



‘DK’ and Telstra Corporation Limited **[2014] AICmr 118 (30 October 2014)**

Determination and reasons for determination of Privacy Commissioner, Timothy Pilgrim

Complainant:	‘DK’
Respondent:	Telstra Corporation Limited
Determination date:	30 October 2014
Application number:	CP13/01248
Catchwords:	Privacy — Privacy Act — National Privacy Principles — (CTH) <i>Privacy Act 1988</i> s 52 — NPP1— Collection NPP 2 — Use and disclosure — Compensation — Non-economic loss — Aggravated damages not awarded

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Summary

1. Telstra Corporation Limited (Telstra) interfered with the complainant's privacy by failing to take reasonable steps to provide notice to the complainant that it would use and disclose his personal information for the purpose of publishing it in the White Pages, in breach of National Privacy Principle (NPP) 1.3 of the *Privacy Act 1988* (Cth) (the Privacy Act).
2. To redress this matter, Telstra shall:
 - apologise in writing to the complainant within 4 weeks of this determination;
 - review its processes so that its sales consultants are specifically required to notify each prospective customer that their phone line number will be listed in the White Pages and that they have the option of taking out a silent line;
 - review its Privacy Statement to make specific reference to Telstra's collection of personal information for the purpose of publication in the White Pages; and
 - pay the complainant \$18,000 for non-economic loss caused by the interference with the complainant's privacy.

Background

3. The complainant works as a judge in the family law jurisdiction. He claims that he regularly receives threats from parties whose matters he has heard. He has explained that, as a result of the security implications of the work, there are specific security measures provided for by the Federal Circuit Court to protect judges and their families. The measures include setting up alarm systems at judges' homes and suppressing judges' and their partners' contact details on publically accessible databases.
4. In April 2013, the complainant contacted Telstra to have a phone line connected to his home. The phone line was to be part of an alarm system installed by the Federal Circuit Court as a security measure for him and his partner in light of the security implications of his work with the Court.
5. He states that when he contacted Telstra through its instant messaging facility to arrange the connection of the phone line, he told the Telstra representative that the sole purpose of the phone line was for the alarm system and that the phone line would not be used for any other purpose.
6. Telstra set up the phone line and published the complainant's name, address and the number of the phone line in both the White Pages online and hard copy directory through its subsidiary Sensis Pty Ltd.

Privacy complaint and remedy sought

7. On 10 September 2013, the complainant lodged a complaint with the OAIC against Telstra under s 36 of the Privacy Act.
8. The complainant claimed that Telstra had improperly disclosed his personal information (full name, address and the phone line number) to the White Pages for publication without his knowledge or consent.
9. The complainant seeks a declaration by me that:
 - Telstra apologise in writing to him and his partner;
 - Telstra amend its website, telephone connection service and online form to include the question 'do you wish your details to be published in the White Pages?' (i.e. change the onus to an opt-in rather than Telstra assume customers consent to publication); and
 - he be awarded compensation for the potential compromise of personal security he and his partner have suffered as a result of his personal information being disclosed.
10. Telstra has not accepted that it has breached the complainant's privacy.
11. Notwithstanding this, Telstra has advised that in light of this complaint it has amended its Privacy Statement to make specific reference to the publication of customer information in the White Pages and put processes in place which require sales consultants to notify each prospective customer of the option of taking out a silent line. While these steps form part of my declaration, I appreciate that Telstra proactively undertook to implement them during the complaint process.

The law

12. This present matter relates to events that occurred prior to reforms to the Privacy Act which commenced on 12 March 2014 and so has been dealt with under the NPPs contained in Schedule 3 of the Privacy Act. The NPPs outline the standards for handling personal information that legally bind 'organisations'.¹ Section 6A(1) provides that for the purposes of the Privacy Act 'an act or practice breaches a National Privacy Principle if, and only if, it is contrary to, or inconsistent with, that National Privacy Principle'.
13. Section 6C of the Privacy Act defines 'organisation' as meaning:
 - (a) an individual; or
 - (b) a body corporate; or
 - (c) a partnership; or

¹ From 12 March 2014, the Australian Privacy Principles replaced the National Privacy Principles (NPPs) and the Information Privacy Principles (IPPs). These new APPs apply to both Australian Government agencies and organisations covered by the Privacy Act.

(d) any other unincorporated association; or

(e) a trust

that is not a small business operator, a registered political party, an agency, a State or Territory authority or a prescribed instrumentality of a State or Territory.

14. Telstra is an 'organisation' as defined by s 6C(1) and is accordingly bound by the NPPs.
15. 'Personal information' is defined in s 6(1) of the Privacy Act as:

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.
16. It is not disputed that the information, which is the subject of this determination, is personal information under the Privacy Act.
17. The issues for determination are whether Telstra:
 - a. failed to comply with the notice requirements in NPP 1.3; and
 - b. used and disclosed personal information for a secondary purpose that was not related to the purpose of collection and would not be 'reasonably expected' by the individual concerned, or was not authorised or required by law; thereby breaching NPP 2.1.
18. Section 52 of the Privacy Act provides that, after investigating a complaint, I may make a determination:
 - dismissing the complaint (s 52(1)(a)); or
 - finding the complaint substantiated and declaring:
 - that the respondent has engaged in conduct constituting an interference with the privacy of an individual and should not repeat or continue such conduct (s 52(1)(b)(A)); and/or
 - the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant (s 52(1)(b)(ii)); and/or
 - the complainant is entitled to compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint (s 52(1)(b)(iii)); and/or
 - it would be inappropriate for any further action to be taken in the matter (s 52(1)(b)(iv)).

Investigation process

19. The OAIC's investigation of this complaint involved the following:
 - On 26 September 2013, preliminary inquiries were conducted into the complainant's allegations under s 42 of the Privacy Act
 - The OAIC considered written submissions provided by both the complainant and Telstra
 - On 9 January 2014, an investigation was opened under s 40(1) of the Privacy Act. In the investigation opening letters, the OAIC provided its preliminary view that Telstra had breached NPP 2.1 of the Privacy Act
 - In response to the OAIC's preliminary view, both the complainant and Telstra provided further submissions
 - Attempts were made to resolve the matter through conciliation
 - The parties were unable to reach a mutually agreeable outcome through conciliation and I decided to determine the matter under s 52 of the Privacy Act.

The relationship between Telstra and Sensis

20. Telstra is obliged under the terms of its carrier licence conditions² to produce and distribute an alphabetical public number directory and arrange to publish and distribute the directory to its own customers and the customers of other carriage service providers.
21. Sensis Pty Ltd (Sensis) is responsible for the Yellow Pages and White Pages directories and associated voice, electronic, wireless and online products, as well as a range of advertising, media, content, location and other business services. At the time of the alleged breach, Sensis was a wholly owned subsidiary of Telstra.³
22. Telstra's practice was, and continues to be, to utilise Sensis to publish names, addresses and phone numbers in the White Pages (unless a silent line, which is an unlisted number, is requested) in compliance with its carrier licence obligations.
23. Even though Sensis carried out the directory publication and distribution, Telstra utilised Sensis to do these acts in order for Telstra to meet its obligations. Telstra maintained effective control over the information that was provided to Sensis for the purpose of Telstra meeting its licencing conditions. The subsequent publication of the personal information by Sensis through the

² *Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997* made pursuant to s63(3) of the *Telecommunications Act 1997*

³ In February 2014, Sensis was acquired by a US-based firm, Platinum Equity. Telstra has retained 30% ownership of Sensis.

White Pages was consequently a disclosure by Telstra to the public for the purposes of the Privacy Act.

National Privacy Principle (NPP) 1.3

24. NPP 1.3 is applicable when organisations are collecting personal information from individuals directly.

25. It relevantly provides that:

At or before the time (or, if that is not practicable, as soon as practicable after) an organisation collects personal information about an individual from the individual, the organisation must take reasonable steps to ensure that the individual is aware of:

(c) the purposes for which the information is collected

(d) the organisation (or the types of organisations) to which the organisation usually discloses information of that kind

26. The term 'reasonable steps' is not defined in the Privacy Act and so must be interpreted according to its ordinary meaning, having regard to the context in which it appears in the Privacy Act.

Submissions

27. The complainant submits that at the time he contacted Telstra to request connection of a phone service for the purpose of installing an alarm system, the Telstra representative failed to inform him that his name, address and phone number would be published in the White Pages directory. The complainant claims that it is unreasonable to expect people to know that their personal information will be disclosed in this way, particularly when the purpose of their phone line is for an alarm system and not for a functioning phone handset.

28. In its submissions to the OAIC, Telstra states that it is reasonable to assume that people would be aware that information about phone services would appear in the White Pages which is 'well known to be a comprehensive directory of telephone listings'.

29. Telstra further submits that the complainant did not request a silent line feature and that on that basis Telstra followed its usual business practice to publish the complainant's name, address and phone number in the White Pages.

Findings in relation to NPP 1.3

30. NPP 1.3 does not specify how notice of the matters set out in that provision is to be given. I have consequently had regard to the circumstances surrounding the collection of the complainant's personal information to determine whether

or not Telstra took reasonable steps to ensure that the complainant was made aware of NPP 1.3 matters. I am satisfied that, when speaking to the complainant to arrange the phone line, the Telstra representative did not inform the complainant that Telstra would publish the complainant's personal information in the White Pages.

31. In reaching this conclusion, I have had regard to the transcript of the instant message exchange between the complainant and Telstra during which the complainant made it clear that the phone line connection was for the sole purpose of a back to base alarm. The transcript makes it apparent that the Telstra representative did not inform the complainant that Telstra's usual practice was to publish names, addresses and phone numbers in the White Pages unless there was a request for a silent line feature.
32. In order to meet the requirements of NPP 1.3, it is not sufficient for Telstra to assume that the complainant knew that his personal information would be published in the White Pages unless he requested a silent line feature. Telstra bears the onus of showing that the complainant was aware that it was Telstra's usual business practice to disclose phone line information in the White Pages.
33. Telstra's Privacy Statement '*Protecting Your Privacy*' aims to advise individuals both about collection and use/disclosure of their personal information by Telstra. I have reviewed that Privacy Statement (as it existed at April 2013) and note that it does not specifically identify that the personal information it collects will be published in the White Pages. It indicates generally that Telstra may disclose personal information to 'the manager of the Integrated Public Number Database, and other organisations as required or authorised by law'. There is no reference to the fact that disclosure to these 'other organisations' also involves disclosure to the public (through the White Pages).
34. There is no information before me to suggest that the complainant was made aware through any medium of this particular purpose of collection (i.e. publishing in the White Pages) and of the consequent disclosure of his personal information.
35. Further, I do not consider any legal obligation that Telstra may have to publish personal information obviates the requirement to comply with NPP 1.3.
36. I am of the view that Telstra did not take reasonable steps to properly identify for the complainant the purposes of collection and the disclosures Telstra would usually make so as to enable the complainant to be reasonably made aware that his personal information would be published in the White Pages. Consequently, I find that Telstra has breached NPP 1.3.

National Privacy Principle (NPP) 2.1

37. NPP 2 contains the principles relating to use and disclosure of personal information. The use and disclosure of personal information for the primary

purpose for which it was collected is permissible. NPP 2.1 prohibits an organisation such as Telstra from using or disclosing personal information about an individual such as the applicant for a secondary purpose unless an exception relevantly applies to the information in question.

38. For the purpose of this determination, it is sufficient for me to have regard to the exceptions at paragraphs (a) and (g) provided as follows:

An organisation must not use or disclose personal information about an individual for a purpose (***the secondary purpose***) other than the primary purpose of collection unless:

(a) both of the following apply:

- (i) the secondary purpose is related to the primary purpose of collection and, if the personal information is sensitive information, directly related to the primary purpose of collection;
- (ii) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose; or

.....

(g) the use or disclosure is required or authorised by or under law

39. The *Guidelines to the National Privacy Principles* issued by the then Office of the Federal Privacy Commissioner in September 2001 (the Guidelines)⁴ state that '[t]o be related, the secondary purpose must be something that arises in the context of the primary purpose.'⁵

Submissions

40. The complainant submits that by publishing his personal information, Telstra used and disclosed his personal information for a purpose other than the primary purpose of collection (which was to set up the phone line). He also submits that he did not reasonably expect Telstra to use or disclose his personal information for the purpose of publishing it in the White Pages.
41. Telstra submits that one of the primary purposes for which Telstra collects personal information is to discharge its legal obligations to publish information in the White Pages. On this basis, it says that as a primary purpose of collection publication was permissible and it cannot be found to be in breach of NPP 2.1.
42. Telstra alternatively contends that the publication of the complainant's details was permitted under NPP 2.1(a) because it was clearly related to the primary purpose of supplying the telephone service to the complainant and should have been within the complainant's reasonable expectations. It states that the public is familiar with the White Pages as a source of telephone listings information. It claims that this familiarity means that individuals would

⁴ These guidelines have been superseded by the APP *Guidelines to the National Privacy Principles*, page 35. Guidelines which apply from 12 March 2014.

⁵ *Guidelines to the National Privacy Principles*, page 35.

reasonably expect when ordering a new telephone service that their details would be published in the White Pages unless they obtained a silent line.

43. Telstra further contends that the publication of the complainant's details was permitted under NPP 2.1(g) as the disclosure of that information was required or authorised by or under law. Telstra notes that 'under clause 9 of the *Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997* (the Declaration) which is made under s 63(3) of the *Telecommunications Act 1997* (Cth) (Telecommunications Act), Telstra is required to produce and distribute an alphabetical public number directory that includes entries for all customers who are supplied with a standard telephone service, regardless of who provides them with that service'. Telstra says that the service supplied to the complainant was a standard telephone service.

Findings in relation to NPP 2.1

Primary Purpose

44. Telstra's Privacy Statement '*Protecting Your Privacy*' forms part of a Terms and Conditions Booklet titled '*Things You Need to Know About Your Service*', which is made available to new customers. Under the heading '*About us*', it states that Telstra provides a range of telecommunication services. It goes on to say under the heading '*How we use your personal information*', that Telstra may use personal information to:
- assist customers to subscribe to its services;
 - administer and manage those services;
 - inform of ways those services could be improved;
 - research and develop Telstra's services;
 - gain an understanding of customer information in order for Telstra to provide customers with a better services; and
 - maintain and develop Telstra's business systems and its infrastructure.
45. There is no information in the Privacy Statement which indicates that the collection of customers' personal information is for the purpose of publication in the White Pages. Nor is there any indication that collection is for the more general purpose of Telstra being able to comply with its carrier licence obligations.
46. I am of the view that the primary purpose for Telstra's collection of customers' personal information is to enable Telstra to deliver those services to which customers have subscribed. The discharge of Telstra's obligations under its carrier licence (including publication of customer information in the White Pages) does not fall within primary purpose of collection. It follows that the complainant's personal information was not disclosed to the public in the White Pages for the primary purpose of collection. I find that publication of

customer information in the White Pages was for the secondary purpose of Telstra meeting the conditions of its carrier licence.

Application of NPP 2.1(a)

47. NPP 2.1 prohibits the disclosure of personal information for a secondary purpose unless, relevantly here, the secondary purpose is related to the primary purpose of collection (the purpose must be directly related where the information is sensitive information) and the individual would reasonably expect the organisation to disclose the information for the secondary purpose (NPP 2.1(a)).
48. I note that the complainant contends that his information is sensitive information and so the higher standard of 'directly related' should apply in these circumstances. 'Sensitive information' is exhaustively defined at s 6 of the Privacy Act.⁶ In this situation, names, addresses and phone contact details do not fall within the definition of 'sensitive information' for the purposes of the Privacy Act. Consequently, I must consider whether or not the purpose of publication in the White Pages was 'related' rather than 'directly related' to the primary purpose of collection.
49. I note that Telstra is obliged to comply with the conditions of its carrier licence. Telstra points out in its 19 June and 30 July 2014 submissions that if Telstra fails to comply with its carrier licence conditions, it will be in breach of s 68(1) of the Telecommunications Act. It notes that 'each such breach could expose Telstra to pecuniary penalty of up to \$10 million under s 570(3) of the Telco Act'. As such, Telstra is bound by law to comply with its carrier licence when conducting its carrier business and providing Telstra services to customers.
50. Telstra further highlights in its submissions that it has obligations under cl 9 of the Declaration to produce and distribute an alphabetical public number directory. Telstra contends it fulfils this condition of its carrier licence through the publication of the White Pages. I am of the view that publication of customer details in the White Pages is required for compliance with Telstra's

⁶ Sensitive information is defined in s 6 as:

- (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.

carrier licence. It follows that publication is related to the provision of services by Telstra, and as such the first limb of the disclosure exception provision at NPP 2.1(a) is made out.

51. However, while I accept that publication is a related secondary purpose, I must consider whether the complainant would reasonably expect Telstra to disclose his information for the purpose of publication in the White Page.
52. Telstra contends that the complainant should have reasonably expected that his information would be published in the White Pages. It submits that a majority of the public are aware of the White Pages and its publication of listings information for telephone services. I note Telstra's statement that the service supplied to the complainant was a standard telephone service within the meaning given in the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).
53. While a phone line for the purposes of an alarm system may be within the definition of 'standard telephone service', there is no information before me to suggest that individuals who apply for a phone line for the purposes of an alarm system are aware or made aware that this service falls within the definition of a 'standard telephone service' and their information will therefore be handled in the same way as a phone line for a functioning handset. This information is not detailed in the Terms and Conditions Booklet that customers receive following acquisition of a Telstra service, nor as far as I am aware is it conveyed to prospective customers who contact Telstra to secure a telephone service.
54. Moreover, Telstra has not provided any information to demonstrate why customers should reasonably expect that the personal information they provide to Telstra when they sign up for a telecommunication service is then also published in the White Pages for the purpose of providing the directory. There is no information provided in either Telstra's Privacy Statement or its Terms and Conditions Booklet, which informs customers of this particular use and disclosure of their personal information. Telstra concedes that it 'does not specifically mention White Pages to customers ...unless the customer asks for a silent line'.
55. Telstra's Privacy Statement under the heading '*Protecting Your Privacy*' highlights that Telstra is 'committed to providing [customers] with the highest levels of customer service. This includes protecting your privacy'. This, in my view, creates an expectation that personal information will be handled by Telstra in a manner consistent with the Privacy Act. The publishing of personal information in a publically available directory, in my view, is inconsistent with such an expectation. There is no information before me to suggest that the complainant should therefore have reasonably expected that his information would be made publically available in the White Pages.

56. I therefore find that Telstra cannot rely on NPP 2.1(a) to justify its use and disclosure of the complainant's personal information.

Application of NPP 2.1(g)

57. NPP 2.1(g) permits personal information to be used or disclosed if that use or disclosure is required or authorised by or under law.
58. Telstra submits that its publication of the complainant's personal information in the White Pages was required by the Declaration which is made under s 63(3) of the Telecommunications Act.
59. As noted above, Telstra is required under cl 9 of the Declaration to produce and distribute an alphabetical public number directory that includes entries for all customers who are supplied with a standard telephone service, regardless of who provides them with that service.
60. The complainant contends that publication in the White Pages is not required or authorised by law. He contends that the licence condition is not a legal obligation, and it does not permit Telstra to fail to comply or act inconsistently with its legal obligations under the Privacy Act.
61. Telstra relies on s 63(3) of the Telecommunications Act, which provides that the Minister may, by written instrument, declare that a specified carrier licence is subject to such conditions as are specified in the instrument. Telstra points out that the Declaration at cl 9 requires it, as a licensee, to produce an alphabetical public number directory (cl 9(1)) and arrange to publish and distribute the directory to its own customers and the customers of other carriage service providers. Clause 9(4) of the Declaration provides that a standard entry in the directory must include a name and address and one public number that is either the customer's mobile number (if requested by the customer) or the customer's geographic number.
62. I accept that Telstra satisfies this licence condition by providing the personal information it collects from customers to Sensis for publication in the White Pages.
63. However, I also note that cl 9(7) states that Telstra must ensure, to the greatest extent practicable, that the directory does not include details of a customer whose number is an unlisted number. An unlisted number is defined as a geographic number the customer and the carriage service provider that provides services for originating or terminating carriage services to the customer agree will not be included in the directory.⁷
64. Whether or not the customer and the carriage service provider have agreed that a customer's number will be unlisted goes to issues of notice and consent. While I accept that Telstra is authorised under law to publish the name,

⁷ *Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997*, clause 3.

address and phone line number of all customers of carriage service providers supplied with a standard telephone service in the White Pages, I do not accept that it can do so without taking reasonable steps to provide notice of such a disclosure of customer information. I have discussed the notice requirement at paragraphs [24] to [36] of this determination.

65. Having said that, in respect of the application of NPP 2.1 (g), in this case, the law itself (the Telecommunications Act) is not the direct source of the authorisation to use and disclose customers' personal information, the Minister's instrument (the Declaration) is. So I accept that it cannot be said that any disclosure made in accordance with the Declaration is a disclosure 'required or authorised by law'. However, as the authorisation is made pursuant to a law (that is, the Telecommunications Act, which gives effect to the Declaration) any disclosure would, in my view, be held to be authorised *under* that law. I therefore find that Telstra was authorised under law to publish the complainant's personal information in the White Pages and that therefore Telstra was entitled to rely on the exception provision at NPP 2.1(g) for its publication of the complainant's personal information in the White Pages.

Finding on damages

66. 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. Section 52(1A) states that loss or damage can include 'injury to the complainant's feelings or humiliation suffered by the complainant'.
67. In making a declaration for an award of compensation, I am guided by the principles applied in the Administrative Appeals Tribunal (AAT) decision, *Rummery and the Federal Privacy Commissioner and Anor*⁸, which sets out the principles that might be applied in the making of compensation awards for privacy breaches:
- a. where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course
 - b. awards should be restrained but not minimal
 - c. in measuring compensation the principles of damages applied in tort law will assist, although the ultimate guide is the words of the statute
 - d. in an appropriate case, aggravated damages may be awarded
 - e. 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.

⁸ [2004] AATA 1221 [32].

68. The Tribunal in *Rummery* also expressed the view that:

... once loss is proved, there would need to be good reason shown to the Tribunal as to why compensation for that loss should not be awarded.⁹

Non-economic loss

69. In his privacy complaint form, the complainant advised that he was seeking financial compensation for the stress and anxiety experienced by him and his partner, their relocation costs and the disruption to their lives.

70. In submissions to the OAIC, the complainant advised that he was seeking significant financial compensation for the day to day frustration and distress of dealing with the matter, the costs of repaying stamp duty associated with his relocation, as well as to address his general safety concerns.

71. Notwithstanding this, I note the complainant's subsequent advice that the costs associated with any relocation will be covered by his employer. As such, I will make no award for economic loss. I am of the view that any award that may be declared under this determination should be in respect of non-economic loss that the complainant has suffered.

72. The complainant submits that as a result of the unauthorised disclosure by Telstra, he and his partner have experienced 'significant anxiety and stress'. He notes that he receives regular death threats as a result of his occupation as a family law court judge. To explain the security risk that is associated with his work, the complainant has, in his submissions, highlighted instances where judges and/or their partners have been murdered or severely injured by ex-litigants. The complainant states that he is fearful for his physical safety and that of his partner. I also note his advice that he and his partner have had to stay with friends because they feared to stay at their own home.

73. The complainant says that:

Since the publication of my details a litigant from a matter decided by me has begun to loiter at and about our home. As my details and those of my partner are suppressed on every public register I infer his knowledge of our address is the White Pages site.....

We have just moved to our home and our enjoyment of it has been rudely interrupted....

We both jump whenever the street bell rings. I have applied to be transferred interstate. On moving we will incur moving costs, expenses re sale of our home and costs of resettling... We will both have expenses travelling to visit family and friends as our lives, to date, have been in Sydney.

74. In further submissions, the complainant goes on to say:

⁹ [2004] AATA 1221 [34].

‘The invasion of and prejudice to my privacy and personal safety can be readily envisioned as arising for others such as victims of crime, women fleeing domestic violence and the like.’

75. In awarding compensation, I am guided by the impact of the privacy breach on the complainant. His concerns for his and his partner’s safety arising directly out of the privacy breach have led him to apply to move interstate away from family and friends. His application for transfer demonstrates the severity of the stress that the disclosure has caused the complainant.
76. I have also considered the following matters:
- the added security threat to which the complainant and his partner have been exposed as a result of the disclosure
 - the responsibility of Telstra as an organisation to have appropriate measures in place to comply with its privacy obligations
 - the extent of the publication in the White Pages directory, with the complainant’s personal information having been disclosed to a very wide audience, both in online and in hard copy form (the latter having a significantly longer life without the possibility of early recall).
77. I accept that Telstra’s failure to take reasonable steps to notify the complainant that his personal information would be published in the White Pages has caused the complainant significant distress and anxiety associated with legitimate fears for his and his partner’s physical safety. I accept that for the complainant both his work and personal life have been significantly dislocated by this privacy breach. I also accept that the distress and anxiety suffered by the complainant will continue for some time presumably until such time as he and his partner have settled interstate and reconciled themselves to their new surrounds.
78. The approach taken in *Rummery* was adopted from the Federal Court’s approach taken to the assessment of damages under the *Sex Discrimination Act 1984* (Cth) in *Hall v A & A Sheiban Pty Ltd*.¹⁰ There, Wilcox J noted (at [42]) that:
- ...damages for such matters as injury to feelings, distress, humiliation and the effect of the complainant’s relationships with other people are not susceptible to mathematical calculation...to ignore such items of damages simply because of the impossibility of demonstrating the correctness of any particular figure would be to visit an injustice upon a complainant by failing to grant relief in a proven item of damage.’
79. To assist in deciding an appropriate amount for damages, I have considered a range of awards for non-economic loss in discrimination as well as privacy jurisdictions, including discrimination cases as reported in *Federal*

¹⁰ *Re Susan Hall; Dianne Susan Oliver and Karyn Reid v A & A Sheiban Pty Ltd; Dr Atallah Sheiban and Human Rights and Equal Opportunity Commission* [1989] FCA 72.

Discrimination Law Online.¹¹ In particular, I have had regard to comparable cases in which moderate awards of general damages were granted in circumstances which bear some similarity to those faced by the complainant in this matter. I have also had regard to the conciliated outcomes of comparable complaints in the privacy jurisdiction. The range of compensation agreed upon by the parties for non-economic loss in recent such cases is between \$13,000 and \$25,000.

80. In the case of *Murphy v The New South Wales Department of Education*¹² the complainants, the parents of Sian Grahl who had a disability, were awarded the sum of \$25,000 for the considerable hurt and distress they and their daughter suffered as a result of discriminatory acts and conduct to which the daughter and her parents were subjected at the local public primary school in Bellingen, a town on the mid-north coast of New South Wales. The only recourse available to the applicants was to sell their home in Bellingen and re-settle in Sydney so that their child could continue her education at a different primary school.
81. In the disability discrimination case of *Gordon v Commonwealth of Australia*¹³, the applicant had been offered employment by the Australian Taxation Office based in Launceston on condition that should he be found unfit for employment, the offer would be withdrawn. In reliance on this offer, Mr Gordon moved interstate, purchased a house in Launceston and commenced duties, but the ATO subsequently dismissed him on the basis of an imputed disability. An award of \$20,000 was made for the substantial grief and anxiety caused by the ATO's unlawful discriminatory conduct.
82. In *'BO' and AeroCare* [2014] AICmr 32, I awarded \$8500 for non-economic loss caused by the interference with the complainant's privacy. In that case, the complainant experienced significant distress and anxiety as a result of the one-off disclosure of his sensitive medical information through a conversation held in a public space. The disclosure was limited to a small group of people.
83. It is my view that the injury to feelings suffered by the complainant in this matter as a result of Telstra's actions is comparable to the injury suffered by the complainants in the above-mentioned cases who experienced substantial disruption to their lives. In determining an appropriate amount of damages in the present matter, it is useful to compare and contrast the elements of this matter to the elements in the cases I have cited.
84. Telstra's breach has had serious consequences for the complainant. The complainant has as a result of the breach suffered significant anxiety and distress including I believe a well-founded fear for his physical safety and that of his partner. The complainant has explained that Telstra's breach has made it

¹¹ Australian Human Rights Commission, *Federal Discrimination Law* (2011) www.hreoc.gov.au/legal/FDL/index.html, chapter 7 at 30 September 2014.

¹² *Murphy v The New South Wales Department of Education* [2000] HREOCA 14 (27 March 2000).

¹³ *Gordon v Commonwealth of Australia* [2008] FCA 603 (6 May 2008).

implausible for him to continue to reside at his current home. This is supported by the complainant's application for an interstate transfer with his job, which I am satisfied, is a direct consequence of the actions of Telstra.

85. Notwithstanding this, the complainant in the present matter has not suffered the same extent of physical dislocation as the complainant in the *Gordon* matter. Nor has the complainant suffered any loss of employment, which, although generally considered under the head of economic loss, can also have a significant impact on a complainant's injury to feelings as recognised in other cases. The complainant in this case has however suffered disruption to all aspects of his life as a result of the security threat which arose out of Telstra's disclosure, the extent of which was very wide and difficult to contain. It is therefore my view that for the injury to his feelings as a result of Telstra's privacy breach, an appropriate sum to award the complainant is \$18,000.
86. The complainant has also asked that I order Telstra to apologise to his partner who he feels also experienced significant stress and anxiety as a result of Telstra's actions. As that person is not a party to these proceedings that order is beyond the scope of outcomes I am able to order.

Aggravated damages

87. The power to award damages in s 52 of the Privacy Act includes the power to award aggravated damages in addition to general damages.¹⁴ I am guided by the following principles:
- a. aggravated damages may be awarded where the respondent behaved 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination'¹⁵
 - b. the 'manner in which a defendant conducts his or her case may exacerbate the hurt and injury suffered by the plaintiff so as to warrant the award of additional compensation in the form of aggravated damages.'¹⁶
88. There is no evidence before me to suggest that the disclosure was high-handed or malicious. While Telstra has refused to concede it breached the complainant's privacy, its conduct has been conciliatory. I am therefore of the view that an award for aggravated damages is not justified.

Determination

89. I declare in accordance with s 52(1)(b)(i)(B) of the Privacy Act that:
- the complainant's complaint is substantiated;

¹⁴ *Rummery* [2004] AATA 1221 [32].

¹⁵ *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72 [75].

¹⁶ *Elliott v Nanda & Commonwealth* [2001] FCA 418 [180].

- the respondent has breached NPP 1.3 by failing to take reasonable steps to ensure that the complainant was aware of the reasons it was collecting his personal information and the organisations to which it usually discloses information of that kind.
90. I declare in accordance with s 52(1)(b)(ii) of the Privacy Act that the respondent must:
- apologise in writing to the complainant within 4 weeks of this determination;
 - review its processes so that its sales consultants are required to notify each prospective customer that their phone line number will be listed in the White Pages and that they have the option of taking out a silent line. Telstra must confirm to me no later than six months from the date of this determination that these amendments to its procedures have been completed;
 - review its Privacy Statement to make specific and accessible reference to Telstra's collection of personal information for publication in the White Pages. Telstra must confirm to me no later than six months from the date of this determination that this amendment has been completed;
 - pay the complainant \$18,000 for non-economic loss caused by Telstra's interference with the complainant's privacy within four weeks of the date of this determination.

Timothy Pilgrim
 Privacy Commissioner
 30 October 2014

Review rights

If a party to a privacy determination is unsatisfied with the privacy determination, they may apply under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* to have the determination reviewed by the Federal Court of Australia or the Federal Circuit Court. The Court will not review the merits of the determination, but 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 (<http://www.federalcourt.gov.au/>) or by contacting your nearest District Registry.

Determinations involving Australian Government agencies – compensation

If a party to a privacy determination about a complaint involving an Australian or ACT government agency disagrees with the amount of compensation set by the Information Commissioner, they may apply under s 61 of the *Privacy Act 1988* to the Administrative Appeals Tribunal (AAT) to review the declaration about compensation. The AAT provides independent merits review of administrative

decisions and has power to set aside, vary, or affirm the Information Commissioner's declaration about compensation.

An application to the AAT must be made within 28 days of the day on which the applicant 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. The current application fee is \$861, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

Enforcement of determination

Under s 58 of the *Privacy Act 1988*, a respondent agency to a privacy determination is obliged to comply with any declarations made by the Information Commissioner in that determination.

Section 62 of the *Privacy Act 1988* provides that either the complainant or Information Commissioner may commence proceedings in the Federal Court or the Federal Circuit Court for an order to enforce the determination.