

31 March 2023

Attorney-General's Department
Privacy Act Review

Online via: <https://consultations.ag.gov.au/integrity/privacy-act-review-report/consultation/>

Dear Attorney-General

Privacy Act Review Report consultation

Thank you for the opportunity to comment on the Privacy Act Review Report (Review Report).

This submission reflects the positions of the Energy and Water Ombudsman Queensland (EWOQ), Energy & Water Ombudsman South Australia (EWOSA), Energy and Water Ombudsman Victoria (EWOV) and Energy & Water Ombudsman New South Wales (EWON). We are the external dispute resolution schemes for the energy and water industries in our respective states.

EWOQ, EWOSA, EWOV and EWON are formally recognised as External Dispute Resolution (EDR) schemes by the Office of the Australian Information Commissioner (OAIC) under section 35A of the Privacy Act 1988 (the Act). This requires us to receive, investigate and facilitate the resolution of privacy complaints about our members. We have collectively reviewed the Review Report and our comments are informed by our investigation of privacy complaints about our members, and through our community outreach and stakeholder engagement activities.

If you require any further information regarding our submission, please contact Mr Jeremy Inglis, Principal Policy Officer (EWOQ) on [REDACTED], Ms Jo De Silva, Policy and Communications Manager (EWOSA) on [REDACTED], Ms Bronwen Jennings, Assistant Ombudsman – Insights & Engagement (EWOV) on [REDACTED] or Dr Rory Campbell, Manager Policy & Systemic Issues (EWON) on [REDACTED].

Yours sincerely

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Privacy Act Review Report

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

We support measures outlined in Part 1 and Part 2 of the Review Report which clarify the purpose of the Act, modernise the Act and strengthen individual privacy protections. Customer trust in all sectors, including essential services like energy and water, is at stake if individuals feel exposed to potential harm when engaging with those sectors. The overall principles-based approach of the proposals in the Review Report rather than, for example, a more technology-specific approach, will assist in providing the flexibility needed to enable robust privacy protections even as technologies like Artificial Intelligence (AI) evolve.

We particularly support proposals relating to:

- privacy policies and collection notices (Proposals 10.1 to 10.3)
- consent and privacy default settings (Proposals 11.1 to 11.4)
- fair and reasonable personal information handling (Proposals 12.1 to 12.3)
- people experiencing vulnerability (Proposals 17.1 to 17.3)
- automated decision making (Proposals 19.1 to 19.3)
- direct marketing, targeting and trading (Proposals 20.1 to 20.9).

We recognise there is a need to strike the right balance between privacy rights of individuals and practical issues including consumer expectations, ever-evolving technology and the ways in which businesses and organisations carry out their function. Given the extent of the changes, we support measures to ensure Australian Privacy Principle (APP) entities are given sufficient guidance and time to comply with any changes that are implemented, particularly small and mid-size entities.

Consumer experience and vulnerability

The Review Report acknowledges stakeholder feedback calling for a multi-faceted understanding of vulnerability, including individuals with accessibility needs and individuals who have experienced, are experiencing or are at risk of experiencing family violence. For example, it is pleasing to see that Proposal 10.1 recognises the need for appropriate accessibility measures for collection notices. Proposal 17.3 provides another example, with recognition that consultation on options to take appropriate steps for individuals who may be experiencing financial abuse should not be confined to only financial institutions.

We also support recognition of the need to extend particular care to the interests of children. In some circumstances, individuals under the age of 18 years old are able to or will need to hold energy accounts if they do not live with another adult. Individuals under the age of 18 years old may also be involved in the management of an adult's energy account, such as assisting with translation in Culturally and Linguistically Diverse (CALD) households. We support the child-specific privacy needs considered in the Review Report, as well as the general proposals which indirectly offer better protections for children such as those related to collection notices and consent.

Rights of the Individual – External dispute resolution exception

The Privacy Act Review Discussion Paper (Discussion Paper) outlines a proposed EDR exception 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. In our response to the Discussion Paper, we argued that 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.

In accordance with our offices adherence to the Commonwealth Government’s Benchmarks for Industry-based Customer Dispute Resolution¹, we have 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.

The Review Report briefly discusses the EDR exception in the context of Proposal 18.6 and a general exception to all rights of the individual under the category of “required or authorised by law and legal relationships”. It is therefore somewhat unclear in the Review Report whether the EDR exception is still intended to apply only to requests for access to personal information, or whether it is intended to be applicable for all the proposed rights of the individual.

We reiterate that the intent and application of the proposed EDR exception must be clear and support EDR principles of procedural fairness, openness and transparency. This should be balanced with recognition of the other core functions of EDR schemes beyond dispute resolution which bring value to consumers and the businesses which are our members and could be impacted by a change in individual rights and exceptions to those rights. These functions include, for example, the investigation of systemic issues, both industry-wide and/or specific to an energy or water business scheme participant/member.

Part 3: Regulation and enforcement

We support measures outlined in Part 3 to strengthen and harmonise the framework of enforcement, penalties and legal recourse. These measures will help provide incentives for preventative and mitigating action by organisations in relation to privacy breaches and sufficient recognition of the impact of privacy breaches on individual customers.

Privacy regulatory model

The Review Report indicates that consideration of changes to the privacy regulatory model is a work in progress, likely drawing on elements of all three of the proposed models that were explored in the Discussion Paper. As outlined in our response to the Discussion Paper, whatever changes, if any, are made to the privacy regulatory model, we are committed to operational harmonisation, cooperation and taking a “no wrong door” approach to privacy complaints. We handle privacy-related complaints (and, as the scheme gains traction in the energy sector, Consumer Data Right complaints) in accordance with our Constitutions/Charters which require us to have regard to relevant laws, codes, regulations, good industry practice and the individual circumstances of each complaint, in order to obtain fair and reasonable outcomes. An individual’s complaint will most often not be solely about privacy, and EDR schemes have shown over many years how we are able to effectively handle complaints holistically without the complainant needing to deal with multiple EDR bodies, to the benefit of the individual and the scheme participant/member that is the subject of the complaint.

We support Proposal 25.11 to provide discretion for the Information Commissioner not to investigate complaints where the complaint has been adequately dealt with by an EDR scheme. When a customer is seeking purely a legal outcome to a complaint about privacy and the Act, our offices will manage those aspects of the complaint related to energy or water and refer the complainant/privacy complaint to the OAIC for their action.

¹ Benchmarks for Industry-based Customer Dispute Resolution – Principles and Purposes, February 2015, <https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution>

In those circumstances where it is most suitable for the OAIC to handle a privacy complaint rather than an EDR scheme, the regulatory model should retain and enhance the existing OAIC complaint handling approaches for applying compensation for financial loss and adding the ability to award compensation for distress and inconvenience on an individualised redress basis, complemented by the OAIC's ability to consider appropriate statutory penalties.

In conclusion, the ability for EDR schemes and the OAIC to deliver effective complaint resolution in accordance with their different but complimentary, complaint management policies and processes, should not be diluted by any changes to the regulatory model.