



21 December 2021

Attorney-General's Department
Privacy Act Review

Via email: PrivacyActReview@ag.gov.au

Dear Attorney-General

Privacy Act Review Discussion Paper

Thank you for the opportunity to comment on the Privacy Act Review Discussion 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 an External Dispute Resolution (EDR) scheme by the Office of the Australian Information Commissioner (OAIC) under section 35A of the Privacy Act 1988 (the Act). 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.

We have only responded to those matters that align with privacy issues customers raise with EWON, or with our organisation's operations as they relate to this discussion paper.

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



Privacy Act Review Discussion Paper

Part 1: Scope and application of the Privacy Act and Part 2: Protections – general comments

EWON recognises that protecting the privacy rights of individuals needs to be balanced with the need for a business to carry out its functions. Therefore, we support measures outlined in Part 1 and Part 2 of the Discussion Paper to clarify the purpose of the Act and strengthen individual privacy protections.

We also support measures to increase guidance for organisations in understanding and meeting their privacy obligations. For example, if changes are made to small business exemptions, we support the proposal to provide small businesses with educational resources and assistance.

Part 3: Regulation and enforcement – general comments

The current framework lacks penalties for organisations that have a history of ongoing, but relatively minor, non-compliance with the Act. Incentives for preventative and mitigating action by organisations in relation to privacy breaches are also inadequate, and there is insufficient recognition of the impact of privacy breaches on individual customers. EWON supports the measures outlined in Part 3 of the Discussion Paper to address these gaps and strengthen the enforcement, penalties and legal recourse framework.

While credit reporting under Part IIIA of the Act is outside the scope of the Attorney-General's review, the proposed increase in penalties and enforcement for privacy interferences and privacy breaches points to the need for further measures for breaches of the Credit Reporting Code such as wrongful credit listings. This was discussed in detail in EWON's submission in response to the Issues Paper, including a case study.

Further comments

Consumer experience and vulnerability

The Attorney-General has already acknowledged in the Discussion Paper that considering consumer experiences such as information overload and notice fatigue is crucial for proposed measures that require individual engagement and self-management. It is also important to consider the experience of individuals who may face challenges engaging with and self-managing privacy, when extensive information must be read, assimilated, and evaluated. This includes culturally and linguistically diverse (CALD) individuals, elderly people, and individuals with a low level of digital literacy. Some of the proposed measures in the Discussion Paper may help to improve the experiences of these types of customers, such as proposal 9.1 to increase the standard of valid consent.

The Discussion Paper specifically considers whether additional protections are required for vulnerable persons, looking at vulnerability primarily in terms of limited mental or physical capacity to communicate and make decisions. It is critical that a multi-faceted view of vulnerability be taken, including the significant vulnerability experienced due to family violence. For example, the idea that vulnerable individuals can be represented by a nominated or legally appointed third party is potentially complex in family violence situations where that third party may be contributing to the customer's vulnerable state. A multi-faceted view of vulnerability should also inform the framework of enforcement, penalties, and legal recourse, such as definitions of a 'serious' interference of privacy and the 'adverse impacts' of breaches.

The importance of considering family violence situations as a specific type of vulnerability was also discussed in EWON's submission in response to the Issues Paper, including a case study illustrating



that a privacy breach has the potential to cause a dangerous situation. See Case Study 1 in **Attachment 1** for a further example. This case study also points to the potential issues of third party arrangements.

Marketing

EWON strongly supports measures to increase individual protections around direct marketing outlined in proposals 16.1-16.4. Marketing complaints made to EWON indicate a strong consumer appetite for limiting unsolicited marketing contact and that complaints about marketing are often tied to other serious issues such as vulnerability and questionable consent. See Case Study 2 in **Attachment 1** for a complaint illustrating that unwanted direct marketing can lead to other difficulties for customers.

EDR exception proposal

EWON supports Proposal 18.2 to introduce an additional ground that would allow an EDR organisation to refuse an individual's request for access to personal information relating to EDR services where giving access would prejudice the dispute resolution process. If this ground is introduced, its intent and practical application must be clear in the Act to ensure that it is a reasonable and useful measure.

EWON has its own policies and procedures in place to manage information sharing with EDR participants in a way that supports the EDR process and aligns with EDR principles of procedural fairness, openness and transparency. The provision would provide an additional option for managing information sharing and would be integrated into our existing organisational practices.

Privacy regulatory model

Proposal 24.9 outlines three options for potentially changing the privacy regulatory model. The implications of Option 1 for EWON are minimal because as noted in the Discussions Paper, EWON is already the recognised EDR scheme receiving and resolving privacy complaints in the energy and water sector. Option 2 and Option 3 would have a greater impact as EWON may be required to refer a higher volume of complaints to the OAIC and/or increase its information sharing with the OAIC.

EWON's handling of privacy complaints demonstrates that EDRs can achieve fair and reasonable outcomes for complaints about privacy or that include a privacy aspect. An individual's complaint will most often not be solely about privacy, and EDRs are able to handle complaints holistically without the complainant needing to deal with multiple EDR bodies. There may be additional jurisdictional complexity for future complaints under the Consumer Data Right (CDR) that have a privacy aspect, as CDR privacy protections will be enforced by both the OAIC and the Australian Competition & Consumer Commission (ACCC) with a memorandum of understanding. This complexity could be mitigated by leveraging EDR schemes' capacity to review complaints that touch on multiple issues.

Case Study 1 and Case Study 2 in **Attachment 1** illustrate that privacy issues are most often intertwined with other issues and that EWON is well positioned to achieve holistic, fair and reasonable outcomes.

Whatever changes, if any, are made to the privacy regulatory model, EWON is committed to harmonisation, cooperation and taking a "no wrong door" approach to privacy complaints.

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.



Case studies

Case Study 1

An energy retailer provided a customer's personal information to an ex-partner in error due to his association with a previous electricity account.

A customer advised that she moved into a new property and established an electricity account with her preferred retailer. Her electricity account for her previous property with the same retailer included her ex-partner as a contact. She requested that he not be associated with her new account and provided her email address to receive any documentation about the new account. She later received a phone call from her ex-partner advising that he received an email from the retailer about the electricity account for her new address. While the customer was not in danger, the incident caused her distress and created problems in her relationship with her ex-partner as it was a sensitive situation. There were also aspects of the complaint not directly related to privacy such as poor customer service and financial difficulties.

The retailer advised EWON that it incorrectly included the customer's ex-partner's email when sending the welcome pack for her new account which included personal information such as the new address. This constituted a breach of her privacy as it provided her personal information to an unauthorised person. A senior member of the retailer's privacy team reviewed the complaint, self-reported the privacy breach to the OAIC, provided coaching to staff and sent a formal apology letter to the customer. The retailer removed any association with the customer's ex-partner on the previous and new accounts, and put a password on the new account for extra security. The retailer also waived a total of \$1,335 in electricity charges and applied a total \$200 customer service gesture.

Case Study 2

A hearing impaired customer's electricity account was transferred to a new retailer without her consent following repeated, unwanted marketing phone calls.

A customer advised that she received repeated and unwanted marketing phone calls from an energy retailer. The customer was vulnerable as she was a pensioner and had a hearing impairment. She considers she did not consent to change retailers on any of the phone calls, but received a welcome pack from the retailer in the mail.

She contacted her preferred retailer to explain what had happened and advise that she did not wish to change retailers. Her preferred retailer said it would resolve the issue but she did not receive any updates about what was happening. She was unsure if the transfer from her preferred retailer to the disputed retailer had been cancelled or reversed as per her request. She received bills from both her preferred retailer and the disputed retailer, causing her significant confusion. She had been paying a regular fortnightly amount to her preferred retailer via Centrepay and was unsure where those payments were going. The complaint therefore raised multiple issues including marketing, customer service, billing, transfer and consent issues.

EWON's review identified that the transfer had gone ahead and the customer's electricity billing rights were with the disputed retailer. The disputed retailer acknowledged the customer's concerns, and the preferred retailer and disputed retailer arranged for the customer's electricity billing rights to be retrospectively returned to her preferred retailer. There was still a three month period where the disputed retailer held the billing rights due to industry rule limits on backdating electricity transfers. The disputed retailer waived all charges of \$205, which meant the customer



was not required to pay electricity charges for this three month period. The customer's preferred retailer confirmed her account was reinstated and was in credit due to her fortnightly Centrepay payments.