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Canadian Privacy Law

**BILL C-11 REIMAGINES
PIPEDA FOR A GDPR WORLD**

December 7, 2020

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CPD

AB: Please consider including this program as a learning activity in your mandatory annual CPD Plan.

BC: This program has been approved by the Law Society of British Columbia for 1 Hour of CPD (Corporate).

ON: This program contains 1 Hour of Substantive content.





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Changing Privacy Landscape

BERNICE KARN



Changing Privacy Landscape in Canada

- Existing Private Sector Privacy Laws
 - Federal
 - *Personal Information Protection and Electronic Documents Act*
 - Provincial Laws
 - *Personal Information Protection Act* (Alberta)
 - *Personal Information Protection Act* (BC)
 - *Act respecting the protection of personal information in the private sector* (Quebec)



Changing Privacy Landscape in Canada

- Current Initiatives
 - Quebec — Bill 64 — *An Act to modernize legislative provisions as regards the protection of personal information*
 - Ontario — Discussion Paper and Consultation — *Private Sector Privacy Reform: Improving private sector privacy for Ontarians in a digital age*
 - Transparency
 - Right to be forgotten
 - OIPC Enforcement Powers — Penalties
 - Expanded scope — non-commercial entities
 - Clear, opt-in consent
 - Data portability
 - De-identification
 - Various support mechanisms — data trusts

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Changing Privacy Landscape in Canada

- OIPC submissions October 16, 2020
 - Closing gaps in federal coverage
 - Predictable rules
 - Oversight
 - Localized solution
- British Columbia — 2020 PIPA Statutory Review
 - Mandatory breach reporting
 - Administrative monetary penalties
 - Investigative powers



Appropriate Purposes

- PIPEDA Section 5(3) — Reasonableness test
- CPPA Section 12 Factors
 - Sensitivity
 - Legitimate business needs
 - Effectiveness in meeting the organization's legitimate business needs
 - Less intrusive means
 - Loss of privacy proportionate to the benefits



Consent Requirements

- Default rule
- Recording purposes
- Plain language
- Mandatory information
 - Purposes
 - Means of collection, use, disclosure
 - Reasonably foreseeable consequences
 - Specific types of personal information
 - Third party information

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New Exception to Consent — “Business Activities”

- What are “business activities”?
 - Necessary to provide or deliver a requested product or service
 - Due diligence activities to prevent/reduce commercial risk
 - Necessary for information, system or network security
 - Necessary for the safety of a product or service
 - Consent impracticable because of no direct relationship with the individual
 - Other prescribed activities
- Requirements
 - Reasonable person expectation
 - No influence on behaviour or decisions



Other New Exceptions

- Socially Beneficial Purposes
 - Requirements
 - De-identification
 - Limited group of recipients of information
 - Disclosure is made for a “socially beneficial purpose





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Privacy Management

GEORGE A. WOWK



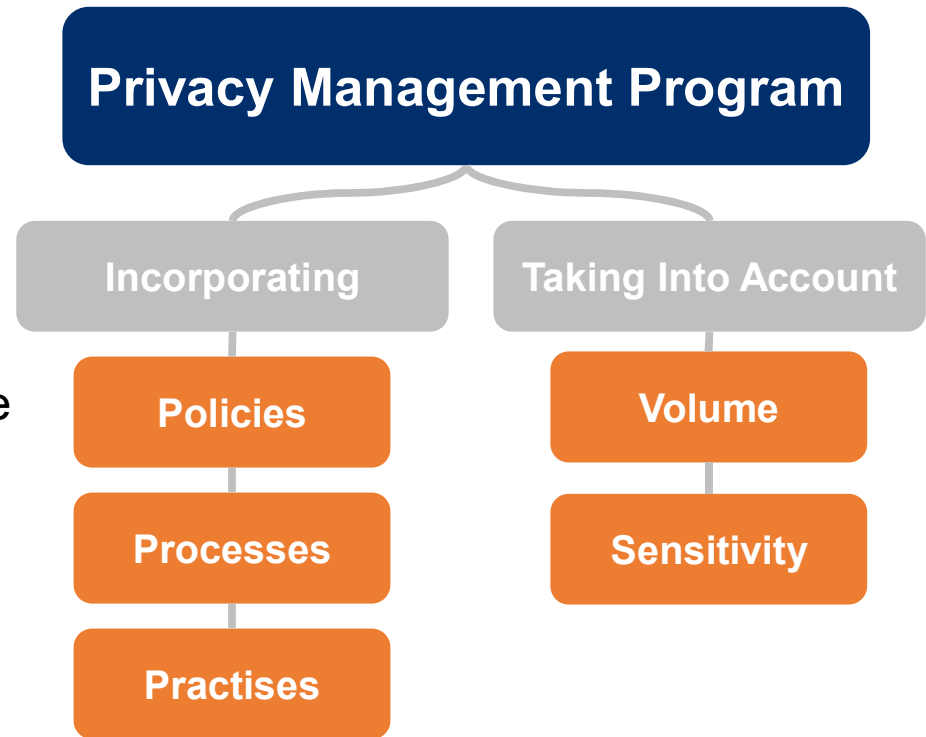
Privacy Management Program

- Develop and implement policies, practices and procedures
 - Protect personal information
 - Deal with requests and complaints
 - Staff training and information
- Develop materials to explain policies and procedures



Privacy Management Program

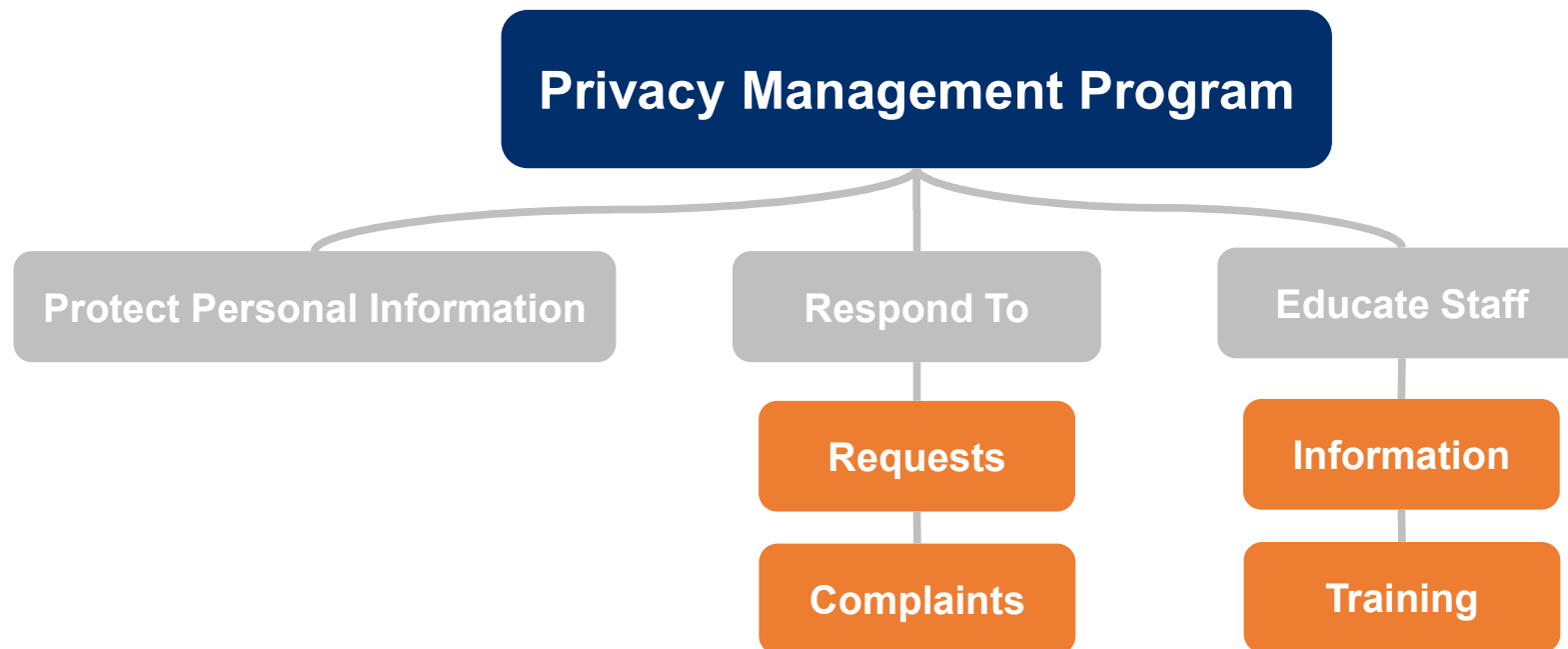
- Designed to Fulfill Privacy Obligations
 - Accountability
 - Appropriate Purpose
 - Openness and Transparency
 - Consent
 - Limiting Collection, Use, and Disclosure
 - Security Safeguards
 - Accuracy
 - Access
 - Retention and Disposal



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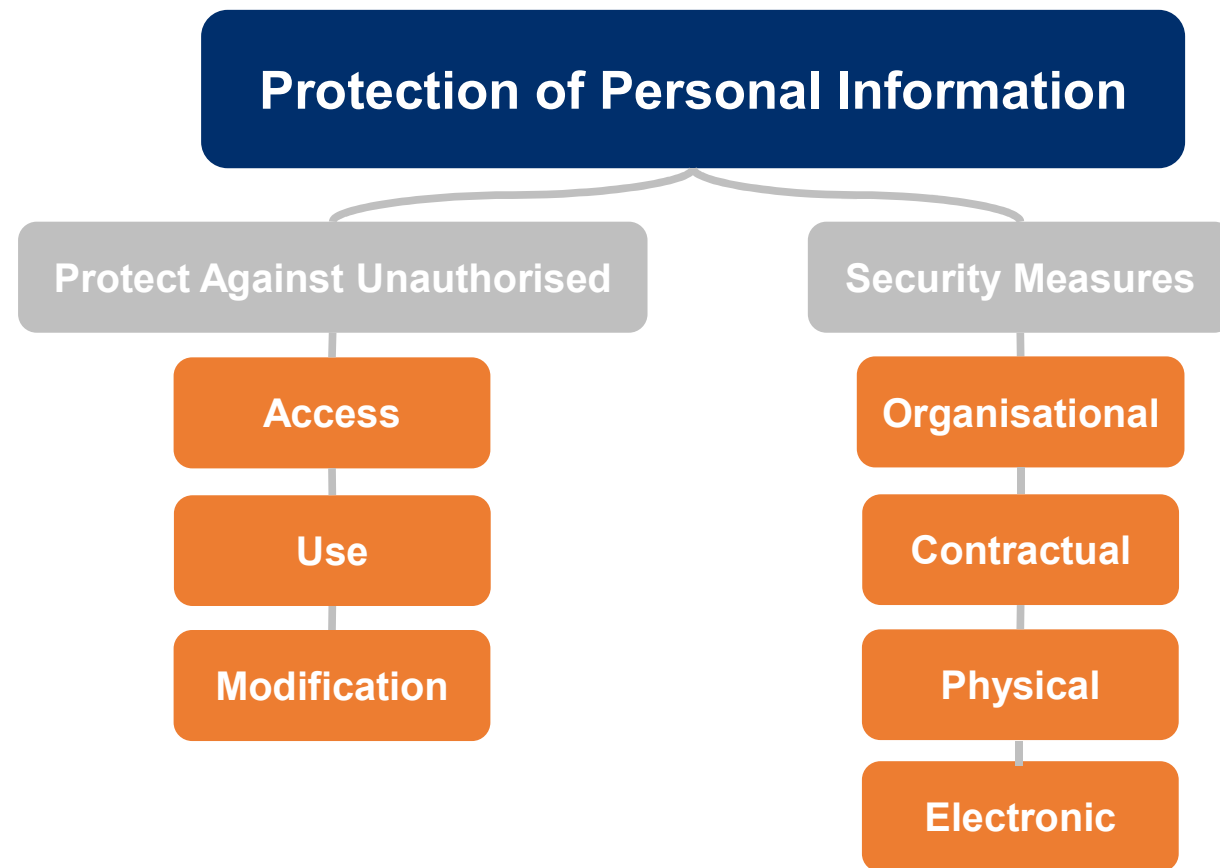


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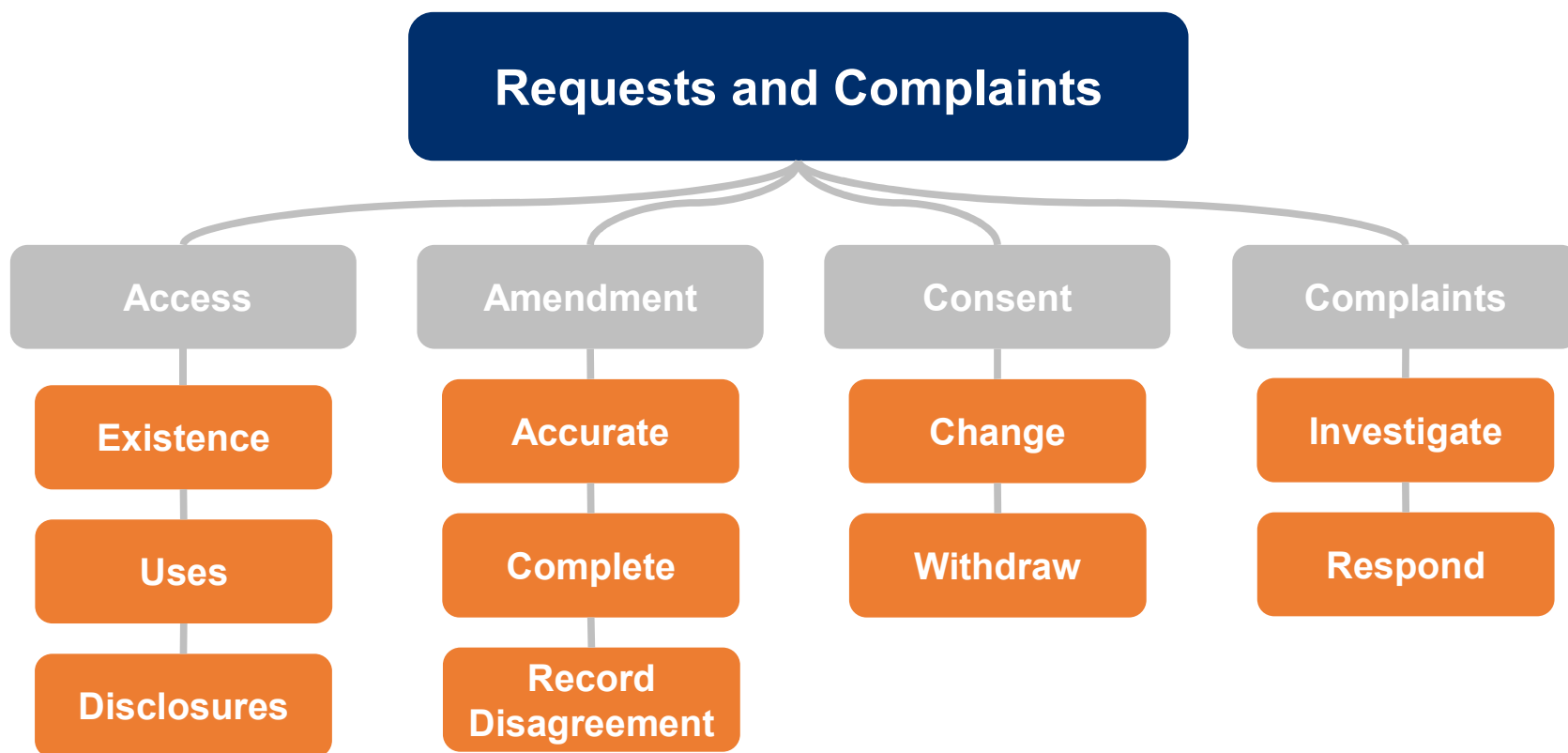


Protection of Personal Information

- Take into account
 - Volume
 - Sensitivity



Receiving and Handling Requests and Complaints



Certain Data Rights of Individuals

- Delivery of Data to Third Party
 - At the request of the individual
 - If both organizations participate in a data mobility framework
- Disposal of Personal Information
 - At the request of the individual
 - Subject to some exemptions



Staff Training and Information

- Policies, practices and procedures
 - Ongoing training and awareness
 - Written material





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Personal Information Control

MARCO CIARLARIELLO



Dealing with Service Providers

- Outsourcing of Personal Information to Service Providers under PIPEDA
 - 2019 OPC consultation (outsourcing personal information as a use vs. disclosure)
- Changes under the CPPA
 - Codification of best practices under PIPEDA
 - Principles for outsourcing: consent, control, accountability, notification
 - Cross border data flows



De-identification of Personal Information

- Introduction to “De-identified” Information?
 - Clearing up ambiguities in PIPEDA
- De-identified Information vs. Anonymized Information
 - CPPA Standard: “the information does not identify an individual or could not be used in reasonably foreseeable circumstances, alone or in combination with other information, to identify an individual”
 - CPPA vs. Quebec Bill 64 — what is more favourable to organizations?
- Business Transactions
 - PIPEDA vs. CPPA
 - Practical impacts of the CPPA requirements



Automated Decision Systems

- New concept of Automated Decision Systems
 - Automated Decision Systems are defined as “any technology that assists or replaces the judgment of human decisionmakers using techniques such as rules-based systems, regression analysis, predictive analysis, machine learning, deep learning, and neural nets.”
- Application in the CPPA
 - Openness and Transparency
 - What constitutes a “significant impact” on an individual?
 - Access to and Amendment of Personal Information
 - Explanations to be provided in “plain language”
 - Challenging the conclusions of an automated decision system



The background of the slide features a light-colored marble texture with grey veining. Scattered across the entire background are numerous small triangles, some of which are orange and others are grey.

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Enforcement and Penalties

W. MICHAEL G.
OSBORNE

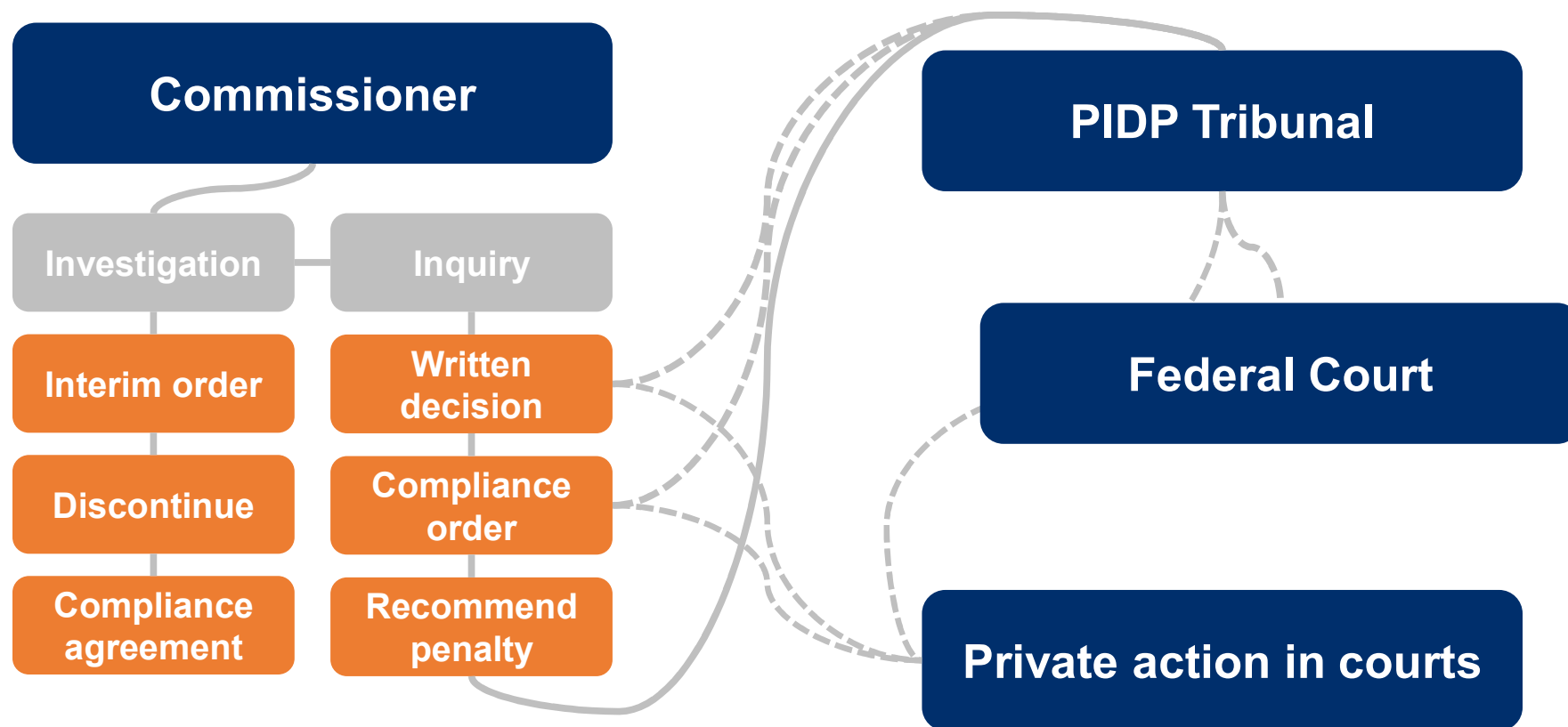
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Enforcement

- Process
- Remedies for breaches
- Criminal offence for certain breaches
- Limited procedural fairness rights



Enforcement Process, Outcomes, and Remedies



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Process

- Same powers but higher stakes
- Commissioner is **investigator**, **prosecutor**, and **adjudicator**
- **Investigations**, **inquiries**, and **audits**
- Powerful investigative tools:
 - Compel **document production**
 - Compel **oral evidence on oath**
 - Compel **written evidence on oath**
 - **Search premises**
- No judicial authorization required



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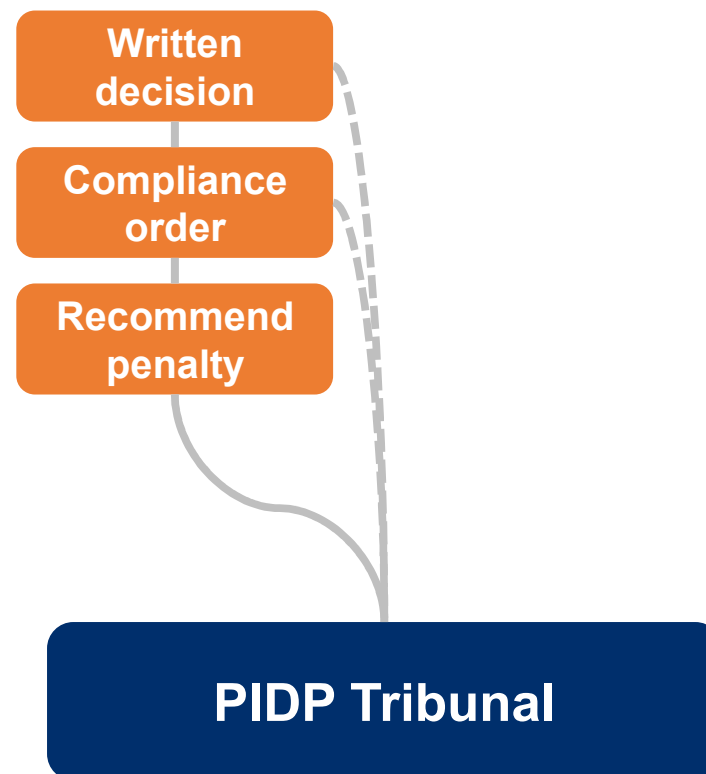
- Investigation
 - **Discontinuance**
 - Settlement — **compliance agreement**
 - **Interim orders**
 - **Inquiry**
- Inquiry
 - **Written decision** (mandatory)
 - **Compliance order**
 - **Penalty recommendation**



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PIDP Tribunal

- Penalty hearing
 - Impose penalty – up to **\$10 million** or **3% of global revenue** whichever is more
 - Bound by Commissioner's findings absent appeal
- Appeals
 - By **respondent**
 - By **complainant**



Private Actions

- Statutory cause of action
 - Finding of **contravention** or conviction of an offence
 - **Loss** or **injury**
- Remedy: **damages**
- **Two year** limitation from discovery
- **Class actions** possible

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Criminal Offence

- Criminal offence for **knowing breach** of certain provisions, including:
 - **Failure to notify** of breach of security safeguards
 - **Failure to retain** certain records
 - **Reprisals** against whistleblower
 - **Breach of compliance order**
- Fine: up to **\$25 million** or **5% of global revenue**, whichever is more



Limited Procedural Fairness Rights

- No impartial decision-maker
- No disclosure of evidence
- No right to present evidence or cross-examine
- Warrantless search and seizure
- No effective recourse to Tribunal



Questions? We're Here to Help!

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