

Investigation and Complaints

Privacy breaches

[10,000] Breach of privacy or breach of confidentiality requirement¹

Not every breach of a person's privacy, by disclosing personal information, will constitute a breach of a requirement to maintain confidentiality. It is important to determine what category the disclosed information falls into, as remedies and appropriate remedial action may differ.

A person's philosophical or religious beliefs, or their membership of a trade union, would not generally be regarded as confidential information although they may be regarded as recognisably private or personal. The misuse of personal information can give rise to remedies which would not be available under laws relating to the protection of confidential information.

Breaches of confidence arise out of a duty to observe a confidence. By contrast, a right of privacy arises from the nature of the information itself and, because it is private, for that reason alone should not be disclosed. However in some circumstances a breach of confidence can also be a breach of privacy.

Notes

1 For further discussion see guide card LAWS OF CONFIDENCE [110,000].

[10,050] What constitutes a privacy breach?

A privacy breach will occur when personal information, which is protected by statute, is collected, used or disclosed contrary to the requirements of the relevant privacy statute.²

The range of potential breaches is very wide. Examples include:

- (a) use of a person's personal details to sell them products totally unrelated to the purpose for which those details were disclosed and without their approval;³
- (b) failure to properly keep personal information secure which results in it being stolen;⁴ and
- (c) collecting health information about a person from a third party without the consent of the person.⁵

The privacy breach that occurs may have consequences for the person whose personal information was collected, used or disclosed, although sometimes they will not know that this has occurred. It may also have consequences for the agency or organisation which collected, used or disclosed the data contrary to the requirements of the relevant statute.

Notes

2 Including the Privacy Act 1988 (Cth), Personal Information and Privacy Act 1998 (NSW), Information Privacy Act 2000 (VIC), Information Privacy Act 2009 (QLD), Northern Territory Information Act 2002 (NT) and Personal Information and Protection Act 2004 (Tas).

3 NPP 2.1.

4 NPP 4.1.

5 NPP 10.1.

[10,100] Options available for a person who believes that their privacy has been breached

The appropriate courses of action available will depend upon the circumstances. Some

breaches will merely cause aggravation, such as when a person's name has been disclosed and placed on a third party's database without permission; some could cause a serious threat to life or health, such as where a person's name and address has been provided to a person who is known to be violent; others could cause embarrassment, such as when health information is improperly disclosed.

In some cases the complainant will seek simple remedies such as the removal of their name from a database. In others they may seek compensatory remedies such as apologies or damages.

If the breach of privacy also involves a breach of confidence a person may have a cause of action for such breach in the equity division of a State Court.

[10,150] Issues to consider before making a complaint about privacy breaches⁶

Before making a complaint to a regulatory authority about a perceived privacy breach there are a number of questions that need to be answered by the complainant:

- (a) Is the information personal information? That is, is it information that identifies the data subject or allows the identity of the data subject to be identified? If no, there has been no breach of privacy.
- (b) If yes, was the information contained in a record such as a letter, email or photograph or was it just contained in a conversation which was not recorded? If it was not contained in a record it will not be a breach of privacy.
- (c) If the information was contained in a record, is the complaint about a local, state or territory agency such as a local council or state government department? If yes, the complaint must be directed to the relevant State Privacy Commissioner.
- (d) Is the complaint about a federal government agency or an organisation with a turnover of more than \$3 million? If yes, the complaint should be made to the Federal Privacy Commissioner.
- (e) Is the complaint about:
 - (i) an organisation with a turnover of less than \$3 million?
 - (ii) the handling of an employment record by the current employer?
 - (iii) a politician or political party? or
 - (iv) the journalistic practice of a media organisation?

If yes, it is likely that it will not be able to be investigated by the Federal Privacy Commissioner or any State Privacy Commissioner.

Notes

⁶ The Office of the Australian Information Commissioner's website has useful '*compliance checkers*' for people alleging breaches of privacy contrary to the Commonwealth Privacy Act: www.privacy.gov.au/complaints/who/complaintchecker/

[10,200] Making a complaint

A complaint may be made to the Federal Privacy Commissioner by completing the form available at the Commissioner's website⁷ or otherwise in writing. The form is a useful method of ensuring that all relevant matters are covered.

Notes

⁷ www.privacy.gov.au/complaints/how/complaint-form.

[10,250] Representative complaints

Where the interference with privacy involves two or more individuals, one of the individuals may make a representative complaint.⁸

A representative complaint may only be made if it is made against the same person, arises out of the same or similar circumstances, and gives rise to a common issue of fact or law.⁹ It may be made without the consent of class members¹⁰ but must identify the class members, the nature of the complaints, the nature of the relief sought and questions of law or fact that are common to the complaints.¹¹

The Commissioner can on his or her initiative or on the application of a respondent determine that a complaint no longer continue as a representative complaint if satisfied that it would incur greater costs than if processed as individual complaints, it would not be an efficient and effective method of dealing with the complaints, it was not made in good faith or would otherwise be inappropriate.¹²

Examples of determinations following representative complaints are contained at 3.3.

Notes

8 Privacy Act 1988 (Cth) s 36(2).

9 Privacy Act 1988 (Cth) s 38(1).

10 Privacy Act 1988 (Cth) s 38(3).

11 Privacy Act 1988 (Cth) s 38(2).

12 Privacy Act 1988 (Cth) s 38A.

[10,300] Prior to making a complaint

Before a complaint is investigated, the Commissioner will usually require the complainant to have attempted to resolve the complaint with the agency or organisation about which the complaint is made.

If there is a doubt as to the identity of the organisation which held, used or disclosed the personal information which is thought to have been misused it is possible to make inquiries of a number of possible organisations to identify what personal information, if any, about the complainant is held by the agency or organisation. This is done by making an application for access to that information under NPP 6.¹³

Notes

13 See guide card NATIONAL PRIVACY PRINCIPLES.

[10,350] Action by a respondent on receiving a privacy complaint¹⁴

A valid complaint about breach of privacy can have serious repercussions for an agency or organisation. At a minimum it may result in the loss of a customer. At the other end of the spectrum it could result in a serious loss of reputation in a market or a claim for compensation, or both.

For this reason it is a good practice to act promptly when receiving a complaint and attempt to resolve it. Suggested procedures are:

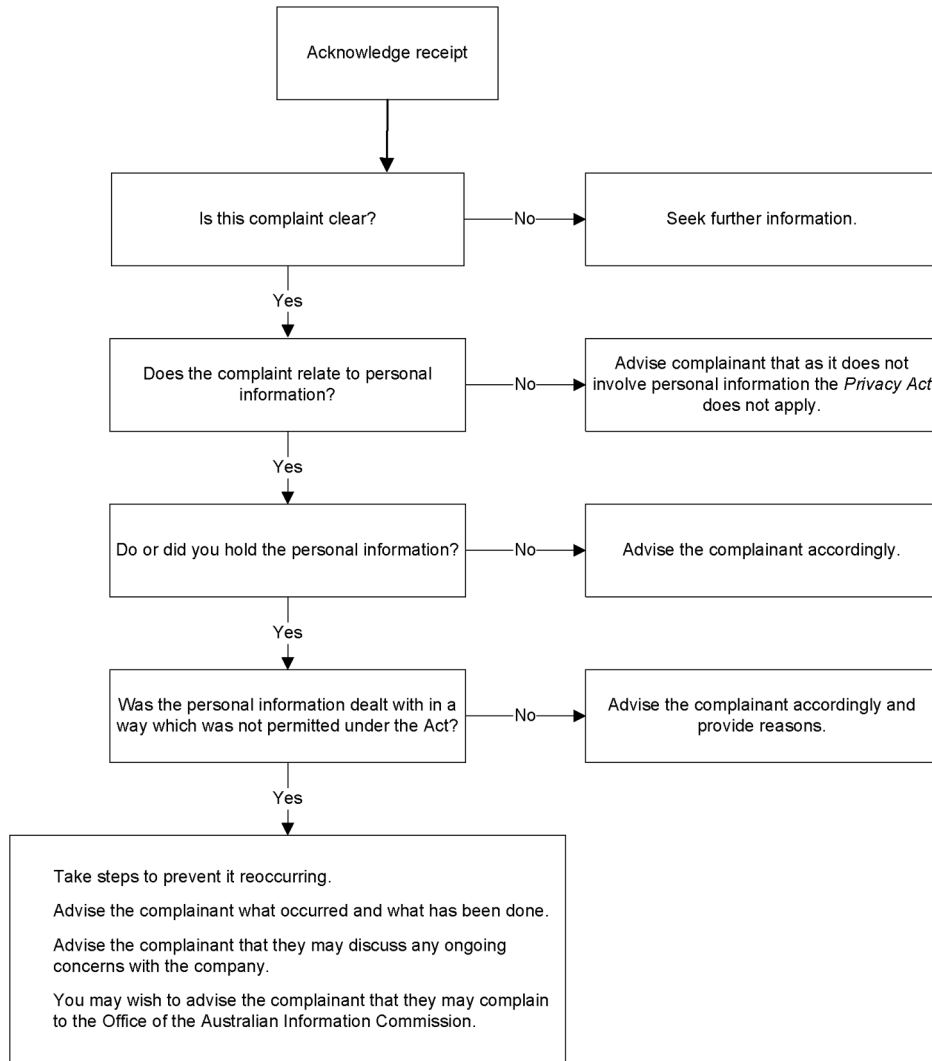
- (a) acknowledge receipt of the complaint and advise when a substantive reply will be given;
- (b) verify that the complaint relates to "personal information";
- (c) if the complaint is not made by the person whose personal information is involved, seek to establish their authority to act for the complainant;
- (d) check the details of the complaint to verify that the organisation did hold the personal information about the complainant in a record;
- (e) did the complaint involve:
 - (i) collection of personal information (NPP 1, IPP 1);
 - (ii) collection of sensitive information (NPP 10);

- (iii) use of personal information (NPP 2, IPP 10);
 - (iv) disclosure of personal information (NPP 2, IPP 11);
 - (v) accuracy of personal information (NPP 3, IPP 8);
 - (vi) security of personal information (NPP 4, IPP 4);
 - (vii) refusal of a request for access to personal information (NPP 6, IPP 6); or
 - (viii) transfer of personal information offshore (NPP 9).
- (f) investigate the alleged breach to determine if the act complained of was permitted under the relevant privacy principles. For example, the disclosure of the information was for the primary purpose for which it was collected or a reasonably expected secondary purpose;
- (g) if the practice was permitted under the NPPs, advise the complainant with the reasons; and
- (h) if the practice was not permitted, put measures in place to stop it happening again, take steps to ameliorate any damage to the complainant and advise the complainant of what action has been taken.

If the complaint is unclear it may be necessary to obtain further detail from the complainant to ascertain the full details of the complaint.

If the complainant is not satisfied with the action taken by the agency or organisation they may make complaint to the Commissioner.

Procedure on Receiving Complaint



Notes

- 14 See also Office of the Australian Information Commissioner, *Information Sheet (Private Sector) 27 — 2008: A step-by-step guide to internal investigations of privacy complaints by organisations* <http://www.privacy.gov.au/materials/types/infosheets/view/6560>.

Role of Federal Privacy Commissioner in Relation to Complaints

[11,000] Investigatory powers of the Federal Privacy Commissioner

The Commissioner may investigate an act or practice of an agency or an organisation that appears to breach the privacy of an individual. The Commissioner will first consider conciliation as a means to effect a settlement of the matters that gave rise to the investigation.¹⁵

The Commissioner as a matter of practice has adopted a policy of conciliating complaints, and making determinations as a last resort.

The Commissioner may exercise this power following a complaint¹⁶ or on the Commissioner's own motion where the Commissioner considers "it is desirable that the act or practice be investigated".¹⁷

The Commissioner has tended to investigate "high profile" data security breaches on the Commissioner's own motion.¹⁸

Notes

15 Privacy Act 1988 (Cth) ss 27(1)(a) and 27(1)(ab).

16 Privacy Act 1988 (Cth) s 36.

17 Privacy Act 1988 (Cth) s 40(2).

18 See for example, inquiry into privacy breaches by Google and Telstra in 2010.

[11,050] Investigations following complaints

Where a complaint is made to the Commissioner under s 36 of the Privacy Act, the Commissioner will usually require that the complainant must first complain to the respondent to the complaint, unless the Commissioner believes that this "is not appropriate".¹⁹

Notes

19 Privacy Act 1988 (Cth) s 40(1A).

[11,100] Investigations under Privacy Code

A Privacy Code will include provisions in relation to procedures to be followed where complaints are made under the Code.

If the Code contained incorporated provisions for a code adjudicator, the adjudicator may adjudicate in respect of the complaint or refer the complaint to the Commissioner.

If the Code adjudicator refers the complaint to the Commissioner and the Commissioner accepts the complaint after consultation with the complainant,²⁰ the Commissioner must deal with it as if it were a complaint under s 36 of the Privacy Act.²¹

As at June 2011 there were only three approved Privacy Codes and the Commissioner is appointed as the code adjudicator in each case.²²

Notes

20 Privacy Act 1988 (Cth) s 40(1B).

21 Privacy Act 1988 (Cth) s 40(1C).

[11,150] Power to decline or defer investigation complaints

The Commissioner may decline to investigate or cease investigating a complaint at any time if:

- the act is not an interference with privacy;
- the complaint was made more than 12 months after the complainant became aware of the act or practice;
- the complaint is “frivolous, vexatious, misconceived or lacking in substance”;
- the act is being dealt with adequately under another Commonwealth, territory or state law; or
- another Commonwealth, territory or state law provides a more appropriate remedy.²³

The Commissioner may decide not to investigate a complaint further if the Commissioner believes that the respondent has adequately dealt with the complainant or the respondent has not yet had an adequate chance to deal with the complaint.²⁴

The Commissioner may also defer conducting an investigation if an application has been made for a public interest determination and the Commissioner believes the interests of the people affected by the act or practice by such deferment would not be unreasonably prejudiced.²⁵

The Commissioner’s powers may not investigate a complaint by people who are not Australian citizens or where continued presence in Australia is subject to a limitation imposed by law if the complaint relates to correction of their personal information.²⁶

If the Commissioner decides not to investigate a complaint or not to investigate further the Commissioner must inform the complainant and respondent and give the reasons for the decision.²⁷

In the period 2009/10 the Commissioner:

- declined to investigate 51.4% of complaints; and
- ceased to investigate 33.2% of complaints after making preliminary inquiries.²⁸

Notes

23 Privacy Act 1988 (Cth) s 41(1).

24 Privacy Act 1988 (Cth) s 41(2).

25 Privacy Act 1988 (Cth) s 41(3). For a discussion of public interest determinations, see 3.4.

26 Privacy Act 1988 (Cth) s 41(4).

27 Privacy Act 1988 (Cth) s 48.

28 See 2009–10 Annual Report of the Office of the Privacy Commissioner
<http://www.privacy.gov.au/materials/types/reports/view/7140>.

[11,200] The conduct of investigations by Commissioner

The Commissioner is required to advise a respondent before commencing an investigation in relation to a complaint. If the complaint relates to a contracted service provider to an agency, the Commissioner must also advise the relevant agency.²⁹

An investigation must be conducted in private, but otherwise the Commissioner has a wide discretion on how to conduct the investigation and may make all such inquiries as he or she thinks fit.³⁰

There is no right for a complainant or respondent to appear before the Commissioner unless the Commissioner is intending to make a finding under s 52 which is adverse to a

complainant or respondent in which case they must be given an opportunity to make submissions, “orally, in writing or both”.³¹ It is unclear if the discretion to making submissions orally or in writing is a discretion to be exercised by the Commissioner or the respondent.

Where a person does appear they only may be represented by another person with the approval of the Commissioner.

When conducting an inquiry the Commissioner is required to inform the Minister if the Commissioner is giving the organisation or agency the opportunity to appear or make submissions. However the Commissioner may not discuss any matter relevant to an investigation unless the act or practice is engaged in by a contracted service provider for the purpose of providing a service to the agency.³²

If the Commissioner forms the view that an office of an agency has been guilty of a breach of duty or misconduct and “the evidence is of sufficient force to do so”, the Commissioner must inform an appropriate officer of the agency or the Minister.³³

Notes

29 Privacy Act 1988 (Cth) ss 43(1) and 43(1A).

30 Privacy Act 1988 (Cth) ss 43(2) and 43(3).

31 Privacy Act 1988 (Cth) s 43(5). For commentary on s 52 see 3.2.

32 Privacy Act 1988 (Cth) ss 43(8) and 43(8A).

33 Privacy Act 1988 (Cth) s 43(9).

[11,250] Commissioner acting on own motion

The Commissioner can and does investigate possible breaches of privacy on the Commissioner’s own motion. However where this course is taken the Commissioner is not able to make determinations under s 52 of the Privacy Act, as these powers can only be exercised following the investigation of a complaint.

In these circumstances the Commissioner is limited to making a report to the Minister.³⁴

Despite the lack of formal powers the Commissioner has managed to obtain undertakings from the organisations which have been found to have breached privacy. Following a privacy breach by Google in 2010 the Commissioner obtained undertakings that Google would:

- publish an apology;
- undertake a privacy Impact Assessment;
- provide a copy of the Assessment to the Commissioner; and
- regularly consult with the Commissioner about personal data collection activities.³⁵

Such undertakings have no status under the Privacy Act and cannot be enforced.

Notes

34 Privacy Act 1988 (Cth) s 30(1).

35 See *Privacy Matters* Winter 2010, <http://www.privacy.gov.au/materials/types/newsletters/view/7120>.

[11,300] Powers of Commissioner during investigation

Power to obtain information or documents

The Commissioner may issue a notice under s 44 of the Privacy Act requiring a person, who the Commissioner believes has information or documents relevant to an

investigation, to give the information in writing or produce the document to the Commissioner. However the Commissioner may not require and a person may not give information or documents if the information or document relates to an individual and the disclosure would reveal the identity of the individual. An exception arises if the individual made the complaint or has consented; or, in the case of a document, if the document has been amended to delete such information as reveals the identity of the individual.³⁶

The power of the Commissioner under s 44 to require a person to produce information or documents relevant to an investigation is similar to, but in many ways broader than, s 155 of the Competition and Consumer Act, 2010 (CCA). Section 155 gives the ACCC power to obtain information, documents and evidence relating to a matter that constitutes, or may constitute, a contravention of the CCA.

There is no case law which elucidates the operation of s 44. There is a large body of case law relevant to s 155 which may be applicable by analogy to s 44.

The main distinction between the two sections appears to be in the threshold requirement for the Commissioner or Commission to act. Under s 44, the Commissioner must have reason to believe that a person has information or a document relevant to an investigation under the Division. This appears to be much broader than the s 155 requirement of relevance to a matter that constitutes, or may constitute, a contravention of the CCA. Although it is not necessary for the Chairperson or Deputy Chairperson to have reason to believe that a breach of the CCA has actually occurred, they must hold a reasonable belief, based on facts, that the notice recipient is capable of providing information concerning a possible breach.

A notice under s 155 may be directed to anyone capable of providing information or documents relating to a possible contravention of the CCA, whether the person has engaged in contravening conduct or not.³⁷ Similarly, there is no requirement in s 44 that the notice recipient be the person actually suspected of a contravention. It has been held in relation to s 155 that where the notice is directed to a person suspected of having committed a breach of the CCA, the common law privilege against answering questions which may incriminate that person do not apply.

Under s 155, the term “information” has been held to be broad and far-reaching, including the identification and location of another person who in turn may be considered capable of providing information.³⁸

Power to require a person to attend and answer questions

The Commissioner may require a person to attend before the Commissioner and answer questions³⁹ and to examine that person under oath.⁴⁰

Power to direct people to attend a compulsory conference

The Commissioner may summon people to attend a compulsory conference. This includes the complainant, the respondent and any other person who the Commissioner considers is able to provide relevant information. Failure to attend without reasonable excuse constitutes an offence. A person may be required to produce documents at the conference.

Unless the Commissioner agrees an individual is not able to be represented at a compulsory conference and an organisation may only be represented by an officer or employee.⁴¹

Notes

36 Privacy Act 1988 (Cth) s 69.

37 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; 192 ALR 561; [2002] HCA 49; BC200206568.

- 38 *Seven Network Ltd v Australian Competition and Consumer Commission* (2004) 140 FCR 170; 212 ALR 31; [2004] FCAFC 267; BC200406517.
- 39 Privacy Act 1988 (Cth) s 44(3).
- 40 Privacy Act 1988 (Cth) s 45.
- 41 Privacy Act 1988 (Cth) s 47.

[11,350] Conciliation and Determinations under the Privacy Act 1988 (Cth)

The Privacy Act provides an avenue for individuals to complain about acts or practices of an organisation or agency that may be an interference with their privacy. The Privacy Act provides the Commissioner with the power to investigate, conciliate and make determinations to resolve complaints made by individuals.

The Privacy Act provides the Commissioner with two formal means of complaint resolution following investigation: the power to conciliate the matter to effect a settlement between the parties; and the power to make a formal determination in relation to the matter.

The Office of the Australian Information Commissioner's (OAIC) approach to complaint handling is that "compliance will be achieved most often by helping organisations to comply rather than seeking out and punishing the few organisations that do not".⁴² Past practice suggests that the OAIC is inclined to conciliate a complaint, rather than make a formal determination — in the past 18 years, successive Commissioner's have found it necessary to use the determination-making power under s 52 of the Privacy Act in only eight cases.

Notes

- 42 Office of the Australian Information Commissioner, *Information Sheet (Private Sector) 13 — 2001: The Federal Privacy Commissioner's Approach to Promoting Compliance with the Privacy Act* <http://www.privacy.gov.au/materials/types/infosheets/view/6545>.

[11,400] Conciliation of complaints by the Commissioner

The Commissioner may endeavour, by conciliation, to effect a settlement of the matters that gave rise to an investigation.⁴³ This power relates to complaints against both organisations and agencies and may be utilised only in circumstances where the Commissioner considers it appropriate to do so.⁴⁴ A conciliation will usually be the first point at which the Commissioner attempts to resolve a privacy related matter.⁴⁵

The Privacy Act does not prescribe the manner in which a conciliation must take place, however a conciliation can occur at any stage once an investigation has started and may:

- be conducted in writing with the OAIC writing to the parties;
- involve a face to face meeting where both parties and a conciliator are present;
- be conducted via a telephone conference call involving the parties and a conciliator; or
- involve the conciliator speaking to one party at a time.⁴⁶

Possible outcomes from a conciliation include:

- an apology or acknowledgement;
- a change to the respondent's practices or procedures;
- the respondent taking steps to address the matter;
- payment of money for expenses or in recognition of other non-financial loss; or
- redress via other non-financial options.⁴⁷

During the conciliation, a complainant may be required to present evidence in order to substantiate any financial or non-financial loss suffered as a result of the breach.

Where the parties agree on an outcome to resolve the complaint, the OAIC may close the complaint on the basis that it has been adequately dealt with. Where a respondent has agreed to a reasonable outcome but the complainant does not agree with that proposal, the OAIC may nevertheless close the complaint on the grounds that the respondent has adequately dealt with the matter.

If the parties cannot reach agreement during the conciliation, the OAIC may decide to close the complaint or proceed to make a determination instructing the respondent on how to resolve the complaint, including by ordering the respondent to pay compensation, alter its practices or procedures, or to apologise to the complainant.

Notes

- 43 Privacy Act 1988 (Cth) ss 27(1)(a), 27(1)(ab).
- 44 Privacy Act 1988 (Cth) ss 27(1)(a), 27(1)(ab).
- 45 Office of the Australian Information Commissioner *What Happens to Your Complaint?* <http://www.privacy.gov.au/complaints/process>.
- 46 Office of the Australian Information Commissioner Information Sheet *Conciliation of Privacy Complaints* <http://www.privacy.gov.au/materials/types/infosheets/view/6430>.
- 47 Office of the Australian Information Commissioner Information Sheet *Conciliation of Privacy Complaints* <http://www.privacy.gov.au/materials/types/infosheets/view/6430>.

[11,450] Complaints handled by the Commissioner

During 2009–2010,⁴⁸ 1201 complaints in total were received by the then Office of the Privacy Commissioner. 15.4% of those complaints were closed following an investigation of the matter by the Commissioner. In 33.2% of cases, the Commissioner closed the complaint after making preliminary enquiries only, while the Commissioner declined to investigate 51.4% of the complaints received.

Where the Commissioner closed a complaint after finding it to have been adequately dealt with by the respondent, the most common remedy for the complainant was an apology, followed by staff training and counselling. Compensation was the third most common remedy, and was paid in fewer than 16% of investigations. The 29 compensation payments awarded to complainants during this period can be summarised as follows:

Compensation payment	Number of compensation payments
Under \$1000	11
Between \$1001 and \$5000	12
Between \$5001–\$10,000	5
Over \$10,000	0
Confidential settlement	1

Where the Commissioner proceeded to close a matter after making preliminary inquiries, the amendment of a complainant's record was the most common resolution, followed by access to records and other remedies. Compensation was paid in less than 5% of complaints resolved at the preliminary inquiries stage. The 24 compensation payments awarded to complainants during this period can be summarised as follows:

Compensation payment	Number of compensation payments
Under \$1000	15
Between \$1001 and \$5000	5
Between \$5001–\$10,000	0
Over \$10,000	0
Confidential settlement	4

Notes

48 2009–10 Annual Report of the Office of the Privacy Commissioner
<http://www.privacy.gov.au/materials/types/reports/view/7140>.

[11,500] Case Notes from the former Office of the Privacy Commissioner

Complaints resolved by apology

Some examples where apologies were considered appropriate include in the following cases:

- (a) *Y v Real Estate Agent* [2004] PrivCmrA 11 — The complainant was party to a rental agreement with the respondent, a real estate agent. The respondent contacted a member of the complainant's family whose phone number was included on the complainant's rental file. On contacting the family member, the respondent requested that the family member tell the complainant that she owed a number of weeks rent and that, if the arrears were not immediately paid, an eviction notice would be sent. On becoming aware of this disclosure of her personal information, the complainant wrote a letter of complaint to the respondent. The respondent replied with an apology letter which stated that the disclosure would not have occurred had the respondent paid their rent on time. The Commissioner found the letter of apology from the respondent did not provide an adequate resolution to the complaint and the respondent agreed to provide an additional apology letter which did not make reference to the complainant's rental arrears. The complainant was satisfied with this response and the Commissioner closed the complaint.⁴⁹
- (b) *C v Health Service Provider* [2008] PrivCmrA — The complainant was a relative of a client of the health service provider, who had concerns about their relative's health. The complainant outlined these concerns in a letter to their relative's employer marked 'confidential', seeking the employer's intervention and assistance. The health service provider disclosed the complainant's name and job title to the relative, and advised the relative of the nature of the letter. The complainant alleged that, as a result of the alleged disclosures, they and their family were subjected to ongoing harassment and difficulties from the relative. The Commissioner opened an investigation and, during conciliation of the matter, the Commissioner received information from the complainant that they were seeking an apology acknowledging the health service provider had improperly disclosed their personal information. The health service provider offered a letter of apology as full and final settlement of the complaint. This was accepted by the complainant, and the Commissioner ceased the investigation.⁵⁰

Complaints resolved through compensation

Some examples where compensation was considered appropriate include in the following cases:

- (a) *G v Law Firm* [2007] PrivCmrA — The complainant insured their home with an insurance company, and made a claim on that policy. After undertaking some investigations into the claim, including a criminal history check, the insurance company rejected the claim and engaged a law firm to defend it in any resulting litigation from the complainant. The law firm also represented a second insurance company which was involved in a separate case involving the complainant and, on their behalf, requested access to the information obtained by the first insurance company, including the criminal history check. After obtaining this information, the law firm approached the complainant's solicitor for the second insurer case with a view to settling the matter. The Commissioner found that while the law firm had reason to suspect unlawful activity had or was being engaged in by the complainant, the disclosure of that information was not necessary and it was used to add weight to the second insurer's legal argument in defending itself against the complainant's insurance claim. The law firm offered a sum of compensation and an apology, to which the complainant requested a higher amount of compensation. Given the complainant could not substantiate their claims to the higher amount of compensation and was not seeking any procedural changes to the law firm's practices, the Commissioner was satisfied that the law firm adequately responded to the matter by making an offer of compensation and apologising.⁵¹
- (b) *P v Commonwealth Agency* [2009] PrivCmrA 19 — The complainant left the marital home due to domestic violence and moved to a residence in a dangerous area. Due to safety fears, the complainant moved again and changed their name by deed poll. This was concealed from the ex-partner. The complainant confidentially advised a Commonwealth agency of their change in name and address. The complainant received a phone call from the ex-partner addressing them by their new name. The ex-partner said the agency had sent a letter to the former-marital home, setting out the complainant's new name and address. The agency apologised and offered to pay an amount in compensation, which the complainant rejected. The complainant wrote a letter to the Commissioner, seeking compensation for health treatment and other costs incurred after the disclosure and for injury to feelings. During conciliation, the agency agreed to pay some, but not all, of the claimed amount. The complainant provided further evidence to support their claim for compensation and the agency agreed to increase the monetary sum. The complainant agreed to settle the matter and the Commissioner closed the complaint.⁵²
- (c) *U v Major Banking Institution* [2004] PrivCmrA 9 — A default notice regarding the complainant's private bank account was disclosed by the respondent to the complainant's spouse, from whom she was separated. The respondent said the error was due to out-of-date information being held on its database and apologised for the incident. The complainant wrote to the Commissioner, seeking compensation. The Commissioner found there was no clear nexus between the loss suffered by the complainant and the breach by the respondent, finding the complainant had not substantiated a claim for compensation. The Commissioner was of the opinion that an apology from the respondent was an appropriate response to the complaint and declined to investigate the matter.⁵³
- (d) *IPP II* [1995] PrivCmrA 1 — A Commonwealth agency sent a notice in error to the complainant who was not a client, advising him of his obligations as a

non-custodial parent. At the time, the complainant's wife was suspicious that he may have been involved in an affair with another woman, but was satisfied when the agency explained its mistake and apologised. Eighteen months later, when a second unrelated notice was sent to the complainant, his wife became convinced that he must have had one or more extra-marital relationships. The complainant wrote to the Commissioner, seeking compensation for the hurt and humiliation caused. The Commissioner found that the agency failed to take adequate steps to check the accuracy of information, and that compensation should be paid due to the severe strain placed on the complainant's marriage.⁵⁴

- (e) *Inaccurate default listing* [1998] PrivCmrA 10 — The complainant applied for a loan with a credit provider and was sent a letter stating that his application was unsuccessful due to a credit report held by a credit reporting agency which indicated a default had been listed against the complainant by a bank. The complainant denied he had ever dealt with the bank and, after extensive efforts, received a letter from the bank confirming this fact. The credit reporting agency conducted an investigation and removed the incorrect listing. The complainant requested \$65 in compensation from the credit reference agency for the time and cost of phone calls to the bank, which the credit reference agency refused to honour. The complainant wrote to the Commissioner, seeking compensation. The Commissioner contacted the bank who stated that, as a gesture of goodwill, it would compensate the complainant for the amount requested.⁵⁵

Notes

49 *Y v Real Estate Agent* [2004] PrivCmrA 11 (1 June 2004).

50 *C v Health Service Provider* [2008] PrivCmrA (29 May 2008).

51 *G v Law Firm* [2007] PrivCmrA (29 June 2007).

52 *P v Commonwealth Agency* [2009] PrivCmrA 19 (22 December 2009).

53 *U v Major Banking Institution* [2004] PrivCmrA 9 (1 June 2004).

54 *IPP II* [1995] PrivCmrA 1 (1 July 1995).

55 *Inaccurate default listing* [1998] PrivCmrA 10 (1 July 1998).

[11,550] Determinations by the Commissioner

The Privacy Act provides that the Commissioner may make a determination dismissing a complaint, or may find a complaint substantiated and make a determination which may include one or more of the following declarations:

- that the agency or respondent organisations has engaged in conduct constituting an interference with the privacy of an individual and should not repeat or continue such conduct;⁵⁶
- that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant, including injury to the complainant's feelings or humiliation suffered by the complainant;⁵⁷
- that the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice that is the subject of the complaint, including injury to the complainant's feelings or humiliation suffered by the complainant; or⁵⁸
- that it would be inappropriate for any further action to be taken in the matter.⁵⁹

The Privacy Act does not prescribe any limit to monetary compensation that may be awarded by the Commissioner to a complainant to redress loss or damage suffered.

The Commissioner can also make 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.⁶⁰

A determination may also include an order that an agency or respondent:

- make an appropriate correction, deletion or addition to a record or to a credit information file or credit report; or
- attach a statement provided by the complainant of a correction, deletion or addition sought by a complainant to a record, credit information file or credit report.⁶¹

Where the principal executive of an agency is the respondent to a determination, that person must take all such steps as are reasonably within their power to ensure:

- that the terms of the determination are brought to the notice of all members, officers and employees of the agency who may engage in the kind of conduct to which the determination relates;
- that no member, officer or employee of the agency repeats or continues conduct that is covered by the declaration;
- the performance of any act or course of conduct that is covered by a declaration included in the determination.⁶²

Where a contracted service provider for a Commonwealth contract is the respondent to a determination, the Commissioner must give a copy of the determination to each agency to which services are or were to be provided under the contract, and also to those agencies to which the Commissioner considers it appropriate to give a copy.⁶³ The Commissioner may only give an agency a recommendation after consulting the agency.⁶⁴ An agency must tell the Commissioner of any action they wish to take in relation to the recommendation within 60 days of receiving the recommendation.⁶⁵

Where the contracted service provider either dies or ceases to exist, or becomes bankrupt, insolvent or commences to be wound up, the Commissioner may substitute a specified agency as a respondent to that determination.⁶⁶ The Commissioner must provide the substituted agency with a notice setting out the intention and reasons for making the proposed determination, and provide the agency with an opportunity to make submissions in relation to the proposed determination.⁶⁷

In relation to representative complaints,⁶⁸ a determination by the Commissioner that the complainants are entitled to compensation may provide for payment of specified amounts, or of amounts worked out in a manner specified by the Commissioner, and must make provision for the payment of the money to the complainants concerned.⁶⁹ The Commissioner may also, if necessary, give such directions in relation to the manner in which a class member is to establish their entitlement to the payment of an amount under the determination, and the manner for determining any dispute regarding the entitlement of a class member to the payment.⁷⁰ The determination must also identify the class members who are to be affected by that determination.⁷¹

To date, there have only been eight complaint determinations made by the Commissioner. The Commissioner seeks to resolve most complaints by conciliation, but will proceed to make a determination under the Privacy Act where:

- the interests of the parties will be better served by the opportunity to make formal submissions to the Commissioner, either orally or in writing;
- the issues in the complaint are not clear and the Commissioner will be required to make findings;
- the conciliation has failed or the complaint is not appropriate for conciliation; or
- there is a public interest in proceeding to a determination.⁷²

A determination made by the Commissioner is not binding or conclusive between any of the parties to the determination.⁷³ The making of a determination is, however, subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth). Enforcement of determinations is discussed at Pt 4.

Notes

- 56 Privacy Act 1988 (Cth) ss 52(1)(b)(i)(A), 52(1)(b)(i)(B).
- 57 Privacy Act 1988 (Cth) s 52(1)(b)(ii).
- 58 Privacy Act 1988 (Cth) s 52(1)(b)(iii).
- 59 Privacy Act 1988 (Cth) s 52(1)(b)(iv).
- 60 Privacy Act 1988 (Cth) s 52(3).
- 61 Privacy Act 1988 (Cth) s 52(3B).
- 62 Privacy Act 1988 (Cth) s 59.
- 63 Privacy Act 1988 (Cth) s 53A(1).
- 64 Privacy Act 1988 (Cth) s 53A(2).
- 65 Privacy Act 1988 (Cth) s 53A(3).
- 66 Privacy Act 1988 (Cth) s 53B(1).
- 67 Privacy Act 1988 (Cth) s 53B(3).
- 68 Privacy Act 1988 (Cth) s 6: "A complaint where the persons on whose behalf the complaint was made include persons other than the complainant, but does not include a complaint that the Commissioner has determined should no longer be continued as a representative complaint".
- 69 Privacy Act 1988 (Cth) s 52(4).
- 70 Privacy Act 1988 (Cth) s 52(5).
- 71 Privacy Act 1988 (Cth) s 53.
- 72 *Privacy Matters* Spring 2006 <http://www.privacy.gov.au/materials/types/newsletters/view/6259#mozTocId741735>.
- 73 Privacy Act 1988 (Cth) s 52(1A).

[11,600] Previous determinations by the Commissioner

Previous determinations made by the Commissioner are set out below:

- (a) **Complaint Determination No 5 of 2004:** The complainant was employed by a government agency and, during his employment, the complainant made a public interest disclosure to the Ombudsman, alleging the agency had failed to enforce provisions of the Liquor Act adequately in relation to offences concerning minors and associated issues of public safety. During the course of investigating the complainant's public interest disclosure, the agency disclosed to the Ombudsman that they presumed the public interest disclosure had emanated from the complainant, and proceeded to disclose a range of personal information about the complainant. The complainant complained to the Commissioner, seeking compensation of \$20,000 and an apology. While the Commissioner was satisfied there had been an interference with the complainant's privacy, he declined to make a declaration as to compensation.⁷⁴
- (b) *Rummery and Federal Privacy Commissioner* (2004) 85 ALD 368; 39 AAR 166; [2004] AATA 1221; BC200410810: Complaint Determination No 5 of 2004 (above) was appealed to the Administrative Appeals Tribunal (AAT). The AAT overturned the Commissioner's determination, awarding the complainant \$8000 in compensation for loss and damage suffered due to an inappropriate disclosure of personal information by the Department of Justice and Community Safety of

the Australian Capital Territory. The Commissioner's decision not to award compensation to the complainant was based on the Commissioner's finding that the disclosures were made to two staff of the ACT Ombudsman's office; did not occur outside the confines of the investigating team and were not known more widely in that office or in the community. The tribunal found that the interference with the complainant's privacy was serious and warranted a payment of compensation, though it was well short of the \$200,000 claimed by the complainant.⁷⁵

- (c) **Complaint Determination No 4 of 2004:** A representative complaint was made against a residential tenancy database operator. The database held personal information about applicants for tenancies, including information relating to alleged default on tenancy agreements, such as failures to pay rent or damaging property. The database also held personal information about applicants for tenancies in an "enquiries database". The database operator collected personal information about tenants and applicants from property managers who were "members" of the database. It was alleged that the collection of personal information from prospective occupants and concerning "enquiries" made by real estate agents, were unnecessary for the functions and activities of the tenancy database operator. The Commissioner found there had been a breach of the Privacy Act, and made a statement in which the Commissioner encouraged the database operator to develop a collection statement which identified the personal information that was to be used or collected; information about how individuals may resolve disputes about the accuracy, completeness or currency of listings; and information about individual's right to complain to the Commissioner.⁷⁶
- (d) **Complaint Determination No 3 of 2004:** A representative complaint was made against the same residential tenancy database operator as in Complaint Determination No 4 of 2004 (above). It was alleged that information was stored on the database for a period between 3 years and indefinitely. The Commissioner found that the database operators failed to take reasonable steps to ensure the information it held was up-to-date, or to destroy or de-identify personal information which was no longer needed. The Commissioner made recommendations requiring the deletion of certain out-of-date information.⁷⁷
- (e) **Complaint Determination No 2 of 2004:** A representative complaint was made against the same residential tenancy database operator as in Complaint Determination No 4 of 2004 (above). It was alleged that the database operator did not provide individuals with sufficient notice to make individuals aware that they had been listed on the database and thus allow them to challenge the accuracy, completeness and currency of a listing. It was alleged that there were a number of other problems which contributed to the allegation that the information held on the database was not sufficiently accurate, complete or up-to-date. The Commissioner found the database operator to be in breach of NPPs 3, 6.5 and 6.6 and formulated a list of recommendations to ensure the personal information it held, used or disclosed was accurate, complete and up-to-date.⁷⁸
- (f) **Complaint Determination No 1 of 2004:** A representative complaint was made against the same residential tenancy database operator as in Complaint Determination No 4 of 2004 (above). It was alleged that the database operator imposed excessive charges for individuals to access their personal information held on the database. The Commissioner found the database operator had breached NPP 6.4(a) and recommended the reduction of access charges.⁷⁹

- (g) **Complaint Determination No 1 of 2003:** The complainant lodged a complaint with an agency against the owner of a dog. The complainant did not want their identity to be revealed to the dog owner and wished to remain anonymous. The respondent was a lawyer who had been briefed to represent the agency in proceedings against the dog owner. The respondent disclosed the identity of the complainant to the dog owner and, as a result, the dog owner commenced proceedings in order to obtain a restraining order against the complainant. The Commissioner found the respondent in breach of IPP 11, stating the respondent had disclosed the identity of the complainant to the dog owner in circumstances where it was unauthorised to do so. The Commissioner awarded the complainant \$1,000 in compensation for the loss of his privacy, and \$1,643 relating to legal costs, travel expenses and loss of income incurred in the restraining order proceedings.⁸⁰
- (h) **Complaint Determination No 2 of 1993:** The first complainant was a Member of Parliament and the second complainant was an adviser on his staff. The complaint arose from an item published in a newspaper which concerned the complainants. The article referred to information which was identical to that which the Member of Parliament had given the Minister for Administrative Services (the first respondent), in a letter written in confidence, seeking a reimbursement in respect of an expense incurred by the Member of Parliament in connection with his responsibilities as a member. It was contended the material contained in the letter was personal information within the meaning of the Privacy Act. The Commissioner found that while there had been a disclosure in breach of IPP 11, there was insufficient evidence to specify who was responsible for that disclosure and, accordingly, could take no further action in the matter.⁸¹
- (i) **Complaint Determination No 1 of 1993:** The complainant interviewed for a job and, during the interview, was offered the position. During the interview, the complainant advised he had previously been enlisted in the army. The complainant did not provide a discharge certificate and the employer contacted the army base following the interview. The army base advised that the complainant had been discharged as he had been absent without leave for more than six months. The usual practice of the army on discharge is to provide the member with a certificate setting out the soldier's rank and period of service, but no reason for discharge is given. On arrival at work, the employer dismissed the complainant and asked him to leave immediately. The Commissioner found the Department of Defence had not taken steps to ensure the complainant's record was protected by security safeguards to prevent unauthorised access, disclosure or other misuse. The Commissioner found there had been a breach of IPP 4 and IPP 11 and ordered compensation for economic and non-economic loss as a result of the interference with the complainant's privacy.⁸²

Notes

74 Office of the Australian Information Commissioner, Complaint Determination No 5 of 2004 <http://privacy.gov.au/materials/types/determinations/view/6028>.

75 *Rummery and Federal Privacy Commissioner* (2004) 85 ALD 368; 39 AAR 166; [2004] AATA 1221; BC200410810.

76 Office of the Australian Information Commissioner, Complaint Determination No 4 of 2004 <http://privacy.gov.au/materials/types/determinations/view/6027>.

77 Office of the Australian Information Commissioner, Complaint Determination No 3 of 2004 <http://privacy.gov.au/materials/types/determinations/view/6026>.

- 78 Office of the Australian Information Commissioner, Complaint Determination No 2 of 2004 <http://privacy.gov.au/materials/types/determinations/view/6025>.
- 79 Office of the Australian Information Commissioner, Complaint Determination No 1 of 2004 <http://privacy.gov.au/materials/types/determinations/view/6024>.
- 80 Office of the Australian Information Commissioner, Complaint Determination No 1 of 2003 <http://privacy.gov.au/materials/types/determinations/view/6792>.
- 81 Office of the Australian Information Commissioner, Complaint Determination No 2 of 1993 <http://privacy.gov.au/materials/types/determinations/view/6030>.
- 82 Office of the Australian Information Commissioner, Complaint Determination No 1 of 1993 <http://privacy.gov.au/materials/types/determinations/view/6029>.

[11,650] Public Interest Determinations and Temporary Public Interest Determinations by the Commissioner

The Privacy Act provides the Commissioner with the power to determine that an act or practice shall be disregarded where the act or practice might otherwise constitute a breach of the IPPs in the case of a Commonwealth public sector agency, or the NPPs or approved privacy code in the case of a private sector organisations.⁸³

The Commissioner may make a “Public Interest Determination” only when satisfied that the public interest in the agency or organisation doing the act or engaging in the practice outweighs to a substantial degree the public interest in adhering to that IPP, NPP or approved privacy code.⁸⁴

The Privacy Act gives the Privacy Commissioner the power to make a Temporary Public Interest Determination in limited circumstances, where an application for a Public Interest Determination contains matters of an urgent nature.⁸⁵

In determining the public interest aspect of an application for a Public Interest Determination or Temporary Public Interest Determination, the Commissioner may consider matters including:

- the potential for the proposed act or practice to harm the interests of individuals;
- the extent to which the proposed act or practice is inconsistent with an individual’s reasonable expectation of privacy;
- the nature of the public interest objectives served by the proposed interference with privacy;
- the need to balance competing interests;⁸⁶ and
- the impact on the public interest if the proposed act or practice is not permitted.⁸⁷

The steps to obtaining a Public Interest Determination can be summarised as follows:

- (1) the applicant prepares an application for the determination. If the application raises issues of an urgent nature, the Commissioner may consider issuing a Temporary Public Interest Determination;
- (2) the Commissioner publishes notice of receipt of the application and calls for expressions of interest of submissions on the issue;
- (3) the Commissioner prepares a draft determination based on the information and submissions received. The applicant and interested parties will be invited to notify the Commissioner as to whether they wish to attend a conference to discuss the draft determination;
- (4) the Commissioner will convene a conference if requested by any interested party; and
- (5) the Commissioner will make a final determination based on the information presented to the Commissioner, including throughout the consultation and conference processes.⁸⁸

Notes

- 83 Privacy Act 1988 (Cth) s 72.
- 84 Privacy Act 1988 (Cth) s 72.
- 85 Privacy Act 1988 (Cth) s 80A.
- 86 These “competing interests” are set out in s 29 of the Privacy Act 1988 (Cth) and include “the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information (through the media and otherwise) and the recognition of the right of government and business to achieve their objectives in an efficient way”.
- 87 Office of the Australian Information Commissioner *Public Interest Determination Procedure Guidelines* <http://www.privacy.gov.au/law/act/pid>.
- 88 Office of the Australian Information Commissioner *Public Interest Determination Procedure Guidelines* <http://www.privacy.gov.au/law/act/pid>.

[11,700] Current Public Interest Determinations and Temporary Public Interest Determinations

Some current Public Interest Determinations include the following:

- Public Interest Determination 1: Disclosure by the Director of Public Prosecutions to the Victorian Mental Health Board — disclosure of personal information to assist the Board in assessing whether individuals (with a criminal history) should continue to be detained in mental institutions;⁸⁹
- Public Interest Determination 2: Disclosure by the Department of Immigration, Local Government and Ethnic Affairs to the Office of the Awards and National Symbols — disclosure of information about citizenship status for the purpose of considering applications for Australian honours;⁹⁰
- Public Interest Determination 3A: Disclosure by the Director of Public Prosecutions to relevant statutory disciplinary or regulatory bodies;⁹¹
- Public Interest Determination 4: Disclosure by the Australian Federal Police — disclosure of police reports for the purposes of pursuing insurance claims or civil litigation;⁹²
- Public Interest Determination 5: Disclosure by the Australian Federal Police to the Australian Institute of Criminology — disclosure of personal information contained in homicide files for research purposes;⁹³
- Public Interest Determination 7: Disclosures by the Department of Foreign Affairs and Trade of personal information of Australians overseas to their next of kin in certain limited circumstances;⁹⁴
- Public Interest Determination 8: Disclosure of personal information contained in certain Commonwealth Director of Public Prosecutions files relating to serious incidences of fraud, dishonesty and deception to the Australian Institute of Criminology for research purposes;⁹⁵ and
- Public Interest Determination 10: Determination to exempt providers of health services in certain circumstances from complying with NPP 10.1.⁹⁶

Some current Temporary Public Interest Determinations include:

- Temporary Public Interest Determination 2010-1: disclosure by the Department of Immigration and Citizenship to allow collation of victims of crime statistics involving student visa holders for research purposes; and
- Temporary Public Interest Determination 2009-1 and Determination 2009-1A: determination on the collection and use of contact details of genetic relatives to enable disclosure of genetic information.⁹⁷

Notes

- 89 Issued 14 August 1990, Gazette 14 December 1991, see Office of the Australian Information Commissioner, *Public Interest Determinations* <http://www.privacy.gov.au/law/act/pid>.
- 90 Issued 16 July 1990, Gazette 14 December 1991, see Office of the Australian Information Commissioner, *Public Interest Determinations* <http://www.privacy.gov.au/law/act/pid>.
- 91 Issued 22 August 1991, Gazette 14 December 1991, see Office of the Australian Information Commissioner, *Public Interest Determinations* <http://www.privacy.gov.au/law/act/pid>.
- 92 Issued 29 April 1991, Gazette 14 December 1991, see Office of the Australian Information Commissioner, *Public Interest Determinations* <http://www.privacy.gov.au/law/act/pid>.
- 93 Issued 29 April 1991, Gazette 14 December 1991, see Office of the Australian Information Commissioner, *Public Interest Determinations* <http://www.privacy.gov.au/law/act/pid>.
- 94 Issued 21 October 1997, Gazette 19 December 1997, see Office of the Australian Information Commissioner, *Public Interest Determinations* <http://www.privacy.gov.au/law/act/pid>.
- 95 Issued 22 March 2002, Gazette 1 May 2002, Effective 26 August 2002, see Office of the Australian Information Commissioner, *Public Interest Determinations* <http://www.privacy.gov.au/law/act/pid>.
- 96 Issued 6 December 2007, Effective 11 December 2007, see Office of the Australian Information Commissioner, *Public Interest Determinations* <http://www.privacy.gov.au/law/act/pid>.
- 97 Office of the Australian Information Commissioner, *Temporary Public Interest Determinations* <http://www.privacy.gov.au/law/act/pid>.

[11,750] Enforcement of decisions made under the Privacy Act 1988 (Cth)

Part V Division 3 of the Privacy Act applies to determinations made under s 52 where the respondent to the determination is not an agency or the principal executive of an agency. Of the eight determinations made under s 52 since the commencement of the Privacy Act in 1989,⁹⁸ four have a respondent other than an agency or principal executive of an agency. It also applies to determinations made by an adjudicator for an approved privacy code in relation to a complaint made under the code.

Section 55(1)(a) gives force to a declaration of the Commissioner under s 52(1)(b)(i)(B) — ie, a declaration that the respondent has engaged in conduct constituting an interference with the privacy of an individual and should not repeat or continue such conduct — by providing that an organisation that is the respondent to such a determination must not repeat or continue the conduct.

Section 55(1)(b) gives force to a declaration of the Commissioner under s 52(1)(b)(ii) — ie, a declaration that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant — by providing that an organisation that is the respondent to such a determination must perform the act or course of conduct.

Section 55(2) makes similar provisions for determinations made under approved privacy codes.

Notes

- 98 Office of the Australian Information Commissioner, *Determinations* <http://www.privacy.gov.au/law/apply/determinations>.

[11,800] Enforcement by Federal Court or Federal Magistrates Court

Section 55A gives the Federal Court and the Federal Magistrates Court power to enforce a determination. Proceedings may be commenced by the complainant; the

Commissioner, if the determination was made under s 52; or the adjudicator for the approved privacy code, if the determination was made under an approved privacy code.

The court will conduct a hearing de novo to determine whether the respondent has interfered with the privacy of the complainant.⁹⁹ However, the court may receive as evidence the written reasons of the Commissioner or an adjudicator for an approved privacy code, a copy of any document that was before the Commissioner or adjudicator, and/or a copy of a record of any appearance before the Commissioner or adjudicator.¹⁰⁰ Additionally, a certificate setting out findings of fact made by a Commissioner or an adjudicator for an approved privacy code will be prima facie evidence of those facts, but not of the existence of a breach.¹⁰¹

In conducting a hearing and making an order under s 55A, the court must have regard to the matters set out in s 29(a).¹⁰²

If the court is satisfied that there has been interference with the complainant's privacy, the court may make such orders as it thinks fit, including a declaration of right¹⁰³ or an interim injunction.¹⁰⁴

In *Gao v Federal Privacy Commissioner*,¹⁰⁵ the applicant sought relief against a government department for breaches of the Privacy Act and IPPs. A breach of the Privacy Principles is not directly actionable under the Privacy Act. Complaints about interference with privacy must be made to the Privacy Commissioner under s 36 of the Privacy Act.¹⁰⁶ The court's only jurisdiction is under s 55A, to enforce determinations made under the Privacy Act, and that remedy was not sought in the present proceeding.¹⁰⁷

The Office of the Australian Information Commissioner has not yet needed to approach the court under s 55A to seek enforcement of a determination.¹⁰⁸

Notes

- 99 Privacy Act 1988 (Cth) s 55A(5).
- 100 Privacy Act 1988 (Cth) s 55A(6), (7).
- 101 Privacy Act 1988 (Cth) s 56.
- 102 Privacy Act 1988 (Cth) s 55A(7A); ie, "the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information (through the media and otherwise) and the recognition of the right of government and business to achieve their objectives in an efficient way".
- 103 Privacy Act 1988 (Cth) s 55A(2).
- 104 Privacy Act 1988 (Cth) s 55A(3).
- 105 (2002) 76 ALD 447; [2002] FCA 823; BC200203521.
- 106 Id at [22].
- 107 Id at [23]; see also *Palmer v Child Support Registrar* [2003] FMCA 394; *Day v Lynn* [2003] FCA 879; BC200305553 at [50] ("There is . . . no provision in the Privacy Act for a breach of the Privacy Principles to be directly actionable in this Court"); *Ibarcena v Templar* [1999] FCA 900; BC9903772 at [9] ("[The applicant] cannot simply allege a breach of an Information Privacy Principle of the Privacy Act for the purpose of enlivening this Court's jurisdiction and for the grant of relief."); cf *Seven Network (Operations) Ltd v Media Entertainment and Arts Alliance* (2004) 148 FCR 145; 134 IR 19; [2004] FCA 637; BC200402867 at [40] ("There is no express provision that limits pursuit of complaints of breach of the Principles to the making of a complaint to the Privacy Commissioner and what follows from that. I can find no such necessary implication from the terms of the Act as a whole or in Pt V of it. Indeed, the presence of s 55A (and also s 62 which deals with enforcement of a determination against an agency) points in the opposite direction.") (Note that these comments are *obiter dicta*.)
- 108 Office of the Australian Information Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, p 318, March 2005 <http://www.privacy.gov.au/law/reform/review>; see also Office of the Australian Information Commissioner, *Information Sheet (Private Sector) 13 — 2001: The Federal Privacy Commissioner's*

[11,850] Review and enforcement of determinations involving Commonwealth agencies

Part V Div 4 of the Privacy Act applies to determinations made under s 52 where the respondent to the determination is an agency or the principal executive of an agency. Of the eight determinations made under s 52 since the commencement of the Privacy Act in 1989,¹⁰⁹ four have as the respondent an agency or principal executive of an agency.

Section 58(a) gives force to a declaration of the Commissioner under s 52(1)(b)(i) — ie, a declaration that the respondent has engaged in conduct constituting an interference with the privacy of an individual and should not repeat or continue such conduct — by providing that an organisation that is the respondent to such a determination must not repeat or continue the conduct.

Section 58(b) gives force to a declaration of the Commissioner under s 52(1)(b)(ii) — ie, a declaration that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant — by providing that an organisation that is the respondent to such a determination must perform the act or course of conduct.

If an agency fails to comply with s 58, the Commissioner or the complainant may make an application to the Federal Court or Federal Magistrates Court for an order directing the agency to comply.¹¹⁰ The court may also make any other order it thinks fit to secure compliance.¹¹¹

Section 59 imposes a number of responsibilities upon principal executives of agencies who are respondents to determinations by the Commissioner. If a principal executive of an agency fails to comply with s 59, the Commissioner or the complainant may make an application to the Federal Court or the Federal Magistrates Court for an order directing the principal executive to comply.¹¹² The court may also make any other order it thinks fit to secure compliance.¹¹³

Section 60 provides that a complainant is entitled to be paid any amount for redress of loss or damage or reimbursement of expenses that is specified in a declaration in accordance with ss 52(1)(b)(iii) or 52(3).¹¹⁴

Notes

109 see Office of the Australian Information Commissioner, *Determinations* <http://www.privacy.gov.au/law/apply/determinations>.

110 Privacy Act 1988 (Cth) s 62(1), (3).

111 Privacy Act 1988 (Cth) s 62(4).

112 Privacy Act 1988 (Cth) s 62(2), (3).

113 Privacy Act 1988 (Cth) s 62(4).

114 Privacy Act 1988 (Cth) s 60.

[11,900] Reports by the Commissioner

Investigation of an act or practice

Where the Commissioner has investigated an act or practice other than under ss 36 or 40(1B), the Commissioner may report to the Minister about the act or practice. The Commissioner must report if so directed by the Minister, or if the Commissioner thinks the act or practice is an interference with the privacy of an individual and the Commissioner has not effected a settlement of the matter.¹¹⁵

Where the Commissioner is required to report to the Minister and the investigation is conducted under ss 27(1)(a), 28(1)(b) or (c), or 28A(1)(b), the report must set out the Commissioner's findings, reasons, and recommendations (including for payment of compensation or other remedies for loss and damage). The report must be served on the body investigated, the responsible Minister, and any person affected by the act or practice under investigation.¹¹⁶

If the body investigated has not taken reasonable steps to prevent a repetition or continuation of the act or practice within 60 days after being served with the report, the Commissioner must give a further report to the Minister, who must cause it to be laid before each House of the Parliament.¹¹⁷

Examination of a proposed enactment

Where the Commissioner has examined a proposed enactment under s 27(1)(b), he or she may report to the Minister.¹¹⁸ The Commissioner must report to the Minister, including any recommendations for amendment of the proposed enactment, if he or she thinks that the enactment would require or authorise acts or practices that would interfere with individual privacy.¹¹⁹ If the Commissioner believes a further report is in the public interest, he or she may give such a report to the Minister, who is to cause it to be laid before each House of the Parliament.¹²⁰

Monitoring of activities and conducting audits

Where the Commissioner has monitored an activity or conducted an audit in the performance of the function referred to in ss 27(1)(c), (h), (ha), (j), (k), (m) or (r), 28(1)(e), (f) or (h) or 28A(1)(g), (j), (j) or (k), he or she may report to the Minister, and must do so if so directed by the Minister.¹²¹ If the Commissioner believes a further report is in the public interest, he or she may give such a report to the Minister, who is to cause it to be laid before each House of the Parliament.¹²²

Exclusion of certain matters from reports

Section 33(2) sets out a number of reasons for which the Commissioner may exclude a matter from a report.¹²³ For example, a matter may be excluded to prevent prejudice to national security or relations between governments, the disclosure of certain deliberations and other protected information, or the endangerment of the life or safety of any person. The Commissioner must try to achieve an appropriate balance between the reasons for exclusion and the desirability of ensuring that interested persons are sufficiently informed of the results of the Commissioner's investigation, examination or monitoring.¹²⁴ Where a matter is excluded, the Commissioner must give a report to the Minister setting out the reasons for the exclusion.¹²⁵

Notes

115 Privacy Act 1988 (Cth) s 30(1).

116 Privacy Act 1988 (Cth) s 30(3).

117 Privacy Act 1988 (Cth) s 30(4), (5).

118 Privacy Act 1988 (Cth) s 31(1), (3).

119 Privacy Act 1988 (Cth) s 31(2).

120 Privacy Act 1988 (Cth) s 31(4), (5).

121 Privacy Act 1988 (Cth) s 32(1).

122 Privacy Act 1988 (Cth) s 32(2), (3).

123 Privacy Act 1988 (Cth) s 33(1).

124 Privacy Act 1988 (Cth) s 33(3).

125 Privacy Act 1988 (Cth) s 33(4).

[11,950] Injunctions

Section 98 of the Privacy Act allows the Federal Court or Federal Magistrates Court to grant an injunction restraining a person from acts or omissions that have contravened or would contravene the Privacy Act and, where desirable, requiring the person to do any other act or thing.

If the court is satisfied that the person has already engaged in an act or omission in contravention of the Privacy Act, it may grant an injunction regardless of whether the person intends to continue or repeat the conduct.¹²⁶ If it appears to the court that a person will engage in an act or omission in contravention of the Privacy Act if an injunction is not granted, the court may grant an injunction regardless of whether the person has previously engaged in the conduct and regardless of whether there is imminent danger of substantial damage to any person.¹²⁷

In *Seven Network (Operations) Ltd v Media Entertainment and Arts Alliance*¹²⁸ the applicant sought injunctions and positive orders under s 98 to restrain breaches of the NPPs by the respondents. Justice Gyles held that the line of authority in which it is established that the court has no direct role in the enforcement of the Privacy Principles is not applicable to s 98. In that case breaches of the National Privacy Principles were established, and the applicant was held to be entitled to injunctions and other orders. Justice Gyles suggested that the principles developed in relation to the similar power in s 80 of the Trade Practices Act (now ss 232–235 of the CCA) give useful guidance as to the proper interpretation of s 98.¹²⁹

The court may also grant interim injunctions under s 98(3) pending the determination of an application for a permanent injunction. No undertaking is to be required as a condition of the granting of an interim injunction.¹³⁰

The Commissioner has not yet sought an injunction under s 98 to ensure compliance with the Privacy Act.¹³¹

Notes

126 Privacy Act 1988 (Cth) s 98(5)(a), (6)(a).

127 Privacy Act 1988 (Cth) s 98(5)(b), (6)(b).

128 (2004) 148 FCR 145; 134 IR 19; [2004] FCA 637; BC200402867.

129 For examples of unsuccessful applications for injunctions under s 98, see *Hendy v Manager Centrelink (Ipswich)* [2004] FMCA 579; BC200406965; *Yousif v Commonwealth Bank of Australia (No 2)* (2009) 185 IR 414; [2009] FCA 656; BC200905310 and *Ajok v Minister for Immigration and Citizenship* [2010] FMCA 331; BC201003315.

130 Privacy Act 1988 (Cth) s 98(7).

131 Office of the Australian Information Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, p 319, March 2005. <http://www.privacy.gov.au/law/reform/review>; see also Office of the Australian Information Commissioner, *Information Sheet (Private Sector) 13 — 2001: The Federal Privacy Commissioner's Approach to Promoting Compliance with the Privacy Act* <http://www.privacy.gov.au/materials/types/infosheets/view/6545>.

Appeal rights under the Privacy Act 1988 (Cth)

[12,000] Administrative Appeals Tribunal

An application may be made to the AAT for review of a declaration or refusal to make a declaration under ss 52(1)(b)(iii) or 52(3) that a claimant is entitled to an amount for redress of loss or damage or reimbursement of expenses.¹³²

Review by the AAT is available only where the respondent is an agency or a principal executive of an agency. Where such a respondent wishes to make an application to the AAT it must obtain the permission of the Minister.¹³³

Where an application is brought for review by the tribunal of a decision of the Commissioner, the Commissioner must lodge with the tribunal a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and giving the reasons for the decision; and every other document or part of a document that is in the Commissioner's possession or under its control and is relevant to the review by the tribunal.¹³⁴ Copies of the statement and documents must also be given to the other party to the proceeding.¹³⁵

Note that if the Tribunal is of the opinion that particular other documents in the Commissioner's possession or under his or her control may be relevant, it may require the Commissioner to provide them.¹³⁶ This requirement has effect notwithstanding any rule of law relating to privilege or the public interest in relation to the production of documents.¹³⁷ In *Forsyth and Federal Privacy Commissioner*¹³⁸ the tribunal required the Commissioner to produce correspondence and legal advice.

If the AAT decides that the Commissioner's decision is incorrect, it may either vary the decision, or set it aside and substitute its own decision or remit the matter for reconsideration by the Commissioner in accordance with its directions or recommendations.¹³⁹

Notes

132 Privacy Act 1988 (Cth) s 61(1); for an example of a successful application under s 61, see *Rummery v Federal Privacy Commissioner* (2004) 85 ALD 368; 39 AAR 166; [2004] AATA 1221; BC200410810; cf *Epifano and Privacy Commissioner* (2010) 52 AAR 164; [2010] AATA 489; BC201004593, in which the tribunal held that it did not have jurisdiction to review a decision of the Commissioner under s 41(2)(a) of the Act.

133 Privacy Act 1988 (Cth) s 61(2).

134 Administrative Appeals Tribunal Act 1975 (Cth) s 37(1).

135 Administrative Appeals Tribunal Act 1975 (Cth) s 37(1AE).

136 Administrative Appeals Tribunal Act 1975 (Cth) s 37(1AE).

137 Administrative Appeals Tribunal Act 1975 (Cth) s 37(3).

138 (2004) 80 ALD 489; 38 AAR 347; [2004] AATA 175.

139 Administrative Appeals Tribunal Act 1975 (Cth) s 37(2).

[12,050] Judicial review

Within 28 days of the Commissioner making a decision not to investigate or not to further investigate a complaint, or within 28 days of a determination by the Commissioner following an investigation, a claimant or respondent may make an application to the

Federal Court for judicial review of the decision or determination under the Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act).¹⁴⁰

However, as with all other reviews conducted under the ADJR Act, the court will review only the process followed by the Commissioner in making the decision or determination, not the merits or substance of the decision or determination.¹⁴¹

If the court finds that the determination was wrong in law or the Commissioner's powers were improperly exercised, it may refer the matter back to the Commissioner for further consideration according to law.¹⁴²

Notes

- 140 See Office of the Australian Information Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, p 29, March 2005 <http://www.privacy.gov.au/law/reform/review>; see also Office of the Australian Information Commissioner, *Appeal rights* <http://www.privacy.gov.au/complaints/appeal>; see *Ajok v Minister for Immigration and Citizenship* [2010] FMCA 331; BC201003315, in which the court refused to grant relief under the ADJR Act on the basis that no error affecting a decision of the Commissioner to cease investigation of a matter could be identified, and the time limit had expired; and *A v Australian Information Commissioner* (2011) 121 ALD 94; [2011] FCA 520; BC201103113, in which an application for judicial review of a decision of the Commissioner not to investigate a complaint pursuant to s 40(1A) of the Act was dismissed as incompetent.
- 141 See *Phillips v Military Rehabilitation and Compensation Commission* (2006) 90 ALD 667; [2006] FCA 882; BC200605232, in which Cowdroy J conducted a judicial review of a decision of the agency respondent on the assumption that a breach of the Information Privacy Principles would render a decision of the respondent invalid (at [29]); *Day v Lynn* [2003] FCA 879; BC200305553, in which Stone J considered whether the respondent had erred in law within the meaning of s 5(1)(f) of the ADJR Act by receiving evidence in breach of the IPPs (at [49]–[51]).
- 142 Office of the Australian Information Commissioner, *Information Sheet (About the Office): Client Service Charter* <http://www.privacy.gov.au/materials/types/infosheets/view/5889>.

[12,100] Ombudsman

A complaint may be made to the Commonwealth Ombudsman, who has power to investigate action relating to a “matter of administration” taken by the Office of the Australian Information Commissioner.¹⁴³

Where the Ombudsman is of the opinion:

- (a) that the action:
 - (i) appears to have been contrary to law;
 - (ii) was unreasonable, unjust, oppressive or improperly discriminatory;
 - (iii) was in accordance with a rule of law, a provision of an enactment or a practice but the rule, provision or practice is or may be unreasonable, unjust, oppressive or improperly discriminatory;
 - (iv) was based either wholly or partly on a mistake of law or of fact; or
 - (v) was otherwise, in all the circumstances, wrong;
- (b) that, in the course of the taking of the action, a discretionary power had been exercised for an improper purpose or on irrelevant grounds; or
- (c) in a case where the action comprised or included a decision to exercise a discretionary power in a particular manner or to refuse to exercise such a power:
 - (i) that irrelevant considerations were taken into account, or that there was a failure to take relevant considerations into account; or
 - (ii) that the complainant in respect of the investigation or some other person should have been furnished, but was not furnished, with particulars of the reasons for deciding to exercise the power in that manner or to refuse to exercise the power;

and the Ombudsman considers that some action should be taken, the Ombudsman must report to the agency concerned.¹⁴⁴ The Ombudsman must also provide a copy of the report to the relevant Minister.¹⁴⁵

The Ombudsman may make recommendations as follows:

- (a) that a decision, recommendation, act or omission should be referred to an appropriate authority for further consideration;
- (b) that some particular action could be, and should be, taken to rectify, mitigate or alter the effects of a decision, recommendation, act or omission;
- (c) that a decision should be cancelled or varied;
- (d) that the rule of law, provision of an enactment or practice on which a decision, recommendation, act or omission was based should be altered;
- (e) that reasons should have been, but were not, given for a decision; or
- (f) that any other thing should be done in relation to a decision, recommendation, act or omission.¹⁴⁶

The Ombudsman may request the agency concerned to provide particulars of any action that it proposes to take with respect to the report.¹⁴⁷

Notes

143 Ombudsman Act 1976 (Cth) s 5(1)(a).

144 Ombudsman Act 1976 (Cth) s 15(1), (2).

145 Ombudsman Act 1976 (Cth) s 15(6).

146 Ombudsman Act 1976 (Cth) s 15(2).

147 Ombudsman Act 1976 (Cth) s 15(4).