



Telecommunications
Industry
Ombudsman

Submission to Attorney-
General's Department
Privacy Act Review
Discussion Paper
January 2022

Introduction from Ombudsman, Judi Jones

I welcome the opportunity to comment on the Privacy Act Review Discussion Paper (**Discussion Paper**), released by the Attorney-General's Department.

The Telecommunications Industry Ombudsman (TIO) has an interest in the proposed reforms from two perspectives. The TIO's interest is both as an entity subject to the Australian Privacy Principles (APPs) and as an external dispute resolution (EDR) scheme recognised by the Office of the Australian Information Commissioner (OAIC) to handle privacy-related complaints under the *Privacy Act 1988*.

In financial year 2020-21, the TIO handled 4,312 complaints about how a TIO member has dealt with consumers' personal information. The TIO also investigates systemic issues related to privacy. Recently, we published two systemic investigation reports which highlight privacy issues arising from fraudsters accessing telecommunications accounts¹ and the impact of family violence on telecommunications consumers.²

The Privacy Act Review is timely, and we broadly support proposals which strengthen privacy protections for consumers. Our feedback aims to assist the Department in achieving the right balance between enhanced privacy protections and obligations that are clear and effective in practice, especially in the way those obligations relate to EDR schemes.

I look forward to the outcome of the Privacy Act Review following the Department's Final Report.

¹ *Defending phone and internet accounts from fraudsters* (November 2021)

² *Meeting the needs of consumers impacted by family violence* (December 2020)

1. Regulatory reform should retain a complaint handling body specialising in privacy

The Discussion Paper proposes three options for reforming the regulatory framework and role of the OAIC. We encourage any regulatory reform to retain a complaint handling body which can take privacy complaints about any APP entity.

'Option 1' of the Discussion Paper's alternative regulatory models proposes a greater role for recognised EDR schemes. It would require all APP entities to participate in a recognised EDR scheme where one is available. The OAIC would then refer all privacy complaints in each sector to the EDR scheme wherever possible.

We support a 'no wrong door' approach to privacy complaint handling. In most cases, EDR schemes such as the TIO are well equipped to deal with privacy complaints in their sector. However, in some cases, we consider a complaint handling body specialising in privacy may be more appropriate.

Some privacy breaches may involve multiple APP entities from different sectors

For example, a privacy breach may have been repeated or involve multiple APP entities. In these circumstances the APP entities involved in the breach may not all be members of the same recognised EDR scheme. To ensure all complaint issues are dealt with in a timely and effective way in the same forum, it may be more appropriate such complaints are dealt with by a complaint handling body specialising in privacy.

The compensation limits of EDR schemes may not be appropriate for complaints about serious privacy breaches

Some privacy complaints may involve egregious breaches and compensation claims that exceed an EDR scheme's financial limit. For example, the TIO has a financial limit for the total value of compensation it can award. From 1 January 2022, this limit is \$100,000.

2. Recognised EDR schemes should be excluded from the proposed requirements for collecting information from an indirect source

The Discussion Paper proposes an additional requirement for APP entities where they receive personal information about an individual from a third party.³ APP entities would be required to take reasonable steps to satisfy themselves the information was originally collected from the individual in accordance with APP 3.

While we are supportive of stronger privacy protections, we encourage the Department to clarify how the proposal would apply to EDR schemes in practice. The proposal may have unintended consequences for recognised EDR schemes like the TIO, particularly where we receive information from consumer representatives. We do not currently verify how information from third parties is collected and are unlikely to be able to do this in every situation.

If the proposed requirement proceeds, we recommend the Department consider an exemption for recognised EDR schemes. Having an easy pathway for consumers to appoint complaint representatives is important to ensuring the accessibility of EDR schemes.

We regularly receive personal information from third parties

As part of our usual complaint handling activities, we regularly receive personal information from third parties. Where a representative handles a complaint on behalf of a consumer, the representative usually provides personal information about the consumer to assist us in dealing with the complaint. We also request information from our members to help us resolve complaints, some of which may include a consumer's personal information.

Sometimes, a consumer gives us unsolicited personal information about a third party. Such information may be relevant to dealing with their complaint. For example, a consumer may tell us their abusive ex-partner is involved with their account.

The proposal may prevent EDR schemes from accepting complaints from consumer representatives

In many cases, it may not be practicable for EDR schemes like the TIO to comply with a positive obligation to be reasonably satisfied a consumer representative collected information about a consumer in accordance with APP 3.

A consumer representative is often a friend or family member of the consumer. Most consumer representatives are unlikely to understand or be subject to the requirements of APP 3.

The proposed requirement may prevent EDR schemes from accepting complaints from a significant number of consumer representatives.

³ Proposal 10.3

3. The role of EDR schemes in a direct right of action should be clarified

We welcome the Department's proposal to introduce a direct right of action for individuals whose privacy has been interfered with by an APP entity.⁴ We support additional pathways for individuals to enforce their privacy rights.

We understand the proposed right of action would require claimants to first make a complaint and have their complaint assessed for conciliation by either the OAIC or a recognised EDR scheme. The claimant could then begin court action if the matter is deemed unsuitable for conciliation, conciliation has failed, or the claimant chooses not to pursue conciliation.

To ensure uniformity across EDR schemes, we encourage the Department to clarify details around the role of EDR schemes in the process for the direct right of action including:

- how EDR schemes would be expected to 'assess a complaint for conciliation' and the criteria to be applied, and
- whether EDR schemes would need to provide some form of certification to support the claimant's court action.

We also encourage the Department ensure a clear pathway for claimants who do not want to pursue conciliation. Where a consumer shows genuine disinterest in participating and has only lodged a complaint to facilitate litigation, it may not be an effective use of EDR resources to compel such claimants to engage with an EDR scheme before they can choose to pursue action other than conciliation.

4. The EDR-related ground for refusing access to personal information should be clarified

We support the Department's proposal to introduce an additional ground for refusing access to personal information related to EDR. We understand an APP entity could rely on this ground where the information requested relates to EDR services and giving access would prejudice the dispute resolution process.⁵

While we do not expect to frequently need to rely on this ground, we recommend clarifying how it would operate in practice. The Discussion Paper notes the proposed ground of refusal would prevent individuals from accessing internal working documents that could prejudice the dispute resolution process. Further guidance on the scope of this proposed ground (including examples) would ensure EDR schemes apply the ground consistently.

It should also be clarified whether the ground of refusal will also be available to APP entities who are a party to the EDR process (such as telecommunications providers). If the ground is available, care should be taken to ensure the scope of the ground is not too broad and does not unduly impair individuals' access to personal information.

⁴ Proposal 25.1

⁵ Proposal 18.2