

- 27 Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com. No 40) (1970) (HCP184).
- 28 *D&F* (n 4) 207 Lord Bridge.
- 29 Law Com. No. 40 (n 27) para 73.
- 30 Section 1 (5) of the DPA provides that: 'Any cause of action in respect of a breach of the duty imposed by this section shall be deemed for the purposes of the Limitation Act 1939, the Law Reform (Limitations of Actions) Act 1954 and the Limitation Act 1963 to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished'.
- 31 [2003] EWCA Civ. 408.
- 32 [2009] 124 Con LR 1.
- 33 *Ibid.* See also Sinclair Stacy & Elliot Fenwick, comments on *Bole v Huntbuilds Money* [2009] EWHC.483 (TCC). Available at: [http://www.building.o.uk/story.asp?storycode=3138717-](http://www.building.o.uk/story.asp?storycode=3138717) (accessed 23 April 2011).
- 34 *Bole* (n 33) 23–27.
- 35 *Ibid* 17–22.
- 36 *Ibid* 30–31.
- 37 *Ibid.*
- 38 *Ibid.*
- 39 *Ibid.* See also *Jensen* (n 20).
- 40 See Law Com. No. 40 (n 27).
- 41 *Alderson* (n 31) 409–410.
- 42 *Ibid.*
- 43 *Ibid.*
- 44 *Ibid* 411.
- 45 *Ibid.*
- 46 *Ibid.*
- 47 See *Murphy* (n 5).
- 48 It is argued that it is imperative that these amendments be incorporated into the DPA as it will alleviate the perceived inconsistency between ss 1 and 3 of the DPA.
- 49 [1983] 2 AC 1 (HL).
- 50 [1963] AC 758.
- 51 *Ibid* 17.
- 52 *Ibid* 18.
- 53 Michael A Jones and Anthony M Dugdale (eds), *Clerk and Lindsell on Torts* (20th edn Sweet & Maxwell, London 2010) 2104.
- 54 [1964] AC 465.
- 55 [2011] EWHC 1722 (TCC).
- 56 See also Jane Stapelton, 'The Gist of Negligence' (1988) 104 LQR 213, 237-8 and Elizabeth Parker, 'Complex Theory and the Latent Damage Act 1986' September 2011 *Construction Review* pp.1–3.
- 57 A Grubb, 'A Case for Recognising Economic Loss in Defective Building Cases' [1984] CLJ 111.

Telecommunications industry self-regulation: assessing the Telecommunications Industry Ombudsman Scheme in Australia

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Abstract: In Australia, the Telecommunications Industry Ombudsman (TIO) is a private corporation enacted by parliament as the sole alternate dispute resolution mediator between carriage service providers (CSPs) and consumers. The TIO is designed as an office of last resort and relies on attracting, receiving, investigating and escalating complaints as its sole source of funding. Currently, the Telecommunications Act requires all CSPs to become members of the TIO scheme. The research project was undertaken to study the effectiveness of the TIO scheme in 2010–2011. The project results demonstrated universal and significant dissatisfaction with many material aspects of the TIO scheme. Further, the analysis of TIO key performance metrics uncovered patterns that provide some evidence of the issues raised by CSPs in their responses. A comprehensive legal analysis of the unique position of the TIO considered the sources of power the TIO relies upon and offers some insight into perhaps why the scheme operates in the manner it does. In conclusion, a set of recommendations is made to reform the scheme to provide fair, just and economical outcomes for CSPs and consumers.

Keywords: Telecommunications Industry Ombudsman; TIO; carriage service providers.

Reference to this paper should be made as follows: Widdowson, L. and Li, G. (2013) 'Telecommunications industry self-regulation: assessing the Telecommunications Industry Ombudsman Scheme in Australia', *Int. J. Private Law*, Vol. 6, No. 3, pp.315–328.

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1 Introduction

The Telecommunications Industry Ombudsman (TIO) is a private, statutory corporation enacted by parliament as the alternate dispute resolution mediator between carriage service providers (CSPs) and consumers (including small business). 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 Act 1997 (Cth) requires all CSPs become members of the TIO.

In the recent years, the number of the complaints received by TIO has increased dramatically. In this context, a multi-phased study was carried out during 2010–2011 to study the effectiveness of this scheme. Research activities in the project included a comprehensive documentary research to identify problems and form research tasks, a large-scale survey to gain an insight into the policy and practice of the TIO from the perspective of CSPs; and an in-depth analysis of TIO cases to verify the research results. At the completion of the study, a set of recommendations to the TIO scheme was prepared in order to provide a fair, just and economical outcome for both CSPs and consumers in Australia.

2 The TIO scheme in brief

Australia was the first country in the world to introduce a telecommunication industry ombudsman. The organisation was created as a private statutory corporation in 1993 by an act of Federal Parliament¹.

The TIO is a private corporation limited by guarantee and governed by the memorandum and articles of association and a constitution as outlined by the Corporations Act 2001 (Cth). The corporation consists of members who are carriers or CSPs mandated by section 128 of the Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth) (the Act) to join the scheme.

The constitution of the scheme established a tripartite structure to govern the organisation, which in some way mirrors the classical separation of powers found in Commonwealth governments. The structure consists of The Ombudsman, who is responsible for complaint handling and the day to day management and structure of the scheme as defined in the constitution; The Council, which is a group of four industry and four consumer representatives with an independent chairperson responsible for setting the policy direction of the scheme; and the Board of Directors, which is a board of up to seven directors comprised of members and an independent director responsible for the fiduciary and corporate compliance of the scheme. Prima facie, this structure allows the scheme to be independent of consumers, government and CSPs while remaining industry funded.²

The jurisdiction of the scheme is defined by a combination of Sections 5 and 6 of the Telecommunications (Consumer Protection and Service Standards) Act (1999) and the Constitution³. The TIO has jurisdiction to investigate complaints regarding fixed and mobile telephone services; the provision of internet access; operator and directory assistance services; fault reporting and repair; printed and electronic directories; billing not in accordance or failure to supply a service with respect to Part 23 of the Telecommunications Act; and interference with the privacy of an individual with respect

to the Privacy Act 1988 or industry codes; as well as failure to access a carriage service as a result of a failure in customer premises equipment supplied to facilitate access to that carriage service. If in the course of the investigation of a complaint, the TIO determines that an industry code has been breached, it is obliged to refer code violations or systematic problems to the Australian Communications and Media Authority ('ACMA'), which may then elect to undertake a form of enforcement method such as prosecution. As a result, the TIO holds a dual role as a quasi-judiciary and an industry co-regulator⁴.

3 The issues

The rationale of the Ombudsman is to create an entity that can facilitate resolution between parties where there is a significant imbalance in power between the complainant and the accused such that any traditional means of legal redress are unrealistic.

The TIO scheme has now operated for almost 20 years in Australia with limited change or reform to the structure and execution of the scheme. During this period, a number of issues have been raised which are of concern, of which, the imbalance of power is a key issue.

The imbalance between an individual consumer and the initial members of the scheme Telstra, Optus and Vodafone, which are large corporations, is obvious. However, as of June 2011, there are 1701 members of the TIO scheme and in excess of 90% of these members are small businesses or small owner operators⁵. Therefore, there is a question to be answered with respect to if an imbalance actually still exists between the vast majority of members and consumers or if there is now, in fact, a newly created imbalance where the TIO is exerting its considerable power and resources over carriage service providers as a consumer advocate? In this context, consideration of conflict of interest, transparency, reporting and decision making, are specified as below to form the hypothesis of this study.

Conflict of interest – In McCarthy⁶, his honour Lord Hewart CJ, stated that: "Not only must justice be done; it must also be seen to be done". Since the inception of the TIO, it has been the subject of accusations from both consumers and industry alike that the Ombudsman and executive are biased. The argument for the consumer side is well ventilated and some commentators goes so far to conclude that the scheme is a 'scam' on the basis that it fails to satisfy the requirements of administrative law or alternative dispute resolution ('ADR') bodies as it sources its funding and board of directors from the industry⁷.

Conversely, recent submissions to the government from CSPs have asserted that the TIO is a consumer advocate rather than an impartial mediator. A number of CSPs have also gone so far as to accuse consumers of regularly misusing the structure and procedure of the TIO as an instrument of extortion⁸ and that the growing number of complaints is a result of the TIO attracting and escalating first contact, frivolous or vexatious complaints rather than a sign of genuine systemic industry failure.⁹ Further, one industry submission contends that a conflict of interest arises within the structure of the TIO funding model as the tenure of the Ombudsman and executive relies solely upon increasing complaint numbers with no incentives to reduce complaints.¹⁰ Therefore, there is a question to be answered regarding if any conflict or bias exists, and if so, to what extent and who enjoys its favour.

Transparency. Unlike the Commonwealth Ombudsman, the TIO is a private corporation and is therefore not subject to Freedom of Information legislation and with exception of the annual general meeting (which is held in a public location and minuted), all documents held by the organisation are not available to members or the public. Council and board members are bound by strict confidentiality agreements with non-disparagement clauses and are not able to discuss any matters pertaining to the TIO with anybody. All complaints are confidential and therefore, the process, like some ADR entities, has a characteristic of 'star chamber' procedures, which is inappropriate given the focus on public welfare of the organisation.¹¹

Reporting. The reporting of the TIO is another issue. In particular, the TIO counts a single complaint multiple times so it is impossible to know how many real, unique complaints were made in a single year¹². A number of service providers also claim that the TIO accepts large numbers of first contact or out of jurisdiction complaints and therefore the complaint figures themselves are questionable.¹³ The TIO receives revenue for each time it counts and attributes a complaint to a CSP so this may form part of the reason as to why an individual complaint might be counted several times. Furthermore, as the TIO stopped publishing the disposition of complaints in 2008, it is impossible to know what proportion is found in favour of consumers or CSPs anymore.¹⁴

Decision making. The procedures and quality of decisions made by the TIO are of paramount importance because unlike a court or tribunal, neither party has a right nor prescribed course of appeal¹⁵ and the verdict is not constrained solely by the law, but may be made upon a principle of being 'fair and reasonable'¹⁶ (Ombudsman, 2010). The challenge is that what is fair and reasonable is arguably subjective and not always consistent, as the laws of precedence does not apply. Without precedence or standards amongst ombudsmen¹⁷, it is likely that outcomes will be inconsistent between adjudicators.

The UK Building Society Ombudsman has stated that he applies the principal of 'Clapham omnibus' (the view of a reasonable, educated man standing at a bus stop) in his determinations. It must be noted that all financial sector ombudsmen in the UK are former lawyers or barristers and the vast majority of staff are also legally qualified¹⁸. Arguably, an ombudsman with legal background might pay more consideration to natural justice, equity and the law than a layperson.

Moreover, the Telecommunications environment itself adds an additional layer of complexity when making decisions because matters of a technical nature and industry practices and norms must also be considered with equal importance. In stark contrast to the UK financial services ombudsmen, the vast majority TIO investigation staff possesses neither legal nor telecommunications qualifications but rather, tend to have backgrounds in consumer advocacy or social justice as outlined in staff profiles in the TIO annual reports.

Clearly, the lack of adherence to established legal precedence, legal doctrines, common law principles and statutes fundamentally removes predictability from the industry when entering into or completing transactions with consumers. That is, that the contract or standard form of agreement between the consumer and the CSP, no matter how learned the lawyer who drafts them, are worthless and only enforceable when the TIO make such a determination on a case-by-case basis.

The unpredictable nature of the Ombudsman scheme means the rights of CSPs with respect to enforcement of contract terms, or indeed, possession of assets exist only until the Ombudsman decides it is fair and reasonable for them to be transferred to someone

else.¹⁹ In essence, every CSP operates in an industry for which there is no certainty in the transactions or interactions with their customers.

As the act of creating the Ombudsman as a self-regulator within the newly deregulated telecommunications industry was an act of policy, it is critical that this does not cause justice to give way to policy as noted by Hotham LCJ in *Prideaux*²⁰.

The aforementioned issues can, in some way, be crystallised into a single hypothesis. That is: "The Telecommunications Industry Ombudsman is afflicted by various issues that may compromise the delivery of procedural and judicial fairness in dealing with complaints".

Cost. While the dispute resolution service is free for consumers, the complaint handling service fee is paid by the CSP even if the complaint is found in favour of the CSP or is frivolous and vexatious. The minimum cost of a complaint of average complexity is no less than \$766. The average monthly revenue per user for a very large carriage service provider is \$50.25 with a gross margin of just \$15.04. This means that it would take over four years of continuous custom in order to break even on a customer who lodges an average complaint of average complexity. Further, the quantum of the complaint handling fee is disproportionate with any likely disputed amount by at least an order of magnitude which in essence places undue pressure on CSPs to concede on any issue to achieve a commercially palatable outcome without regard to justice.

The rest of this paper is thus dedicated to testing the above hypothesis.

4 The documentary research – TIO's legal position

In this phase, a numerical and statistical analysis has been performed along with a literature review to consider the rise in complaints and sources of power and legal issues surrounding the scheme. The statistical analysis was performed on public information published in the TIO annual reports between 1995 and 2010²¹ in order to identify any underlying patterns or factors in the growth of complaints while the legal analysis considered relevant case law and scholarly resources.

4.1 The sources of power

Prior to considering any matters related to the legal status of the TIO, it is important to first identify and characterise its sources of power. The sources of power of the TIO include: Section 128 (1) of the Act by requiring all carriage service providers join the scheme; Section 128 (4) of the Act by prescribing that the scheme is to investigate, give directions and make determinations with respect to complaints; and, s.140 of the Corporations Act 2001 (Cth), the constitution of the TIO has the effect of a contract between the members and the organisation.

In spite of the fact that the TIO has powers to make binding determinations and directions, the TIO is not considered to have judicial powers as in *Viper*²², his honour Sackville J, noted that the judicial nature of making binding determinations is a grey area of the law. Further, in *Rola*²³, his honour Latham CJ observed that just because the decisions are binding, does not mean they are a result of judicial power as persons are 'bound' by private contract, statutes, etc. Further, as the TIO has no power of

enforcement and must instead rely on ACMA to bring about court proceedings, his honour Sackville J found that the TIO was not conferred judicial powers.

4.2 The legal status of TIO – public officer or trading corporation

Due to the fact that TIO received its power from both legislation and contract, the legal status of TIO is uncertain. Arguably, it could be considered as a public officer and therefore subject to Administrative Law, which gives the rise of actions such as torts of malfeasance or misfeasance.

Traditionally, the test for being a public officer is that the person or entity must be 'paid out of public funds (i); and owes duties to members of the public as to how the office shall be exercised (ii)'. It is clear that the TIO meets test (ii) but not likely test (i) here, depending on how a definition of public funds is argued. It is however, likely, that any view of the definition of 'public funds' would be formed based upon taxation. In *Viper*²⁴, it was held that the fees related to the scheme do not amount to a form of taxation and therefore any contrary argument would likely fail.

Nonetheless, in modern government, more and more services of a public nature are privatised and delivered by the private sector.²⁵ The nature of the services provided by Ombudsmen, that is, regulation, consumer protection and dispute resolution are more of a public nature and they are established for the benefit of the public supported by a statutory framework.²⁶ This position is also supported in case law as in *Aga Khan*²⁷, where his honour Hoffman LJ noted that an organisation "which exercises governmental powers is not any less the amenable to public law because it has contractual relations with its members".

In the event an action of misfeasance or malfeasance is pursued, the plaintiff would have to be an entity to whom the TIO owed a duty of care not to commit the particular abuse and that entity would have had to suffer pure economic loss as a result of the tortious act. Further, in order for any such argument to succeed, the act must have been performed with intent to cause harm and knowingly or recklessly ultra vires. If successful, the aforementioned torts afford a remedy of liquidated damages including exemplary damages.²⁸

However, putting aside the obvious hurdles in establishing the TIO as a public officer, it might be that the Ombudsman has a defence based upon statutory authorised damage as established in *Geddis*²⁹. It could be argued that any economic loss experienced by a CSP is as an inevitable consequence of the implementation of the Act as established in *Manchester*³⁰.

On the other hand, if the TIO is not a public officer, perhaps it could instead be considered a trading corporation and therefore subject to the Competition and Consumer Act 2010 (Cth). In order for the TIO to be a trading corporation, it must first be determined if the organisation is in trade or commerce.

In *Capital Networks*³¹, the plaintiffs argued that the .AU Domain Administration Pty Ltd (AUDA), a private, proprietary corporation created by the Commonwealth Government to regulate and administer the '.au' internet domain name addresses on the internet, had engaged in misleading, deceptive and unconscionable conduct and therefore was in breach of the Trade Practices Act 1974 (Cth) (as it was then). While the AUDA obtained its power from private sources only and had no statutory sources of power, the use of a private corporation to perform regulatory functions is similar in nature to the TIO. In the judgment, her honour, Bennet J considered the conduct of the defendant only

and once she determined that they did not engage in unconscionable or deceptive conduct, purposefully made no determination on whether the organisation was engaged in trade or commerce.

In *RSPCA*³², his honour Weinberg J, provided further guidance with respect to causes of action under the consumer protection legislation. In particular, that any statements or actions performed by a person arising in an alleged breach, need to be considered in light whether they were performed in trade or commerce. That is, it is not sufficient (or even necessary) to establish that the corporation is in trade or commerce but rather that action itself was made in the course of (but not in relation to) trade or commerce.

With respect to the actions of the TIO, it would need to be established that actions of an investigation officer in making a decision or investigating a complaint occurred in trade or commerce. Given that the investigation and decision making process is made on a fee for service basis, there is merit in such an the argument, but likewise, the obvious retort is that the actions are performed as a result of the regulatory function of the TIO, in the manner of a public officer, rather than in trade or commerce.

There has been little action in Australia or guidance from either the TIO or the Commonwealth Government therefore the sources of power and legal status of the TIO remains a matter of conjecture until an action is brought forth. We therefore look to other common law jurisdictions for guidance on the matter.

4.3 The TIO's decision making power and the matter of judicial review

In *Datafin*³³ their honours of the UK Court of Appeal held that a private company, the Takeovers Panel which was solely responsible for exercising a public function, had a duty to act judiciously and therefore was subject to juridical review. However, a divergence from this position grew in *Aegon*³⁴ which was an application for judicial review against decisions made by the Insurance Ombudsman in the UK. In this case, his honour Rose LJ looked to *Aga Khan*³⁵, where a race horse owner sought judicial review for decision made by a private body that controlled horse racing in the UK. In his judgment, his honour sought to derive three key principles: one, a monopolistic body which permits no alternative market may not be subject to juridical review and will not be if it is not in its origin, history, constitution or membership a public body; two, bodies who's creation and constitution owed nothing to any exercise of governmental power may be subject to judicial review if it has been woven into the fabric of public regulation, is a surrogate of government or but for its existence a government body would assume control; and three, judicial review should not be extended to a body whose powers derive from agreement of the parties and where effective private law remedies are available.³⁶

In formulating his decision on the case, that is, that decisions of the Insurance Ombudsman are not reviewable, Rose LJ looked to these two key facts: one, the Insurance Ombudsman was setup as a private Ombudsman by insurance companies and private law remedies were available; and two, the voluntary status of the scheme did not satisfy it as monopolistic.

The implication of *Aegon* is that it is likely that some Ombudsman might be subject to judicial review and some may not.³⁷ As such, in spite of the decision it would appear that the TIO might be subject to judicial review based upon Rose LJ's three principles.

However, two very recent cases are likely to support a different position. In *Heather Moor*³⁸, the plaintiff brought proceedings against the Financial Ombudsman in the UK

with respect to being denied an oral hearing. The plaintiff contended that the Ombudsman was required to determine complaints in accordance with the rules of English law. The plaintiff was unsuccessful in a number of jurisdictions and ultimately the Court of Appeal held that, the Ombudsman was entitled to decide by 'reference to what is, in the opinion of the ombudsman, fair and reasonable in all circumstances of the case'. The case creates some of the most significant case law giving clear direction that an Ombudsman is not constrained by the law when making decisions. However, his honour Davis J did note that if the Ombudsman was negligent, perverse or irrational, or that rules were not reasonable and justifiably applied, any such decision was liable to be set-aside on conventional judicial review grounds. In *Exetel*³⁹, an Australian CSP has brought proceedings in the Federal Court against the TIO arguing breach of statutory duty of care with respect to negligence in the handing of cases but the matter was settled confidentially without having the issues considered at trial.

Similar issues were raised again in *BBA*⁴⁰, where the British Bankers Association brought proceedings against the Financial Services Ombudsman and Financial Services Authority (the government department that empowers the ombudsman) in the High Court of the UK on three grounds – arbitrary nomination of principles in policy statements where those principles contradicted with rules of law, the actionability of those principles and finally the obligations of the plaintiff that arose from those principles. In his decision, Ouseley J again reaffirmed that the Ombudsman need not abide by the law in constructing decisions and paradoxically, that its policy statements were giving rise to obligations owed by firms to customers but these obligations were not actionable by law. This judgment reinforced the fact that there is no course of appeal for the decision of an Ombudsman and the subjective vagueness of the fair and reasonable criterion makes any judicial review of decisions for all practical purposes impossible.⁴¹

This is also consistent with the findings in *Viper*⁴² where Sackville J labelled the legislation underpinning the TIO as meagre and curious based upon its absence of guidance with respect to how the TIO go on about making determinations or directions. His honour specifically identified that the TIO need not implement a scheme for which they are bound to make determinations by applying settled legal principles to the facts of particular complaints. However, his honour did note that such principles could instead be woven into the scheme through changes to the Constitution.

While there has been no judicial consideration in Australia of the status of the TIO or its decisions, guidance from the common law decisions of UK would appear to affirm that decisions by the Ombudsman may contradict the law and are not reviewable by any entity.

5 Anonymous CSP survey

Based on the issues identified from the legal and statistical analysis above, a wide range of CSP survey was carried out in 2010. In order to collect anonymous information from the CSPs, a decision was made that the most accessible and simplest way to do this would be via a website which CSPs could visit and input their results. The nominated TIO contact for each CSP would be sent an e-mail with a link to the survey containing some anonymous but unique identification.

5.1 Survey results

Results were received from CSPs that represent in excess of 3,000,000 Australian small business and consumer Telecommunication customers. The respondents included two very large carriage service providers in the top-5 as well as numerous other small and medium sized providers.

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

- 1 61% of CSPs have experienced one or more complaints lodged against their organisation against the express wishes of the complainant/consumer.
- 2 81% of CSPs have experienced the TIO accept complaints that were in their opinion out of jurisdiction.
- 3 71% indicated that they do not believe the services provided by the TIO represent good value for money.
- 4 90% indicated that they have experienced the TIO act as a consumer advocate rather than an impartial mediator.
- 5 64% indicated that they have experienced TIO officers make decisions in contradictory ways.
- 6 81% 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.
- 7 97% 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.
- 8 48% indicated that they have stopped lawfully collecting duly owed debts because of a fear of TIO complaints.
- 9 80% indicated that both consumers and industry do not benefit from the current regulation performed by the TIO.
- 10 81% indicated they would prefer a formal legal tribunal replace the TIO.
- 11 45% would welcome more formal and rigid regulation.

The quantitative and qualitative results show that there is universal dissatisfaction and that industry has numerous issues with respect to the policy and practice of the TIO. This high degree of dissatisfaction is likely to dispel the myth that the TIO is an agent of industry.

To further verify the survey result, the project invited the CSPs to provide cases decided by the TIO and then performed a comprehensive case study.

6 Case analysis – verification of the survey result

In order to verify the survey results and explore the matters further, CSPs were invited to send in actual TIO cases for analysis. In excess of 100 cases were provided, but a number

of typical cases were selected for analysis. In each case, the correspondence from the TIO, complainant and CSP has been sited and appear to be bona fide true copies. All correspondence had personal information redacted prior to supply.

6.1 Case study 1 – GST complaint (Level 1)

Key facts: The following complaint was lodged against a listed, very large sized carriage service in 2011. In this case, the complainant wanted to cancel his/her contract without paying the early termination fee. The complainant's reason was he/she was not aware of the extra \$10 monthly Good and Services Tax (GST) was part of the contract, where CSP said they mentioned it over the phone and it was written on its website.

Analysis: Pursuant to the law, the CSP in question displays all charges on their website inclusive of GST and as they are predominately focused on providing consumer services, all communication of prices is GST inclusive. The requested resolution from the complainant of removing GST would be unlawful and a request to be released from the contract without paying an early termination fee would be unjust. The complaint itself appears to be frivolous and vexatious but was accepted by the TIO nonetheless and the CSP in question billed \$31 (ex GST) plus volume fees. The acceptance of this complaint appears to be consistent with the judgment in Kirk⁴³ with respect to the acceptance of any and all kinds of mischief.

6.2 Case study 2 – Lead-in damaged by contractors (Level 4)

Key facts: The following complaint was lodged against a very large sized CSP in April 2010. All CSPs in Australia rely on the incumbent, Telstra, for repair and maintenance of the customer access network. The nature of the complaint and events are as follows:

- 1 The complainant had a service with the CSP for several years.
- 2 The complainant subdivided his land and began building a house on the newly subdivided lot.
- 3 The builders severed and severely damaged the telephone lead-in cable beyond repair. The builders did not call 'dial before you dig'.
- 4 The complainant contacted the CSP and they sent a Telstra technician to assess the fault.
- 5 The Telstra technician installed a temporary above-ground lead-in cable.
- 6 Telstra advised that the customer needs to either pay Telstra a quoted amount of \$3800 to run and bury a new underground lead-in or alternatively organise for a contractor of their own to do so.
- 7 The customer refused and continued to use the above-ground temporary lead-in cable which occasionally was prone to faults due to physical damage or poor weather.
- 8 The complainant lodged a complaint with the TIO.
- 9 The complainant requested a resolution that the CSP:

- a organise the permanent replacement of the temporary cable with a permanent cable
 - b follow up the damaged cable issue with the builder that damaged the cable.
- 10 As part of their resolution of the complaint, the CSP had already:
- a waived all line rental fees
 - b offered the customer release from his contract without penalty.

In investigating the complaint, the TIO took the view that as faults were regularly experienced on the temporary lead-in cable, the complainant was entitled to a CSG compensation payment for the entire period and that CSP should pay for the restoration of the lead-in cable. The total cost to the CSP would have exceeded \$10,000. In negotiating an outcome with the consumer in order to avoid an adverse determination from the TIO, the CSP paid a contractor \$3,400 for the installation of the permanent lead-in cable and in return had the customer sign a Customer Service Guarantee waiver.

Analysis: It is clear that the above complaint fails within the jurisdiction of the TIO but it appears that the complaint has been escalated without appropriate consideration. In particular, it would appear that such a complaint ought to have been closed at Level 2. Of some concern, is that despite the significant investigation which occurs with any Level 4 complaint, the TIO developed a position without regard to the Act which defines the Customer Service Guarantee.

Section 22 (2) of the Act allows a provider to claim an exemption to payment of compensation for a service damaged by a third party. Therefore, the CSP was entitled to rely on this provision to release it from any obligation of compensation.

Further, the damage caused by the complainant's builder was not something that ought to have been pursued by the CSP. Indeed, the CSP noted that no commercial or contractual relationship existed between it and the builder which gave rise to some difficulty in recovering damages.

A more appropriate scenario would have been for the complainant to pay for the installation of the permanent lead-in cable and seek damages from the builder in the Small Claims division of the Local Court or the CTTT.

It would appear that this complaint might be considered as an example of both the development of a 'distorted position' and an 'acceptance of all mischief' as described by Kirk⁴⁴.

7 Conclusions and recommendations

As a result of the analysis performed on the legal and regulatory status of the TIO, survey results and case studies, a number of issues and recommendations have been formulated at the completion of the project. The key issues are:

- 1 It appears a lack of transparency in the TIO practices and procedures, including inaccurate and misleading statistics and insufficient information disclosure.
- 2 It appears that the TIO scheme can be used by unscrupulous complainants for frivolous, vexatious and inappropriate complaints, which damages the scheme itself and the industry as a whole.

3 The TIO has a conflict of interest in funding model and high cost of complaint processing.

4 There is a lack of avenues for external review and appeal on the CSPs side.

The recommended approaches to resolve these issues include:

1 Amend legislature to make the TIO fall under and comply with Freedom of Information Act including disclosure and publication of TIO council and board minutes, case disclosure and so forth.

2 Amend the Telecommunications (Consumer Protection and Service Standards) Act to allow the TIO, through changes to its constitution to either make orders of costs; or charge a nominal complaint handling fee consistent with other consumer focused courts and tribunals.

3 Amend TIO policy, procedure and nomenclature to return to the original terminology consistent with other Ombudsmen schemes such that unsubstantiated and un-investigated complaints are referred to as contacts or enquiries rather than complaints; to cease the multiple counting of complaints in statistics and recommence reporting disposition of complaints; to ensure the complainant provides tangible evidence that they have exhausted all resolution options with the CSP prior to accepting a complaint through completion of the Complaints Handling process defined in section 9 of the TCP code C628:2007 (Such evidence might include written correspondence, notes and records of calls to the CSP or a dead lock letter from the CSP as in other Ombudsman schemes⁴⁵, etc).

4 Amend the TIO constitution to specifically provide an avenue for external review of complaints.

5 Require the TIO to follow, rather than consider the Law when making decisions in order to restore certainty in transactions between consumers and CSPs.

As a post-script, although all the research activities in this project were completed, the project findings/recommendations are, in fact, still a research in progress. This was mainly because this project could only source opinions from one side of the argument (the CSPs) through its survey instrument. Despite the fact that both the documentary research and the case analysis do verify the result of the survey to certain extent, future research projects have been planned to study the topical area further.

Notes

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