



# ***‘EQ’ and Great Barrier Reef Marine Park Authority [2015] AICmr 11 (2 February 2015)***

Determination and reasons for determination of  
Privacy Commissioner, Timothy Pilgrim

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<b>Complainant:</b>	<b>‘EQ’</b>
<b>Respondent:</b>	<b>Great Barrier Reef Marine Park Authority</b>
<b>Determination date:</b>	<b>2 February 2015</b>
<b>Application number:</b>	<b>CP13/01351</b>
<b>Catchwords:</b>	<b>Privacy Act — Information Privacy Principles — (CTH) <i>Privacy Act 1988</i> s 52 — IPP 11 — IPP 11.1(d) — Disclosure — Compensation — Non-economic loss — Aggravated damages not awarded</b>

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## Summary

1. The Great Barrier Reef Marine Park Authority (GBRMPA) interfered with the complainant's privacy by a disclosure of personal information that was not authorised by Information Privacy Principle (IPP) 11.1 of the *Privacy Act 1988* (Privacy Act).
2. To redress this matter, GBRMPA shall:
  - apologise in writing to the complainant within 28 days of this determination
  - review its training of staff and agents who act on behalf of GBRMPA in the handling of personal information
  - confirm that this review of training has been completed and advise me of the results of the review no later than three months from the date of this determination, and
  - within 28 days of this determination, pay the complainant \$5,000 for non-economic loss caused by the interference with the complainant's privacy.

## Background

3. The Great Barrier Reef Marine Park Authority (GBRMPA) is established under the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act). GBRMPA and the State of Queensland are party to the *Great Barrier Reef Intergovernmental Agreement 2009* which provides a framework for managing the Great Barrier Reef Marine Park (the Marine Park). As part of these arrangements, Queensland Parks and Wildlife Service (QPWS) Rangers are appointed as inspectors under the GBRMP Act and may report their compliance activities to QPWS and GBRMPA.
4. The complainant was employed on a casual basis as a marine conservation research assistant. Among his duties, he was coxswain of a new boat for the purpose of conducting marine conservation research. The marine conservation research boat was owned by his employer and funded by two external sponsor organisations. It was fitted with a Global Positioning System (GPS) which showed marine zones within the Marine Park.
5. The complainant agrees that on 27 February 2013, he took the marine research boat out by himself into the Marine Park and fished in Shepherd Bay near Hinchinbrook Island in Marine National Park Zone 18-1077.
6. Marine National Park Zones are known as 'Green Zones'. The act of fishing is prohibited in Green Zones. It is a strict liability offence under regulation 73BA of the *Great Barrier Reef Marine Park Regulations 1983* (GBRMP Regulations).

7. The complainant says that, at the time of committing the offence, he was not aware that he was in a Green Zone. He says he sought to ensure he was not in a Green Zone by checking the boat's GPS, but misread the map because of the way it displayed overlapping conservation zones within the Marine Park.
8. QPWS Rangers observed the complainant in the act of fishing in the Green Zone. The rangers took photographs of his fishing activity and the marine conservation research boat. The rangers approached the complainant and advised him that he had contravened the prohibition on fishing in a 'Green Zone'. The complainant told the rangers that his conduct was an honest mistake and explained the circumstances.
9. The complainant says that he expected to receive a warning as a consequence of the incident; he did not expect to receive a formal infringement notice. He reported the incident to his direct supervisor at his employer. Neither he nor his direct supervisor made any one else in the organisation aware of the incident.
10. On 8 March 2013, QPWS submitted a compliance incident report and photographs to the Field Management Compliance Unit of GBRMPA (compliance unit). The compliance unit recorded the report on its compliance database and the matter was allocated for investigation to an investigative officer.
11. A senior investigative officer from the compliance unit contacted the complainant to provide an opportunity to participate in an interview to respond to the allegation that he had fished unlawfully in a Marine National Park Zone. The complainant agreed to attend an interview on 5 April 2013.
12. At around 9 am on 5 April 2013, the complainant attended a 50-minute interview in Townsville with the senior investigative officer and a legal compliance officer from GBRMPA. The officers asked the complainant about his employment, the incident and circumstances of the incident. They recorded the interview for transcription.
13. The transcript of the interview does not include or refer to any assurances that the interview or investigation would be confidential. However, the complainant says:

[The GBRMPA officer] looked me in the eye on 5 April 2013, just before the GBRMPA interview and assured me that the entire interview process would remain confidential, with no possibility of other agencies knowing about the interview details or subsequent results of the investigation.
14. Around 1 pm on 5 April 2013, the complainant says he was told that a journalist had contacted his employer and a sponsor of the marine conservation research boat. The journalist had asked for comment about the incident and had said she had photographs and information about the incident.

15. Around 3 pm on 5 April 2013, the communications section of GBRMPA received a request for information from News Corp Australia.<sup>1</sup> The email named the complainant and said:
- I have information in relation to an incident in the Great Barrier Reef Marine Park. On 27 February, Queensland government authorities caught [the complainant] fishing in a Green Zone in Shepherd Bay (at the northern end of Hinchinbrook Island) in a [deleted] research vessel. ...
- Why has it taken so long to finalise this case and issue a fine or bring this to a resolution? (I understand [the named complainant] is yet to be interviewed). What is the status of the matter? ...
16. On 6 April 2013, an officer from GBRMPA's communications section sent a response naming the complainant:
- Our response to your query is as follows (please attribute to a Great Barrier Reef Marine Park Authority spokesperson): ...
- GBRMPA is currently investigating a matter of fishing in a Marine National Park Zone from a [complainant's employer] research vessel. However, we do not comment on matters currently under investigation.
- The time which is it is taking to consider the matter relating to [the named complainant] is well inside the standard amount of time it takes to investigate such matters.
17. On 7 April 2013, The Sunday Mail published a story about the incident. The story included information which had been disclosed by GBRMPA in its email on 6 April 2013, in particular the complainant's name, the name of the complainant's employer as owner of the boat, and the incident under investigation. The story also included information which had not been disclosed by GBRMPA in that email, in particular information about the complainant's employment, the sponsor of the boat, the incident, and the status of the investigation. In addition, the story reported comments from the complainant's employer and the boat sponsor.
18. On 8 April 2013, GBRMPA sent the complainant a letter enclosing an Infringement Notice for breach of the GBRMP Regulations. GBRMPA says that its delegate had considered the evidence following the interview on 5 April 2013, including the admissions made by the complainant in the interview and the recommendations of the investigating officer, and had instructed that an Infringement Notice be issued and a penalty of \$1,700 be imposed.
19. On 10 April 2013, The Townsville Bulletin published a story about the incident. The story included information which had been disclosed by GBRMPA in its email on 6 April 2013, in particular the complainant's name and the incident

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<sup>1</sup> The email was from News Queensland, which was then part of News Limited. News Limited subsequently became News Corp Australia on 1 July 2013. News Corp Australia publishes the Courier Mail and Sunday Mail. I refer to it as New Corp Australia in this determination.

under investigation. The story also reported comments by the complainant's employer and included further information, apparently provided by the employer, about the incident and the complainant's employment.

20. On 19 April 2013, the complainant made a written request under regulation 122H of the GBRMP Regulations for GBRMPA to withdraw the infringement notice. On 9 May 2013,<sup>2</sup> GBRMPA declined to withdraw the infringement notice and gave reasons for its refusal.
21. In July 2013, the Queensland Seafood Industry Association (QSIA) published an article in its newsletter about the incident. While the article did not include the complainant's name, it did include some information about the incident which had been disclosed by GBRMPA in its email on 6 April 2013. The article also said that the 'GBRMPA compliance area' had disclosed to QSIA that the complainant was issued with an infringement notice with a \$1,700 penalty. This information had not appeared in the newspaper stories by The Sunday Mail or The Townsville Bulletin.
22. On 22 July 2013, the complainant wrote to GBRMPA to seek 'explanation, resolution and atonement' for the disclosure of his personal information to News Corp Australia, QSIA and any other third parties.
23. On 3 September 2013, GBRMPA responded to the complainant that it had not released his personal information to the QSIA. GBRMPA acknowledged it had confirmed to News Corp Australia<sup>3</sup> that it was investigating the matter.

## **Privacy complaint and investigation**

24. On 20 September 2013, the complainant lodged a complaint against GBRMPA with the Office of the Australian Information Commissioner (OAIC) under s 36 of the Privacy Act.
25. The complainant alleged that GBRMPA interfered with his privacy by disclosing his personal information to third parties. He said:
  - GBRMPA, or QPWS as its agent, disclosed his personal information to News Corp Australia on or before 5 April 2013 (first alleged breach)
  - GBRMPA disclosed his personal information to News Corp Australia on 6 April 2013 (second alleged breach)
  - GBRMPA disclosed his personal information to QSIA in or before July 2013 (third alleged breach).
26. The personal information allegedly disclosed was the complainant's name, the complainant's place, position and status of employment, photographs of the

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<sup>2</sup> The letter was dated both 9 April 2013 and 9 May 2013, but the correct date appears to be 9 May 2013.

<sup>3</sup> The disclosure was made in an email to part of News Corp Australia, which publishes the Courier Mail.

complainant at the time of an incident for which he was investigated, and the outcome of the investigation.

27. During the course of the investigation, the complainant revised the scope of the redress he sought. He seeks a declaration by me that GBRMPA must provide by way of redress:
  - an apology for each alleged breach
  - compensation for economic and non-economic loss
  - aggravated damages
  - amendment of its information handling procedures in compliance with the Privacy Act.
28. On 15 January 2014, the OAIC opened an investigation into the complainant's allegations under s 40(1) of the Privacy Act. The written submissions and evidence provided by both the complainant and GBRMPA were considered. The OAIC also sought information from QPWS, News Corp Australia and QSIA under s 43 of the Privacy Act. Their responses were also considered.
29. During the investigation, GBRMPA acknowledged that it had disclosed the complainant's name in an email to News Corp Australia of 6 April 2013. It accepted that this disclosure was a breach of IPP 11.1.
30. The matter was not resolved through conciliation and I decided to determine the matter under s 52 of the Privacy Act. Section 52 provides that, after investigating a complaint, I may make a determination:
  - dismissing the complaint (s 52(1)(a))
  - 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))
    - 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))
    - 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))
    - it would be inappropriate for any further action to be taken in the matter (s 52(1)(b)(iv)).

## Information Privacy Principle (IPP) 11.1

31. The IPPs contained in section 14 of the Privacy Act outline standards for handling personal information that legally bind agencies.<sup>4</sup> At the relevant time, personal information was defined in s 6(1) of the Privacy Act as:

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

32. Under s 16 of the Privacy Act, an agency is prohibited from breaching the IPPs. GBRMPA is an agency for the purposes of the Privacy Act.<sup>5</sup> As an agency it is regarded as a 'record-keeper' in relation to a record if it has possession or control of a record that contains personal information.
33. IPP 11 prohibits the disclosure of personal information, though the prohibition is qualified. IPP 11.1 provides:

### 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 or imminent threat to 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.

34. The complainant alleges that GBRMPA breached the IPP 11.1 on three occasions. I will consider each occasion in turn.

### First Alleged Breach

35. The complainant alleges that GBRMPA, or QPWS as its agent, disclosed his personal information to News Corp Australia on or before 5 April 2013. It

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<sup>4</sup> From 12 March 2014, the Australian Privacy Principles replace the National Privacy Principles (NPPs) and the Information Privacy Principles (IPPs) (except for ACT Government agencies, who continue to be covered by the IPPs). These new APPs apply to both Australian Government agencies and organisations covered by the Privacy Act.

<sup>5</sup> It is worth noting that QPWS is not established under a Commonwealth enactment and therefore is not an agency for the purposes of the Privacy Act.

appears from its contact with the complainant and the email sent to GBRMPA on 5 April that News Corp Australia had obtained a copy of the QPWS compliance report and photographs.

36. GBRMPA says that it has no record of its officers disclosing the personal information used in the newspaper stories published on 7 and 10 April 2013. QPWS also says its officers did not make such a disclosure. As part of the investigation, the OAIC asked News Corp Australia to disclose the source of the personal information used in the story. News Corp Australia declined.
37. There is no information before me as to how the complainant's personal information came to be disclosed to News Corp Australia. Both QPWS and GBRMPA held the relevant records containing the complainant's personal information. While it appears likely that the disclosure must have emanated from within QPWS or GBRMPA, I cannot make a finding on the information before me as to whether an agency was the source of the disclosure, and if so which agency was the source of the disclosure.
38. Even if the information before me were sufficient to find that the disclosure came from a GBRMPA officer, this would raise the question of whether the act of the officer is to be treated as the act of the agency under s 8 of the Privacy Act. There is no information before me that GBRMPA authorised or knew of such a disclosure and that the disclosure by the officer (if it occurred) took place in the course of the performance of the officer's usual duties of employment.
39. There is insufficient information before me to find that the GBRMPA made the first disclosure as alleged by the complainant.

## **Second Alleged Breach**

40. The complainant alleges that GBRMPA disclosed his personal information to News Corp Australia on 6 April 2013 in the email set out in [16].
41. GBRMPA agrees that it disclosed the complainant's personal information in its email to News Corp Australia of 6 April 2013. It says:

GBRMPA acknowledged that the action of confirming the Applicant's name in the response was a breach of IPP 11. GBRMPA does not consider that confirming the Applicant's name was permitted by IPP 11.1.

42. The exception in IPP 11.1(d) could apply if GBRMPA was authorised to make the disclosure under the GBRMP Act. GBRMPA says:

The GBRMPA is not authorised by the *Great Barrier Reef Marine Park Act 1975*, read in conjunction with its subordinate legislation, to release information about current investigations to the media. The GBRMPA's usual practice is not to provide specific comment on matters that are under investigations.

43. I have considered whether GBRMPA was authorised by or under law to disclose the information at the time such that the exception in IPP 11.1(d) would apply. In relation to IPP 11.1(d), Guideline 34 of the OAIC's advisory *Plain English Guidelines to Information Privacy Principles 8-11* (Plain English Guidelines) relevantly says:

A law authorises a disclosure if legislation governing the disclosing agency clearly and specifically gives it a discretion to disclose the personal information. The disclosing agency must be able to point to a specific relevant discretion in the legislation governing it. It is not enough for the receiving agency to show that the personal information is relevant to its lawful functions.<sup>6</sup>

44. Under the GBRMP Act, the GBRMPA is authorised to publicise information about offences, contraventions and penalties in specific circumstances. Section 61AFA of the GBRMP Act provides:

**61AFA Publicising offences and contraventions**

- (1) The Minister or the Authority may publicise, in any way the Minister or Authority thinks appropriate, any or all of the following:
- (a) an offence against this Act of which a person has been convicted;
  - (b) a contravention of a civil penalty provision in respect of which a declaration of contravention has been made against a person or for which a person has been required to pay a pecuniary penalty;
  - (c) a penalty imposed on a person for an offence or contravention of a civil penalty provision.
- (2) This section does not:
- (a) limit the Minister's or Authority's powers to publicise an offence against or contravention of this Act; or
  - (b) prevent anyone else from publicising an offence against or contravention of this Act; or
  - (c) affect any obligation (however imposed) on anyone to publicise an offence against or contravention of this Act.

45. The explanatory memorandum for the *Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008*, which introduced section 61AFA, says:

Item 125 establishes a subdivision empowering the Minister and Authority to publicise the fact that a person has been convicted of an offence or found to have contravened a civil penalty provision and the penalty that was imposed. This additional sanction is intended to enhance deterrence, particularly in relation to commercial Marine Park users whose marketing includes promotion of an environmentally friendly image.

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<sup>6</sup> *Plain English Guidelines to Information Privacy Principles 8-11*, Guideline 19. These guidelines have been superseded by the APP Guidelines which apply from 12 March 2014.

46. Since the complainant was not convicted of an offence and had not contravened a civil penalty provision<sup>7</sup>, the relevant provision to consider is s 61AFA(1)(c) which authorises GBRMPA to disclose a penalty imposed on a person for an offence. Section 61AFA(1)(c) itself is not clear on whether the authorisation to publicise ‘a penalty imposed on a person for an offence’ extends to the name of the person and the details of the offence. The explanatory memorandum at the time of the section’s introduction says that the publication of the penalty was an ‘additional sanction ... intended to enhance deterrence’. To function as an additional sanction on the offender, I think it follows that the offender’s name may be disclosed along with the details of the penalty and offence.
47. However, at the time of making the disclosure, GBRMPA had not imposed a penalty on the complainant for the offence; the infringement notice was not issued until 8 April 2013. Therefore, GBRMPA was not authorised to rely on s 61AFA(1)(c) on 6 April 2013 because a penalty had not yet been imposed on the complainant.
48. I agree with GBRMPA that the exception in IPP 11.1(d) did not apply to its disclosure. Accordingly, its disclosure to News Corp Australia on 6 April 2013 was contrary to IPP 11.1.
49. While GBRMPA accepts that it committed the breach, it also says:
- It should be noted in the penultimate paragraph of the GBRMPA response [on 6 April 2013] that the officer was aware of and communicated to News Queensland the obligation to observe the Applicant’s privacy.
50. I disagree. In asking in its email of 6 April 2013 for its comments to be attributed to a spokesperson, the GBRMPA officer clearly indicates her expectation that News Corp Australia will publish the personal information contained in the response. The officer’s response does not mention privacy or confidentiality. Indeed, while the officer states the GBRMPA policy not to comment on matters currently under investigation, the officer then proceeds to disclose information about a matter then under investigation and to name the complainant and his employer.
51. In any event, it is not relevant whether the officer communicated the obligation to ‘observe the Applicant’s privacy’ to News Corp Australia. That obligation not to disclose the complainant’s personal information fell upon GBRMPA as the agency which had ‘possession and control of the record that contains personal information’.<sup>8</sup> In disclosing the personal information without being able to rely on one of the exceptions set out in IPP 11.1,<sup>9</sup> it is not

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<sup>7</sup> ‘Civil penalty provision’ has the meaning given in s 61AID of the GBRMP Act.

<sup>8</sup> IPP 11.1.

<sup>9</sup> For example, the disclosure was made with the consent of the complainant (IPP 11.1(b)) or the disclosure being required or authorised by or under law (IPP 11.1(d)).

relevant whether the agency communicated the confidentiality of the information it was disclosing.

### **Third Alleged Breach**

52. The complainant alleges that GBRMPA disclosed his personal information to QSIA in or before July 2013.
53. QSIA's newsletter article in July 2013 reports the outcome of the investigation and the amount of the penalty imposed on the complainant. This information was not already in the public domain and was not disclosed in GBRMPA's email of 6 April 2013. The article says that GBRMPA's compliance unit disclosed this information to QSIA. While the article does not name the complainant, he is clearly identifiable from the other personal information included in the article.
54. GBRMPA says that it did not disclose this personal information to QSIA. As part of the investigation, the OAIC sought information from QSIA about the source from which it obtained the personal information used in the article published in July 2013. QSIA says that the article indicates that GBRMPA's compliance area provided the information. However, QSIA also says it conducted a 'comprehensive search' of its emails and documents and no contact with GBRMPA regarding the matter was found.
55. There is insufficient information before me to find that GBRMPA disclosed the complainant's personal information to QSIA. Even if I found that a GBRMPA officer disclosed the information, there is insufficient information to find that the GBRMPA officer disclosed the information in the performance of the officer's duties such that it can be taken to be an act of GBRMPA.

### **Findings**

56. GBRMPA interfered with the complainant's privacy by disclosing the complainant's personal information to News Corp Australia on 6 April 2013. This disclosure contravened IPP 11.1.
57. There is insufficient information before me to find that GBRMPA disclosed the complainant's personal information to News Corp Australia on or before 5 April 2013 or to QSIA in or before July 2013.

### **Finding on damages**

58. 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'.

59. The principles for awarding compensation derive from *Rummery and Federal Privacy Commissioner*<sup>10</sup> and have been approved in previous determinations.<sup>11</sup> The principles are:

- 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
- f. once loss is established, there must be a good reason not to award compensation for that loss.

### **Economic loss**

60. The complainant says that GBRMPA's interference with his privacy caused him economic loss. The complainant attributes the entirety of his economic loss to GBRMPA's interference and does not consider his own actions to have contributed to that loss. He says that his economic loss should be valued at around \$100,000 and consists of:

- lost income during 2013 due to his resignation from his employment and later restricted duties (after being re-employed), as well as lost superannuation
- lost future income during 2014 and 2015 due to restricted duties
- loss of future career opportunities with one of the marine conservation research boat sponsors, which is a major employer in his trade in a small geographical area.

61. GBRMPA says:

Any financial loss as a result of a loss of employment is a matter between the Applicant and his employer which has arisen due to the Applicant committing an offence in the Marine Park.

62. The complainant's first contention is that he lost income and superannuation from his then employer in 2013 as a result of the breach. The complainant says that his employer was primarily concerned about not having been informed of the incident before being contacted by the journalist. The

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<sup>10</sup> [2004] AATA 1221 [32] (*Rummery*).

<sup>11</sup> See *'BO' and AeroCare Pty Ltd* [2014] AICmr 32 (8 April 2014), *'CP' and Department of Defence* [2014] AICmr 88 (2 September 2014).

complainant contends that he would have informed his employer and the marine conservation research boat sponsors but for GBRMPA's assurances of confidentiality. In his view, his loss of income from his resignation and restricted duties was the direct result of GBRMPA's interference with his privacy.

63. As set out in [57], there is insufficient evidence to support a finding that GBRMPA disclosed the complainant's personal information prior to 6 April 2013. The journalist contacted the complainant's employer on 5 April 2013. I am not satisfied that GBRMPA's interference with the complainant's privacy on 6 April 2013 caused the loss of income and superannuation from his then employer.
64. There is no information before me, other than the complainant's assertion, that the complainant relied on GBRMPA's assurances of confidentiality in deciding not to inform his employer about the incident involving the employer's marine conservation research boat and not to contest the matter in court.
65. The complainant's second contention is that he lost income from restricted duties at the behest of the sponsor of the marine conservation research boat. He says that the boat sponsor was concerned about the complainant's 'apparent lack of regard for OH&S' having taken the boat out by himself in contravention of the relevant policy, as well as the information about the incident becoming public. In the complainant's view, his loss was the direct result of GBRMPA's interference with his privacy.
66. I am not satisfied that GBRMPA's breach caused the complainant's lost income from restricted duties. The journalist appears already to have known the circumstances of the incident prior to 6 April 2013. To find that the breach caused the loss would require me to conclude that the story would not have been published but for GBRMPA's disclosure. I am not satisfied that there is a basis for this conclusion. Furthermore, GBRMPA did not disclose that the complainant took the research boat out alone.
67. The complainant's third contention is that he lost future career opportunities with the boat sponsor, which is a major employer in his trade in a small geographical area. In the complainant's view, his loss was the direct result of GBRMPA's interference with his privacy.
68. This loss is too remote from the original breach. Even if the loss were not too remote, it is likely that the loss is more directly attributable to the complainant's actions in committing the offence and then not reporting it to his employer or the boat sponsor. While the complainant asserts that it was an honest mistake, fishing in a Green Zone is a strict liability offence. He also knew that the purpose for which the research boat was to be used was marine conservation research. The complainant would not have suffered economic loss but for his own conduct.

69. Based on the information before me, I am not satisfied that the complainant's economic loss was caused by GBRMPA's interference with his privacy.

### **Non-economic loss**

70. The complainant says that GBRMPA's interference with his privacy caused him non-economic loss. The complainant says that his non-economic loss should be valued at around \$20,000 and consists of 'mental anguish, stress, anxiety, embarrassment, public humiliation, depression, paranoia, suicidal thoughts, inability to function in society especially [in] Queensland, expenses to visit Hypnotherapist and [counsellor]'
71. The complainant contends that GBRMPA assured him that the incident, investigation and outcome would be treated confidentially, but disclosed his personal information in violation of its assurances. In his view, this disclosure resulted in his non-economic loss.
72. GBRMPA says that the complainant's personal information reported in the media had already been obtained from other sources before its disclosure by GBRMPA on 6 April 2013. Accordingly, GBRMPA says any loss suffered by the complainant did not result from GBRMPA's breach of his privacy and GBRMPA is not responsible for the payment of compensation to the complainant.
73. I have considered whether the complainant's psychological complaints are directly attributable to GBRMPA's interference with his privacy. In my view, the psychological complaints are more directly attributable to the disclosure of his information to the journalist on or before 5 April 2013. As set out in [57], there is insufficient evidence to find that this disclosure originated from GBRMPA and should be treated as its act. However, I am satisfied that GBRMPA's disclosure on 6 April 2013 formally confirmed that the complainant was subject to investigation and this contributed in a small but not insignificant way to the complainant's psychological complaints.
74. Moreover, while I accept that GBRMPA only confirmed information that had already been disclosed, GBRMPA had 'possession and control' of the record containing the complainant's personal information and was prohibited from disclosing that information except in the circumstances set out in IPP 11.1.
75. In deciding the appropriate damages for non-economic loss, I have considered previous Privacy Act determinations, discrimination cases that have considered compensation for non-economic loss, as outlined in *Federal Discrimination Law Online*,<sup>12</sup> and the Conciliation Register of the Australian Human Rights Commission.<sup>13</sup>

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<sup>12</sup> Australian Human Rights Commission, *Federal Discrimination Law* (2011) [www.hreoc.gov.au/legal/FDL/index.html](http://www.hreoc.gov.au/legal/FDL/index.html), ch 7 at 20 March 2014.

<sup>13</sup> Australian Human Rights Commission, *Conciliation Register*, <http://www.humanrights.gov.au/complaints/conciliation-register>

76. In deciding the appropriate amount of compensation for non-economic loss, I have had particular regard to the AAT's decision in *Rummery*<sup>14</sup>. In *Rummery*, the Administrative Appeals Tribunal (AAT) awarded \$8,000 for injury to the applicant's feelings and humiliation. The applicant had made a public interest disclosure to the ACT Ombudsman under the *Public Interest Disclosure Act 1994* (ACT). During the course of the ACT Ombudsman's investigation, the department disclosed the applicant's personal information, including employment related issues. Relevantly, the AAT considered the applicant's evidence as to his feelings when he learned the details of the disclosure in assessing the injury to his feelings and humiliation.
77. In *'CP' and Department of Defence*<sup>15</sup>, I awarded \$5,000 for non-economic loss. I found that the department disclosed a psychologist report about the complainant to his treating general practitioner in violation of its agreement not to do so and in the knowledge that the complainant had expressly withdrawn consent to the disclosure. A relevant factor in that matter, as in the matter at hand, is that the agency had given assurances not to disclose the complainant's personal information before making the disclosure. Relevantly, the disclosure in *'CP'* was to the complainant's doctor, who had an obligation of confidentiality to the complainant. In this matter, the disclosure was made to a journalist in the knowledge that the journalist intended to disclose it to the general public.
78. In *'BO' v Aerocare Pty Ltd*<sup>16</sup>, I awarded \$8500 for non-economic loss. I found that AeroCare collected and disclosed the complainant's sensitive personal information in an airport departure lounge in circumstances where the complainant, as a person with a disability, made him particularly vulnerable. In determining damages in *'BO'*, I did not place significant weight on the question of whether the collection and disclosure of personal was in fact heard by members of the public in the departure lounge. Rather, I placed greater weight on the breach of the complainant's right not to have his personal information collected and disclosed in that manner. Similarly, in the matter at hand, I give greater weight to the breach of the right than to the psychological impact on the complainant.
79. The complainant is entitled to compensation for the non-economic loss or damage he suffered because of GBRMPA's interference with his privacy. However, unlike in *'CP'* and *'BO'*, I am satisfied that the complainant's own acts were the primary factor contributing to his non-economic loss.
80. The complainant could not have suffered this non-economic loss but for his own conduct. The complainant accepts that he took a marine conservation research boat into the marine park and fished unlawfully in a marine conservation zone.

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<sup>14</sup> *Rummery and Federal Privacy Commissioner* [2004] AATA 1221 [32].

<sup>15</sup> *'CP' and Department of Defence* [2014] AICmr 88 (2 September 2014).

<sup>16</sup> *'BO' v AeroCare Pty Ltd* [2014] AICmr 37 (8 April 2014).

81. I give significant weight to this factor in determining the appropriate amount of damages to award. In my view, it is appropriate to award damages to recognise the humiliation the complainant suffered, while still recognising that the complainant was the primary contributor to his own non-economic loss.
82. I consequently award \$5,000 to the complainant.

### **Aggravated damages**

83. The power to award damages in s 52 of the Privacy Act includes the power to award aggravated damages in addition to general damages.<sup>17</sup>
84. The principles for awarding aggravated damages have been approved in previous determinations.<sup>18</sup> The principles are:
- a. aggravated damages may be awarded where the respondent behaved 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination'<sup>19</sup>
  - 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.'<sup>20</sup>
85. GBRMPA committed the breach of IPP 11.1, but accepted that it had done so and made reasonable efforts during the conciliation process to resolve this matter.
86. I do not consider GBRMPA's conduct to be high-handed, malicious, insulting or oppressive, nor its manner of conducting its case to have exacerbated the hurt or injury suffered by the complainant. The threshold for aggravated damages has not been met.

### **Determination**

87. I declare in accordance with s 52(1)(b)(i)(B) of the Privacy Act that GBRMPA has breached IPP 11.1 by disclosing the complainant's personal information .
88. I declare in accordance with s 52(1)(b)(ii) of the Privacy Act that GBRMPA must, if it has not already done so:
- apologise in writing to the complainant within 28 days of this determination
  - review its training of staff and training of agents who act on GBRMPA's behalf in the handling of personal information

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<sup>17</sup> *Rummery* [2004] AATA 1221 [32].

<sup>18</sup> See *'BO' and AeroCare Pty Ltd* [2014] AICmr 32 (8 April 2014), *'CP' and Department of Defence* [2014] AICmr 88 (2 September 2014).

<sup>19</sup> *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72 [75].

<sup>20</sup> *Elliott v Nanda & Commonwealth* [2001] FCA 418 [180].

- confirm that this review of training has been completed and advise me of the results of review within three months from the date of this determination.
89. I declare in accordance with s 52(1)(b)(iii) that the complainant is entitled to \$5,000 for the non-economic loss suffered as a result of the GBRMPA's interference with his privacy. GBRMPA should pay the compensation to the complainant within 28 days of this determination.

Timothy Pilgrim  
Privacy Commissioner

2 February 2015

#### **Review rights**

A party may apply under s 96 of the *Privacy Act 1988* to have the decision 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. 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](http://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 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.

#### **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 directing the principal executive to comply. An application can only be made once the time has expired for making a determination under section 96 for review of the determination or if such an application is made, the decision of the AAT on the application has come into operation.