



'LP' and The Westin Sydney (Privacy) [2017] AICmr 53 (7 June 2017)

Decision and reasons for decision of
Australian Privacy Commissioner, Timothy Pilgrim

Complainant: 'LP'

Respondent: The Westin Sydney

Decision date: 7 June 2017

Application number: CP16/00133

Catchwords: Privacy — Australian Privacy Principles — *Privacy Act 1988* (Cth) — APP 3 — Whether collection of personal information was by lawful and fair means – Recording of phone call without participants' knowledge – APP 12 – Access to personal information – Whether three days was an unreasonable period within which to provide access to a call recording

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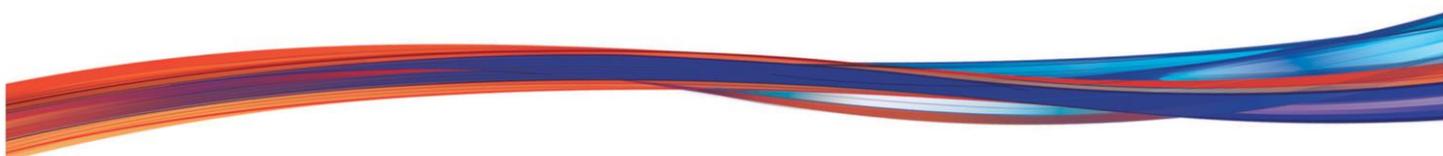
Determination

1. I find that the respondent, The Westin Sydney¹ (**The Westin**), interfered with the complainant’s privacy as defined in the *Privacy Act 1988* (Cth) (**Privacy Act**) by recording a telephone conversation without the complainant’s knowledge. In doing so The Westin collected the complainant’s personal information in a manner that was not fair, in breach of Australian Privacy Principle (**APP**) 3.5.
2. I declare that The Westin must, within 60 days of this determination, issue a written apology to the complainant acknowledging its interference with his privacy, and pay the complainant \$1,500 for non-economic loss caused by the interference.

Background

3. I have set out below the events leading to the making of the complaint, based on the information provided by the parties to the Office of the Australian Information Commissioner (**OAIC**).
4. The complainant had booked a room at The Westin. On the afternoon of 17 January 2016, he arrived and checked in. The Westin employee who handled his check-in informed him that there would be a 10 to 20 minute delay until his room became available, and the complainant moved to the hotel’s executive lounge to wait. Around 10 minutes later, the complainant received a call to his mobile phone from a Westin employee, who advised the complainant that his preferred room would not be available until later that afternoon. The Westin employee asked the complainant whether he wanted to wait for a similar room on a different floor, or if he would prefer an alternate smaller room on the same floor that was

¹ According to the respondent, The Westin Sydney is a privately owned hotel, owned by Martin Heritage Pty Ltd as a trustee for the Far East Martin Trust and managed by Starwood Pacific Hotels Pty Limited, a limited by shares, Australian proprietary company.



available immediately. The complainant agreed to accept the alternate room, but conveyed his displeasure to The Westin.²

5. The complainant subsequently complained to The Westin about his treatment by the hotel, including the unavailability of his preferred room. In the course of responding to his complaint, on 18 January 2016, the Executive Assistant Manager of The Westin referred to the call recording. The complainant had been unaware that The Westin had recorded the call.
6. On 19 January 2016, the complainant emailed the General Manager of The Westin about the call recording. He stated that the recording had occurred in contravention of the *Surveillance Devices Act 2007* (NSW) (**NSW SD Act**), the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**), and the Privacy Act. He requested a copy of the call recording. The Westin did not immediately respond to the request.
7. On 22 January 2016, the complainant made a complaint to the OAIC under s 36 of the Privacy Act claiming that the call recording was 'an unlawful breach of NSW law' and his privacy, and that the respondent had not provided him with a copy of the call recording on request.

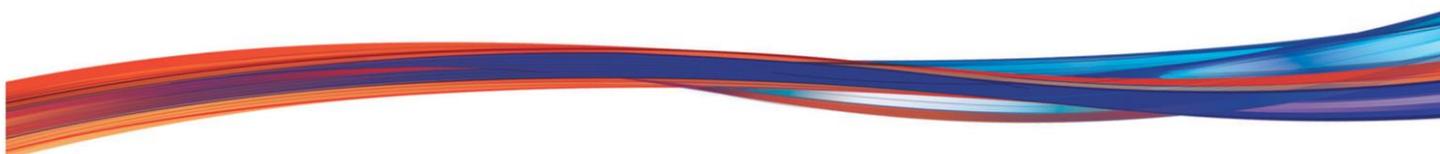
The complaint

8. Having regard to the complaint made under s 36 by email on 22 January 2016, and the earlier email by the complainant to The Westin on 19 January 2016 (which was attached to the complaint), I consider that the relevant acts and practices subject to this complaint are:
 - a. The Westin's act of recording the telephone call of 17 January 2016 without the complainant's knowledge;
 - b. The Westin's failure to provide the complainant with a copy of the call recording on request in a timely manner.
9. The complainant has said that I should determine a wide range of ancillary matters that he did not raise in his complaint to the OAIC on 22 January 2016 or in his earlier email of 19 January 2016 to The Westin. Although these allegations were not part of the complainant's original complaint under s 36 of the Privacy Act, I have sufficient information to address them in this determination.

Basis for determination

10. The complainant seeks a declaration that The Westin interfered with his privacy. He seeks compensation from The Westin. Section 52 of the Privacy Act provides that, after investigating a complaint, I may make a determination:
 - a. dismissing the complaint; or
 - b. finding the complaint substantiated and declaring that:
 - i. the respondent has engaged in conduct constituting an interference with privacy of an individual and should not repeat or continue such conduct (s 52(1)(b)(i)(B));

² This description of the call is drawn from a recording and transcript provided by The Westin. The complainant alleges that the recording and transcript are inaccurate. For reasons outlined at paragraphs [55]-[58] below, I do not accept this.



- ii. the respondent must take specified steps within a specified period to ensure that such conduct is not repeated or continued (s 52(1)(b)(ia));
 - iii. the respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant (s 52(1)(b)(ii)); or
 - iv. the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint (s 52(1)(b)(iii))
 - v. it would be inappropriate for any further action to be taken in the matter (s 52(1)(b)(iv)).
11. The APPs, which are contained at Schedule 1 to the Privacy Act, regulate the collection, use, disclosure and security of personal information held by government agencies and certain private sector organisations (**APP entities**). Section 15 of the Privacy Act prohibits an APP entity from doing an act, or engaging in a practice, that breaches an APP.
12. The Westin is an organisation for the purposes of the Privacy Act. It is an APP entity and the APPs apply to it in respect of the complaint.
13. The matter was not resolved through conciliation and I have decided to determine the matter under s 52 of the Privacy Act.

Issue 1 - collection by 'lawful and fair' means (APP 3)

14. The complainant alleges that the creation of the call recording by The Westin was unlawful, on the basis that it contravened the NSW SD Act and the TIA Act. As such, he alleges it was a collection not by 'lawful and fair means', in breach of APP 3.5.

Relevant law and policy

15. APP 3.5 says that '[a]n APP entity must collect personal information only by lawful and fair means.'
16. Personal information is defined in s 6 of the Privacy Act as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not'.
17. I have listened to a copy of the call recording held by The Westin. The complainant alleges that the call recording has been 'fraudulently modified', which I do not accept for the reasons outlined below at paragraphs [55] to [58]. It is clear that the recording contains the complainant's voice and constitutes the complainant's personal information.
18. The complainant alleges that the information collected in the call recording includes 'sensitive information' as defined in s 6 of the Privacy Act.³ He contends that the information collected in the call included information 'relating to philosophical opinions (about fair trade and deceptive practices) ... and medical information (disability was disclosed, in relation to why another floor was not acceptable)'.⁴ I do not agree that the call contained 'health information', as the complainant's health (including whether he

³ Sensitive information, as defined in s 6 of the Privacy Act, includes information or an opinion about an individual's philosophical beliefs that is also personal information, as well as health information about an individual. Sensitive information is provided additional protections by the APPs, compared to other categories of personal information.

⁴ Submissions of the complainant, 5 December 2016.



had a disability) was not discussed. Nor do I consider that the complainant's statement that he was 'unhappy' about the room downgrade or that he regarded it as 'obviously unacceptable' is a 'philosophical belief' for the purpose of s 6.

19. In my view, by recording the conversation, The Westin collected the complainant's personal information, but not sensitive information.
20. The *Australian Privacy Principle Guidelines (APP Guidelines)*⁵ explain how the OAIC interprets the APPs. The requirement to collect personal information by lawful and fair means is explained at paragraphs [3.60] to [3.63] of the APP Guidelines, which relevantly state:

[3.60] The term 'lawful' is not defined in the Privacy Act. ... Unlawful activity does not include breach of a contract.

[3.61] Examples of collection that would not be lawful include:

- collecting in breach of legislation, for example: ...
 - collecting using telephone interception or a listening device except under the authority of a warrant (For example, *Telecommunications (Interception) Act 1979* (Cth) s 7; *Surveillance Devices Act 2004* (Cth) s 14) ...

[3.62] A 'fair means' of collecting information is one that does not involve intimidation or deception, and is not unreasonably intrusive. Whether a collection uses unfair means will depend on the circumstances. For example, it would usually be unfair to collect personal information covertly without the knowledge of the individual. However, this may be a fair means of collection if undertaken in connection with a fraud investigation. ...

Consideration

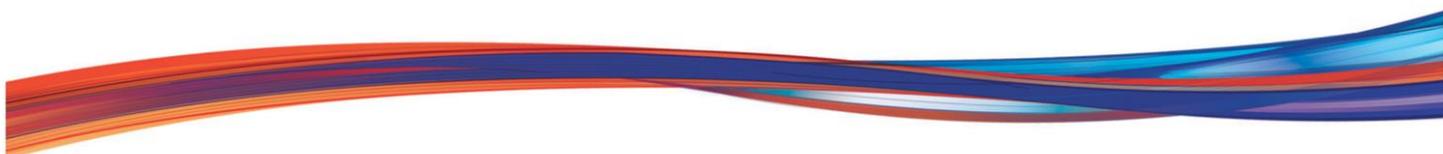
Was the collection unlawful?

21. The complainant alleges that the collection was unlawful as it contravened the NSW SD Act and the TIA Act.

Surveillance Devices Act 2007 (NSW)

22. The NSW SD Act, as I understand it, prohibits the use of certain surveillance devices and the recording of 'private conversations' without the knowledge of the participants in the conversation. The complainant has specifically referred to s 7(1) of the NSW SD Act, which prohibits the recording of a private conversation. 'Private conversation' is defined in s 4 of the NSW SD Act, and provides that the call must be made 'in circumstances that may reasonably be taken to indicate that [either call participant] desires the words to be listened to only ... by themselves ... [or] by some other person who has the consent, express or implied, of all of those persons to do so'.
23. As I understand it, the respondent made the call from the hotel's front desk; the complainant received the call in The Westin's executive lounge. The complainant's travel companion was with the complainant when the call occurred. The conversation itself was of an innocuous and transactional nature. There was nothing in the content of the conversation or in the circumstances, as I understand them, to suggest that

⁵ Available online at www.oaic.gov.au/agencies-and-organisations/app-guidelines/.



either party should regard the call as a private or confidential discussion. As such, I am not satisfied that the call was a private conversation for the purposes of the NSW SD Act.

Telecommunications (Interception and Access) Act 1979 (Cth)

24. The TIA Act, amongst other things, prohibits the 'interception' of telecommunications passing over a telecommunications system. The complainant also contends that The Westin has breached the TIA Act and has specifically referred to s 7(1) of that Act which prohibits the 'interception' of a call. Section 6(1) of the TIA Act provides that 'interception of a communication passing over a telecommunications system consists of listening to or recording, by any means, such a communication in its passage over that telecommunications system without the knowledge of the person making the communication'.
25. Section 6 of the TIA Act defines 'interception' to mean only the listening to or recording of a communication 'in its passage' over a telephone communications system. Judicial decision-makers have stated on a number of occasions that a purpose of the TIA Act in seeking to regulate the interception of a communication is to protect against a third party invading the privacy of that communication between caller and receiver.⁶ The Westin contends that the recording of the communication was not made in its passage over the telephone communications system, but rather was created using equipment installed on The Westin premises and could therefore have only occurred once the transmission was received.⁷ The Westin contends that this means that the communication was not 'in its passage' over a telecommunication system and the recording would therefore not constitute 'interception'.
26. As I understand it, the recording occurred in a PABX telephone system under The Westin's control. There was no 'third party' intrusion into the communication between respondent and complainant. I therefore accept The Westin's view on this, that there has been no 'interception' of the call for the purpose of the TIA Act. The complainant's contention of an unlawful collection of his personal information by The Westin has, in my view, not been made out.

Was the collection unfair?

27. Even if the collection was lawful, it may not have been fair. Subject to some exceptions, it would for example usually be unfair to collect personal information covertly without the knowledge of the individual.⁸
28. The complainant submitted that recording conversations covertly goes against accepted community values, and is 'unethical and a substantial impropriety'.⁹ To illustrate this point he quoted various judicial and administrative decision makers who had commented on covert recordings:

In ordinary business and social behaviour there is, in my understanding, a very strong expectation that there will not be a secret recording of a conversation but that any process of recording will be revealed, so as to give those recorded an opportunity to decide whether or not they will participate [per Bryson J in *See v Hardman and Anor*]¹⁰

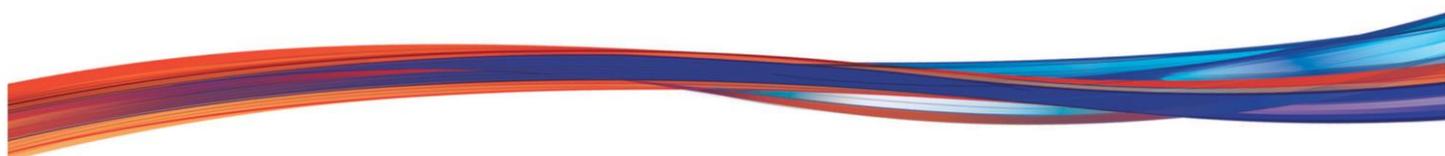
⁶ *Green v R* (1996) 135 ALR 181, 189-190, Franklyn J, citing with approval the majority decision in *T v Medical Board of South Australia* (1999) SASC 402, which found support for this view in the decision of the New South Wales Court of Appeal in *R v Edelsten* (1990) 21 NSWLR 542.

⁷ Submissions of the respondent, 16 February 2017.

⁸ APP Guidelines, [3.62]-[3.63].

⁹ Submissions of the complainant, 5 December 2016.

¹⁰ [2002] NSWSC 234, [27]-[28].



The ordinary conduct of personal, business and working relationships in our community is predicated on the basis that if there is to be any record of a meeting it will be agreed in advance. Anything else is quite properly described as sneaky. Its very sneakiness makes it abhorrent to ordinary persons dealing with each other in a proper fashion [per Senior Deputy President Drake in *Ron Lever v Australian Nuclear Science and Technology Organisation*]¹¹

29. For its part, The Westin submits that it had taken numerous steps to inform the complainant that The Westin would collect his personal information. It contends the collection that occurred on the phone call of 17 January 2016 was consistent with what it told him. In particular, The Westin refers to its Privacy Statement and the registration card that the complainant signed when he registered at the hotel:¹²

- The Privacy Statement relevant to The Westin ... informs individuals of the collection of their personal information including, if applicable, information for 'fulfilling reservations or information requests' and 'accommodating your personal preferences'. The Privacy Statement further notifies individuals that their personal information may be used to provide services such as making reservations or processing another type of transaction;' ...
- [The complainant] is a Starwood Preferred Guest ('SPG') member. In order to become an SPG member, [the complainant] was presented with a link to the Privacy Statement, and agreed to the Privacy Statement ... on 13 January 2013
- [The complainant] made an online reservation, on 9 January 2016, for the 17 January 2016 stay To make that reservation, [the complainant] was again presented with the Privacy Statement in the course of confirming his reservation. ...
- The registration card signed by [the complainant] upon registration at the hotel on 17 January 2016 provided the following notice to ensure that [the complainant] was aware of the Westin's personal information collection practices:

You authorise Starwood Hotels & Resorts Worldwide Inc. and its affiliated and subsidiary companies to collect, process and use information collected in conjunction with your stay for lawful Starwood Group business related purposes, to store your Guest Information at and transmit your Guest Information to various locations throughout the world, either directly or through its third party vendors, as the Starwood group deems appropriate, whether within your country of residence, the United States or elsewhere. To learn more about our data collection and usage practices, please see our Privacy Statement at starwoodhotels.com.

30. The Westin argues that in light of the notices that were provided to the complainant prior to it collecting his personal information, none of the personal information the subject of the complaint was collected without notice, and that personal information was used in a manner consistent with those notices. It contends that it is not intrusive or unusual for a hospitality company like The Westin to retain records of its communications with guests which directly relate to the service provided. It further contends that at no point did it misrepresent the purpose or effect of collection to the complainant, or suggest that The Westin would not retain a record of the complainant's instructions about room selection. The Westin does therefore not agree that the collection of the complainant's information was unlawful or unfair.

31. In the 17 January 2016 call, the complainant provided information about his room preferences, and instructions to The Westin for his booking. This information fell within the categories of information

¹¹ (2009) AIRC 784, [103].

¹² Submissions of the respondent, 1 December 2016.



described in the various personal information handling notices extracted above. However, at issue is not the categories of information collected, but the 'means' of collection, which APP 3.5 requires to be 'fair'.

32. The examples of administrative and judicial decisions provided by the complainant are persuasive. I accept the complainant's proposition that according to ordinary Australian community standards, participants in a telephone call would generally expect to be notified if the call will be recorded. As such, if notification is not given, call participants can reasonably expect that a call will not be recorded.
33. When considering whether a collection such as this is 'unfair' for the purposes of APP 3.5, I must consider all the circumstances, which may include issues going to the sensitivity or secrecy of the conversation, the reasonable expectations of participants, and the ease with which the participants could be informed that a recording was being made.
34. In this case, it would not have been difficult for The Westin to alert the complainant that it was recording the call. It could have done so by informing the complainant at the start of the call or by playing a pre-recorded message. There is no apparent reason why The Westin did not notify the complainant that it was recording the call, and this failure appears to have been an oversight. Although the nature of the conversation was not sensitive or secret, the complainant does appear to have had a reasonable expectation that the call would not be recorded without his knowledge.
35. I note that The Westin has now amended its practices by implementing a system that will play a pre-recorded message for inbound calls when call recording will occur. It has also issued procedural instructions that direct all staff to notify when call recording is occurring for outbound calls. Nevertheless, The Westin's current practices are not relevant to the issue of whether or not The Westin breached the Privacy Act on 17 January 2016 by recording the relevant call without the complainant's knowledge. My findings are made on the practices that The Westin had in place at the time of the alleged breach.
36. The Westin recorded the complainant's call without his knowledge. In the circumstances of the call, I consider this constitutes a collection by unfair means.

Findings – APP 3

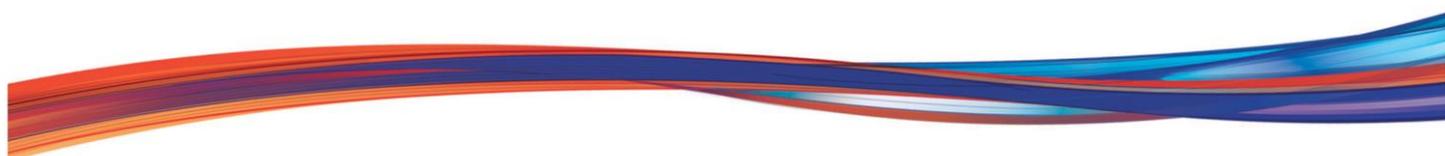
37. In recording the phone call without the complainant's knowledge, The Westin collected the complainant's personal information by unfair means. As such, The Westin breached APP 3.5.

Issue 2 - request for access to personal information (APP 12)

38. On 19 January 2016, the complainant requested a copy of the call recording held by The Westin. On 22 January 2016, he complained to the OAIC that The Westin had not responded to that request.

Relevant law and policy

39. APP 12.1 says: 'If an APP entity holds personal information about an individual, the entity must, on request by the individual, give the individual access to the information.' If the entity is an 'organisation' (which The Westin is), then APP 12.4(a)(ii) requires that access must be provided 'within a reasonable period after the request is made'.



40. The APP guidelines state 'as a general guide, a reasonable period should not exceed 30 calendar days'.¹³

Consideration

41. The complainant requested a copy of the call recording on 19 January 2016.
42. Three days later, on 22 January 2016, he complained to the OAIC about the respondent's failure to provide him with a copy of the recording. I must determine whether the period between the request and the respondent's failure to provide access, being three days, is greater than a reasonable period in the circumstances. The Westin provided the recording to the complainant through the OAIC on 8 March 2016, in the course of responding to his privacy complaint.
43. I have considered some of the factors outlined in the APP guidelines, which may be relevant in assessing what is a reasonable period for responding to a request for access under APP 12. These factors include the scope and clarity of the request, the location of and access to the requested information, how quickly it can be assembled for disclosure to the requestor, and whether any consultation is required with the individual or other parties.¹⁴
44. In this case, the request was very specific and the recording very accessible. The Westin may have needed to take the additional step of transforming the call into a readily accessible format for the complainant. It was also open to The Westin to impose a charge for providing access, and some time might be justified in deciding whether or not to charge, and if so, calculating an appropriate charge. The Westin might also have considered whether any of the exceptions in APP 12 applied (although it ultimately decided that the recording could be released to the complainant in full).
45. There is no information before me to suggest that any significant delay in responding to the complainant's request was justified. Even so, on general administrative terms, three days is not indicative of a delay. Organising access to personal information of this nature could reasonably take a least a few days, especially in the context of the complainant's ongoing dispute with The Westin.

Findings – APP 12

46. The Westin's approach in relation to the complainant's request for access appears to have been reasonable and did not result in a substantial delay. I am therefore satisfied that The Westin did not breach APP 12.4(a).

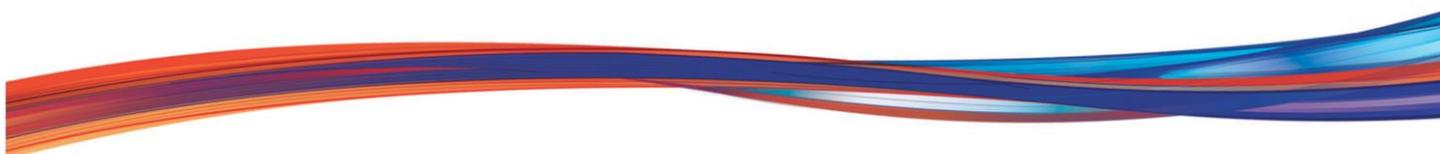
Other matters raised by the complainant

47. Additional matters raised by the complainant subsequent to his initial complaint to the OAIC included the following:
- a. The Westin did not meet the requirements of APP 1.2 as it failed to 'manage personal information in an open and transparent way, including the requirement it take reasonable steps to implement practices, procedures and systems ... to ensure it complies with the APPs, including in the way it manages complaints.'¹⁵

¹³ APP guidelines, [12.67].

¹⁴ APP guidelines, [12.67].

¹⁵ Submissions of the complainant, 5 December 2016.



- b. The Westin did not publish a privacy policy, as required by APP 1.3, or provide a copy of the policy to the complainant on request, as required by APP 1.6.
- c. The Westin did not permit the complainant to deal with it anonymously or pseudonymously, as required by APP 2.
- d. The Westin did not provide notice to the complainant that it was collecting his personal information, as required by APP 5.
- e. The Westin disclosed personal information about the complainant to TripAdvisor, Inc. (**TripAdvisor**) in an effort to have TripAdvisor remove a negative review posted by the complainant. This was allegedly a disclosure outside the purpose of collection and not permitted by APP 6, and a cross-border disclosure of personal information in contravention of APP 8.
- f. The Westin fraudulently modified the call recording, thereby failing to take reasonable steps to ensure that the information it used and disclosed was accurate, as required by APP 10. The complainant also said that this alleged fraudulent modification was 'unauthorised modification', indicating a failure on the part of The Westin to take the reasonable steps to protect the recording as required by APP 11.

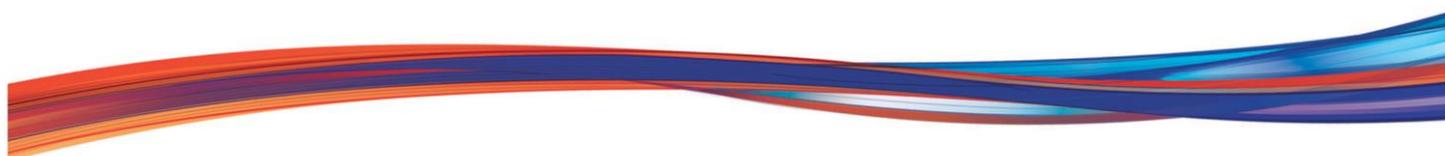
'Practices, procedures and systems' to ensure compliance with the APPs

48. I have not assessed the practices, procedures and systems of The Westin holistically, as this is beyond the scope of the complaint. Section 36 permits an individual to complain about an act or practice that may be an 'interference with the privacy of [that] individual'. Such an interference occurs where the act or practice breaches an APP in relation to 'personal information about the individual' (s 13(1)(a)). The Westin's privacy governance arrangements, and the 'practices, procedures and systems' required by APP 1.2, extend beyond how an organisation handles any one individual's personal information.
49. Although I would be unlikely to consider an organisation's holistic compliance with APP 1 in the course of an individual complaint, I can investigate this under s 40(2)(a) of the Privacy Act, which explicitly provides that I may investigate a 'possible breach of Australian Privacy Principle 1' on my own initiative. In the present circumstances, I am not inclined to do so.

Privacy policy

50. In the course of the complaint, The Westin provided the complainant and the OAIC with copies of the privacy policy of the Starwood Hotels & Resorts Worldwide, Inc.¹⁶ The privacy policy states that it covers the entire Starwood Hotel Group. The Westin Sydney is one of several entities managed by Starwood Pacific Hotels Pty Limited. I am satisfied that this policy contains the elements required by APP 1.
51. The complainant was concerned that this policy was not drafted specifically for The Westin, but related to a group of entities. Nothing in APP 1 prohibits a privacy policy from applying to multiple organisations where they share the same personal information handling practices.

¹⁶ http://www.starwoodhotels.com/westin/legal/privacy.html?language=en_US.



Anonymity and pseudonymity

52. APP 2 provides that individuals must have the option of dealing anonymously or by pseudonym with an APP entity, where there is no law or court or tribunal order requiring otherwise, or where it is not impracticable for the entity to deal with individuals who have not identified themselves. In this matter, the complainant chose to make a booking at The Westin under his own name, and The Westin subsequently dealt with him using that name. I am not satisfied that The Westin has breached APP 2.

Notice of collection

53. APP 5 provides that an entity must take reasonable steps either to notify an individual of the APP 5 matters or to ensure the individual is aware of those matters (APP 5.1). The Westin has outlined in its submissions the notices that it provided to the complainant about the collection of his personal information. I have described their content at paragraph [29]. I am satisfied that The Westin has met the requirements of APP 5.

Disclosure to TripAdvisor

54. The complainant alleges that The Westin improperly disclosed his personal information to TripAdvisor, resulting in the removal of a negative review from its website. However, The Westin denies this, and the complainant has provided no persuasive evidence in support of his allegation. I do not have any other information before me on the issue and therefore will not consider it further.

Modification to the call recording

55. APP 10 provides that an APP entity must take reasonable steps to ensure that the personal information it collects is accurate, up-to-date and complete. The complainant alleges that The Westin modified the call recording by using audio editing software.

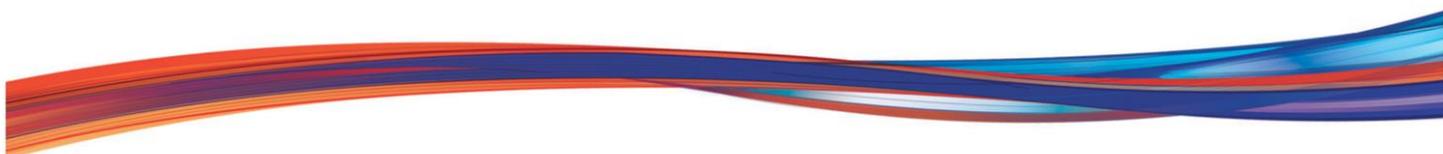
56. The complainant says he believes this because the call recording does not match his or his travelling companion's recollection of the call, and the length of the call recording does not match the length of the call listed in his mobile phone's call history. I have listened to the call recording and viewed a screenshot provided by the complainant of the mobile phone call history. Taking into account the fact that the recording begins several seconds before the call starts, and that the call length recorded in the complainant's phone appears to have been rounded down to the nearest minute, there is no inconsistency between these two records.

57. There is nothing to suggest that the recording or the transcript has been modified other than the complainant's assertion. The Westin strongly denies that it modified the call recording.

58. I am satisfied the call recording and transcript are accurate records of the call, and The Westin has not breached its obligations under APP 10 and APP 11 in this respect.

Damages and other remedies

59. Having found that The Westin interfered with the complainant's privacy by breaching APP 3.5, I have the discretion under s 52(1)(b) to make a declaration that the respondent take certain action in response to the breach, including an award of compensation for 'any loss or damage suffered by reason of the act or



practice the subject of the complaint'. Section 52(1AB) provides that loss or damage can include injury to the complainant's feelings or humiliation suffered by the complainant.

60. The complainant initially sought an apology and an assurance that The Westin would cease recording calls without notice. However, he did not accept a number of apologies and assurances provided by The Westin during the course of the complaint. The complainant is currently seeking \$35,000 in total for non-economic loss (\$20,000) and aggravated damages (\$15,000).
61. In support of his claim for non-economic loss, he has provided a number of statements, including an expert opinion from a clinical psychologist, dated 26 October 2016; a letter from his general practitioner dated 28 November 2016; and a statement from a friend who was present with the complainant during his stay at The Westin.
62. The Westin's view is that it has not interfered with the complainant's privacy. It argues that I should take no further action on the basis that it has apologised to the complainant, and changed its practices to ensure that calls are only recorded with the knowledge and consent of call participants.¹⁷
63. I am satisfied that the procedural and technical measures put in place by The Westin in response to this complaint, noted above at [35], will ensure that future recordings are not made by The Westin without the knowledge of the other call participant in breach of APP 3.5. As such, I do not intend to make a declaration that The Westin take steps to ensure the relevant conduct is not repeated under s 52(1)(b)(ia).
64. The psychologist and the complainant's doctor express the view that the privacy breach has had a detrimental impact on the complainant's mood and mental health, and that he has suffered anxiety, depression, humiliation, stress and a withdrawal from social activities. I accept that the APP 3.5 breach has adversely affected the complainant, and that some award of compensation is appropriate.

Damages

65. In making a declaration for an award of compensation, I have had regard to the principles relevant to the assessment of damages summarised by the Administrative Appeals Tribunal in *EQ and Office of the Australian Information Commissioner (Freedom of information)*¹⁸ and *Rummery and Federal Privacy Commissioner*.¹⁹

Non-economic loss

66. As part of my consideration of damages, I have considered the nature of the personal information and the effect its unfair collection had on the complainant. I have also had regard to how The Westin has responded to the complaint and conducted itself throughout the investigation process. The Westin provided a number of apologies to the complainant. However, the complainant did not accept these apologies because, in the complainant's opinion, as I understand it, the apologies did not acknowledge the interference with his privacy or a breach of the TIA Act or NSW SD Act. As well as apologising to the complainant, The Westin has taken steps to revise its practices in relation to the recording of phone calls.
67. Taking all the circumstances into account, while being mindful that to maintain integrity in public policy, awards should not be minimal, I am satisfied that the breach in this case does not command damages in the higher range. The breach was evidently an oversight, and was not intended to upset the complainant

¹⁷ Submissions of the respondent, 1 December 2016.

¹⁸ [2016] AATA 785 [53].

¹⁹ [2004] AATA 1221 [32].



in any way. Although I accept that the complainant suffered anxiety and hurt, having listened to the call recording I am of the view that the call was of a transactional nature and the information collected was relatively innocuous. I am however mindful that in accordance with the principles laid down in *Rummery*, damages should be assessed having regard to the complainant's reaction and not by the perceived reaction of the majority of the community or of a reasonable person in similar circumstances. In *'S' and Veda Advantage Information Services and Solutions Limited*²⁰, I awarded \$2,000 for the stress and anxiety caused to the complainant by reason of Veda's failure to take reasonable steps to ensure that the information contained in the complainant's credit file was accurate, up-to-date, complete and not misleading. Similarly, I awarded the complainant in *'IQ' and NRMA Insurance Australia Limited*²¹ \$2,000 for the improper disclosure of his personal information to his spouse and daughter, which caused the complainant in that matter 'huge stress and anxiety'.

68. Having regard to similar amounts awarded in these other privacy determinations, and the particular circumstances of this matter, I consider an award of \$1,500 is appropriate.

Aggravated damages

69. The power to award damages in s 52 of the Privacy Act includes the power to award aggravated damages in addition to general damages. The complainant seeks aggravated damages. Two principles provide useful guidance in determining whether such an award is warranted:²²

- Aggravated damages may be awarded where the respondent behaved 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination.'
- 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.'

70. I am not satisfied that there are any particular aspects of The Westin's conduct which give rise to damage warranting a separate award of aggravated damages. It provided an apology to the complainant and assurances that it would change its practice in relation to recording calls. I am of the view that The Westin attempted to resolve the complaint in good faith. The Westin's efforts were generally conciliatory and I am not satisfied that it behaved high-handedly, maliciously, or insultingly towards the complainant.

71. An award of aggravated damages is therefore not appropriate in this case.

Declarations

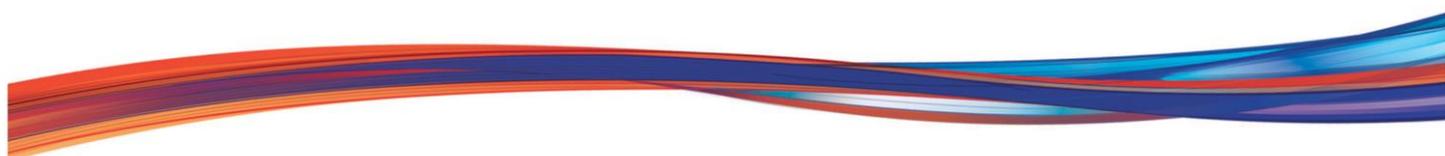
72. I declare that the complaint is substantiated in part in accordance with s 52(1)(b) of the Privacy Act, on the basis that the respondent collected the complainant's personal information by unfair means.

73. I declare in accordance with s 52(1)(b)(ii) of the Privacy Act that the respondent must issue a written apology to the complainant acknowledging its interference with the complainant's privacy within 60 days of the date of this determination.

²⁰ [2012] AICmr 33 [90]-[91].

²¹ [2016] AICmr 36 [65]-[69].

²² *'D' and Wentworthville Leagues Club* [2001] AICmr 9 [51]-[52]; *'S' and Veda Advantage Information Services and Solutions Limited* [2012] AICmr 33 [93]; *'BO' and AeroCare Pty Ltd* [2014] AICmr 37 [57]; *'HW' and Freelancer International Pty Limited* [2015] AICmr 86 [379].



74. I declare in accordance with s 52(1)(b)(iii) of the Privacy Act that the respondent must pay the complainant the amount of \$1,500 for non-economic loss caused by the respondent's interference with the complainant's privacy within 60 days of the date of this determination.

Timothy Pilgrim
Australian Privacy Commissioner

7 June 2017

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.

