



**Telecommunications
Industry
Ombudsman**

**Submission to the Commonwealth
Attorney-General's Department:
Consultation on the Privacy Act Review**

March 2023

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Introduction

Thank you for the opportunity to comment on the Attorney-General's Department's (Department's) *Privacy Act Review Report (Report)*. We have an interest in the proposed reforms as both an entity subject to the Australian Privacy Principles (APP) and an Office of the Australian Information Commissioner (OAIC) recognised external dispute resolution (EDR) scheme which handles privacy complaints.

We continue to broadly support the proposed amendments to the *Privacy Act 1988* (Cth).¹ In particular, we welcome and support the proposed enhancements to the regulatory model for privacy complaints and the proposals seeking to better support vulnerable consumers.²

Recent events, such as the Optus Data Breach,³ have reiterated the importance of strong privacy protections for consumers. A robust privacy regime is required, but it should also balance consumer expectations with the operational practicalities of entities bound by the privacy regime (APP entities).

This submission offers feedback on the following four key areas:

1. EDR schemes will require guidance on the requirement for APP entities to be satisfied that third parties have collected information in accordance with APP 3.
2. There should be minimal steps required for individuals to access the direct right of action and consistency in how EDR schemes assess complaints.
3. Clarity is required on whether there will be an exception for refusing access to information where it could prejudice dispute resolution.
4. We support the provision of examples of serious interferences with privacy that reflect current community expectations.

We welcome the opportunity to comment on any further consultations and look forward to the outcome of the Review.

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¹ See our previous submissions to the Privacy Act Review from [December 2020](#) and [January 2022](#).

² Proposals 25.10, 25.11, and 17.1-17.3.

³ [TIO, Increase in phone and internet complaints in quarter two shows impact of Optus data breach, 8 February 2023.](#)

1. EDR schemes will require guidance on the requirement for APP entities to be satisfied that third parties have collected information in accordance with APP 3

The Report proposes that APP entities must take reasonable steps to satisfy themselves that any personal information they receive about an individual from a third party was originally collected in accordance with APP 3.⁴ While we support this proposal, we would like clarity on how this will apply in practice to EDR schemes and similar bodies.

As an EDR scheme, we often receive personal information about consumers from third parties. This can occur when a family member or financial counsellor makes a complaint on behalf of a consumer. We also receive personal information about consumers, who make a complaint to our office, from members of our scheme as part of our complaint handling process. We often receive this personal information without having requested it.

Considering the scale of personal information we receive daily,⁵ it is not feasible to be satisfied on a complaint-by-complaint basis that personal information disclosed to us was collected in accordance with APP 3. To ensure we can properly perform our functions in the absence of collecting personal information directly from the consumer, our Privacy Policy explains we will collect personal information from a consumer's authorised representative and that we may also collect personal information from the consumer's telecommunications provider or another complaint handling body.⁶ Further, we ensure sensitive information, or information not reasonably necessary to perform our functions is either redacted or not collected.

Should proposal 13.4 proceed, we would require detailed guidance on how EDR schemes could meet the obligation in a practical way that is not overly burdensome on consumers or the scheme.

2. There should be minimal steps required for individuals to access the direct right of action and consistency in how EDR schemes assess complaints

We support the proposal to give individuals a direct right of action when an APP entity interferes with their privacy.⁷

While the Report has provided guidance on how the direct right of action would operate, we

⁴ Proposal 13.4.

⁵ For reference, we received 198,440 contacts in [FY 2021-2022](#), and 301,396 contacts in [FY 2020-2021](#).

⁶ [TIO Privacy Policy](#), paragraph 6.

⁷ Proposal 26.1.

encourage the Department to amend the proposal to clarify:

- the steps a consumer is required to take before they can access the direct right of action, and
- how OAIC recognised EDR schemes should assess complaints.

2.1 The steps required for consumers to enliven the direct right of action should be clear

Under subsection (d) of this proposal,⁸ a consumer would first need to make a complaint to the OAIC before they can access the direct of action. However, subsection (d) also proposes that a consumer can have their complaint assessed for conciliation either by the OAIC or an OAIC recognised EDR scheme.

As currently drafted, this subsection is unclear on whether a consumer must first take their complaint to the OAIC, or whether the consumer can take their complaint to either the OAIC or an OAIC recognised EDR scheme at the first instance.

We support a 'no wrong door' approach to complaint handling. It would be beneficial for consumers if they could make a complaint to either the OAIC or an OAIC recognised EDR scheme at the first instance. Consumers should be able to pursue either pathway to reduce the steps required to engage in dispute resolution. This approach would ensure complaints are assessed in an efficient and timely manner and avoid duplication.

2.2 There should be consistency in the way EDR schemes assess complaints

While EDR schemes should tailor their dispute resolution processes to suit their different subject matters, there should be consistency in how OAIC-recognised EDR schemes assess whether a complaint is unsuitable for conciliation or there is no reasonable likelihood the complaint can be resolved by conciliation.

To ensure that the direct right of action is consistently made available to consumers, the Department could consider amending the design elements of the direct right of action proposal to:

- **Expand sub-section (e) to include situations where the OAIC or EDR scheme refuses to handle (or stops handling) a complaint in accordance with relevant legislation or its Terms of Reference.** Each EDR scheme has its own rules about which complaints fall inside or outside its jurisdiction. This may not be the same across all EDR schemes. For example, we will not handle a complaint that is over six years old.

⁸ Privacy Act Review Report, page 279.

- **Ensure the design elements consider the different dispute resolution methods that EDR schemes use.** Subsection (e) refers to ‘conciliation’ exclusively. However, some EDR schemes use other methods to resolve complaints. Using language that captures a broader range of dispute resolution methods would ensure that complaints preceding the direct right of action would be subject to the same processes that apply to other complaints.
- **Guidance should be provided on how the OAIC and EDR schemes determine when there is no reasonable likelihood that the complaint will be resolved via conciliation.** Such guidance would promote a consistent approach for consumers across the different dispute resolution bodies.

3. **Clarity is required on whether there will be an additional exception for refusing access to information where it could prejudice dispute resolution**

We previously supported the 2021 Discussion Paper’s proposal to amend APP 12 to allow an APP organisation to refuse a request for information relating to EDR schemes, where giving access would prejudice a dispute resolution process.⁹

The Report outlines general exceptions to the rights of the individual based on specified categories and notes general support for the above exception for EDR schemes.¹⁰ However, it is unclear from the proposals as drafted in the Report if the above exception relating to EDR schemes is intended to proceed, and if it does proceed, how it would be applied in practice.

We support the right of individuals to access their personal information when it is appropriately balanced against legitimate reasons for denying access. Should this exception proceed, clarity is needed on the type of APP entities that can rely upon it. For example, it is unclear whether only EDR schemes could rely on this exception, or whether other APP entities that may be participating in EDR to resolve a complaint could also access this exception.

4. **We support examples of serious interferences with privacy that reflect current community expectations**

We are pleased to see the Report has clarified what may constitute a serious interference with privacy.¹¹ The Department could include further examples of serious interferences

⁹ Proposal 18.2 of the 2021 Privacy Act Review Discussion Paper, page 142.

¹⁰ Privacy Act Review Report, pages 180 to 182.

¹¹ Proposal 25.2.

in light of recent large scale data breaches.

Complaints received by our office suggest that consumers view the unauthorised disclosure of information that could facilitate identity theft (such as a drivers' license or passport information) as a serious interference with their privacy, even where identity theft may not eventuate.