



Privacy Commissioner  
Te Mana Mātāpono Matatapu

**Inquiry into Trade Me's  
Privacy Policy update and  
compliance with the Privacy Act 1993**

Report by the Privacy Commissioner  
pursuant to section 13(1)(m) of the Privacy Act 1993

August 2020

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## Executive Summary

1. In September 2015 Trade Me provided members with the ability to opt-out of targeted advertisements. In early 2019 a team within Trade Me queried whether the existing practice of excluding members who had opted out from targeted onsite advertising about Trade Me services was consistent with the intent of the opt-out policy.
2. Trade Me reviewed the application of the opt-out and concluded that it had been overly broad in its application of the opt-out. Trade Me believed that its original 2015 opt-out had only given members the ability to opt-out of *third-party* advertising and that despite its broad application of the opt-out, Trade Me should now only offer and apply an opt-out to third-party advertising.
3. In November 2019 Trade Me emailed members who had previously opted out of receiving targeted advertising and advised that their personal information would now be able to be used to market Trade Me services to them. Trade Me also advised these members that they would remain opted out of receiving targeted advertising from third parties.
4. I was approached by concerned Trade Me members who considered the change to be inconsistent with what Trade Me had told them, breached the trust they had in Trade Me and raised issues under the Privacy Act 1993. Trade Me also received around 750 pieces of correspondence either querying or raising concerns with the change in policy.

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*“To me opting out of use of my data has no grey area. I don’t want targeted marketing. I don’t want it at all. [...] Opt out means opt out”*  
– Trade Me member

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5. I initiated an Inquiry under section 13(1)(m) of the Privacy Act. This allows me to inquire generally into any matter that may infringe individual privacy, even without a complaint.
6. My Inquiry considered whether Trade Me took reasonable steps to ensure individuals were aware of the purpose for which their information was being collected and whether Trade Me acted consistently with what they told individuals.
7. Trade Me’s initiative to create a targeted advertising opt-out was in itself privacy protective and sought to respect the preferences of its members. There was and is a clear demand for privacy enhancing solutions as demonstrated by the number of individuals who use Trade Me’s opt-out. I encourage all agencies to consider how they can better design their services to be privacy enhancing for individuals.
8. I thank Trade Me for its cooperation and assistance in responding to this Inquiry.

## Findings

- **Trade Me did not adequately explain the privacy opt-out and their messaging about the change was sufficiently ambiguous as to cause confusion. Trade Me did not take all reasonable steps to ensure that individuals were aware of the purpose for which their information was being collected under Information Privacy Principle 3 of the Privacy Act. This failure infringed the privacy of individuals.**
- **Trade Me acted consistently with Information Privacy Principle 10 of the Privacy Act. Information provided by members (who had opted out) prior to November 2019 is *not* being repurposed or used by Trade Me to advertise to them.**

## Introduction

1. This report sets out the findings of my Inquiry into Trade Me's 'opt-out' policy change and compliance with the Privacy Act.
2. In September 2015 Trade Me instituted a privacy opt-out to allow members to opt-out of targeted advertising by third parties. The wording of this opt-out was updated in June 2018 and November 2019. I was approached by a number of concerned individuals who felt that Trade Me's latest change to its opt-out policy raised issues under the Privacy Act.
3. Trade Me's information collection, use and disclosure practices are governed by the Privacy Act, which requires that agencies:
  - have a lawful purpose for collecting information and that information collected is necessary for that purpose;
  - get that information from the individual directly (unless an exception applies);
  - tell an individual why they're collecting information and what they will do with it;
  - act fairly and reasonably in collecting information;
  - keep information safe; and
  - only use and disclose information in accordance with the purpose it was collected for.
4. In December 2019 I launched an Inquiry under section 13(1)(m) of the Privacy Act, which provides the Privacy Commissioner with the ability to inquire generally into any matter that may infringe on individual privacy. I decided to launch an Inquiry to:
  - examine potential infringements on individual privacy by the change in practice; and
  - establish whether that change complied with Trade Me's obligations under the Privacy Act.
5. I wanted to ensure that Trade Me's change to its opt-out policy was consistent with the Privacy Act. I particularly wanted to understand what Trade Me members had been told about how their information would be used and whether Trade Me was acting consistently with that.
6. I understand that business needs, technology and practice necessarily change and evolve over time. However, individuals need to know how their information was and will be used.
7. Trade Me members told me they felt misled and that their deliberate choices about how their information was to be used was overridden, infringing the privacy of those individuals.

## Methodology

8. In undertaking this Inquiry, I:

- i) developed and issued terms of reference for the Inquiry;
- ii) called for submissions from affected individuals;
- iii) considered submissions received from Trade Me members;
- iv) reviewed publicly available information, as well as documents regarding the policy, procedure and exercise of the 'opt-out' provided by Trade Me;
- v) met with Trade Me; and
- vi) considered comments received from Trade Me on a draft of this report.

## What did Trade Me tell members?

9. In September 2015 Trade Me members were provided the option of opting out of Trade Me “disclosing” and “receiving” their personal information for targeted advertising.<sup>1</sup>

10. Trade Me advised individuals that:

*Unless opted out “Trade Me [can] use your information to show you advertising via our data management platform”*

and

*If opted out you would still see advertisements “but those ads won’t be delivered via Krux [the data management platform]. Allowing [Trade Me] to use your information for advertising means the ads you see should be more relevant to you”.*

11. Trade Me’s 2015 privacy policy said:

*“Trade Me also uses information we hold about you to deliver display advertisements intended to be relevant to your interests, based on the information you have provided to us through the use of any of our Services”.*

12. The privacy policy also said that individuals could opt-out of this “customised advertising”. It did not specify that this was only advertising from third parties.

13. In June 2018 Trade Me updated the description of the opt-out so that it expressly applied to all targeted advertisements regardless of source. The description also expressly included within scope of the opt-out the disclosure of information to third parties and Trade Me affiliated services.

14. The 2018 opt-out stated that when opted in Trade Me could use and disclose individuals’ information:

*“to show you relevant advertising, to trusted third parties using Trade Me tailored products; to entities fully or partly owned by Trade Me that provide affiliated services”.*

15. Trade Me’s 2018 privacy policy stated that its services may be personalised “unless you opt-out, [by] showing ads based on your use of our Services and your preferences.” The

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<sup>1</sup> Trade Me’s 2015 opt-out wording.

policy also stated that Trade Me could use individuals' information to “*send you customised advertising (unless you opt-out)*”.

16. The 2018 change in wording did not result in a change in practice in regard to targeted advertising as since 2015 **Trade Me had been applying the opt-out as if it applied to all targeted advertising, including Trade Me derived advertising.**<sup>2</sup>
17. In early 2019 a team within Trade Me queried whether the existing practice of excluding individuals from targeted onsite advertising about Trade Me services (when they had opted out through the privacy opt-out) was consistent with the intent of the opt-out policy.
18. On review, Trade Me believed that it had been overly broad in its application of the opt-out and that the original 2015 opt-out had only given members the ability to opt-out of *third-party* advertising.
19. In November 2019 Trade Me notified members who had previously opted out of targeted advertising that it would be changing its practice of opting members out of targeted advertising of Trade Me services on Trade Me's website.<sup>3</sup>

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*“I was particularly upset about [...] the fact that they decided to ignore my explicit wishes, apparently on the basis that they felt this was not making them enough money”*

*“From my point of view, if I have opted out of marketing, then I am not one of those customers who expect tailored advertising and have gone out of my way to avoid it. I do not appreciate this arbitrary changing of an existing policy”*

– Trade Me Members

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<sup>2</sup> Trade Me has said that due to the way the opt-out was applied using their data management platform no data collection or targeting could take place against those opted out, including for Trade Me advertisements on the Trade Me website. Although Trade Me notes that members could receive some ‘basic customisation’ this basic customisation did not utilise member information or store this against member profiles. Basic customisation allowed Trade Me's website to register pages visited (eg Trade Me Motors) and then display advertisements onsite based on pages viewed during a single session.

<sup>3</sup> Trade Me emailed all members who had opted out of targeted advertising in November 2019 to advise that:

- because they were opted out Trade Me could not use their information to improve the relevance of Trade Me marketing;
- Trade Me believed customers would expect to have their information used to target Trade Me advertisements to them;
- from 9 December Trade Me would use all members' information to market Trade Me products/services; and

20. The opt-out wording now reads:

*“When opted in, Trade Me can use and disclose my information to show me relevant **third-party** advertising, **to advertise its services to me off-site**, to trusted third parties using Trade Me tailored products; to entities fully or partly owned by Trade Me that provide affiliated services”.*

21. The response to the new opt-out made it clear that some Trade Me members believed the opt-out had always applied to *all* targeted advertising. This is likely because Trade Me had in practice always applied the privacy opt-out to all onsite targeted advertising (including Trade Me services and products).
22. Trade Me’s wording of its 2015 policy (under which the bulk of individuals opted out) coupled with their application of the opt-out caused confusion and upset for some members who believed that the opt-out had always applied to all targeted advertising. I saw evidence of this confusion in the over 50 submissions I received from Trade Me members.
23. The submissions I received as part of this Inquiry demonstrate that some members read the 2015 opt-out to include the advertising of Trade Me’s services. This belief was reinforced by the way in which Trade Me applied the opt-out to onsite advertising. Trade Me state that they *“did not specify that the ‘Ad option’ only related to ‘third-party’ ads because this was unnecessary at the time and it was clear from the information provided onsite”*
24. I consider that it was open to members to read Trade Me’s 2015 policy as covering *all* advertisers including Trade Me. The policy did not specify the source of the ‘customised advertising’ and Trade Me itself applied the opt-out to its own advertisements.
25. Trade Me has tacitly acknowledged the ambiguity of its policy through later amending its terms and conditions to “clarify” its original intentions. It is this ambiguity that calls into question Trade Me’s compliance with Privacy Principle 3.
26. Between 2015 and 2018, approximately 200,000 individuals opted out of targeted advertising. In total, of the approximately 4.8 million Trade Me memberships **320,823 had opted out of receiving targeted advertising** of some description.

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*I expect “that the information Trade Me asks [sic] me for or gathers about me during the course of my shopping will not be used by Trade Me or anyone else to target advertising at me. [...] That it will be handled in accordance with the law”*

– Trade Me Member

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- members would remain opted out of targeted third-party advertisements and Trade Me offsite advertising.

27. Trade Me has drawn to my attention that the number of members who raised concerns about being misled or confused was relatively small. I acknowledge that these individuals likely represent those who felt strongly about the change in policy but make up a relatively small percentage of Trade Me's overall membership.

28. **I do not consider that Trade Me took all reasonable steps in these circumstances to communicate how members' information would be used.** Trade Me failed to clearly inform individuals of the purpose for which their information was being collected and who the recipients of that information would be.

*Did individuals understand the different types of advertising that appear on Trade Me's platform?*

29. As noted above, Trade Me employs multiple different types of advertising:

- 1) Targeted advertising of Trade Me services on Trade Me's website.
- 2) Non-targeted advertising of Trade Me services on Trade Me's website.
- 3) Targeted advertising of Trade Me services on other websites – for example advertisements on another website for items individuals have looked at on Trade Me.
- 4) Targeted third-party advertising on Trade Me's website, where Trade Me has used its data to support the advertisement – for example a car manufacturer advertisement on Trade Me's website targeted at males in their 30's.
- 5) Non-targeted third-party advertising on Trade Me's website – for example an advertisement for Air New Zealand holidays displaying to everyone.
- 6) Targeted third-party advertising on Trade Me's website from cookies – that is where another website advertises on Trade Me's website based on an individual's browsing history.

30. Between September 2015 and June 2018 all targeted advertising on Trade Me's website (types 1 and 4) was treated as though they it was included in the scope of the opt-out. After November 2019 this was changed so that only targeted advertising from third parties or on websites other than Trade Me (types 3 and 4) are part of the opt-out.

31. It is important to note that targeted third-party advertising on the website from cookies (type 6) has never been part of the opt-out. It is possible that individuals believed that the targeted or customised advertising opt-out included type 6. Type 6 advertising will have consistently displayed (barring any separate action to block cookies) on Trade Me's website.

32. It is my view that it was open to individuals to interpret the opt-out as including targeted advertising of Trade Me services on Trade Me's website (type 1). Type 1 advertising was not consistently displayed. As a result, I am concerned that individuals did not actively differentiate between targeted advertising from Trade Me and targeted advertising from third parties within their interpretation of the scope of the opt-out.

**Did Trade Me act consistently with what it told members?**

33. Trade Me maintains that it did not intend nor draft the 2015 opt-out to apply to its own targeted advertisements. However, the 2015 opt-out wording and privacy policy were drafted broadly to cover "customised advertising". **Many users believed that the opt-out**



**acted as a limitation on the ability for Trade Me to target its own advertisements to members, and between 2015 and 2018 Trade Me behaved as if this was the case.**

34. So, while Trade Me's operational practice was inconsistent with what it maintains was the intent and scope of its policy, its practice was actually consistent with how many members appear to have expected the opt-out to work. The 2018 opt-out and privacy policy updated appears to have brought Trade Me's policy in line with its operational practice.
35. It is my view that the individuals who had taken the time to opt-out likely value their privacy highly and felt that the 2019 change in policy disregarded that value by telling them what Trade Me thought they should expect.

*How is personal information being used now?*

36. Information provided post December 2019 by Trade Me members (who are opted out) is being used by Trade Me to target advertisements about Trade Me services to them. Trade Me have advised that information is not being used to target third-party advertisements to opted out members or to target Trade Me advertisements to members off-site.
37. Individuals who have not opted-out can be targeted for advertising by anyone.
- 38. Information provided by members who had opted out prior to November 2019 is not now being repurposed or used by Trade Me to advertise to them.**
39. Had Trade Me unilaterally amended its Terms and Conditions/Privacy Policy to allow for the use of information collected from opted out members prior to November 2019 it may have been open to me to find a breach of Principle 10.
40. As discussed further below, businesses who seek to rely on continued use of their service as individual authorisation for use of their information will run afoul of principle 10 where the application of that authorisation has retrospective effect. **In this case Trade Me's**

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*"I selected to opt-out for a reason. I am concerned that the company has decided that my reason is invalid and they know best."*

*"The process to opt-out takes time and is not obvious"*

*"I interpreted the email as 'we don't care that you opted out, we're going to use your details anyway and there's no way to say no'"*

*"It is hard or impossible to ascertain from this message how large the impact on privacy will actually be"*

– Trade Me members

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**application of individual authorisation is prospective, not retrospective, and therefore consistent with Principle 10.**

41. Trade Me's messaging however suggested that the change to the opt-out would be welcomed by members, it said "*It's often expected by our customers that we tailor our own marketing in this way, and we think it's reasonable too, so we're changing our policy to reflect this*". However, it is clear that a number of members did not expect this change, as demonstrated by the complaints and enquiries both Trade Me and my Office received.
42. The responses I received about this Inquiry from affected members highlight lessons in knowing your audience and communicating effectively.

**What does this have to do with the Privacy Act?**

43. New Zealand's Privacy Act protects individuals' ability to determine for themselves when, how, and to what extent their information is shared with others.

*Information Privacy Principle 3*

44. I am concerned about the substance and clarity of the information provided by Trade Me. A lack of clarity about what the opt-out covered led to many members being confused about the effect of their opt-out decision. Specifically, I am concerned about:
- the lack of consistency between what members were told about the opt-out in 2015, 2018 and 2019;
  - the lack of clarity about the application of the 2015 policy;
  - whether members had the ability to understand the different types of advertising that appear on Trade Me's platform; and
  - the clarity of Trade Me's 2019 email messaging.
45. Informing people about how their information is to be used is an important privacy safeguard enshrined in Information Privacy Principle 3(1)(b). Providing individuals with clear, easy to understand explanations of the purpose for which the information is being collected will inform them how their information will be used.
46. Providing individuals opportunities to opt-out of certain features is good privacy practice. In doing so, individuals can meaningfully consider whether and how they wish to engage with a service.
47. Unlike many other countries, New Zealand's law does not depend on consent as the primary authority for collecting, using and disclosing personal information. Consent plays a role, but legitimate and lawful business purpose is the main source of authority for the use or disclosure of personal information.
48. Globally, we have seen a shift in expectation around ensuring individuals are fully informed about how their information is being used and requiring meaningful consent to process their information.<sup>4</sup> In part, this shift has been in response to 'click and consent' or 'assumed authority' models. These models have been problematic for individual privacy.

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<sup>4</sup> <https://gdpr-info.eu/issues/consent/>

49. As noted by the (now) Chief Justice Helen Winkelmann in a recent lecture<sup>5</sup>:

“There is good reason for proceeding with caution when weighing the significance to be given to consent when assessing whether the individual expected privacy or had waived it. These are standard contracts people must agree to if they are to access services, sometimes essential services. Most do not read the full content of any such contract. That is especially so with online service providers. Although the privacy policy must be agreed to before services can be accessed, acceptance is easy — simply click on the accept button.

Often the consequential authorised collection of data will occur in the course of a very low to no value transaction. Few would spend time reading a privacy policy before using a search engine or purchasing food to go. And yet by clicking accept, we are agreeing to all of the terms and conditions, if expressed in suitably plain English, contained in the privacy policy of the service provider. Even if we do read the privacy policy, it is doubtful we will have a full understanding of the implications of what we have agreed to. There is a very substantial asymmetry in technical understanding between the customer and most who operate business in an online world.”

50. Trade Me provides information to individuals on how their information would be used through its:

- online opt-out page;
- privacy policy; and
- emails.

*Information Privacy Principle 10*

51. I was concerned about:

- whether Trade Me acted consistently with what it told members in 2015 and 2018; and;
- how individuals' information is being used now.

52. I was reassured to find that information provided by members who had opted out, prior to November 2019, was not being reused or repurposed by Trade Me in ways that were inconsistent with the expectation created in members. That is to say, the change or 'clarification' of the opt-out policy was not applied retrospectively.

53. Information Privacy Principle 10 states that an agency must use information in accordance with the purpose for which it obtained that information, unless it believes on reasonable grounds that an exception applies. Exceptions include that an individual has authorised the use for another purpose or that the use is directly related to the purpose for which is was obtained.

54. The enabling nature of the Privacy Act allows commercial agencies to define their own lawful purposes for using personal information. However, they must ensure that the

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<sup>5</sup> <https://www.courtsofnz.govt.nz/assets/speechpapers/Bruce-Slane-Privacy-lecture.pdf>

individuals from whom they are collecting personal information are aware of those purposes.

55. Principle 10 is strongly linked with Principle 3. Principle 3 allows individuals to evaluate the cost and consequence of a transaction in terms of how their information will be used. If an individual is not satisfied with the intended use they could decline to use that service or elect to obtain the goods or services from another provider with more favourable privacy practices.
56. Agencies can expect individuals to assess the way in which their information is being used against what they were told when it was collected. When a company tells its customers that it will use their information for specified purposes, it is limiting its own ability and lawful authority to use that information.
57. Offering an opt-out is a way of using information for certain purposes and of giving consumers greater choice, allowing individuals to use particular services in a nuanced way.

### Lessons learnt

58. The lessons that can be learned from this event are:
  - building and maintaining customer trust is important to business;
  - be clear; and
  - be proactive.
59. Below are some general lessons that all businesses should consider when changing the way they collect, handle, use or disclose information. We know that businesses will necessarily need to change their terms and conditions from time to time as technology and business needs evolve. However, businesses should take care to ensure these changes are consistent with the requirements of the Privacy Act.
60. Businesses who want to make changes to their terms and conditions or privacy policies can do so consistently with the Privacy Act by considering:
  - what individuals have been told about how their information will be used (and the substance and clarity of those communications);
  - whether the new use is consistent or directly related to what individuals have been told or whether a new authority to use the information is needed; and
  - providing individuals with options they need to maintain trust in their business, for example can the business ringfence information collected before the change occurred.
61. Businesses who wish to change their terms and conditions around the handling of personal information should act prospectively, not retrospectively, in notifying changes to individuals.
62. Businesses should be clear and explain plainly how the change impacts on the use/disclosure/handling of individuals' information. The notification should provide enough time for people affected to understand and query the change, particularly if the business intends that any continued use of the service implies an authorisation from the individual

in support of the change.<sup>6</sup> If changes or messaging are at all unclear then businesses may not be able to rely on implied authorisation.

63. Where practicable, businesses should also provide options for individuals to tailor how their information is used, for example through toggle settings or similar.<sup>7</sup>
64. Businesses should be aware of the risks of incremental changes to terms and conditions. A series of updates can compound any ambiguity in understanding and create a mismatch between individual expectations and business expectations.
65. The OECD have provided guidance and suggested caution to agencies when obtaining and relying on consent.<sup>8</sup> They have said that generally, individuals want to know about and be able to choose whether to authorise new and unrelated uses of their information. Obtaining authorisation, either in terms of the permission businesses obtained initially or in going back to individuals to obtain consent for new purposes, presents risks.

*“Many purposes for collecting personal data may be difficult to explain and equally difficult to understand. If the initial consent language is overly broad to take into account any potential uses of personal data, individuals may not know or understand what could happen to their personal data, and any consent they provide is arguably less than informed. Consequently, their trust in the organisation may be placed at risk. [...] Privacy policies that are revised frequently to reflect rapidly changing uses risk confusing individuals and potentially making them wary of the organisation’s practices.”*

66. In essence, the OECD warns that seeking authorisation from individuals should be meaningful and build rather than erode trust in the businesses’ practices.
67. I understand that Trade Me’s email notifying individuals of the change in policy was intended to be upfront about how information was going to be used from now on. However, the communications process could have been managed better, and the email led individuals to believe their explicit wishes were being disregarded and that Trade Me had assumed expectations on the part of their members that some clearly did not have. Feedback from some Trade Me members is that this has led to a lack of trust in Trade Me’s ability to manage personal information reliably.

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<sup>6</sup> Principle 10 provides that individuals can authorise agencies to use information for a purpose other than for which it was collected, authorization implies understanding on the part of the individual. Authorisation is similar to consent, which is defined under Article 6 of the GDPR as “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.”

<sup>7</sup> Article 7 of the GDPR provides that individuals must be able to easily withdraw consent for data processing they have previously consented to.

<sup>8</sup> [http://www.oecd.org/sti/ieconomy/oecd\\_privacy\\_framework.pdf](http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf)

### How did Trade Me members feel about the change in policy?

68. As a part of my Inquiry I sought comment from individuals affected by Trade Me's procedural change. Some of their comments are scattered throughout this report. Of the over 50 responses my Office received the main concerns can be summarised as follows:

- some individuals felt misled;
- Trade Me abused its position in the market;
- there has been a loss of trust;
- opting out was a deliberate and considered choice which has been overridden, what was the point in opting out;
- change in practice/policy makes a mockery of privacy statements/promises;
- Trade Me was disingenuous;
- Trade Me's change removes personal autonomy over information;
- Trade Me was acting out of greed; and
- individuals do not understand the full scope of the changes.

69. I am also aware of some Trade Me members closing their accounts as a result of this change.

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*“Because of its dominant position Trade Me has a social responsibility to be a model corporate citizen when it comes to customer privacy”*

*“Trade Me should be held to a high standard. It holds the Privacy Trust Mark and is a highly trusted New Zealand brand. This move feels a little desperate and may be born of a desire to unlock a bunch of money by marketing to members who have explicitly opted out of having their data shared with anyone”*

– Trade Me members

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70. Member statements to my Office indicate that members feel Trade Me should act in accordance with best practice in regard to privacy, as a trusted New Zealand company. Trade Me itself has recognised its place in the market and its ability to promote good practice amongst the New Zealand private sector by instituting a number of privacy positive initiatives, including the annual Transparency reports for which Trade Me received an award of a Privacy Trust Mark.<sup>9 10</sup>

<sup>9</sup> <https://newsroom.trademe.co.nz/articles/transparency-report-2019-2/>

<sup>10</sup> <https://www.privacy.org.nz/privacy-for-agencies/applying-for-a-privacy-trust-mark/privacy-trust-mark-recipients/>

### Did the change cause individuals 'harm'?

71. My Inquiry powers under section 13(1)(m) of the Privacy Act (the basis for this Inquiry) provide broad scope to assess whether a matter has caused or may cause an infringement of the privacy of individuals. I can also investigate complaints from individuals under Part 8 of the Privacy Act in order to establish whether there has been an interference with individual privacy.
72. Section 66 of the Privacy Act requires that in order for me to find that there has been an 'interference' with individual privacy there must be both an action that has breached a privacy principle plus 'harm' to that individual caused by that action/breach. That is, an action has adversely affected the individual, caused loss or damage to the individual, or resulted in significant humiliation, loss of dignity or injury to feelings.
73. While it would be open for Trade Me members to make a complaint to my Office, any complaint would need to demonstrate that there has been harm caused. In this case demonstrating the adverse impact required to substantiate a complaint could be difficult.
74. Being annoyed, irritated or losing trust in an agency is not enough to access the remedies found in the Privacy Act. The Inquiry powers used to inquire into this issue allow me to consider issues that might have a lower level of harm but affect a wider range of individuals.
75. To date I have not seen evidence that would suggest the enforcement threshold set out in section 66 for an interference with privacy would be met.

### Conclusion

76. My Office has a history of positive engagement with Trade Me and I thank Trade Me for its cooperation with this Inquiry. I trust that Trade Me will adopt the identified lessons from this incident. It is important to note that data based businesses need to be particular about how they communicate options to customers and cautious about amending their terms and conditions.
77. I would like to reemphasise that the initiative to create a targeted advertising opt-out by Trade Me was a positive and privacy protective one that looks to respect the preferences of its members. **There is a clear demand for privacy enhancing solutions as demonstrated by the number of individuals who use Trade Me's opt-out.**
78. I encourage all agencies to consider how they can better design their services to be privacy enhancing for individuals.

### Appendix A: What can Trade Me members opt-out of?

Can Trade Me members opt-out of...?	Previous privacy opt-out (2015)		Previous privacy opt-out (2018)		Current privacy opt-out (2019)	
	YES	NO	YES	NO	YES	NO
<ul style="list-style-type: none"> <li>Targeted advertisements from third parties</li> </ul>	✓		✓		✓	
<ul style="list-style-type: none"> <li>Targeted advertising of Trade Me's services/products on other websites</li> </ul>		N/A	✓		✓	
<ul style="list-style-type: none"> <li>Disclosure of member information, collected by Trade Me, to third parties for direct marketing of services eg jobs</li> </ul>		N/A	✓		✓	
<ul style="list-style-type: none"> <li>Disclosure of member information, collected by Trade Me, to Trade Me affiliated services for direct marketing of services eg Harmony</li> </ul>		N/A	✓		✓	
Targeted advertisements from third parties resulting from cookies/browsing history.		✗		✗		✗
Targeted advertisements about Trade Me's services/products	?		✓			✗