



Submission by the
Financial Rights Legal Centre
Consumer Action Law Centre

Office of the Australian Information
Commissioner

Guide to privacy regulatory action exposure draft:
Chapter 2: Privacy complaint handling process

June 2015

About the Financial Rights Legal Centre

The Financial Rights Legal Centre (*formerly known as the Consumer Credit Legal Centre (NSW)*) is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 22,000 calls for advice or assistance during the 2013/2014 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether. Federal Government changes to legal services funding agreements in mid 2014 restrict policy and law reform that CLCs can undertake with Federal Government funds. These restrictions have the potential to deprive Government and others from valuable advice and information and reduce efficiency and other improvements in the legal system.

For more information please see

www.communitylawaustralia.org.au/law-reform-and-legal-policy-restrictions/

About the Consumer Action Law Centre

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Introduction

Thank you for the opportunity to comment on Chapter 2 of the OAIC's Guide to privacy regulatory action exposure draft. The Financial Rights Legal Centre and Consumer Action Law Centre will address three overarching issues raised by the exposure drafts:

- Complaints handling and enforcement are related but separate regulatory activities and should have separate regulatory actions.
- The Guide should have more explicit procedural timeframes.
- Issues of confidentiality of complaints in practice do not match the relevant statements in the Guide.

We also make several comments about specific paragraphs in the exposure draft.

Case Study: Our experience as complainants

In August 2014 the Financial Rights Legal Centre, Consumer Action Law Centre, Financial Counselling Australia and the Australian Privacy Foundation lodged a representative complaint on behalf of all consumers in Australia with the OAIC against Veda Advantage for breaches to the Credit Reporting Privacy Code (Code). We alleged that consumers cannot easily access free copies of their credit reports through Veda in contravention of Veda's obligations under the Privacy Act and the Code. Two months later we lodged two additional, but related representative complaints. All three complaints are still being processed by the OAIC.

Our experience as complainants to these representative complaints has informed our comments below about the OAIC's privacy complaint handling process. In general, the complaint handling process that we have experienced has been haphazard and opaque. The following are some of the procedural deficiencies we experienced:

Lack of procedural clarity: We were not given an overall explanation of how the complaint would proceed at the outset, nor were we told what the steps toward determination would be, or estimated timeframes for the various stages of the complaint.

Non-transparency: We are aware of discussions that the Privacy Commissioner had with Veda regarding the complaints, including regulatory guidance that the Commissioner gave to representatives of Veda on issues of the complaint to which we were never made privy. We asked for transcripts of relevant meetings or at least a written summary of the issues discussed but we were never given anything.

Confidentiality: It was very unclear in the process what parts were confidential and what parts were not confidential. A statement needed to be sent at the start of the process by the OAIC to both parties to clarify this matter. The complaint process should be transparent.

Lack of timeliness: We experienced significant delays between communications with the OAIC, had meetings cancelled with limited notice, and multiple deadlines given to Veda to respond to our complaints were ignored and unenforced. Veda did not formally respond to any of our complaints until eight months after we lodged them with the OAIC.

Unreasonable conciliation: We were also made to attend two separate conciliation meetings even though we made it clear in writing and verbally that we did not believe our complaints could be resolved in that manner, and we were unable to compromise on behalf of all the consumers that we represented in the proceedings.

Given our experience with the Veda complaint we submit that procedural fairness, timeliness and transparency of the privacy complaint handling process could be improved upon, and the procedure described in Chapter 2 of the Guide should be more closely adhered to in practice. If the OAIC has views on the interpretation of the law these should be public before discussing these views with stakeholders.

Complaints vs Compliance

Complaints handling and enforcement are related but separate activities. In Chapter 2 of the Guide to privacy regulatory action the OAIC mixes these two activities together. For example, the OAIC seeks to conciliate all complaints, and only if conciliation fails will the Office consider going to an enforcement response or determination.

A hypothetical situation that highlights this problem is if a business successfully conciliates with an individual complainant about privacy interference, and the privacy issue never proceeds to an enforcement or determination outcome by the OAIC. This means that consumers lose the opportunity of having a systemic outcome with broader outcomes, including deterrence of other businesses from engaging in the same conduct. Other businesses also miss out on guidance about what the OAIC considers to be a privacy interference.

Consumer advocates would like to see the OAIC operate like other regulators. The OAIC should have one area of its regulatory practice that responds to individual complaints and seeks to conciliate them with a binding resolution power, then also have a broader compliance/enforcement area where it investigates systemic issues and takes appropriate action. The latter area can investigate where the individual complaint handling area has identified issues causing particular concern, or take 'own motion' investigations (including audits of compliance) where other intelligence work highlights privacy issues. The OAIC could also investigate new and emerging risks, identify trends and systemic issues.

Procedural Timeframes

Consumer advocates submit that a major deficiency of Chapter 2 is that there are no timelines set out in the privacy complaint handling process. Australians that make complaints to the OAIC should understand the OAIC's complaints handling process, how long an investigation or conciliation process

may take and when they can expect to be contacted. We appreciate that some conciliation processes may take more time than others depending on the parties, and that some investigations may require extra time for exceptional circumstances, but that does not excuse having no timelines at all for the guide to the OAIC's complaint handling processes.

Under the heading '**How the Office handles privacy complaints**' there should be a clear procedure with estimated response times. For example, when complaints are assessed of receipt, there should be a statement that the complainant will be contacted within 10 business days as to whether the complaint reaches the threshold required. If the OAIC decides to attempt to conciliate the matter, both parties will be invited to attend a conciliation meeting within 6 weeks of the complaint being assessed as meeting the threshold. There should be estimated timeframes for each stage of the process all the way through to determination.

While the Guide makes it clear that the OAIC wants to ensure they have flexibility in dealing with a complaint, our experience in making our Representative Complaints has only reinforced our belief that the process (including timeframes) should be clarified. The Guide should at least provide a 'typical' process, which could be departed from if necessary.

Other regulators and external dispute resolution schemes are under enormous pressure to improve their complaint handling timeframes. For example, in 2013 an independent review of the Financial Ombudsman Service found that 'timeliness and efficiency' was a key issue for improvement.¹ Delay of complaint resolutions was also a big issue in the 2012 independent review of the Credit and Investments Ombudsman.² The Telecommunications Industry Ombudsman was facing great criticism that "the TIO takes an unnecessarily lengthy approach to resolving complaints, especially escalated or complex complaints, and does not sufficiently enforce dispute resolution time frames on industry or consumers."³ However, in recent years the TIO has made significant improvements in its complaint handling process and a survey in March 2011 found 93% of consumers satisfied with the TIO's handling of their complaint, including 45% very satisfied and 39% extremely satisfied.⁴

Confidentiality

The Guide references confidentiality in several places. We agree with the guidelines in relation to confidentiality in paragraphs 29-31 and 36, but note that these guidelines were not adhered to by the OAIC in our experience making a representative complaint under the Act. In our experience almost all submissions, discussions and meetings have been confidential, contradicting the approach in the draft Guide.

¹ <http://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf> (see pg 9)

² [http://www.cio.org.au/cosl/assets/File/Independently%20Review%202012%20\(The%20Navigator%20Group\).pdf](http://www.cio.org.au/cosl/assets/File/Independently%20Review%202012%20(The%20Navigator%20Group).pdf)

³ http://www.communications.gov.au/_data/assets/pdf_file/0003/147504/TIO-Review-Report-web-May.pdf (pg 93)

⁴ http://www.communications.gov.au/_data/assets/pdf_file/0019/133660/Telecommunications_Industry_Ombudsman.pdf

Specific comments on exposure draft of Chapter 2

Paragraph 16: Is there assistance for complainants who may not know how to frame a complaint before they are assessed as not reaching the threshold required? If so, this should be expressed in the Guide.

Paragraph 17: Consumer advocates are very concerned about the Office's ability to at any stage decline to investigate a complaint "based on information available to the Office." There is very little information around this statement, and thus very little accountability on the OAIC to show it has investigated all meaningful complaints or systemic issues.

Paragraph 18: Like other dispute resolution schemes the OAIC should have a process to refer complainants back to the respondent to complete whatever internal dispute resolution (IDR) process the respondent has in place. The OAIC should be able to provide IDR contact details to the complainant.

Additionally, the list of reasons when the Office may investigate a complaint without providing a copy to the respondent should include situations where there is urgency because of ongoing detriment.

Paragraph 19: The Guide should set out the additional circumstances provided in Section 40 (1B) of the Act, or at least provide a summary of the circumstances mentioned.

Paragraph 22: The Act obliges the Office to conciliate where the Office is of the view that it is reasonably possible that a complaint could be successfully conciliated. What happens when one or more of the parties believe it is impossible to conciliate a complaint? In the case of our representative complaint described above, consumer advocates explicitly explained to the Office and the respondent that we could not compromise on any of the alleged breaches in our complaint because they were being made on behalf of all consumers. Nevertheless we were told that we must participate in two separate conciliation meetings, the second of which was unproductive and aggressive.

Representative Complaints: Consumer advocates submit that Representative Complaints should have a separate chapter in the Guide. The process for handling representative complaints is necessarily different from that of handling personal complaints.

Additionally, this section should have a lot more detail about process. There is nothing in this section about how complaints will be assessed or investigated, how the conciliation process will work, when submissions should be made by each party or when to expect a determination to be made.

Paragraph 30-31: These paragraphs state that parties to the complaint are not bound by any form of confidentiality during the complaint process, but that the Office encourages parties not to disseminate information while involved in the conciliation process. In our experience making a representative complaint we were explicitly told that Veda would not provide any submissions or responses to our complaints unless we agreed that they would be treated confidentially. This is after we explicitly told the OAIC that we did not believe the complaint could be conciliated and that we believed the complaint was in the public interest and should be resolved by public determination.

Investigating Privacy Complaints: Consumer advocates recommend that complainants receive a brochure outlining the clear process of investigations at the outset of the complaint.

Paragraph 33: This paragraph should include timeframes. How long does the respondent have to review the complaint and respond to the investigation? When will a conciliation be organised?

Paragraph 49: When parties enter into a deed of release the OAIC should always draft the deed, or at least oversee the agreement process in order to prevent abuses by one powerful party over the other.

Paragraph 50: Complainants should be referred for legal advice as early as possible if the complaint is to be resolved through conciliation. The OAIC should provide information to unrepresented consumers about where to obtain legal advice.

Deciding not to investigate a complaint: The overriding principle for complaints processing by the OAIC is that if a complaint meets the threshold criteria to be investigated, the Office or Commissioner should make some form of public determination, or regulatory guidance on the subject. The OAIC should only decide not to investigate a complaint in exceptional circumstances.

Paragraph 61: The first bullet point should be its own paragraph, or the remaining bullet points should be indented below it.

In relation to the third bullet point (*the complaint was made more than 12 months...*), this time limit is too short. A complainant may have become aware of an 'act or practice' long before he or she realises that 'act or practice' is an infringement of his or her privacy.

In relation to the fifth bullet point (*a recognized external dispute resolution scheme ...*), consumer advocates are concerned that this point is misleading as complainants have the right to make a complaint to the OAIC if they have had an unfavourable outcome at an EDR scheme.

In relation to the last bullet point (*the respondent has dealt with...*) consumer advocates submit that this statement needs to be clarified. What does it mean that a respondent is 'adequately dealing with the

complaint”? This is unclear and a judgment on whether a complaint has been adequately addressed cannot be made without investigation. We contend that unless there is a clear legal precedent confirming that the response is adequate, the matter should be determined if the complainant remains unsatisfied.

Paragraph 62: There should be a statement that this discretion will be exercised with due care.

Concluding Remarks

Thank you again for the opportunity to comment on the OAIC's Guide to privacy regulatory action exposure draft. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Yours faithfully,



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