



‘WP’ and Secretary to the Department of Home Affairs (Privacy) [2021] AICmr 2 (11 January 2021)

Decision and reasons for decision of
Australian Information Commissioner and Privacy Commissioner, Angelene Falk

Complainant	'WP'
Respondent	Secretary to the Department of Home Affairs
Decision date	11 January 2021
Application number	CP15/01390
Catchwords	Privacy — <i>Privacy Act 1988</i> (Cth) — Information Privacy Principles — IPP 4 — Data security failure — IPP 11 — Unauthorised disclosure of personal information — Breaches substantiated — Compensation awarded — s 52(4)(a) — Manner in which the amount of compensation payable to class members is to be calculated — s 52(5)(b) — Process for determining any dispute regarding the entitlement of a class member to the payment

Determination

1. In accordance with s 53 of the *Privacy Act 1988* (Cth) (**Privacy Act**), the class members are the 9,258 individuals, whose names were published by the respondent on 10 February 2014, with the exception of the seven individuals who opted out under s 38B(2).
2. I find that the respondent interfered with the privacy, as defined in s 13(a) of the Privacy Act, of the class members by:
 - 1) disclosing the personal information of class members on a publicly available website, in breach of Information Privacy Principle (**IPP**) 11, and
 - 2) failing to take such security safeguards as it is reasonable in the circumstance to take, against loss, against unauthorised access, use, modification or disclosure, and against other misuse, in breach of IPP 4.

Declarations

3. I determine that the complaint is substantiated and make the following declarations:

- 1) Under s 52(1)(b)(i)(A) of the Privacy Act, the respondent has engaged in conduct constituting an interference with the privacy of class members when it acted in contravention of IPPs 4(a) and 11, and must not repeat such conduct.
- 2) Under s 52(4)(a), the 1,297 class members who made submissions and/or provided evidence of loss or damage to the Office of the Australian Information Commissioner (**OAIC**) within the timeframe specified by the OAIC, and who did not opt out (**participating class members**), are to be paid compensation for loss or damage arising from that publication in the following manner:
 - a) the respondent shall assign a quantum of damages for each participating class member, with reference to the table at Addendum A (**Table**) to this determination (**preliminary assessment**).
 - b) on completion of the assessment for each participating class member, the respondent is to provide the assessment and relevant evidence to the legal representative for each participating class member, or directly to the participating class member if they are unrepresented, and seek agreement on the quantum assigned to each participating class member with the legal representative or the participating class member.
 - c) where the parties agree on the quantum of damages for a particular participating class member, the respondent will within a reasonable period of time, pay the participating class member the agreed quantum in resolution of their claim.
 - d) to the extent the parties are unable to agree on the quantum for a particular participating class member after the assessment, the respondent may re-assess the claim. Where a re-assessment is undertaken, the respondent shall re-assign a quantum of damages for each participating class member, with reference to Table 1 and seek agreement on the re-assigned quantum (**re-assessment**) with the participating class member or their legal representative.
 - e) where the parties agree on the re-assigned quantum of damages for a particular participating class member, the respondent will, within a reasonable period of time, pay the participating class member the agreed quantum in resolution of their claim.
 - f) to the extent that the parties are unable to agree on the category in the Table into which the participating class member is assigned after re-assessment, and there is some evidence provided by each party for the divergent views, I declare under s 52(5)(b) that further submissions should be obtained through expert assessment, except where the participating class member has not responded to the respondent's re-assessment (**non-responsive participating class member**) within 28 days. Despite my declaration in this regard, the respondent may refer a matter for expert assessment at any time following preliminary assessment. Where there is a dispute between the respondent and a participating class member or their legal representative regarding whether a matter should be referred for expert assessment, the matter will be decided by a senior member of the OAIC.
 - g) the respondent will provide me with a brief statement of reasons of no more than one page, including a recommendation of quantum (**brief statement of reasons**) for each non-responsive participating class member. I will proceed to declare the

quantum of compensation for the claim of the non-responsive participating class member.

- h) the expert/s to provide the expert assessments will be agreed upon by the respondent and the solicitors for the representative complainant. An appropriately qualified counsel, with relevant skills and experience would be suitable to appoint as the expert.
 - i) to assist in the selection of the expert, following guidance provided by my office, the respondent will prepare a list of counsel suitable to appoint as the expert/s for the consideration of the solicitors for the representative complainant. Once the respondent and the solicitor for the representative complainant have agreed upon the expert/s, the respondent will provide the name/s of the agreed expert/s, details of their qualifications and experience, and a brief explanation of why they are suitable to me for my approval as soon as possible, but no later than 3 months from the date of the determination. At that time, the respondent will also provide the draft agreement with the expert/s to me for my approval.
 - j) the respondent shall pay any reasonable costs associated with the expert assessment process, including the expert's fees, but excluding any costs incurred by class members in participating in those processes (s 52(1)(b)(ii)).
 - k) if a participating class member's claim is referred to expert assessment in accordance with (f) it should occur within a reasonable period of time. The claim will be assessed on the papers only and there will be no right of reply to the expert's assessment. The expert assessment will have effect as a recommendation and will not be binding on the parties. The expert will provide their recommendation and accompanying reasons, directly to the OAIC, copying in the parties.
 - l) where, following expert assessment, the parties agree on the quantum of damages for a particular participating class member, the respondent will, within a reasonable period of time, pay the participating class member the agreed quantum in resolution of their claim.
 - m) to the extent the parties are unable to agree on the quantum for a particular participating class member and the matter is not referred for expert assessment, the respondent, and the solicitor for the representative complainant, or the legal representative for the member of the class, or, if unrepresented, the member of the class, are to provide me with a brief statement of reasons, as soon as possible, but no later than 12 months from the date of the determination.
 - n) upon receiving either the brief statement of reasons from each party, or where the matter has been referred for expert assessment, the expert's recommendation and accompanying reasons, I will proceed to declare the quantum of compensation for each disputed claim.
- 3) Prior to making a decision regarding the quantum of compensation for each disputed claim, I may give such further directions (if any) as I think are just in relation to the manner in which a participating class member is to establish his or her entitlement to the payment of an amount under the determination, or the manner for determining any dispute regarding the entitlement of a participating class member to the payment (s 52(5)).

- 4) The members of the class who did not provide a submission and/or evidence to the OAIC within the timeframe specified by the OAIC, and who did not opt out, have not substantiated that they have suffered loss or damage as a result of the interference with their privacy. Pursuant to s 52(1)(b)(iv), I declare that it would be inappropriate for any further action to be taken in relation to those individuals.

Background

4. On 10 February 2014 the respondent published on its website a Microsoft Word document dated 31 January 2014 entitled 'The Immigration Detention and Community Statistics Summary' (**the Detention Report**).
5. At that time, it was the respondent's standard practice to publish the Detention Report on its website on a monthly basis, in Word and PDF formats, for accessibility reasons. The Word version of the Detention Report had a Microsoft Excel spreadsheet embedded within it, which had been used by the respondent to prepare the Detention Report.
6. Unbeknownst to the respondent, the embedded spreadsheet included the personal information of 9,258 individuals who were in immigration detention at that time (**the Spreadsheet**). This information was made publicly accessible when the Detention Report was published (**the Data Breach**).
7. The Spreadsheet contained the following categories of personal information about class members:
 - full names;
 - gender;
 - citizenship;
 - date of birth;
 - period of immigration detention;
 - location;
 - boat arrival details; and
 - reasons why the individual had been considered an unlawful non-citizen.
8. On 19 February 2014 at 9.15am, the respondent was notified about the data breach by a journalist. The respondent removed the Detention Report from its website by 10am on that date.
9. The Detention Report, including the Spreadsheet, was available on the respondent's website for approximately eight days.
10. The respondent also identified that the Detention Report was available on The Internet Archive (**Archive.org**)¹ from 11 February 2014. On 24 February 2014, the respondent wrote to Archive.org seeking removal of the Detention Report. Archive.org complied with this request on 27 February 2014. The Detention Report including the Spreadsheet was available on Archive.org for approximately 16 days.

¹ The Internet Archive (<http://archive.org>) is a non-profit organisation that was founded to build an 'Internet library' by archiving and preserving materials published on the internet; this is done in part by automated processes, which search for and capture new publications.

Investigation summary

11. On 25 March 2014 an individual made a complaint to the OAIC alleging that they were in immigration detention during January 2014 and that their personal information had been disclosed by the respondent.
12. The OAIC opened an investigation into the complaint on 23 April 2014.
13. On 30 August 2015 the individual (**the original representative complainant**) submitted a representative complaint to the OAIC. The original representative complainant sought a declaration that the class members were entitled to an apology from the respondent, compensation for economic and non-economic loss, and aggravated damages.
14. The OAIC attempted to resolve the representative complaint through conciliation. However, the complaint could not be resolved by conciliation.
15. On 9 February 2018, the original representative complainant's solicitor advised the OAIC that their client had passed away. On 10 October 2018 I made a decision to replace the original representative complainant with another class member (**the representative complainant**) pursuant to s 38B(1) of the Privacy Act.
16. In January 2018 the former Commissioner gave notice (**the Notice**) that if class members believed they had suffered loss or damage as a result of the data breach and wanted the opportunity to seek compensation for that loss or damage, they needed to provide information about their loss or damage to the OAIC.
17. On 9 January 2018 the former Commissioner directed the respondent under s 38B(3) to give the Notice to each of the class members that the respondent was reasonably able to contact by 23 February 2018. The Notice was sent by the respondent to those class members for whom the respondent held an email or postal address (a total of 9,086 class members) in January and February 2018.
18. On 24 January 2018, the Notice was published on the OAIC's website, both in English and 20 non-English languages, and in the legal notices section of The Australian newspaper. The OAIC sent the notice to all complainants who had previously contacted the OAIC directly, and to asylum seeker support organisations.
19. Class members were initially given until 14 April 2018 to respond to the Notice (**the deadline**). The deadline was subsequently extended on two occasions to 19 October 2018. The OAIC continued to accept responses after the deadline from persons who had outstanding information requests to the respondent as at 19 October 2018, or had not received a response to their request for information from the respondent by 10 September 2018. Class members who fell within these categories were permitted to provide a response within 40 days of receipt of the decision on their information request and the material the subject of that decision.
20. The OAIC also granted some class members a further 40 days to respond for each file released by the respondent to them after 26 November 2018, and up to and including 31 January 2019. The final date for providing submissions was 22 April 2019.²
21. Seven class members exercised their right to opt out of the representative complaint process. A total of 2579 individuals registered their interest as class members. This includes 1,282 individuals who registered but did not provide the OAIC with any submission or evidence of loss or damage (**the registered cohort**). The remaining 6,679 class members did not respond to the Notice (**the unregistered cohort**).

² Correspondence from the respondent to the OAIC dated 2 September 2020.

22. A total of 1,297 participating class members provided submissions or evidence of loss or damage to the OAIC.
23. After receiving the submissions and evidence, the OAIC undertook an assessment of all the information received from participating class members to inform the creation of the non-economic loss categories set out in the Table at **Addendum A**.

The Law

24. The complaint is about the acts and practices of the Department of Home Affairs (formerly the Department of Immigration and Border Protection), which is an ‘agency’ under s 6 of the Privacy Act.
25. The Secretary is the principal executive of the agency and is therefore the respondent to the complaint under s 36(6)(b) of the Privacy Act.
26. The representative complaint relates to conduct that occurred before the date the *Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Privacy Amendment Act)*, substantively took effect, being 12 March 2014. Prior to the Privacy Amendment Act, the IPPs regulated the standards for the collection, use, disclosure and security of personal information, with which government agencies subject to the Privacy Act had to comply.
27. As the alleged breaches occurred before 12 March 2014, and the respondent is an agency for the purposes of the Privacy Act, the former IPPs apply.
28. Under s 16 of the Privacy Act, as in place at the relevant time, an agency was prohibited from breaching the IPPs. The relevant law is set out in **Addendum B**.

Material considered

29. In making this determination I have considered the following:
- Submissions made by the respondent and the solicitors for the representative complainant
 - Submissions and evidence of loss or damage provided by participating class members and/or their legal or other representatives
 - The OAIC’s ‘own motion investigation report’ dated 12 November 2014³
 - *OAIC Guide to privacy regulatory action*⁴
 - *OAIC Privacy regulatory action policy*.⁵

The issues

The representative complaint

30. The complaint has been made under s 36 of the Privacy Act, which provides for the making of representative complaints.

³ <https://www.oaic.gov.au/privacy/privacy-decisions/investigation-reports/departments-of-immigration-and-border-protection-own-motion-investigation-report/>

⁴ June 2020 version.

⁵ May 2018 version.

31. Representative complaint is defined in s 6 of the Privacy Act as ‘a complaint where the persons on whose behalf the complaint was made include persons other than the complainant but does not include a complaint that the Commissioner has determined should no longer be continued as a representative complaint.’
32. Subsection 36(2) of the Privacy Act states that in the case of an act or practice that may be an interference with the privacy of two or more individuals, any one of those individuals may make a complaint under s 36(1) on behalf of all those individuals. I am satisfied that the complaint was validly made under s 36 of the Privacy Act.
33. Additionally, a representative complaint must meet the requirements of s 38 of the Privacy Act, which sets out the conditions that must exist in order for a representative complaint to be lodged.⁶
34. Section 38(1) of the Privacy Act states that a representative complaint may be lodged under s 36 only if:
- the class members have complaints against the same person or entity; and
 - all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and
 - all the complaints give rise to substantial common issues of law or fact.
35. Section 38(2) sets out further conditions for a representative complaint to be made. Specifically, the section states that the representative complaint must:
- describe or otherwise identify the class members;
 - specify the nature of the complaints made on behalf of the class members;
 - specify the nature of the relief sought; and
 - specify the questions of law or fact that are common to the complaints of the class members.
36. In describing or otherwise identifying the class members, it is not necessary to name them or specify how many there are.
37. Subsection 38(3) further states that a representative complaint may be lodged without the consent of class members.
38. The respondent does not contest that the complainant has met the s 38 requirements of a representative complaint.⁷ I am satisfied that these requirements are met.
39. Subsection 38B(2) provides a mechanism by which class members may withdraw from the representative complaint. Seven class members had opted out of the representative complaint as of that date on which submissions for loss or damage as a result of the Data Breach closed.

IPPs 4 and 11

40. The representative complainant has alleged that the respondent has interfered with the privacy of class members by improperly disclosing their personal information (including their sensitive information) (IPP 11.1), and by failing to protect their personal information from loss, unauthorised access, use, modification or disclosure or other misuse (IPP 4(a)).

⁶ Section 36(2A) of the Act states that in the case of a representative complaint, s 36 has effect subject to s 38.

⁷ Submissions from the respondent to the OAIC, 22 December 2016, 3, [3.6].

41. These allegations have been the subject of a Commissioner Initiated Investigation (CII) and an 'own motion investigation report' (**the Own Motion Report**) dated 12 November 2014.
42. The Own Motion Report concluded that the respondent breached IPP 4 by failing to put in place reasonable security safeguards to protect the personal information that it held against loss, unauthorised access, use, modification or disclosure and against other misuse. It also found that the publication of the personal information of the listed individuals was an unauthorised disclosure, in contravention of IPP 11.
43. In response to the Own Motion Report, the respondent acknowledged that breaches of IPPs 4 and 11 occurred.
44. Since that time, and the commencement of the investigation into the representative complaint on 23 April 2014, there has been no evidence to call into question the findings of the 2014 CII and Own Motion Report. I am therefore satisfied that I can rely on those findings for the proper discharge of the statutory powers and functions in determining this representative complaint under s 52 of the Privacy Act.

Remedies

45. Having found the complaint substantiated, I may make a determination that includes one or more declarations under s 52(1)(b).

Apology

46. Under s 52(1)(b)(ii) of the Privacy Act I may declare that the respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the representative complainant, and the class members.
47. The solicitors for the representative complainant have requested that the respondent provide class members with 'a sincere and meaningful apology'.⁸
48. The respondent wrote to class members on 12 March 2014 to apologise for the unauthorised disclosure of their personal information. The respondent has also included a statement on its website which notes that it 'deeply regrets inadvertently allowing unauthorised access to personal information'.⁹ Given this, I consider it unnecessary to make a declaration requiring the respondent to issue a further apology.

Reconsideration of protection visa

49. The solicitors for the representative complainant also seek a declaration that the respondent must reconsider the rejected protection visa applications of class members.¹⁰ Protection claims are assessed through a separate administrative decision-making process under the *Migration Act 1958* (Cth). I do not have the power under the Privacy Act to require that the respondent reconsider decisions made under a separate statutory scheme.

⁸ Submissions from representative complainant to the OAIC, 19 October 2018, 26, [5.37].

⁹ <https://www.homeaffairs.gov.au/reports-and-publications/reviews-and-inquiries/departmental-reviews/data-breach>

¹⁰ Submissions from the representative complainant to the OAIC, 19 October 2018, 26, [5.39].

Compensation

50. The solicitors for the representative complainant seek compensation for economic and non-economic losses suffered by reason of the Data Breach, on behalf of all class members.¹¹
51. I have the discretion under s 52(1)(b)(iii) of the Privacy Act to award compensation for ‘any loss or damage suffered by reason of the interference with privacy’. Subsection 52(1AB) states that loss or damage can include injury to the complainant's feelings or humiliation suffered by the representative complainant.
52. Under s 52(1)(b)(iii) of the Privacy Act, I am empowered to award compensation where a complainant has established that they, individually, have suffered loss or damage by reason of the respondent's interference with their privacy such that they are entitled to monetary compensation.
53. This is apparent from the wording of s 52(1)(b)(iii) itself, where a declaration that a complainant is entitled to compensation must be in respect of loss or damage suffered by reason of the act or practice the subject of the complaint. Section 52(5)(a) gives me the power to make directions as I think just in relation to the manner in which a class member is to establish his or her entitlement to the payment of an amount under the determination.
54. Therefore, an evidentiary basis is required to make a declaration s 52(1)(b)(iii) that a complainant is entitled to compensation. This is particularly the case in respect of non-economic loss, which is of an inherently personal nature and is not sufficiently common in this case to lend itself to a declaration that all class members are entitled to the same kind or amounts of compensation without some evidence from those class members as to their loss.
55. The principles for awarding compensation under the Privacy Act were summarised by the Administrative Appeals Tribunal (**AAT**) in *Rummery and Federal Privacy Commissioner and Department of Justice and Community Safety (Rummery)*:¹²
- where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course
 - 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.
56. The solicitors for the representative complainant submit that the typical range of compensation for non-economic loss in privacy determinations is generally too low and

¹¹ In their submissions dated 19 October 2018, at [5.21] the solicitors for the representative complainant referred to the Federal Court's decision in *Richardson v Oracle Corporation Australia Pty Ltd*,¹¹ where Kenny J relied upon ‘prevailing community standards’ to find that an award of compensation for non-economic loss was unreasonably low. The solicitors for the representative complainant submit that a similar approach should be taken in the context of complaints under the Privacy Act.

¹² [2004] AATA 1221.

fails to reflect the public's expectations concerning the value of privacy and personal information.¹³

57. Accordingly, they submit:

- there was a common element of loss suffered by the class members, being the loss of confidentiality surrounding the circumstances of their presence in immigration detention and their application for protection within Australia¹⁴
- the appropriate 'base' compensation payment for the 'common' loss caused by the breach is \$20,000 per class member, and¹⁵
- this amount should be adjusted for any class member who makes an individual submission as to their own loss and damage.¹⁶

58. As evidence of the non-economic loss or damage suffered by class members, the representative complainant has provided a report from a psychologist, which was based on information that included summarised responses of 12 class members ¹⁷(**the report**). The report provided that without a direct assessment of a representative sample of the cohort's psychological response to the Data Breach it is difficult to determine how widespread distress and adverse reactions have been, and whether these reactions have persisted.¹⁸

59. A causal link must firstly be made out between the Data Breach and any non-economic loss class members claim to have incurred as a result.

60. In such instances, I may then determine that some award of damages is appropriate where class members have provided submissions on feelings of hurt and/or humiliation on discovery of the Data Breach.

61. Assessing compensation by having regard to each class member's reaction requires the provision of individualised submissions and/or evidence.¹⁹ Non-economic loss is of an inherently personal nature and does not lend itself to a declaration that class members are entitled to compensation without some evidence from those class members as to their loss. This approach is in keeping with the determination in *'PB' and United Super Pty Ltd as Trustee for Cbus (Privacy)*²⁰ in which the then Commissioner stated that the onus of establishing loss or damage is on the complainant,²¹ and unless an individual member of the class supplies evidence of loss or damage, they are not entitled to a remedy.²² It is also consistent with what was communicated to class members in the Notice.²³

¹³ Submissions from the representative complainant to the OAIC, 19 October 2018, 24 [5.29]

¹⁴ Ibid, [5.10].

¹⁵ Ibid, [5.35].

¹⁶ Ibid.

¹⁷ Psychologist report from the representative complainant to the OAIC, 18 October 2018.

¹⁸ Opinion regarding the mental health consequences of the Department of Immigration and Border Protection Data Breach, 18 October 2018, [19].

¹⁹ *BMW Australia Ltd v Brewster* [2019] HCA 45.

²⁰ [2018] AICmr 513r

²¹ Ibid [83].

²² Ibid [91].

²³ The Notice stated, 'In order to make a determination about the Representative Complaint, including whether any of the persons whose personal information was published in the Data Breach are entitled to compensation for any loss or damage suffered, the Commissioner needs information from you. If you were affected by the Data Breach and do not provide information of the kind described below, the Commissioner may conclude that

62. Therefore, I consider it would be appropriate in this instance to distinguish between class members who provided submissions and/or evidence in relation to loss or damage prior to the deadline, and those that did not.
63. Participating class members are to be paid compensation for loss or damage arising from the interference with their privacy, in accordance with the process outlined in the declarations at [3] above and the categories of loss or damage in the Table at **Addendum A**.
64. The process is intended to provide a quick and efficient mechanism for participating class members to resolve their claims. While the process does include a 12-month deadline, this timeframe is a safeguard to ensure that claims are resolved in a timely manner. It is anticipated that the bulk of the claims will be resolved in a much shorter timeframe by agreement between the parties.
65. Class members in the registered and unregistered cohorts (who did not provide a submission or evidence to the OAIC, within the timeframe specified by the OAIC, and who did not opt out) have not substantiated that they have suffered loss or damage as a result of the interference with their privacy.
66. The solicitors for the representative complainant have queried this approach. They submit:
- the fact that class members in the registered and unregistered cohorts did not provide submissions or evidence prior to the deadline indicates that a serious procedural problem may have occurred²⁴
 - in these circumstances, a finding that class members in the registered cohort have not suffered loss or damage would lead to an unjust outcome given that it is based on the uncertain assumption that they have had a reasonable and fair opportunity to engage in a complex legal process.²⁵
67. The solicitors for the representative complainant submit that the appropriate course is for me to make a declaration under s52(1)(b)(iii), and to give directions under s52(5)(a) to provide for a process for the class members in the registered and unregistered cohorts to provide any submission or evidence of their loss or damage.²⁶ This would be facilitated by the OAIC directing the respondent to give the Notice to each of the class members under s 38B(3).
68. In my view there is no evidence that a serious procedural problem has occurred, or that such a finding would lead to an unjust outcome. In the circumstances I do not consider that the approach suggested by the solicitors for the representative complainant would be reasonable or appropriate given that the OAIC has already directed the respondent to give the Notice to each of the class members under s 38B(3), and has overseen a lengthy

he is not satisfied you have suffered any loss or damage as a result of the Data Breach and you may not receive compensation for the Data Breach.’

²⁴ Submissions from the representative complainant to the OAIC, 20 October 2020.

²⁵ Particular areas of concern cited by the solicitors for the representative complainant included the size of the registered cohort, that they have taken active steps to respond to the Notice by providing the OAIC with their contact details, and the high proportion of class members from a non- English-speaking background.

²⁶ Submissions from the representative complainant to the OAIC, 20 October 2020.

process, with the respondent's cooperation, for the class members to provide submissions or evidence of their loss or damage.

69. The requirements for class members to make a claim for loss and/or damage were clearly expressed in the Notice, and the OAIC took numerous steps to ensure that the Notice was effectively communicated to class members, including:

- consulting with the respondent and the solicitor for the original representative complainant about the content and form of the Notice
- publishing the Notice on the OAIC's website in English and 20 non-English languages on 24 January 2018
- publishing the Notice in the legal notices section of The Australian newspaper on 24 January 2018
- making information available via social media channels
- directing the respondent on 9 January 2018, under s 38B(3), to give the Notice to each of the class members that the respondent is reasonably able to contact by 23 February 2018²⁷
- sending the Notice to those class members who had previously contacted the OAIC, and to asylum seeker support organisations
- providing a copy of the Notice to the solicitor for the original representative complainant, who also represented a large number of class members
- answering written and phone enquiries from class members and using interpreters and translators in communicating with class members wherever appropriate
- providing information on the OAIC's website about how class members may seek further assistance from the OAIC in languages other than English.

70. I also consider that class members have been given a reasonable opportunity to provide submissions or evidence to the OAIC:

- class members were initially given until 14 April 2018 to respond to the Notice
- the deadline was subsequently extended by the OAIC on two occasions to 19 October 2018
- as outlined in detail at [19] – [20] above, extensions on the 19 October 2018 deadline were provided to some class members
- submissions were finalised in April 2019.

71. The solicitors for the representative complainant raised concerns about whether the class members in the registered cohort are represented, and the extent to which they have received communication from the OAIC to alert them that they may lose their rights in relation to the complaint.

²⁷ In response to the direction under s 38B(3), the respondent sent the Notice to those class members for whom the respondent held an email or postal address (a total of 9,086 class members) across January and February 2018.

72. A significant proportion of the class members in the registered cohort were either represented, and/or had their details provided to the OAIC by a legal or other representative.
73. In so far as was practicable, the OAIC took steps to communicate with the solicitors for the representative complainant, and the person who was listed as representative for the majority of the class members in the registered cohort. These communications included the OAIC's view that members of the class who did not provide a submission to the OAIC within the relevant period have not suffered any loss or damage as a result of the Data Breach.
74. In my view, it would be inappropriate for any further action to be taken in relation to class members in the registered and unregistered cohorts. In arriving at this view, I have considered:
- my finding that the class members in the registered and unregistered cohorts have not substantiated that they have suffered loss or damage resulting from the interference with their privacy
 - the steps taken by the OAIC to ensure that the Notice was effectively communicated to class members and that they had a reasonable opportunity to provide submissions and evidence to the OAIC in response to the Notice
 - the considerable time and resources invested by the OAIC in taking the above steps, as well as assessing the submissions received, and developing and facilitating a process for the resolution of class members' claims
 - the additional cost and time to the OAIC, and the parties, of giving class members a further opportunity to provide submissions and/or evidence to substantiate their claims for loss and/or damage²⁸
 - the additional cost and time to the respondent of requiring that it engage in negotiation and expert assessment with the class members in the registered and unregistered cohorts in circumstances where those individuals have failed to provide submissions or evidence to substantiate their claims for loss and/or damage
 - the need to ensure that the OAIC uses its powers and resources in a productive and efficient manner, and that orders made are necessary and appropriate²⁹
 - actions taken by the respondent to remedy and address the consequences of the conduct, including the steps taken by the respondent to cooperate with the OAIC's investigation, and other actions outlined below at [86]³⁰
 - the importance for the class members, respondent and the OAIC of finalising the matter as soon as reasonably practicable to ensure that compensation is paid to those class members who provided evidence or submissions substantiating their claims for loss and/or damage.

Non-economic loss

75. I have a broad discretion to give directions as to how damages may be dealt with. For example, I may choose to conduct individual assessments of each class member's right to damages, or as I do here, pursuant to subsections 52(4) and/or 52(5) of the Act, refer the

²⁸ Ibid.

²⁹ Section 52(3A).

³⁰ *Privacy Regulatory Action Policy*, [38].

matter of damages to a form of dispute resolution for the parties to negotiate on quantum, with any unresolved claims to be put before me for my consideration.

76. The Table at Addendum A has been constructed to reflect the claims made by class members, and to assist parties in their negotiations. The categories are specific to the circumstances outlined in this representative complaint and are not intended to be used as a formula for determining compensation for non-economic loss in privacy matters more generally.

77. In *Rummery*, the AAT confirmed that the Commissioner should have regard to the seriousness of the breach in assessing the significance of a complainant's evidence as to the injury to their feelings and humiliation because it assists in assessing the depth of their feelings.³¹ The OAIC has considered these matters in developing the respective categories.

78. Notwithstanding this, the range of quanta of compensation outlined in the Table are broadly consistent with the range of compensation awarded in previous privacy determinations.³²

Economic loss

79. The Table at Addendum A has been developed to assist with the calculation of compensation for non-economic loss. It is not intended to assist with the calculation of damages for economic loss.

80. Damages for economic loss are awarded to restore an individual to 'the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation'.³³

81. I must therefore determine that a causal link can be made out between the privacy breaches, and any economic loss participating class members may have incurred as a result of the Data Breach.

82. In '*QP*' and *the Commonwealth Bank of Australia Limited*,³⁴ I outlined the principles relevant to causation espoused by the High Court in *March v Stramare (E and MH) Pty Ltd*³⁵

³¹ *Rummery* [54].

³² **Category 1** - In '*S*' and *Veda Advantage Services and Solutions Limited* [2012] AICmr 33 and '*111*' and *Business Services Brokers Pty Ltd t/a TeleChoice* [2016] AICmr 42 the then Commissioner awarded compensation for non-economic loss of \$2000 and \$3,500 respectively because the complainants were made anxious by the conduct of the respondents.

Category 2 - In '*CM*' and *Corporation of the Synod of the Diocese of Brisbane* [2014] AICmr 86 the then Commissioner awarded compensation of \$7,500 on the basis that the incident caused 'pain and suffering' and 'feelings of humiliation'.

Category 3 - In '*BO*' and *Aerocare Pty Ltd* [2014] AICmr 32 the then Commissioner awarded \$8,500 because the disclosure caused the complainant 'significant distress and humiliation'. The Commissioner awarded compensation for non-economic loss of \$8,500.

Category 4 - is broadly consistent with '*DK*' and *Telstra Corporation Limited* [2014] AICmr 118 in which the then Commissioner stated 'the complainant has suffered significant anxiety and distress including I believe a well-founded fear for his physical safety and that of his partner, as a result of the breach'. The complainant was awarded compensation for non-economic loss of \$18,000.

Category 5 - This category captures non-economic loss that is extreme and falls beyond the range of previous privacy determinations.

³³ *Livingstone v Raywards Coal Company* [1880] 5 App Cas 25

³⁴ [2019] AICmr 48.

and cited by Deputy President Melick in *'EQ' and Office of the Australian Information Commissioner*:³⁶

- causation is ultimately a question of common sense and experience, determined on the facts of each case;
- in law, causation is a question identifying where legal responsibility should lie, rather than examining the cause of event from a scientific or philosophical viewpoint; policy issues and value judgements have a role to play in determining whether, for legal purposes, a circumstance is found to be causative of loss;
- a 'but for' analysis is not a sufficient test of causation, although it may be a guide; and
- where there are multiple elements, each one sufficient on its own to have caused the loss, the causation test may be considered satisfied by each one of them.

83. The quantum of compensation for economic loss payable to participating class members must therefore be determined on a case-by-case basis, taking into account the circumstances, according to these principles.

Aggravated damages

84. The power to award damages in s 52 of the Privacy Act includes the power to award aggravated damages in addition to general damages.

85. Aggravated damages are given to compensate a person where the harm suffered was aggravated by the manner in which the act was done, rather than to punish a wrongdoer or deliver a measure of deterrence.

86. In the circumstances of this case, an award of aggravated damages is not justified for the following reasons:

- the Data Breach occurred inadvertently
- the respondent promptly took steps to address the underlying cause of the Data Breach
- the respondent commissioned an independent investigator/auditor to investigate the Data Breach, and provide recommendations to prevent reoccurrence of a similar data breach
- the respondent also adopted and implemented a number of the independent investigator/auditor's recommendations
- the respondent apologised to class members, and cooperated with the OAIC throughout the representative complaint process.

87. For these reasons, I find the complaint substantiated and I make this determination and the declarations set out above at [3].

Angelene Falk

Australian Information Commissioner and Privacy Commissioner

11 January 2021

³⁵ [1991] HCA 12.

³⁶ [2016] AATA 785.

Review rights

A party may apply under s 96 of the *Privacy Act 1988* (Cth) to have a decision under s 52(1) or (1A) to make a determination reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm a privacy determination. An application to the AAT must be made within 28 days after the day on which the person is given the privacy determination (s 29(2) of the Administrative Appeals Tribunal Act 1975). An application fee may be payable when lodging an application for review to the AAT. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

A party may also apply under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* to have the determination reviewed by the Federal Circuit Court or the Federal Court of Australia. The Court may refer the matter back to the OAIC for further consideration if it finds the Information Commissioner's decision was wrong in law or the Information Commissioner's powers were not exercised properly. An application to the Court must be lodged within 28 days of the date of the determination. An application fee may be payable when lodging an application to the Court. Further information is available on the Court's website (www.federalcourt.gov.au/) or by contacting your nearest District Registry.

Addendum A

Table of categories of loss or damage experienced by members of the class and indicative quantum of compensation

Non-economic loss category		+ Economic loss (Case-by-case calculation taking into account the principles outlined at [79] – [83] above)
0	The individual has not provided a submission and/or evidence that substantiates loss or damage resulting from the Data Breach	
1	General anxiousness, trepidation, concern or embarrassment, resulting from the Data Breach	
2	Moderate anxiousness, fear, pain and suffering, distress or humiliation, resulting from the Data Breach, which may cause minor physiological symptoms, such as loss of sleep or headaches, and may result in a consultation with a health practitioner	
3	Significant or prolonged anxiousness, fear, pain and suffering, distress or humiliation, resulting from the Data Breach, which may cause psychological or other harm, and may result in a prescribed course of treatment from a general practitioner	
4	The development or exacerbation of a mental health condition as a result of the Data Breach, resulting in a referral to a mental health specialist for treatment	
5	Extreme loss or damage resulting from the Data Breach	

Non-economic loss categories
Category 0: \$0
Category 1: \$500 - \$4000
Category 2: \$4001 - \$8000
Category 3: \$8001 - \$12 000
Category 4: \$12 001 - \$20 000
Category 5: > \$20,000

Addendum B

Relevant legislation – Privacy Act

52 Determination of the Commissioner

(1) After investigating a complaint, the Commissioner may:

(a) make a determination dismissing the complaint; or

(b) find the complaint substantiated and make a determination that includes one or more of the following:

(i) a declaration:

(A) where the principal executive of an agency is the respondent—that the agency has engaged in conduct constituting an interference with the privacy of an individual and must not repeat or continue such conduct; or

(B) in any other case—that the respondent has engaged in conduct constituting an interference with the privacy of an individual and must not repeat or continue such conduct;

(ia) a declaration that the respondent must take specified steps within a specified period to ensure that such conduct is not repeated or continued;

(ii) a declaration that the respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;

(iii) a declaration that the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint;

(iv) a declaration that it would be inappropriate for any further action to be taken in the matter.

...

(1AA) The steps specified by the Commissioner under subparagraph (1)(b)(ia) or paragraph (1A)(b) must be reasonable and appropriate.

(1AB) The loss or damage referred to in paragraph (1)(b) or subsection (1A) includes:

(a) injury to the feelings of the complainant or individual; and

(b) humiliation suffered by the complainant or individual.

(1B) A determination of the Commissioner under subsection (1) or (1A) is not binding or conclusive between any of the parties to the determination.

(2) The Commissioner shall, in a determination, state any findings of fact upon which the determination is based.

...

(3A) A determination under paragraph (1)(b) or subsection (1A) may include any order that the Commissioner considers necessary or appropriate.

(4) A determination by the Commissioner under subparagraph (1)(b)(iii) on a representative complaint:

(a) may provide for payment of specified amounts or of amounts worked out in a manner specified by the Commissioner; and

(b) if the Commissioner provides for payment in accordance with paragraph (a), must make provision for the payment of the money to the complainants concerned.

(5) If the Commissioner makes a determination under subparagraph (1)(b)(iii) on a representative complaint, the Commissioner may give such directions (if any) as he or she thinks just in relation to:

(a) the manner in which a class member is to establish his or her entitlement to the payment of an amount under the determination; and

(b) the manner for determining any dispute regarding the entitlement of a class member to the payment.

(6) In this section:

complainant, in relation to a representative complaint, means the class members.

53 Determination must identify the class members who are to be affected by the determination

A determination under section 52 on a representative complaint must describe or otherwise identify those of the class members who are to be affected by the determination.

6 Interpretation

(1) In this Act, unless the contrary intention appears:

personal information means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

sensitive information means:

(a) information or an opinion about an individual's:

(i) racial or ethnic origin; or

(ii) political opinions; or

(iii) membership of a political association; or

(iv) religious beliefs or affiliations; or

- (v) philosophical beliefs; or
- (vi) membership of a professional or trade association; or
- (vii) membership of a trade union; or
- (viii) sexual preferences or practices; or
- (ix) criminal record;

that is also personal information; or

- (b) health information about an individual; or
- (c) genetic information about an individual that is not otherwise health information.

10 Record-keepers

(1) Subject to subsections (4) and (5), an agency that is in possession or control of a record of personal information shall be regarded, for the purposes of this Act, as the record-keeper in relation to that record.

(2) Subject to subsections (3), (4) and (5), where a record of personal information is in the possession or under the control of a person:

(a) in the course of the person's employment in the service of or by an agency other than the Australian Federal Police; or

(b) as a member, staff member or special member of the Australian Federal Police in the performance of his or her duties as such a member, staff member or special member;

then, for the purposes of this Act, the record-keeper in relation to that record shall be taken to be:

- (c) if paragraph (a) applies—the agency first referred to in that paragraph; and
- (d) if paragraph (b) applies—the Australian Federal Police.

The Information Privacy Principles

Principle 4

Storage and security of personal information

A record-keeper who has possession or control of a record that contains personal information shall ensure:

(a) that the record is protected, by such security safeguards as it is reasonable in the circumstances to take, against loss, against unauthorised access, use, modification or disclosure, and against other misuse; and

(b) that if it is necessary for the record to be given to a person in connection with the provision of a service to the record-keeper, everything reasonably within the power of the record-keeper is done to prevent unauthorised use or disclosure of information contained in the record.

Principle 11

Limits on disclosure of personal information

1. A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless:

(a) the individual concerned is reasonably likely to have been aware, or made aware under Principle 2, that information of that kind is usually passed to that person, body or agency;

(b) the individual concerned has consented to the disclosure;

(c) the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;

(d) the disclosure is required or authorised by or under law; or

(e) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.

2. Where personal information is disclosed for the purposes of enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the purpose of the protection of the public revenue, the record-keeper shall include in the record containing that information a note of the disclosure.

3. A person, body or agency to whom personal information is disclosed under clause 1 of this Principle shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency.