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By email: tiodiscussionpaper@dbcde.gov.au

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Telecommunications Industry Ombudsman Discussion Paper

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide a brief submission to the Department of Broadband, Communications and the Digital Economy on the Telecommunications Industry Ombudsman (**TIO**) scheme.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Since September 2009 we have also operated *MoneyHelp*, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians with changed financial circumstances due to job loss or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

Introductory comments

Telecommunications consumer complaints feature regularly in our casework - both legal and financial counselling. Telecommunications is not a policy priority for Consumer Action at present, however external dispute resolution (**EDR**) and access to justice are. As such, we have confined our comments primarily to matters relating to external dispute resolution principles in general. Issues specific to telecommunications are well addressed by specialist telecommunications advocacy groups such as the Australian Communications Consumer Action Network (**ACCAN**).

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Accessibility

It is a matter of public record that telecommunications consumer complaint levels have been unacceptably high for many years now. This remains a matter for serious concern, as does the extent to which consumers are aware of the TIO. Whilst the TIO's surveys suggest very high levels of public awareness generally, we remain concerned that the absence of an obligation for members to advise consumers generally about the existence of the TIO means that disadvantaged and vulnerable consumers - those perhaps less likely to find out from other sources - are missing out on this information.

On the other hand we also note that once a consumer reaches the scheme, the TIO's ability to take complaints verbally is a benchmark of accessibility that other dispute resolution schemes should seek to replicate.

Independence

As with any industry-based external dispute resolution scheme, the independence of the TIO is critical to its success. This is recognised in all existing benchmarks relating to industry-based EDR, including the (then) Department of Industry Science and Tourism, Benchmarks for Industry-based external dispute resolution schemes, 1997 (the **DIST Benchmarks**) and Regulatory Guide 139, produced by the Australian Securities and Investments Commission.

The starting point for independence must be the corporate governance structure. The DIST Benchmarks indicate that independence in industry-based dispute resolution finds its best practice expression in a single tiered structure - a board, constituted by an equal number of industry and consumer representatives, with an independent Chair.

Creating a truly independent TIO has long been a policy priority for consumers. Submissions by other consumer organisations to this review, including ACCAN, consider the need to restructure the TIO governance model as critical¹. Recommendation 4 of the 2008 Choice/Galexia report *Consumer Protection in the Communications Industry: Moving to best practice* also referenced the well known problems of the existing governance structure of the TIO, and recommended dispute resolution in the telecommunications sector be aligned with best practice in co-regulation².

Consumer Action has long held reservations regarding the two-tiered governance structure of the TIO. This structure fails to promote the perception of independence, which is so important to schemes such as the TIO, and we believe that the structure compromises the scheme's independence, effectiveness and efficiency. This is the case for a number of reasons, including:

- The Board is the only body with governance responsibility and directors' duties in the legal sense;

¹ Australian Communications Consumer Action Network, *Modernising the TIO* (2011) online at: <http://accan.org.au/files/Submissions/ACCAN%20Submission%20TIO%20March%202011%20FINAL.pdf>

² Choice/Galexia, *Consumer Protection in the Communications Industry: Moving to best practice*, (2008) p22. Online at http://www.galexia.com/public/research/assets/choice_consumer_protection_in_telecoms.pdf

- The Board is responsible for setting the TIO's budget - a key determinant in the organisation's ability to function effectively;
- The Board is responsible for setting the jurisdictional limit (which badly needs increasing), a key determinant of the scheme's ability to deliver effective outcomes to consumers;
- The Board is responsible for appointing the Independent Chair of the Council;
- The Board is responsible for appointing the Ombudsman; and
- The Board is responsible for determining the terms of reference for internal reviews of the TIO.

The Council, the second tier of the TIO's governance structure, is expressed as having a role in safeguarding the independence of the TIO. However, requirements that the Board consult the Council in relation to some of the matters above are inadequate to achieve balance or independence..

In the past we have raised our concerns about the appointment processes of the TIO Council Chair. In two instances, we understand that the Independent Council Chair role was not re-appointed, for no stated reason and without consultation with the Council, despite what we believe to be clear intent in the Articles of Association.

Together with the Consumers' Federation of Australia and CHOICE, Consumer Action wrote to the Chair of the TIO Board noting that Clause 12.7 of the Articles of Association of the TIO requires the Board to Consult with Council members 'before appointment or re-appointment of the Chairman of the Council...!'.

The response we received from the (then) Chair of the Board stated that 'the article 12.7 relates to the appointment and re-appointment of the Chairman - not a decision *not* to reappoint" (emphasis added). As we stated at the time, this interpretation of the article is so narrow that the consultation requirement is effectively meaningless.

Even were the interpretation correct, it is clearly still open to the Board to consult with the Council. Given the Council's express role in relation to scheme independence it is difficult to understand that this would be not seen as a useful and important step - particularly when a key group of stakeholders to the scheme - consumer groups - are on record as expressing concerns regarding the process the first time it was employed.

It is our view that the powers of the TIO Board in relation to appointing the Council Chair place any Council Chair in a position where to challenge the Board, or promote issues that the Board does not support, could threaten the position of the Council Chair. While we have total respect for those who have held the Council Chair position, and have high regard for the individuals on the Council, we believe that a balanced governance structure would result in better outcomes from the contributions of these individuals.

Current members of Consumer Action staff have been, at some time, directors on three industry ombudsman boards. It is our experience that these Boards work well, and that the interaction at Board level of industry and consumer representatives is an effective and efficient way to work through issues - particularly those which are contentious. We question whether the process of having issues discussed at Council level and then brought to the Board for decision is as

effective. Our view is that a single, balanced Board structure generally results in a fairer, faster and more efficient approach to scheme issues and reforms, for example reviews of scheme jurisdiction.

Structurally reforming the governance structure of the TIO into a single body that has equal representation of consumer and industry representatives, plus an independent Chair, will help ensure genuine independence can be achieved.

Funding arrangements

We are of the view that the current funding model is appropriate. It is critical that consumers are not required to pay to have a genuine dispute resolved.

We would, however, suggest that the cost of making complaints, particularly at Level 1, may need review, to ensure that the costs of allowing complaints to go directly to the TIO is not less than having an internal dispute resolution process. A significant proportion of the unacceptably high complaint numbers that the TIO has struggled with involve basic customer service and complaints matters that should properly be resolved by member telecommunications companies, not the EDR scheme³.

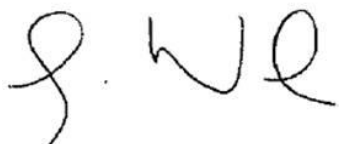
Promotion of TIO

Consumers need to know they have a right to access the TIO when there is a dispute. We support having TIO contact details on the bottom of bills. There is no more logical place to promote the TIO. Given the strong trend toward encouraging self-service style billing and service management, it is difficult to imagine any significant cost imposts arising from such a development.

Thank you again for the opportunity to provide input into the Government's review of the TIO. Please contact Sarah Wilson on 03 9670 5088 or at sarahw@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE



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³ Telecommunications Industry Ombudsman, 'Ombudsman challenges industry to improve customer service', *Media release*, 21 November 2008. Online at http://www.tio.com.au/media_statements/RELEASES/2008/21_11_08_connectresolve.html.