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31 March 2011

Dear Ms Shadbolt,

Thank you for your invitation to contribute to the discussion with respect to reforms of the Telecommunications Industry Ombudsman (TIO) Scheme dated 15 March 2011.

A cross-disciplinary research project at the University of Technology, Sydney by the faculties of Engineering and Law is presently undertaking research into the TIO scheme.

As our research has not yet completed, we are not in a position to provide final recommendations and detailed responses to the questions posed by the department.

We will however, take this opportunity to provide a general submission with respect to our observations, results and analysis to date and provide some interim recommendations for reform which we hope will be of some assistance to you.

We anticipate that this research will be completed in August 2011 and look forward to publicising the final results and recommendations then.

Yours faithfully,

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This study has been approved by the University of Technology, Sydney Human Research Ethics Committee.

The views represented in this submission are those of the authors and not necessarily the views of the University of Technology, Sydney. Please refer to our Disclosure Statement in Section 4.

If you have any complaints or reservations about any aspect of your participation in this research which you cannot resolve with the researcher, you may contact the Ethics Committee through the Research Ethics Officer (ph: +61 2 9514 9772 Research.Ethics@uts.edu.au) and quote the UTS HREC reference number 2010-184A.

Any complaint you make will be treated in confidence and investigated fully and you will be informed of the outcome.

Table of Contents

Table of Contents	2
Executive Summary.....	3
1. Introduction.....	6
1.1 Research Approach.....	7
2. First Phase Results	8
2.1 TIO Policy and Practice.....	8
2.1.1 Complaints Lodged against consumer wishes	9
2.1.2 Out of Jurisdiction Complaints.....	10
2.1.3 Consumer Advocacy	12
2.1.4 Extortion.....	13
2.1.5 Debt Collection.....	13
2.1.6 Res Judicata/Ultra Vires.....	13
2.1.7 Cost of Complaints.....	14
2.2 TIO Satisfaction.....	15
2.3 Reporting and Transparency	16
2.3.1 Reporting	16
2.3.2 Transparency	17
2.4 Independence	17
2.5 Funding Model Conflict of Interest.....	18
2.6 Accountability	19
3. Preliminary Summary and Conclusion.....	20
4. Disclosure Statement	22

Executive Summary

The TIO is a private corporation enacted by parliament as an alternate dispute resolution mediator between carriage service providers (CSPs) and consumers. The TIO is an office of last resort which relies on attracting, receiving, investigating and escalating complaints as its sole source of funding from industry¹.

The University of Technology, Sydney has undertaken a two-phased research project to study the effectiveness of the TIO regime. In the first phase, the project undertook a large scale survey of CSPs that represent 2.5 million Australian telecommunications customers. We sought their experience with the practice and policy of the TIO and the regulatory environment in general. The second phase of research extends to analysing TIO cases and decisions and their compliance with the Law.

The overall aim of this study is to perform an analysis of the current regime and provide recommendations on regulatory reform that will benefit consumers by enhancing the effectiveness of dispute resolution within the Telecommunications industry. We feel that it is critical that any regulation is cost-effective, efficient and just for all parties because the cost of regulation is ultimately passed onto consumers both directly and indirectly by CSPs.

Our study aims to build a balanced, practical view through stakeholder and industry consultation which will complement recent consumer focused² studies. The industry has until recently been silent in this dialog and therefore, we feel it is important for CSPs to air their grievances and frankly identify and atone for their failures in order to achieve an outcome which is beneficial for consumers, industry, jobs and ultimately the economy.

Although the TIO was invited to participate in our project on a number of occasions, they have declined our invitation without providing specific reasons.

While the second phase of our research is not yet complete, we have already uncovered significant and compelling results which are highly critical of the policy and practice of the TIO regime.

Our findings have uncovered that of the CSPs surveyed:

- (i) Over of 80% are dissatisfied with every aspect of the policy and procedure of the TIO to such an extent that they believe that neither consumers nor service providers benefit from its function.
- (ii) Over 80% assert that the TIO accepts complaints which are out of jurisdiction, frivolous or vexatious.

¹ Telecommunications Industry Ombudsman (2010), *About the telecommunications industry ombudsman* (2010) <http://www.tio.com.au/about_tio.htm> at 20 March 2011.

²Australian Communications Consumer Action Network, *Millions of unhappy customers with telco problems and complaints* (2010) <http://www.accan.org.au/news_item_full.php?id=120> at 31 March 2011

- (iii) Close to 100% assert that the TIO acts as a consumer advocate and complaints would drop significantly if consumers paid all charges in the event a judgement was not found in their favour.

Our research and analysis of the policy and procedure of the TIO has uncovered significant dissatisfaction amongst CSPs with respect to:

- (iv) Reporting and Transparency
- (v) Compliance
- (vi) Funding Model Conflict of Interest

These issues resonate in the allegations made in the statement of claim currently before the Federal Court in the litigation between CSP Exetel and the TIO³. The serious nature of allegations should be of concern to regulators and consumers.

Therefore, our interim recommendation is that no increases in jurisdiction or power ought to be granted to the TIO until the judgement in the *Exetel*⁴ is handed down by the Federal Court.

We do however recognise that a number of simple, interim reforms could be undertaken immediately to benefit all stakeholders without materially affecting the powers of the TIO or prejudicing the proceedings.

Our recommendations are as follows:

- (vii) Amend TIO policy and/or legislature to cause the TIO to fall under and comply with Freedom of Information⁵ including disclosure and publication of TIO Council and board Meeting minutes and discourse.
- (viii) Amend TIO policy and procedure to cease the multiple counting of complaints in statistics and recommence reporting disposition of complaints.
- (ix) Amend TIO policy and procedure to refer to Level 1 Complaints as *Contacts* rather than *Complaints*.
- (x) Request the TIO comply with existing policy that requires a complainant provide evidence that they have attempted to resolve the matter with their CSP through completion of the CSP Complaints Handling Process as per section 9 of the TCP code C628:2007⁶ before a *Contact* is registered. This

³ Exetel Pty Ltd ACN 097 986 546 v Telecommunications Industry Ombudsman Ltd ABN 46 057 634 787 (Unreported, Federal Court of Australia, Buchanan J)

⁴ Ibid

⁵ Corporations Act 2001(Cth)

⁶ Australian Communications and Media Authority, *Telecommunications Consumer Protections Code C628:2007 (2007)* Communications Alliance <http://www.acma.gov.au/webwr/telcomm/industry_codes/codes/c628_2007.pdf> at 30 March 2011

approach is consistent with other Ombudsman schemes that require a “deadlock letter” be produced before a complaint may be registered.⁷

- (xi) Request the TIO function within its jurisdiction.
- (xii) Fill the accountability void by articulating or creating avenues of external review for both consumers and CSPs to seek appeals on both merit and procedural grounds.

Upon the completion of our second phase of research, we will be in a position to make final recommendations regarding structural reform to the regulatory environment as well as the TIO.

⁷ Australian Communications and Media Authority, *Reconnecting the Customer* (2010) AAPT submission <http://www.acma.gov.au/webwr/_assets/main/lib311946/105_aapt-reconnecting_the_customer.pdf> pg. 3 at 30 March 2011

1. Introduction

The TIO is a private, statutory corporation enacted by parliament as the alternate dispute resolution mediator between CSPs and consumers/small business⁸. The TIO is an office of last resort, where consumers may seek assistance in resolving a dispute with a CSP after they have exhausted all avenues of resolution. Section 128 of the Telecommunications Act⁹ requires all CSPs become members of the TIO.

The objective of our research is to analyse the current regulatory framework, the policy and the practice of the TIO.

The research was initiated by the growing concern of consumers, industry and regulators at the increasingly large number of complaints registered with the TIO and the associated extensive media coverage and commentary which has illuminated this issue¹⁰.

Therefore, a key guiding principle of our research is to analyse the statistics and trends in consultation with industry stakeholders in order to illuminate their experience and gain perspectives at the real world coal-face implementation of the scheme.

Accessing the perspectives of the consumers was carefully considered at the project design stage in order to achieve a balanced investigation but unfortunately, we lack the necessary resources to reach to a large scale of consumers without the cooperation of the TIO. We will, however, instead rely upon the input from the consumer focused research commissioned by ACCAN¹¹ to assist us in forming a measured and balanced conclusion.

While the commencement of the research predated the Australian Communication and Media Authority's (ACMA) *Reconnecting with the customer*¹² public inquiry, our research does consider this inquiry, the recent High Court case *Kirk v Industrial Relations Commission*¹³ and the current *Exetel*¹⁴ matter before the Federal Court as key inputs into framing the research approach and context from a regulatory and legal perspective.

⁸ Telecommunications Industry Ombudsman (2010), *About the telecommunications industry ombudsman* (2010) <http://www.tio.com.au/about_tio.htm> at 20 March 2011.

⁹ Telecommunications Act 1997 (Cth).

¹⁰ Stuart Corner, *TIO complaints figures: the good, the bad and the ugly* (2010) ITWire, <<http://www.itwire.com/it-policy-news/regulation/43692-tio-complaints-figures-the-good-the-bad-and-the-ugly>> at 31 March 2011

¹¹ Australian Communications Consumer Action Network, *Millions of unhappy customers with telco problems and complaints* (2010) <http://www.accan.org.au/news_item_full.php?id=120> at 31 March 2011

¹² Australian Communication and Media Authority (2011) <http://www.acma.gov.au/WEB/STANDARD/pc=pc_312222> at 21 March 2011

¹³ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531

¹⁴ *Exetel Pty Ltd ACN 097 986 546 v Telecommunications Industry Ombudsman Ltd ABN 46 057 634 787* (Unreported, Federal Court of Australia, Buchanan J)

In *Kirk*,¹⁵ a matter on appeal to the High Court from the Industrial Court of NSW, Heydon J raised a number of concerns regarding the creation and operation specialist courts and tribunals, of which the TIO could be considered one.

In his judgement, Heydon J stated "*A major difficulty in setting up a particular court . . . is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary.*"

Specialist courts, his honour went on to say, "*tend to become over-enthusiastic about vindicating the purposes for which they were set up . . . They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted.*"

Therefore, as part of our research, we hope to ascertain if the large numbers of complaints before the Ombudsman are a result of *over enthusiasm*, comprehensive failure on the part of the Telecommunications industry or some combination there-of.

In *Exetel*, the Applicant, a very large carriage service provider is alleging that the TIO has mishandled numerous complaints resulting in breaches of duty of care, contract, s.140 of the Corporations Act¹⁶, and s.128 of the Telecommunications (Consumer Protection and Service Standards) Act¹⁷.

The matter is set down for directions on 6 May 2011 at the Sydney registry of the Federal Court.

1.1 Research Approach

Our research is based upon a two phased approach.

In the first phase, we offered all CSP members of the TIO scheme an opportunity to give their feedback in a detailed, anonymous survey. Our first phase research is completed.

In the second phase of our research, we have engaged with senior executives and complaints officers at CSPs in order to gain their perspective of the scheme and review actual TIO cases to gain further insight into the nature and compliance of both parties in the ADR process. Our second phase research is still in progress.

¹⁵ Ibid

¹⁶ Corporations Act 2001 (Cth.)

¹⁷ Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth.)

2. First Phase Results

The first phase anonymous survey ran between 12 December 2010 and 31 January 2011. The survey contained 81 questions of either standardized or short text responses split into the areas of:

- (i) TIO Policy and ADR Rules
- (ii) TIO Procedure and ADR Services
- (iii) Complaint Handling
- (iv) Consumer Behaviour
- (v) Cost of Complaints
- (vi) Debts
- (vii) Regulation
- (viii) SFOA and Contracts

We were very pleased that a significant number of TIO members responded representing in excess of 2.5 million Australian telecommunications customers.

There was also representation in all of the Australian Bureau of Statistics CSP size classifications of Very large, Large, Medium, Small and Very Small¹⁸. The respondents included numerous members with more than 100,000 customers including one CSP who is placed amongst the top three service providers in Australia.

2.1 TIO Policy and Practice

A summary of key results from the survey of TIO members regarding their experiences with TIO complaints is as follows:

- (a) 58% of CSPs have experienced one or more complaints lodged against their organisation against the express wishes of the complainant/consumer.
- (b) 77% of CSPs have experienced the TIO accept complaints that were in their opinion out of jurisdiction.
- (c) 71% of CSPs have indicated that they do not believe the services provided by the TIO represent good value for money.

¹⁸ Australian Bureau of Statistics (2010), Internet Activity, Australia
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8153.0Explanatory%20Notes1Jun%202010?OpenDocument>>, at 1 November 2010

- (d) 87% of CSPs have indicated that they have experienced the TIO act as a consumer advocate rather than an impartial mediator.
- (e) 61% of CSPs have indicated that they have experienced TIO officers make decisions in contradictory ways.
- (f) 81% of CSPs have indicated that they have experienced cases where consumers have used the TIO as an instrument of extortion to demand something for which they had no entitlement.
- (g) 96% of CSPs have indicated that complaint handling fees payable by the consumer in the event the case was not found in their favour would discourage extortion and complaints made in bad faith.
- (h) 51% of CSPs have indicated that they have stopped lawfully collecting duly owed debts because of a fear of TIO complaints.
- (i) 77% of CSPs have indicated that both consumers and industry do not benefit from the current regulation performed by the TIO.
- (j) 81% of CSPs have indicated they would prefer a formal legal tribunal replace the TIO.
- (k) 45% of CSPs would welcome more formal and rigid regulation.

The results show that there is wide dissatisfaction and that industry has numerous issues with respect to the policy and practice of the TIO.

A number of matters of key issues arose from both survey short answer responses and case information we received from CSPs to support their position. In order to investigate these further, we have characterised them into groups.

2.1.1 Complaints Lodged against consumer wishes

A key area of concern for both consumers and CSPs alike is that more than half of the CSPs surveyed have experienced complaints lodged against them by the TIO against the express wishes of the consumer.

We have been provided some examples of these complaints which broadly fall into three categories.

Infrastructure Issues

We have sighted a number of complaints where the consumer is located in an area with insufficient telecommunications infrastructure. In these cases, the consumer is generally either a broadband Internet subscriber experiencing slow Internet speeds because they are in a congested exchange area or alternatively they are unable to obtain a broadband Internet service at all due to a lack of infrastructure.

In these cases cited, we have seen that the complainant specifically ask that the complaint be placed against the infrastructure supplier but are forced instead by the TIO to lodge the complaint against the retail CSP as a result of the *bill the biller* policy¹⁹.

In this situation, neither the consumer nor the retail CSP benefit from TIO involvement as neither party is able to perform any action to remedy the matter and CSP is left with a sizeable fee from the TIO.

Transfer Issues

We have sighted a number of complaints where the consumer is attempting to transfer a service from one provider to another. In these cases, against the wishes of the complainants, the TIO has lodged complaints against the wrong provider by strictly applying their telephone transfer delays policy²⁰ to numerous other types of services.

In this situation, neither the consumer nor the retail CSP benefit from TIO involvement as the party capable of resolving the matter is not included in the dialog. A number of CSPs have stated that they have successfully had such complaints redirected to the most appropriate CSP but not without considerable effort and expense. In either case, the consumer is significantly disadvantaged and the CSP is left with a sizeable fee for actions unrelated to them.

Undue pressure or incorrect advice

We have sighted at least one complaint where a TIO officer pressured a consumer who called up for general advice to make a complaint, stating that it would only be used for “*statistical purposes*” and that no complaint would be registered.

We have sighted other complaints where the TIO has provided incorrect advice that lodging a complaint would in some way change an outcome of an event or decision where it is clear *prima facie* that this was not physically possible or within jurisdiction.

2.1.2 Out of Jurisdiction Complaints

One of the most consistent and vocal concerns from CSPs has been acceptance and escalation of alleged out of jurisdiction complaints by the TIO. We have sighted a number of complaints that *prima facie* appear to fall out of the jurisdiction as defined in the TIO Constitution²¹.

¹⁹ Telecommunications Industry Ombudsman (2011), *Funding Arrangements*
<<http://www.tio.com.au/policies/funding%20arrangements.htm>> at 29 March 2011

²⁰ Telecommunications Industry Ombudsman (2011), *Telephone Transfers*,
<http://www.tio.com.au/POLICIES/Transfers/Churn_porting_preselection%20delays.htm> at 29 March 2011

²¹ Telecommunications Industry Ombudsman (2011), *Constitution*
<<http://www.tio.com.au/LIBRARY/documents/TIO%20Constitution.pdf>> at 31 March 2011

We can broadly characterise these complaints into the following categories:

First Contact Complaints

The rising number of first contact complaints is a common concern amongst CSPs²² and we have sighted numerous examples of such complaints. A first contact complaint is a complaint where the consumer has not made any attempt to raise or resolve the matter with the CSP first.

We have sighted a number of first complaints in our case study reviews, including some where consumer has explicitly stated to the TIO that they had not contacted the CSP regarding the matter.

The concern regarding first contact complaints was raised by a number of CSPs in their submissions to the ACMA Reconnecting the Customer public inquiry^{23 24}.

Complaints beyond the network termination point

We have sighted a number of complaints which appear to all have the same theme. These complaints are generally regarding fee for service charges for faults detected by infrastructure technicians beyond the network termination boundary. The network termination boundary is defined in s.22 of the Telecommunications Act²⁵.

In the cases we have sighted, the TIO has not only accepted and escalated such cases but also adopted a position that notes from technician and linesmen describing that the fault was found outside the network boundary were insufficient evidence to support the position of the responding CSPs and therefore, any charges ought to be waived.

In some of the cases where the CSP has questioned jurisdiction, the TIO has indicated that the matters were heard under the guise of 'customer service'.

The settings of tariffs

We have sighted a number of complaints that broadly fall in the area of setting of tariffs including complaints where the consumer requested as a resolution:

- The cost of a service ought to be reduced so people who are unemployed can afford it
- The cost of relocating a service to a new address ought to be waived

²² Australian Communications and Media Authority, *Reconnecting the Customer* (2010) VHA submission
<http://www.acma.gov.au/webwr/_assets/main/lib311946/95_vodafone_hutchison_australia-10-09-10-reconnecting_the_customer.pdf> pg. 14 at 30 March 2011

²³ Ibid

²⁴ Australian Communications and Media Authority, *Reconnecting the Customer* (2010) AAPT submission <http://www.acma.gov.au/webwr/_assets/main/lib311946/105_aapt-reconnecting_the_customer.pdf> pg. 3 at 30 March 2011

²⁵ Telecommunications Act 1997 (Cth).

- There should not be a fee to change plan
- A service should be provided on the same commercial terms but with a different contract length more suitable to the individual needs of the complainant

Commercial activities which do not include the provision of carriage services

We have sighted a number of complaints that broadly fall in the area of activities that do not include the provision of a carriage service.

In particular, one example complaint described to us by a CSP was related to the provision of a bonus gift (a non-telecommunications homeware item) upon subscription to a consumer service.

The gift was delivered one day after the proposed delivery date. The consumer demanded another free gift for the 'inconvenience' of not receiving his gift on time but the CSP, for obvious reasons, declined. The TIO accepted and escalated the complaint on the basis that it was related to 'customer service'.

Frivolous and Vexatious Complaints

We have sighted a very large number of complaints which have been characterised by CSPs as frivolous and vexatious. One particular example of a complaint is that of a consumer who refused to pay his bill and then lodged a complaint with the TIO against when he became aware that the CSP in question had provided evidence to the Australian Federal Police in relation to a warrant in an unrelated criminal proceeding against the consumer.

The CSP stated the TIO continued to escalate and hear the matter without regard to their position.

Another example related to the provision of a refund of close to \$1000 to the wrong customer. The incorrectly credited customer refused to admit to receiving the funds despite being presented with a bank trace to that effect. The consumer went on to state, that if he did receive the money, he would only pay it back \$20 per week. The CSP persisted with requesting the money be returned. In retaliation, the consumer lodged a complaint with the TIO citing harassment and poor customer service. The TIO was provided evidence of the bank trace and found in favour of the CSP but not until the matter had reached Level 2 and cost the CSP hundreds of dollars in complaint handling fees.

2.1.3 Consumer Advocacy

A common theme in the responses for CSPs, is that they believe the TIO fails in its objective to act as a fair and impartial alternate dispute resolution arbiter and instead acts as a consumer advocate.

In particular, a number of CSPs have stated that they have received advise from TIO officers that despite the fact they agreed that a consumer's position was invalid or flawed in a particular case, the CSP ought to settle the matter as the TIO will otherwise escalate

it and increase complaint handling fees until the consumer is satisfied, no matter how unjust the outcome must be to obtain that satisfaction

2.1.4 Extortion

A consistent theme from all the CSPs surveyed is that a TIO complaint is often used by unscrupulous consumers as leverage in order to gain benefits for which they are not entitled.

In particular, a number of CSPs state they regularly experience consumers use the TIO to get out of contracts without penalty (so they might change to other service providers that have a better deal) by exploiting the fact that an average Level 2 complaint will incur greater cost to the CSP than waiving the early termination fee.

These themes are echoed in the VHA submission to the Reconnecting the Customer inquiry that asserted that a proportion of its complaints were received by consumers using the process to try and obtain a free upgrade to an iPhone 4²⁶.

2.1.5 Debt Collection

Over 50% of CSPs that responded to our survey stated that they stopped collecting lawfully owed debts due to fear of the costs associated with TIO complaints.

One CSP stated that 100% of complaints recorded against them in the last year were simply consumers trying to have legitimate bills waived.

This should be of great concern to consumers, as the cost of bad debts will be passed on to them in form of increased monthly fees or reduced service value.

2.1.6 Res Judicata/Ultra Vires

We have been informed by a number of CSPs of situations where the TIO accepted and escalated a complaint regarding a matter that had already been judged in a court of competent jurisdiction.

In all cases described to us by CSPs, these matters were related to debts. The CSPs stated to us that the TIO argued that the Court judgement pertained only to the debt, not how the debt was accrued and therefore, they would continue to investigate and make a judgement on the matter.

It was not until the CSPs in question engaged solicitors to deal with the TIO on these matters that they then ceased investigation. In some cases, the CSPs stated to us that the TIO still charged for the aborted the investigation.

²⁶ Ry Crozier, *VHA sees record complaints before iPhone 4 Launch* (2010) IT News <<http://www.itnews.com.au/News/233429,vha-sees-record-complaints-before-iphone-4-launch.aspx>> at 31 March 2011

2.1.7 Cost of Complaints

Over 70% of the CSPs that responded indicated that they think the TIO provides services which are poor value for money. A complaint of average complexity that requires formal investigation by the TIO generally reaches Level 3. This means that in the course of the complaint lifecycle, the matter will have been billed and reported at least once as a Level 1 complaint, then a Level 2 and then a Level 3.

Therefore, the minimum cost of a complaint of average complexity is at least \$766 without volume related fees. Including volume related fees the cost would generally be around \$1000.

The TIO charges members on a cost recovery basis, which means that even if the matter is not found in their favour, and sometimes even if the matter is out of jurisdiction, the CSP will be liable for the complaint handling charges.

The graph in Figure 1 - Comparison of charges and profit shows the magnitude in cost of average formally investigated TIO complaints compared to the annual gross profit before fixed costs of a telecommunications service from a leading very large CSP.

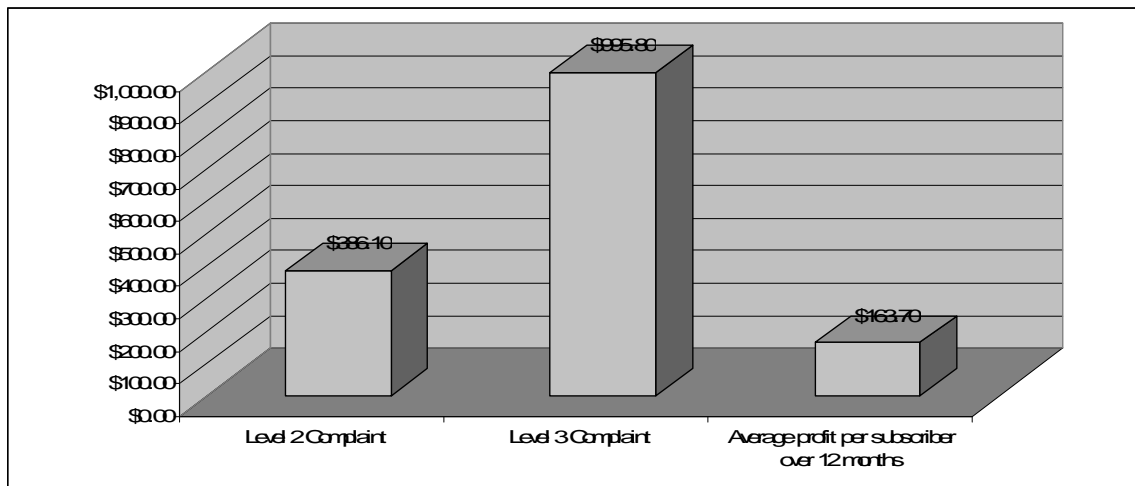


Figure 1 - Comparison of charges and profit

It would take over 6 years of continuous custom in order to break even on a customer who lodges an average complaint of average complexity which reaches Level 3²⁷. For smaller members, this break-even period would be much greater as their margins are much lower.

As CSPs are not permitted to recover their costs with respect to the complaint even if the complaint is found in their favour, these charges are ultimately passed onto consumers as higher fees and tariffs.

²⁷ iiNet, *Results for the year ended 30 June 2010* (2010), <<http://investor.iinet.net.au/IRM/Company/ShowPage.aspx/PDFs/1317-32472550/PresentationFullYearResults>> at 30 March 2011

In the survey, a number of CSPs stated they built-in the cost of TIO charges into all their cost modelling used to set their plan and product fees.

It is therefore imperative for consumers that the fees levied by TIO are both appropriate and fair.

2.2 TIO Satisfaction

A summary of key results from our CSP survey with respect to their satisfaction with the implementation of the TIO scheme is as follows:

- (a) 84% of CSPs have indicated that they are dissatisfied or very dissatisfied with the alternate dispute resolution services the TIO provides.
- (b) 77% of CSPs have indicated that they are dissatisfied or very dissatisfied with the technical industry knowledge the TIO possesses.
- (c) 87% of CSPs have indicated that they are dissatisfied or very dissatisfied with the fairness of TIO policies and procedures.
- (d) 87% of CSPs have indicated that they are dissatisfied or very dissatisfied with the fairness of TIO decisions.
- (e) 71% of CSPs have indicated that they are dissatisfied or very dissatisfied with the escalation policies of the TIO.
- (f) 77% of CSPs have indicated that they are dissatisfied or very dissatisfied with the regulatory functions performed by the TIO.

The results show that there is wide dissatisfaction and that industry has numerous issues with respect to the policy and practice of the TIO.

As part of the survey, we also asked participants if they were dissatisfied with the TIO, what steps they undertook to try and resolve or escalate the issues in order to reach a resolution.

Many respondents indicated that they did not escalate matters further because they either were unaware of the avenues of escalation or because they were concerned that further escalation might result in retaliatory action. Some respondents stated that their requests to the TIO regarding what external avenues of appeal may exist remain unanswered.

A number of the medium to very large sized respondents indicated that they had either met with the Ombudsman or other senior leaders in the TIO to air their grievances or have engaged solicitors to negotiate or commence legal action on their behalf.

One very large sized member stated that they had contacted the Commonwealth Ombudsman regarding matters relating to the TIO but were told that it did not have jurisdiction to review either decisions or the operation of the TIO.

A review of both the legislation and constitution which underpin the TIO reveals that there are no prescribed external avenues in which a consumer or CSP may seek to appeal a decision made by the TIO either on merit or procedural grounds.

In particular, it would appear that decisions made by the TIO are not reviewable by the Administrative Appeals Tribunal and there are no test cases with respect to judicial review of decisions in any federal or state jurisdiction on grounds of either merit or procedure.

In the second phase of our research, we have engaged directly with CSP senior managers and complaints officers in order to gather their perspectives on the policy and practice of the TIO and analyse actual TIO cases.

While this research is currently in progress, and not complete, we cannot provide any conclusions, we can however instead identify what we have observed to date in a number of key areas raised by the Department call for papers.

2.3 Reporting and Transparency

2.3.1 Reporting

The TIO has gained numerous headlines by publishing that they received 168,000 complaints in the 2010 year²⁸.

However, an analysis of those complaint numbers shows that there are actually much fewer complaints received.

The TIO counts complaints numerous times when producing its statistics, so a Level 3 complaint, would be counted no less than 3 times and perhaps up to even 5 times in the statistics²⁹.

Given that a Level 1 complaint has no investigation or validation, it would seem inappropriate to refer to these as complaints, but rather as contacts.

Therefore, this leaves 413 Level 4 cases, 3,789 Level 3 cases and 19,860 Level 2 cases of which when normalised for multiple-counting means, that the TIO actually handled 413 Level 4 complaints, 3,376 Level 3 complaints and 15,658 Level 2 complaints.

²⁸ Stuart Corner, *TIO complaints figures: the good, the bad and the ugly* (2010) ITWire, <<http://www.itwire.com/it-policy-news/regulation/43692-tio-complaints-figures-the-good-the-bad-and-the-ugly>> at 31 March 2011

²⁹ Brett Winterford, *Telco questions TIO complaint count* (2010) ITNews, <<http://www.itnews.com.au/News/172718,telco-questions-tio-complaint-count.aspx>> at 31 March 2011

Therefore, a more appropriate figure would be that the TIO investigated 19,447 complaints in 2010.

Further, in 2008, the TIO ceased reporting on the distribution of how complaints are adjudicated in terms of being in favour of consumers, CSPs, etc. The last set statistics published in the 2007 annual report³⁰ indicate that neutral outcomes were approximately 53%.

It is not clear what a neutral outcome is despite the description, but it would appear that it is a result that favours neither the consumer nor the CSP. This may mean that more than half of the complaints processed by the TIO result in no discernable outcome for either the consumer or CSP.

2.3.2 Transparency

The surveyed CSPs raised a number of issues with respect to transparency.

In particular, that:

- The TIO is not subject to Freedom of Information legislation
- Minutes from TIO Council and Board meetings are secret
- TIO Council members are bound by strict confidentiality
- TIO Board members are bound by strict confidentiality
- TIO Council members are legally obliged to act in the best interests of the TIO even if this is to the detriment of consumers or CSPs

The CSPs surveyed express frustration that they were unable to discuss operational matters with their elected members on the council and did not have any visibility of the policy and operational dialog within the TIO.

2.4 Independence

The independence of the scheme is sometimes questioned on the basis that Ombudsman is an agent of industry because it is funded by industry and its board of directors consists predominately of industry members³¹. However, the observed universal discontent in industry with the scheme ought to finally put such rhetoric to rest.

The TIO has a tripartite governance structure consisting of a board overseeing fiduciary duties, a council overseeing policy matters and the ombudsman overseeing the execution of the ADR function.

³⁰ Telecommunications Industry Ombudsman, *Annual Report 2006/2007* (2007), <http://www.tio.com.au/publications/annual_reports/ar2007/PDF/PartTwo.pdf> at 31 March 2011

³¹ David Hyatt, *Opinion: Telcos need to address TIO disquiet* (2010) IT News: Haymarket Media, <<http://www.itnews.com.au/Tools/Print.aspx?CIID=238301>> at 20 March 2011
Conrad Walters, *Ringling in changes* (2010), Sydney Morning Herald: Fairfax Media, <<http://www.smh.com.au/money/ringing-in-changes-20101207-18ngl.html>> at 20 March 2011

The council consists of equal numbers of elected industry and consumer representatives with an independent chair. In many ways, the structure mimics that of the classic separation of powers with a legislature (council), judiciary (ombudsman) and executive (board of directors).

The three former ombudsmen recommended the collapse of the governance into a single board in their submission to the ACMA reconnecting the customer inquiry³² however it is unclear as to how this would be of significant benefit to the scheme given that board members are primarily concerned with fiduciary and compliance matters while council members are predominately concerned with matters of policy. While the two are not by any means mutually exclusive, the tripartite management structure allows persons with specific interests and skills in each area to apply them without burden or distraction.

Given that the minutes of the board and council meetings are secret, it is difficult for anyone outside the TIO to determine if the structure is successful and it would be preferable to at least assess the capability and performance of the current structure before making structural change.

2.5 Funding Model Conflict of Interest

As described in previous sections, the TIO receives its funding as a result of the reception, investigation and escalation of complaints. The TIO is also able to raise a special levy against its members to cover any funding deficit or capital program³³.

Theoretically, the funding model is a perfect regulatory instrument to reward CSPs which do not receive complaints or resolve them expeditiously and punish those rouge CSPs who attract numerous complaints or fail to adequately resolve them. There is no doubt that there are rouge CSPs in the industry worthy of punishment.

However, in practice, the funding model creates a conflict of interest because it lacks the controls to address how the tenure and operation of the TIO might continue if complaints recede or dwindle. Further, it contains no provisions to actively reward the TIO for reduction in complaint numbers and escalations. Therefore, a number of CSPs have asserted that it is in the TIO's interest for the organisation to receive and escalate as many complaints as possible³⁴.

Further, a number of CSPs stated in their survey responses that it was their experience that the TIO undertook steps to attract (TV advertising, 'how to complain packs' handed

³² Australian Communications and Media Authority, *Reconnecting the Customer* (2010) Cleary, O'Donnell, Pinnock submission <http://www.acma.gov.au/webwr/_assets/main/lib311946/126_cleary_odonnell_pinnock-reconnecting_the_customer.pdf> pg. 3 at 30 March 2011

³³ Telecommunications Industry Ombudsman, *Funding Arrangements* (2010) <<http://www.tio.com.au/policies/funding%20arrangements.htm>> at 30 March 2011

³⁴ Australian Communications and Media Authority, *Reconnecting the Customer* (2010) Beagle submission <http://www.acma.gov.au/webwr/_assets/main/lib311946/122_beagle-reconnecting_the_customer.pdf> pg. 3 at 30 March 2011

out at Universities, etc) and escalate complaints in a manner which was in its own best interests and not in the interests of consumers, industry or regulators.

This type of funding model is consistent with other Ombudsmen schemes but varies significantly from that of any independent court, tribunal or alternate dispute resolution scheme in that the tenure and stature of the entity, its staff and management does not rely on the volume of cases before them. One does not see the Small Claims division of the NSW Local Court advertising its services in the mass media as a service to recover money or resolve fencing disputes.

As the TIO functions predominately as a judiciary, one might argue that it should also in many ways, act like a judiciary.

There are a number of potential reforms to the funding model which could address this perceived conflict without structural regulatory change. These could include:

- Payment of a nominal fee by consumers to lodge a complaint in the order of magnitude of other consumer focused courts and tribunals such as the NSW CTTT³⁵. For example:

CTTT Application Type	Cost
Claim or dispute not exceeding \$10,000	\$35.00
Claim or dispute between \$10,000 and \$30,000	\$72.00
Pensioners and students (all applications)	\$5.00

- Government funding for processing of complaints (potentially funded by carrier license fees) and instead application of pecuniary penalties to CSPs for non-compliance with industry codes.

We believe that it is critical that any reform to the funding model also simultaneously address the issue raised by CSPs of the alleged wide-spread extortion by unscrupulous consumers that use the funding model of the TIO scheme as leverage to obtain benefits for which they are not entitled or release themselves from obligations.

At this stage of the research, we are not in a position to recommend any particular model for funding reform or assess the merits of any of the aforementioned examples.

2.6 Accountability

A common theme in the responses from CSPs is that they believe the TIO lacks accountability because its decisions, policy and practice are not reviewable by any external entity. Further, the CSPs have stated that as council and board meetings are secret, they are unable to ascertain any information regarding the manner in which the organisation they fund is operated.

³⁵ Consumer, Trader and Tenancy Tribunal, *Fees and charge* (2011), <http://www.cttt.nsw.gov.au/Applications/Fees_and_charges.html> at 31 March 2011

Therefore, a key measure to address this discontent from members and presumably consumers alike would be for the TIO to lift the veil of secrecy on its management and operation and avail itself to external review.

3. Preliminary Summary and Conclusion

It is clear from the survey results, that industry is extremely dissatisfied with the policy and practice of the TIO.

Further, industry has framed this dissatisfaction with respect to their customers, stating that the TIO is failing to provide fair and economical resolution of complaints.

These results appear to be inconsistent with oft repeated assertion that the Ombudsman is an agent of industry because it is funded by industry and its board of directors consist predominately of industry members³⁶. If the hypothesis were to be true, unilateral contentment with the scheme would be expected.

Our interim recommendation is that no increases in jurisdiction or power ought to be granted to the TIO until the judgement in the *Exetel* is handed down as the serious nature of allegations must be taken into consideration.

However, we do still recognise that a number of simple, interim reforms may be undertaken immediately to benefit all stakeholders without materially affecting the powers of the TIO or prejudicing the proceedings.

Our recommendations are as follows:

- (i) Amend TIO policy and/or legislature to cause the TIO to fall under and comply with Freedom of Information³⁷ legislation including disclosure and publication of TIO Council meeting minutes and discourse.
- (ii) Amend TIO policy and procedure to cease the multiple counting of complaints in statistics.
- (iii) Amend TIO policy and procedure to refer to Level 1 Complaints as *Contacts* rather than Complaints.
- (iv) Request the TIO to comply with existing policy that requires a complainant provide evidence that they have attempted to resolve the matter with their CSP by completing their Complaints Handling Process as per section 9 of the

³⁶ David Hyatt, *Opinion: Telcos need to address TIO disquiet* (2010) IT News: Haymarket Media, <<http://www.itnews.com.au/Tools/Print.aspx?CIID=238301>> at 20 March 2011
Conrad Walters, *Ringling in changes* (2010), Sydney Morning Herald: Fairfax Media, <<http://www.smh.com.au/money/ringing-in-changes-20101207-18ngl.html>> at 20 March 2011

³⁷ Corporations Act 2001(Cth)

TCP code C628:2007³⁸ before a *Contact* is registered. This approach is consistent with other Ombudsman schemes that require a “deadlock letter” be produced before a complaint may be registered.³⁹

- (v) Request the TIO function within its jurisdiction.
- (vi) Fill the accountability void by articulating or creating avenues of external review for both consumers and CSPs to seek appeals on both merit and procedural grounds.

Upon the completion of our second phase of research, we will be in a position to make final recommendations regarding structural reform to the regulatory environment as well as the TIO.

³⁸ Australian Communications and Media Authority, *Telecommunications Consumer Protections Code C628:2007* (2007) Communications Alliance <http://www.acma.gov.au/webwr/telcomm/industry_codes/codes/c628_2007.pdf> at 30 March 2011

³⁹ Australian Communications and Media Authority, *Reconnecting the Customer* (2010) AAPT submission <http://www.acma.gov.au/webwr/_assets/main/lib311946/105_aapt-reconnecting_the_customer.pdf> pg. 3 at 30 March 2011

4. Disclosure Statement

The authors of this discussion paper make the following disclosures:

- (i) This submission to the DBCDE consultation on TIO reforms was solicited by Ms Emma Shadbolt, Assistant Director of Consumer Policy & Privacy at the Department of Broadband, Communications and the Digital Economy on 15 March 2011.
- (ii) The views expressed in this paper represent those of the researchers only and do not represent the views of the University of Technology, Sydney.
- (iii) The research contained in this paper is based upon information supplied by participating carriage service providers which we believe to be true.
- (iv) The recommendations made in this paper are subject to change upon completion of our research.
- (v) The authors of this paper hold shares and securities in a number of Australian carriage service providers.
- (vi) The primary investigator, Liam Widdowson is actively employed in senior positions in the Australian Telecommunications industry. Some of the research contained in this submission forms part of a postgraduate coursework project.
- (vii) Nerida Caesar, Group Managing Director, Telstra Corporation Limited is a member of the University of Technology's Vice Chancellor's Industry Advisor Board.
- (viii) The Faculty of Engineering and IT has received research grants for an unrelated project ("Web-based Telecom Service Recommendation System for Optus Potential SMB Customers") in the year 2011 from carriage service provider Singtel Optus.