



Clare Petre
ANZOA Chair
Energy & Water Ombudsman NSW
Phone: + 61 2 8218 5204
Email: info@anzoa.com.au

30 August 2013

Mr Timothy Pilgrim
Australian Privacy Commissioner
GPO Box 5218
Sydney 2001
By email: consultation@oaic.gov.au

Dear Mr Pilgrim

Guidelines for recognising external dispute resolution schemes under s35A of the Privacy Act 1988 (draft Guidelines)

The Australian and New Zealand Ombudsman Association (ANZOA) is pleased to respond to the draft Guidelines proposed by the Office of the Australian Information Commissioner (OAIC). ANZOA is the peak body for Ombudsmen in Australia. ANZOA's members are Ombudsmen whose offices have external dispute resolution (EDR) functions in energy, finance, public transport, telecommunications and water, as well as most parliamentary Ombudsmen.

OVERVIEW

The amendments to the Privacy Act and the framework it establishes will ensure enhanced protection for individual privacy, and an improved credit reporting regime.

The Guidelines will be an important aspect of the implementation of the new privacy framework. They will serve to ensure that individuals and Australian Privacy Principles (APP) entities continue have access to independent, effective and fair avenues of dispute resolution for any privacy-related complaints. It is important, therefore, that the Guidelines provide the right balance in recognising the role EDR schemes play, ensuring accountability in performing that role, and facilitating the OAIC in its role as privacy regulator.

In ANZOA's view, the draft Guidelines largely achieve this balance. Reasons for this include the explicit recognition of the expertise and experience of EDR schemes, and recognition of the role EDR schemes play alongside the OAIC in resolving complaints about privacy-related matters.

Many existing industry Ombudsmen already deal with privacy-related complaints made by consumers about service providers. ANZOA members therefore look forward to working closely with the OAIC, to ensure the most appropriate response to these complaints.

It is important to acknowledge that the Guidelines will place a significant impost on EDR offices, both in seeking recognition and in ongoing compliance and reporting requirements. Given this, the OAIC will need to be flexible when administering them.

SPECIFIC COMMENTS

I am aware that the Privacy Commissioner has already consulted with some Ombudsmen in the preparation of the draft Guidelines. As a result, ANZOA's specific comments are in fairly small compass. To assist the OAIC in its consideration, the following comments are offered on the Guidelines in the order they appear in the discussion paper.

Independent review

4.8 The EDR scheme should notify the Information Commissioner about the terms of the review and the appointment of an independent reviewer before the review commences. The Commissioner may request that the review examine other matters the Commissioner considers relevant.

ANZOA response: This paragraph appears to be broad in nature and gives the Commissioner significant discretion to request that the scope of an independent review be varied. This may not be appropriate where privacy complaints are a very small part of an EDR scheme's operation, and where an independent review would necessarily be focused on a range of areas.

In addition, and as currently framed, the draft Guidelines appear to require that the Commissioner's comments be sought after the terms of review are settled; this point is perhaps too late in the process, as the budget for any review is likely to be already established.

ANZOA therefore recommends that this clause be amended, such that the obligation on the EDR scheme is simply that the Commissioner be consulted about the terms of any independent review before the review commences. This will allow for the Commissioner's comments or requests to be fully considered and accommodated at the time of scoping the review.

General reporting on privacy-related complaints

4.15 Where possible EDR schemes should provide information about:

- a) The number of privacy-related complaints received in the financial year
- b) the average time taken to resolve privacy-related complaints
- c) for complaints finalised in the financial year:
 - the outcome of the complaint (e.g. conciliated, withdrawal)
 - the nature of any remedy awarded in finalising the complaint (e.g. compensation, apology, staff training)
- d) any systemic privacy-related issues or trends.

ANZOA response: Clause 4.15 provides for the EDR scheme to provide, where possible, information about a range of matters. The inclusion of the phrase 'where possible' should provide some flexibility. However, it is important to flag some issues that will arise with this requirement:

- Privacy-related complaints will often raise other issues. For example, a credit default listing complaint may also include a billing dispute or financial hardship concern. Given the multiple issues, seeking to separate these complaints as 'privacy-related complaints' for the purpose of providing information about the time taken to resolve or the outcomes of them, may be inaccurate or misleading.
- Most disputes are resolved through negotiation or conciliation. Accordingly, remedies are often not 'awarded'. Rather the parties reach an agreement which may reflect a number of considerations, of which the privacy-related issue may be only one aspect. For some matters, including those resolved by referral to senior officers within the scheme members, the EDR scheme may not have any information about the 'remedy' or agreed outcome.

These practical issues will have an impact on whether and how EDR schemes can provide information of the type specified in the draft Guidelines. While information requests for the number of privacy-related complaints and any systemic issues identified would cause few difficulties, it may be more problematic to provide time and outcome information for privacy-related complaints specifically.

This matter emphasises the importance of the OAIC taking a flexible approach in administering the Guidelines.

Monitoring and reporting serious or repeated interferences with privacy and systemic issues

4.17 Serious or repeated interferences with privacy and systemic privacy issues should be reported to the Information Commissioner when an EDR scheme becomes aware of them.

ANZOA response: In the experience of EDR schemes, systemic issues and repeated events can generally be reported to regulators only after the EDR scheme has had the opportunity to properly consider and confirm them. Referral before this point, and without some thorough analysis, may be premature, unfair and inefficient. ANZOA therefore recommends that these matters should be reported once confirmed, i.e.:

Serious or repeated interferences with privacy and systemic privacy issues should be reported to the Information Commissioner when an EDR scheme has confirmed that serious or repeated interference with privacy has occurred, or where a systemic privacy issue has been confirmed.

Other General Conditions

4.20 The footnote to bullet point 1 says that “Details of how the Commissioner will refer and transfer complaints to EDR schemes are detailed in the enforcement guidelines issued by the OAIC”.

ANZOA response: ANZOA understands these enforcement guidelines are currently being drafted. At an early point in the preparation of the enforcement guidelines, it is recommended that the OAIC consult with ANZOA about these details of how the OAIC will refer and transfer complaints to EDR schemes.

Part 5: The registration process for recognition of an EDR scheme

5.2 The Information Commissioner may publish an EDR scheme’s application, and any relevant documentation, on the OAIC website in the interests of transparency of the application process. Furthermore, any information provided as part of an EDR scheme’s application may be subject to obligations under the Freedom of Information Act 1982.

ANZOA response: ANZOA recommends that publication of an EDR scheme’s application for recognition only be done after consultation with the EDR scheme, in the same manner as consultation is provided for in respect of publication of any independent review report (clause 4.10). For example, the clause may provide:

The Information Commissioner may publish an EDR scheme’s application, and any relevant documentation, on the OAIC website in the interests of transparency of the application process, *after consultation with the EDR scheme.*

Schemes already recognised and/or which have a statutory basis

5.3 Existing EDR schemes that are already recognised under another recognition scheme, and/or which have a statutory basis for their operation, should include in their application: ...

- If relevant: ...
 - Details of communications with members, potential members, consumer representatives and other regulatory bodies about the EDR scheme being recognised by the Information Commissioner so as to demonstrate that these parties have been consulted with about the registration, and informing the Information Commissioner of any outstanding issues from those consultations.

ANZOA response: It is unclear why existing EDR schemes that are already recognised and/or which have a statutory basis would need to undertake substantial stakeholder consultation for the purposes of submitting an application to the OAIC for recognition. The draft Guideline recognises that the function of handling privacy-related complaints is already undertaken by existing EDR schemes; why consultation would be required about continuing this role is not explained. In the event that consultation is required it would appear more appropriate that the OAIC perform this function. We recommend that this requirement be deleted from the Guidelines.

Other schemes

In relation to clause 5.4, ANZOA recommends that for 'other' schemes, the draft Guidelines include a requirement that their application address the extent to which any recognised EDR scheme can already deal with privacy-related complaints in the industry or service area of the scheme applying for recognition. There are strong policy reasons that support non-fragmentation of EDR services in specific industries and service areas, as outlined in ANZOA's position statement 'Competition among Ombudsman offices'¹. This would clearly be relevant to the Information Commissioner's decision as to whether or not to recognise an EDR scheme.

Varying and revoking recognition

5.10 Matters that may cause the Information Commissioner to vary or revoke an EDR scheme's recognition include, but are not limited to:

- If the EDR scheme has not complied with a condition of its recognition, for instance:
 - It has been more than five years since the EDR scheme was last independently reviewed, as discussed in 4.27

ANZOA response: The reference here to clause 4.27 should be clause 4.7.

CONCLUSION

Effective implementation of the Guidelines will enhance access by individuals to independent and effective dispute resolution bodies for privacy complaints. It will also benefit APP entities, and facilitate the OAIC's functions under privacy legislation.

As the Guidelines and the overarching legislative framework will be new, I strongly encourage the OAIC to continue to consult with ANZOA members about the arrangements to ensure their appropriateness. This includes being open to adjusting the requirements for recognition of EDR schemes as required, should implementation or other issues arise.

I would be pleased to discuss this further and to provide any additional information if required, and may be contacted via the ANZOA Secretariat (info@anzoa.com.au) or through my own office at the Energy & Water Ombudsman NSW on (02) 8218 5204.

Yours sincerely



Clare Petre
ANZOA Chair

¹ http://www.anzoa.com.au/ANZOA_Policy-Statement_Competition-among-Ombudsman-offices_Sept2011.pdf