



Determination

30 March 2017

- Judgment debt
- Debt purchaser
- Privacy breach
- Validity of judgement
 - Enforcement action

DETERMINATION

Consumer: Mrs C

Financial Services Provider (FSP): FSP

Date: xx March 2017

Summary

1. I find that the claims raised by the consumer have either not been established or are outside our jurisdiction.
2. I also find that the consumer's new claim about the FSP's bankruptcy notice is outside our jurisdiction.
3. This Determination affirms the general position set out in our Review dated xx August 2016 (**the Review**). However, some of the analysis set out in the Review requires further clarification. A copy of the Review is attached.

Background to the complaint

4. The consumer's complaint arises from a debt owed to the FSP, assigned from the consumer's bank.
5. The Review found that:
 - (a) CIO was not the appropriate forum to investigate the consumer's claim that the FSP had breached her privacy,
 - (b) the consumer's claim about whether the default judgment against her was correctly obtained was outside CIO's jurisdiction, and
 - (c) the FSP did not breach any CIO Rules when it attended a court hearing while the consumer's complaint was open.
6. As part of her complaint, the consumer also claimed that the assignment of her debt from the consumer's bank to the FSP was invalid. The consumer therefore requested a copy of the deed of assignment between the consumer's bank and the FSP. The Review did not address this claim.
7. Furthermore, after the complaint had been referred to me for Determination, the FSP issued the consumer with a bankruptcy notice. The consumer claims that taking such enforcement action during an open complaint is a breach of CIO's Rules, and the FSP's conduct has resulted in the cancellation of the consumer's licence agreement with a third party company. This is a new claim not previously raised.

Key issues

8. The key issues to be decided in this Determination are:
 - (a) clarification of the findings outlined in the Review,

- (b) the consumer's outstanding claim about assignment, which was not addressed in the Review, and
- (c) the consumer's new claim about the bankruptcy notice.

Relevant considerations

9. In making a Determination, I am required to have regard to:
- (a) relevant legal requirements or rights provided by law to the consumer in relation to the subject matter of the complaint,
 - (b) applicable codes of practice,
 - (c) good practice in the financial services industry, and
 - (d) fairness in all the circumstances.¹
10. Both the consumer and the FSP have been given the opportunity to provide information in support of their respective positions. I am satisfied that, with the exception of commercially sensitive information,² all information provided has been exchanged between the parties, and that each party is aware of the issues raised in this complaint.

Findings and reasons for decision

11. I have considered all the information provided by the parties, including the consumer's response to the Review, and for the reasons set out in the Review and this Determination I find that the consumer's claims have either not been made out or are outside our jurisdiction.

Claims considered in the Review

12. Broadly speaking, I agree with the Review in that we cannot consider the consumer's claims any further. However, some of the reasoning given in the Review requires clarification.

Privacy claim

13. In contrast to the considerations given in the Review, I consider that CIO is an appropriate forum to investigate the consumer's claim that the FSP had breached her privacy. I have therefore considered this claim below.
14. The consumer says that the FSP's website's security certificate was expired from xx June 2012 until on or around xx May 2013. The consumer claims that the FSP's failure to renew the security certificate is a breach of relevant privacy laws, as it enables any third party to access the FSP's data, including information about the consumer and other customers of the FSP.
15. The consumer also claims that the consumer's bank failed to conduct the necessary due diligences before assigning her debt to the FSP.
16. I do not consider that there is a duty or obligation on an assignor, such as the consumer's bank, to conduct due diligence to the extent that the assignor is assured that the

¹ CIO Rule 12.1 – 9th Edition. All references to CIO Rules in this Determination are references to the 9th Edition Rules.

² CIO Rule 33.2. The FSP has not been provided with a copy of the consumer's licence agreement with the third party company.

assignee has an up-to-date security certificate on its website. For this reason, I will not consider the consumer's bank's alleged conduct in this Determination any further.

17. Turning to the FSP's conduct, as I understand it, an expired security certificate can increase the risk of certain personal information being accessed by unauthorised third parties. For instance, if an individual was to provide credit card information via a website that did not have a security certificate, that information may not be sufficiently encrypted to prevent unauthorised access.
18. The FSP's failure to renew its security certificate may therefore have introduced this risk. I regard this failure to be a breach of relevant privacy laws. This is because the FSP is obliged to take reasonable steps to keep a consumer's personal information secure.³
19. In view of this, I would consider it appropriate for the FSP to:
 - (a) take any necessary steps to remove the risk, and
 - (b) compensate the consumer for any loss arising out of the FSP's conduct.
20. Accessing the FSP's website now shows that the security certificate has been renewed. Accordingly, and consistently with the position described in paragraph 19(a) above, the FSP has accordingly already taken appropriate action to remove the risk.
21. As to the issue of loss, I note that, despite the FSP's conduct, the consumer's personal information was not misused, interfered with or lost,⁴ nor was it accessed, modified, or disclosed in an unauthorised manner during the relevant period.⁵ The FSP's conduct has therefore not resulted in a loss to the consumer that would require her to be compensated.
22. For the above reasons, I find that the FSP has taken the necessary steps to remedy its breach, and we cannot assist the consumer any further with her claim for compensation.⁶

Default judgment claim

23. I do not consider that the analysis in the Review requires further clarification. Therefore, for the reasons set out in the Review, I find that this claim is outside CIO's jurisdiction.

Enforcement action claim

24. In contrast with the findings in the Review, I consider that the FSP has breached CIO's Rules in attending the court hearing on xx May 2016.⁷ I have therefore reviewed this claim again, below.
25. Based on my review of the information in the file:
 - (a) the consumer had filed a notice of motion to set aside the default judgment against her on xx October 2015,
 - (b) the consumer lodged her complaint with CIO on xx May 2016,

³ Under Australian Privacy Principle 11. The Australian Privacy Principles are found under Schedule 1 of the *Privacy Act 1988* (Cth).

⁴ APP 11.1(a).

⁵ APP 11.1(b).

⁶ CIO Rules 9, 10.1(i).

⁷ CIO Rule 17.1.

- (c) the matter was listed for hearing at 9:30am on xx May 2016,
 - (d) the FSP received notification of the complaint at 2:19pm on xx May 2016,
 - (e) both the FSP and the consumer attended the hearing, and
 - (f) the court dismissed the consumer's motion, meaning that the default judgment was not set aside.
26. CIO will generally inform a financial services provider that a complaint against it has been received within two or three days. This means that there may be a short time between the complaint being received and the financial services provider being informed of the complaint.⁸
27. Given the above timeline of events, it does not appear that the FSP was aware of the consumer's complaint when it attended the hearing. I therefore do not consider the FSP's actions to be a conscious breach of our Rules.
28. The FSP's actions do, however, constitute a technical breach of our Rules. If a financial services provider has continued with enforcement action after a complaint has been recorded, we may require the financial services provider to:⁹
- (a) withdraw any legal proceedings commenced,
 - (b) return any repossessed assets,
 - (c) set aside any judgment entered,
 - (d) re-purchase any debt sold, and/or
 - (e) remove any defaults listed.
29. Based on the available information, it does not appear that any of the above consequences transpired as a result of the hearing on 26 May 2016; rather, the consumer's motion was dismissed and the default judgment against her is still enforceable.
30. The consumer is, in fact, in the same position as she was before the hearing took place, and there are no consequences arising out of the FSP's actions that CIO needs the FSP to remedy.
31. For the above reasons, I find that we cannot assist the consumer any further with this claim.¹⁰

Assignment claim

32. As this claim was not addressed in the Review, I have outlined my findings below with respect to this claim.
33. The Review stated, within the context of the consumer's default judgment claim, that we cannot deal with a claim if our findings would overturn or be perceived to overturn a judgment.¹¹

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¹⁰ CIO Rules 9, 10.1(i), 36.1(d).

¹¹ Australian Securities and Investments and Commission (ASIC) Regulatory Guide, [139.181].

34. For the same reasons, we cannot consider the consumer's claim about the assignment of her debt. This is because the court, in refusing to set aside the judgment, has ordered the consumer to pay the debt to the FSP; in other words, the court has decided that the FSP is the rightful owner of the consumer's debt.
35. Consequently, a decision about whether the debt was appropriately assigned from CBA to the FSP might conflict with that judgment. I therefore find that we cannot assist the consumer any further with this claim.¹²
36. For completeness, I note the consumer's request for a copy of the deed of assignment between the consumer's bank and the FSP. In addition to the fact that the court has decided that the FSP is the rightful owner of the consumer's debt, I am unaware of any law, duty or obligation that would entitle the consumer to a copy of the deed. For these reasons, I cannot assist the consumer with her request.

Bankruptcy notice claim

37. On xx December 2010, the consumer entered into an exclusive licensed product rights agreement with ABC Limited, a company organised under the laws of Hong Kong.
38. On xx November 2014, this agreement was amended, so that the consumer instead had an exclusive licensed product rights agreement with XYZ Limited, a company organised under the laws of the United Kingdom.
39. Both agreements provide that the licensor may terminate the agreement by written notice, if the licensee, or a third party, has filed a petition for bankruptcy, or a petition seeking the reorganisation, readjustment or rearrangement of the licensee's business or affairs relating to bankruptcy.¹³
40. On xx September 2016, XYZ Limited sent written notice to the consumer, terminating the licence agreement due to the FSP's bankruptcy notice dated xx September 2016.
41. In considering these events, I remark on the following:
 - (a) according to the amended agreement, the consumer's husband and third party representative in this complaint, is a director of XYZ Limited, and
 - (b) the notice of termination incorrectly refers to the FSP's bankruptcy notice as a "bankruptcy petition".
42. A bankruptcy notice is a formal demand for payment based on a court judgment or order, and gives the debtor 21 days to comply, from the date they are served the notice, to either pay the debt, or make arrangements for settlement of the debt. If the debtor fails to comply, they have committed an act of bankruptcy, entitling the creditor to apply to the court to have the debtor declared bankrupt. This application is known as a creditor's petition.
43. The FSP's bankruptcy notice is therefore not a "bankruptcy petition" as detailed in the notice of termination. However, it may be that this has a certain meaning under the licence agreement.
44. The original licence agreement provides that the agreement is executed and delivered in Australia, and is to be constructed in accordance with the laws of

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the government of Hong Kong.¹⁴ The amended agreement says the same but in respect of the United Kingdom.¹⁵

45. Based on these provisions, it appears that the parties have agreed that the governing law of the licence agreement would either be the laws of Hong Kong, or the laws of the United Kingdom, depending on the agreement being enforced.
46. Under our Rules, I cannot consider a complaint if it relates to a contract or obligation not arising under Australian law.¹⁶
47. The consumer's obligations under the licence agreement arise under two different international laws. This means that I cannot determine whether or not the FSP's conduct resulted in the consumer breaching the licence agreement, as it would require me to interpret the meaning of "bankruptcy petition" or "petition of bankruptcy" using international laws of construction.
48. Consequently, this claim is outside CIO's jurisdiction.

Decision

49. For the reasons set out in the Review and this Determination, I find that the consumer's claims have either not been made out or are outside our jurisdiction.

Ombudsman

¹⁴ Item 2 under Article XIII – Miscellaneous (6 December 2010 agreement).

¹⁵ Item 2 under Article XIII – Miscellaneous (22 November 2014 agreement).

¹⁶ CIO Rule 10.1(g).

DETERMINATION

Consumer: Mrs C

Financial Services Provider (FSP): FSP

Date: xx March 2017

Summary

1. I find that the claims raised by the consumer have either not been established or are outside our jurisdiction.
2. I also find that the consumer's new claim about the FSP's bankruptcy notice is outside our jurisdiction.
3. This Determination affirms the general position set out in our Review dated xx August 2016 (**the Review**). However, some of the analysis set out in the Review requires further clarification. A copy of the Review is attached.

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 - (c) the FSP did not breach any CIO Rules when it attended a court hearing while the consumer's complaint was open.
6. As part of her complaint, the consumer also claimed that the assignment of her debt from the consumer's bank to the FSP was invalid. The consumer therefore requested a copy of the deed of assignment between the consumer's bank and the FSP. The Review did not address this claim.
7. Furthermore, after the complaint had been referred to me for Determination, the FSP issued the consumer with a bankruptcy notice. The consumer claims that taking such enforcement action during an open complaint is a breach of CIO's Rules, and the FSP's conduct has resulted in the cancellation of the consumer's licence agreement with a third party company. This is a new claim not previously raised.

Key issues

8. The key issues to be decided in this Determination are:
 - (a) clarification of the findings outlined in the Review,

- (b) the consumer's outstanding claim about assignment, which was not addressed in the Review, and
- (c) the consumer's new claim about the bankruptcy notice.

Relevant considerations

9. In making a Determination, I am required to have regard to:
- (a) relevant legal requirements or rights provided by law to the consumer in relation to the subject matter of the complaint,
 - (b) applicable codes of practice,
 - (c) good practice in the financial services industry, and
 - (d) fairness in all the circumstances.¹
10. Both the consumer and the FSP have been given the opportunity to provide information in support of their respective positions. I am satisfied that, with the exception of commercially sensitive information,² all information provided has been exchanged between the parties, and that each party is aware of the issues raised in this complaint.

Findings and reasons for decision

11. I have considered all the information provided by the parties, including the consumer's response to the Review, and for the reasons set out in the Review and this Determination I find that the consumer's claims have either not been made out or are outside our jurisdiction.

Claims considered in the Review

12. Broadly speaking, I agree with the Review in that we cannot consider the consumer's claims any further. However, some of the reasoning given in the Review requires clarification.

Privacy claim

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assignee has an up-to-date security certificate on its website. For this reason, I will not consider the consumer's bank's alleged conduct in this Determination any further.

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18. The FSP's failure to renew its security certificate may therefore have introduced this risk. I regard this failure to be a breach of relevant privacy laws. This is because the FSP is obliged to take reasonable steps to keep a consumer's personal information secure.³
19. In view of this, I would consider it appropriate for the FSP to:
 - (a) take any necessary steps to remove the risk, and
 - (b) compensate the consumer for any loss arising out of the FSP's conduct.
20. Accessing the FSP's website now shows that the security certificate has been renewed. Accordingly, and consistently with the position described in paragraph 19(a) above, the FSP has accordingly already taken appropriate action to remove the risk.
21. As to the issue of loss, I note that, despite the FSP's conduct, the consumer's personal information was not misused, interfered with or lost,⁴ nor was it accessed, modified, or disclosed in an unauthorised manner during the relevant period.⁵ The FSP's conduct has therefore not resulted in a loss to the consumer that would require her to be compensated.
22. For the above reasons, I find that the FSP has taken the necessary steps to remedy its breach, and we cannot assist the consumer any further with her claim for compensation.⁶

Default judgment claim

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25. Based on my review of the information in the file:
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26. CIO will generally inform a financial services provider that a complaint against it has been received within two or three days. This means that there may be a short time between the complaint being received and the financial services provider being informed of the complaint.⁸
27. Given the above timeline of events, it does not appear that the FSP was aware of the consumer's complaint when it attended the hearing. I therefore do not consider the FSP's actions to be a conscious breach of our Rules.
28. The FSP's actions do, however, constitute a technical breach of our Rules. If a financial services provider has continued with enforcement action after a complaint has been recorded, we may require the financial services provider to:⁹
- (a) withdraw any legal proceedings commenced,
 - (b) return any repossessed assets,
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29. Based on the available information, it does not appear that any of the above consequences transpired as a result of the hearing on 26 May 2016; rather, the consumer's motion was dismissed and the default judgment against her is still enforceable.
30. The consumer is, in fact, in the same position as she was before the hearing took place, and there are no consequences arising out of the FSP's actions that CIO needs the FSP to remedy.
31. For the above reasons, I find that we cannot assist the consumer any further with this claim.¹⁰

Assignment claim

32. As this claim was not addressed in the Review, I have outlined my findings below with respect to this claim.
33. The Review stated, within the context of the consumer's default judgment claim, that we cannot deal with a claim if our findings would overturn or be perceived to overturn a judgment.¹¹

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¹⁰ CIO Rules 9, 10.1(i), 36.1(d).

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34. For the same reasons, we cannot consider the consumer's claim about the assignment of her debt. This is because the court, in refusing to set aside the judgment, has ordered the consumer to pay the debt to the FSP; in other words, the court has decided that the FSP is the rightful owner of the consumer's debt.
35. Consequently, a decision about whether the debt was appropriately assigned from CBA to the FSP might conflict with that judgment. I therefore find that we cannot assist the consumer any further with this claim.¹²
36. For completeness, I note the consumer's request for a copy of the deed of assignment between the consumer's bank and the FSP. In addition to the fact that the court has decided that the FSP is the rightful owner of the consumer's debt, I am unaware of any law, duty or obligation that would entitle the consumer to a copy of the deed. For these reasons, I cannot assist the consumer with her request.

Bankruptcy notice claim

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39. Both agreements provide that the licensor may terminate the agreement by written notice, if the licensee, or a third party, has filed a petition for bankruptcy, or a petition seeking the reorganisation, readjustment or rearrangement of the licensee's business or affairs relating to bankruptcy.¹³
40. On xx September 2016, XYZ Limited sent written notice to the consumer, terminating the licence agreement due to the FSP's bankruptcy notice dated xx September 2016.
41. In considering these events, I remark on the following:
 - (a) according to the amended agreement, the consumer's husband and third party representative in this complaint, is a director of XYZ Limited, and
 - (b) the notice of termination incorrectly refers to the FSP's bankruptcy notice as a "bankruptcy petition".
42. A bankruptcy notice is a formal demand for payment based on a court judgment or order, and gives the debtor 21 days to comply, from the date they are served the notice, to either pay the debt, or make arrangements for settlement of the debt. If the debtor fails to comply, they have committed an act of bankruptcy, entitling the creditor to apply to the court to have the debtor declared bankrupt. This application is known as a creditor's petition.
43. The FSP's bankruptcy notice is therefore not a "bankruptcy petition" as detailed in the notice of termination. However, it may be that this has a certain meaning under the licence agreement.
44. The original licence agreement provides that the agreement is executed and delivered in Australia, and is to be constructed in accordance with the laws of

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the government of Hong Kong.¹⁴ The amended agreement says the same but in respect of the United Kingdom.¹⁵

45. Based on these provisions, it appears that the parties have agreed that the governing law of the licence agreement would either be the laws of Hong Kong, or the laws of the United Kingdom, depending on the agreement being enforced.
46. Under our Rules, I cannot consider a complaint if it relates to a contract or obligation not arising under Australian law.¹⁶
47. The consumer's obligations under the licence agreement arise under two different international laws. This means that I cannot determine whether or not the FSP's conduct resulted in the consumer breaching the licence agreement, as it would require me to interpret the meaning of "bankruptcy petition" or "petition of bankruptcy" using international laws of construction.
48. Consequently, this claim is outside CIO's jurisdiction.

Decision

49. For the reasons set out in the Review and this Determination, I find that the consumer's claims have either not been made out or are outside our jurisdiction.

Ombudsman

¹⁴ Item 2 under Article XIII – Miscellaneous (6 December 2010 agreement).

¹⁵ Item 2 under Article XIII – Miscellaneous (22 November 2014 agreement).

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Review

16 August 2016

- Judgment debt
- Debt purchaser
- Privacy breach
- **Validity of judgement**
 - **Enforcement action**

Case Management PO
Box A252
Sydney South NSW 1235

T 1800 138 422
F 02 9273 8440
info@cio.org.au
www.cio.org.au

16 August 2016

Mrs C
The consumer's property

Our ref: xx/xxxx
Contact: XXX

Dear Mrs C

Complaint regarding Mrs C and FSP

We refer to the consumer's complaint against the FSP received on xx May 2016.

The Rules under which Credit and Investments Ombudsman (**CIO**) operates, limits the types of complaints and issues that we can consider.

Having reviewed the information, the consumer provided us, we are unable to consider the consumer's complaint further.

Complaint summary

The complaint relates to:

1. a security certificate breach message that appeared on the FSP's website on or around xx June 2012, and
2. a default judgment obtained by the FSP from the Local Court of NSW on xx October 2015 to recover \$47,454.49 from the consumer.

On xx May 2016, the Local Court of NSW dismissed the consumer's motion to set aside the default judgment and upheld the original default judgment dated xx October 2015.

Consumer's claims and preferred outcome

The consumer claims that:

1. the FSP committed a breach of the consumer's privacy by not remedying the security certificate breach,
 2. the Statement of Claim was issued to the wrong address although the consumer had updated the new address on xx July 2015, and
-

3. the FSP attended the hearing on xx May 2016 despite being aware of the complaint being open with CIO.

In resolution of the complaint the consumer would like the judgment set aside and a compensation of \$75,000.

Our review

The claim that the FSP committed a breach of the consumer's privacy by not remedying the security certificate breach

The claim that the consumer's privacy was breached as the FSP did not remedy the security certificate breach. We would not be the appropriate forum to consider complaints about security certificates.

Based on the available information, we consider it more appropriate that the consumer direct this claim with the Office of the Australian Information Commissioner (**OAIC**).³ The OAIC can investigate privacy complaints covered by the Privacy Act 1988 (CTH) and also complaints relating to handling of the consumer's personal information by the FSP.

The consumer's claim that the Statement of Claim was issued to the wrong address despite the consumer updating the consumer's new address on xx July 2015

The FSP has provided us a copy of the judgment by the Local Court of NSW against the consumer dated xx October 2015 and a copy of the notice dismissing the consumer's motion to set aside the default judgment dated xx May 2016.

A court has ordered that the consumer pay the judgment debt. We cannot deal with a complaint if the subject matter of the complaint has been determined by the court.⁴ This is because we are not able to make a decision that would be seen to conflict with a decision of the court. Furthermore, only a court is able to set aside a court's judgment.

If the consumer wishes to set aside the default judgment, the consumer's claim would be better raised with the Local Court of NSW.⁵

The consumer's claim that the FSP attended the hearing on xx May 2016 despite being aware of the complaint being open with CIO

We received the consumer's complaint against the FSP on xx May 2016. When we receive a complaint, the financial services provider is required to cease enforcement action for as long as we deal with the complaint.

On or around the same time the consumer lodged the complaint with us, the consumer approached the Local Court of NSW to set aside the default judgment obtained by The FSP.

Both the parties attended the hearing to set aside the default judgment on xx May 2016. The court dismissed the consumer's motion to set aside the default judgment and upheld its original default judgment against the consumer dated xx October 2015.

We do not consider that the FSP breached our Rules by attending the court hearing. This is because the FSP already obtained a judgment against the consumer on xx October 2015 and was attending the court to respond to the consumer's notice to set aside the default judgment. We are unable to find that this amounted to a continuation of enforcement action as The FSP is entitled to defend itself to legal proceedings commenced by the consumer.

³ CIO Rule 10.1(o), CIO Rules 9th Edition. All references to a CIO Rule are to the 9th Edition CIO Rules.

⁴ CIO Rule 10.1(m).

⁵ CIO Rule 10.1(o).

Responding to our Review

For the reasons stated above, we are unable to consider this complaint further.

If our understanding of the complaint is incorrect, or if the consumer has further information which indicates that we should continue dealing with some or all aspects of this complaint further, please provide this to us by **xx August 2016**.

If the consumer provides us with new information by **xx August 2016**, we will review this information to consider whether it changes our view. If it does, we will continue dealing with this complaint.

If we do not receive a response from the consumer by **xx August 2016**, or if the information received does not change our review, this complaint about The FSP will be closed without further notice. Once closed, a complaint can only be reopened in exceptional circumstances.

The consumer can also ask for a Determination. A Determination is made by the Ombudsman and is a final decision about the complaint.

Further assistance

If the consumer wishes to lodge the consumer's complaint with the OAIC, they can

be contacted on:

N Office of the Australian Information Commissioner
T 1300 363 992
E enquiries@oaic.gov.au

Please be aware that The FSP is entitled to continue with enforcement action once the CIO complaint is closed.

If the consumer wish to seek urgent legal advice on this matter, please contact the Credit and Debt Hotline on 1800 007 007.

Case Manager