



**Office of the Victorian
Information Commissioner**

**‘How do you put a price on a
breach?’**

**Compensation in privacy
complaints**

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What we'll cover

- **What does the PDP Act say?**
- **Loss for which compensation can be awarded:**
 1. Economic loss
 2. Non-economic loss
 3. Reimbursement for expenses reasonably incurred
- **Causation**

Compensation claims in privacy complaints

- Compensation is not the only way a complaint can be resolved.
- However, assessing harm and levels of compensation is often an issue in privacy complaints – particularly where a breach has been established.
- **Issues:**
 - Parties unsure about what a breach is ‘worth’ – how to assess harm in monetary terms.
 - Lack of VCAT caselaw where compensation has been considered – *Zeqaj v Victoria Police*
 - Organisations can be reluctant to entertain compensation claims.
 - Complainants can ask for compensation that is disproportionate or not linked to breach.

The PDP Act and powers of VCAT

- Purpose of PDP Act is ‘to provide remedies for interferences with the information privacy of an individual’.
- If VCAT Finds there has been an interference with privacy, it can order that:

the complainant is entitled to a specified amount, not exceeding \$100 000, by way of compensation for any loss or damage suffered by the complainant, including injury to the complainant's feelings or humiliation suffered by the complainant, by reason of the act or practice the subject of the complaint.

Compensation for economic loss

- Loss of a financial nature caused by the breach.
- Seeks 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 receiving compensation’.
- Examples:
 - Medical or counselling expenses (*CH v Queensland Police Service* [2019] QCAT 297)
 - Lost income due to job loss (*Hammond v Credit Union Baywide* [2015] NZHRRT 6)
 - Subscription to identity monitoring services.

Compensation for non-economic loss/emotional harm

- Most commonly claimed and most difficult to grapple with.
- The PDP Act makes provision for this and appropriately so:

The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

Director of Proceedings v O'Neil [2001] NZAR 59 at [29] as cited in the privacy matter of Hammond at [153].

Assessing harm for non-economic loss

- Assess non-economic loss by looking at complainant's reaction, not perceived reaction of majority of community or reasonable person.
- Look at effect of conduct rather than the conduct itself.
- Does not always have to result in medical condition or treatment. (Zeqaj; AA v State of Queensland (Office of Industrial Relations)[2021]; Hammond)
- But, where a large amount of compensation sought, there is a higher expectation of medical evidence to demonstrate harm.

Levels of compensation for non-economic loss

Severity of harm	Compensation amount	Example of harm
No harm or trivial harm	\$0	This may include mere annoyance, slight inconvenience or a complainant failing to establish the harm occurred.
Low harm	\$500 – \$5000	This may include suffering ‘some stress and anxiety’.
Moderate harm	\$5000 – 12,000	This may include suffering ‘significant distress and humiliation’ or ‘reactivation of...psychological symptoms and...distress’
Serious harm	\$12,000 – \$20,000	This may include experiencing a ‘significant psychological effect’.
Severe harm	Over \$20,000	This may include experiencing humiliation, loss of dignity and injury to feelings amounting to ‘enormous harm’

Reimbursement for expenses incurred in making the complaint

- Under s 77(1)(d) of the PDP Act, VCAT has power to:

in any case, make an order that the complainant is entitled to a specified amount to reimburse the complainant for expenses reasonably incurred by the complainant in connection with the making of the complaint and the proceedings held in respect of it under this Act.

- Examples – medical examinations and expert reports.
- VCAT has not determined if legal fees may be recovered for taking a matter to VCAT (noting s 109 VCAT Act) but has been ordered in other jurisdictions.

Causation – linking harm to the breach

- Not all breaches warrant compensation. But where harm has been established, ‘the legislation contemplates some form of redress in the ordinary course’.
- A ‘but for’ analysis is not sufficient but may act as a guide.
- May involve disentangling harm caused by breach and other causes of harm to complainant.
- Actions that occur after a breach?
- Difficult for a complainant to establish future losses that are speculative in nature.
- Complainant’s own conduct may be relevant.