Australian Government
Office of the Australian Information Commissioner

'IV' and 'IW' [2016] AICmr 41 (27 June 2016)

Determination and reasons for determination of
Acting Australian Information Commissioner, Timothy Pilgrim

Complainant:	**'IV'**
Respondent:	**'IW'**
Decision date:	**27 June 2016**
Application number:	**CP15/00700**
Catchwords:	**Privacy — *Privacy Act 1988* (Cth) s 52 — Australian Privacy Principles— APP 6 — Disclosure by medical practitioner of patient's medical information — Breach of APP 6.1 — APP 10 – Quality of personal information – Breach of APP 10.2 - Compensation awarded — Non-economic loss — Aggravated damages not awarded**

Contents

Findings

1. The respondent interfered with the complainant's privacy by disclosing the complainant's personal information to six individual third parties, in breach of Australian Privacy Principles (**APP**) 6.1 and 10.2 of the *Privacy Act 1988* (Cth) (**Privacy Act**).

2. To redress this matter, the respondent shall pay the complainant $10,000 compensation for non-economic loss caused by the interference with his privacy.

Background

3. The respondent is a medical doctor with a background in general practice, surgery, psychiatry, and drug and alcohol care. He is currently in practice as a consulting general practitioner. The complainant and respondent had been acquainted for a number of years through their common Islamic faith and their attendance at religious services.

4. In 2011-2012, the complainant was seeking treatment from his local doctor for what he describes as 'panic attacks'. At that time, the complainant also sought the respondent's medical opinion.

5. On 1 July 2014, the complainant wrote to his relatives and friends informing them that he had renounced his Islamic faith. Subsequently, he and the respondent engaged in a series of theological discussions - both in person and through email communications.

6. On 5 January 2015, the complainant sent the respondent an email quoting four religious ayats[1] and sought the respondent's interpretation of the meanings.

7. On 19 January 2015, the complainant sent a further email to the respondent, and to six third party recipients requesting a response to his questions.

8. On 20 January 2015, the respondent sent the following response to the complainant and the third parties (**the email**):

> ….As I explained, all the answers will be provided with the view that NOT ONLY YOU & [name deleted] but ANYONE ELSE would not have legs to stand on as regards your enquiry if you follow the FULL explanation. As I mentioned it will come in INSTALMENTS. I

[1] Verses.

am a perpetual student of OMNISCIENCE and will do the explanation in a scientific manner.

I also want you to answer a few questions so that the DELUSION is avoided and does NOT PERSIST. **You'll recall my management of your Delusional Depression**.

[emphases in original]

Privacy complaint and remedy sought

9. On 1 May 2015, the complainant lodged a complaint under s 36 of the Privacy Act in relation to the respondent's conduct. The complainant alleges that the respondent had made the disclosure, and exaggerated the nature of a prior illness to prove to the community that it was an illness that caused him to leave the faith. The complainant contends that the respondent's disclosure of his personal information was made with malicious intent; and the disclosure has damaged both his personal social standing and his reputation in business.

10. The complainant raises two allegations; that the respondent interfered with his privacy on 20 January 2015 by:

    - improperly disclosing his personal information, his medical sensitive information collected for the purpose of providing him with medical treatment, to six third party individuals for the purpose of persuading those individuals, and by dissemination other members of his faith community, that a delusional depressive illness had caused him to leave his faith (alleged breach of APP 6.1), and

    - disclosing inaccurate information, to convince others that he suffers from a serious mental illness when he does not (alleged breach of APP 10.2).

11. The complainant seeks financial compensation for economic loss through damage to his business, and non-economic loss of social status and personal reputational damage.

Information taken into consideration

12. In making this determination, I have considered the following material:
    - the Privacy Act, in particular ss 6, 15, 16A, 16B, 52, APP 6 and APP 10

- *Australian Privacy Principles guidelines* (**APP guidelines**)[2]
- the submissions of the complainant during the investigation process, including supporting documents
- the submissions of the respondent, including supporting documents, and
- privacy determinations and case law relating to the Privacy Act.[3]

13. As both complainant and respondents are individuals, consistent with my obligations under the Privacy Act, the parties have not been named in this determination.[4]

The law

14. I have considered the complaint under the provisions of the current Privacy Act including the Australian Privacy Principles (APPs) currently in effect, and that were in effect at the relevant time.

15. The APPs set out the standards for APP entities' practices for the handling of personal information.

16. Section 6 of the Privacy Act provides than an APP entity means an agency or organisation. An organisation includes, amongst other things, entities (including individuals) who provide a health service to another individual and holds any health information except in an employee record.[5]

17. Section 6 of the Privacy Act defines 'health service' to mean:

    a) An activity performed in relation to an individual that is intended or claimed (expressly or otherwise) by the individual or the person performing it:

        (i) to assess, record, maintain or improve the individual's health; or

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2 *Australian Privacy Principles guidelines* (2015). The Australian Privacy Principles (APP) guidelines were developed to help organisations to comply with the APPs and to avoid interfering with an individual's privacy. The guidelines indicate some factors the Commissioner may take into account when handling a complaint. The guidelines are advisory only, and are not legally binding. The guidelines are available at https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/.

3 '*BO' v AeroCare Pty Ltd* [2014] AICmr 37, [57]; *'D' v Wentworthville Leagues Club* [2001] AICmr 9, [50]; *'DK' and Telstra Corporation Limited* [2014] AICmr 118; Federal Privacy Commissioner, *Eighth Annual Report on the Operation of the Privacy Act for the period 1 July 1995 to 30 June 1996*, October 1996, 90; *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72, [75]; *'HW' v Freelancer International Pty Limited* [2015] AICmr 86, [379]; *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221, [32]; *'S' v Veda Advantage Information Services and Solutions Limited* [2012] AICmr 33, [93].

4 It is the usual practice of the OAIC not to name a party if the party is an individual.

5 Section s 6D(4)(b) of the Privacy Act; also see *APP guidelines* footnote 25 (footnote to [B78]).

(ii) to diagnose the individual's illness or disability; or

(iii) to treat the individual's illness or disability or suspected illness or disability; or

b) The dispensing on prescription of a drug or medicinal preparation by a pharmacist.

18. An entity 'holds' personal information if the entity has possession or control of a record that contains the personal information.[6]

19. The respondent assessed, diagnosed and treated the complainant, and prescribed him medication.[7] It is evident that the respondent falls within the definition of 'organisation' under s 6D(4)(b) of the Privacy Act, and is accordingly bound by the APPs.

20. Section 15 of the Privacy Act provides that an APP entity must not do an act, or engage in a practice, that breaches an APP.

21. Section 16A of the Privacy Act provides for permitted general situations for the collection, use or disclosure of personal information.

22. Section 16B of the Privacy Act provides for permitted health situations for the collection, use or disclosure of health information.

Investigation process

23. On 18 September 2015, the OAIC commenced an investigation into the complainant's allegations under s 40(1) of the Privacy Act.

24. As part of the investigation, both parties provided written submissions and supporting documents to the OAIC.

25. On 1 December 2015, the parties participated in a conciliation teleconference. However, at the teleconference the parties were not able to resolve the issues in dispute. Therefore, I decided to determine the matter under s 52(1) of the Privacy Act.

26. The complainant maintains his allegations that the respondent exaggerated a medical diagnosis, and disclosed personal information with malicious intent.

[6] *Privacy Act 1988* (Cth), s 6.
[7] See respondent's letter to the OAIC, 12 April 2016.

27. The complainant's allegations relate to alleged breaches of APP 6 (disclosure of personal information) and APP 10 (accuracy of personal information). I will consider each of the alleged breaches and the relevant APP in turn.

Alleged breach of APP 6

28. The complainant contends that the respondent improperly disclosed his personal information with malicious intent when the respondent found he could not bring him back to the faith.

29. The respondent does not dispute that on 20 January 2015, he disclosed to six third parties that he had treated the complainant for 'Delusional Depression'.[8]

30. The respondent submits:

> …. [the complainant] continued ringing me and sending numerous emails demanding answers to his questions about religion. He ignored my repeated requests to involve his family or friends in his management and to attend for treatment with a GP or psychiatrist. I remained very concerned about his welfare. When I received an email from [the complainant] addressed to me and also to his sons and friends. I assumed that by including these people in the email correspondence, [the complainant] was happy for them to be included in ongoing discussions. For this reason, I included these people in the email I sent to [the complainant], dated 20 January 2015.[9]

31. There is no dispute that the six third party recipients had no connection to the management and/or treatment of the complainant's medical condition. The respondent contends that he disclosed the complainant's personal information because:

    (a) he was concerned for the complainant's health and personal safety, and/or

    (b) he was of the understanding that the complainant had impliedly consented to the disclosure of his personal information to the recipients of the email.

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8 As I discussed above at [8].

9 Respondent letter to the OAIC, 12 April 2016, 3.

Findings in relation to alleged APP 6.1 breach

32. APP 6.1(a) provides that if an APP entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), which in this case was the provision of health services, the entity must not use or disclose the information for another purpose (the secondary purpose) unless the individual has consented to the use or disclosure of the information.

33. This notion is reflected in the respondent's privacy policy, which states that:

> ALL THE…INFORMATION IS COVERED BY A HIGH LEVEL OF TRUST AND CONFIDENTIALITY
>
> NONE OF THE…INFORMATION WILL BE RELEASED BY THE STAFF. HOWEVER, YOU CAN REQUEST THE RELEASE BY PROVIDING CONSENT (WRITTEN, VERBAL TO DOCTOR, IN CASE OF EMERGENCY ADMISSION TO THE HOSPITAL, OR VIA E-MAIL) [emphasis in original].[10]

34. The substance of the email communications between the parties in 2014 and 2015 outlined at paragraphs [7]-[8] above, primarily relate to theology, not to the complainant's medical history. Given this and the manner in which patient information is supposed to be handled by the respondent's practice, I am satisfied that the disclosure of the complainant's 'Delusional Depression' made in the email of 20 January 2015 was not made for the primary purpose of providing him with medical care.

Disclosure of personal information - consent

35. The respondent says that he assumed that the complainant was happy for the third parties to be included in his email response. While I accept that the complainant might have consented to the inclusion of third parties in a theological discussion, I do not agree that the respondent could have reasonably assumed that the complainant consented to his medical history being disclosed in these circumstances. Further, the disclosure was in breach of the respondent's own practice's privacy policy which clearly requires consent to be provided expressly in writing, except where a patient is admitted to the hospital.

36. It is clear from the complainant's submissions as well as the email communications themselves that the complainant did not consent to the disclosure.

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[10] Respondent's letter to the OAIC, 4 March 2016.

Disclosure of personal information - permitted disclosure

37. The exceptions for permitted disclosure of personal information in APP 6.1 are expanded beyond consent in subclause 6.2. Relevantly, the circumstances to which APP 6.2 applies in relation to the use or disclosure of personal information about an individual includes where a permitted general situation exists in relation to the use or disclosure of the information by the APP entity (APP 6.2(c)); or where the APP entity is an organisation and a permitted health situation exists in relation to the use or disclosure of the information by the entity (APP 6.2(d)).

Permitted general situation - serious threat to health or safety

38. A permitted general situation relevantly includes where an APP entity holds personal information and it is unreasonable or impracticable to obtain the individual's consent; and the entity believes that the disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (s 16A of the Privacy Act).

39. The respondent submits that he had become quite concerned about the complainant in July 2014 as when he was at the respondent's home he had made a series of outbursts which included a threat to burn the Al Qur'an. The respondent said that he wanted to protect the complainant from others who may have overheard the outbursts. The respondent further submits that 'had this outburst occurred in [his] consulting room, [he] would have seriously considered COMMITAL [emphasis in original] and called the Police'.

40. While it is apparent that the respondent holds a genuine concern for the complainant, I am satisfied a permitted general situation does not exist. The respondent did not take any special precautions or measures in relation to the alleged concern of a serious threat to the health or safety of the complainant. If the respondent believed that the disclosure in this case was necessary to lessen or prevent a threat to the life, health or safety of the complainant, the most obvious approach would have been to document his concerns and/or raise those concerns with the complainant in the first instance.

41. I also note that the July 2014 incident was some six months before the disclosure about the complainant's medical condition in the January 2015 email. There is no information before me to suggest that it was reasonable for the respondent to consider the complainant a serious threat to himself or to others at the time the email

was sent. Therefore, given the circumstances of this matter, in my view there is no basis on which a person could believe that it was necessary to disclose sensitive information about the complainant in a group email to prevent or lessen any threat.

Permitted health situation

42. There are three permitted health situations permitting disclosure (s 16B of the Privacy Act):

- use or disclosure is necessary for research
- use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of a genetic relative, or
- disclosure where the recipient of the information is a responsible person for the individual.

43. I am satisfied that none of these permitted health situations apply in the circumstances of the matter before me.

44. Neither a permitted general situation, nor a permitted health situation, that would have permitted disclosure, exists in this case.

45. I therefore find that the respondent improperly disclosed the complainant's personal information in breach of APP 6.1, and has interfered with the complainant's privacy in this regard.

Alleged breach of APP 10.2

46. APP 10.2 states that an APP entity must take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity uses or discloses is, having regard to the purpose of the use or disclosure, accurate, up-to-date, complete and relevant.

47. The complainant contends that the respondent exaggerated the nature of a prior illness. Specifically, he was not diagnosed with 'delusional depression' as disclosed. Rather, he had suffered from a 'panic disorder':

> ..In the email, [the respondent] has named my illness as Delusional Depression. Few years back I did seek his advice about panic attacks.
>
> I have been advised that panic attacks and delusional depression are two separate illnesses.

> In effect, he was trying to prove that I have mental issues.[11]

48. The respondent submits that his diagnosis of delusional depression is correct.

Findings in relation to alleged APP 10 breach

49. The APP guidelines state that:

> For APP 10 purposes the opinion may be accurate if it is presented as an opinion and not objective fact, accurately records the view held by the third party and is an informed assessment that takes into account competing facts and views.[12]

50. I accept that the complainant does not agree with the respondent's opinion expressed in the 20 January 2015 email. However, an opinion about an individual given by a third party is not inaccurate by reason only that the individual disagrees with that opinion or advice.[13] The difference of opinion about the complainant's condition does not make the respondent's opinion inaccurate. Rather, the question is whether the respondent's disclosure of the complainant's medical information accurately reflects his diagnosis.

51. The respondent, as a medical doctor, contends that he diagnosed the complainant with delusional depression. There is no evidence before me to suggest that the respondent did not honestly hold the opinion expressed in the email after undertaking assessment and treatment of the complainant. I am satisfied that the personal information disclosed by the respondent accurately reflects the respondent's opinion of the complainant's medical condition, and is accurate for the purposes of APP 10.2.

52. Notwithstanding this for the purposes of APP 10.2, disclosure of the personal information must also be relevant:

> Personal information is irrelevant if it does not have a bearing upon or connection to the purpose for which the personal information is disclosed.[14]

53. This required the respondent to assess the relevance of the personal information against the particular reason for its disclosure and only disclose so much of it as is relevant to that purpose.

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[11] Email to the OAIC, 22 July 2015.
[12] *APP guidelines*, [10.13].
[13] App guidelines, [10.19].
[14] APP guidelines, [10.19].

54. Even if, as the doctor contended, there was implied consent by the complainant to disclose his personal information to the other email recipients, there is nothing in the rest of the email communication which could conceivably be thought to pertain to a discussion about the complainant's medical care, and so warrant the disclosure of the doctor's diagnosis of the complainant's medical condition. Even a concern about the health or safety of the complainant does not lend itself to revealing the doctor's diagnosis of the complainant's medical condition to persons unrelated to the complainant's medical care.

55. It is apparent that the respondent was not asked to provide his opinion in relation to medical issues, but rather on theological matters.

56. I therefore find that the respondent breached APP 10.2 by not taking reasonable steps to ensure that the personal information he disclosed was relevant to the purpose for which it was disclosed.

Findings on damages

57. I have found that the respondent breached APP 6.1 and APP 10.2.

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(1AB) provides that loss or damage can include injury to the complainant's feelings or humiliation suffered by the complainant.

59. The principles for awarding compensation in such matters has been canvassed by the Administrative Appeals Tribunal (**AAT**) in *Rummery and Federal Privacy Commissioner*[15] (***Rummery***):

    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

[15] [2004] AATA 1221 [32].

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 good reason not to award compensation for that loss.

60. In its assessment of an appropriate amount of compensation the AAT in *Rummery*[16] said:

> - [53] …we have considered Mr Rummery's evidence as to his feelings when he learned of the details of the disclosures made by Mr Keady [the head of the department]. This was clearly a breach in Mr Rummery's eyes.
> - [54] It is our opinion also that this was a serious breach. We have had regard to this in assessing the significance of Mr Rummery's evidence as to the injury to his feelings and humiliation. It assists us in assessing the depth of his feelings.

The AAT in that matter concluded that an appropriate award for the injury to Mr Rummery's feelings and humiliation was $8,000.

61. The complainant in the present matter submits that the breach of his privacy has had an impact on him both socially and financially. He says that social invitations have declined, and that people from his community have stopped consulting him professionally, thereby affecting his livelihood.[17]

Considerations – economic loss

62. The complainant has not provided any financial information that substantiates his claim that business has dropped off following the improper disclosure, or that links any decline in business to the email. I am consequently of the view that there is no basis for awarding compensation for the alleged economic loss.

Considerations – non- economic loss

63. I accept from the statements made by the complainant in his complaint and subsequent submissions that the respondent's conduct has caused him some distress, which falls within the ambit of 'injury to feelings'. I am therefore satisfied that an award of compensation is appropriate in this case.

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16 *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221.

17 Complainant's complaint to the OAIC, 1 May 2015; complainant's email to the OAIC, 22 July 2015; complainant's email to the OAIC, 5 November 2015; complainant's email to the OAIC, 20 April 2016.

64. In deciding the appropriate amount of compensation, I have considered amounts awarded in previous determinations, as well as amounts settled on in conciliated matters of similar vein:

- In *'BO' and AeroCare*,[18] I awarded $8,500 for non-economic loss caused by the interference with the complainant's privacy. In that case, I found that AeroCare had breached the complainant's privacy both in its collection and disclosure of his sensitive medical information in an airport departure lounge, and in circumstances where the complainant's disability made him particularly vulnerable.

- In a settled privacy complaint matter an agency agreed to pay a complainant $10,000 compensation for her embarrassment and humiliation over two notices sent to all agency staff, which contained sensitive information about the complainant's legionnaire's disease.[19]

- In *'HW' v Freelancer International Pty Ltd*[20] I awarded general damages in the amount of $15,000[21] for the anxiety and stress suffered by the complainant as a result of repeated improper disclosures of the complainant's personal information on public websites.

- In *'DK' and Telstra Corporation Limited*[22], I ordered Telstra to pay $18,000 in circumstances where the publication of the complainant's personal information in the White Pages forced the complainant to move interstate because of a well-founded fear for his safety and that of his partner.

65. In deciding the appropriate amount of compensation to award in this matter, I have given weight to:

- the sensitive nature of the personal information that was disclosed

- the fact that as a patient of the respondent's, the complainant was in a position of vulnerability

- the fact that the disclosure was made by email to six third parties, and

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18 *'BO' and Aerocare* [2014] AICmr 32.

19 Federal Privacy Commissioner, *Eighth Annual Report on the Operation of the Privacy Act for the period 1 July 1995 to 30 June 1996*, October 1996, 90.

20 [2015] AICmr 86.

21 A further $5,000 was awarded in aggravated damages.

22 [2014] AICmr 118.

- the responsibility of the respondent as a doctor to have a sound understanding of his privacy obligations.

66. While I am satisfied for reasons outlined above that this matter does not fall within the lowest range, it likewise does not command damages in the highest range. The breach was limited to one instance of improper disclosure to a small group of email recipients. In contrast, I found in the *Freelancer case*[23] several instances of improper disclosure to the general public over a prolonged period of time. Moreover, in the current matter, the complainant has not suffered the type of physical disruption to his life as did the complainant in *'DK' and Telstra Corporation Limited*.[24] Nor in this case is there any evidence that the complainant has suffered any long-term emotional or psychological harm.

67. Accordingly, I am satisfied that it would be appropriate to award an amount of compensation in the sum of $10,000. The respondent disclosed in an email the complainant's sensitive personal information to a group of people not involved with the complainant's medical care, in circumstances where the complainant as patient of the respondent's was vulnerable.

Aggravated damages

58. The power to award damages in s 52 of the Privacy Act includes the power to award aggravated damages in addition to general damages.[25]

59. I have previously made reference to two principles which provide useful guidance in determining whether such an award is warranted. Aggravated damages may be awarded where:

(a) the respondent has behaved 'high-handedly, maliciously, insultingly or oppressively'[26]

(b) the 'manner in which a defendant conducts his or her case may exacerbate the hurt and injury suffered by the plaintiff.' [27]

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23 [2015] AICmr 86.
24 [2014] AICmr 118.
25 *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221, [32].
26 *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72, [75].
27 *'D' v Wentworthville Leagues Club* [2001] AICmr 9, [50]; *'S' v Veda Advantage Information Services and Solutions Limited* [2012] AICmr 33, [93]; '*BO v AeroCare Pty Ltd* [2014] AICmr 37, [57]; *'HW' v Freelancer International Pty Limited* [2015] AICmr 86, [379].

60. There is no evidence before me to suggest that the disclosure was malicious as the complainant contends.[28]The respondent's conduct in these proceedings has been conciliatory and I can see no justification for an award of aggravated damages.

Determination

68. I find that complainant's complaint is substantiated and in accordance with s 52(1)(b)(i)(B) of the Privacy Act declare that the respondent has interfered with the complainant's privacy in contravention of APP 6.1 and APP 10.2.

69. I declare in accordance with s 52(1)(b)(iii) that within 30 days from the date of this determination the respondent shall pay the complainant $10,000 compensation for non-economic loss caused by the interference with his privacy.

Timothy Pilgrim
Acting Australian Information Commissioner
27 June 2016

Review rights

A party may apply under s 96 of the Privacy Act 1988 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 (http://www.federalcourt.gov.au/) or by contacting your nearest District Registry.

[28] NRMA's letter to the complainant, 7 August 2014.