



Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

By email: consultation@oaic.gov.au

30 August 2013

Dear Commissioner

**GUIDELINES FOR RECOGNISING EXTERNAL DISPUTE RESOLUTION SCHEMES
UNDER S35A OF THE PRIVACY ACT (DRAFT GUIDELINES)**

The Insurance Council of Australia¹ (Insurance Council) appreciates the opportunity to comment on the Office of the Australian Information Commissioner's (OAIC) draft guidelines.

We note the Draft Guidelines are aimed at entities and EDR schemes interested in preparing an application for recognition, although the OAIC welcomes comments by other interested stakeholders and members of the community. The Insurance Council's interest arises from our members' subscription to an External Dispute Resolution (EDR) scheme administered by the Financial Ombudsman Service (FOS). Currently, FOS may consider privacy complaints that are ancillary to an insurance dispute. FOS's Terms of Reference at 5.1 covers the relevant scope for insurance disputes.

The Draft Guidelines clearly state that a recognised EDR scheme is not expected to handle complaints outside its scope or terms of reference (1.12).

An issue yet to be resolved by the draft guidelines is the process by which the OAIC would use its discretion to refer a privacy complaint to an EDR scheme. The draft Guidelines state that information about how and when the Information Commissioner will decide not to investigate a complaint or will transfer the complaint to a recognised EDR scheme will be set

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. March 2013 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$39.2 billion per annum and has total assets of \$116.1 billion. The industry employs approximately 60,000 people and on average pays out about \$101 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

out in enforcement guidelines issued by the OAIC. The Insurance Council notes consultation on draft Enforcement Guidelines is indicatively scheduled for October.² Our members look forward to considering the proposal for this process in detail.

Recognising the OAIC has sought comments on guidance consultations through industry associations, the short **attachment** sets out the issues raised with the Insurance Council by members of its Privacy Working Group.

If you have any questions or comments in relation to our submission please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on tel: (02) 9253 5121 or email: janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO

² OAIC *Privacy Law Reform Guidance Consultation and Publication Guide* 30/5/2013

ATTACHMENT

This attachment provides the issues raised by Insurance Council members in relation to the draft guidelines.

1.2 The Privacy Act 1988 (the Privacy Act) gives the Information Commissioner the discretion to recognise EDR schemes to handle privacy-related complaints (s 35A)2. The Privacy Act also gives the Information Commissioner the discretion to decide not to investigate, or not to investigate further, an act or practice about which a complaint has been made, or which the Information Commissioner has accepted, if the Information Commissioner is satisfied that the act or practice:

- **is being dealt with by a recognised EDR scheme (s 41(1)(dc)), or**
- **would be more effectively or appropriately dealt with by a recognised EDR scheme (s 41(1)(dd)).**

The Insurance Council notes Enforcement Guidelines will be issued in October to provide a better understanding of how the OAIC's discretion may be applied.

Clarification of the proposed process would be useful, for example whether a consumer contacts the OAIC with a complaint and is then redirected by OAIC to the appropriate EDR scheme.

1.12 A recognised EDR scheme is not expected to handle complaints outside its scope, or terms of reference (where applicable).

The Insurance Council strongly endorses this principle. It would be inappropriate for example for FOS to be expected to deal with general privacy complaints and privacy complaints about non-insurance business.

2.2 The matters which the Information Commissioner must take into account are based on the benchmarks developed in 1997 by the then Department of Industry, Science and Tourism (DIST) for industry-based customer dispute resolution schemes (DIST benchmarks). These benchmarks are still considered best practice requirements.

The Insurance Council understands the DIST benchmarks are currently under review and any changes made as a result should be carefully considered before being incorporated into the OAIC Guidelines.

3.7 Remedies for privacy-related complaints may include one or more of the following:

- **an apology to the individual being provided with access to information or charges for access being reduced**
- **compensation**
- **correction or amendment of a record**
- **extra services or services at reduced costs**
- **the respondent entity improving systems or procedures, including changed or upgraded security arrangements for personal information**

- ***privacy notices being changed or updated***
- ***staff training for the respondent entity.***

Some of the remedies available to the EDR, such as changing systems or privacy notices, could have significant cost impacts on an EDR member. As EDR decisions are binding on respondents, it is important the OAIC ensures mechanisms are in place to facilitate EDR schemes making legally sound decisions and orders.

A concern has been raised that by having complaints redirected to an EDR scheme, respondents lose the opportunity to make submissions in Court, which is unlike the situation where an OAIC considers a complaint. Our understanding is that if complaints go directly to the OAIC, the OAIC may make a determination under s52 but the Federal Court enforces it under s55A (which has not been repealed by the amendment Act). Clarification of this matter would be welcome.

Any decision to require improvements to systems or procedures must be made in consultation with the entity as core system changes may take months to change and other processes may need to be followed until changes could be implemented.

Similarly, general insurers have privacy notices in PDSs, online quote engines and other documentation. If an EDR scheme orders changes to privacy notices, it could be problematic and costly for an EDR member to comply, including where it may impact on the non-insurance business of an EDR member. It is important that sufficient time is provided to ensure required changes can be made.

The overall impact on the cost structure of an industry of a change mandated for one entity needs to be kept in mind. Once an EDR scheme makes an order, there is potential for the cost impacts to flow through the industry, with a potential knock-on effect in terms of others changing processes to avoid similar complaints and orders.

4.17 Serious or repeated interferences with privacy and systemic privacy issues should be reported to the Information Commissioner when an EDR scheme becomes aware of them.

4.18 If EDR scheme members do not appropriately rectify serious or repeated interferences with privacy or systemic issues within a reasonable period of time, the Information Commissioner may investigate the act or practice of an entity on the Commissioner's own initiative under Part V of the Privacy Act. The Commissioner may also chose to investigate the act or practices of an entity under certain circumstances, such as when it is in the public interest to do so.

The OAIC Guidelines should usefully explain the circumstances and processes which would trigger these two clauses.

1.18 refers to 'the code' - clarification would be appreciated as to what Code is being referred to.