

12 May 2014

Ms Sabina Wynn
The Executive Director
Australian Law Reform Commission

[REDACTED]

[REDACTED]

Dear Ms Wynn

ALRC consultation on serious invasions of privacy in the digital era

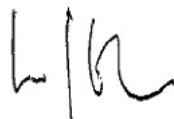
The Telecommunications Industry Ombudsman (TIO) welcomes the opportunity to contribute to the Australian Law Reform Commission's Discussion Paper on *Serious invasions of privacy in the digital era* (the Discussion Paper). Our submission is enclosed.

In our submission, we respond to the proposals and questions in the Discussion Paper that are relevant to our experience in handling privacy-related complaints in Australia's telecommunications industry. We set out in our submission:

- an overview of TIO complaints and issues data relevant to privacy-related complaints
- our responses to the questions in the Discussion Paper, to the extent these are relevant to the TIO's experience, and
- supporting case studies and other information in the Appendices.

[REDACTED]

Yours sincerely



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Telecommunications Industry Ombudsman submission: Serious invasions of privacy in the digital era

May 2014



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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.

For most complaints we receive, we establish the issues in dispute and the resolution sought, and then refer the consumer or small business to a designated point of contact at the 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 per cent 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 per cent of complaints are resolved using this conciliation process.

Complaints that cannot be resolved by conciliation are progressed 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 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 and fault repair, 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 progressed (a complaint handling issue).

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

TIO submission on *Serious invasions of privacy in the digital era*

The TIO welcomes the opportunity to contribute to the Australian Law Reform Commission's Discussion Paper on *Serious invasions of privacy in the digital era* (the Discussion Paper).

In this submission, we respond to the proposals and questions in the Discussion Paper that are relevant to our experience in handling privacy-related complaints in Australia's telecommunications industry. We set out in this submission:

- a) an overview of TIO complaints and issues data relevant to privacy-related complaints
- b) our responses to the questions in the Discussion Paper, to the extent these are relevant to the TIO's experience, and
- c) supporting case studies and other information in the Appendices.

A summary of our responses on the relevant proposals is outlined below:

Proposals 5-3 and 5-4

An apology genuinely made has the potential to encourage the early resolution of disputes. It would detract from any dispute resolution process if the parties were reluctant to offer an apology due to possible use as evidence of fault or liability.

Proposals 9-1 and 9-5

It is appropriate for courts to be vested with the jurisdiction to deal with any serious invasion of privacy as defined in the Discussion Paper. However, this should not preclude complainants also taking their matter to an appropriate Alternative Dispute Resolution (ADR) forum, including an Ombudsman. Similarly, those who have used ADR services and are not satisfied with this process or outcome should not be barred from initiating legal proceedings.

Proposal 10-4

The defence of qualified privilege will be important to achieving an effective balance between protecting people from serious invasions of privacy and other countervailing interests such as disclosing consumer personal information for legitimate complaint handling purposes within an ADR context.

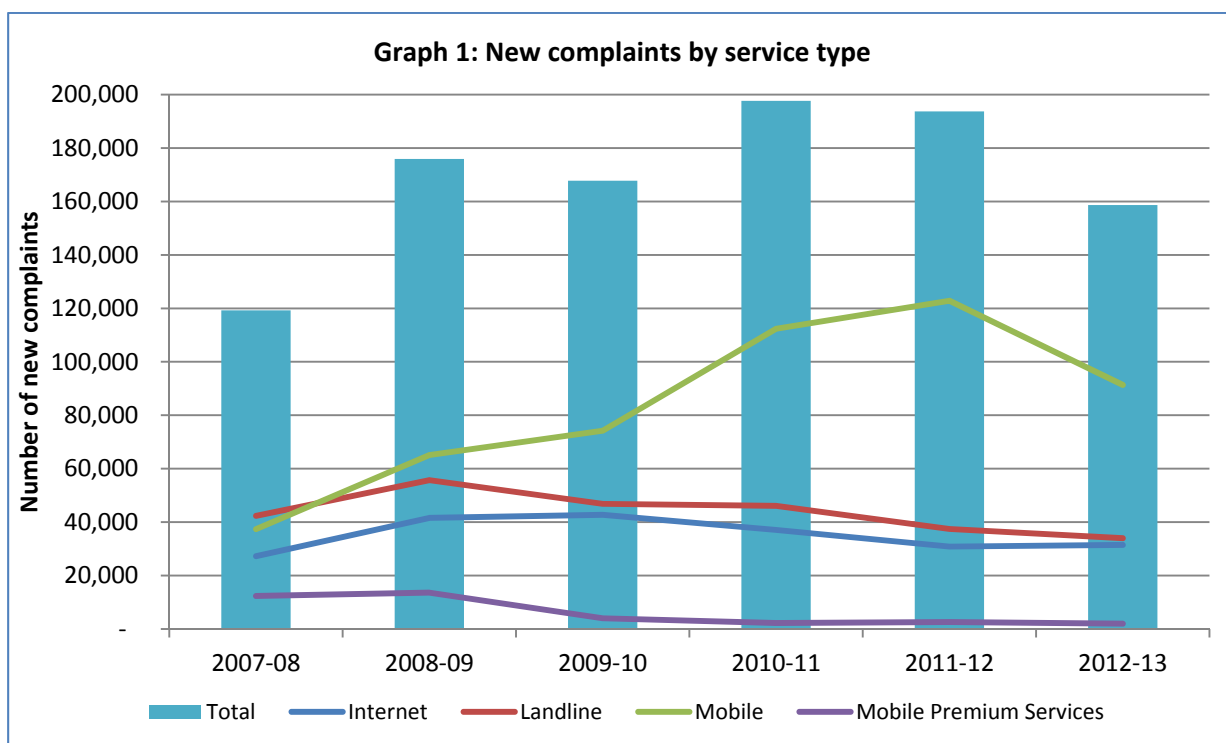
Complaints to the TIO

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 158,652 new complaints from small business and residential consumers in 2012-13. This compares with 167,772 new complaints recorded during 2009-10, 197,682 in 2010-11 and 193,702 in 2011-12. Over the first two quarters of 2013-14, we have recorded around 69,000 new complaints.

Graph 1 shows the breakdown of new complaints recorded by the TIO by service type – internet, landline, mobile and mobile premium services (MPS) – over the past six years.



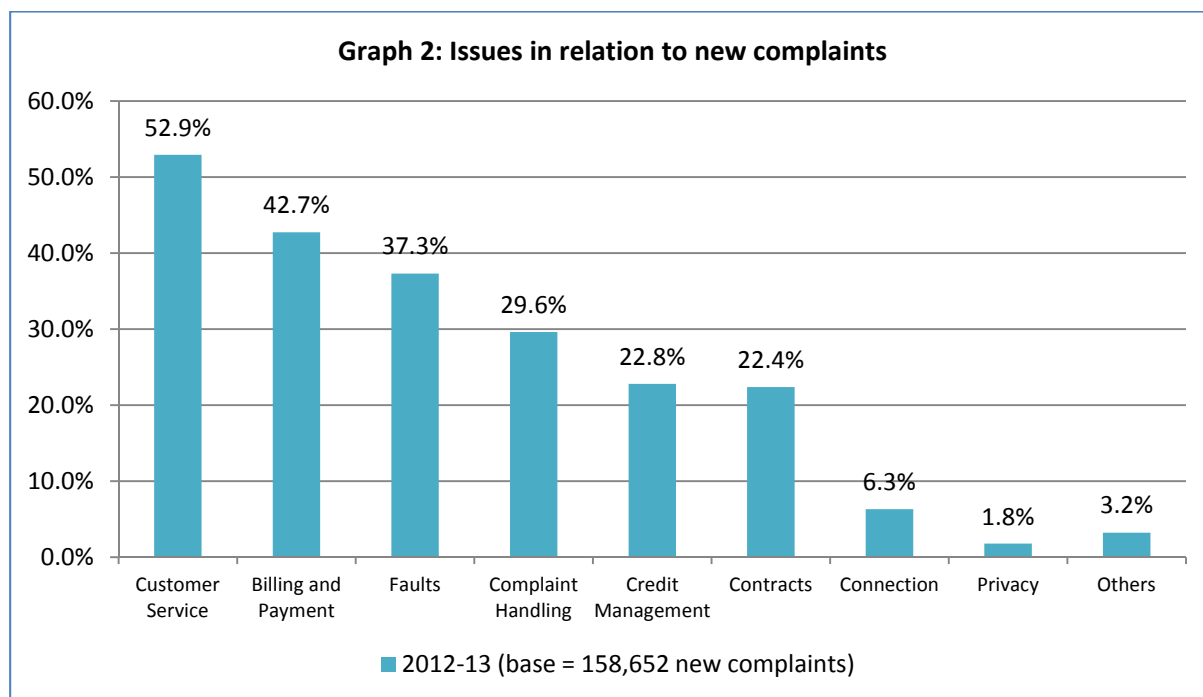
Issues in relation to new complaints

We record new complaints by the types of issues that these complaints present. Issues are selected from a choice of keywords that are aligned to industry codes or common complaint categories that the TIO has identified. These issues include connection and fault repair delays, credit management disputes, privacy issues, contractual or transfer disputes, customer service/complaint handling issues and billing disputes.

Every new complaint involves at least one complaint issue. Some complaints can involve multiple complaint issues – for example, a complaint about a faulty mobile service may also involve a concern over the lack of a response from the service provider about the fault. In such circumstances, the TIO would record one complaint comprising two issues – a faults issue and a customer service issue. See the **Appendix II** for more information about how the TIO reports on new complaints and issues.

In 2012-13, customer service and billing and payments issues respectively featured in 52.9 per cent and 42.7 per cent of new complaints across all service types. Issues relating to faulty services featured in 37.3 per cent of new complaints while issues about credit management featured in 22.8 per cent of new complaints. Privacy issues featured in around 1.8 per cent of new complaints in 2012-13.

Graph 2 illustrates the distribution of issues in new complaints across all service types, in 2012-13.

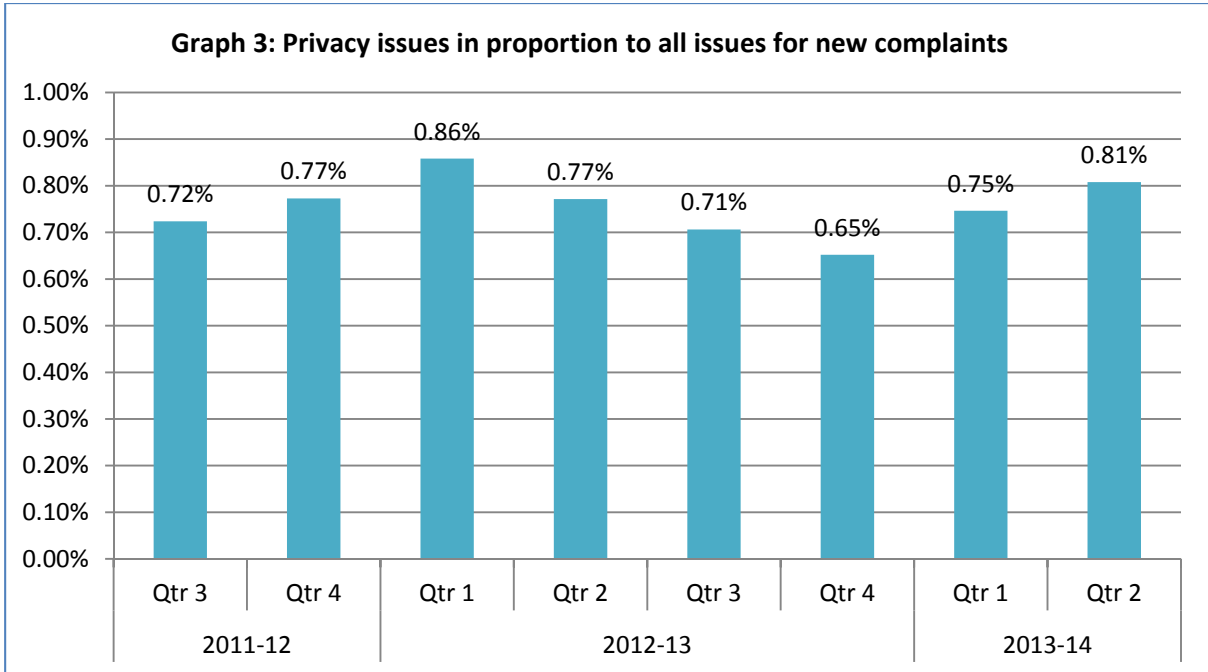


Privacy issues in new complaints

The TIO captures data about several issues relating 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 unlisted numbers. Other privacy issues surrounding unwelcome communications, telemarketing and spam are also recorded by the TIO. In addition, we deal with complaints about the handling of credit information – including debt collection practices; these are recorded as credit management (rather than privacy) issues.

New complaints about privacy issues are generally dealt with by the TIO under the Privacy Act 1988, other privacy-related legislation and relevant industry standards and codes.

Graph 3 highlights the proportion of privacy issues compared to all new complaint issues over the past eight quarters. In each quarter there were approximately 700 privacy-related issues recorded, with around 50 per cent of these relating to mobile services, 40 per cent relating to landline services and the remaining 10 per cent relating to internet services. In 2012-13, privacy issues formed around 0.8 per cent of all new complaint issues recorded by the TIO. In absolute numerical terms, the overall trend is reduced consumer complaints about privacy issues.



Graph 4 illustrates the range of privacy-related complaint issues received by the TIO over the past eight quarters. These include issues about the access to or accuracy of personal information, disclosure of personal information (including disclosure of silent numbers), unwelcome or life-threatening communications and continuation of telemarketing after being asked to stop.

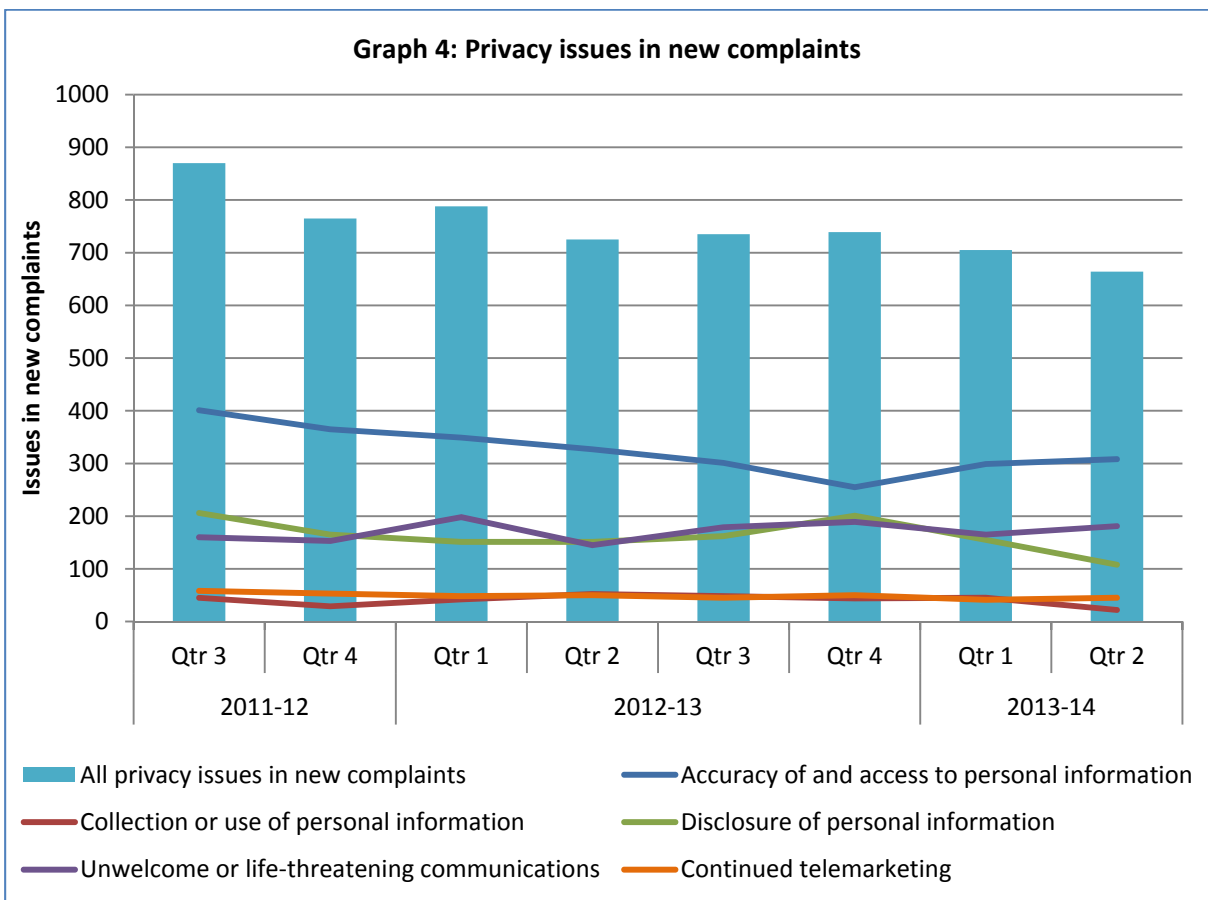


Table 1 illustrates the breakdown of these issues recorded by the TIO over the past four financial years.

Table 1: Privacy issues in new complaints	2009-10	2010-11	2011-12	2012-13
Access to or accuracy of consumer personal information	2,057	1,893	1,487	1,225
Collection, use and disclosure of consumer personal information (including disclosure of silent numbers)	901	1229	904	853
Unwelcome or life-threatening communications	818	714	605	714
Continued telemarketing after being asked to stop	441	355	248	184

Responses to specific questions in the Discussion Paper

We set out below our responses to the proposals and questions in the Discussion Paper that are relevant to our experience in handling privacy-related complaints in Australia's telecommunications industry.

Effect of apology on liability

Proposal 5-3: The new Act should provide that an apology made by or on behalf of a person in connection with any invasion of privacy alleged to have been committed by the person:

- a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter; and***
- b) is not relevant to the determination of fault or liability in connection with that matter.***

Proposal 5-4: Evidence of an apology made by or on behalf of a person in connection with any conduct by the person should not be admissible in any civil proceedings under the new Act as evidence of the fault or liability of the person in connection with that matter.

From our experience, consumers will request apologies to resolve privacy complaints and an apology genuinely made has the potential to encourage the early resolution of disputes. It would detract from any dispute resolution process if the parties were reluctant to offer an apology due to possible use as evidence of fault or liability.

An apology can be an important part of resolving a dispute and it is one of several readily available remedies used in ADR processes. From our experience, apologies can help:

- diffuse tension and create common ground between opposing parties
- foster constructive discussion and even conciliation between parties
- alleviate injury and distress caused to aggrieved parties, and
- reduce the length and severity of disputes.

Case studies 1 – 2 in Appendix I illustrate how important an apology can be for consumers seeking a resolution to privacy-related complaints. In each of these matters, the consumer requested an apology as part of the resolution of their complaint. After our referrals to the senior complaint handling team at the respective providers, neither consumer returned to the TIO for further assistance.

Alternative Dispute Resolution (ADR) processes

Proposal 9–1: Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the new Act.

Proposal 9–5: The new Act should provide that, in determining any remedy, the court may take into account:

- a) whether or not a party took reasonable steps to resolve the dispute without litigation; and***
- b) the outcome of any alternative dispute resolution process.***

It is appropriate for courts to be vested with the jurisdiction to deal with any serious invasion of privacy as defined in the Discussion Paper, should a new tort be created.

However, this should not preclude complainants also taking their matter to an appropriate ADR forum, including an Ombudsman. Similarly, those who have used ADR services and are not satisfied with this process or outcome should not be barred from initiating legal proceedings.

Most Ombudsman schemes specifically provide that a complainant does not have to accept any determination and is free to access other remedies. However, any proposed arrangements for dealing with serious invasions of privacy should not prevent a complainant and the other party from reaching an agreement that includes a term that the agreement is in full and final settlement of the complainant's claim.

Ombudsman schemes have a proven track record for dealing with complex privacy-related complaints in certain fields such as telecommunications, financial services or utilities. This is illustrated by the range of privacy-related complaints that the TIO handles as a recognised external dispute resolution scheme under the Privacy Act 1988.¹

Ombudsman schemes are also very effective in providing economical and accessible justice which plays a critical objective in providing forums for *all* consumers subject to serious invasions of privacy (including those who may not be able to afford the cost of formal legal proceedings) if the new tort is be fully effective.

Case studies 3 – 4 in Appendix I demonstrate the important role Ombudsman schemes such as the TIO play in prompting organisations to respond to and deal with complaints by individuals claiming serious invasions of privacy.

¹ The TIO was recognised as an external dispute resolution (EDR) scheme by the Office of the Australian Information Commissioner (OAIC) on 19 December 2013. The TIO is authorised to receive, investigate, facilitate the resolution of, make decisions and recommendations for, and report on, complaints about acts or practices of TIO members that may be an interference with the privacy of an individual under subsections 13(1) and/or 13(2) of the Privacy Act 1988. For more information, please visit the OAIC website: <http://www.oaic.gov.au/privacy/applying-privacy-law/privacy-registers/recognised-edr-schemes>. A number of EDR schemes have also been recognised by the OAIC for this purpose.

Qualified privilege

Proposal 10–4: The new Act should provide for a defence of qualified privilege to the publication of private information where the defendant published matter to a person (the recipient) in circumstances where:

- a) the defendant had an interest or duty (whether legal, social or moral) to provide information on a subject to the recipient; and***
- b) the recipient had a corresponding interest or duty in having information on that subject; and***
- c) the matter was published to the recipient in the course of giving to the recipient information on that subject.***

The defence of qualified privilege should be defeated if the plaintiff proves that the conduct of the defendant was actuated by malice.

The defence of qualified privilege would assist in creating an effective balance between protecting people from serious invasions of privacy and other countervailing interests such as disclosing consumer personal information for legitimate complaint handling purposes within an ADR context.

The defence of qualified privilege is relevant to ADR schemes, such as the TIO. Telecommunications service providers have an obligation as members of the TIO scheme, to give information to us to assist with resolving disputes. Similarly, as the recipient of the information, we have an interest in receiving accurate, up-to-date, complete and relevant information that is necessary for complaint resolution. This goes to the purpose of an ADR scheme. Service providers complying with the TIO scheme should be able to provide the information they think is relevant to resolving a complaint, or information the TIO has requested.

In the course of complaint-handling, we often receive information of a sensitive nature that may be relevant to resolving the dispute. A service provider acting in good faith should not be restricted in providing appropriate information as part of the complaint-handling process.

Should a new tort be established, this defence would be relevant to the TIO's ability (and that of other similar Ombudsman offices) to deliver effective dispute resolution services, which requires the disclosure of consumer personal information to resolve complaints. In this context, a defence of qualified privilege is necessary so that telecommunications service providers are still able to disclose private information in the course of resolving complaints without being constrained by the possible consequence of it being a serious invasion of privacy.

Appendix I: Case studies

Case study 1: Misuse and inability to correct personal information

Consumer A approached the TIO in late 2013 about a telecommunications service provider pursuing him for his son's outstanding account.

Consumer A claimed that he and his son had terminated their contracts with the service provider, were no longer its customers and he had no outstanding repayments. In mid-2013 however, the service provider mixed up the details of both consumers, declared they had no record of his son terminating his account and erroneously began to pursue Consumer A for his son's outstanding payments.

Consumer A contacted the provider numerous times via email and phone to correct the situation. The telecommunications provider responded in writing with an admission of error and a promise to rectify the case. However, debt collection action continued to the point of threatened legal action and a default being listed on Consumer A's credit file.

Consumer A told the TIO that he wanted the service provider to resolve the complaint by ceasing debt collection activity and removing the default from his credit file. He also requested that the service provider apologise and compensate him for all the wasted time, effort and stress he had suffered as a result of the problem.

We referred the consumer to the senior complaint handling area at the provider. As Consumer A did not return to the TIO following our referral, we did not progress his complaint further.

Case study 2: Misuse and disclosure of personal information

Consumer B approached the TIO in mid-2013 with a complaint about a potential privacy breach. Consumer B told the TIO that after recently logging into her telecommunications account online, she discovered that her personal account details had been merged with those of another customer with the same name.

The consumer claimed that she was able to access the other customer's account information and presumed it was likely that the other customer could also read her details. Consumer B rang her service provider immediately to report the incident and was told it would be rectified immediately but she would have to re-register for her online account. Consumer B spent a month trying unsuccessfully to set up a new account with her service provider and raised several complaints with them regarding the situation.

Consumer B told the TIO that she was shocked by the privacy breach and was very agitated that her service provider was taking so long to fix the problem. For a resolution, the consumer requested an apology from the service provider and reassurance that this would never happen again. This was important because she was moving house soon and would be reluctant to reconnect with the same service provider if her privacy could not be guaranteed.

We referred the consumer to the senior complaint handling area at the provider. As Consumer B did not return to the TIO following our referral, we did not progress her complaint further.

Case Study 3: Disclosure of unlisted telephone number

Consumer C signed a contract with a small telecommunications service provider in May 2013 for a landline. She paid \$3 per month in addition to her landline fees to keep her number private. Consumer C wanted her personal information protected because she holds an Apprehended Violence Order against her ex-husband, and she knew that publication of her personal details would put her and her family at risk.

In August 2013, Consumer C's number and address were published in her local phone directory. The printed directory, which included her details, was distributed widely. After her personal information was released, Consumer C's ex-husband visited her house. As Consumer C's ex-husband was in violation of his court order, the police attended the residence.

Consumer C called her service provider to complain, but did not receive a response for three months. Every time she called the service provider, she was told that the complaint was with the service provider's complaints department, and that she would receive a swift response. After receiving no contact from the provider, Consumer C contacted the TIO. We referred the consumer to the senior complaint handling area at the provider.

The service provider informed the TIO that Consumer C had accepted its explanation of the system error that had caused the silent number to be published. The service provider also informed us that Consumer C had accepted credits for the silent number charges paid to-date and an additional credit for three months' worth of service charges, as a resolution to her complaint. As Consumer C did not return to the TIO following our referral, we did not progress her complaint further.

Case Study 4: Disclosure of unlisted telephone number

Consumer D had a local business in a small suburb where she performed psychic readings, and both the address and phone number of the business were publicly available. She claimed she always made an effort to keep her personal and professional lives separate, and accordingly used her maiden name for the business and requested an unlisted number for her personal mobile phone.

The service provider published the consumer's mobile number and address in both online and printed directories although she had asked for these to be unlisted.

When Consumer D first complained to the TIO, she said that her service provider had given her a new mobile number and a \$50 credit to cover the cost of telling family and friends about her new number. Consumer D was initially satisfied with this aspect of her resolution, but said that people were now harassing her about the nature of her business.

Consumer D returned to the TIO after we referred her to the senior complaint handling area of the provider, as the complaint remained unresolved. Consumer D said she had started becoming afraid

for her safety and that of her family. She said people were coming to her home several times per week including damaging her property and abusing her verbally, which never happened before the publication of her details. As a result of these matters the consumer moved house.

Attempts by the consumer and provider to negotiate compensation had broken down.

The TIO progressed the complaint for conciliation and investigation based on the consumer's claims of threats to her safety. The TIO worked with the provider and consumer to conciliate a reasonable amount of compensation to address the impact of disclosure of the consumer's personal information. The provider offered Consumer D compensation in the amount of \$10,000, which she accepted.

Appendix II: TIO reporting methodology

Why we capture data

The TIO provides the telecommunications industry and the community with an independent perspective on the consumer experience in the context of landline, mobile, internet and mobile premium services. Through the thousands of contacts we receive each week and the many residential or small business consumer complaints we resolve each year, we are able to identify complaint trends and their probable causes, and to provide this valuable information to stakeholders.

We capture information about complaints for a variety of reasons including:

- monitoring of complaint trends
- identifying gaps in consumer protection as may be indicated by complaint trends
- identifying systemic problems within the industry
- measuring the impact of new technologies and changes in industry behaviour
- creating awareness and informing TIO Members about good industry practice as set out in Industry Codes
- reporting complaint trends and possible code compliance issues, to regulators and the industry
- allocating TIO resources in an efficient and effective manner, and
- reporting to the community on the work we do.

How we capture data

The TIO keeps a record of every telecommunications enquiry² or complaint that is reported to us. Most consumer contacts are made through our free telephone number, with a smaller portion being lodged electronically via our website or by email. Each complaint is captured in our complaints management system and is categorised using a comprehensive list of 'keywords'. These keywords are divided into three tiers with the first tier categorising the general subject matter of the complaint and the second and third tiers identifying the precise nature of the complaint.

For example, a complaint about a credit or adjustment not having been applied to a bill would be recorded in our system as:

<i>Tier 1</i>	<i>Tier 2</i>	<i>Tier 3</i>
Billing & Payments	Credit/Adjustment	Not Applied

Capturing complaints in this way means that we have a very rich source of data we can refer to for the purposes of giving information to stakeholders and undertaking our own analysis. We supply complaints data to TIO Members, industry groups and regulators. We publish quarterly and annual data on our website for public use. We see our data and its publication as important steps in helping to identify and address issues of concern for consumers.

² The TIO records an Enquiry when a person contacts us about something we cannot deal with directly, for example because they have not yet given their provider an opportunity to consider it or because their complaint is about something outside the TIO's functions or powers.

Reporting terminology

New complaints

The TIO records a 'new complaint' when it first receives an expression of grievance or dissatisfaction from a consumer where the telecommunications service provider has had an opportunity to consider the matter. A new complaint is initially classified at Level 1 of the TIO process, with a small number initially classified at Level 2 (and at Level 4 in limited circumstances such as Land Access Objections). Each new complaint has its own unique reference number.

Level 1 complaints are referred to senior complaint handlers or specialist teams within telecommunications providers for a final opportunity to resolve the matter. The TIO clarifies the consumer's complaint issues and desired resolution when referring a complaint.

Conciliations/Investigations

Where a new complaint remains unresolved and requires conciliation or investigation by the TIO, it is progressed to a higher case level. Usually, new complaints classified at Level 1 that remain unresolved are progressed to Level 2 for conciliation, and to Levels 3 and 4 for formal investigation/determination.

Issues

The TIO records 'issues' to capture the types of issues that are presented by each new complaint. Issues are selected from a choice of keywords that are aligned to industry codes or common complaint categories that the TIO has identified. These include connection and fault repair delays, credit management disputes, contractual disputes, customer service/complaint handling and billing disputes.

Every new complaint involves at least one complaint issue. Some complaints can involve multiple complaint issues – for example, a complaint about a faulty mobile service may also involve a concern over the lack of a response from the service provider about the fault. In such circumstances, the TIO would record one complaint comprising two issues – a faults issue and a customer service issue.

The TIO also updates the issues for unresolved complaints that are progressed to a higher case level.

Enquiries

The TIO records an enquiry for any new contact that is not classified as a new complaint. These include, for example, where the consumer:

- is expressing a grievance but has not given the TIO Member an opportunity to consider the matter
- does not have sufficient interest in the matter
- is only requesting for information.

Enquiries can also include matters that:

- are outside the TIO's jurisdiction
- could be raised with a more appropriate organisation
- are under consideration or have already been considered by another body, and

- are frivolous or vexatious.

Quality assurance

Each month, quarter and end of financial year, we undertake a range of quality assurance activities to ensure the accuracy of our data.