

Power to Award Compensation to Aggrieved Data Subjects

Introduction

1. The Privacy Commissioner for Personal Data (“PCPD”) has made a proposal to the Administration to amend the Personal Data (Privacy) Ordinance (“**the Ordinance**”) to empower the PCPD to award compensation to aggrieved data subjects in cases of contravention of the requirements under the Ordinance. Award of compensation by PCPD provides a simple and quick relief to an aggrieved data subject who will otherwise have to seek remedy by instituting a court action which is generally very much more time-consuming and costly. The PCPD also proposed to be empowered to carry out conciliation between the parties of a complaint before making an award of compensation.

2. PCPD’s proposal is modelled on the *Privacy Act 1988, Australia* (“**Privacy Act**”). This paper aims to provide information on details of the compensation scheme and past cases of compensation awarded to aggrieved data subjects by the Australian Privacy Commissioner pursuant to section 52(1)(b)(iii), (1A) and (3) of the Privacy Act.

Relevant Provisions of the Australian Privacy Act

3. Pursuant to section 52(1) of the Privacy Act, following the investigation of a complaint, if the Australian Privacy Commissioner finds the complaint substantiated, he/she may make a determination that (a) directs the respondent to perform reasonable acts to remedy the contravention, and/or (b) award a specified amount by way of compensation for any loss or damage suffered by the complainant.

4. Under section 52(1B) of the Privacy Act, a determination made by the Australian Privacy Commissioner under section 52(1) is not binding or conclusive between any of the parties to the determination. Under section 55A of the Privacy Act, the Australian Privacy Commissioner or the complainant may commence proceedings in the Federal Court or the Federal Magistrates Court for an order to enforce a determination made under section 52. The Court shall determine the matter afresh including the question whether the respondent has engaged in conduct that constitutes an interference with the privacy of the

complainant.¹

5. Section 27(1)(a) of the Privacy Act provides that the Australian Privacy Commissioner should endeavour to conciliate matters when appropriate to do so. In the Australian Law Reform Commission Report 108 issued in August 2008, it has been proposed that the Privacy Act should be amended to include specific provisions dealing expressly with conciliation after receiving a complaint if the Commissioner considers it reasonably possible that the complaint may be dealt with by conciliation.²

Compensations Resulting from Conciliation

6. Many of the compensation paid in relation to privacy complaints are as a result of mutually satisfactory agreements. As indicated in the *Annual Reports (2007-8 and 2008-9) of the Office of the Australian Privacy Commissioner*, compensation is one of the common remedies. The range of compensation achieved by conciliation is listed below.³

Compensation range	No. of cases in 2007-8	No. of cases in 2008-9
Up to AUD500	9	19
AUD501 - 2000	14	18
AUD2001 - 20 000	17	13
Above AUD20000	-	2

Compensations Awarded by a Determination

7. The Australian Privacy Commissioner's power to award compensation under section 52 of the Privacy Act may be invoked if conciliation fails. The compensation to be awarded to the aggrieved data subject for his/her loss or damage may include not only the expenses reasonably incurred as a result of the act complained of but also the injury to his/her feelings or humiliation he/she suffered⁴.

¹ Section 55A(5) Privacy Act.

² Recommendation 49-5 of the Australian Law Reform Commission Report.

³ Available at <http://www.privacy.gov.au/materials/types/download/9231/6820> and <http://www.privacy.gov.au/materials/types/download/9417/6961>

⁴ See sections 52(1)(b)(iii), 52(1A) and 52(3) of the Privacy Act.

Damage or loss as a result of the breach

8. The general position for claiming compensation for any loss and damage made pursuant to section 52(1)(b)(iii) and (1A) is outlined in the case *U v. Major Banking Institution* [2004] PrivCmrA 9 published by the Office of Australian Privacy Commissioner⁵. The compensation sought (which may include compensation for injury to the complainant's feelings or humiliation suffered) for the damage or loss suffered must be a direct result of the particular action that was a breach of the Privacy Act. An individual is usually only compensated for actual loss or damage rather than potential loss or damage unless it was reasonably foreseeable at the time of the breach that this future loss or damage would occur. In the aforesaid case, the Australian Privacy Commissioner declined to make any award because the complainant failed to prove to the satisfaction of the Australian Privacy Commissioner that she was entitled to the compensation.

9. So far, the Australian Privacy Commissioner has exercised his/her power to make a determination of compensation in 8 cases. Compensations were awarded in two cases as explained in the ensuing paragraphs. In its internal review, the Office of the Australian Privacy Commissioner recommended that it would consider making greater use of the Commissioner's power to make determination under section 52 of the Privacy Act.⁶

10. In the case *A Complainant v. the Secretary, Department of Defence* Determination No. 1 of 1993, the Australian Privacy Commissioner declared that the complainant was entitled to AUD\$5,000 as compensation. The wrongful act was the unauthorized disclosure by the Department of Defence to the complainant's employer of the reason for his discharge from the Army, namely, absent without leave for more than 6 months. It caused embarrassment to the complainant and led to his dismissal by his employer⁷.

11. In another case *A Complainant v. ACT Government Solicitor* Determination No.1 of 2003, the Australian Privacy Commissioner declared

⁵ Available at http://www.privacy.gov.au/index.php?option=com_icedoc&view=types&element=casenotes&fullsummary=6021&Itemid=1021.

⁶ Paragraph 49.45 Australian Law Reform Commission Report 108 issued in August 2008. Available at <http://www.alrc.gov.au/publications/report-108>

⁷ Available at <http://www.privacy.gov.au/materials/types/determinations/view/6029>

that a complainant was entitled to AUD\$1,000 as compensation for the infringement of his privacy as a result of the unlawful disclosure of his identity to a third party dog-owner against whom he had lodged a complaint. In that case, the complainant had indicated his wish to remain anonymous until the day of the hearing of the complaint when he would be required to appear as a witness. Apart from the compensation, he was also entitled to be paid certain part of his legal costs, traveling expenses and loss of income at AUD\$1,643⁸.

The test adopted in assessing the compensation

12. The determination of award of compensation is subject to review⁹. In the case *Re Alan Rummery and Federal Privacy Commissioner-BC200410810* [2004] AATA 1221, the Australian Administrative Appeals Tribunal considered an appeal lodged against the Australian Privacy Commissioner's decision in refusing to make an award of compensation to the complainant. The complainant in *Re Alan* made a public interest disclosure to the Ombudsman against the government department in which he was employed. He complained to the Australian Privacy Commissioner about the employer's disclosure of his personal information to an officer of the Ombudsman during investigation. The Australian Privacy Commissioner found that the complaint was substantiated but decided not to make a declaration as to compensation for the breach. The Australian Privacy Commissioner took the view that the disclosure did not occur outside the confines of the investigating team of the Ombudsman and were not known more widely. Being dissatisfied, the complainant applied to the Tribunal to review the decision.¹⁰

13. After hearing evidence, the Tribunal accepted the complainant's claim and he was awarded AUD\$8,000. The Tribunal examined an Australian Federal Court decision with regard to the *Sex Discrimination Act*, which also provides compensation for loss or damage to the complainant's feelings or humiliation, and took the view that the principles laid down therein are applicable to the issues under section 52(1)(b)(iii) of the *Privacy Act*, that is, a determination that the complainant is entitled to a specified amount by way of compensation

⁸ Available at <http://www.privacy.gov.au/materials/types/determinations/view/6792>

⁹ A determination will be reviewable under the *Administrative Decision (Judicial Review) Act 1977* and a limited right of review of the Commissioner's decision by the Administrative Appeals Tribunal.

¹⁰ Available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/AATA/2004/1221.html?stem=0&synonyms=0&query=Re%20Alan%20Rummery>

for any loss or damage suffered. The relevant principles are:

- Where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course. (Once loss is proved, there would need to be good reason shown as to why compensation for that loss should not be awarded).
- Awards should be restrained but not minimal.
- In measuring compensation, the principles of damages applied in tort law will assist, although the ultimate guide is the words of the statute.
- In an appropriate case, aggravated damages may be awarded.
- Compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.

14. With regard to the amount of compensation, the Tribunal referred to the cases and awards made in relation to (1) compensation for shock and distress by way of termination of an employee's employment under the *Workplace Relations Act, Australia*; and (2) discrimination and sexual harassment cases. The relevant awards are usually made in the range of a few to twenty-five thousand Australian dollars.

Effectiveness of the Power to Award Compensation

15. In light of the Australian experience, the PCPD urges the Administration to reconsider granting similar powers to PCPD to conduct conciliation of a complaint and to award compensation to aggrieved data subjects. According to the PCPD's original proposal, the award of compensation will be subject to review and the maximum amount to be awarded will be set by the Legislative Council. Given that most people cannot afford the time and costs involved in pursuing a civil action for compensation through courts or tribunals, and that usually relatively low levels of compensation are payable in relation to the privacy complaints, PCPD's proposal should be given serious consideration.