



**Australian
Privacy
Foundation**

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5 June 2015

Office of the Australian Information Commissioner

By email: Consultation@oaic.gov.au

Dear Director,

Re: Guide to Privacy Regulatory Action consultation

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

This submission by the Australian Privacy Foundation responds to the Consultation Paper – on the chapters released on the Guide to Privacy Regulatory Action.

The Foundation is the nation's premier civil society organisation concerned with privacy. It is a non-partisan body that draws on expertise regarding law, business, technologies and public administration. It has provided invited and independent advice to parliamentary inquiries, law reform commissions and other bodies over the past two decades.

Comments

Chapter 6: Injunctions

1. Section 98 provides:

- (1) Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted or would constitute a contravention of this Act, the [Federal Court](#) or the [Federal Circuit Court](#) may, on the application of the [Commissioner](#) or any other person, grant an injunction restraining the person from engaging in the conduct and, if in the court's opinion it is desirable to do so, requiring the person to do any act or thing.
- (2) Where:
 - (a) a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing; and
 - (b) the refusal or failure was, is, or would be a contravention of this Act;

the [Federal Court](#) or the [Federal Circuit Court](#) may, on the application of the [Commissioner](#) or any other person, grant an injunction requiring the first-mentioned person to do that act or thing.

- (3) Where an application is made to the court for an injunction under this section, the court may, if in the court's opinion it is desirable to do so, before considering the application, grant an interim injunction restraining a person from engaging in conduct of the kind referred to in that subsection pending the determination of the application.
- (4) The court may discharge or vary an injunction granted under this section.
- (5) The power of the court to grant an injunction restraining a person from engaging in conduct of a particular kind may be exercised:
 - (a) if the court is satisfied that the person has engaged in conduct of that kind--whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
 - (b) if it appears to the court that, in the event that an injunction is not granted, it is likely that the person will engage in conduct of that kind--whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (6) The power of the court to grant an injunction requiring a person to do a particular act or thing may be exercised:
 - (a) if the court is satisfied that the person has refused or failed to do that act or thing--whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; or
 - (b) if it appears to the court that, in the event that an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing--whether or not the person has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
- (7) Where the [Commissioner](#) makes an application to the court for the grant of an injunction under this section, the court shall not require the [Commissioner](#) or any other person, as a condition of the granting of an interim injunction, to give any undertakings as to damages.
- (8) The powers conferred on the court under this section are in addition to, and not in derogation of, any powers of the court, whether conferred by this Act or otherwise.

2. Section 98 is self contained and should be considered on its face. Section 98 is an important means by which the Privacy Commissioner can take action to deal with breaches of the Act. He should avail himself of this significant form of redress.

3. In seeking injunctive relief through section 98 of the Act it is relevant to note that:

- (a) the jurisdiction is enlivened where a person has engaged, is engaging or is proposing to engage in any conduct that constituted or would constitute a contravention of the Act.
- (b) the application can be made by "the Commissioner or any other person"

- (c) the Federal Court may grant an interim injunction¹ or permanent injunction restraining the person from engaging in the conduct.² It may grant an injunction in circumstances "...whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind;"³ and
 - (d) the Federal Court has broad powers to require a person to do an act or thing⁴
4. The court may grant injunctive relief irrespective of whether there is a likelihood, or not, of a repeat of the offending behaviour. The legislature has given the Privacy Commissioner broad discretion and considerable scope for action in terms of the orders that can be sought. He should not limit his discretion by means of guidelines where the enactment imposes no such restriction unless there are good legal or overwhelming public policy reasons for doing so.

Purpose and key features of an injunction

5. In this section the APF refers to paragraph 18 which states:
Generally, an injunction may be appropriate in circumstances where the conduct:
- *is **serious** or has had, or is likely to have, **serious or extensive adverse** consequences*
 - ***is systemic or poses ongoing compliance** or enforcement issues*
 - ***is deliberate or reckless or where the entity involved is not being cooperative**, or*
 - raises **significant** concerns of public interest.
6. If the above description is an analysis of the circumstances when an injunction may be appropriate having regard to the provisions of section 98 it is inaccurate. Section 98 imposes no restriction on the applicant to establish the existence of or likelihood of any matters set out in the dot points to paragraph 18. The elements required to establish a basis for the grant of an injunction under sub section 98(1) are:
- (a) a person;
 - (b) engages or is proposing to engage in;
 - (c) any conduct;
 - (d) that constituted or would constitute;
 - (e) a contravention of this Act.
7. It is not immediately apparent that there are other provisions of the Privacy Act 1988 which would operate to restrict or otherwise vary the operation of section 98(1) of the Act. As such

¹ *ibid* 98(3)

² *ibid*

³ *ibid* 98(5)(a)

⁴ *ibid* 98(6)

paragraph 18 is poor analysis of the operation of section 98, which is the focus of the exercise after all.

8. If paragraph 18 seeks to describe the broad general principles that should be applied in the seeking and grant of injunctive relief it also misstates the law. A party seeking injunctive relief should show:
 - (a) that there is an actual or threatened injury to a legal or equitable right;⁵ or
 - (b) that a party to an action has behaved, or threatens to behave, in an unconscionable manner.⁶
9. Injunctions are considered and granted (or not) in accordance with equitable principles. It is important to note that courts take a liberal view of the requirement that an injunction must be awarded to enforce or protect an existing right. The jurisdiction to grant an injunction should not be rigidly confined by restrictive categories but should be available as a remedy whenever justice requires⁷. That is clearly contemplated in the broad drafting of section 98.
10. In addition to paragraph 18 being a misstatement of the law as it applies to the grant of an injunction generally and in relation to the operation of section 98 in particular it may also confuse the reader into thinking that the Privacy Commissioner will restrain himself when considering using section 98 to circumstances set out within that paragraph. The parameters set out in paragraph 18 unduly (and wrongly) confines the considerations involved in seeking injunctive relief by the Privacy Commissioner. It should be deleted or redrafted to reflect the operation of section 98.

Interim injunctions

11. The APF has no comment regarding his section.

Permanent Injunctions

12. The APF suggest a modification to paragraph 27 to provide (using tracking to show the additions):
 27. For a permanent injunction, the Commissioner is required to establish on the balance of probabilities that the facts asserted to support the grant of an injunction, in that the elements of section 98(1) have been ~~are~~ made out.
13. While paragraph 27 may be a, very, shorthand way of describing how an injunction is granted it is important to reference the powers upon which it is made. A court will need to consider each element to determine whether it can make the orders sought.

⁵ *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* [2002] FCAFC 390

⁶ *South Carolina Insurance Co v Assurantie Maatschappij De Zeven Provinciën NV* [1987] AC 24 at 40

⁷ *Tymbrook Pty Ltd v Victoria* [2006] VSCA and *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775

Injunctions restraining a person from engaging in conduct

14. The APF has no comment regarding this section.

Injunctions requiring a person to do a particular act or thing

15. The APF has no comment regarding this section.

The content of injunctions

16. The APF has no comment regarding this section.

Procedural steps in seeking an injunction

17. The APF recommends an amendment to the second dot point to paragraph 41 which provides:
- The Office will review the matter against either the *Privacy regulatory action policy* (including the factors set out in paragraph 38) or the *PCEHR (Information Commissioner Enforcement Powers) Guidelines*, as applicable, as well as the additional factors outlined above to assess whether seeking an injunction is an appropriate regulatory response, either by itself or in conjunction with other remedies.

It is not at all clear what the "additional factors outlined above" means? It could not relate to the state of the evidence because that is covered by the third dot point. What is a factor for the purpose of this document? While the APF understands that a certain degree of generality is required in the preparation of a document of this nature a reader needs to be able to understand where to look when this type of phrase is deployed. In short, as it stands it could mean almost anything. The phrase "..or in conjunction with other remedies.." connotes that other action may be taken contemporaneously. It is not immediately apparent what contemporaneous action will be taken in the Federal or Federal Magistrates Court. Is the Privacy Commissioner, for example, considering seeking injunctive relief in addition to civil penalties? If that is the case that should be addressed. The options are clearly limited and specifiable. Otherwise it is a phrase with little practical meaning.

18. The dot point providing:
- Following judgment in the matter, the Office will generally publicly communicate the outcome of the proceedings.

should be strengthened to provide:

- Following judgment in the matter, the Office will unless there is an order of the court prohibiting, restricting or otherwise limiting the publication of its orders and/or reasons publicly communicate the outcome of the proceedings and the orders made. Where possible, and when available, it will hyperlink the judgment on its site.

If Orders are made in open court and reasons are published without restriction the Privacy Commissioner should as a matter of course republish (by hyperlink) those Orders and

Reasons, which will usually be found in the judgment of the court. There is no good reason why the Privacy Commissioner should not also, on all occasions where there is no restriction on publication, publicly communicate the outcome of the proceedings.

After an injunction has been granted

19. The APF has concerns with the terms of paragraph 44. The phrase "terms of an injunction" refers to an order or orders of a court. A breach of the order may, and often is, a contempt of that court's orders. The proposed approach of dealing with a breach as set out in paragraph 44 is drafted in wooly terms which may conceal a fundamentally flawed approach, both as a party to a proceeding which obtained that order and a regulator.
20. The Privacy Commissioner first needs to establish whether his belief that there has been a breach. That needs to be made clear. If he has evidence of a breach he can put the malefactor on notice and in the normal course would. That needs to be said but it also needs to be stated that in matters of urgency caused as a result of this breach the Privacy Commissioner reserves the right to be able to return to court quickly without any notice upon the respondent and bringing any matter to that parties attention. That may also include bringing contempt proceedings with formal notice. Those circumstances will be the exception but they may arise.
21. In bringing the issue (whatever that means) to the attention of the respondent for the purpose of paragraph 44 it is important to set out a requirement that the Privacy Commissioner will expect and put the respondent on notice that he/she/it will cease doing or do those actions the subject of the order within a specified short space of time.
22. The ultimate sentence in paragraph 44 providing:

"This notification and response may be sufficient to resolve the breach"

is vague to the point of meaningless. Alternatively, it could mean just about anything. What does "resolve the breach" actually mean? There needs to be greater rigour in setting out the approach the Privacy Commissioner will in relation to breaches.
23. If a respondent is in breach of an order of the court it is critical that action be taken. It is an abrogation of responsibility for a regulator to take no action if he is possessed of such knowledge. Accordingly paragraph 45 should be redrafted. As it now stands it is unacceptably equivocal. If a party breaches the terms of an order of the court, orders sought by the Privacy Commissioner, it is unacceptable for the Privacy Commissioner to

may then consider whether it would be appropriate to bring proceedings for contempt of court

(Emphasis added)

It is imperative that the starting point is that the Privacy Commissioner will consider whether it is appropriate to bring contempt proceedings. Section 98 proceedings are very significant. In the significant time within which the provision has been in force there are no reported judgments, as best as the APF can determine, where the Privacy Commissioner has sought injunctive relief. On this basis when the Privacy Commissioner does take action it will involve very significant issues and breaches. It is therefore imperative that he acts firmly in relation to compliance with any orders arising out of that action.

Publication

24. The APF has no comment to make regarding this section save to say that the only basis for the not publicly communicating the information set out in paragraph 46 is where restrictions are imposed by the Federal Court or the Federal Circuit Court. To this end the phrase in the 3rd dot point to paragraph 46 providing:

other than any order that is inappropriate to publish because of statutory secrecy provisions or for reasons of privacy, confidentiality, commercial sensitivity, security or privilege

should be deleted. A court will make the order granting injunctive relief. It may also place restrictions on the publication of the orders. It will invariably do so after hearing submissions on that issue. Once it publishes its orders it is not for the Privacy Commissioner to then determine what will or won't be publicized. That would almost certainly lead to the ridiculous situation of the Federal Court, for example, making and publishing orders which can be accessed on its website or through austlii, for example, but a redacted version of the same order is found on the Privacy Commissioner's website. Or worse, no version at all. If it is intended by the above phrase that the Privacy Commissioner will publicize an order which has been made save where restrictions have been applied on its publication then that is what should be written. The above phrase is poorly drafted and confusing.

25. In paragraph 48 the sentence providing:

Where it is inappropriate to publish the orders because of statutory secrecy provisions or for reasons of privacy, confidentiality, commercial sensitivity, security or privilege, the Office may publish a redacted version of the orders, or a summary of the orders.

should be deleted or redrafted. If the Federal Court or the Federal Magistrates Court deem it appropriate to publish orders the Privacy Commissioner should reproduce those orders in their entirety. If the Courts restrict the publication then the Privacy Commissioner should comply with those orders. There should be no scope for bowdlerise any order made by the Courts. Arguments about the publication of orders are appropriately, and should only be, dealt with by the court.

26. In paragraph 49 the Office should communicate any breaches of an injunction. It serves a very strong public policy purpose. Accordingly the phrase " may publicly communicate" should read "shall publicly communicate."

Chapter 2: Privacy complaint handling process

Legislative framework

1. The APF has no comment to make about this section of Chapter 2.

General approach to handling privacy complaints

2. In relation to paragraph 11 it is not correct to say that the privacy jurisdiction is a non-costs jurisdiction. There is no provision within the Privacy Act 1988 which supports such an assertion. Actions in the Federal and Federal Magistrates Court would in the main involve the award of costs to the successful party. It is correct to state that the Office does not have the power to award costs in relation to the processing of complaints however it does have the power under section 52(3) of the Privacy Act 1988 that

" ..a declaration that the [complainant](#) is entitled to a specified amount to reimburse the [complainant](#) for expenses reasonably incurred by the [complainant](#) in connection with the making of the complaint and the investigation of the complaint."

Legal fees are an expense which can be reasonably incurred in connection with the making of a complaint and its investigation. The Commissioner's determinations make it clear that a rigorous analysis of the evidence and consideration of the law is undertaken. Agencies and organisations are well resourced and have strong legal teams. They can adopt a very combative approach. By way of example in *DK v Telstra Corporation Ltd*⁸, Telstra resisted the complaint strongly. It filed written and further written submissions dealing with complex areas of law including the operations of other Acts⁹. In a strongly contested case against a determined respondent who relies on factual and legal arguments it is both reasonable and prudent to engage legal representation. This reduces the burden on the decision maker having to deal with the complexities of having a self represented litigant running a case. There is no good public policy in discouraging legal representation which is both professional and assists in focusing on the real issues in a timely fashion. Having a default position that there will be no allowance for legal costs has the effect of potentially prejudicing a complainant. Given the parsimony of awards, which the APF believe are kept unnecessarily and artificially low on weak legal and policy grounds, a complainant may be faced with a very difficult choice, run a case without the skills to do so or lose money in enforcing his or her rights. An award that at least covers part of that person's costs should be properly considered and applied where appropriate.

⁸ [2014] AICmr 118 (30 October 2014)

⁹ *Ibid* at paragraph 43, 52 and 61

3. The APF otherwise makes no comment on this section.

How the Office handles privacy complaints

4. Paragraph 20 should be amended to provide:

Where a complaint raises an issue that could be an interference with privacy the Office will conduct preliminary inquiries to obtain relevant information of any person to assist with the handling of the complaint. These inquiries may be made, for example, to clarify the allegations in the complaint or to confirm that the Office has jurisdiction.

It is prudent to draft paragraph 20 in mandatory terms.

5. The APF otherwise does not make comment on this section.

Representative complaints

6. The APF makes no comment on this section.

Confidentiality

7. The APF makes no comment on this section.

Investigating privacy complaints

8. Paragraph 37 is somewhat trite in advising that

Where an investigation has been commenced the Office **may decline to continue to investigate a matter**, or attempt to conciliate a matter, at any stage during the investigation where that appears to be the appropriate course of action.

(Emphasis added)

That the Commissioner has the power and exercises it is not the issue. The issue is the basis for declining to investigate.

9. The APF is very aware of the Office exercising its power to decline to investigate. The APF believes it is a power exercised too regularly and without sufficient scrutiny and transparency. It is unclear what the criteria used or factors considered in exercising that power. At a minimum these criteria need to be set out in detail. APF contends that to ensure procedural fairness is accorded there must be a process of investigation to determine the merits of the complaint in the case of the vast majority of complaints. There should only be a narrow set of circumstances where the Office does not investigate with a clear example being where a court or OAIIC determination provides a clear answer. The Office needs to be very careful about not declining to investigate individual complaints where the individual may simply be having trouble explaining the nature of their complaint.
10. Paragraph 39 is too equivocal and quite vague. There is no one process for dealing with a complaint, or even a preferred option. The Office is a regulator with a range of powers. Each fact situation should be considered and the appropriate regulatory response made. There

should be no expectation that a determination is the appropriate procedure. The complaint may be serious and warranting immediate action. Based on the current experience the time from complaint to determination, when there is one, is in the vicinity of 2 years. Such a delay is of itself unacceptable however may be contrary to good policy if there is another action which can be taken more quickly and effectively. For example it is surprising that the Office has not availed itself of the considerable powers under section 98 to obtain injunctive relief, both in terms of preventing an acts or compelling acts. Actions in the Federal Magistrates Court would take less time than the current 2 year delay in process determination by way of the determination process.

11. Paragraph 39 should be drafted in terms where all options are available at the outset, and throughout the complaint handling procedure. As drafted paragraph 39 presupposes that a section 52 is the primary, or standard response, and there may be additional action taken. Section 36 sets out what must be included within a complaint. While it is understandable to regard the provisions in Part V, Division 1 as necessarily moving to a determination of the Commissioner, assuming the complaint remains extant, as a matter of law it is not necessary for a determination to be the end result. The Commissioner may take a range of other steps in addition to a determination, or instead of a determination.
12. Accordingly paragraph 39 should be redrafted to provide:

Where an investigation has been opened, conciliation has not resolved the matter and the complaint has not been declined the Office will consider which is the appropriate enforcement response for a complaint available under the Privacy Act 1988. The Office recognises no hierarchy of responses and will consider the appropriate response on the facts. The factors the Office will consider in determining which response is the most appropriate include but are not limited to:

- the timeliness of resolution. The Office is committed to providing resolving complaints in as timely a response as possible;
- nature of the breach, including whether serious or repeated interferences with privacy have been involved;
- urgency of response.;
- the public interest in taking more assertive action;

The Commissioner reserves the right to consider all options available under the Privacy Act to obtain the most just solution, including determinations, injunctive relief, enforceable undertakings and civil penalty proceedings.

13. The APF is of the view that the Privacy Commissioner has not been timely in handling complaints nor sufficiently prepared to use the panoply of increased powers available to him. A more assertive and varied approach to the privacy complaint handling process would be more consistent with an effective regulation of the Act.

Conciliating a complaint

14. The APF believes that the most effective means of conciliation is by face-to-face meetings where the complainant is prepared to undertake that process. In this context the respondent's

attitude should be given less weight, especially if it is an agency. It should be the preferred starting position. That should be reflected in paragraph 47. It is standard, if not mandatory practice, in courts and tribunals for the parties to be physically present at mediation. Often the parties are placed in different rooms, after a brief meeting or from the outset. The importance of the process is that the parties are proximate. A mediator/conciliator can deal with the issues and offers there and then. Phone, emails and even conferencing are not nearly as effective. Although we do note that phone conferences may be necessary given the location of the parties. The Office should ensure it has the necessary skills to conduct conciliation over the phone in an effective manner.

15. Paragraph 52 should be amended to read:

Where a complaint is not able to be resolved through conciliation the Commissioner or delegate shall after notifying the parties under section 40A(3) consider using his powers under the act where appropriate in relation to the complaint. Only where further action is not sustainable at law or where there is insufficient evidence to support further action will he exercise his powers under s40A(4).

As previously stated the APF has longstanding concerns about the effectiveness in dealing with complaints by Commissioners in the past. The fact that a matter does not resolve at conciliation is not relevant to the strength of the complaint or the importance of considering it further. If there is a basis in law and on the evidence for the Commissioner to take a range of actions after conciliation process has completed, albeit without resolution, he should do so. More importantly he should only exercise his powers under section 40A(4) as a last resort. That policy should be reflected in paragraph 52.

Deciding not to investigate a complaint

16. Paragraphs 60 and 61 accurately summarises the contents of section 41 of the Privacy Act. That however is not the issue. The provision is drawn broadly and gives the Commissioner significant discretion not to investigate. Unfortunately in the past that discretion has been exercised too freely and as a consequence the Act has been poorly regulated as far as dealing with complaints.
17. It is disappointing and extraordinary that this section is so brief and anodyne in its current form. No insight or guidance is provided by the Commissioner into how he approaches the use of his powers. This is in marked contrast to the detail to which the Draft chapters will go in other matters of less moment.
18. This section should set out, in varying degrees of detail depending on the issue, the relevant factors the Commissioner takes into account when deciding not to investigate or investigate further. For example when will the Commissioner exercise his discretion in relation to section 41(1)(c), where the complaint is made more than 12 months after the complainant became aware of the act or practice? It is not a limitations point. The Commissioner can still consider

the complaint if the knowledge of the complaint exceeds 12 months. What factors does he take into account? Using 12 months plus 1 day as a basis for not investigating would on the face of it, absent other factors, be unjust. What factors does the Commissioner consider when determining whether a complaint is frivolous? Similarly vexatious is a term the subject of significant law however the Commissioner does not set out how he interprets such a term in. How does the Commissioner determine whether a complaint is not made in good faith for the purpose of section 41(1)(d)? How does the Commissioner determine how an investigation “..is not warranted having regard to all the circumstances” for the purpose of section 41(1)(da). What circumstances? It is not beyond the wit of the Commissioner to provide **some** basis. It is unsatisfactory to provide no guidance on this and other sub sections of section 41. It is not necessary, or even desirable if it were possible, to codify or exhaustively define the circumstances when the Commissioner will exercise his discretion under section 41. That is as unacceptable as the current situation, where there is no meaningful commentary provided at all. Currently the process is, at best, opaque. More transparency is required.

19. Paragraph 62 is somewhat disingenuous. It is correct that the Commissioner’s decision to decline a complaint may be reviewed under the *Administrative Decisions (Judicial Review)* Act. That said many complainants have limited means. It is a dead letter provision for many claimants. Even those with means would find the process of review difficult to undertake. |The statement providing:

Given this there is a requirement that a decision to decline a complaint is based on information that can be subject to rigorous review. As such, there are circumstances where the Office seeks information from a respondent to assist in that decision making process.

has the wrong focus. The Commissioner should seek information as a matter of course to make a decision. As drafted the statement could be read as the Commissioner seeking information to permit him to successfully resist a review under the ADJR Act. It can be read, reasonably, as being self-serving. It is not at all clear what circumstances the above statement refers to. It should be deleted or revised

20. In relation to paragraph 63 there should be reference to the provision of the Act upon which the Commissioner relies.

Referral of matters

21. The APF makes not comment upon this section.

Chapter 5 — Determinations

Legislative framework

1. There is no provision in the Privacy Act which provides that the default position is that each party should bear its own costs. That seems to have been a policy that the Commissioner has adopted. That would seem to underpin the sentence in paragraph 2 which provides:

Parties generally bear their own costs in the complaint handling process

There is no need for such rigidity. Each case should be dealt with on its merits. Given section 52(3) specifically provides for the Commissioner to award an amount to reimburse a complainant for expenses reasonably incurred there is even less reason for this sentence. It should be noted that in accordance with dispute resolution principles in Australia the complaint should always be free and without risk of costs for the individual.

- 2 The APF otherwise does not make comment upon this section.

When will a determination be made?

3. As far as it goes APF supports the contents of this section. Under paragraph 5 it believes a further factor that should be taken into account are:
 - (a) that the complaint raises matters of public interest which warrants investigation and determination;
 - (b) a determination will clarify issues or provide guidance by way of analysis as to privacy intrusive acts or practices which organisations and agencies need to be aware of.
4. The Guidelines are general and there is limited precedent emanating from the Courts and Tribunals on privacy related issues. To that extent the determinations by the Commissioner may act as a form of precedent. Such rulings act to build up a body of common law which addresses matter of complexity or ambiguity until there is a more definitive ruling by the courts or amendment by the legislature. It is also important for the Commissioner, as regulator, to make determinations which deal with problems which are arising in the community. Part of the reason there is poor compliance by organisations and to a lesser extent agencies is the paucity of determinations in the past and the lack of signal through those determinations as to what is and is not acceptable under the Act. It is entirely appropriate on occasion to make determinations which will have an impact which extends beyond the parties to the complaint. Test cases are *de rigeour* for other regulators. It is difficult to reconcile the clear breaches of privacy that occur each year and the (increasing) volume of complaints with the small number of determinations which occur on a year on year basis. It is a failing which requires remedial action.
5. Paragraphs 9 - 10 seem to be drafted in substantially the same terms as paragraphs 5 - 6. Accordingly the APF refers to and repeats its submissions in paragraph 3 - 4 above as they apply to paragraph 9. Given the determination is based on an own motion initiative there is a greater reason for including those factors for consideration.

6. It is the APF's view that part of the reason for poor compliance by organisations is the perceived small risk of being subject to action by the regulator. There is some basis for that perception. While the number of determinations have increased markedly in last two years over the previous period the numbers of determinations are quite modest compared to the number of complaints made. Even after taking into the account the disparity in size and budget the Commissioner's level of activity compares quite unfavourably with the presence and actions taken by the Australian Securities and Investment Commission ("ASIC") and the Australian Competition and Consumer Commission ("ACCC"). Regulation of the Privacy Act has been decidedly light touch to the point of an invisible hand. There has been an excessive, perhaps even almost exclusive, focus on education through publications and speeches and a distinct perceived wariness of taking action.

Procedural steps in making a determination

7. The APF has no issue with the process set out in paragraph 13 save to say that there should be some reference to need to deal with matters expeditiously. There should be reference to either a timetable for the completion of steps or the expectation that steps will be completed by a certain date. It is a concern that determinations which are described as "..free and informal.." are taking in excess of 2 years from the date of complaint to reach resolution. That is longer than the average civil proceeding in the Federal Magistrates Court, a jurisdiction where there is normally legal representation and pleadings.
8. The section should set out a preferred period within which the determination should be completed. It can make reference to the various caveats associated with the further steps being required. It is important that the Commissioner set out the expectation. At the moment with no time periods set out, as are found in the Rules of Court in most jurisdictions there is nothing to measure the efficiency of the Commissioner's complaint handling processes save that clearly the time lag between complaint and determination is too long for no good reason.
9. The dot point in paragraph 13 providing:
 - In exceptional circumstances where confidential or commercially sensitive information is essential to the determination process, the Commissioner will accept that information on a confidential basis and provide access to a summary of that material to ensure the other party is not disadvantaged.

should be revised. It should be made clear that it is necessary for a respondent to establish a basis for claiming such confidentiality or commercial sensitivity. It is an oft-used claim and all too frequently an examination of the evidence reveals the claim is more grounded in preference rather than true confidentiality and sensitivity. Courts require substantiation. The Commissioner should require no less and be very parsimonious in allowing such latitude.

Content of determinations

10. The drafting of reasons for decision is not a formula. The Courts have resisted such exhortations when they are occasionally made. The key is for there to be a clearly understood path of reasoning, sufficient evidence upon which to base a finding and clearly understood findings. Good judicial officers follow a logical path in drafting their judgments. That almost invariably involves setting out the law and the facts and applying the facts to the law and indicating, where appropriate, the exercise of discretion and why. To the extent that the matters set out in paragraph 14 exhaustively set out what the Commissioner can do the APF is supportive.

Compensation

11. The APF believes it is completely unnecessary to include paragraph 15. The contents are not based on any legislative provision within the Privacy Act. Each case should be dealt with on its merits. The finder of fact needs to assess the circumstances of the case in light of relevant submission and precedent. As drafted the paragraph seems to be of the view that principles set out in the dot points to paragraph 15 are fixed and immutable. They are not.
12. It is flawed policy, fallacious analysis and poor drafting to state that:

the Commissioner is guided by the following principles on awarding compensation, drawn from a Federal Court decision

The Federal Court decision referred to is *Hall v A & A Sheiban Pty Ltd*¹⁰. It is not the only authority that is relevant in the consideration of damages. It is correct that the Administrative Appeals Tribunal in *Rummery and Federal Privacy Commissioner and Anor*¹¹ cited with approval *Hall* and distilled what it regarded were the relevant principles at paragraphs 31 & 32

In *Hall v A & A Sheiban Pty Ltd* [[1989\] FCA 72](#); [\(1989\) 20 FCR 217](#), the Federal Court gave detailed consideration to the determination of the entitlement to compensation, and the assessment of that compensation, under s 81 of the [Sex Discrimination Act](#). We are of the view that these principles are applicable to the issues we have to decide in relation to [s 52](#) of the [Privacy Act](#).

The principles which are relevant to this matter are:

- (a) where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course;
- (b) awards should be restrained but not minimal;
- (c) in measuring compensation the principles of damages applied in tort law will assist, although the ultimate guide is the words of the statute;
- (d) in an appropriate case, aggravated damages may be awarded;

¹⁰ (1989) 20 FCR 217

¹¹ [2004] AATA 1221

- (e) compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances

13. Nowhere in the *Hall* or *Rummery* is the principal enunciated that the matters dealt with in those cases and the ratio of those cases were the last word on the subject of damages. The law has developed since those cases were decided. It is relevant to note that the lexis nexis service, case base, regards this authority as warranting "cautionary treatment indicated." There is good reason for that. The law relating to damages in the human rights related field, such as discrimination (and the APF believes Privacy), has developed at a pace which goes beyond the general strictures of *Hall*. *Hall* has been considered and applied regularly. The law has also developed further in this field. The quantum of damages has increased considerably in the decade since *Rummery*. Yet the Commissioner has a frozen in time approach to the application of the relevant principles. This Rip Van Winkle approach to precedent hampers proper development of this jurisprudence.
14. In this context it is relevant to have regard, by way of example to *Richardson v Oracle Corporation Australia Pty Ltd*¹² where the Full Court of the Federal Court considered the award of damages under the Human Rights Act. At paragraph 95 the Court noted:

[95] An award of damages by way of compensation under s 46PO(4)(d) of the AHRC Act is to compensate for the injury suffered by the person harassed: see *Hall v A & A Sheiban* at 256 (Wilcox J), 281 (French J). ***In making an award, a court necessarily has regard to the general standards prevailing in the community.*** As indicated above, other awards of general damages for injury of the kind suffered by Ms Richardson may provide some measure of manifest inadequacy since they may provide some guidance as to what contemporary courts have discerned as proper compensation for such an injury according to generally prevailing community standards. Cases in the field of personal injury may be particularly useful because the object of an award of damages for non-pecuniary loss in such cases is much the same as an award of damages under s 46PO(4)(d) of the AHRC Act: see *O'Brien v Dunsdon* at 78 and *Teubner v Humble* (1963) 108 CLR 491 at 507 (Windeyer J); and *Qantas Airways Ltd v Gama* at [96].

[96] I begin by observing that, in the context of damages for personal injury, there is reason to believe that community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before. This was the assessment of the Victorian Court of Appeal in *Amaca Pty Ltd v King* [\[2011\] VSCA 447](#) (*Amaca Pty Ltd v King*). I refer to this case only to demonstrate the court's adoption of this proposition in 2011 and its subsequent effect in other cases more closely akin to the present case.

(Emphasis added)

15. The Commissioner should have regard to all relevant authority. *Hall* and *Rummery* do not cover the field and do not preclude such an exercise. In fact restricting consideration to such

¹² [2014] FCAFC 82

principles is in, of itself, an error of law. That such an approach has not been appealed is a matter of good fortune for the Commissioner rather than an endorsement of this approach.

16. The awards of compensation by the Commissioner has been risible. They bear no resemblance to actual damage suffered. That has resulted in a more sophisticated and nuanced approach to the award of damages. That approach has not found its way into the consideration of the Commissioner. There is now a significant disconnect between awards in the privacy field and that in the privacy area. There is no good reason for such a distinction per se.
17. By way of example in Victoria the Victorian Civil and Administrative Tribunal has been prepared to order significant damages in relation to human rights breaches. In *GLS v PLP*¹³ the Tribunal, per the President Justice Garde AO RFD, ordered the sum of \$100,000 for an egregious breaches of the *Equal Opportunity Act 1995*¹⁴. The Tribunal awarded the sum of \$100,000 in *Tan v Xenos (Nos 3)*¹⁵ while in the Federal Court the sum of \$90,000 as a pain and suffering component in *Poniatowska v Hickinbotham*¹⁶ the Federal Court awarded the sum of \$90,000 as part of a \$466,000 compensation payment.

Publication of determinations

18. There is no good reason for not publishing the name of a respondent who has been the subject of an adverse finding. Accordingly the reference to generally in first sentence of paragraph 22 should be deleted.

Review rights

19. The APF has not comment to make on this section.

Enforcement of determinations

- 20 . The APF has not comment to make on this section.

Representatives of the Foundation would be pleased to discuss this submission with you and address particular aspects in more detail.

Thank you for your consideration.

Yours sincerely

Australian Privacy Foundation

¹³ [2013] VCAT 221

¹⁴ Now repealed however a similar provision is replicated in section 125 of the Equal Opportunity Act 2010 at section 125(a)(b).

¹⁵ [2008] VCAT 584

¹⁶ [2009] FCA 680

Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby AC CMG and The Hon Elizabeth Evatt AC, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html

- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>