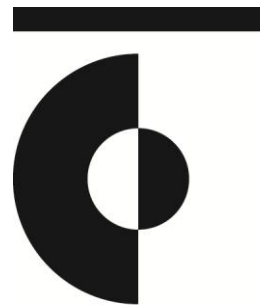


30 August 2013

Mr Timothy Pilgrim
Australian Privacy Commissioner
GPO Box 5218
SYDNEY NSW 2001
email: consultation@oaic.gov.au



**Telecommunications
Industry
Ombudsman**

Simon Cohen
Ombudsman

Dear Mr Pilgrim

Public Consultation: draft Guidelines for recognising external dispute resolution schemes under s35A of the *Privacy Act 1988*

Thank you for providing the Telecommunications Industry Ombudsman (the TIO) with the opportunity to comment on the draft Guidelines for recognising external dispute resolution schemes under s35A of the *Privacy Act 1988* (the draft Guidelines).

The TIO notes, and has provided input into, the Australian and New Zealand Ombudsman Association's (ANZOA) submission on the draft Guidelines. We support the views expressed in the ANZOA submission, and acknowledge that in the main, the draft Guidelines achieve the right balance in recognising the role EDR schemes play and in facilitating the role of the Office of the Australian Information Commissioner (OAIC) as the privacy regulator within the new privacy framework.

We enclose our supporting submission on the draft Guidelines. In this submission, we have focussed our comments on the following:

- (a) an overview of TIO complaint statistics relevant to credit reporting and privacy issues in the telecommunications industry
- (b) general observations on the draft Guidelines, and
- (c) our specific comments on a number of key issues in the draft Guidelines.

We note the OAIC will be making all submissions on the draft Guidelines publically available. The TIO has no objections to our submission being published.

If you require any further information, please contact David Brockman, the TIO's Executive Director – Industry, Community and Government, on 03 8600 8700.

Yours sincerely

Simon Cohen
Ombudsman

"... providing independent, just, informal and speedy resolution of complaints"

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Telecommunications Industry Ombudsman

**Telecommunications Industry
Ombudsman – Submission on the draft
Guidelines for recognising external
dispute resolution schemes under s35A of
the *Privacy Act 1988***

August 2013



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About the TIO

The Telecommunications Industry Ombudsman (TIO) is authorised under Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to provide an independent alternative dispute resolution service for small business and residential consumers in Australia who have a complaint about their telecommunications services.

We aim to resolve these complaints quickly in a fair, independent and informal way, having regard not only to the law and to good industry practice, but also to what is fair and reasonable in all the circumstances. Before the TIO becomes involved in a complaint, the service provider is given an opportunity to resolve the complaint with its customer.

We are independent of telecommunications companies, consumer groups and government. Our services are provided at no cost to consumers.

For most complaints we receive, we establish the issues in the dispute and the resolution sought, and then refer the consumer or small business to a designated point of contact at their relevant telephone or internet service provider. The provider is given a final opportunity to resolve the matter directly with the consumer, without the TIO's direct involvement. Around 90% of complaints we receive each year are resolved at this stage of the process.

Where the consumer and service provider do not reach an agreement at this early stage, the TIO becomes more directly involved by seeking to conciliate an agreed resolution between the parties. Around 7% of complaints are resolved using this conciliation process.

Complaints that cannot be resolved by conciliation are escalated for formal investigation by the TIO. If the complaint remains unresolved after formal investigation and the TIO is of the view that it would be fair and reasonable to do so, the TIO can make binding determinations on a service provider up to a value of \$50,000 and non-binding recommendations up to a value of \$100,000 in respect of each complaint.

We record complaints according to service types – internet, mobile, landline and mobile premium services (MPS), and by the types of issues that these complaints present. These issues include connection delays, credit management disputes, contractual disputes, customer service/complaint handling and billing disputes. Every complaint involves at least one issue. Some complaints can involve multiple issues – for example, a complaint about a delay in rectifying a faulty landline service may also involve a claim that the consumer's complaint about this fault was not acknowledged or escalated (a complaint handling issue).

Further information about the TIO is available at www.tio.com.au.

TIO response to the draft Guidelines for recognising EDR schemes

The TIO welcomes the opportunity to comment on the draft Guidelines for recognising external dispute resolution (EDR) schemes (the draft Guidelines).

We view the draft Guidelines, once registered and implemented, as integral to the overarching framework of privacy regulation in Australia. Consumers need to have confidence in their provider's ability to deal with privacy-related complaints and in having pathways to recognised EDR schemes for resolution of those complaints if needed.

EDR schemes – like the TIO – that have been in operation for a number of years are likely to already have experience and expertise in handling privacy-related matters. We appreciate that the draft Guidelines acknowledge this and reflect that the Office of the Australian Information Commissioner (OAIC) may exercise discretion not to investigate a matter where a recognised EDR scheme is already dealing with a matter or where it would be appropriate for it to do so.

To this end, we support the measures in the draft Guidelines that provide guidance to EDR schemes on what is required to be recognised as an EDR scheme by the OAIC; the process for being recognised; the obligations of a recognised EDR scheme; and the circumstances in which a scheme may have recognition altered or revoked.

In this submission we have focussed our comments on the following:

- (a) an overview of TIO complaint statistics about privacy-related complaints (mainly credit defaults and the use, access, disclosure of other personal information) in the telecommunications industry – we have included this information to provide a context to our views on the draft Guidelines
- (b) general observations about the development of the draft Guidelines, and
- (c) specific comments about several issues in the draft Guidelines that may be useful to the OAIC.

We trust that the information in this submission will assist the OAIC in the finalisation of the Guidelines.

Complaints to the TIO

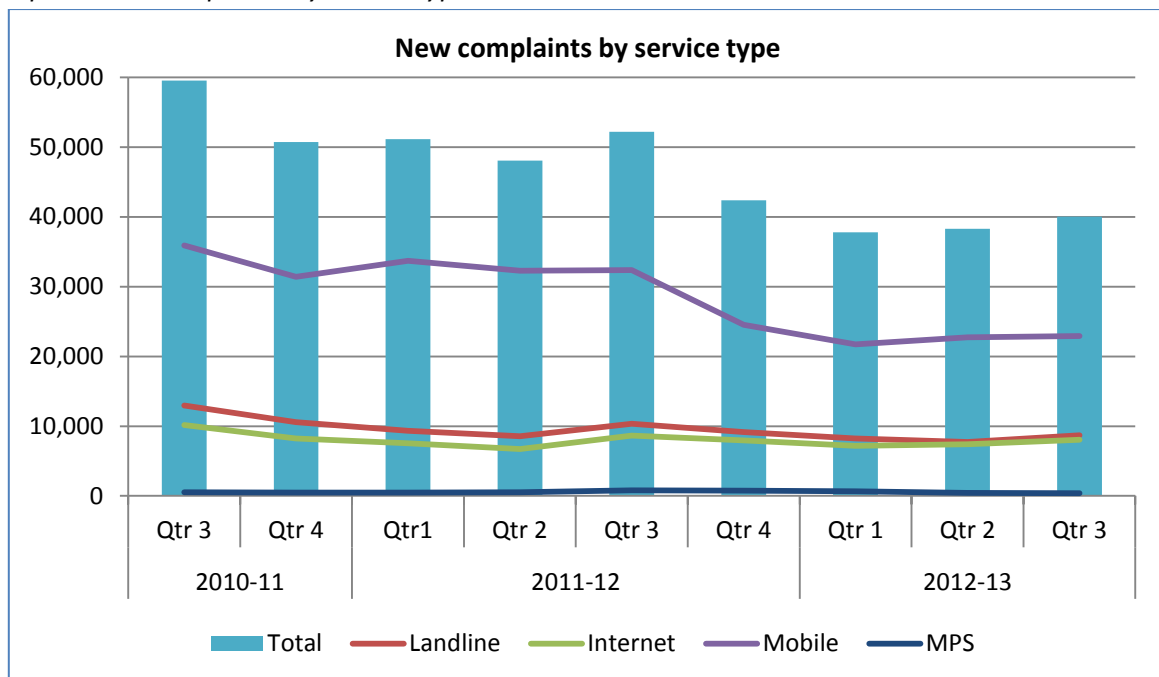
Overall trends for new complaints

When a consumer – residential or small business – contacts us about an expression of grievance or dissatisfaction about a matter within the TIO’s jurisdiction that the service provider has had an opportunity to consider, we record this as a ‘new complaint’.

The TIO recorded and handled around 193,702 new complaints from small business and residential consumers in 2011-12. This compares with 167,772 new complaints recorded during 2009-10 and 197,682 in 2010-11. Over the first three quarters of 2012-13, we recorded around 116,000 new complaints.

The graph below shows the breakdown of new complaints recorded by the TIO by service type – internet, landline, mobile and mobile premium services (MPS) – over the last nine quarters up to March 2013.¹

Graph 1: New complaints by service type



Main issues for new complaints

We record new complaints by the types of issues that these complaints present. These issues include connection delays, credit management disputes, privacy issues, contractual or transfer disputes, customer service/complaint handling issues and billing disputes.

From January 2011 through to the end of March 2013, customer service and billing and payments issues formed 24% and 19.1% respectively of the issues we recorded for new complaints. Issues

¹ Details of TIO complaints data for quarter 3 of 2012-13 was released in the June edition of TIO Talks at http://www.tio.com.au/data/assets/pdf_file/0010/131311/TIO-Talks-No2-2013-WEB.pdf. Details of TIO complaints data for 2012-13 will be released in October 2013.

relating to faulty services formed 17.9% while issues regarding complaint handling and contract disputes made up 14.5% and 9.6% respectively.

Credit management issues for new complaints

General trends

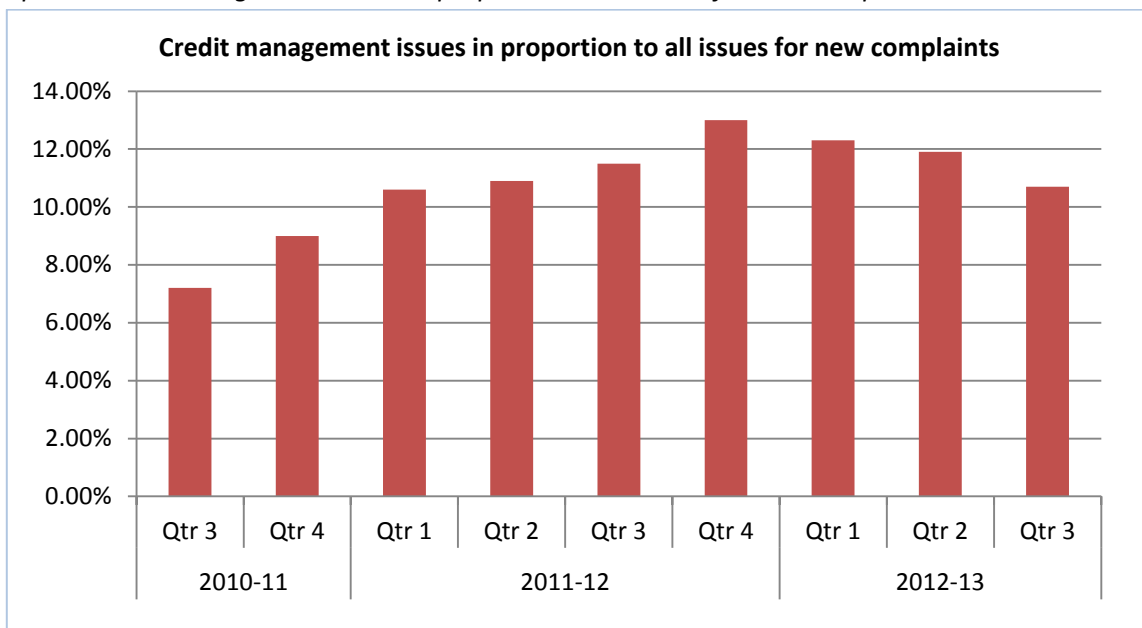
The TIO records a variety of issues related to credit management including credit assessment, disputed default listings, over-commitment, the suspension and disconnection of services and collection action over disputed debts.

Between January 2011 and March 2013, credit management issues formed on average, 11.5% of all issues recorded for new complaints. As Graph 2 below illustrates, we saw a continuous upward trend from January 2011 until March 2012 with credit management issues peaking at 13% of all new complaint issues in quarter 4 of 2011-12.

However, there has been a decline in recent quarters, with quarter 3 of 2012-13 dropping back to around the same proportion of credit management issues received in quarter 1 of 2011-12.

Graph 2 illustrates the proportion of credit management issues recorded for new complaints over the past nine quarters up to quarter 3 of 2012-13.

Graph 2: Credit management issues in proportion to all issues for new complaints



Issues about credit defaults

While the most common credit management issues raised in new complaints relate to over-commitment, the conduct of collections agents and the suspension or disconnection of services, issues about credit defaults are also common.

We capture complaint issues about the listing of credit defaults using the following categories:

- (a) *Credit default – disputed debt*: for example, where a provider lists a credit default in relation to a debt that is in dispute
- (b) *Credit default – notification*: for example, where a provider fails to warn the consumer that it intends to list an overdue debt with a credit reporting agency
- (c) *Credit default – failure to update or remove*: for example, a provider fails to update a credit default listing once payment has been made or to remove it if it is incorrect.

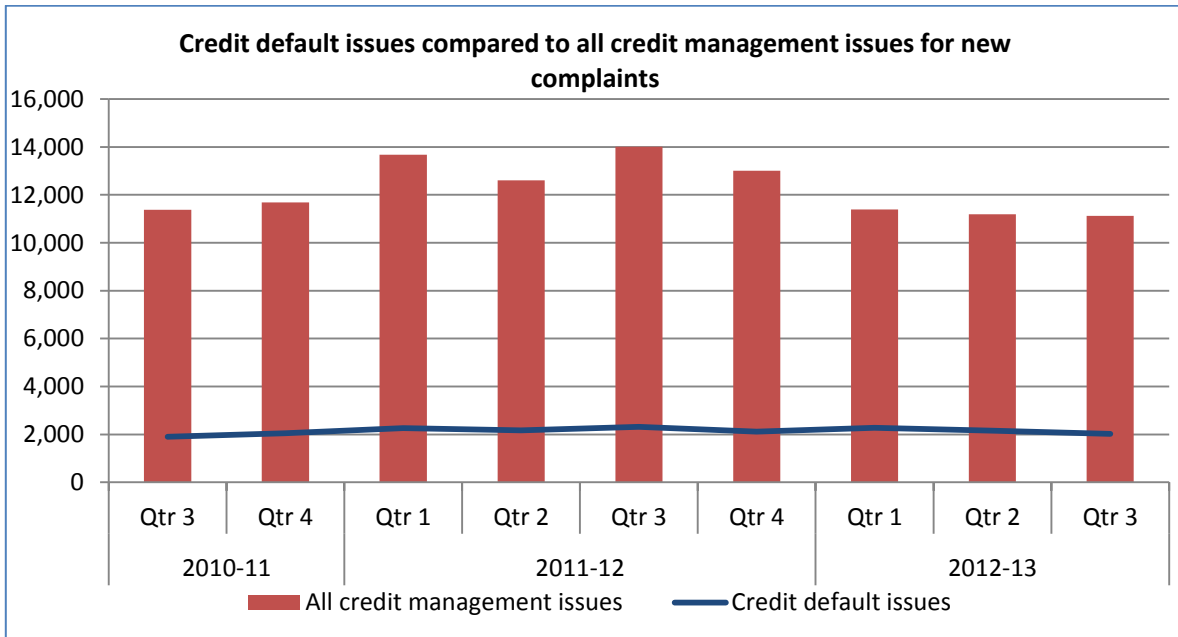
Providers of telecommunications services have obligations to follow specific rules – as outlined in the Privacy Act, the Telecommunications Consumer Protections (TCP) Code 2012 and the Credit Reporting Code – prior to listing a default against a consumer².

We often receive complaints that allege providers have failed to comply with these rules and, as a consequence, consumers have been unaware that a credit default has been listed against their name until sometime later. Delays in resolving disputes regarding credit defaults can cause significant detriment to consumers as they may not be able to obtain credit while the default remains in place.

Graph 3 illustrates the issues recorded about credit defaults compared to all credit management issues for new complaints over the past nine quarters up to quarter 3 of 2012-13. As indicated in the graph below, issues relating to credit defaults have remained steady at around 2,100 issues on average each quarter over the past nine quarters.

² In addition, the TIO issues a number of position statements which outline our general approach to particular types of complaints and what may be fair and reasonable outcomes to these complaints. See for example, the position statement on Disputed Default Listings at http://www.tio.com.au/_data/assets/pdf_file/0014/9032/DISPUTED-DEFAULT-LISTINGS.pdf.

Graph 3: Credit default issues compared to all credit management issues for new complaints



Privacy issues for new complaints

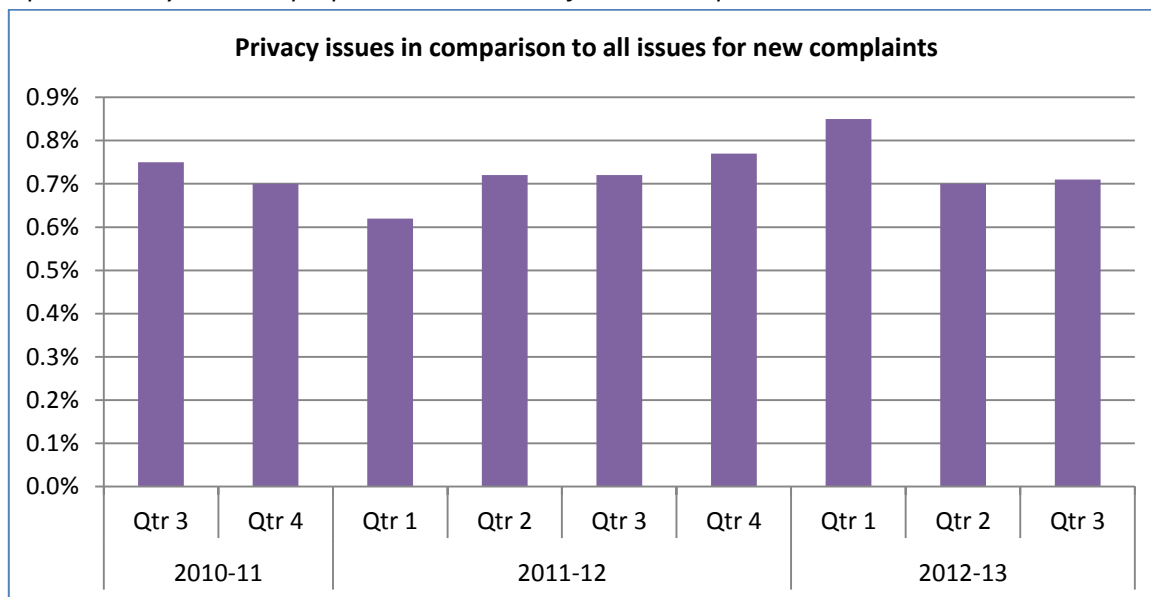
General trends

The TIO records several issues related to privacy including the collection of personal information by providers, a consumer’s access to this information, the accuracy of the information collected, and its disclosure (including the disclosure of silent numbers). Other issues about unwelcome communications and telemarketing are also recorded by the TIO.

Between January 2011 and March 2013, privacy related issues made up 0.73% of new complaint issues recorded by the TIO. During this time, we have seen a decrease of 39% in privacy issues recorded for new complaints, with around 1,200 issues recorded in quarter 3 of 2010-11 compared to around 730 issues recorded in quarter 3 of 2012-13.

Graph 4 illustrates the proportion of privacy issues recorded for new complaints over the past nine quarters up to quarter 3 of 2012-13.

Graph 4: Privacy issues in proportion to all issues for new complaints



Issues about consumer personal information

The TIO records new complaints about issues surrounding a consumer’s personal information. We capture these issues using the following categories:

- (a) *Consumer personal Information – access/accuracy:* where access to information is denied or information held by the provider is inaccurate
- (b) *Consumer personal information – collection:* where information collected, stored or disposed of in a manner that is contrary to what is set out in the TCP Code or Privacy Act
- (c) *Consumer personal information – disclosure: silent number:* where a consumer’s silent number has been disclosed
- (d) *Consumer personal information – disclosure: other information:* where there has been disclosure of personal information related to a consumer’s account (other than an unlisted number). This may include where a provider’s representative is alleged to have used a consumer’s personal information for a purpose other than what it was provided for.

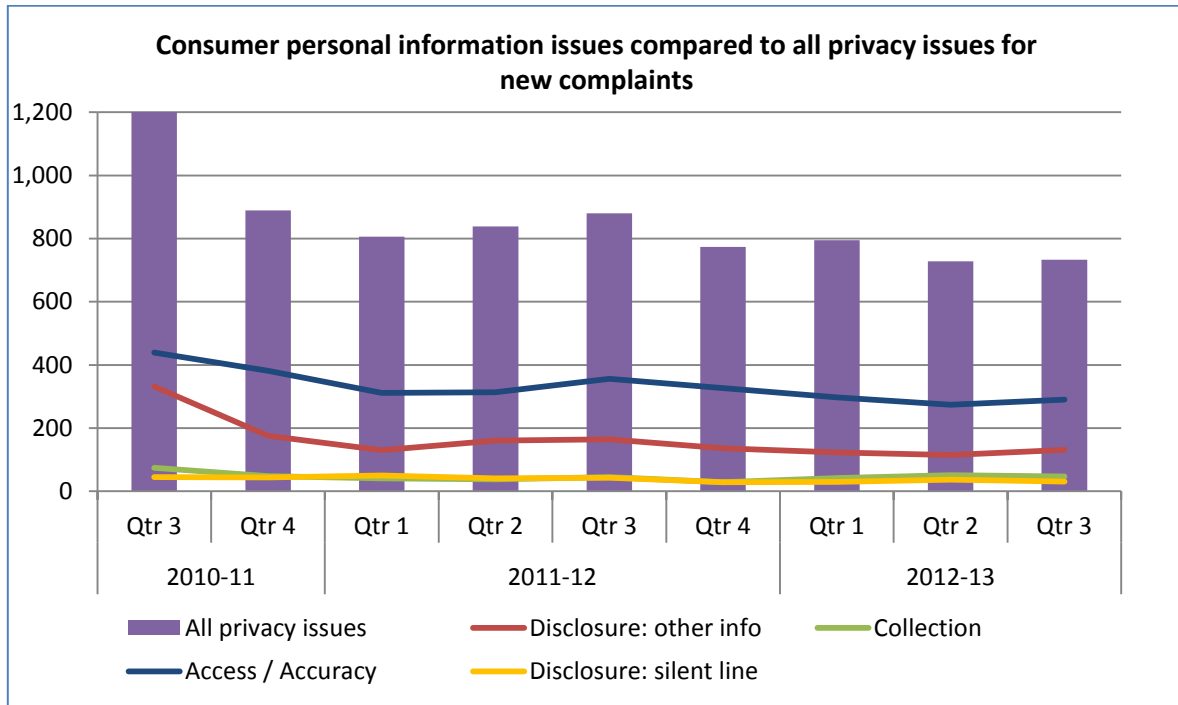
We note that during the period between January 2011 and March 2013, almost 40% of all privacy related complaint issues concern consumers accessing their personal information and the accuracy of this information. These complaints commonly relate to the provider’s records not being correctly updated – often when a consumer changes their address.

These issues can lead to more serious complaints such as problems with consumers not receiving bills or notifications of credit management, potentially leading to increased financial hardship as additional fees are added to original debts.

Issues regarding the improper disclosure of personal information are the second most common new complaint issue the TIO captures in respect of privacy.

Graph 5 illustrates the issues recorded about customer personal information compared to all privacy issues for new complaints over the past nine quarters up to quarter 3 of 2012-13.

Graph 5: Consumer personal information issues compared to all privacy issues for new complaints



General observations about the draft Guidelines

We would like to acknowledge the significant effort and work by the OAIC that has gone into the development of the draft Guidelines.

In our view, the draft Guidelines present a pragmatic framework for the recognition of EDR schemes which balances the requirements under the Privacy Act while giving due recognition to the expertise and experience of existing EDR schemes in handling privacy-related matters. The draft Guidelines provide a clear and transparent process for the recognition of EDR schemes under the Privacy Act, without imposing onerous obligations on existing EDR schemes.

On this basis, we are broadly supportive of the draft Guidelines as they stand, subject to our specific comments on the issues outlined below.

Specific comments on the draft Guidelines

Recognition for a specific purpose – clause 1.11

We note clause 1.11 in the draft Guidelines indicates that the OAIC will recognise an EDR scheme for a ‘specified purpose’ – that is, a scheme will be recognised for dealing with a particular type or range of privacy-related complaints.

For the TIO, any ‘specified purpose’ will clearly relate to privacy complaints which are associated with telecommunications products and services provided by telecommunications service providers who are members of the TIO scheme. We have given an indication of some of the privacy-related issues that the TIO currently handles in the statistical data above.

We consider it important for EDR schemes to be consulted upon the 'specified purpose' they may be given recognition under the Privacy Act. As such, we suggest that clause 1.11 in the draft Guidelines include a requirement for the OAIC to consult with the EDR scheme prior to settling the 'specified purpose' for recognition as an EDR scheme under the Privacy Act.

Remedies and outcomes for privacy related complaints – clauses 3.3, 3.7, 3.8 and 4.15

The draft Guidelines provide that the powers of an EDR scheme should include the ability to offer remedies that are generally consistent with the declarations available to the OAIC under section 52 of the Privacy Act.

The TIO has under its Constitution, the power to make determinations (that are binding on scheme members) requiring our members: to pay compensation; to do or not to do specified acts; and to correct, delete or add to records. We understand the use of the words 'generally consistent' in clause 3.8 will provide for some flexibility when assessing the congruence of the powers of the OAIC under the Privacy Act, and the powers of each EDR scheme seeking recognition.

We further note that clause 4.15 of the draft Guidelines require the EDR scheme – where possible – to provide information about outcomes and nature of the remedy awarded in finalising privacy related complaints.

The TIO, like all other EDR schemes, focuses on helping the parties to come to an agreed resolution to the complaint. The vast majority of privacy-related complaints we handle are resolved via negotiated processes (referral and conciliation) with very few matters requiring investigation or determination. We currently do not capture information about the outcomes of complaints that are resolved via our referral and conciliation processes.

While clauses 3.8 and 4.15 of the draft Guidelines offer some flexibility, the requirements in these clauses do not take into account the various issues that can be present in a privacy-related complaint. Often, primary issues, such as billing disputes or financial hardship, may take precedence to issues surrounding privacy. This does not mean that an EDR scheme considers the privacy aspect any less important, only that more urgent concerns may be the focus of a complaint and its outcome.

As such, while reporting on the number of specific privacy-related complaints will not have a great impact on an EDR scheme, reporting on the outcomes and the time taken to arrive at these may be more difficult. We suggest that the OAIC takes a flexible approach on this issue when administering the Guidelines.

Serious or repeated interferences and systemic privacy issues – clauses 4.16 to 4.19

We note clause 4.5 states that the OAIC will make recognition of an EDR scheme subject to three conditions relating to reporting and other general matters around handling privacy-related complaints. These three conditions include the independent review of the EDR scheme, meeting the OAIC's requirements for reporting serious or repeated interferences with privacy and systemic issues, and other general conditions.

While the supporting clauses to clause 4.5 provide some guidance about the requirements for independent review and the other general conditions, we note that clauses 4.16 to 4.19 provide limited guidance about the recognition and reporting of serious or repeated interferences with privacy. We note that additional guidance is intended to be provided via 'Enforcement Guidelines' issued by the OAIC, however we note that this guidance is still in development at this stage (see our comments below).

The TIO will generally alert the industry regulator to any systemic issues once we have had an opportunity to review and confirm the details. While we appreciate the OAIC will be interested in obtaining early notice of any such systemic issues or serious or repeated interferences with privacy, we seek greater clarity on how the OAIC considers this will play out. For example:

- At what point would the OAIC consider it prudent for an EDR scheme to alert an industry regulator?
- Does the OAIC expect that an EDR scheme will, at the same time, advise it of a systemic investigation?
- Does the OAIC consider a systemic issue needs to be at the point of an investigation before alerts are issued?

We suggest that further guidance on the above issues in the draft Guidelines would be helpful to EDR schemes.

Enforcement Guidelines – clauses 1.4, 4.16

We understand that the Enforcement Guidelines referred to in the draft Guidelines are currently being developed and that these will be consulted upon later this year.

Given that the Enforcement Guidelines underpin some of the requirements in the current draft Guidelines, we would appreciate an early opportunity to discuss and consider the Enforcement Guidelines. We suggest that a similar consultative approach as undertaken for these draft Guidelines, be considered for the Enforcement Guidelines.