**From:** Tamsin Lawrence <Tamsin.Lawrence@ablawyers.com.au>
**Sent:** Thursday, April 11, 2024 9:31 AM
**To:** Chambers - Asbury VP <Chambers.Asbury.VP@fwc.gov.au>
**Subject:** AM2024/6 - Variation of modern awards to include a delegates' right term

Dear Associate

I refer to the above proceeding which is listed for consultation.

**Attached** is the decision of '*QF' & Others and Spotless Group Limit*ed *(Privacy)* [2019] AICmr 20, which Australian Business Industrial and Business NSW may wish to take the full bench to during the course of the consultation this afternoon:

I would be grateful if the decision can be made available to the Full Bench.

Yours faithfully
Tamsin

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# ‘QF’ & Others and Spotless Group Limited (Privacy) [2019] AICmr 20 (28 May 2019)

**Decision and reasons for decision of**
**Australian Information Commissioner and Privacy Commissioner, Angelene Falk**

| | |
|---|---|
| Complainants | ‘QF’ & Others |
| Respondent | Spotless Group Limited |
| Decision date | 28 May 2019 |
| Application numbers | CP15/01290, CP16/00369, CP16/01327, CP16/01572, CP16/01298, CP16/01301, CP16/00260, CP16/01325, CP16/00413, CP16/01428, CP16/01346, CP16/01326, CP16/00411, CP15/02089 |
| Catchwords | Privacy — *Privacy Act 1988* (Cth)— National Privacy Principles —NPP 1.3 — Notice of collection of personal information – NPP 2 — Disclosure of personal information — NPP 3 – Accuracy of personal information – NPP 4 — Security of personal information — Breach substantiated — Compensation awarded – Economic loss — Non-economic loss – Aggravated damages |

## Determination

1. I find that the respondent Spotless Group Limited (**Spotless**) has interfered with the complainants’ privacy in breach of the *Privacy Act 1988* (Cth) (**Privacy Act**) by:

    i. improperly disclosing, through its related entity Cleanevent, the complainants’ personal information to the Australian Workers’ Union (AWU), contrary to National Privacy Principle (**NPP**) 2; and

    ii. failing to take reasonable steps to protect the complainants’ personal information from misuse and unauthorised disclosure, contrary to NPP 4.

2. I declare that Spotless must, within 60 days of the date of this determination:

    i. engage an independent reviewer with privacy expertise to undertake a review of Spotless’ current privacy compliance procedures, policies and processes, and those of Spotless’s subsidiaries, and provide me with a copy of the reports from the independent review (**independent reviewer’s reports**)

ii. issue a written apology to each complainant acknowledging its interference with their privacy and the distress it has caused, and

iii. pay each of the complainants compensation, in the amounts set out in the table at paragraph 146, for non-economic loss, including a component for aggravated damages.

3. I declare that Spotless must, within six months of receiving the independent reviewer's reports, undertake a further independent assessment of its own practices and those of its subsidiaries, to determine the effectiveness of any recommendations implemented as a result of the independent reviewer's reports, and provide me with a copy of those assessment findings within two weeks of receiving them.

# Background

4. At the time of the alleged breaches, the complainants were employees of Cleanevent Australia Pty Ltd (**Cleanevent**), a subsidiary of Spotless, which provided cleaning, waste management and associated services around Australia and internationally.

5. The complainants have made complaints under s 36 of the Privacy Act against Spotless concerning the actions of Cleanevent in providing lists of Cleanevent employees' names to the AWU with the approval of Spotless, but without the authority and knowledge of the complainants.

6. Spotless, as the parent company of Cleanevent, has responded to those complaints. I am satisfied that Spotless is the proper respondent.

7. The complainants allege that, without their consent and with the approval of Spotless:

   i. on 30 May 2011 Cleanevent disclosed the names of complainants C, D, H, I, and N as part of a list of 100 names of casual employees provided to the AWU (**2011 disclosure**)

   ii. on 20 April 2012 Cleanevent disclosed the names of complainants A, B, E, F, G, H, J, K, L, M and N as part of a list of 100 names of casual employees provided to the AWU (**2012 disclosure**).

8. Spotless has acknowledged that the alleged disclosures occurred.

# Privacy complaints and remedies sought

9. In 2015, Complainant A made a complaint to the Office of the Australian Information Commissioner (**OAIC**) under s 36 of the Privacy Act, about the disclosure of their personal information on 20 April 2012.[1]

10. The complainants had become aware of the alleged unauthorised disclosures by Cleanevent in May 2015 through the proceedings of the Royal Commission into

[1] Complainant A's email to the OAIC of 12 August 2015.

Trade Union Governance and Corruption (**Royal Commission**). The Royal Commission examined, amongst other things, the actions of the AWU and Cleanevent, in relation to an arrangement made between the two entities whereby Cleanevent secured, in exchange for payments of $25,000 per year, the AWU's agreement, for a three-year period, not to seek better terms and conditions for those of its members employed by Cleanevent (**the arrangement**).[2] The 2011 and 2012 disclosures were made as part of the arrangement.

11. In the course of the OAIC's investigation, nineteen further complaints were made to the OAIC about the 2011 and 2012 disclosures.

12. On 26 October 2015, the OAIC opened an investigation into three of the 20 complaints under s 40(1) of the Privacy Act. The OAIC opened investigations into the remaining 17 complaints in the period from 26 October 2015 to 13 September 2016.[3]

13. In the course of the OAIC's investigations, six of the complaints were resolved. The 14 remaining complaints were not resolved through conciliation and, on 23 December 2016, the Commissioner decided to determine these complaints under s 52 of the Privacy Act.[4]

14. Complainant A acts for each of the complainants who are the subject of this determination, although some of the complainants have made separate submissions in relation to the remedies they are seeking.

15. Following the decision to determine these complaints, there was some correspondence between the OAIC and Complainant A about whether the complaints should proceed as a representative complaint. However, a representative complaint satisfying the requirements of s 38 of the Privacy Act was ultimately not lodged, and I have determined each of the complaints as individual complaints.

16. Having regard to each of the 14 complaints on hand, I consider that the relevant acts and practices are the alleged:

    i. failure to provide the complainants with notice that their personal information may be disclosed to the AWU (**Issue 1**)

    ii. inappropriate disclosure of the names of the complainants to the AWU, without their consent (**Issue 2**)

    iii. disclosure of inaccurate personal information (addresses) about the complainants to the AWU (**Issue 3**), and

    iv. failure to take reasonable steps to protect the personal information of the complainants from misuse and unauthorised disclosure (**Issue 4**).

[2] Final Report, Volume 4, Chapter 10.2, https://www.royalcommission.gov.au/royal-commission-trade-union-governance-and-corruption.
[3] OAIC to Respondent, 13 September 2016.
[4] OAIC s 52 letter to Respondent, 23 December 2016.

17. The complainants seek a declaration that Spotless interfered with their privacy and an apology from Spotless.[5] They also seek compensation for alleged loss.[6]

18. The complainants also allege irregularities in Cleanevent's Enterprise Bargaining Agreement (**EBA**) voting procedures, as well as failures to detect faulty payroll procedures, a lack of information from the AWU generally, failures of Cleanevent concerning the payment of site allowances, public holiday payments and correct base rates for employment, breaches of the *Fair Work Act 2009,* and unfairness and bullying. These matters are not concerned with allegations about interferences with individuals' privacy,and are outside the jurisdiction of the Privacy Act. They have not been investigated by the OAIC and have not been considered for the purpose of this determination.[7]

# The law

19. Subsection 52(1) 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 must not repeat or continue such conduct (s 52(1)(b)(i)(B));

        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));

        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)).

20. At the time of the alleged 2011 and 2012 disclosures, the NPPs applied to the handling of personal information by private sector organisations.[8]

21. Spotless is an Australian public company. It is a body corporate and therefore an 'organisation' within the meaning of s 6C of the Privacy Act.

22. Section 13A of the Privacy Act as in force at the relevant time provided that an act or practice of an organisation was an interference with the privacy of an individual if it breached an NPP, and the organisation was not bound by an approved privacy code in relation to the personal information.

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[5] Complainant A's email to the OAIC of 19 October 2015, OAIC letter to the Respondent of 4 April 2016.
[6] Complainant A's email to the OAIC of 17 December 2015.
[7] Submissions from Complainants A, B, C – see footnotes 11-14.
[8] The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Privacy Amendment Act), which substantively took effect on 12 March 2014, replaced the NPPs with the Australian Privacy Principles.

23. 'Personal information' was defined in s 6 of the Privacy Act as:

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

24. There is no dispute between the parties that the 2011 and 2012 disclosures were disclosures of information that constituted personal information.

## Complainants' submissions

25. In his original complaint to the OAIC claiming an interference with privacy, Complainant A advises that he had become aware of the disclosures through the Royal Commission.

### Royal Commission into Trade Union Governance and Corruption

26. The Royal Commission was established on 13 March 2014. Its final report, which was handed to the Governor-General on 28 December 2015 and tabled in Parliament (**Final Report**)[9], examined the arrangement made between the AWU and Cleanevent in volume 4, chapter 10.2.[10]

27. Both Spotless and the complainants have referred to the Final Report in their submissions to the OAIC.

28. In its Final Report the Royal Commission accepted:

v. Cleanevent entered into the arrangement with the Victorian Branch of the AWU. The effect of the arrangement was to extend the then existing 2006 Enterprise Bargaining Agreement (EBA), covering Cleanevent employees Australia wide and made under the *Workplace Relations Act 1996*, beyond its nominal expiry date of 1 December 2009.

vi. The arrangement was established by a memorandum of understanding (MOU) and a Side Letter resulting in an increase of wages from those covered by the previous EBA but lower than any increase that might have been awarded under the *Cleaning Service Award 2010* (also referred to as the Modern Award). The MOU also prevented the AWU, Cleanevent or its employees seeking to terminate the MOU.

29. The Side Letter is set out at paragraph 145 of the Final Report, and I set it out below for ease of reference:

> Dear [name],
>
> I am writing to you regarding the implementation of new pay scales and the continuation of the terms and conditions as prescribed in the "Cleanevent Australia Pty Ltd AWU

[9] http://webarchive.nla.gov.au/gov/20180615091310/https://www.tradeunionroyalcommission.gov.au/About/Pages/default.aspx - accessed 9 April 2019.

[10] http://webarchive.nla.gov.au/gov/20180615091405/https://www.tradeunionroyalcommission.gov.au/reports/Pages/Volume-4.aspx# - accessed 9 April 2019.

Agreement 2006" (Cleanevent EBA) and the agreements by Cleanevent to pay membership fees on behalf of some employees who wish to join the AWU.

While the MOU is in operation, Cleanevent will pay, on behalf of employees of Cleanevent who are or become members of the AWU, the employees' union fees up to $25,000 for each financial year up to 30 June 2013. Payments will be made by Cleanevent biannually (December and June) to the AWU on receipt of a list of Cleanevent employees and the associated membership fees that Cleanevent are being requested to pay.

During the period of operation of the MOU it is understood that the AWU will not commence or take any step which may result in the commencement of enterprise bargaining under the Fair Work Act 2009; or seek to terminate (or support or encourage the termination of) the Cleanevent EBA or the aforementioned MOU.

30. The Royal Commission, in its Final Report at paragraphs [134]-[306], accepted the following events took place:

| Date | Event |
|---|---|
| May-September 2010 | Negotiations for the arrangement were underway |
| October 2010 | MOU and Side Letter finalised and executed by Cleanevent |
| 8, 13 December 2010 | AWU seeks first payment from Cleanevent |
| 17 December 2010 | $12,500 paid via EFT by Cleanevent to AWU |
| 30 May 2011 | 'Random' list of 100 names of casual employees [in alphabetical order culminating in letter 'G'] provided by Cleanevent to AWU |
| | Names entered onto AWU membership roll, and membership of $125 allocated to each name |
| April 2012 | AWU sends invoice for membership fees in the amount of $27,000 to Cleanevent, and seeks up-to-date list of employees for 2011/12 financial year |
| 20 April 2012 | Cleanevent emails AWU an updated list of names of employees. The updated list includes some of the same names as provided on the May 2011 list |
| June 2012 | Spotless approves invoice payment |
| 29 June 2012 | Invoice is paid |
| March 2014 | Third payment in the amount of $27,000 made by Cleanevent to AWU. No list of names provided for this third payment. |

31. The Royal Commission concluded that:

[146] On one view, the arrangement contemplated that the amount to be paid might be dependent on the number of workers who wished to become members

of the AWU, however, the agreement was treated by both parties as an agreement to pay $25,000 per annum.

…in substance, what occurred was that Cleanevent, at the time of payment, provided a list of employees to the AWU Vic without regard to whether they were already members of the AWU and without regard to whether they wished to become members… The AWU Vic then entered their names on the membership roll.[11]

[314] The employees whose names were on the list had no idea membership was being paid on their behalf and cannot be taken to have authorised it.

[315] The payment of union fees by an employer of random lists of employees without their knowledge creates the difficulty that the member is therefore not in a position to take advantage of the benefits of membership.

[316] A person can only become a member if the amount of that contribution is paid. The amounts allocated to each member for a full year's membership were far below the amounts prescribed by the AWU Rules.

[317] In the case of the 100 persons referred to in the 30 May 2011 email, those persons would not have become members at all if the payment was applied as their first membership contribution. In the cases of those persons who were already members…if the existing member was up-to-date with membership contributions…he or she would be entitled to a refund or credit against future membership contributions to the extent of the overpayment.

[318-319] There was no evidence that steps had been taken to obtain signed membership applications as required by the AWU Rules, and a number of employees had their addresses listed as Cleanevent rather than their personal address.

[323] The arrangement with Cleanevent resulted in a significant number of persons becoming recorded as members of the AWU when this did not make them members under the AWU Rules, and in circumstances in which some of the employees on the list were already paying members of the AWU, and others did not know that they had become members.

32. In submissions made on behalf the 14 complainants, Complainant A relies on the execution of the MOU in 2010, the Side Letter and his evidence and the evidence of three other employees to the Royal Commission that they were unaware of their names being provided to the AWU and that the MOU and Side Letter were kept secret from employees.[12]

33. Complainant A submits that he did not consent to the disclosure and that none of the complainants were contacted to fill out AWU membership forms nor did they

[11] The Royal Commission's final report into Trade Union Governance and Corruption, volume 4, part 10, chapter 10.2 pages 56, 114 – 116.

[12] Complainant A's emails to the OAIC of 12 August 2015, 23 November 2015, 18 December 2015, 3 March 2016 (2.11 PM), 3 March 2016 (3.26 PM), 10 March 2016, 31 March 2017 (3.05 PM - Part 1), 31 March 2017 (1.17 PM Part 2), 7 April 2017, 13 April 2017 (1.30 PM), 13 April 2017 (4.18 PM), 13 April 2017 (4.53 PM), 26 June 2017.

receive any membership benefits. Complainant A's submissions were supported by submissions from Complainant B which also referenced the Final Report of the Royal Commission.[13] Complainant C submitted that they became aware that their name had been provided to the AWU in April 2012, without permission and knowledge when they were subpoenaed to the Royal Commission.[14] Complainant D gave evidence that they appeared at the Royal Commission to give evidence that they had been put on the list without their knowledge.[15]

34. Complainants A and B, in their submissions, reference three documents sourced from the public records of the Royal Commission in support of their allegations:

    (a) An email dated 30 May 2011 at 2:02pm from Cleanevent to the AWU providing a list of 100 names under the subject title 'Names of casuals'. The names of complainants C, D, H, I and N appear on this list. [16]

    (b) An email dated 20 April 2012 at 3:05pm from Cleanevent to the AWU providing a list of 100 names under the subject title 'Names of casuals'. The names of complainants A, B, E, F, G, H, J, K, L, M and N appear on this list.

    (c) A document titled 'Reconciliation of names on the list provided to the AWU on 20 April 2012 with the membership register, AWU application forms and Cleanevent payroll deduction information'. This list also contains 100 names, including those of complainants A, B, E, F, G, H, J, K, L, M and N. [17]

35. Additional evidence, sourced from Complainant B's submissions[18], which I have considered for the purposes of this determination include:

    - a copy of the MOU of 12 November 2010
    - an email of 18 April 2012 from the AWU to Cleanevent requesting 'an up to date list of employees for the financial year', and
    - an Excel sheet of Minimum Wage Orders.

36. Based on the information before me I accept that complainants C, D, F, G, H, I, K and L were already members of the AWU at the time of the 2011 and 2012 disclosures and had previously paid AWU membership fees under the AWU Rules via payroll deductions.

37. I further note that complainants A, B, E, J, M and N were not members of the AWU at the time of the 2011 and 2012 disclosures.

[13] Complainant B's emails to the OAIC of 17 December 2015, 26 February 2016, 19 October 2016, 19 February 2017, 23 February 2017, 29 March 2017.
[14] Complainant C's email to the OAIC of 14 March 2016.
[15] Complainant D's email to the OAIC of 2 March 2016.
[16] Email from Complainant A to the OAIC of 10 March 2016 and Attachment from Complainant A, being email dated 30 May 2011 (Names of casuals).
[17] Email from Complainant A to the OAIC of 3 March 2016 and Attachment.
[18] Complainant B's email to the OAIC of 19 February 2017.

## Spotless submissions

38. Spotless does not dispute that the 2011 and 2012 disclosures occurred, nor does it dispute any of the complainants' submissions concerning the facts set out in the Royal Commission's Final Report.

39. It submits that through its involvement with the Royal Commission it became aware of the 2012 disclosure. It contends the following:

    - the personal information disclosed was limited to the complainants' names only
    - the disclosure arose from the actions of two employees both of whom acted without authority and contrary to Spotless' privacy policy and processes; the actions were not reflective of systemic breaches or a culture of disregard for privacy obligations
    - the 2012 disclosure was not consistent with an arrangement that Cleanevent had made in April 2010 with the AWU for the payment of membership fees for casual employees which had been approved by Cleanevent management:
        - to pay membership fees up to $25,000 per year of casual employees who were or would become members of the AWU for each financial year up to 30 June 2013
        - that payments would be made on receipt of a list from the AWU of Cleanevent employees who were or would become members of the AWU
    - Spotless takes seriously its obligations under the Privacy Act, publishes and reviews its privacy policy (covering its related entities) on its website, implements staff training on the handling of personal information and securely stores personal information
    - since becoming aware of the disclosures, Spotless has arranged for privacy compliance training, and a review of its privacy compliance procedures and processes.

## Findings of fact

40. I am satisfied that I can rely on evidence given before the Royal Commission and its findings, for the proper discharge of my statutory powers and functions in determining these complaints under s 52 of the Privacy Act.[19]

41. Accordingly, I find that:

    - on 30 May 2011 Cleanevent disclosed to the AWU a list of 100 names of Cleanevent employees including the names of complainants C, D, H, I and N, without their consent.

[19] *X v Australian Prudential Regulation Authority* [2007] HCA 4.

- on 20 April 2012 Cleanevent disclosed to the AWU a list of 100 names of Cleanevent employees including the names of complainants A, B, E, F, G, H, J, K, L, M and N, without their consent.

42. Further, I am satisfied that the 2011 and 2012 disclosures by Cleanevent to the AWU that are the subject of this determination were made as part of the arrangement examined by the Royal Commission.

43. On the material before me, I am satisfied that:

    - while the Side Letter ostensibly provided for payments to be made by Cleanevent for AWU membership, the payments were not dependent on applications for membership of the AWU

    - following the disclosures, none of the complainants paid, or were asked to reimburse Cleanevent for any portion of the payments made to the AWU as AWU membership fees, nor were payments deducted from the complainants' pay

    - none of the complainants who were not already members of the AWU at the time of the disclosures, received any benefits of AWU membership, nor were they made aware of their purported membership.

44. I do not accept Spotless's submission that the disclosures occurred as a result of the conduct of employees acting without authority. I accept the Royal Commission's findings that the disclosures were made by employees in the course of the performance of their duties of employment [paragraphs 148-190 of the Final Report].

# National Privacy Principles

## Issue 1 – Notice of collection of personal information (NPP 1.3)

45. NPP 1.3 set out the obligations on an organisation to notify individuals about how the organisation would deal with personal information:

> At or before the time (or, if that is not practicable, as soon as practicable after) an organisation collects personal information about an individual from the individual, the organisation must take reasonable steps to ensure the individual is aware of (among other things):
>
> …the purposes for which the information is collected; and
>
> …the organisations (or the types of organisations) to which the organisation *usually* discloses information of that kind [italics my emphasis].

46. The complainants allege that when Cleanevent collected their personal information, it did not provide them with adequate notice with respect to the disclosure of their names to the AWU.

47. Spotless submits that while it (or Cleanevent) did not provide any express notice to the complainants to make them aware of matters listed in NPP1.3:

- the complainants were [at the time], or shortly after their personal information was collected, they became, employees of Spotless. Spotless was therefore exempted from notification obligations under NPP1.3 on the basis of the employee records exemption under s 7B of the Privacy Act; and

- in relation to personal information collected about the complainants during the recruitment process (i.e. prior to the complainants becoming employees of Spotless), details about the handling of that information were set out in Spotless' privacy policy. By virtue of the complainants participating in the recruitment process, and the information provided to them throughout that process, they were made aware of the matters listed in NPP1.3.[20]

## Findings - NPP 1.3

*Section 7B employee records exemption*

48. In considering Spotless' claim that the employee exemption under s 7B(3) of the Act applied to its obligations to notify employees of disclosures, I note the exemption only applies to an act or practice that is directly related to a current or former employment relationship between the employer and the individual, and where an employee record is held relating to the individual.[21] There is no dispute that employee names constituted employee records held by the respondent.

49. To fall within the exemption under s 7B(3), the act or practice must be directly related to the employment relationship, and not merely an act or practice having an indirect, consequential or remote effect on that relationship.[22]

50. The Macquarie Online Dictionary defines 'related' as "associated; connected". 'Directly' is relevantly defined as "in a direct line, way, or manner…absolutely; exactly; precisely".[23] The literal interpretation is therefore a strict one, with the term denoting 'absolutely or exactly having connection' to the employment relationship between the employer and the individual. The notion that the exemption is intended to be limited to acts and practices done completely in relation to the employment relationship is supported by wording used by the then Attorney-General during the second reading speech of the Privacy Amendment (Private Sector) Bill 2000 regarding the exemption:

> "…it is the government's view that such protection is more properly a matter for workplace relations legislation. It should be noted, however, that the exemption is limited to collection, use or disclosure of employee records where this directly relates to the employment relationship".

51. A number of court decisions have considered the types of matters that may pertain directly to an employee-employer relationship. In *Electrolux Home Products v The*

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[20] Spotless's submission to the OAIC dated 12 November 2015.
[21] Section 7B of the Privacy Act.
[22] Note the High Court decision in *Electrolux Home Products Pty Ltd v The Australian Workers' Union* [2004] HCA 40, where the Court majority held that union fees did not constitute part of the employment relationship.
[23] https://www.macquariedictionary.com.au/features/word/search/?word=related&search_word_type=Dictionary; https://www.macquariedictionary.com.au/features/word/search/?word=directly&search_word_type=Dictionary.

*Australian Workers' Union*, a case concerning a proposed agreement whereby a bargaining agent's fee was to be paid by all employees including non-union members, the High Court by majority, held that the proposed agreement was not a matter pertaining to the relationship between employer and employee for the purposes of the *Workplace Relations Act 1996* (Cth).[24] In the current matter before me, the Royal Commission concluded that the disclosure of random lists of Cleanevent employees' names to the AWU was not part of the arrangement made between Cleanevent and the AWU,[25] which was rather, in effect, an agreement to pay $25,000 per annum. Even if the arrangement itself pertained directly to the employer and employee relationship (and I make no findings about this), the act of remitting a list of random names to the AWU had an insufficient connection with the arrangement to fall with the s 7B(3) statutory requirement of 'directly related' to the employment relationship.

52. Accordingly, I find that the s7B employee records exemption does not apply to the acts or practices of Spotless falling within the circumstances of this matter.

*NPP 1.3 notice*

53. The obligation under NPP 1.3 required an organisation, relevantly here, to notify individuals about the purposes of collection and about the usual disclosures related to the stated purposes of collection. The Guidelines to the National Privacy Principles issued in 2001 by the Office of the Federal Privacy Commissioner (**the guidelines**) also stated that if there was some change in the circumstances relevant to NPP 1.3, then the organisation would need to take reasonable steps to make an individual aware of it. Notwithstanding this, under NPP 1.3, an organisation did not need to mention disclosures at the time of collection that were not 'usual'.[26]

54. The term 'usual' or 'usually' is not defined in the Privacy Act and so must be interpreted according to its ordinary meaning, having regard to the context in which it appears in the Privacy Act. The ordinary meanings of 'usually' are "generally", or "under normal conditions".[27]

55. It is not disputed that Spotless did not make its employees aware, at the time of collection of their personal information, or as was reasonably practicable thereafter, that it would disclose their personal information to organisations such as the AWU or other unions.

56. Spotless' privacy policy relevantly dated April 2011 detailed the types of information it may collect and hold about customers, clients and employees. It relevantly stated that Spotless:

> 'may collect personal information such as name, address, telephone number or email address. For prospective employees, we may also seek information such as your resume and employment history'.

57. The policy relevantly stated that Spotless 'typically uses' personal information:

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[24] [2004] HCA 40.
[25] See the Royal Commission findings, referred to relevantly at paragraph [31] of this determination.
[26] Office of the Federal Privacy Commissioner. (September 2001). Guidelines to the National Privacy Principles, p. 28.
[27] https://en.oxforddictionaries.com/definition/usually.

'to comply with our obligations of employment and keep you updated on company information'. It goes onto say that 'we may disclose your information to a third party in the event it is legal to do so and/or we are compelled to do so by law'

58. No further description of sets of persons or organisations to whom individuals' personal information may be disclosed were detailed in Spotless' policy. Spotless' privacy policy did not change substantially until 2014 when the Privacy Act was amended and the NPPs were replaced with the Australian Privacy Principles (**APPs**).

59. It is clear that the form and content of information given by Spotless in its privacy policy during the relevant period about its purpose of collection of employee information was insufficient to ensure that employees were aware of the kind of use and disclosure of employee information that was subsequently undertaken by Spotless in relation to the arrangement between Cleanevent and the AWU. I am also not aware of any other kind of notice provided to employees that would have ensured they were aware of what Spotless was going to do with the information in relation to that arrangement. I accept the complainants' submissions that employees were not made aware of the MOU or the Side Letter.

60. Though the aim of the NPPs was to ensure that organisations generally only used or disclosed personal information in ways that individuals would reasonably expect[28], NPP 1.3(d) did not require organisations to notify individuals at the time of collection, or as soon as practicably after, of disclosures that were not ordinary or usual. I have insufficient information available to me to make a finding that the exchange of employee personal information between Spotless and its subsidiaries and the AWU, or unions in general, was usual practice.

61. This does not mean to say that because a disclosure is not ordinary or usual that under the NPPs an organisation was permitted to make that disclosure freely. NPP 2 set out the general rule that disclosure for a secondary purpose was prohibited subject to a number of exceptions, including whether the disclosure fell within a related or directly related purpose within the individual's reasonable expectations. Though the NPPs no longer apply, under the APPs organisations need to ensure that individuals are informed about the organisation's primary purposes of collection and of its proposed uses and disclosures, including for any secondary purposes of collection.

62. In the matter before me however, there is no evidence to indicate that information exchanged between Spotless and the AWU or unions in general was usual or ordinary practice. Accordingly, I cannot find that Spotless breached NPP 1.3 and interfered with the complainants' privacy in this regard.

## Issue 2 – Use and disclosure of personal information (NPP 2.1)

63. The complainants claim that the disclosure of their personal information in the two lists of names provided to the AWU were not permitted under NPP 2.1.

64. NPP 2.1 provided that an organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection unless:

[28] NPP guidelines, p. 36.

(a) both of the following apply:

i. the secondary purpose is related to the primary purpose of collection and, if the personal information is sensitive information, directly related to the primary purpose of collection;

ii. the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose; or

(b) the individual has consented to the use or disclosure; …

65. Spotless concedes that the disclosure of the complainants' personal information was not authorised under NPP 2.1. However, it submits that the personal information disclosed was limited to the complainants' first and last names only.

66. Complainant A refutes, on behalf of the complainants, that the disclosure of personal information was limited to the complainants' names only. He claims that Cleanevent also disclosed their address details (which he also contends were incorrect).

## Findings – NPP 2.1

67. I accept that Spotless or Cleanevent collected the complainants' personal information including their names and contact details during its recruitment process, for the primary purpose of its recruitment and the ongoing employment of the complainants. It is not disputed that Cleanevent, with Spotless' approval, disclosed the complainants' personal information to the AWU for a secondary purpose.

68. For the 2011 and 2012 disclosures to be permitted under the Privacy Act, the complainants must have either consented to the disclosures or must have reasonably expected the disclosures (which must be related to the primary purpose of collection).

69. First, I consider that 2011 and 2012 disclosures of the complainants' personal information were not for a secondary purpose that was related to the primary purpose of recruitment and ongoing employment. In any event, I am not persuaded that the complainants would reasonably expect disclosure of their names to the AWU. There is nothing in Spotless' (or Cleanevent's) privacy policy which raises an expectation that the complainants' personal information will be disclosed to the AWU.

70. Secondly, on the material before me, including the Royal Commission's Final Report and the complainants' submissions provided to the OAIC, I accept that the complainants' personal information was disclosed to the AWU without their consent.

71. Spotless has acknowledged that the disclosures were not permitted under NPP 2.1.

72. For these reasons, I am satisfied that Spotless, through Cleanevent, improperly disclosed the complainants' personal information to the AWU in respect of both the 2011 and 2012 disclosures in breach of NPP 2.1.

73. In relation to other personal information - that being address details, which the complainants contend was also improperly disclosed - having reviewed the two lists emailed by Cleanevent to the AWU on 30 April 2011 and 20 May 2012, I find no

evidence of disclosure of any personal information on those lists other than the first and last names of the complainants.

74. On the document titled 'Reconciliation of names on the list provided to the AWU on 20 April 2012 with the membership register, AWU application forms and Cleanevent payroll deduction information'[29], the AWU included the words 'company address' or 'personal address' against the names of each complainant. There are no addresses detailed on the reconciliation sheet.

75. As stated at paragraph [73] above, I have reviewed the two lists relevant to this complaint. The emails detail a list of names on each. There are no addresses detailed on either list. There is no other information before me to indicate that the complainants' address information was provided to the AWU during the 2011 and 2012 disclosures.

76. I therefore find that the only information improperly disclosed by Spotless to the AWU comprised the names of the complainants.

## Issue 3 – Data quality (NPP 3)

77. NPP 3 required organisations to take reasonable steps to make sure the personal information it collected, used and disclosed was accurate, complete and up-to-date.

78. Reasonable steps vary depending on the circumstances. Some factors to consider include how recently the personal information was collected, where or from whom the information was collected, and how reliable it is.[30]

79. The aim of NPP 3 is to prevent the adverse consequences for people that might result from an organisation collecting, using, or disclosing inaccurate, incomplete or out-of-date personal information.[31]

80. Complainant A submits on behalf of the complainants that the personal information disclosed by Spotless through Cleanevent to the AWU was inaccurate as it included incorrect contact addresses. As I understand it the complainants contend that the words 'personal address' should have been recorded against complainant names instead of 'company address'. They argue that this signals Spotless or its subsidiary disclosed inaccurate address information to the AWU.

81. Spotless contends that the personal information it disclosed to the AWU was limited to the first and last names of the complainants only, and that no personal addresses or other details about the complainants were provided by Cleanevent to the AWU.

## Findings – NPP 3

82. I have reviewed the two lists of names of employees provided by Cleanevent to the AWU. These were referred to in each of Complainant A and Complainant B's submissions and referenced in the Final Report of the Royal Commission.

[29] Complainant A's email to the OAIC of 3 March 2016
[30] The NPP Guidelines, NPP 3 – Data quality
[31] The NPP Guidelines, NPP 3 – Data quality

83. The first list of names in the email of 30 May 2011, is a list of 100 employees set out from A - G alphabetically.[32] Five of the complainants' names were included in this list. This email does not contain the complainants' addresses. Although the email correspondence from the AWU indicates that their addresses were expected to follow, there is no evidence that those details were ever provided to the AWU.

84. The second list of names in the email of 20 April 2012 included 11 of the complainants' names.[33] This email does not contain the complainants' addresses.

85. I have also considered the document titled: 'Reconciliation of names on the list provided to the AWU on 20 April 2012 with the membership register, AWU application forms and Cleanevent payroll deduction information'. Eleven of the complainants' names are included on this document. While it also records the words 'personal address' or 'company address' against each of the complainants' names, those words do not constitute personal information. There is no information before me to indicate that Spotless or its subsidiary disclosed inaccurate information about the complainants to the AWU in breach of NPP 3.

86. I accordingly dismiss this part of their complaint.

## Issue 4 – security of personal information (NPP 4.1)

87. The complainants claim Spotless failed to take reasonable steps to protect their personal information from unauthorised disclosure, and that this resulted from a lack of adequate privacy governance practices and a disregard for the law.

88. NPP 4.1 required an organisation to take reasonable steps to protect the personal information it held from misuse and loss, and from unauthorised access, modification or disclosure. Reasonable steps to secure personal information depended on the organisation's particular circumstances.[34]

89. Spotless submits that it is committed to, and has a long history of compliance with, its obligations under the Privacy Act, and further, that the disclosures do not reflect systemic privacy breaches within the organisation or a culture of disregard for its privacy obligations. [35]

90. Spotless claims the disclosures were the actions of two particular employees who acted without authority and contrary to its privacy policy and processes.

91. In its submissions to the OAIC, Spotless outlines the steps it had in place to ensure NPP 4 compliance by Spotless and its related entities:

    - regularly reviewing and updating its privacy policy, which was freely available on its website
    - implementing staff training on the handling of personal information during each employee's induction

[32] Email from Complainant A to the OAIC of 10 March 2016 and Attachment, being email dated 30 May 2011 (Names of casuals).
[33] Email from complainant A to OAIC of 3 March 2016 and Attachment.
[34] The NPP Guidelines, NPP 4 – Data security.
[35] Emails from Respondent to OAIC 12 November 2015 and 10 February 2017

- securely storing personal information, in both electronic and hardcopy form, and
- limiting access to personal information to staff who required access in the performance of their duties.[36]

92. Spotless has acknowledged that such measures did not prevent the 2011 and 2012 disclosures from occurring. It contends that as a result, since becoming aware of the disclosures, Spotless has taken steps to improve its privacy practices, including by:

- engaging external legal services to provide further privacy compliance training to its employees, and
- arranging an internal review of privacy compliance procedures and processes.

## Findings – NPP 4.1

93. I have already accepted at paragraph [43] of this determination the Royal Commission's findings that the disclosures were made by employees in the course of the performance of their duties of employment. I do not accept Spotless' contention that the disclosures were the actions of employees acting outside the scope of their authority.

94. Spotless is a large organisation operating nationally. Those with ultimate responsibility for its affairs, including its obligations of compliance with privacy law, must discharge that responsibility properly.

95. I accept that Spotless may have had in place some access controls and other procedures and policies to secure information safely. I accept that Spotless had provided privacy awareness training as part of its induction program for new employees, and that it undertook reviews and updates of its privacy policy and procedures. Notwithstanding this, the arrangement was constituted by three unauthorised disclosures over time (although on the evidence only two occurred). The arrangement was reviewed by employees of both Cleanevent and Spotless and there is evidence that Spotless approved payment under the arrangement. There is no evidence that Spotless or Cleanevent gave any consideration to whether affected individuals would be consulted before their personal information was disclosed.

96. The disclosures were deliberate and arose out of the conduct of senior management. In my view, this is evidence of a disregard for its privacy obligations, and a lack of appropriate privacy controls. It indicates that access controls and procedures and policies to secure information need to be reviewed and strengthened to prevent further breaches.

97. Accordingly, I find that Spotless failed to take reasonable steps to protect the personal information it held from misuse, and from unauthorised disclosure, in breach of NPP 4.1.

[36] Spotless's submission to the OAIC dated 12 November 2015.

# Findings – remedies

98. I have found that Spotless interfered with the complainants' privacy by improperly disclosing their personal information and failing to protect their information from misuse and unauthorised disclosure.

99. Section 52(1)(b)(ia) provides that I can declare that the respondent must take specified steps, within a specified period, to ensure that such conduct is not repeated or continued.

100. Spotless advised the OAIC on 12 November 2015 that it was in the process of arranging an internal review of its privacy compliance procedures and processes, to ensure the conduct was not repeated. I am not aware of what recommendations resulted from that review, nor whether any of those recommendations were implemented. Accordingly I consider it now appropriate that within 60 days of the date of this determination Spotless engage an independent reviewer with privacy expertise to undertake a review of Spotless' current privacy compliance procedures, policies and processes, and those of its subsidiaries, and provide me with a copy of the reports from the independent review, including any recommendations detailed for improving Spotless' and its subsidiaries' compliance with their obligations under the Privacy Act. I also consider it appropriate that Spotless, within six months of receiving the independent reviewer's reports, undertake further independent assessments to determine the effectiveness of any recommendations implemented as a result of those independent reviews, and provide me with a copy of those assessment findings.

# Damages

101. Having found that Spotless breached NPP 2.1 and NPP 4.1, 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) provides that loss or damage can include 'injury to the complainant's feelings' or 'humiliation suffered by the complainant'.

102. I am guided by the following principles on awarding compensation summarised by the Administrative Appeals Tribunal (**Tribunal**) in *Rummery and Federal Privacy Commissioner* (***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

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.[37]

## Economic loss

103. Complainant A seeks a declaration, on behalf of all complainants, that they are entitled to compensation for economic loss, claiming that that because of the arrangement established by the MOU and Side Letter, the complainants were not paid in accordance with the appropriate award but were underpaid. They seek compensation for this economic loss contending the loss of wages is directly attributable to the privacy breaches, because the disclosure of their names was integral to the arrangement between Spotless, Cleanevent and the AWU. I note Complainant A also alleges faulty payroll procedures resulting in the failure to pay entitlements, allowances and loadings and asserts that 'only permanent employees remember getting any details of the MOU' executed in 2010. These matters are not within the jurisdiction of the Privacy Act, and I am unable to consider them further for the purposes of this determination.

104. The complainants have not sought a specific quantum for economic loss, rather claim that the alleged underpayments may be calculated based on individual pay records, relying on the Royal Commission's Final Report's comparison between the pay rates applicable to Cleanevent employees under the MOU, against the pay rates applicable under the *Cleaning Service Award 2010*.[38]

105. The first question for me is whether there was a causal link between the complainants' claimed lost wages and the unauthorised disclosure of their names to the AWU.

106. The relevant principles applied in establishing whether a causal link has been made out between the privacy breach and the economic loss suffered are summarised in *EQ and Office of the Australian Information Commissioner*:[39]

    i. causation is ultimately a question of common sense and experience, determined on the facts of each case

    ii. in law, causation is a question identifying where legal responsibility should lie, rather than examine the cause of event from a scientific or philosophical viewpoint

    iii. a 'but for' analysis is not a sufficient test for causation, although it may be a guide; and

    iv. where there are multiple elements, each one sufficient on its own to have caused the loss, the causation test may be considered satisfied by each one of them.

107. As outlined at paragraph [9] of this determination, in 2010 Cleanevent entered into an arrangement with the AWU, established by an MOU, to extend the then existing

[37] [2004] AATA 1221 [32].
[38] The Royal Commission's report into Trade Union Governance and Corruption Volume 4, Chapter 10.2 at [328]- [359].
[39] [2016] AATA 785.

2006 EBA beyond its nominal expiry date of 1 December 2009. Under the Side Letter a payment from Cleanevent to the AWU of $25,000 per annum for three years was payable.

108. The 2006 EBA remained in place until it was terminated by the Fair Work Commission on 12 June 2015.[40]

109. I have accepted that the 2011 and 2012 disclosures by Spotless to the AWU were made as part of the arrangement. Nonetheless, the arrangement, which resulted in a lower increase in wages under the MOU for Cleanevent employees than might have been awarded to those employees under the *Cleaning Service Award 2010*, was not reliant on the unauthorised disclosures by Cleanevent.

110. The arrangement did not require the unauthorised disclosures and under the arrangement, names could have been provided in accordance with NPP obligations, such as the giving of notice and obtaining consent. It was also possible at the outset of the arrangement, pursuant to the Side Letter, that employees might be found who wished to join the AWU and provide their names.

111. As concluded by the Royal Commission, the arrangement was an agreement for Cleanevent to pay AWU $25,000 per year. There is no evidence that the extension of the 2006 EBA under the MOU was contingent on the names of the complainants being provided to the AWU, nor that the supply of their names by Cleanevent was a condition precedent to the arrangement.

112. The Royal Commission further concluded that all Cleanevent employees under the then existing 2006 EBA were 'worse off' as a result of the arrangement. The 'wrong' sustained was not limited to the complainants whose names appeared on the lists disclosed to the AWU in May 2011 and April 2012, but rather to all Cleanevent employees.

113. As cited by Deputy President Melick in '*EQ' and the Office of the Australian Information Commissioner*, damages for economic loss are awarded to restore an individual to 'the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation'.[41]

114. The 'wrong' that resulted in the reduced earnings for Cleanevent employees under the 2006 EBA was as a result of the arrangement and not as a result of the interferences with the privacy of the complainants. The arrangement adversely affected all employees, not just those employees whose names were randomly chosen for the lists provided to the AWU during 2011 and 2012. The Royal Commission concluded that the improper 2011 and 2012 disclosures of random lists of employee names was not an operative part of the arrangement between Cleanevent and the AWU.

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[40] The Royal Commission's report into Trade Union Governance and Corruption Volume 4, Chapter 10.2 at [389].

[41] [2016] AATA 785, citing with approval *Livingstone v Rawyards Coal Company* (1880) 5 App Case 35; HL 1880, as cited in H. Luntz, Assessment of Damages for Personal Injury and Death (4th ed.), 2002, LexisNexis Butterworths at p 4.

115. I am accordingly not satisfied that a causal link can be made out between the disclosure of the complainants' names, and any economic loss they may have incurred as a result of the MOU arrangement.

116. In these circumstances, I find there is no basis under the Privacy Act for awarding compensation for economic loss for differences in wages that might have been earned by the complainants had the arrangement not been undertaken.

## Non-economic loss

117. Complainant A, on behalf of all the complainants, has also made a claim for non-economic loss. He submits that their underpayment under the MOU and the unauthorised disclosures of their personal information caused feelings of 'anger and betrayal', which he alleges resulted in 'psychological damage'.

118. Thirteen (13) of the complainants, including Complainant A, made additional submissions about their alleged loss or damage caused by the unauthorised disclosures. The remaining complainant relied on the submissions of Complainant A, the complainants' representative.

119. The statements from the complainants indicate being 'disheartened', 'angry', 'betrayed' and experiencing feelings of 'stress and/or anxiety' at the actions of their employer. They did not provide any additional evidence in relation to these matters.

120. Though any underpayment of the complainants' earnings under the MOU arrangement lies outside of the jurisdiction of the Privacy Act, I am satisfied that the complainants' stated feelings of hurt and/or humiliation on discovery of the arrangement were heightened when they became aware their names had been misused and improperly disclosed to the AWU. Accordingly, I am satisfied that some award of damages is appropriate.

121. Notably some statements also contain assertions about victimisation, intimidation, abuse and harassment by Spotless or Cleanevent management, or by other employees, for making a complaint to the OAIC, with some complainants also alleging they have been denied work by Spotless or Cleanevent. These matters do not relate to loss or damage 'by reason of the interference with their privacy' and accordingly I am unable to award any compensation in respect of them.

122. The Tribunal has noted that: 'it is well settled that the damages for non-economic loss are paid as compensation for pain and suffering, loss of amenity in a life and a loss of enjoyment of life and that an award of non-economic loss is an evaluative judgement and is a matter of "opinion, impression, speculation and estimation"'.[42]

123. I consider that, while the disclosures were deliberate, disclosure was limited to the AWU and the complainants' names were not further published. The personal information improperly disclosed comprised their names only and did not include any additional personal information about the complainants. In the case of those complainants who were union members at the time of the disclosures, their names were already known to the AWU.

[42] *EQ and Office of the Australian Information Commissioner* at [53].

124. Accordingly, I consider it would be appropriate to distinguish between individual complainants on the basis of those who were already AWU members at the time of the 2011 and 2012 disclosures, and those who were not. There is, in my view, an important difference between those complainants who voluntarily joined the AWU, and those who were unknowingly recorded as members of the AWU (although by all accounts, that membership was nominal).

125. Complainant A, on behalf of all the complainants who were non-members of the AWU, submits that the disclosure of their names to the AWU, 'took away our rights to choose not to join a union'.[43]

126. The importance of the notion of freedom of association was re-affirmed by the *High Court in Unions NSW v NSW*.[44]

127. In *Wotton and Others v Queensland and Another (No. 5),* Mortimer J in consideration of the orders a court may make if satisfied there has been unlawful discrimination held that:

> Compensation awarded for loss or damage "because of" contravening conduct must take into account the particular human rights nullified or impaired. It should also reflect the measure of causal connection between the contravening conduct and the loss or damage suffered.[45]

128. I am of the view that the 2011 and 2012 disclosures offended the notion of freedom of association and the complainants who were not already AWU members, suffered an additional level of hurt and/or humiliation arising from the disclosure(s), by the AWU being provided with their names by their employer and being unknowingly joined as nominal union members of the AWU. This additional level of injury to feelings needs to be reflected in the different award of damages.

129. I do not propose to distinguish between the individual complainants on any other basis, though there are undoubtedly some differences between those complainants in terms of the types of feelings they harboured when they became aware of the unauthorised disclosures. The assessment of damages is not subject to precise mathematical calculation, and on the information available to me, I have no other basis on which I might make further differentiation.

130. I accept the evidence of the complainants in the form of their statements, and I keep in mind that some complainants may have had difficulty articulating their hurt. I have given weight to the principle that compensation should be assessed having regard to the complainants' reactions and not the perceived reaction of the majority of the community or that of a reasonable person in similar circumstances.

131. Having regard to all the circumstances, including for reasons outlined above at paragraph [110] and paying attention to cases of similar vein[46], I have determined

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[43] Complainant A's email to the OAIC of 31 March 2017.
[44] [2013] HCA 58, per statement on the AHRC website at https://www.humanrights.gov.au/freedom-association.
[45] [2016] FCA 1457, [1598]-[1618].
[46] *'LP' and The Westin Sydney* (Privacy)[2017] AICmr 53; *'IQ' and NRMA Insurance Australia Limited* [2016] AICmr 36.

the following awards as appropriate compensation for non-economic loss arising from the privacy breaches.

132. For those complainants already substantive AWU members at the time of the disclosures, I have determined that $1,500 is an appropriate amount to remedy the complainants' injury to feelings and/or humiliation. For those complainants who were not AWU members, but were nominally joined as members at the time of the disclosures, I have determined that $4,500 is an appropriate amount to remedy the complainants' injury to feelings and/or humiliation.

## Aggravated damages

133. The power to award damages under section 52 of the Privacy Act includes the power to award aggravated damages in addition to general damages.

134. The former Commissioner has previously referred to two principles which provide useful guidance in determining whether an award of aggravated damages is warranted:

    a. where the respondent behaved 'high-handedly, maliciously, insultingly or oppressively'
    b. where the manner in which a defendant conducts his or her case exacerbates the hurt and injury suffered by the complainant.[47]

135. Such guidance on the making of a case for aggravated damages is not exhaustive. The High Court in *Triggell v Pheeney* for example, described the character of the conduct necessary as a basis for an award of aggravated damages as being 'improper, unjustifiable or lacking in bona fides'.[48] This has given rise to the proposition that where conduct which is improper, unjustifiable or lacking in bona fides is established, 'an increase to a plaintiff's sense of hurt may be presumed from all the evidence'.[49]

136. In *Rummery*[50] the Tribunal refer to the proposition stated by Lockhart J in *Hall v A & A Sheiban Pty Ltd* that the circumstances in which the respondent's conduct takes place may themselves give rise to an element of aggravation:

> …Sexual harassment in contravention of s 28 of the Act, occurring within the relationship of employer and employee where the employer has power or authority over the employee and commonly has an ability to adversely affect the interests of the employee, would by its nature appear to involve an element of aggravation so as to give rise to the possibility of aggravated damages. [footnotes omitted].

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[47] *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].

[48] [1951] HCA 23 ; 82 CLR 497 at 514.

[49] Flanagan J in *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201, [743] citing *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 at 114, [446(g)] where White J refers to *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643 at 653 for the proposition that "conduct with those characteristics will be such as to increase the harm which the defamation has caused or may be supposed to have caused".

[50] (2004) 85 ALD 368 at 376.

137. Spotless submits that it (and its related entities) has a long history of compliance with the Privacy Act and it has been cooperative in the conduct of its case. It claims, and I accept, that it has been conciliatory in its approach to resolve the matter. It contends that the complainants have acted unreasonably in the circumstances, resulting in a protracted process and ongoing costs.

138. In their submissions the complainants have documented their work ethic, their long years of service and their feelings of anger, outrage, injustice and betrayal on becoming aware of the disclosures.

139. I am of the view that Spotless' failure to appreciate the implications of handing over lists of random names and its and its subsidiary's disregard for whether its employees would have reasonably expected this type of disclosure or whether they had provided consent, amounts to an indifference to its privacy obligations under the Privacy Act. Spotless' conduct in that sense was unjustified, improper and lacking in bona fides.

140. I also consider that the conduct took place in the context of an employment relationship, in which Spotless, through its subsidiary Cleanevent, exercised a degree of authority over the complainants and had the ability to adversely affect those employees' interests.

141. As an employer, Spotless was in a position of trust and confidence with respect to its employees and their information that it held.[51] Its conduct damaged that relationship of confidence and trust. In consideration of this, I accept that the apparent indifference of Spotless towards its privacy obligations in respect of employee information, was a source of additional hurt for the complainants.

142. Having regard to the general guidance on amounts awarded for aggravated damages in discrimination cases[52], as well weighing up the aggravated elements of the breaches against Spotless' subsequent conciliatory conduct, I have decided that the circumstances justify an award of aggravated damages in the sum of $1,500 to each complainant.

# Declarations

143. I declare that the complaint is substantiated under s 52(1)(b)(i)(B) of the Privacy Act, on the basis that the respondent has interfered with the complainants' privacy in breach of the Privacy Act by:

    i. improperly disclosing through its related entity Cleanevent, the complainants' personal information to the AWU, contrary to NPP 2, and

    ii. failing to take reasonable steps to protect their personal information from misuse and unauthorised disclosure, contrary to NPP 4.

144. I declare, under s 52(1)(b)(ia) of the Privacy Act, that Spotless must:

[51] See case law describing the employer-employee relationship as one importing duties of confidentiality and implied trust: e.g. *Concut v Worrell* (2000) 75 AJRD 312.

[52] Australian Human Rights Commission, Federal Discrimination Law Online (June 2016), https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016.

i. within 60 days of the date of this determination, engage an independent reviewer with privacy expertise to undertake a review of Spotless' current privacy compliance procedures, policies and processes, and those of Spotless's subsidiaries, and provide me with a copy of the reports from the independent review (**independent reviewer's reports**)

ii. within six months' of receiving the independent reviewer's reports, undertake further independent assessments assessment of its own practices and those of its subsidiaries, to determine the effectiveness of any recommendations implemented from the independent reviewer's reports, and provide me with a copy of those assessment findings within two weeks of receiving them.

145. I declare, under s 52(1)(b)(ii) of the Privacy Act, that within 60 days of the date of the determination, Spotless must issue a written apology to each complainant acknowledging its interference with their privacy and the distress it has caused.

146. I declare, under s 52(1)(b)(iii) of the Privacy Act, that within 60 days of the date of the determination, Spotless must pay each of the complainants compensation, in the amounts set out in the table below, for non-economic loss, including a component for aggravated damages.

**Table of compensation**

| Complainant | Non-economic loss – injury to feelings and/or humiliation | Aggravated damages | Total |
|---|---|---|---|
| **A*** | 4500 | 1500 | 6000 |
| **B*** | 4500 | 1500 | 6000 |
| **C** | 1500 | 1500 | 3000 |
| **D** | 1500 | 1500 | 3000 |
| **E*** | 4500 | 1500 | 6000 |
| **F** | 1500 | 1500 | 3000 |
| **G** | 1500 | 1500 | 3000 |
| **H** | 1500 | 1500 | 3000 |
| **I** | 1500 | 1500 | 3000 |
| **J*** | 4500 | 1500 | 6000 |
| **K** | 1500 | 1500 | 3000 |
| **L** | 1500 | 1500 | 3000 |
| **M*** | 4500 | 1500 | 6000 |
| **N*** | 4500 | 1500 | 6000 |
| ***** These complainants were not AWU members at the time of the disclosures. | | | |

Angelene Falk
Australian Information Commissioner and Privacy Commissioner

28 May 2019

**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.

**Making a complaint to the Commonwealth Ombudsman**

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly. If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website.