Submission Summary

Given Australians currently have limited ability to litigate breaches of their Privacy in the court system, the OAIC is the only realistic avenue open for Australians to enforce breaches of Privacy.[1]

This causes a number of problems, as taking action against every breach may not always align with the responsive regulatory approach adopted by the OAIC.[2]

In our submission, the OAIC currently has too many roles in the enforcement of Privacy breaches, including acting as an External Dispute Resolution body (EDR), an enforcement body and a final determinative body offering guidance on the interpretation of the Act.

In other areas, for example financial law, these areas would normally be dealt with by 3 separate bodies (in the case of financial breaches, these may be dealt with by either AFCA (the EDR body), ASIC (the enforcement body) or the courts (the final determinative body offering guidance on interpretation).

We submit that the OAIC is unable to perform all these functions adequately, as the need for targeted enforcement action is not always in congruence with providing fair and balanced outcomes for all complainants who are potentially wronged.

53. Is the current enforcement framework for interferences with privacy working effectively?

Summary: No, although the enforcement framework may provide for general compliance, it does not adequately handle minor breaches. This would be less of a problem if there were alternative avenues under which individuals could pursue their action.

Due to the principle-based nature of the Privacy Act 1988 (Cth) ('**the Privacy Act**'),[3] the OAIC takes an outcome-based approach to regulation of the Privacy Act,[4] with enforcement methods that closely align with those of 'responsive regulation' (also known as 'strategic regulation theory').[5]

Responsive regulation recognises that it is not possible for any regulatory agency to detect and enforce every contravention, and therefore encourages the use of guidance, with punitive measures reserved for serious breaches.[6] Although this may be a resource effective approach to regulating the Privacy Act, we have found, anecdotally, that it will often leave complainants at a disadvantage.

We often find that the OAIC will elect not to take action in relation to minor breaches of the Privacy Act, so long as the other side have substantially complied and acted in accordance with the principles underlying the Act.

[1] Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019), 473.
[2] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, May 2008) vol 2, 1517.
[3] Ibid chapter 4.
[4] J Black, *Principles Based Regulation: Risks, Challenges and Opportunities* (2007) London School of Economics and Political Science, 3.
[5] This is a similar approach adopted by many enforcement bodies within Australia, see for example ASIC.
[6] ASIC, *Annual Report 2012–13*, p. 19.

As an example, many of our clients will make access requests for personal information under APP 12, but will often not receive that information for over 4 months,[7] and will often not receive the entirety the information once the request has been completed.

We find the OAIC will often elect not to make a determination in relation to these breaches,[8] given that the body will have substantially complied with the requirement. Although this may be a resource-effective way in enforcing substantial compliance with the Act,[9] it will often leave the client at a disadvantage, as they will often require the entirety of the information as part of a wider potential dispute.

54. *Does the current enforcement approach achieve the right balance between conciliating complaints, investigating systemic issues, and taking punitive action for serious non-compliance?*
55. *Are the remedies available to the Commissioner sufficient or do the enforcement mechanisms available to the Commissioner require expansion?*

Summary: No. Too much emphasis is placed on conciliation and early resolutions, which will often leave complainants at a disadvantage. This problem is exasperated by the OAIC's unwillingness to award compensation and desire to resolve matters quickly.

As part of the OAIC's outcome-based approach to regulation, particular emphasis is placed on a conciliatory approach to disputes.[10] Although in theory conciliation is intended to only be the first phase of the OAIC dispute resolution process,[11] we often find that the preliminary decisions of conciliators are binding, and that this problem has only been worsened by the introduction of the Early Resolution Regime in 2017-2018.

We find, in practice, that the approach taken by the OAIC in resolving disputes, is to refer the matter to the Early Resolution Team (ER Team), who will reach out to the parties to arrange for an opportunity to conciliate. If an agreement is not reached between the parties, the conciliator, who will often not have a legal background or have conducted a full investigation, will then make preliminary enquiries under s 42 of the Act, and then make a decision whether or not the OAIC should investigate.

If a decision is made under s 41(1)(da) to not investigate, there are limited avenues available to the complainant to have their issue addressed.

This can cause a number of issues, and we provide the below scenario as examples of this:

Scenario 1:

[7] The OAIC has previously issued guidance that access responses should be addressed within 30 days (see APP 12.4(a)(i), 12.4(a)(ii); OAIC, Australian Privacy Principles Guidelines, chapter 12.
[8] *Privacy Act 1988* (Cth) s 52.
[9] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992).
[10] Privacy Act s 40A(1).
[11] ALRC, *For Your Information: Australian Privacy Law and Practice* (n 2) 1626.

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Mr A had a dispute about whether a document under the Privacy Act had been sent to his last known address. In 2011, Mr A had issued a letter to a Financial Services Provider (FSP) advising that he could not receive notices at his residential address, and therefore requested if all notices could be sent to his PO Box. The FSP updated his address in their system to the PO Box.

On 9 October 2012, the FSP then changed the address back to Mr A's residential address, and all notices were then sent to the old address. Although it was not apparent on what basis the FSP had changed the address back to the residential address, the Financial Ombudsman Service (FOS), determined that because the address had been changed back, this was the client's last known address.[12]

"*On 12 August 2016 the FSP sent the applicant a default notice to the residential address it had for him. The applicant has confirmed that this was his address at the time. However, as the building did not have separate mailboxes for each tenancy,* ***he has provided a copy of a letter he says he sent to the FSP in September 2011 which asked them to send mail to a PO box address.***

The FSP's contact notes show that the applicant's address was updated to the residential address on 9 October 2012*. This was the same address as on the account statements****. Whilst the notes do not show how they were informed of this, I am satisfied on the available information, that this was the last known address the FSP had for the applicant***."[13]

Disagreeing with the FOS interpretation of last-known address, Mr A asked the OAIC to investigate.

The OAIC conducted a preliminary enquiry and determined that the original letter updating the address was not sent by Mr A and therefore the last known address was, and had always been, the residential address, and not the PO Box.[14]

The OAIC made no attempt to address the inconsistencies between this finding and the FOS finding, including:

1) if the FSP had not received the letter requesting the address be updated in 2011, why the FSP updated the address in their system in 2011 and why they would need to change the address back to the residential address in October 2012

2) that FOS found on the balance of probabilities that there was sufficient evidence to support that the letter was sent to the FSP; this evidence included:
   a) a copy of the letter; and
   b) the FSP updating the address to the PO Box in their system; and
   c) Evidence that Mr A sent the same letter to several other agencies with which he had relationships at the same time and they consequently updated his address

When asked to clarify these points and whether there were any avenues available to have the decision not to investigate reconsidered, the ERT advised "*Thank you for your enquiry. Once a*

[12] The only reason Mr A was able to use an EDR scheme other than the OAIC, was because the respondent was also a member of AFCA (then FOS).
[13] FOS determination 519460 (https://service02.afca.org.au/CaseFiles/FOSSIC/519460.pdf)
[14] It is important to note that this is not an investigation and determination under s 40A and 52 of the Privacy Act.

privacy complaint has been closed by the Commissioner pursuant to Part V Division 1 Privacy Act 1988 (Cth) (the Act), there is no provision for such a complaint to be "re-opened."

As demonstrated above, we find this desire to close complaints early can often result in inconsistent determinations without a full consideration of the relevant facts, or at least adequate reasoning is not provided to properly explain the basis of the determination.

Further, similar to an EDR scheme, we find that the ER Team will often try to consider matters on a merits approach, without consideration of the rules of evidence.[15] This system is effective for EDR schemes as their goal is provide a cost-effective mechanism to resolve disputes as an alternative to the courts, and if the complainant disagrees with the determination, they have the option of having the matter resolved in a court.[16]

However, limited such avenue currently exists for breaches of the Privacy Act, [17] and where a decision is made which does not follow legal principles (and noting anecdotally from our experience that many in the ER Team and conciliators do not have a legal background), limited avenues exist to appeal a decision not to investigate (particularly where a complainant seeks legal advice more than 28 days after the ER Team's decision).[18]

Issues with unwillingness to investigate and award compensation

Another issue we often run into as a result of the OAIC's desire to keep costs down and resolve matters through conciliation, is that there is no effective way to obtain binding guidance and that often there is limited acknowledgement of the costs that may be incurred by individuals having to pursue cases in the OAIC (the only realistic option available to them).

This again causes several issues, and we provide the below as one such example of this:

Scenario 2:

On 14 February 2020, changes were made to the *Privacy (Credit Reporting) Code 2014* (Cth) which affected what judgements may appear on an individual's credit file. There was a disagreement of interpretation between the Credit Reporting Bodies (CRB's) and individuals on the scope of these changes.

The matter came before the OAIC for an individual client. At the conciliation the CRB agreed to remove the judgement from the credit file, but would not acknowledge any wrong-doing.

Given the number of individuals this question applied to and that the CRB's were unwilling to have further discussions, we requested if the OAIC would issue a separate determination to provide guidance on the correct interpretation. To date (over 9 months since the changes), no such determination or guidance has been provided. The only avenue now available (and the avenue suggested by the OAIC) is to bring separate complaints on behalf of each individual client.

[15] AFCA rules A.14.2.
[16] AFCA rules A.15.4.
[17] Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019), 473.
[18] *Administrative Appeals Tribunal Act 1975* (Cth) 2 28.

When pushed on the costs involved in bringing multiple OAIC complaints on the same issue due to the CRB's unwillingness to submit to a sample case, and whether this would be taken into consideration when awarding compensation if the CRB's interpretation was found to be incorrect, we were advised by the conciliator, words to the effect of, inter alia:

"Because there would have been no determination on how to interpret the law at the time of the breaches, the actions of the CRB's would not be considered illegal, and it would only be if the CRB's continued to breach the law after a determination was made that OAIC would consider it a breach. In other words, until such time that the CRB's breach the law knowing that their interpretation is wrong, there is no breach."

Not only does this view starkly contrasts with the position taken by the courts (where misinterpreting the law would not be considered a valid defence), but it also means that individuals are unlikely to recoup the costs in making an application to the OAIC, even where such costs could have been avoided.

The issue is only exasperated by the OAIC's unwillingness to progress the matter further or to issue a determination, which save individual applications having to be made.

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