

Consumer Safeguards Review

(Part A / Redress and Complaints)

Department of Communications and the Arts

GPO Box 2154

CANBERRA ACT 2601

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Thank you for the opportunity to provide a contribution to this review into consumer complaint handling and redress for telecommunications services.

My submission, attached to this letter, provides an opportunity to present conclusions drawn from research which has taken place since 1997. In the twenty year period since, I have published over 20 articles and book chapters on ombudsmen (spanning government, industry and organisational ombudsman) and within that total around 15 articles on ombudsmen schemes, and 3 that relate specifically to the Telecommunications Industry Ombudsman (TIO). I have also recently served as an expert witness on this subject of consumer protection and the TIO in *Telecommunications Industry Ombudsman Ltd v Commissioner of State Revenue* [2017] VSC 286, parts of the below submission are based upon that testimony.

Yours sincerely



Anita Stuhmcke

Summary of submission

The ombudsman model is one that is particularly well suited to meet the objectives of consumer safeguards in essential services industries such as telecommunications. I agree with the observation in the Consultation Paper that independence of the mechanism from industry, consumers and government, is critical and believe that the ombudsman model provides this independence.

I reject the recommendation in the **Consumer Safeguard Review Consultation Paper** which would replace this model with a different scheme.¹

Submission: TIO as a unique institution

As you will be aware, the TIO is a unique institution. It is modelled upon the government ombudsman institution and offers consumers an access point for dispute resolution outside the court system.

The TIO exists to redress the power imbalance between the consumer and the industry. To achieve this the TIO scheme emulate the traditional government or classical ombudsman model and:

- (a) similarly to a government ombudsman, the TIO is independent, and should be perceived to be independent. This means the TIO dispute resolution role is neither one of advocating for the consumer nor for the industry member;
- (b) the TIO operates as a 'last resort' for unresolved complaints through encouraging industry to resolve the complaints at first instance; and
- (c) the TIO relies upon the ombudsman brand name to promote consumer and industry trust and respect for their investigative style of dispute resolution; and

¹ At the end of this paper is an Addendum which references errors and ambiguity in the Consultation Paper.

(d) the TIO acts systemically, to improve industry standards. This may include identifying systemic failings in industry practice and may reduce disputes between consumers and industry.

The TIO does differ from government ombudsmen – particularly with respect to firstly, the fee and governance structure and secondly, that where an agreement cannot be reached, an industry ombudsman may make a decision which is binding on the industry member.

My research to date on ombudsman, suggests that one strength of the model is its flexibility and evolution. Indeed the TIO has responded to changed external demands over time. This evolution has been driven by **consumers, industry and government**, who are all stakeholders in the complaint resolution process.

Australian **consumers** have become increasingly aware of industry ombudsmen schemes. This is not surprising as, in the almost thirty years since the introduction of the Banking Ombudsman in 1989, industry ombudsmen schemes have both proliferated and become the principal pathway for consumer disputes resolution in industries such as telecommunications. Further, the way in which consumers complain has changed. The use of technology and social media seemingly shape consumers expectations of fast and flexible ombudsman services. In relation to the TIO the historical record of high numbers of complaints is well documented. Indeed in July 2010 the Consultation Paper *Reconnecting the Customer* ACMA public inquiry was held² as a direct result of rising numbers of complaints to the TIO. In 2014-15, the TIO received 124,417 new complaints. The TIO Annual Report states that this is a level that is around 35% lower than 2011-2012 and points to factors driving the number of complaints down from historically high levels as including:³

2

<http://www.acma.gov.au/~media/Consumer%20Interests/Information/pdf/Reconnecting%20the%20Customer%20ACMA%20public%20inquiry%20Consultation%20paper.PDF>

³ TIO Annual Report 2014-15, *Complaint Numbers* – note that ‘telcos’ is used here to refer to note here that ‘telcos’ is used to refer to companies that provide telecommunications services to residential and small business consumers.

- The revised Telecommunications Consumer Protections (TCP) Code 2012, which included a range of consumer protection measures for telcos such as clearer advertising, improved spending and data usage alerts and critical information summaries.
- Telcos have focused on improving customer service, designed new plans to better suit customer needs and invested in mobile infrastructure.
- Improved dialogue between the TIO and telcos during the consideration of complaints and systemic issues, and through provider forums and educational resources.

However as noted in the Consultation paper complaints in 2016/2017 again increased – with a 41.1% increase in a year. This increase seems explicable due to the ‘one-off’ NBN where complaints tripled in 12 months – being almost a quarter of total complaints. This surge may be an aberration as NBN complaints were down 16% in the first 6 months of 2017.⁴ Further, the recent review of the TIO and changes brought about from that review need to be taken into account in any discussion of complaint numbers going forward.

Government demands also change and impact the TIO. For example the NBN has impacted consumers and providers. The TIO clearly offers a pathway for such consumers and complaint numbers have accordingly increased. Government also benefits from a privatised dispute resolution service. Government interest in the success of the TIO is partly evidenced by the interest government maintains in establishing the two telecommunications regulators - the ACMA and the ACCC. The ACMA is responsible for administering the licensing of carriers and consumer and technical issues, while the ACCC is responsible for the administration of competition regulation. Refusal to join the TIO scheme is dealt with by those bodies – so for example the TIO will refer non-compliant organisations to the ACMA. More cynically perhaps, the interest of government has been assessed by some commentators as being financial. From this perspective the government shifts the expense of

⁴ <https://www.businessinsider.com.au/complaints-about-australias-telecommunications-had-another-massive-jump-in-late-2017-2018-4>

dispute resolution from the taxpayer to the consumer as it is argued that telecommunications companies transfer the cost of dispute resolution into the fees charged to consumers.⁵ Broadly, the existence of the TIO allows government to focus upon its own mechanisms of dispute resolution ie: the TIO oversees a complex and rapidly changing industry allowing similar government dispute resolution institutions, such as the Commonwealth Ombudsman, to focus its resources upon other areas of telecommunications such as surveillance.

Industry is not static and as industry changes, so too will the need for changes in jurisdiction and operational choices of an industry ombudsman. Change may be as simple as changes in the practice of industry members leading to more or less complaints for ombudsman and thus unpredictable demand, or as complex as the blurred division between public, and private sectors, and changes in service delivery that have knock on effects for the jurisdiction of industry ombudsman. Changes may also occur to the regulatory environment (see for example the new standard AS/NZS 10002:2014). The telecommunications industry has undergone and continues to undergo significant change. As a result the Constitution of TIO Limited has changed such as for example in 2012 when the information collecting powers and the monetary limits of complaints handled were altered.⁶ In 2013 the Constitution was changed to increase the age of complaints handled to two years up from one year and the TIO was given discretion to investigate complaints consumers became aware of up to six years before contacting the TIO, up from two years.⁷

I agree with the observation in the Consultation Paper that independence of the mechanism from industry, consumers and government, is critical. I believe the focus of a complaint resolution mechanism should be upon consumer satisfaction. Importantly, the norms of good industry practice used by the TIO may be higher, at least in terms of quality of service, than legal requirements.

⁵Dee B, Smith S & Wood J, 'Industry Ombudsman Schemes Twenty Years On: World benchmark or industry captured?' (2009) 34(3) *Alternative Law Journal* 182, 187-188.

⁶ TIO *Annual Report*, 2012, 13.

⁷ *Ibid.*

Indeed the standards imposed by the TIO may also be higher than the existing norms of industry practice. This is explicable as even though there may be no contractual basis for industry members to pay a consumer or resolve a dispute as directed by the TIO, the decision made by TIO is legitimated not through legal doctrine but by application of the principle of 'fairness and reasonableness'. The TIO thus acts as any ombudsman would in stating what ought to happen, as a consideration involving intangible qualities of fairness, equity, reasonableness and justice as well as more concrete considerations of law and policy.

In using these standards the TIO has unique value in improving telecommunications industry practice and promoting consumer trust and confidence. This is the artistry of ombudsman practice, to maintain independence from industry while simultaneously setting fair and reasonable standards under which those same service providers are to function. To put this another way, the TIO may act as a type of 'consultant' to industry and to government regulators, using complaint data and the unique overview it has of telecommunications services to reveal problems in risk management. Any resulting industry improvements will allow for due process for the individual consumer and also the provision of consumer services which are fair and equitable and thereby both strengthen consumer confidence and reduce industry exposure to future expensive and time consuming law suits.

What I recommend

I recommend the retention of the TIO scheme. I have commented in the Addendum on some problems, as I see it, with the current Consultation Paper.

An ombudsman model has much to commend to a national essential service industry such as telecommunications. In my research I have found that one obvious result of the TIO ceasing to exist – or having a reduced ability to handle first instance complaints - is that disputes by telecommunications consumers will have to be raised directly by the consumer with the service provider. While this happens now as the TIO expects early resolution at this level wherever possible,

the difference becomes one where following such a step the TIO will not exist to offer a review of the industry decision. This absence is not simply a case of a missing step for review of complaints - for all stakeholders the distinct advantage of the TIO is that the scheme is required to resolve a dispute by taking into account the law, good industry practice and what is fair and reasonable in all the circumstances. Fair and reasonable refers to both the procedure and standards applied throughout the investigation rather than the outcome. This practice of ombudsman means that the TIO may, like courts and tribunals look at whether a decision is lawful and correct, and yet assess the correctness of the decision according to broader principles of fairness and reasonableness. Such standards are both derived from, while aiming to serve and improve, the broader telecommunications industry, rather than applied to promote the interests of either the consumer or the industry.

Other likely implications of the non-existence of the TIO for stakeholders, or a reduced ability to handle first instance complaints, include an absence of umbrella data as to whole of industry practice. The ombudsman model is in a unique position to monitor all complaints and this oversight the **whole** of industry. Further, there will be an absence of a proactive, systemic problem identifier and system fixer leaving much of the dispute handling to merits review and judicial review, which will only provide retrospective solutions after decisions are made. Without the TIO stakeholders have lost a mechanism to assure that the telecommunications industry is subject to ongoing review, revisions and renewal.

Possible reforms to the TIO scheme

In my view there are four reforms, any or all of which may be made to the existing scheme to improve its operation.

Option 1. Expand the industry coverage/jurisdiction of the TIO

I recommend that the jurisdiction of the TIO be expanded to mirror the consumer experience. This means that the scheme should be able to deal with all industry

service providers from retailers in physical shops through to online provision of services.

A recent example of the limitations on TIO jurisdiction and the consumer confusion it causes is found in the streaming of the World Cup matches by Optus. In that instance the TIO had limited jurisdiction to take up consumer complaints. As the Telecommunications Industry Ombudsman remit is to consider phone or internet services, it is unable to manage complaints about content, such as streaming services purchased through apps stores. Optus customers who had a complaint about Optus Sport, delivered as part of their mobile phone or home broadband account could make a complaint to the Telecommunications Industry Ombudsman (if consumers could not resolve their complaint with Optus directly).⁸ In that instance the TIO could assist with problems with "carriage services (phone or internet services)" but not for all complaints about online services.

This shows the gaps in coverage of an issue – which from the consumer perspective was one issue. This limitation to jurisdiction might be adjusted through legislation.

Option 2. Expand the systemic jurisdiction of the TIO

The primary role of an industry ombudsman scheme is to receive the majority of consumer complaints concerning the relevant industry. As such the broader role of the larger industry ombudsman schemes which oversight consumer complains concerning essential services such as gas, electricity, water and telecommunications, is to perform a significant dispute handling service in the Australian dispute resolution landscape. A secondary role is to improve industry standards through identifying and rectifying systemic error and providing input into reform and policy.

⁸ <https://www.tio.com.au/publications/media/statement-from-telecommunications-industry-ombudsman-regarding-optus-sport-subscription>

The function of such schemes in performing the systemic role includes the publication of reports such as Annual Reports which are used by the Ombudsman as a form of 'case' reporting to lift dispute resolution standards. Across all industry ombudsmen schemes the identification and redress of systemic issues can be an informal and/or a formal function.

The TIO serves the wider community as a proactive institution which promotes systemic telecommunications industry wide reform. The TIO Scheme Terms of Reference state that the TIO will deal with systemic issues (see 5.1): "[A] systemic issue is a concern about a system, process or practice of a provider or providers that may or does affect a significant number or particular type of consumers." Such issues may be identified through complaint handling, analysing complaint trends or other information such as media coverage. The TIO reporting and addressing of systemic issues is a society wide concern as it improves the industry as a whole for community benefit. The TIO has no power to direct such reform and is limited to suggesting policy improvement to government and regulators and disseminating the data it collects to inform any such reform. Again, evaluating such work is difficult. It is largely limited to counting outputs from the TIO, such as the fact that listed on the TIO website are submissions from February 2013 to July 2016; in this 3 ½ years the TIO has made over 58 submissions.⁹ The impact such submissions have had is less easily evaluated. This difficulty of evaluation of systemic impact is a problem/concern shared by all industry and government ombudsmen.

Option 3. Change the name of the TIO

Remove the word 'Industry' from the name of the TIO to more accurately reflect the independent nature of the institution. This will require legislative reform.

Option 4. Expanding the range of remedies the TIO may provide

⁹ <https://www.tio.com.au/publications/submissions>

In line with industry change the nature of complaint recording and remedies provided by service providers to consumers should be reviewed. The function of the TIO in performing its dispute handling role is to investigate complaints and make determinations and /or directions (as provided for under the scheme). Disputes are typically handled through early resolution methods, such as initial assessments or referrals (including referral back to the service provider's complaints department), but may require conciliation, facilitation, investigation, or in rare cases, determination or recommendation. Here it is important to consider expanding the remedies available to the TIO beyond financial remedies. Consumers may lose more than money due to poor service (for example, inconvenience, time and distress) and non-financial remedies such as an apology or future improved services by the provider may be in order. An amount of compensation (such as the \$3000 which FOS has been able to award) for non-financial loss is therefore appropriate.

Conclusion

The TIO scheme was established on 1 December 1993 and was the world's first telecommunications ombudsman. It has evolved and has changed to withstand the test of time and to offer consumers a service to resolve complaints in a fast changing and dynamic industry.

In 1991 the Government announced that a telecommunications ombudsman would take over the functions performed by the Commonwealth Ombudsman. It was first established as a corporate vehicle, as the Telecommunications Industry Ombudsman Ltd and was later referred to in the *Telecommunications Act 1997* (Cth) and now in the TCPSSA. The scheme was originally introduced as a condition of holding a general telecommunications licence or a public mobile telecommunications licence. Now, under the TCPSSA, industry membership, and compliance with the scheme, is a statutory requirement (via this Act) for companies in the telecommunications industry which supply the standard telephone service, a public mobile telecommunications service, or a service which allows an end-user to access the Internet.

Today the TIO is more than an individual consumer redress scheme. Based upon the ombudsman model the role of the TIO scheme is to fill a niche in the regulation of the telecommunications industry left vacant by existing regulatory mechanisms. This translates to a wider role of raising industry standards, and enhancing consumer confidence in the telecommunications service providers.

I would underscore the above submission with the following two points:

Firstly, in my opinion the role of the TIO benefits more vulnerable members of the public. Here it is important to observe that the service providers covered by an industry ombudsman are carrying out a business and will therefore often make decisions from a business perspective. The TIO undertakes outreach activities is to reach the vulnerable consumer. The TIO's outreach focus includes disability, indigenous, rural and culturally diverse inclusion. In so doing the TIO humanizes the 'business' of the telecommunications industry. This is an intangible quality associated with the ombudsman institution.

Secondly, through the systemic and policy work of the TIO the wider group loosely defined as 'the Australian public' benefit from TIO activities. Here the benefit of the TIO in monitoring industry performance and improving industry practice flows through to all Australians – not just complainants. The TIO is part of the broader telecommunications industry and is thus able to commend and condemn industry action from a vantage point both within and outside the system of telecommunications service provider decision making. The wider public should not have to bear the risk of the privatised telecommunications industry – here the TIO acts to minimise this risk through applying, creating and improving norms of the industry through exposing defective services and articulating what the norms of good industry practice should be.

It is based upon my beliefs and research that the above suggestions are, in my view, preferable to those suggested in the Review paper. It is nonsensical to replace an existing complaints body with another body which will perform the same activities with a reduced focus on humanizing industry and complaint resolution.

ADDENDUM:

Errors in Consumer Safeguard Review Consultation Paper

Page 2 & 3 – “The TIO is industry owned and industry funded”

This is not the case. To my knowledge the model of the TIO being funded by industry members will not impact the actual independence of the TIO, however it may impact the perceived independence. The charging of a fee in and of itself does not compromise independence. Here I also note that the funding of the TIO by industry may impact the ability of the TIO to resolve disputes at all (a point which has nothing to do with independence). For example, the collapse of One.Tel, a telecommunications company left both the TIO and consumers in the position where there is no company to fund the investigation of complaints

Interestingly it could just as easily be argued that the funding model contributes to the independence of the TIO. This is because charging of fees to industry ensures that funding to the TIO is guaranteed. In contrast the source and amount of funding is a constant struggle for Australian government ombudsmen.

Page 3 – “These complaints do not compare favourably with telecommunications dispute resolution schemes.”

As mentioned above there is no comparative institution for the TIO. Indeed the accompanying paper by PWC which compares telecommunications regimes makes that point. The TIO is internationally unique in terms of scope and regulatory environment.

Further, the number of complaints received by an ombudsman do not indicate whether the institution is effective or not. Indeed the terminology and counting of complaints can vary from office to office. Importantly, the complaint handling procedures identified on page 3 – where complainants are referred back to the

industry member for an attempt at resolution is a typical and useful procedure followed by an ombudsman.

Gaps in Consumer Safeguard Review Consultation Paper

There are gaps in the information provided in the paper which render it difficult to respond to:

Principles 1 – 6

The proposals for reform are based upon 6 principles. It is not evident as to from where those principles are drawn, nor is it made clear whether the telecommunications consumer safeguard scheme which is currently in place deviates from those principles.

Proposal 2

The proposal to have an external dispute resolution scheme seems to mirror the characteristics of the existing TIO scheme, or at least the differences between the EDR scheme suggested and the TIO are not clearly explained.

Page 8 – ‘Complex’ complaints

There is no information provided as to what a complex complaint means. For example a complaint may be seen as complex by a consumer however as simple by industry – whose view is taken into account in determining if the new body has jurisdiction over it.

