



## DAILY BULLETIN

Saturday, 1 October 2011

### ***Perspective on existing and pending disclosure requirement:***

***Andrew Galvin, Partner, Corrs Chambers Westgarth and Catherine Uhr, Consumer Advocate & Senior Solicitor – Consumer Protection Unit, Legal Aid Queensland***

Andrew Galvin described the 1 October 2011 disclosure requirements under the *National Consumer Credit Protection (NCCP) Act* and the *NCCP Regulations*, including Key Fact Sheets (KFS), credit guides, quotes, credit proposals and preliminary and final unsuitability assessments. Outlined the aims, the timetables, which entities are required to produce the documents, and summaries of the required content (including the recent changes to the content requirements) and the manner and timing of distribution for each disclosure document. Mentioned various exemptions under which an entity may not have to provide the documents, or may not have to include specific content.

Looking ahead to new disclosure requirements relating to "Key Fact Sheets", he noted that although the KFS requirements will come into effect in 2012, home loan and credit card providers will need to adjust their systems and procedures before the start date to ensure compliance with the NCCP regime from the effective date. (Following discussion from the floor, it was noted that it may not be possible to circulate KFS earlier than the formal start date because some of the mandatory content will be incorrect before that date). Andrew also spoke about the possibility that KFS for credit cards might be required to include some detailed information about credit card reward programs.

Catherine offered an entertaining and insightful discussion on the usefulness of the proposed

graphical disclosure requirements for reverse mortgages and highlighted the importance of disclosure to any co-tenants. From the perspective of "the consumer advocate", she commented the effectiveness of all disclosure requirements under the *NCCP Act* and the public confusion resulting from the complexity of these requirements.

***Panel: National Credit Reform and External Dispute Resolution (EDR) – the interplay between independent bodies, Philip Field, FOS, Raj Venga, COSL***

***Karen Reid, RHG Mortgage Corporation Limited and Bradley Lynch, Suncorp***

Raj and Philip provided the perspectives of their respective EDR schemes on a number of issues, including: the management of complaint referrals (particularly those relating to hardship), the interplay between ASIC guidance, judicial precedent and FOS' own procedure in making determinations in relation to complaints and any plans to publish decisions in the future.

They noted that their organisations frequently liaise with each other and ASIC to ensure consistency between guidance that is provided on matters of policy.

In particular, Philip stated that FOS Circular 5 - which some have taken to be inconsistent with ASIC Regulatory Guide 209 in relation to the "scalability" of income verification processes - was intended to be consistent with RG 209 and should be read as being consistent.

With respect to the management of complaint referrals, they both commented that hardship complaints formed a significant percentage of claims dealt with by each of the EDR schemes. Given the implications of such



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complaints to both the consumer and financial institution, such claims are fast tracked by the EDR schemes and are generally dealt with within a “45 day” benchmark. Raj noted however, that there were some instances where the 45 day benchmark could not be met given the volume of hardship complaints. It would seem that the increasing trend towards use of EDR schemes will result in resolution of hardship complaints within the benchmark being a continuing challenge for EDR schemes.

While the importance of judicial precedent was acknowledged by both Raj and Philip, it was emphasised that general practice does not strictly follow judicial precedent, with emphasis instead being placed on procedural fairness and providing decisions that are easy to read and understand. Raj acknowledged that an EDR scheme is not a Chapter 3 court and by virtue of this, has limitations. In response to suggestions that there could be merit in some form of higher level review - such as an ‘Ombudsman’s Ombudsman’, both commented that while there may be merit in further review, such review is likely to entail additional costs to industry, which may tend to be inconsistent with the ‘accessibility’ spirit of EDR. In this regard, Phillip noted that the majority of complaints are resolved through negotiation and conciliation and said this suggested that there was no need for an avenue for review of determinations.

Both FOS and COSL hope to provide more information about determinations that are made (including, in the case of FOS, further general guidance on how particular types of issues are resolved), in order to assist industry with understanding both FOS’ and COSL’s position on matters affecting the conduct of business.

***Practical consideration for the EFT Codes Reform: James Moore, Partner, HWL Ebsworth, Cameron Ball, Counsel , the Westpac Group, Rhys Bollen, Senior Manager, ASIC***

As a Senior Manager of ASIC directly involved in the development of the ePayments Code (**Code**), Rhys Bollen encouraged industry bodies to subscribe to the Code. He highlighted the three major areas of complexity which imposed significant challenges and delays to the release of the Code: mistaken payments and how they could be dealt with under the Code, tailored requirements for low value facilities, and electronic communication. Rhys also provided a brief summary of new features of the Code and its implementation timetable.

James gave a detailed presentation explaining the unique features of the Code which are different from the Electronic Funds Transfer Code of Conduct (**EFT Code**). These key features include:

- a) the two part structure of the EFT Code has been replaced with a unified structure substantially based on Part A of the EFT Code;
- b) a formal regime for dealing with mistaken payments using internet banking facilities has been included;
- c) some procedural matters, such as the requirement for printed receipts, have been explained in a greater detail;
- d) new provisions governing “low value payments” have been introduced; and
- e) subscribers have been given a eighteen (18) months transition period for adopting the Code.

In the discussion of “what is new”, James highlighted some specific changes introduced by the Code, such as the changes to the disclosure requirements, the scope of liability, the electronic notices, the content of the receipts and the rules governing low value



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facilities. The practical procedures of managing mistaken internet payments have also been clearly outlined.

Cameron offered analysis on some matters that subscribers will need to focus on in moving to the new Code-

- f) as direct debt arrangements will be regulated by the Code but implemented under BECS procedures, with multiple subscribers involved - as such BECS procedures must be made consistent with Code and deal with any conflicts arising from the involvement of the multiple subscribers;
- g) in implementing new electronic communication rules of the Code, it is important to have regard to NCC requirements and other relevant industrial codes; and
- h) any ambiguities about recovery of funds and investigation in relation to "mistaken payments" will need to be clarified.

***Movements in privacy law reform, Olga Ganopolsky, Veda Advantage, Matt Gijselman, Australasian Retail Credit Association and Geoff Bloom, HWL Ebsworth***

Olga opened the session by making the observation that 'privacy is a highly relevant and topical issue from a regulatory, policy and compliance perspective'.

Although it was acknowledged that privacy law reform has been a protracted process, the contemporary relevance of the topic was demonstrated through a panel discussion. Key issues discussed included whether Australia should have a statutory cause of action for serious invasions of privacy and the issue of development of a more comprehensive regime for credit reporting and regulation of credit reporting agencies and credit providers (including the development of

a credit reporting code of conduct by ARCA and industry).

Geoff commented that with the rapid pace that technology is changing and in the wake of serious widespread privacy breaches (eg. Vodafone, Sony, Medvet and Google), the recent release of the Government's issues paper is rather timely. In particular, Olga commented that the proposal to introduce a statutory tort for breach of privacy raises questions as to whether there should be a fault element. (In the absence of such an element, there could be widespread coverage.) The implication of adopting a simple negligence standard of fault could be that the proposed reform is far reaching, leading to significant compliance costs.

In addition, the proposed reforms create broader credit reporting obligations, and capture a wider range of credit reporting agencies and credit providers. The focus seems to be shifting to more prescriptive obligations, which aims to create a higher standard of privacy for more sensitive information. Once legislation is introduced it is likely to be followed by regulation and codes of conduct, which can also mean a lengthy process. Matt noted that it is expected that the industry developed code of conduct would be released on time. Delegates were encouraged to consider revising current practices and implementing procedures which would minimise the risk of privacy breaches occurring and the impact of the proposed code when released.

***Responsible Managers – what you need to know: Wei-long Chen, Special Counsel, Clayton Utz and Samantha Carroll, Senior Associate, Clayton Utz***

Samantha opened with the analogy that being a responsible manager is akin to being a



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mother, involving supervision, monitoring, reporting and internal and external dispute resolution. This set the tone for the presentation, which focussed on the responsibilities and obligations of a responsible manager and some practical guidance on the role of a responsible manager.

Among a list of obligations that the responsible managers have, both Wei-long and Samantha emphasised the importance of understanding all aspects of the organisation's business—simply knowing that you have a compliance plan is not enough. Responsible managers must know where to find the compliance plan and relevant policies and procedures, and understand what the business does on a day to day basis, who its customers are, what products and services the organisation offers and what legal and compliance requirements the organisation has to comply with.

Wei-long highlighted that compliance is the responsibility of everyone in the organisation and cannot simply be left to responsible managers or compliance managers. However, it is the responsible manager's obligation to drive a compliance culture within the organisation and ensure it has an appropriate compliance plan and framework.

From an outsourcing perspective, in any outsourcing services, there is a need for responsible managers to consider whether there are mechanisms in place to monitor the activities of the service providers and ensure that the service provider conducts business to the agreed standard. It was also suggested that, in the event of breach, responsible manager should consider engaging independent auditors and make any necessary adjustment to processes and procedures.

The session concluded with a brief outline of ASIC's expectations on the responsible managers.

## THANK YOU

We would like to thank you for attending the 21<sup>st</sup> Annual Credit Law Conference and participating in presentations, panel discussions and the gala dinner. We hope you found the conference of value and a great networking opportunity.

We value your feedback and encourage you to contact us if you have any comments or queries which would help make the 2012 conference even better than previous years.

Also, don't forget to drop by [www.lexisnexis.com.au/pd](http://www.lexisnexis.com.au/pd) in the coming months to see photos and video content from this year's event. Plus, be the first to be updated on the 2012 conference information and location details.

**See you in 2012!**



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