

DIFFERENT SIDES OF THE SAME COIN.

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Recently there has been much debate about whether banks and collectors should consider the circumstances of a person who is affected by gambling when resolving a problem with a debt.

The significant changes to the perception of gambling over the last few years have been identified by a variety of means as well as by the expansion of the kinds of ways to gamble, including poker machine, online gambling and casino gambling.



As we know, gambling is identified as “...risking something of value in the hopes of obtaining something of greater value.” Patterns of gambling can be episodic or regular as well increasing at times of stress or depression. Just as illnesses do not discriminate, neither does problematic gambling.¹ Although the DSM 5 can be used to identify some people affected by gambling, it certainly cannot be applied to every person who finds they have problematic gambling affecting them.

The DSM 5 identifies differential diagnosis when it comes to gambling as well. Briefly these may fall under four separate categories:

- Non-disordered gambling – distinguished from professional and social gambling.
- Manic episode – someone who exhibits behaviour that resembles a manic episode.
- Personality disorders – people with antisocial personality disorders.
- Other medical conditions – people who take dopaminergic medications that contribute to the urge to gamble.²

Along with these four categories, according to the DSM 5, gambling is an addiction not an illness.

Gambling and finances.

When considering lending, a bank cannot be expected to assess whether a person’s capacity to borrow may be affected by problematic gambling.

This would also include collection activity as well. Banks would have difficulty in trying to identify a problem gambler. Applicants for finance don’t put down gambling as the intended purpose for the money they want to borrow. In 2006 the Financial Ombudsman found that a lender did not breach any obligation or duty when it approved a loan.³ The determination states:

“There is no reason to believe the FSP⁴ had rejected an earlier loan application from the husband on the basis of a gambling problem. There were no inconsistencies that would require a responsible lender to make further enquiries about his ongoing capacity to make repayments, or to refuse to lend to the Applicant as co-borrower.”

It was identified that the Applicant received a benefit from the loan and should therefore make arrangements to repay the debt. It was noted in the determination that the FOS investigated gambling related activity in regard to whether the financial service provider should have rejected the loan or notified the co-borrower about the gambling activity evident on the statements.⁵

¹ American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders: DSM-5*. Washington, D.C: American Psychiatric Association. P 586

² Ibid. P 586

³ <https://www.fos.org.au/resolving-disputes/decisions/> Decision number 341285

⁴ FSP – Financial Service Provider

⁵ <https://www.fos.org.au/resolving-disputes/decisions/> Decision number 341285

Under the Banking Code of Practice there is no requirement for a bank to disclose this information. In fact the determination states:

"Where there are no inconsistencies in a loan application, a prudent and responsible lender may approve it, and will not go behind the serviceability of a debt to examine the nature of a borrower's transactions. Knowledge that one borrower has made gambling related transactions does not mean that they are unable to meet their loan repayment obligations."

This is further supported in Bulletin 45⁶ from the BFSO⁷ where it states that:

"Generally, a financial services provider is not required to concern itself with how a customer chooses to expend his or her own funds. In the absence of a fiduciary obligation or an express agreement, the financial services provider does not have to take particular care to protect a customer from his or her own actions."

There is a requirement under the National Credit Code that requires the assessment for a loan application to determine that the loan be 'not unsuitable'.

Based on the findings from the FOS in 2005 and 2015, it can be identified that requesting consideration when a person is affected by gambling and disclosing the gambling to a financial service provider may not be advantageous to our clients when trying to seek dispute resolution and addressing of the debt/s. It may not assist in seeking resolution when financial difficulty is evident or present. It has been found that identifying gambling at collection stage of debts, either by banks or collection agencies, can disadvantage negotiations for financial counsellors. Recently a specialist gambling lawyer (Richard Brading) stated that "...telling a creditor about gambling can have adverse effects on the client as it may result in a premature demand for full repayment of the loan or precipitate early debt collection action."

It can be seen that many people who are affected by gambling, either their own or someone else's, have difficult pathways ahead of them. Specialist Financial Counsellors have an obligation to represent their clients to the best of their abilities. It can be identified that if our judgment is impaired by us labelling our clients as gamblers with an illness or allowing judgments to be made on their behalf by creditors by our providing information about gambling that they do not necessarily need to have then we are creating a disservice to our clients and the process of the financial difficulty being addressed.

There is no mention of advocacy and dispute resolution being implemented and dealt with appropriately, however we, as specialists, do not need to create work when it may not be in our client's best interests.

The Bankruptcy Act 1966 (Cth) s 271

Section 271 of the *Bankruptcy Act 1966* states that it is an offence for *"a person who, up to two years prior to presentation of the petition which led to their bankruptcy materially contributed to, or increased the extent of, his or her insolvency ... by gambling or by speculations that, having regard to his or her financial position at the time and any other material circumstance, were rash and hazardous, being gambling or speculations not connected with a trade or business carried on by him or her"*.

The Australian Financial Security Authority, which has responsibility for bankruptcy administration, has released a policy statement stating that it 'will not refer a case for prosecution "...where it appears that the debtor could be classified as having been a "problem gambler" and had not engaged in any associated criminal activity to finance their gambling habit'."⁸ The policy statement further explains that the AFSA will consider referring a case for possible prosecution only where it involves:

- clear criminality;

⁶ https://www.fos.org.au/custom/files/docs/fos_banking_finance_bulletin_45.pdf

⁷ BFSO – Banking and Financial Services Ombudsman (now known as Financial Ombudsman Service - FOS).

⁸ Duns, John --- "Other People's Money: Gambling and Bankruptcy" [2007] MelbULawRw 4; (2007) 31(1) Melbourne University Law Review 87

- complex offences; or
- ongoing allegations of repeat offending despite warnings to the contrary.

It is important to note and to not underestimate the role of specialist financial counsellors in assisting people with bankruptcy where gambling is evident as affecting people's finances. Conversations with banks and collectors should be entered into carefully with financial counsellors having a good working knowledge of the Inspector-General Practice Statement 6⁹. A working knowledge includes not breaching a client's trust when working with clients and consequent disclosure.

Sometimes people will present to our services with multiple debts including credit debt, either banking debt or Small or Medium Amount Credit Contract debts. Whilst negotiating with creditors regarding these debts, we need to be aware of maintaining the dignity and trust of our clients and the responsibilities we have under the Code of Ethical Practice for financial counsellors as well as balancing the legalities of the issues that are present. If we expect banks to behave differently than they do regarding gambling being evident for someone, then it is likely that we are complicating the work we do, increasing our work loads, handicapping ourselves and the advocacy we provide and ultimately undermining better outcomes for our clients.

⁹ <https://www.afsa.gov.au/about-us/policies-and-practices/inspector-general-practice-statements/igps6>