



27 November 2020

Attorney-General's Department
Privacy Act Review

Via email: PrivacyActReview@ag.gov.au

Dear Attorney-General

Review of the Privacy Act 1988

Thank you for the opportunity to comment on the Review of the Privacy Act 1988 issues paper.

The Energy & Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers. EWON is formally recognised as the External Dispute Resolution (EDR) scheme by the Office of the Australian Information Commissioner (OAIC) under section 35A of the Privacy Act 1988. This requires EWON to receive, investigate and facilitate the resolution of privacy complaints about our members. Our comments are informed by our investigations into these complaints, and through our community outreach and stakeholder engagement activities.

EWON endorses the matters to be considered by the Review of the Privacy Act. While EWON recognises that protecting the privacy rights of individuals needs to be balanced with the need for a business to carry out its functions, we support measures to strengthen privacy provisions, notably in relation to the enforcement regime. The enforcement regime needs to send a strong signal to businesses on the significance of privacy breaches.

We have only responded to those questions in the consultation paper that align with issues customers raise with EWON, or with our organisation's operations as they relate to this review.

If you would like to discuss this matter further, please contact me or Rory Campbell, Manager Policy and Research, on (02) 8218 5266.

Yours sincerely

A handwritten signature in black ink that reads 'Janine Young'.

Janine Young
Ombudsman
Energy & Water Ombudsman NSW

Regulation and enforcement

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

There is a lack of penalties for organisations that have a history of ongoing, but relatively minor, non-compliance with the Privacy Act. The existing enforcement framework sets a high threshold before privacy complaints are considered serious.

It affords greater consideration of breaches that impact a large customer base, rather than targeting organisations that may have a history of ongoing minor breaches of the Privacy Act, which may impact a smaller number of customers.

Through EWON's interactions with energy and water companies we have identified two important issues in relation to the effectiveness of the enforcement framework:

- our members do not consider ongoing minor breaches of privacy as being significant, primarily because these complaints are not considered as primary driver of complaints.
- there are inadequate deterrents and/or incentives for members to take remedial action to address privacy breaches and prevent future occurrences.

These issues have resulted in repeated customer complaints about privacy breaches by members. This is explained further in Question 54.

It is important that the enforcement framework appropriately covers privacy breaches based on their effect on individual consumers. Some breaches can be devastating in their impact and should be investigated irrespective of the size of the customer base affected or the number of complaints received.

Question 54. Does the current enforcement approach achieve the right balance between conciliating complaints, investigating systemic issues, and taking punitive action for serious non-compliance?

Privacy breach complaints by EWON identifies two key significant customer impacts:

- disclosure of information to perpetrators, or potential perpetrators, of family violence, and
- wrongful credit listings.

These breaches are not always resolved through conciliation and the current enforcement regime does not provide sufficient guidance about adequate penalties for these serious privacy breach impacts.

Family violence situations where privacy is breached could have serious safety repercussions for individuals. Case study 1 in the attachment illustrates that while a privacy breach has the potential to cause a dangerous situation, companies can be dismissive of these complaints. The retailer in this case study did not consider that it had breached the customer's privacy and also noted that there was no mandated compensation if it had done so. Clear penalties for such breaches are needed to send a strong message to companies that these breaches are significant and need to be addressed.

EWON also notes that there are no clear penalty guidelines for breaches of the credit code. While EWON recognises that credit reporting under Part IIIA of the Privacy Act is not covered by this

review, the current enforcement approach is within scope. EWON investigates repeated breaches of credit reporting under Part IIIA of the Privacy Act. The remedy available for wrongful credit default

listings is usually limited to the removal of the credit listing and does not incur penalties for the breach. Some members do not consider these breaches significant enough to warrant a change to its practices, resulting in repeated breaches with little or no repercussions.

Case study 2 in the attachment provides an insight into our systemic issue monitoring involving credit default listings practices of one retailer. One retailer advised EWON that its approach to non-complaint credit listings is focused on managing complaints efficiently rather than implementing measures to address further non-compliance.

The enforcement framework should act as a driver for businesses to work towards achieving improved outcomes for customers.

Question 66. Should there continue to be separate privacy protections to address specific privacy risks and concerns?

The OAIC notes that the ACCC is responsible for implementing the Consumer Data Right system¹ and that the ACCC and the OAIC have entered into a MOU with respect of the CDR, to ensure that strong privacy protections are built into the system, and will be enforced by the OAIC and the ACCC.²

The introduction of the Consumer Data Right to the energy sector will see new participants in the energy market that are authorised to deal with consumer data. These accredited service providers will be subject to CDR obligations. EWON's jurisdiction as the approved EDR scheme under the Privacy Act, requires full consideration with respect to the privacy rights of individuals and the CDR. EWON's current jurisdiction and membership framework may not be structured or equipped to deal with the number and type of participants that may be accredited by the CDR scheme. However, we have recent experience at expanding our jurisdiction to take on new classes of members and will explore options for further expansion if required under the CDR legislation.

Enquiries about this submission should be directed to Janine Young, Ombudsman on (02) 8218 5256 or Rory Campbell, Manager Policy and Research, on (02) 8218 5266.

¹ <https://www.oaic.gov.au/consumer-data-right/what-is-the-consumer-data-right/>

² Attorney-General's Department's Privacy Act Review Issues Paper, p.84.

EWON Case Studies

Case study 1

A privacy breach with the potential for harm is not taken seriously

A customer said that she opened a new electricity account online with the retailer after separating from her ex-husband. She was moving to a new address and needed to have the account established prior to moving in. She was previously noted as an authority for an electricity account at her previous address on a shared account with her ex-husband. When she opened her new account, the retailer sent the details of the account establishment and her new address to her ex-husband in a text message.

Although she was not concerned for her own safety, she was concerned that a similar privacy breach could result in danger to another customer and she believed the retailer's dismissal of the privacy breach to be inappropriate. The retailer advised her that because they already had her details in the system and linked to another account, it was not a privacy breach. They offered payment assistance at emergency accommodation at the time, but she was not able to accept this. The retailer admitted they had a systems issue, and her mobile number was confused with her ex-husband's mobile number and they were trying to rectify this so it would not occur again. She advised the retailer ignored her when she requested compensation and a written apology. She raised the privacy breach with the retailer again and was again advised that it denied there had been a breach.

EWON investigated the complaint and the retailer responded that it had referred the complaint to the retailer's high risk and privacy compliance team, and it considered it had not breached the customer's privacy. The retailer also noted that there was no mandated compensation amount for this situation even if it considered it had breached the customer's privacy.

It later confirmed that even though the customer provided updated details online, this was overwritten with old details associated with her existing name in the system. The customer's date of birth, licence number and full name were matched with old details in its system and those details were used instead of the updated information. The retailer agreed to apply a goodwill credit of \$361.75 to the electricity account. The retailer's privacy team did not consider the privacy breach was reportable but agreed to self-report it to OIAC.



Case study 2

EWON Systemic issue case study

As part of our systemic issue work, we have been monitoring the outcomes of our credit default listings complaint investigations overall for the past three years. Our systemic investigation identified that one particular retailer has the majority share of these complaints i.e. greater than other retailers combined. During this period, for that retailer, more than 20% of our investigated complaints for each financial year were resolved after it was identified by us, or by the retailer, that the credit listing was not compliant with the Credit Reporting Code or the Privacy Act. Whilst the individual complaint outcomes resulted in the non-compliant credit listing being removed from the customer's credit file, EWON has now yet seen a significant downward trend in credit listing related complaints from the retailer's customers over the three year period.

EWON has engaged with the retailer multiple times during the stated period, including at executive level to ensure that it was aware of the reasons for the non-compliant credit listings identified through EWON investigations. EWON has also stressed to the retailer that we believed that failure to follow the Credit Reporting Code has a significant impact on customers. However, retailer staff advice to EWON was that it considers the number of complaints received by EWON are relatively low compared to the number of complaints it deals with overall and the total number of credit listings it processes. The retailer also advised that its view is that the primary driver of complaints about credit default listings is customers who are simply wanting a credit listing removed, and therefore the retailer is focused on managing those complaints more effectively, rather than focusing on the issues of non-compliance raised by EWON. We have recently been advised that further action has been taken to ensure credit listings processes are improved and we should now see a decrease in credit default listing complaints.