

4 April 2011

**Director**

**Consumer Policy and Privacy**

Department of Broadband, Communications and the Digital Economy

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Australia

By e-mail

tiodiscussionpaper@dbcde.gov.au



Dear Sir/Madam,

**Subject: 'Telecommunications Industry Ombudsman scheme' DBCDE Discussion Paper**

Thank you for providing industry with the opportunity to comment on the DBCDE Discussion Paper, 'Telecommunications Industry Ombudsman scheme'.

The attached submission has been prepared by industry through the auspices of Communications Alliance.

Yours sincerely,

A handwritten signature in black ink that reads 'John Stanton'.

John Stanton

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DEPARTMENT OF BROADBAND, COMMUNICATIONS  
AND THE DIGITAL ECONOMY (DBCDE)

DISCUSSION PAPER ON THE  
TELECOMMUNICATIONS INDUSTRY OMBUDSMAN  
SCHEME

COMMUNICATIONS ALLIANCE SUBMISSION  
APRIL 2011

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## INTRODUCTION

Communications Alliance is pleased to have the opportunity to provide this submission in response to the DBCDE discussion on the Telecommunications Industry Ombudsman (TIO) scheme.

Communications Alliance agrees that the TIO, since its establishment in 1993, has played an important role as the telecommunications industry's alternative dispute resolution (ADR) scheme providing a free and independent service for consumers and small businesses.

There is no doubt that the TIO has assisted many Australian consumers to resolve specific issues with their service providers, and that service providers have gleaned knowledge from their interaction with the TIO that has and continues to assist them in improving their complaint handling processes. The TIO – the operating expenses of which are entirely funded by the industry itself – is a strong example of the co-regulatory model which underpins the *Telecommunications Act 1997*.

In recent years the telecommunications services offered to Australian consumers have become much broader, diverse and more complex. This has contributed to the growth in overall complaints to the TIO in the period leading up to 2009-10 (in which year complaint numbers fell).

Service providers have faced challenges in ensuring that their systems, processes, public communication tools and complaint handling processes could cope with the more complex product suite and associated issues.

Consumers have faced similar challenges to understand the workings of the products they have purchased and how to use them most effectively.

Industry observes that the TIO has also been placed under pressure by the pace of change, in trying to ensure, among other things, that it can attract and retain the in-house expertise to cope with enquiries and complaints about new technologies and services. Indeed, we note that in the two years to 30 June 2010, the TIO's staffing levels increased by nearly 50%.

These pressures on all sides of the service provision equation will likely continue or increase in future as offerings evolve, new services emerge and consumers face the potentially challenging task of migrating their services to a National Broadband Network (NBN)-based platform and seek to manage their telecommunications experience in a "fibre world".

Communications Alliance agrees that it is appropriate to seek to ensure that the structure, capabilities and operating methods of the TIO are maintained such that they can meet the present and future challenges it faces. However, industry notes that an external review of the TIO, initiated by the TIO itself, is running concurrently with the DBCDE process, and question the decision to initiate this review prior to the outcomes being made available from the external review to inform this process. This weakens the DBCDE's review and denies stakeholders who wish to contribute to it access to the latest data and analysis on this subject.

Industry has similar current experience in this regard. A comprehensive revision of the Communications Alliance Telecommunications Consumer Protections (TCP) Code commenced in early 2010, with the work being undertaken jointly by industry and consumer representatives and with oversight and guidance from the Australian Communications & Media Authority (ACMA), ACCC and DBCDE.

Soon after the TCP revision process started, the ACMA announced its own Inquiry into complaint handling and customer services in the telecommunications sector. At the time of

writing it is uncertain whether these two processes will produce complementary or discordant outcomes.

In the body of this submission Communications Alliance has chosen not to answer some of the specific questions raised in the DBCDE discussion paper, and to instead make general comments about some of the topic areas covered.

### **About Communications Alliance**

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

## SECTION 3 - INDEPENDENCE

### 3.1 Governance Structure

**Q3.1.1/2:** Communications Alliance believes that as a matter of principle, any review of the TIO must be based on a tightly focused and evidence-based policy development approach.

With respect specifically to the TIO's governance structure, the discussion paper contemplates action to create a single overseeing Board, comprised of equal industry and consumer representation, with an independent chair, to supersede the current Board/Council structure, yet does not provide any fact-based analysis as to why such a structural change would be objectively likely to deliver superior outcomes. Communications Alliance has not as yet seen any evidence and/or analysis which would objectively indicate that the TIO's governance structure is inhibiting it from effectively fulfilling its role.

For example, the case has not been made that the TIO's independence has been undermined by the current governance structure. Similarly, we note that under its existing governance structure the TIO is well resourced and has substantially increased its staffing levels in recent years.

With regards to industry funding, industry believes that this is integral to the nature of the TIO as an industry ADR scheme in which industry takes responsibility for its own conduct. We are not aware of any evidence which indicates that industry funding has inhibited the TIO's independence and/or performance and/or resourcing levels.

Some Communications Alliance Members have expressed concern that the Industry representatives on the TIO Board and/or Council are not genuinely representative of industry because they are bound to keep all deliberations confidential and cannot consult with the broader industry and take account of industry views on relevant topics.

If a move was made to create a single governance body, Communications Alliance believes it should be accompanied by an examination of how the industry could be more fully enfranchised in the scheme – without sacrificing the independence of the scheme. Confidential industry fora could potentially play a role in this regard. We would note though that such measures could also be considered within the TIO's existing governance and management structure.

A reasonable view can also be advanced that, even if an integrated structural was created, industry representatives should continue to have primary responsibility for financial governance, given that the members fund the scheme.

**Q3.1.3:** Communications Alliance believes it is appropriate the scheme members continue to fund the TIO model. Comments elsewhere in this submission cover issues including whether the fee structure should be recalibrated, and whether the operating expenses of the TIO should be more tightly managed. The recent move from quarterly-in-advance to monthly-in-arrears billing of service providers is welcomed, as is the recent abolition of "recharges" (under which a follow-up call from a consumer on the original topic would generate an automatic additional charge to the service provider in question).

### 3.2 Transparency in the Governance Structure

**Q3.2.1:** It is unfortunate that the DBCDE paper includes old and unsubstantiated allegations that the TIO Board is or was in the habit of over-riding decisions of the TIO Council. There is, to our knowledge, no evidence that this has ever occurred.

### **3.3 Government Involvement in TIO governance**

The TIO at present has a Memorandum of Understanding in place with the ACMA. Communications Alliance is not in a position to comment in detail on the effectiveness of this arrangement, but suggests that it should be the starting point for any attempt to improve the coordination between the two entities.

There is no evidence that the TIO's current governance structure has undermined the TIO's independence, effectiveness or resourcing levels and, as such, no case has been made for fundamental structural changes. That is, it is unclear to Communications Alliance what benefit there could be in Government intervention in the TIO's operations.

## SECTION 4 - ACCESSIBILITY

### 4.1 Awareness of the TIO

Communications Alliance believes that the TIO already enjoys a high profile and high level of awareness in the general community, both of which have risen in the 18 years the TIO has been in existence. This awareness has resulted from a combination of:

- self-promotion campaigns undertaken by the TIO itself;
- concerted public campaigns about the TIO, undertaken by industry-funded consumer groups such as ACCAN;
- regular media focus and associated publicity generated by the increasing number of complaints to the TIO (in itself an indicator of awareness, as well as of issues in complaints handling performance in the industry); and
- regular public statements and pronouncements by politicians concerning TIO-related issues.

Communication Alliance is not aware of any evidence that the effectiveness of the TIO is being constrained by a lack of community awareness about the TIO.

**Q4.1.3:** No – industry should not be required to advise customers about the TIO prior to and at the time they are initially handling an enquiry or complaint from a customer. The primary avenue for resolving customer concerns should remain the interaction that customer has with their service provider. Having service providers resolve issues directly with customers is the best and most efficient channel for the customer and for industry.

It is not essential for every customer to be continually aware of the existence of the TIO. Customers need this information when they find themselves in a position where they have an issue with their provider which has not been satisfactorily resolved.

The existing TCP Code requires service providers to advise their customers of available ADR processes if a customer indicates that they are dissatisfied with the outcome of their complaint or if a customer asks about their external avenues of recourse.

The revised TCP Code is still in draft form and yet to be released for public comment, but the draft text contains similar and strengthened obligations on service providers to promote the existence of the TIO to customers who express dissatisfaction.

The vast majority of customer calls to service providers on issues such as technical faults, product features or billing enquiries are resolved quickly and to the satisfaction of customers. To introduce a requirement to talk to customers about the TIO at the outset of these customer/provider conversations would merely serve to introduce doubt and confusion in the minds of many customers. In many cases it would actually impede the process of resolving the issue at first contact.

**Q4.1.4:** No – the industry should not be required to advertise the TIO through advice on bills. Bills typically contain a service provider telephone number for customers to use if they have a query about the bills or other issues. Consistent with earlier comments, the service provider must remain the first port of call for customers with service-related questions. A requirement to promote the TIO on bills would simply generate thousands of unnecessary calls from customers to the TIO – which the TIO could not immediately resolve and which under the current model would generate significant additional costs to industry.

## **SECTION 5 - FAIRNESS**

**Q5.1.1:** It is disappointing that DBCDE did not take the logical opportunity to balance this question by also asking whether the scheme provides a satisfactory level of fairness from the service providers' perspective.

Industry experience is that the TIO scheme provides an extremely fair process for complainants. Initial enquiries to the TIO by consumers and small businesses are classified as complaints before the TIO has made any effort to ascertain whether there is any veracity to the 'complaint'. Matters reported by callers are taken at face value by the TIO in the first instance. In some other Ombudsman schemes such a 'complaint' would be designated an 'enquiry' until it was established whether it warranted further examination.

### **Small Business Classification**

The TIO's policy of accepting customer's claims in good faith is extended to their evaluation of a small business customer. If a customer advises the TIO that they are a small business the TIO generally accepts this in "good faith". It is the experience of some Communications Alliance members that even when evidence is presented that a customer has more than 20 employees, an annual telecommunications spend in excess of \$20,000 and an annual turnover in excess of \$3 million that the TIO may choose not to reclassify the level 1 complaint to an enquiry even if it may choose not to investigate the complaint further. The reasoning given has been that the above description of a small business is a guideline and if the disputed amount is within the TIO's jurisdiction to make a determination or make a recommendation that this is also taken into consideration when the TIO decides whether it has jurisdiction. This would tend to suggest that the TIO may not be an ADR scheme designed purely for residential and small business customers and any contract that a supplier establishes with any given customer can be voided if the TIO decides that it has jurisdiction. An example is in relation to issues such as PABX hacking.

### **Intermittent Faults**

Some Communications Alliance Members have expressed concern about the fairness of the TIO's approach to intermittent faults. Examples cited include a case where a customer experienced an initial fault, which recurred three months later and where it was suggested by the TIO that the customer be given Customer Service Guarantee payments for the three month period during which the service was fault-free.

## SECTION 6 - ACCOUNTABILITY

**Q6.1.1:** Communications Alliance believes it would be helpful to have an agreed set of data outputs that the TIO reports in its Annual Report and in TIO Talks. After consistent lobbying from Communications Alliance the TIO has now agreed to include in its quarterly data the quantitatively objective number of complaints received, instead of merely reporting the entirely subjective "complaint issues" recorded during the period. The volume of complaint issues can be heavily influenced by the focus that the TIO call centre staff place on particular issues during the conversation with callers. This was evidenced in the rise in complaint issues in the six months to end-December 2010. A significant proportion of the increase was generated by the fact that the TIO chose to place a renewed focus on whether the service provider had specifically referred the caller to the TIO. So, the TIO decided to change the nature of the conversation and thereby generated a different data result, which drew unfavourably, though not perhaps justifiable, comparisons with previous data points.

Similarly, in 2009 TIO management decided (without reference to the Board or Council) to change some aspects of the keyword methodology that is used to populate the matrix that calculates the number of "Potential Code Issues" raised by an individual complaint. The result was a very significant increase in the number of potential code issues allegedly identified, at the same time as the volume of actual complaints was falling. Upward variations in the TIO data such as occurred on this occasion attract adverse public and political attention, and therefore should have a solid basis underlying them.

In the February 2011 edition of TIO Talks, the TIO chose to highlight an increase in complaints received, but chose not to report the good news that there had been a significant drop in the volume of confirmed code breaches.

An agreed data format would help to allay any concerns about the balance in the data sets being reported. It might also be useful to create some new and relevant data outputs. These could include:

- giving better context to the raw TIO statistics by tracking them against the increasing number of services in operation (SIOs) in Australia. In 2010 alone for example, the total number of telecommunication services in Australia grew by almost 3.3 million but the TIO statistics take no account of this significant fact;
- providing an understanding of what percentage of Level 2, 3 and 4 complaints are resolved in favour of the complainant.

In summary, Communications Alliance acknowledges as legitimate and appropriate the TIO's public reporting of its activities, such as the number of complaints it handles, where such reporting is based on objective and corroborated data. We would wish to see however focus also placed on the reporting of objective and useful measures reflective of industry performance. Communications Alliance would be keen to work with the TIO in developing such metrics.

**Q6.1.2:** Communications Alliance would welcome public reporting by the TIO against its key performance indicators (KPIs) – and indeed knowledge of what those KPIs are.

## SECTION 7 - EFFICIENCY

### 7.1 Tracking and Reporting of Complaints

Industry experience with the TIO points to a typically quite lengthy approach to decision-making, notwithstanding that strict time limits are imposed on service providers to investigate complaints and assemble often quite detailed information to present their side of specific complaint cases to the TIO.

Industry would welcome an opportunity to jointly review with the TIO this aspect of its operations and to agree on measures that could streamline and speed up the process in the interests of customers and industry alike.

### 7.2 Appropriate Review

**Q7.2.1:** The TIO has a number of challenges which it needs to deal with, such as adapting to a different (larger) scale of operations; driving for best practice operations and outcomes; keeping its staff upskilled; and keeping its IT systems up-to-date.

Communications Alliance believes that it is critical that the TIO continues to operate efficiently and effectively. While we are aware that the TIO does conduct regular internal audits and that a major external review is currently underway, it is essential for the TIO to utilise its reporting and member engagement procedures to inform members and policy makers and to seek feedback on its performance on an ongoing basis.

It is difficult to know whether the TIO adequately assesses its own efficiency, but this is something which definitely should occur. Some Communications Alliance members have, for example, questioned whether its overheads could be better managed and whether, for example it is "top-heavy" in managerial areas such as strategy.

One area which feeds directly into the efficiency of the TIO is the skill-set among its customer facing staff. Communications Alliance has received reports from some of its members about the lack of knowledge among TIO staff in areas including the characteristics and limitations on networks underlying some services, the way billing systems operate, and how newer services such as VoIP operate.

A lack of basic understanding by TIO staff will often generate additional confusion for customers and very often make it a longer and more difficult process to resolve issues.

Accepting in good faith what a customer states without detailed questioning or evidence to support their claims is one of the main reasons why the TIO scheme has far greater numbers of complaints than similar schemes in other industries and other countries.

It is understood that the TIO previously had a specialist ISP team to boost its expertise in dealing with broadband-related issues, but that this team has now been disbanded.

Some Communications Alliance members have also reported that the TIO appears to be not well disposed toward receiving customer enquiries or complaints via web-portals or emails (as opposed to via telephone) – channels that are already well established in other parts of the industry and other sectors, and which can improve complaint handling efficiency.

#### Position Statements

The TIO has Position Statements, Policies and Procedures (Position Statements) on its website which provide the TIO's approach to investigating and resolving particular types of complaints. The TIO's website says that these statements are guidelines about the TIO's

approach to the investigation and resolution of these complaints, including - where appropriate - the type of documentation it seeks to obtain, the factors it considers in the course of any investigation, and the TIO's view as to "what constitutes a fair and reasonable outcome in a particular set of circumstances".

The TIO's Position Statements generally fall into two categories:

- (a) statements detailing the TIO's position on general complaint handling procedures; and
- (b) statements on the TIO's interpretation of statutory and regulatory instruments and obligations (such as when the CSG Standard applies and more specifically the application of the CSG Standard to 'intermittent' faults).

These Position Statements are drafted by the TIO and are not approved or reviewed by an external or other review body. Accordingly, while it may be appropriate for the TIO to have Position Statements on the TIO's position on general complaint handling procedures, CA does not consider it appropriate for the TIO to develop, approve and review statements which interpret statutory and regulatory instruments and obligations. Through these Position Statements the TIO is effectively making policy decisions for the industry by determining how the legislation applies and the way in which a member should act in relation to that legislation, without any obvious oversight from the regulatory bodies responsible for these areas of policy. Communications Alliance believes that this kind of activity is clearly outside the scope of the TIO's jurisdiction.

It is important that this second type of Position Statement goes through a process of review (and even approval) before the TIO is able to rely on them. Communications Alliance suggests that it is appropriate for the TIO to consult with Industry on these Position Statements (or that the ACMA approve these Position Statements) before they can be relied on by the TIO to make decisions about a particular complaint which relate to matters of regulation and legislative interpretation.

## SECTION 8 - EFFECTIVENESS

### 8.1/2 Jurisdiction

The reality is that the TIO's jurisdiction is a complicated policy issue that needs to be subject to serious evidence-based analysis; and that any such analysis would need to take into account issues such as the outcomes from the Government's Convergence Review and the development of the Australian Digital Economy.

In addition, the TIO's jurisdiction is widening constantly as the product and service set it deals with continues to expand and further diversify. This points to the need to focus on the skill-set issues referred to under Q7.2.1.

The challenges will be further exacerbated by the impending customer migration to NBN-based services. Communications Alliance has been active in seeking to ensure that consumers received the information and education they will need to make informed choices when the time comes to migrate their services to an NBN-based platform, and then to manage their communications experience in a fibre environment.

If this migration process does not run smoothly, there is potential for a large influx of new calls to the TIO, and the risk that the TIO will be poorly placed to respond to many of these issues.

**Q8.2.1:** With regards to the effectiveness of the current compliance and enforcement regime, Communications Alliance notes that the TIO is an industry ADR scheme focused on resolving individual consumer and small business complaints on a cost-recovery basis and that the ACMA is the industry's enforcement body (and has a wide suite of enforcement powers). We believe that there could be opportunities for the TIO and the ACMA to engage together more effectively to ensure that the ACMA's enforcement powers are utilised more effectively.

We also note that the revised TCP Code currently under development is expected to include major improvements in the compliance monitoring and enforcement framework that are designed to bring substantial benefits for consumers and industry alike.

**Q8.3.1:** Communications Alliance does not believe that the TIO requires additional powers at this time. The ACMA did receive additional powers as a result of the recent passage of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth). Time should be allowed for the efficacy of these increased powers to be tested before contemplating any further moves in this regard.

### Internal Dispute Resolution

**Q8.3.5:** Communications Alliance believes that the principle that the TIO operates on a cost-recovery basis must be respected and that costs of complaint resolution is borne by the provider.

With regards to any increases to specific fees at particular complaint levels, any such decision should only be based upon an evidence-based review. It is noted that the discussion paper does not include any analysis/modelling that explores the impacts of increasing Level 1 fees.

Also further to above, any move to shift TIO fees away from cost recovery and towards imposing penalties to drive behavioural changes is a fundamental shift in the TIO's role as ADR body.

It is by no means certain that raising fees charged at Level 1 would be effective, particularly given that Level 1 'complaints' are not necessarily complaints at all. Further examination is needed of this issue.

**Q8.3.7:** The revised TCP Code is expected to deal with this issue.

#### **Sharing Complaint Data**

**Q8.3.9:** See response to Q6.1.1

## SECTION 9 - CONCLUSION

Communications Alliance remains a strong supporter of the TIO scheme and sees both the current Board-initiated external review of the TIO and the DBCDE Discussion Paper exercise as opportunities to objectively examine the scheme. Any reforms or changes proposed should be subject to an evidence-based approach.

Communications Alliance recommends that the TIO, in consultation with industry and other stakeholders, gives focus and priority to:

1. Reviewing and amending the TIO Constitution to ensure clarity around the TIO's jurisdiction, especially in relation to small business – see Section 5 Fairness on page 7.
2. Establishing a more visible mechanism within the scheme for regular review of internal decision making in relation to consumer complaints – see Section 7 Efficiency on page 9.
3. Ensuring increased transparency, certainty and fairness in the range of both process and performance indicators used by the TIO to resolve consumer complaints – see Section 6 Accountability on page 8.
4. Giving members a reasonable opportunity to effectively resolve complaints, by re-asserting the position of the TIO as an 'office of last resort'. This should be supported by a review of policy and constitutional aspects of the scheme – see Section 5 Fairness on page 7.
5. Ensuring all TIO Position Statements concerned with the interpretation of statutory and regulatory instruments or obligations go through a process of review or approval prior to their adoption by the TIO - see Section 7 Efficiency on page 9.
6. Ensuring adequate training is in place so that TIO complaints officers are properly supported in handling complex complaints involving Industry structures, technical, legal and jurisdictional issues - see Section 7 Efficiency on page 9.



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