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Improving OAIC's Privacy regulatory action policy

Submission to the Office of the Australian Information Commissioner (OAIC)

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The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

Please note that APF does not have a single postal address – we prefer communication by e-mail. If a postal address is required please contact the signatory.

Please note that APF has no objection to the publication of this submission in full. To further the public interest in transparency of public policy processes, APF strongly supports the position that all submissions to public Inquiries and reviews should be publicly available, except to the extent that a submitter has reasonable grounds for confidentiality for all, or preferably part of, a submission.

1 Overview of APF's approach

APF commends OAIC for issuing a guide to its use of its regulatory powers. Properly used, such a guide is in itself a valuable aspect of the use of regulatory powers, by indicating to stakeholders (data controllers, potential complainants and their advisers) what they can expect in all aspects of the use of those powers.

In addition to commenting on the issues raised in OAIC's draft policy, APF wishes to do two other things in this submission:

(i) We suggest additional topics which should be covered in a comprehensive regulatory action policy; and
(ii) We suggest policies that we consider OIAC should adopt on those topics.

Even if OIAC does not agree with all of the policies APF suggests under (ii), we consider it is very important that this regulatory action policy does address the issues under (i).

2 Goals and principles [11] - [16]

APF does not criticise the goals of taking regulatory action identified by OIAC, or the principles that guide OIAC in taking such action, and wishes to particularly endorse two of the principles as being particularly relevant to the APF submissions that follow:

- The Principle of 'accountability … through a range of review of review and appeal rights' underlies APF's recommendations that OIAC should reconsider how it uses its s41 powers to decline to investigate, or further investigate, a complaint, so as to ensure that all complaints who could reasonably expect to access appeal rights are able to do so.
- The Principle of 'transparency … about the regulatory outcomes it has achieved' underlies APF's recommendations that OIAC should include in its Regulatory Action Policy details of how it will ensure that it provides sufficient transparency about such outcomes through reporting measures and standards which it adopts and to which it demonstrably adheres.

3 Declining to investigate complaints (s41), and effect on rights of appeal [23]

The APF has been concerned for many years that the use of section 41 to decline to determine a complaint has resulted in the privacy commissioner making a negligible number of determinations under s52. It is critical that people have confidence that the OAIC will consider and determine matters when appropriate.

APF submits that OAIC should develop, preferably within this Regulatory Action Policy, a detailed explanation of its policy on when it is appropriate for the OAIC not to investigate a complaint under each of the separate sub-clauses of s41(1), and under s41(2), rather than proceeding to a s52 determination.

Under the revisions to the Privacy Act now in force, if OIAC makes a determination under s52, then the parties to that determination now have (for the first time) a right of appeal against the Commissioner's determination. This means that every exercise by OIAC of the s41 power not to investigate also deprives the complainant of the ability to appeal against the OIAC's determination. The exercise of the s41 power is therefore now far more serious in its effects on the rights of complainants under the Act than it was previously, and is therefore deserving of more explanation as part of a Regulatory Action Policy, because it is in fact the regulatory action that affects the greatest number of complainants and respondents. Of the 1508 complaints closed in 2012-13, almost half (688) were closed under s41.[1]

In particular, *APF submits that OIAC's Regulatory Action Policy should include details of the policies applied by OIAC in its use of its s41(2)(a) power to refuse to investigate 'if the Commissioner is satisfied that … the respondent has dealt, or is dealing adequately, with the complainant.'* APF understands from OIAC OIAC Fact Sheets (June 2012), and from complainants, that the Commissioner uses this s41(2)(a) power even when the complainant is completely dissatisfied with how the respondent has dealt with the complaint, but the Commissioner is of a different opinion and considers the respondent's actions adequate. These are situations where the complaint is not trivial, or does involve a potential interference with privacy and is not otherwise ill-founded, or it would have been dealt with under s41(1). *APF submits that where use of s41(2)(a) is contemplated, these are situations where it would be consistent with the spirit of the Privacy Act that complainants should not be excluded from the option to appeal*. If the complainant disagrees with the Commissioner's view of the adequacy of the respondent's actions, then it is reasonable that this can be tested on appeal if they wish to pursue an appeal.

While there are clearly many instances where it is necessary and justifiable for OIAC to use s41, and the Act might well become unworkable if OIAC did not do so in relation to many of the sub-categories in s41(1), such reasoning is not applicable to s41(2)(a). In 2012-13 only 25 of the 868 complaints the Commissioner declined to investigate were declined under s41(2)(a). It can be assumed that a proportion of those 25 would not dispute a preliminary assessment by the Commissioner that s41(2)(a) was applicable, and wish to have a determination made under s52. And only of proportion of those complainants would actually pursue an appeal. Therefore, to adopt

[1] OIAC *Annual Report 2012-3*, Table 7.8, p. 72. Calculation for s41 is the total minus the first and last rows.

such a policy is likely to impose only a small extra administrative burden on OIAC, and only in potentially deserving instances. Nevertheless, even a small number of additional s52 determinations which give an explanation why OIAC considers that a complaint is not justified (on further consideration), or has been dealt with adequately by the respondent, would improve the currently low transparency of the OIAC's privacy complaints.

4 Interaction with domestic regulators and alternative complaint bodies [39] – [44]

APF submits that this part of the policy needs to deal specifically with situations where another regulator is investigating a matter but the OAIC is the only regulator who has the power to deal with the privacy aspects. In those cases, the investigation needs to occur in partnership.

A common example occurs in the financial services area. A licensed Financial Services Provider may be investigated by ASIC for breaches of any of the laws regulated by ASIC. That Financial Services Provider may also have been involved in listing inaccurate defaults on the credit reports of a number of debtors. In this situation, the inaccurate listings on the debtor credit reports can only be rectified by the OAIC. ASIC has no power in this regard.

APF submits that the Policy should specifically acknowledge that the OAIC has certain powers that other regulators do not have, particularly in relation to awarding compensatory damages, and due consideration to this will be given in determining whether another regulator can handle a matter.

In relation to paragraph 44, it is essential that the OAIC does not refer to any complaint body that does not have the appropriate powers to resolve the complaint. In our view, the circumstances where another complaint body has the same powers as the OAIC (excluding EDR) will be severely limited.

APF submits that in such circumstances, the OIAC should have an explicit policy that it will keep a complaint open until the other regulator has completed its consideration of the matter, in case there is a need for OIAC to take further remedial action. It appears that OIAC has done something similar to this in its recent joint investigation with ACMA of Telstra, and this is to be commended.[2]

Transparency and communication of privacy regulatory actions [49]-[58]

APF agrees that it is a vital part of OIAC's regulatory action policy that it should embody the Principle of 'transparency … about the regulatory outcomes it has achieved'. APF does not disagree with what is included in the draft Regulatory Action Policy, but consider that it omits a number of very important aspects of what should be part of OIAC's communications policy.

The 'Examples of communication' [57] do not mention publication of complaint summaries. From 2001-2011 Commissioners published on average 20 complaint summaries per year, but since January 2012 the Commissioner has published only one. APF assumes that this has been an unfortunate by-product of the requirement on OIAC to complete numerous sets of guidelines relating to the revisions to the Act, but that the normal level of publication of complaint summaries will now be resumed, and perhaps with some 'catch up' for 2012-13 in due course (as is happening in similar circumstances with the office of the Hong Kong Commissioner). *APF submits that the Regulatory Action Policy should include 'Summaries of significant complaints' in the list of 'Examples of communications', and should preferably indicate a target level of publication which is at least as high as the modest level of 20 summaries per annum previously obtained.* This would be in accord with the ICDPPC *Resolution on Case Reporting* (2009), resolution #1.[3] It is particularly

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[2] See <http://www.oaic.gov.au/news-and-events/media-releases/privacy-media-releases/telstra-breaches-privacy-of-15-775-customers>

[3] ICDPPC *Resolution On Case Reporting* (31st International Conference Of Data Protection and Privacy Commissioners Madrid, 5 November 2009). ICDPPC resolved 'to encourage data protection authorities: (1) To have a process for releasing copies or summaries of positions taken on a selection of complaints handled by the authority, illustrating typical or significant

important that these complaint summaries are published, because of the low, almost non-existent, number of determinations published each year (7 since 2001, and average of well under one per year), and the modest number of Commissioner-initiated investigation reports (5 in 2012-13).

APF submits that the Regulatory Action Policy should also state the basis on which OIAC will choose which complaints to summarise and publish, similar to the 'Factors taken into account' in [33], but preferably stating a standard to which OIAC agrees it will adhere. If OIAC developed and adhered to such a standard,[4] this would be an internationally-leading development.

APF submits that the Regulatory Action Policy should include three other improvements, which are largely a confirmation of best practices already adopted by OIAC:

(i) *That OIAC will continue to publish annual statistical details of the outcomes of complaints.* However, the current reporting format could be improved somewhat, because it makes it difficult to assess, for example, the total amount of compensation resulting from complaint settlements in a year. This would be consistent with the 2013 amendments to the OECD Privacy Guidelines, which 'encourage the development of internationally comparable metrics', with the explanatory materials clarifying that this includes publication of complaint statistics and similar matters than can improve policy-making, particularly if done in internationally consistent fashion.[5]

(ii) *That OIAC will continue to adhere to the standard method of citation of complaints summaries and other enforcement actions which is endorsed by APPA*, as it currently does with determinations and complaint summaries. This is in accord with the ICDPPC *Resolution on Case Reporting* (2009), resolution #2.[6]

(iii) *That OIAC will continue to allow published details of complaint summaries and other enforcement actions to be republished by third-party publishers*, as is currently the case. This is in accord with the ICDPPC *Resolution on Case Reporting* (2009), resolution #3.[7]

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interpretations and notable outcomes (such copies or summaries to be released in a form by which the identities of complainants and other individuals are anonymised);'

[4] One proposal for such a standard is in Part III of G Greenleaf 'Reforming Reporting of Privacy Cases: A Proposal for Improving Accountability of Asia-Pacific Privacy Commissioners' (2004) < http://ssrn.com/abstract=512782>.

[5] The matters discussed here are in Part Five 'National Implementation' and Part 6 'International Co-operation and Interoperability'.

[6] ICDPPC *Resolution On Case Reporting*, resolution #2 'To include an appropriate citation with each copy or summary to make it easy to clearly identify and refer to particular cases;'.

[7] ICDPPC *Resolution On Case Reporting*, resolution #2 ,'To take proactive steps to make those copies or summaries widely available, including using the Internet, to encourage comparative knowledge and stimulate research and debate;'.