and Internet Service Providers (ISPs). A member is only charged complaint handling fees if the TIO receives a complaint from one of its customers. Therefore, the funding system acts as an incentive for members to keep TIO investigations to a minimum

by developing and maintaining effective complaint handling and customer service procedures.

The TIO is independent of telecommunications companies, consumer groups and government. However, the TIO provides information and assistance to organisations where this will help the industry and consumers to resolve complaints without investigation by the TIO.

The TIO may refer systemic problems, identified through investigations and complaint statistics, to the Australian Communications Authority, Australian Competition and Consumer Commission, the Privacy Commissioner or other appropriate bodies.

Privacy Matters

The TIO facilitates the resolution of complaints related to privacy within the telecommunications industry. TIO staff advise complainants that, while they have the option of having any telecommunications complaints under the Privacy Act dealt with by the TIO, they are equally able to have that portion of their complaint investigated by the Office of the Federal Privacy Commissioner instead.

Decision Making

During the 2003/2004 year, the TIO recorded 59,850 complaints, in addition to 16,054 out of jurisdiction enquiries. Of the 59,850 complaints:

- 89.7% of all complaints received by the TIO were resolved after initial referral to a higher level of complaint at the TIO Member;
- The remaining 10.3% of complaints required formal investigation by TIO staff and necessarily required complainant's to supply personal information;
- 44.7% of complaints were resolved substantially in favour of the complainant, with 18.1% of complaints being resolved substantially in favour of the Member;
- 1271 complaints (or 2.1% of all complaints) related directly to issues concerning privacy.

Collection and use: General purposes

The primary role of the TIO is to investigate complaints by residential and small business customers about their telecommunications services (i.e. fixed telephone lines, mobile phone services and internet services).

The TIO only collects personal information where it is necessary for it to carry out its work. A complainant to the TIO is typically required to provide the following information:

- Their full name and address;
- Contact details, which may include a business contact number or email address;
- Details of the service the complaint is about - eg telephone number or Internet account;
- Name of the telecommunications company the complaint is about; and
- Specific details of the complaint including relevant dates, accounts and payment details.

If the TIO elects to investigate a complaint, it forwards the written or oral information provided by a complainant and collected by the TIO to the telecommunications company concerned (member) so that the member can investigate the complaint and verify the details of the complaint.

In addition, the complainant is provided with a copy of the TIO's complaint letter to the Member (minus the Member's contact details). In this way, a complainant is aware of exactly what personal information has been provided to the Member and what information the TIO has specifically requested from the Member.

In order to provide an investigation service to residential and small business customers, the TIO maintains a database of its members that contains contact information, including names and phone numbers of employees. Information received from members in the course of investigating a complaint may also include personal information about the member's representatives.

The TIO also provides an information service to interested parties. In order to send interested parties information such as its Annual Report and TIO Talks, the TIO maintains a database of persons or organisations that have requested TIO publications.

Finally, from time to time the TIO provides statistical and other information, including personal information where consent has been obtained, to agencies such as the Australian Communications Authority (ACA), the Australian Competition and Consumer Commission (ACCC), the Australian Communications Industry Forum (ACIF) and other relevant industry bodies.

The TIO will only collect personal information where it is necessary for one or more of the above functions.

Collection and use: third party information

The TIO treats all complaints as confidential between the complainant, the TIO member and this office.

In dealing with a complaint, the TIO will forward the complainant's information and their complaint details to the telecommunications company concerned - even if the complaint is lodged over the telephone.

If a complainant wishes to remain anonymous or does not wish to supply specific information to the TIO, they are able to do so; however, the TIO advises these complainants that their complaint will not be able to be registered against the company concerned and that TIO staff will not be in a position to formally investigate the complaint.

Collection, use and disclosure: sensitive information

In some instances, sensitive information may be relevant to the investigation of a complaint - for example, there may be an argument that a health matter impacted on the complainant's ability to enter into a contract. TIO staff are instructed to take care to only collect this type of information if it is relevant to the complaint.

Generally, this type of health information is volunteered by the complainant or their representative. However, if the information is not volunteered yet the TIO believes it could be relevant to their complaint, the TIO may suggest that the complainant provide medical documentation or other information which may help their claim.

The TIO may also collect data on an individual's language in order to establish interpreter requirements or to ascertain if it is reaching targeted sections of the community.

Collection, use and disclosure: legal advice

In some instances, the TIO is required to seek external legal advice when considering an individual's complaint. The TIO will forward personal information relating to the complaint to its external legal advisors.