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

PRIVACY IN THE MORTGAGE INDUSTRY

This submission deals with one specific issue – that being the requirement under the Privacy Principles for operators in the mortgage industry to remove Tax File Numbers from documents provided to them to assist in the assessment of a potential borrower's capacity to service a mortgage loan.

The TFN is NOT sought by the business, nor is it used in any way. It is not required and provides no use to the business receiving the information. However despite the obvious privacy concerns about TFNs, potential borrowers, freely and willingly, include these details on documents provided by them to eg mortgage brokers and mortgage managers.

Under the current Principles the mortgage broker or manager is required to remove the TFN. This is 'nuisance' task which merely adds compliance costs to these operators which are generally not large businesses.

Over the past 12 months the Mortgage Industry Association of Australia, to no avail, has attempted to work with the Privacy Commissioner's Office to find a way to remove this non-productive requirement but still ensure privacy concerns are protected.

In fact we chose not to become involved early with this Review as it seemed commonsense would prevail and a successful outcome to our proposals would have been achieved.

Thus this 11th hour submission.

We note the Issues Paper and believe this matter clearly comes under the heading:

- ***Areas that are over-regulated by the private sector provisions.***

MIAA's attempts to overcome what, we believe, is (given the circumstances) an over-regulation of the mortgage industry are chronicled below:

Letter to Privacy Commissioner (2 December 2003)

“I am writing to you to seek an exemption from the Privacy Guidelines regarding tax file numbers (TFNs) in the circumstances in which such numbers are provided to operators in the mortgage industry.

As part of the credit checking and loan eligibility process, mortgage lenders or mortgage brokers or mortgage managers arranging loans for borrowers usually require proof of capacity to repay the loan by verifying the prospective borrower’s income. TFNs are listed on documents such as notices of assessment and tax returns prospective borrowers provide for credit assessment. Mortgage industry participants do not require the TFN but require the documents for credit assessment.

The fact that the TFN may be on the document is of no interest to the mortgage lender, manager or broker and is not used in any way by them.

We note the following guideline and Commissioner’s note:

“7. Incidental provision of tax file numbers

7.1 Where an individual is required by law, or chooses, to provide information which contains a tax file number for a purpose not connected with the operation of a taxation, assistance agency or superannuation law:

- (a) that individual shall not be prevented from removing the tax file number; and
- (b) if the tax file number is not removed, the recipient shall not record, use or disclose the tax file number.

Commissioner’s note

This means, for example, that where an individual chooses not to delete their tax file number from a document that they provide to another person or organisation, say a bank when applying for a loan, then that other person or organisation must delete the tax file number from the document....”

However we reiterate that the TFN is not required by the mortgage industry operator, nor is it recorded or used for any purpose. It is simply a number on a document whose interest to the mortgage industry operator is its income verifying content – the TFN is of no interest at all and if it were not supplied or removed by the borrower this would have no impact on the purpose of use of the document.

Clearly the recipient of the document does not use or disclose the TFN and in the normal sense of the word, does not *record* the TFN (other than for the fact that it is on the document).

Nevertheless it seems the Privacy Commissioner has a view that if the borrower does not remove the TFN, this must be done by the recipient of the document.

This is a time consuming exercise, which slows down the credit assessment of the borrower and imposes additional costs of compliance on the mortgage industry operator in receipt of the document.

Industry operators can request prospective borrowers to obliterate or delete their TFN on documents supplied, however in the vast majority of cases borrowers choose not to, or omit to, remove their TFNs.

It is suggested that in circumstances where a mortgage industry operator advises or requests the prospective borrower to delete their TFN on documents supplied, (on the basis that the TFNs are not required and are not used, or disclosed) and the prospective borrower either chooses not to, or omits to remove the TFN, the mortgage industry operator ought to be relieved from the onerous task of manually removing such TFNs.

In the above circumstances, it is clear that the consumer is being advised in advance that the TFN is not required and that they should remove it from any documents provided.

Given that the mortgage industry operator also undertakes that the TFN will not be used or disclosed (or recorded in the normal meaning of the word), it is not unreasonable to assume that the consumer is willingly providing the TFN (albeit that it is of no interest to, and will not be recorded, used or disclosed by the mortgage industry operator).

The MIAA is mindful of the privacy concerns of individuals but believes in the circumstances outlined above, those concerns are well protected.”

23 December 2004 – Privacy Commissioner’s response

The Privacy Commissioner responded on 23 December 2003 indicating that the Commissioner’s Note to Guideline 7.1 from which the MIAA had sought exemption has been amended as follows:

‘This means, for example, that where an individual chooses not to delete their tax file number from a document that they provide to another person or organization, then that person or organization should consider how they can practically limit access to the tax file number, in order to comply with GL 6.1(b), by other persons within their organizations who do not have a need to see it to perform their duties.’

The Commissioner further noted:

“Compliance with TFN Guideline 6.1(b) requires that, where practicable, access to TFN information should be restricted to persons undertaking duties related to responsibilities arising under taxation, assistance agency or superannuation law which necessitates the use of tax file numbers. What is ‘practical’ or ‘practicable’... will depend on the circumstances of each particular case.”

And-

“Generally speaking, the obligation of persons or organizations in receipt of TFN information in circumstances such as those confronting your members would be to put in place reasonably practical measures which restrict access to TFN information wherever possible.”

“In the circumstances it seems unnecessary to further consider the requested exemption”.

Subsequently MIAA had meetings with officers of the Privacy Commissioner to ascertain how members could operate within these conditions with some certainty, or at least more certainly than came from the above letter. Understandably our members do not wish to become involved in subjective disputes as to what is practical or practicable in various circumstances.

After a meeting in December 2004 a further communication was sent to the Privacy Commissioner’s Office, the salient parts of which are as follows:

‘CLARIFICATION FOR EXEMPTION FROM TFN BETWEEN CERTAIN PARTIES IN THE MORTGAGE INDUSTRY

I refer to the letter from the Federal Privacy Commissioner 23 December 2003 and a meeting with you 2 December 2004.

From a practical perspective for our Members we seek a clarification regarding TFN Guideline 6.1(b). Currently this Guideline requires that, where practicable, access to TFN information should be restricted to persons undertaking duties related to responsibilities arising under taxation, assistance agency or superannuation law which necessitate the use of tax file numbers.

Where a Member of the Mortgage Industry Association of Australia (MIAA) forwards papers containing TFNs to another MIAA Member for the purpose of seeking to originate, manage, or financially package a mortgage loan we seek confirmation that this activity would be deemed as included under TFN Guideline 6.1(b). That is, such activity within the confines of MIAA Members would be exempted from TFN requirements.

The appropriate handling of TFNs would be specifically including in the MIAA Code of Practice for its Members. Here "Members" includes full and associate categories, accredited mortgage consultants and life and independent operator members.

The MIAA is concerned at the growing incidence of mortgage fraud. Currently, MIAA Members are required to manipulate documents to remove TFNs. That practice is diametrically opposed to the general principle that documents should not be altered or manipulated. We maintain that encouraging/requiring the manipulation of documents in one area may be an inducement to fraud generally in the mortgage loan process.

This becomes increasingly an issue as loan documents are being electronically lodged.

For example in Canada, now, all loan applications are electronically lodged and we expect this will be the situation in no more than 2-3 years in Australia.

We are most happy to provide any further information that you may require'.

On 18 February 2005 the MIAA received the following response which while seeking to be helpful did not give the comfort our members sought in order to change their practices regarding TFNs.

'I refer to your email of 9 December 2004 to Kara Mitchell in which you sought to clarify the application of Tax File Number (TFN) Guideline 6.1(b) to members of the Mortgage Industry Association of Australia (MIAA). In particular, you inquire whether a MIAA member who receives from another member mortgage loan documentation containing TFN information is exempt from the application of TFN Guideline 6.1(b).

As you may be aware, the TFN Guidelines have the force of law and aim to protect the privacy of individuals by restricting the use and ensuring the careful handling of TFN information. Compliance with TFN Guideline 6.1(b) requires a tax file number recipient, where practicable, to restrict access to records containing TFN information to persons undertaking duties related to responsibilities arising under taxation, assistance agency or superannuation law which necessitates the use of TFNs. "Practicable" in terms of the Guidelines and the ordinary meaning of the word connotes steps which are *capable of being done* or *feasible* and will depend on the circumstances of each case bearing in mind the overall intention of the Guideline. Well-organised personal information-handling practices may reasonably ensure the safe storage of TFN data in different ways, depending on whether the data is held in hard-copy or electronically, for example.

Your letter advises that MIAA members collect records from customers to verify their income to determine eligibility to obtain a mortgage loan. It appears that the records collected may contain TFNs, the collection of which we understand is not necessary under taxation, assistance agency or superannuation law for MIAA members or their staff to originate, manage, financially package or process mortgage loan applications. In these circumstances, TFN Guideline 6.1(b) means file number recipients, including MIAA members, must take appropriate steps, where practicable, to restrict access to records containing TFN information.

In addition, TFN Guideline 7.1 deals with the incidental collection of TFNs, and means file number recipients must not record, use or disclose the TFN. The Commissioner's Note to this Guideline states that Tax agents should delete TFNs when providing tax-related documents to third parties on behalf of their clients, for example, as proof of income in support of a loan application. This obligation in Guideline 7.1 applies to other professional occupations that collect TFNs incidentally, including members of the MIAA. The Office is aware from conducting TFN audits that most file number recipients have well-settled procedures to comply with TFN

Guidelines 6.1(b) and 7.1, which may incorporate both electronic and/or physical controls including masking or deleting TFNs from electronic and paper records.

These comments are in the nature of general guidance on the interpretation and implementation of the TFN Guidelines and do not amount to legal advice.¹

We are aware the Privacy Commissioner's office has audited some reasonably large operators in the mortgage industry, but a characteristic of this industry is the growth of many smaller operations.

The essence of all comments from the Privacy Commissioner's Office centre around whether it is 'practicable' for a business to remove TFNs.

The test should be, in light of the circumstances in the mortgage industry, whereby potential borrowers who have the ability to remove TFNs from their documents choose not to, and mortgage businesses which have no interest whatsoever in the TFNs and are prepared to undertake they will not use the TFN in any way, whether it is NECESSARY to remove the TFNS.

MIAA proposes that the Principles be changed so that where a person produces to a mortgage business documents which contain a TFN and:

- **the person fails to remove such TFN, and**
- **the business undertakes not to use the TFN for any purpose**

it is not necessary for that business to remove the TFN from such documents

Yours sincerely



PHIL NAYLOR
CHIEF EXECUTIVE OFFICER

The Mortgage Industry Association of Australia (MIAA) is the peak body providing service and representation to over 8,600 mortgage brokers, mortgage managers, mortgage lenders (bank and non-bank), and originators to assist them to develop, foster, and promote the mortgage industry in Australia.

The MIAA is dedicated to promoting and maintaining high standards of professionalism and ethical behaviour, and provides a united voice for the industry when required. MIAA strongly emphasises the responsibility that members have to act in the best interests of consumers. All MIAA members must belong to an ASIC approved independent dispute resolution scheme such as the Credit Ombudsman Service Limited.

The www.miaa.com.au website contains useful information for home buyers including calculation tools, guides to the mortgage industry, and a search engine to help borrowers find a local accredited MIAA member.