



Privacy Commissioner's responses to Questions on Notice

- **What do you think is the principle of courts disclosing information about judgments to credit reference agencies for a fee? It was identified in submission that the courts provide information to credit reference agencies for a fee. This is private information. What do you think the principle at play is? Is that a community interest?**

Subject to certain exemptions, courts, like all public sector agencies, are required to comply with the Information Protection Principles outlined in the *Privacy and Personal Information Protection Act 1998* (PIIP Act). These principles relate to the collection, use, storage and disclosure of "personal information". Personal information as defined in the PIIP Act does not include information about an individual that is contained in a publicly available publication (s4(3)(b)). It is unclear however, whether this question is referring to only publicly available court judgments. As Privacy Commissioner, I would be concerned about any practice of disclosing personal information in contravention of the privacy regime.

In relation to the courts charging a fee for requests of judgment information, this is best directed to the Department of Justice as the agency with oversight responsibility for local courts.

- **A recommendation from Marrickville Legal Centre talked about introducing a low-cost procedure in the Local Court and the New South Wales Civil and Administrative Tribunal for preliminary identity discovery to replace the Uniform Civil Procedure Rule 5.2. That allows for a simple, low-cost method to identify and locate debtors in small claims matters. Can you comment on that recommendation or would you rather take that on notice?**

As stated above, the Local Court is generally subject to the Information Protection Principles of the NSW privacy regime. A public sector agency that holds personal information must not disclose that information to a person or other body unless the disclosure was directly related to the purpose for which the information was collected (s18 of the PIIP Act) unless informed consent is obtained.

The Marrickville Legal Centre has outlined a proposal to reduce the time and cost associated with pursuing debts. I acknowledge the importance of having timely and cost effective debt recovery mechanisms. However, the submission has insufficient detail to assess the impact of the proposal on the privacy of individuals and possibly third parties. I would be happy to receive further information on the detail of this proposal to provide constructive comment from a privacy perspective.

1. Could you share your views on a proposal to allow identifying information from records such as Electoral Rolls to be made available to debt collection businesses through third parties such as Information Brokers?

The Electoral Commission is subject to the Information Protection Principles of the NSW privacy regime. A public sector agency that holds personal information must not disclose the information to a person or other body unless the disclosure was directly related to the purpose for which the information was collected (s18 of the PPIP Act).

Moreover, an electoral roll is a public register within the meaning of the PPIP Act. Section 57 of PPIPA provides that, "the public sector agency responsible for keeping a public register must not disclose any personal information kept in the register unless the agency is satisfied that it is to be used for a purpose relating to the purpose of the register or the Act under which the register is kept".

I understand that under section 41 of the *Parliamentary Electorates and Elections Act 1912* requests can be made to the Electoral Commissioner seeking access to the electoral roll information. The Electoral Commissioner must identify the public interest in providing the information or make a finding whether or not the public interest in providing information outweighs the public interest in protecting the privacy of personal information in the context of the request.

The NSW State Electoral Commission's policy on '*Disclosure of Enrolment, Electoral and Election Information*' (available on the Electoral Commission's website) sets out its approach and the public interests at the core of accessing the electoral roll for purposes other than electoral matters.

The Electoral Commissioner's position as outlined in this policy, reflects a view stated as a custodian of personal information. The Electoral Commissioner's responsibilities to protect the privacy of personal information receive specific attention in this piece of legislation due to the nature and quantum of the personal information contained on the electoral roll. NSW electors have a right to expect that the disclosure and use of their personal information is restricted according to the legislation. I recommend further consultation with the Electoral Commissioner on this issue.

3. The Australian Credit Forum recommended adopting changes to garnishee orders for civil creditors to mirror the arrangements that State Debt Recovery currently has with banks to enable it to identify bank accounts of debtors. Would such changes raise any concerns from a privacy perspective?

The SDRO's authority to order to garnishee debts, wages or salary of fine defaulters are legislated and outlined in section 73 of the *Fines Act 1996*.

The SDRO is a public sector agency, and is therefore obligated to comply with the PPIP Act. However, under section 23(5)(d)(i) of the PPIP Act, a public sector agency is exempt from complying with section 18 (limits on the disclosure of personal information) if the disclosure of the information concerned is for the protection of public revenue.

As such, the legislated authority for the SDRO demonstrates a public interest in protecting public revenue. In contrast, civil creditors are seeking to collect and use personal information for the purposes of collecting private revenue. Civil creditors are not regulated under the PPIP Act and in many cases are not regulated under the *Privacy Act 1988* (Cth). The proposal therefore raises significant concerns for the protection of personal information in relation to its collection, use, storage and disclosure and is not supported.

In reaching this view, I have recognised the issues in a number of submissions and refer to the findings from the 2009 Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) report *'Debt collection practices in Australia: Summary of stakeholder consultation'*. This report highlights consumer concerns that are still relevant despite the introduction of the jointly released *'Debt collection Guideline: for collectors and creditors'* first introduced in 2005. It is important that any proposal is evaluated for its unintended consequences including misuse and exploitation of the system leading to poor outcomes for sections of the community, in particular for domestic violence victims and children.

Rather than mirroring the State Debt Recovery Office arrangement, it would be more useful for civil creditors to for example, focus on reforms to the processes in place for setting up contingency plans to manage defaults, when drafting a loan contract with the customer. Prior to the customer receiving a loan, civil creditors should make the customer aware of the arrangements that will be implemented, if (due to unforeseen circumstances) the debt is unable to be repaid (such as the customer consenting to additional use and disclosure of their personal information in order to recover debts). This approach may reduce the time and cost currently spent on debt recovery without the need to disclose personal information in contravention of the privacy regime.

4. Could you share your views on a proposal to allow licensed commercial agents and private inquiry agents to receive information about the location of debtors in matters that are before a court?
a. What controls would be required to ensure that personal information is only used for appropriate purposes, if such an arrangement was in place?

The proposal to allow private entities to receive information from public sector agencies regarding the location of debtors is not supported. Once again, I draw your attention to section 18 of the PPIP Act which outlines that a public sector agency that holds personal

information must not disclose the information to a person or other body unless the disclosure was directly related to the purpose for which the information was collected or consent has been obtained from the individual.

Licensed commercial agents and private inquiry agents are not regulated under the PPIP Act and in many cases are also not subject to the *Privacy Act 1988* (Cth). I would have significant concerns regarding a proposal for private entities to receive information collected by the courts for a different purpose.

The disclosure of personal information to the private entities in the debt recovery industry raises significant community concerns. To address this, I note for example that the ACCC and ASIC have jointly released the *'Debt collection Guideline: for collectors and creditors'*. The Guideline replaces the ACCC's *Debt collection and the Trade Practices Act 1999* in light of ASIC's new responsibilities for consumer protection in financial services. The Guidelines were developed in consultation with industry and consumer representatives to provide a useful guide on appropriate conduct to anyone involved in debt collection and reflect the joint responsibilities at the Commonwealth level of the ACCC and ASIC for protecting people who are debtors or alleged debtors from unacceptable collection conduct. Although this has no statutory basis, it is regarded by the debt collection profession as the default compliance obligation to minimise allegations of harassment and other inappropriate behaviors when managing the recovery of consumer and commercial debt.

The evidence from the ACCC and ASIC *'Debt collection practices in Australia: Summary of stakeholder consultation'* report shows that although there are guidelines in place, consumers continue to raise concerns about malpractice within the industry, including in relation to:

- harassment and coercion: for example excessive contact, aggression and dissuade from making complaints. This forms the highest number of consumer complaints.
- disputes about the debt: for example situations where the consumer is not the debtor and is not associated with the debt, the debt has already been paid, the debt does not exist and debtor complaints are ignored.
- Debt assignment and/or selling: when a debt is sold, the debtor is often contacted by multiple agencies in relation to the recovery of the debt. In some cases when the consumer is not the debtor, they are asked to prove they are not the debtor. There have also been reports of creditors/collectors contacting a third party (e.g. neighbours, friends, family and work colleagues) when attempting to identify or contact the debtor.
- Representations on consequences of non-payment: consumers have reported instances where letters to debtors were framed to look like legal documents, giving the impression that legal proceedings were about to commence when this was not the case.

In order to support the proposal I would require assurance that appropriate risk mitigations, and audit and compliance mechanisms, are incorporated in the proposal to address community safety issues.