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Enforcement of privacy laws – issues arising from Australian experience

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Abstract
Complaint cases handled under Australian privacy laws have illustrated some significant limitations of the enforcement regimes in those laws. Complainants face many hurdles in having their complaint accepted as within jurisdiction and obtaining a fair hearing. Commissioners favour conciliation without making findings as to compliance, denying complainants the vindication they seek, and limiting the educational impact of complaints in achieving systemic change. In some jurisdictions the prospect of substantial costs if a respondent chooses to appeal will act as a deterrent to individuals bringing complaints in the first place.

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1. Getting a hearing

The first hurdle a potential complainant faces when seeking redress under privacy law is to convince the relevant Commissioner or Tribunal to accept their complaint as within jurisdiction.

Leaving aside the many cases where the action complained about is subject to one of the many exemptions and exceptions, there are several other generic sub-hurdles that a complainant needs to cross. These include:

1.1. Identifying the conduct concerned

To a certain extent, complainants are being required to specifically identify the conduct that gives rise to their complaint.

In New South Wales if a person has a privacy complaint they can complain directly to the offending NSW public sector agency and request that the agency conduct an internal review of the behaviour that is the subject of the privacy complaint. If the person is dissatisfied with the result they can apply to the NSW Administrative Decisions Tribunal ('ADT') under section 55 of the *Privacy and Personal Information Protection Act* 1998 (NSW) ('PPIPA'). The case of *GA v Commissioner of Police, NSW Police*[1], arose after GA sought internal review of conduct which he identified as being the provision of a particular document by the respondent agency (the police) to a named person (the school principal). GA did not indicate which member of the NSW Police made the disclosure, nor the date on which he alleged it occurred. GA stated that he was "not limiting the scope of his request in any way."[2] The NSW Police refused to accept his letter as a valid internal review application on the basis that the request was not specific enough to identify the conduct at issue. At first instance the Tribunal found that GA had no entitlement to internal review because he was "unable to identify the conduct in sufficient detail to allow (them) to determine whether it constitutes a breach of an information protection principle."[3]

The case was appealed in *GA v Commissioner of Police, New South Wales Police* (GD).[4] The Appeal Panel accepted that circumstances could arise where there is so little by way of substance in a communication that purports to be an application for internal review that an agency could properly decline the application.

However, they did not feel that this applied in this particular case and noted GA's letter contained enough particulars to identify 'conduct' subject to the PPIPA. The Panel noted that:

[1] [2004] NSWADT 254. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/254.html> (accessed October 2007).
[2] Ibid at [1].
[3] Ibid, at [10].
[4] [2005] NSWADTAP 38. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2005/38.html> (accessed October 2007).

> [T]here is ample information given to identify that, at the least, conduct involving the disclosure of information has been put in issue, and the detail is retrievable from specifically identified official documents in the possession of the Police Service.[5]

In *Department of Education and Training v GA (No.3)*[6] the Appeal Panel noted that if an applicant *has* identified what they regard the 'contraventions' to be, this can assist the respondent agency in understanding the scope of what the underlying 'conduct' at issue might be. However the Panel found that "an agency is not confined to considering the contraventions referred to by the applicant. An agency must address any contravention ... that is reasonably open on a reading of the entire application for review."[7]

Under the *Health Records and Information Privacy Act* 2002 (NSW) ('HRIPA') a complaint against a private sector respondent can only go to the Tribunal if the Privacy Commissioner has first investigated and made a finding that there is a prima facie case to answer.[8] In the case of *NZ v Commissioner of Police, NSW Police*[9] NZ alleged that the police breached both the PPIPA and the HRIPA. The Tribunal rejected NZ's submission that there was a breach of the HRIPA, since NZ did not identify how that Act had been breached nor make a complaint to the Privacy Commissioner under the HRIPA.

In relation to the PPIPA, the Tribunal observed that it was not necessary for applicants to identify the precise statutory contravention by an agency in their application for internal review. However the Tribunal noted that NZ's complaint did not relate to "conduct" as required under section 52(1) of the Act, including the contravention of an information protection principle (IPP):

> "At most (NZ's complaints) concern the privacy of (NZ) as a person, or the privacy of her personal behaviour and communications."[10]

Since NZ failed to identify relevant conduct as required by the PPIPA, the Tribunal found that it had no jurisdiction and dismissed NZ's application.

To date there have been no cases under the HRIPA scheme, which commenced in 2004, emanating from Privacy Commissioner findings. This may suggest a backlog of cases at Privacy NSW due to a lack of resources, or unwillingness by the Privacy Commissioner to make such formal finding, instead preferring conciliation.

These cases illustrate that determining whether conduct has been sufficiently identified can be unpredictable, and a lack of specificity could spell the early end of a privacy complaint. If privacy laws are to effectively protect often inexperienced complainants, it is essential that Tribunals take a generous approach to the identification of relevant conduct. In light of the ADT Appeal Panel's views in GA, NSW agencies would be well advised to thoroughly investigate applications for

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[5] Ibid, at [14].
[6] [2004] NSWADTAP 50. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2004/50.html > (accessed October 2007).
[7] Ibid, at [14].
[8] See HRIPA, s. 45, s. 47 and s. 48.
[9] [2007] NSWADT 132.
[10] Ibid, at [29]

internal review and obtain clarification from the complainant where necessary. Respondents under other laws should also err on the side of caution and assist complainants in identifying the conduct about which they are concerned.

1.2. Identifying who was responsible

Generally, it has been assumed that the principle of vicarious liability – that an employer is liable for the actions of its employees – applied to privacy laws. This principle means that a complainant can seek remedies from an organisation even if the act or practice that has interfered with their privacy was the 'maverick' action of an employee using information in a way which exceeded their authority.

However, this assumption has been thrown into doubt, at least in relation to the NSW PPIPA. In the case of *NS v Commissioner, Department of Corrective Services* [11] Mrs Monroe, a probation officer at the Department of Corrective Services was also the President of the Scottish Dancing Association. The officer used her access to the Department's computer system to discover that a teacher at a Scottish Dancing School had served a sentence for child sexual assault (and was thus prohibited from working with children). Ms Monroe contacted NS and demanded that he inform the parents of the children in the dancing class of his criminal record and that he was a prohibited person. Ms Munro also called NS's parole officer, and the following day NS was arrested for breach of the conditions of his parole, and re-imprisoned. NS was later released but then immediately re-arrested in relation to a new charge of sexual assault against a child, to which he pleaded guilty. The child had been a Scottish dancing student. Ms Monroe used her access to the computer system to see who visited NS in gaol, contacted one visitor (saying she was from the Scottish Dancing Association), and relayed the information about NS's latest arrest. The Tribunal noted the 'presumption' of vicarious liability:

> "An agency can only act through its officials, which is recognised in the Act by placing an obligation on agencies to put into place appropriate systems that will ensure the security, accuracy and limited use and disclosure of such information. Accordingly ... an agency is prima facie responsible for acts and omissions of its officials in respect of personal information of another person that an official obtains in the course of his/her employment."[12]

but continued:

> "The fact that an agency is prima facie responsible for its officials does not mean that the agency will in fact be held to be have contravened (an IPP). What needs to be assessed is whether the agency has taken every reasonable step to ensure that its systems of collecting, accessing, using and disclosing personal information comply with the PPIP Act and that its officials are aware of the official's and the agency's obligations in respect of that information. What amounts to reasonable steps will vary depending on the nature of the personal information collected, used or held by an

[11] [2004] NSWADT 263. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/263.html> (Accessed on October 2007).
[12] Ibid, at [50].

> agency, how that information is stored or recorded, and who needs to have access to the information for the proper functioning of the agency."[13]

The Tribunal found that in light of warning messages in the computer system to prevent privacy breaches and the officer's 'dual roles' the Department did not breach any IPP. This decision appears to misapply or 'water down' section 21 of the PPIPA and does not differentiate between IPPs that require 'reasonable steps' and those that impose strict liability. This case signifies a significant loophole in the schema of privacy protection if the Tribunal continues with the view that people harmed by the actions of a 'rogue' employee have no civil remedy against either the individual or the agency that employs them.

The issue of employer responsibility was explored more recently by the decision of the NSW Court of Appeal in *Department of Education & Training v MT*.[14] This case was on appeal from the ADT Appeal Panel, who found that the Department breached several IPPs when MT's soccer coach, a schoolteacher at MT's school, accessed medical information about MT from the school file and disclosed it to the President of a soccer club (which was not connected to the school). The Department had not disputed that it breached the security principle, by not taking steps to prevent the teacher's actions, but argued in the Court of Appeal that it was not liable for the teacher's conduct beyond this point (i.e. for breaches of other IPPs), because the teacher was not acting in his role as a teacher, for a purpose authorised by the Department, when he used and disclosed the information about MT. The Department maintained that the teacher's conduct was for the purposes of the soccer club, for which the Department was not responsible. The Court of Appeal agreed.

Section 4(4) of the PPIPA defines information as "held" by an agency where the information is in the possession or control of an employee or agent "in the course" of the employment or agency. The Court of Appeal regarded this provision as indicating an intention to restrict the liability of agencies to circumstances where employees are acting in the course of their employment. The Court of Appeal observed that a separate provision, section 62(1), prohibits employees using or disclosing personal information otherwise that in connection with their official functions. The interaction of section 62(1) with section 12(c), a provision concerned with the "holding" of information, limits the extent to which conduct of employees can be attributed to agencies.

However, the corrupt disclosure provision in section 62(1) makes no provision for an aggrieved person to seek review or compensation and to date these provisions have not been pursued by an aggrieved person, and its enforcement mechanisms remain unclear. This case limits agencies' liability to conduct where an employee is acting in the course of their employment. The decision is a boon to agencies, but is likely to discourage applicants from pursuing complaints in cases where an employee has clearly acted outside the scope of their official functions.

Further, the removal of accountability could lead to agencies being lax with regard to privacy protection and the actions of their employees.

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[13] Ibid at [52].

[14] [2006] NSWCA 270. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2006/270.html> (accessed October 2007).

While this particular complainant certainly received multiple hearings, the effect of the final decision on appeal is likely to deter individuals from complaining in the first place and also lead to the dismissal of many future complaints by the Commissioner, the agency on internal review or by the Tribunal on the grounds that the action complained about is that of a 'maverick' employee, for which the agency cannot be held responsible.

Other Australian privacy laws contain similar vicarious liability provisions. Section 4 of the *Information Privacy Act* 2000 (Vic) ('IPA') states "for the purposes of this Act, an organisation holds personal information if the information is contained in a document that is in the possession or under the control of the organisation." Section 68(1) outlines how the Act applies to 'employees and agents':

> "Any act done or practice engaged in by or on behalf of an organisation by an employee or agent of the organisation acting within the scope of his or her actual or apparent authority is to be taken…to have been done or engaged in by the organisation and not by the employee or agent unless the organisation establishes that it took reasonable precautions and exercised due diligence to avoid the act being done or the practice being engaged by its employee or agent."

Section 68(2) continues:

> "If, for the purpose of investigating a complaint or a proceeding for an offence against this Act, it is necessary to establish the state of mind of an organisation in relation to a particular act or practice, it is sufficient to show-
> (a) that the act was done or practice engaged in by an employee or agent of the organisation acting within the scope of his or her actual or apparent authority; and
> (b) that the employee or agent had that state of mind."

Section 8 of the *Privacy Act* 1988 (Cth) ('Privacy Act') provides that acts or practices of employees etc shall be treated as being those of the agency or organisation if they are "in the performance of [their duties]". Unlike the Victorian Act, there is no defence of having taken reasonable precautions.

As far as we are aware, these sections of the Victorian and Commonwealth Acts have not been judicially considered. However, they would appear to establish a similar position to the NSW Act, in that an agency or organisation will only be held liable for the actions of an employee or agent if the actions are within the scope of their authority (with only the Victorian Act expressly offering the reasonable precautions defence). However, the effect of these provisions will depend crucially on whether an employee's actions are *knowingly and intentionally* outside the scope of their authority, or whether they genuinely believe that their actions are compatible with their authority. If the latter, it would seem appropriate for the employer to be liable. If the former, it may seem reasonable to allow agencies and organisations to escape liability, provided they can show that they had taken reasonable precautions. However, given that remedies for interferences with privacy cannot be obtained from 'rogue' employees, the effect is to leave a significant hole in the protection offered by privacy laws.

It would be far preferable for agencies and organisations to be held liable for the actions of rogue employees even where they are acting *knowingly and intentionally* outside the scope of their authority. This would send a far stronger message about the need both for adequate training and security, and for effective disciplinary action against employees who act outside their authority, as well as ensuring the availability of remedies for injured complainants.

1.3. When is a person affected by an alleged breach?

Under the NSW PPIPA, only a 'person aggrieved' is entitled to internal review of conduct of an agency, which is the precursor to merits review by the ADT. In *GA v Department of Education and Training*,[15] the ADT held that "the person must … be 'aggrieved' because he or she believes that the conduct constitutes a breach of the PPIP Act, not for any extraneous reason."[16] The Tribunal found that GA's complaint did not relate to concerns about the protection of personal information or a person's privacy, but to "unrelated matters".[17] The Tribunal therefore found GA had no standing to pursue that aspect of his complaint which related to passages in hand-written notes which were about his son's girlfriend. GA appears to have identified not only the alleged breach of privacy (breach of the accuracy principle), but also the harm that flowed from the alleged breach (prejudice). Nonetheless the Tribunal believed GA was not describing conduct that is reviewable and unfortunately for GA, the Tribunal did not see this as a 'privacy' issue.

However, in another PPIPA case, *NR and NP v Roads and Traffic Authority*[18] the President of the Tribunal noted that it is possible that a 'person aggrieved' by conduct could be a person other than the person who was the subject of the personal information at issue, and thus a third party may be able to seek a review and a remedy for any breach.

In the PPIPA case of *KO & Anor v Commissioner of Police, NSW Police*[19], the applicants were father and son. The son had made a complaint about the conduct of the police officer who arrested him, and during the course of the investigation of his complaint the investigating officer revealed information relating to the arrest to the son's employer. The son subsequently lost his job and therefore sought compensation for loss of income, while the father wanted to be reimbursed for the economic support he had to provide his son while unemployed. NSW Police claimed that the father could not be considered the 'person aggrieved' for the purposes of the PPIPA. The Tribunal accepted the disclosure was exempt under section 4(3)(h) and hence did not need to consider the issue of standing. However the Tribunal member noted that if the issue of standing had been necessary to consider he was inclined to view the father as

[15] [2005] NSWADT 47. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/47.html> (accessed October 2007).
[16] Ibid at [8].
[17] Ibid at [11].
[18] [2004] NSWADT 276. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/276.html> (accessed October 2007).
[19] [2004] NSWADT 3. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/3.html> (accessed October 2007).

an 'aggrieved person' as a result of his close involvement with the events and subsequent economic loss.

It appears that there will certainly be a limit to how far a person can claim to be aggrieved by conduct that does not involve their own personal information. In *ON v Marrickville Council,*[20] it was alleged that the Council's processing of development applications breached several IPPs. The applicant in the case had not actually provided any personal information to the Council, rather, he argued that he was 'aggrieved' by the Council's development application requirements to provide particular information about the use of premises. The Tribunal agreed with the Council, finding that the 'scope' of conduct requires that the conduct must have actually taken place. This case illustrates the catch-22 faced by people concerned about the privacy implications of a NSW government policy or practice. The PPIPA provides no injunctive relief, so the NSW review process can't be used to change policy or practice to prevent a breach, only to provide a remedy after a breach.

In relation to the Victorian Act, *Little v Melbourne CC (General)*[21] involved information collected as a result of an unsolicited letter to the Council raising breaches of the *Food Act* 1984 (Vic). The Council, relying on section 25 of the IPA, contended that Mr Little was complaining about the use and disclosure of personal information of a person other than himself and as a result the Tribunal has no jurisdiction to hear the matter. The Tribunal did not agree, stating that:

> "whilst the information it acted on may have concerned persons other than Mr Little, s 25 does not operate in a way that means personal information of Mr Little is therefore excluded from being collected and held."[22]

The Tribunal also concludes that:

> "where s 25 provides that an individual (Mr. Little) in respect of whom personal information is held may complain about an interference with the privacy *of the individual* (Mr Little's privacy), the Tribunal has jurisdiction to entertain the complaint."[23]

In relation to the Commonwealth *Privacy Act*, the 'person affected' issue also arose in an unpublished decision of the General Insurance Industry Information Privacy Code Compliance Committee[24] in which a complainant alleged a breach of the security principle in the Code (identical to NPP4) despite there being no evidence of an improper disclosure of information about the specific individual. The committee dismissed the case on the grounds that there could be no breach of the security principle in those circumstances, because section 13A of the *Privacy Act* provides that "an act or practice is only an interference with the privacy of an individual if it breaches the NPPs (or a Code) in relation to personal information *that relates to the*

[20] [2005] NSWADT 274. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/274.html> (accessed October 2007)

[21] [2006] VCAT 2190. Available on AustLII at < http://www.austlii.edu.au/au/cases/vic/VCAT/2006/2190.html> (accessed October 2007)

[22] Ibid, at [16].

[23] Ibid.

[24] Known to the author who was a member of the Code Compliance Committee at the time. The Code was subsequently withdrawn and de-registered.

individual" (emphasis added). However, if this was followed more generally by Commissioners, Tribunals and Courts, the potential value of the laws would be severely reduced. No individual would be able to challenge the adequacy of an organisation's security measures unless and until they were actually personally affected by a security breach, in which case the breach of the security principle would simply be collateral to a breach of the disclosure principle.

It should be noted that the New Zealand privacy law requires an additional test of actual harm or detriment to an individual before there is an actionable 'interference with privacy'.[25] If this test applied in Australian privacy laws it would be even more difficult for complainants to bring cases for breaches of principles based on systemic weaknesses such as inadequate security, collection notices, data quality measures or provision of anonymous transaction options.

1.4. Identifying specific persons aggrieved in representative complaints

Another 'entry' hurdle is faced by consumer NGOs in seeking to use the 'representative complaint' provisions of the *Privacy Act*. In an unpublished 2006 decision to discontinue a representative complaint against a number of telecommunication companies disclosing caller line identification (CLI) information to internet service providers (ISPs)[26] the Commissioner was unwilling to make a finding in relation to a class of respondents without the individual members of the class being identified. The Australian Privacy Foundation expects a similar decision in relation to a complaint lodged in 2006 against all Australian banks using the SWIFT system, but not yet finalised by the OPC[27].

1.5. Identifying which principle has been breached

Even where a complainant can establish their 'standing' to bring a complaint, a further hurdle is the extent to which the complainant must identify which privacy principle(s) have been breached.

According to Privacy NSW[28] the case of *GL v Director General, Department of Education & Training*[29] involved the transfer of a teacher from one school to another,

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[25] *Privacy Act* 1993 (NZ), s. 66(1).

[26] This complaint is described in a subsequent APF submission to ACMA. "ACMA Consultation Paper: Disclosure of CLI to 190 Service Providers", Submission by the Australian Privacy Foundation (October 2005). Available at
< http://www.privacy.org.au/Papers/ACMACLI&190Svces0510.rtf> (accessed October 2007).

[27] This complaint is outlined in a letter to the Privacy Commissioner. "Re: Breach of Privacy Act by Australian financial institutions", Anna Johnstone on behalf of the Australian Privacy Foundation (12 October 2006). Available at
< http://www.privacy.org.au/Papers/SWIFT-AustbanksOFPC061012.pdf> (accessed October 2007).

[28] GL v Director General Department of Education and Training ([2003] NSWADT 166) - Summary [2003] AUPrivCS 6 (11 July 2003), Summary available on AustLII at
<http://www.austlii.edu.au/au/other/AUPrivCS/2003/6.html> (accessed October 2007).

[29] [2003] NSWADT 166. Available on AustLII at
http://www.austlii.edu.au/au/cases/nsw/NSWADT/2003/166.html (accessed October 2007)

in the process, providing the new employer with a report containing information about GL's past issues with alcohol and anti depressants. GL applied for internal review. The Department argued that the Tribunal could not consider the breaches unless the application for internal review by GL identified the IPPs at issue. The Tribunal found that

> "Applicants will not normally have the benefit of legal advice and it is unrealistic in many cases to require them to interpret and apply statutory provisions. While I acknowledge that it may be difficult for a respondent to review conduct without knowing which provision has allegedly been contravened, this can be addressed by discussing the matter with the applicant. Alternatively, the respondent may be able to anticipate from all the circumstances of the case, the nature of the alleged breach."[30]

In the case of *JD v Director General, Department of Health*[31], Privacy NSW explains that JD sought internal review of the way the Department's Pharmaceutical Branch collected and presented evidence to the medical board in a disciplinary action.[32] The Tribunal noted that:

> "A request for internal review of conduct of a public sector agency should not be narrowly construed. If the conduct is subsequently particularised more precisely and this latter explanation of the conduct can reasonably be said to come within the general ambit of the conduct for which review was sought originally, then this latter explanation should be held to be part of the original request."[33]

The case of *NZ v Department of Housing*[34] related to an intrusion into the applicant's personal space. The case was dismissed because of lack of jurisdiction, but the Tribunal affirmed that applicants are not required to identify precisely the IPPs that relate to their complaint. However an application for internal review must "raise conduct on the part of the agency which might reasonably be able to be seen to have something to do with the information protection principles and their application."[35]

The case of *GA v Commissioner of Police, New South Wales Police (GD)*[36] already discussed above under 'Identifying the conduct' is yet another example where the Tribunal examined if an application for internal review was sufficiently particular.

1.6. Uncertainty as to jurisdiction

In relation to the Victorian IPA former senior policy officer at Privacy Victoria Michelle Fisher notes that where it is not clear whether the Privacy Commissioner has

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[30] Ibid, at [26].

[31] [2004] NSWADT 7. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/7.html> (accessed October 2007).

[32] JD v Director General, NSW Department of Health ([2004] NSWADT 7) - Summary [2004] AUPrivCS 17 (15 January 2004) Summary available on AustLII at <http://www.austlii.edu.au/au/other/AUPrivCS/2004/17.html> (accessed March 2008).

[33] See above n 31, at [38].

[34] [2005] NSWADT 234. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/234.html> (accessed October 2007).

[35] Ibid, at [10].

[36] See above n 4.

jurisdiction (e.g. that the information is not reasonably ascertainable, or that the body is subject to the IPA), the Commissioner faces a dilemma.[37] The Commissioner can decline to even treat the matter as a complaint, in which case the complainant is deprived of their merits review rights under the IPA (although leaving the opportunity for judicial review, which has not yet been used for privacy decisions in Victoria). Alternatively, if the Privacy Commissioner treats the matter as likely to fall within jurisdiction but unable to be conciliated (due, for example, to the respondent arguing a lack of jurisdiction), then the complainant is faced with the prospect of airing their matter in public in the Victorian Civil and Administrative Tribunal ('VCAT'), with the possibility that VCAT will decline jurisdiction, leaving them with their own costs and possibly a costs order made against them, and the choice of 'raising the stakes' by pursuing other avenues of review, with the associated time and effort, risk of further costs and potential publicity.

2. Getting a fair hearing

The issue of procedural fairness where unrepresented complainants attempt to argue complex questions of law was raised in a NSW case *GR v Director-General, Department of Housing* (GD).[38] GR had not understood that he was required to provide more persuasive evidence demonstrating psychological harm and causation. The Appeal Panel agreed that the Tribunal should have made this clearer when they explained the inadequacy of the evidence to GR. This is despite the fact that in the original hearing the Tribunal raised issues about the low weight of the evidence provided and the required link between harm and conduct (the exact terms of the Act were not explained however). As a result, this case was remitted back to the Tribunal to allow further filing of medical evidence relating to harm and how it was directly attributable to the conduct proven.

Fisher notes that while the NSW tribunal is at least expressly directed in its administrative review legislation to assist parties to understand the law, the Victorian law does not have a similar provision. Absent such an express direction to review tribunals, there is a risk that privacy complainants may be deprived of a fair hearing.

The case of *Ogawa v University of Melbourne (General)*[39] related to proceedings under the IPA. This particular hearing was an application to the Tribunal to secure a professional advocate to represent the applicant under section 52 of the *Victorian Civil and Administrative Tribunal Act* ('VCAT Act'). The applicant was unable to afford one herself while the respondent was represented by a law firm. The court declined to appoint representation to the applicant, "having regard to the applicant's personal skills, intelligence and education, the applicant's first hand knowledge of the facts upon which the proceedings turn, the nature of the proceedings, the tribunal's practices and procedures and the context of the matter."[40] This case raises interesting

[37] Fisher M, 2007, in unpublished comments to the author.
[38] [2004] NSWADTAP 26. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2004/26.html> (accessed October 2007).
[39] [2005] VCAT 197 Available on AustLII at <http://www.austlii.edu.au/au/cases/vic/VCAT/2005/197.html> (accessed October 2007).
[40] Ibid, at [30].

questions regarding the necessary prerequisites for fair proceedings in the privacy arena, the ways in which inequities can be balanced and the indicators of this balance.

3. Getting a finding

Individuals dissatisfied with an internal review under the NSW PPIPA do at least have a right to review by the ADT, albeit subject to the qualifications and hurdles already discussed. Similarly, complainants under the Victorian IPA can take their case to VCAT and under the New Zealand *Privacy Act* 1993, to the Human Rights Review Tribunal.

In contrast, many complainants under the Commonwealth law[41] are frustrated by their inability to require the federal Privacy Commissioner to make a formal Determination, and the lack of any merits review. Most complaints under the *Privacy Act* are closed by the Commissioner on the grounds that the respondent has 'adequately dealt with the complaint', without any finding as to whether there has in fact been an 'interference with privacy'. This means that there is no publication of the result, unless the Commissioner chooses to write it up as one of a handful of annual case studies. But it also means that complainants, who are often seeking vindication more than compensation, are left without any avenue of appeal (other than an expensive appeal to the federal courts on points of law) to obtain a 'ruling' about breaches of the Principles.

4. Getting a remedy

There are various remedies available to those that have suffered privacy breaches. While we are not concerned here to review the overall pattern of remedies obtained, some published complaint cases illustrate the difficulties faced by complainants in obtaining what they would regard as adequate remedies.

In relation to the NSW PPIPA, several Tribunal decisions go to the issue of the causality connection between a breach of one of the Principles and any loss or damage suffered by the complainant.

In *NW v New South Wales Fire Brigades (No 2)*[42] proof of a causal link between the respondent's conduct and the applicant's financial loss or physical or psychological harm did not, under the PPIPA, result in an automatic 'right' to an award of damages. The Tribunal can choose to take no action in the case of a breach under section 55(2) of the PPIPA. In this case NSW Fire Brigades disclosed NW's hours as a fire-fighter to his employer, which led to his dismissal (for breach of employment conditions). NSW Fire Brigades claimed that it was not their conduct which caused the damage, but NW's misconduct. The Tribunal noted that, in determining a causal link between the respondent's conduct and the applicant's loss, the respondent's conduct does not

[41] The Australian Privacy Foundation regularly hears from complainants who are dissatisfied as much if not more by the OPC's processes as by the outcome of their particular complaint.
[42] [2006] NSWADT 61. Available on AustLII at http://www.austlii.edu.au/au/cases/nsw/NSWADT/2006/61.html (accessed October 2007).

need to be the only cause or the most immediate cause of the loss. The test is whether the conduct made any difference to the loss or harm suffered by the applicant. This approach mirrors the 'but for' test that is generally applied in common law proceedings, which asks whether the damage would have occurred 'but for' the conduct in question. In this case the Tribunal found that the employer's investigation into NW's misconduct would have continued (despite the actions of NSW Fire Brigade).

The Tribunal is thus unlikely to make an order for an award of damages - even if there is a causal link between the respondent's breach and the damage suffered by the applicant - if the circumstances of the loss involve misconduct on the part of the applicant and where a privacy breach was only one of several factors causing the loss. The Tribunal will however hold agencies to account for their information handling practices despite alleged misconduct on the part of applicants. Compliance with the IPPs is required (subject to any relevant exemptions) regardless of whether the personal information discloses wrongdoing on the part of the subject of the information.

The case of *SW v Forests NSW*[43] concerned photographs of a community volunteer which were distributed without her consent (the photos were not taken in her professional capacity). While breaches of several IPPs were found, the Tribunal did not award damages due to lack of evidence in relation to psychological harm suffered by SW.

In *NZ v Director General, Department of Housing*[44] the Tribunal awarded $4,000 for pain and suffering, however declined to award punitive or exemplary damages, though noted that such an award may be possible in privacy cases. This is possibly the most comprehensive judgment in relation to assessment of damages. The decision notes that since privacy laws are human right based legislation, a restrained approach to damages should be applied to promote respect for its objectives. The decision affirms that the Tribunal is willing to award compensation where a causal link is established between loss or harm and the agency's conduct. At the same time, in keeping with developments in comparable jurisdictions, the decision confirms that awards for damages in privacy proceedings are likely to remain modest affairs.

In relation to the federal *Privacy Act*, a major weakness of the enforcement regime is the inability of the federal Privacy Commissioner to *prescribe* compliance measures in a formal Determination under section 52 of the *Privacy Act*. The Commissioner's Determinations Nos 1-4 of 2004 against the Tenancy Information service, TICA, explained that the Commissioner can only *proscribe* acts or practices that are an interference with privacy.[45] This means in effect that a respondent can simply vary its

[43] [2006] NSWADT 74. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2006/74.html> (accessed October 2007).
[44] [2006] NSWADT 173. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2006/173.html> (accessed October 2007).
[45] See Federal Privacy Commissioner, Complaint Determination No. 1 of 2004 (April 2004) at <http://www.privacy.gov.au/act/casenotes/comdeter0401.html> (accessed October 2007); Federal Privacy Commissioner, Complaint Determination No. 2 of 2004 (April 2004) at < http://www.privacy.gov.au/act/casenotes/comdeter0402.html> (accessed October 2007); Federal Privacy Commissioner, Complaint Determination No. 3 of 2004 (April 2004) at < http://www.privacy.gov.au/act/casenotes/comdeter0403.html> (accessed October 2007); Federal

acts or practices in a minor way, with the compliance of the revised acts or practices having to be tested again by a further complaint. While respondents could show goodwill in following any 'advice' that the Commissioner may offer as to what would be compliant, it is open to them to in effect play guessing games with the Commissioner's office. The original complainant would typically have neither the interest not the grounds to pursue a respondent, since their particular complaint would have been remedied. However, there may not be any effect on the way in which the respondent deals 'systemically' with personal information of other individuals.

This issue was raised in the Office of the Privacy Commissioner (OPC) Review and cited again the Australian Law Reform Commission (ALRC) Privacy Review. It was noted that the determinations may be of limited utility in resolving systemic issues.[46] Further, the weakness of a determination under section 52 is that it "cannot require a respondent to do something or refrain from doing something unless the activity relates to matters raised by the complainant."[47] The OPC Review recommended that the *Privacy Act* be amended to "expand the remedies available following a determination under section 52 to include giving the Privacy Commissioner power to require a respondent to take steps to prevent future harm arising from systemic issues."[48] When organisations do not comply with directions due to constraints on enforcement powers available in the current privacy regime this:

> "Devalues the privacy scheme and reduces the incentives for others to comply and also means that organisations that do comply do not receive the full benefit of their conscientious behaviour in terms of level playing fields. Apparent lack of enforcement also discourages individuals from complaining."[49]

These weaknesses go to the issue of whether the objective of the complaints and enforcement regime in privacy laws is only about obtaining remedies for individual complainants or whether it should be making a contribution to the overall level of systemic compliance amongst data users. While Privacy Commissioners often pay lip service to this wider objective, their historical behaviour in complaints handling suggests that in practice they subscribe to the more limited view.

The ADT Appeal Panel's decision in *Vice-Chancellor, Macquarie University v FM (GD)*[50] suggests that it too takes this more limited view. Macquarie University argued that the order made by the Tribunal in the first instance was too broad. The Appeal Panel agreed that it was generally more appropriate to make orders directed to the parties involved and based on the liability that has been established, rather than broad systemic orders covering the agency as a whole.

Privacy Commissioner, Complaint Determination No. 4 of 2004 (April 2004) at < http://www.privacy.gov.au/act/casenotes/comdeter0404.html> (accessed October 2007).

[46] Office of the Privacy Commissioner, *Getting in on the Act: the review of the private sector provisions of the Privacy Act 1988*, p. 136, available at < http://www.privacy.gov.au/act/review/revreport.pdf> ('OPC Review') and Australian Law Reform Commission, *Issue Paper 31 Review of Privacy* (IP 31, October 2006), p. 304 available at < http://www.austlii.edu.au/au/other/alrc/publications/issues/31/>.

[47] Ibid, OPC Review, p. 136.

[48] Ibid, OPC Review, p. 14.

[49] Ibid, OPC Review, p. 149.

[50] [2003] NSWADTAP 43. Available on AustLII at <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2003/43.html> (accessed October 2007).

5. Getting a bill!

Privacy regimes in Australia have been created supposedly as low-cost accessible complaint jurisdictions. There is no charge for complaints to Commissioners, only modest filing fees for proceedings in tribunals, and a presumption that parties bear their own costs. However, the latter presumption has been thrown into serious doubt, at least in relation to NSW, by the decision of the Court of Appeal in *Director General, Department of Education and Training v MT (No 2)*[51] in which the Court awarded the respondent's substantial appeal costs against the complainant, although it was the respondent that pursued the appeal on a point of law to the superior court. It seems extraordinary that the Court of Appeal did not see the Department, or indeed the NSW Government as a whole, as having "a particular interest to resolve the law." Having won the appeal on the issue of vicarious liability, NSW agencies have gained a significant victory with extensive ramifications for the extent to which agencies need worry about privacy breaches at all.

This decision could have a significant chilling effect on privacy complaints in NSW, as complainants realise that although lodging their complaint in the Tribunal is relatively risk-free in terms of legal costs, there is the open-ended risk that if they are successful in the Tribunal, the unsuccessful respondent could appeal their case to the Court of Appeal, where the complainant is more likely to become liable to pay the respondent's (likely expensive) costs.

Costs have also been ordered against complainants in Tribunal proceedings. For example in *EG (No 2) v Commissioner of Police, New South Wales Police*[52] proceedings were dismissed because EG was repeatedly unavailable. His withdrawal prior to the hearing constituted 'special circumstances' which warranted a cost order against him.

In *NW v New South Wales Fire Brigades (No 2),*[53] 'special circumstances' likewise applied as a result of a late adjournment application. This was because the respondent may have briefed counsel for the hearing before the adjournment application was made due the applicant failing to file relevant material in a timely manner. The Tribunal ordered that NW pay costs limited to the respondent's counsel's attendance at the hearing if counsel had been briefed before the respondent was put on notice regarding the adjournment application.

PC v University of New South Wales (GD) (No 2)[54] involved a number of applications relating to a case of very low merit. The Appeal Panel found that PC persisted despite reasonable offers to withdraw from a 'hopeless' appeal. The Panel notes:

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[51] [2006] NSWCA 320. Available on AustLII at
< http://www.austlii.edu.au/au/cases/nsw/NSWCA/2006/320.html> (accessed October 2007).
[52] [2004] NSWADT 226. Available on AustLII at
< http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/226.html> (accessed October 2007).
[53] [2006] NSWADT 61. Available on AustLII at
< http://www.austlii.edu.au/au/cases/nsw/NSWADT/2006/61.html> (accessed October 2007).
[54] [2006] NSWADTAP 54. Available on AustLII at
< http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2006/54.html> (accessed October 2007).

> "There comes a time when such persistence in the face of information, knowledge and reason, must be reflected by a costs order that permits the respondent to recover at least a reasonable portion of the expense to which it has been forced over the history of the matter".[55]

The Panel also noted that they were reluctant to come to this conclusion for fear of deterring applicants from making applications. However, this case involved special circumstances.

While the *DET v MT*[56] case above was under the NSW PPIPA, the final costs decision discussed above invites the question as to whether the same problem could arise under other Australian privacy laws.

Under the federal *Privacy Act* it would seem not, in that complaint cases can only reach a jurisdiction with potential costs at the instigation of the complainant – either seeking AAT review of a Commissioner's decision on compensation, or seeking a de novo hearing in federal courts where a respondent has failed to comply with a Commissioner's Determination. There does not appear to be any situation in which a complainant could face having to pay the costs of the other party as a result of decisions outside their own control.

In the Victorian case of *Little v Melbourne CC* (General)[57] outlined above the complainant avoided a costs order (the Council claiming that the claim had "no tenable basis in fact or law").[58] However the Tribunal member did comment that "Mr Little was unfamiliar with the provisions of s 109 of the VCAT Act, and made no helpful submissions."[59] It would appear that the Tribunal has power to award costs under section 109 if the circumstances warranted this.

6. Conclusion

This paper has addressed only some of the perceived weaknesses of the enforcement regimes in Australian privacy laws, and in the way those regimes are being implemented. Other relevant issues not covered include compensation – how readily it can be obtained and the 'tariff' that has been applied; and the operation of exemptions.

On those issues that have been addressed, there are no doubt other cases which could illuminate the analysis, and perhaps change the balance of the findings. However, there seems to be sufficient evidence, on the basis of the cases discussed above, of significant weaknesses to warrant serious consideration of changes in both law and

[55] Ibid, at [28].
[56] See above, n 51.
[57] See above, n 21.
[58] Ibid, at [27].
[59] Ibid.

practice. The current Law Reform Commission inquiries[60] offer an opportunity for legislative changes to be canvassed.

In contrast, changes in practice, and the 'generosity' with which the various existing provisions are interpreted, are at the discretion of Commissioners, Tribunals and Courts, and require only recognition of the problem and the will to change.

[60] The Australian, New Zealand and NSW Law Reform Commissions are all currently conducting reviews of privacy law, and the Victorian Commission has a specific reference on surveillance in public places which will include an assessment of the current privacy protection framework in that State.