

23 May 2014

Ms Julia Freeman
Manager, Small Business Ombudsman and Procurement Unit
Small Business, Competition and Consumer Policy Division
The Treasury

[REDACTED]
[REDACTED]
[REDACTED]

Dear Ms Freeman

Discussion Paper: The Small Business and Family Enterprise Ombudsman

Thank you for giving the Telecommunications Industry Ombudsman (TIO) the opportunity to comment on the Treasury's Discussion Paper about the proposal to establish the Small Business and Family Enterprise Ombudsman (the Discussion Paper).

ANZOA submission on the proposed name of the new agency

The TIO notes, and has provided input into, the Australian and New Zealand Ombudsman Association (ANZOA) submission which is being tendered to the Treasury in response to the Discussion Paper. The ANZOA submission outlines its concerns about the use of the title Ombudsman for the proposed new agency that has the potential to cause confusion and damage broader community understanding of an Ombudsman's role.

The TIO fully supports the ANZOA submission.

TIO submission in response to the Discussion Paper

We enclose our submission in response to the Discussion Paper. Our submission sets out the following:

1. Our current approach to small business consumers
2. TIO complaints data and issues that relate to small business new complaints
3. Our responses on the following issues:
 - Use of the title 'Ombudsman'
 - Information about and referrals to existing dispute resolution services, and
 - Information sharing between the proposed new agency and the TIO.

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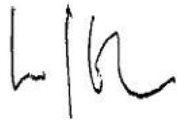
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Yours sincerely



Simon Cohen
OMBUDSMAN



Telecommunications Industry Ombudsman

Telecommunications Industry Ombudsman submission – Proposal for a Small Business and Family Enterprise Ombudsman

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 seven 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 approach to small business consumers

TIO's current approach

We deal with complaints from small businesses about a range of issues, including the supply and connection of standard telephone services, mobile services and internet services, the billing of these services and the repair of faulty services. We also handle complaints – specifically from small businesses – about point of sale advice concerning the bundling of telecommunications services with equipment that may be on finance leases.

The TIO's approach to limiting our services to small business and residential consumer complaints rests on the premise that small business consumers, like residential consumers, are less likely to have the resources necessary to pursue a grievance through the formal legal system. As such, small businesses with telecommunications complaints require access to the TIO in its role as an independent and free external dispute resolution scheme. As well as being typically better resourced, medium and large businesses may seek resolutions that are beyond the scope of the TIO's determinative powers. (The TIO is able to make binding decisions up to a value of \$50,000 and recommendations up to a value of \$100,000).

The criteria we use to define what is a small business include the following:

- the number of employees of the company. The TIO would generally consider 20 employees or less to be indicative of a small business. However, we will categorise some businesses with more than 20 employees as small businesses, e.g. agricultural businesses that seasonally employ more than 20 employees, or goods manufacturing businesses with fewer than 100 employees.
- the company's annual turnover. The TIO generally considers that a small business will have an annual turnover of less than three million dollars.
- the nature of the business, and if it is typically small or not-for-profit. Here we also consider if the nature of the business gives it little or no bargaining power to negotiate the terms of a telecommunications contract with a service provider.
- the way the business is structured or managed. For example, a business independently owned and funded by a small number of individuals who make most important business decisions is likely to be a small business. Conversely, one of several subsidiary businesses with a parent company that makes the major business decisions for the subsidiary is not likely to be a small business.
- the issue in dispute. For example, does it relate to complex technologies or systems not generally purchased by residential or small business consumers?

These criteria are set out on our website (at <http://www.tio.com.au/consumers/small-businesses>).

Where a business is not a small business, the TIO will exercise discretion not to investigate a complaint and it will record this matter as an enquiry.

We deal with around 80 new complaints from small businesses each day. Case studies that present a snapshot of small business disputes about telecommunications services are set out in the **Appendix**.

We actively help small business consumers and their telecommunications providers resolve disputes through our effective referral process, and through the expeditious conciliation of more complex disputes. Very few small business complaints require resolution through our more formal investigation process.

Our experience in dealing with small business commissioners in a range of jurisdictions has been very positive and we continue to maintain good working relationships with them. We also regularly attend forums such as the annual National Small Business Summit organised by the Council of Small Business Australia (COSBOA).

Complaints to the TIO

New complaints from small business consumers

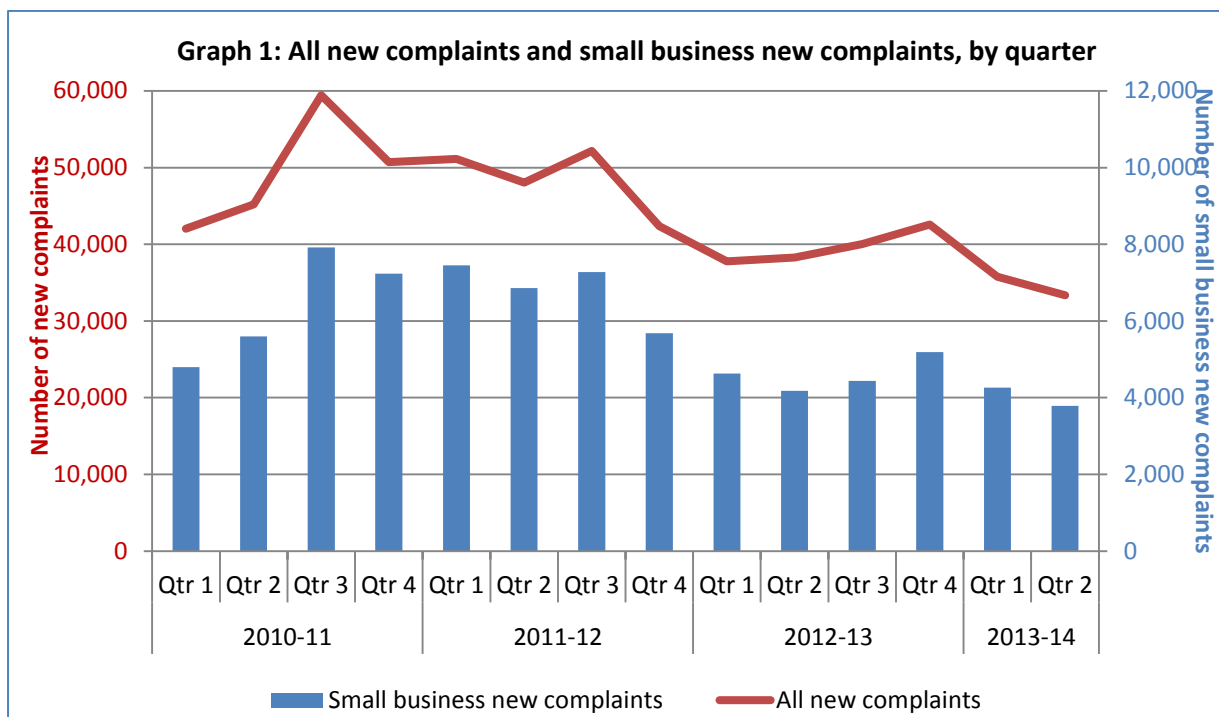
When a consumer – residential or small business – contacts us about an expression of grievance or dissatisfaction about a matter within the TIO's jurisdiction that the service provider has had an opportunity to consider, we record this as a 'new complaint'.

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.

In 2012-13 we received 18,423 new complaints from small businesses around Australia, compared to 14,955 new complaints in 2009-10, 22,836 in 2010-11 and 27,008 in 2011-12. Over the first two quarters of 2013-14, we have recorded around 8,044 new complaints from small businesses.

We have seen a decrease in new complaints from small businesses in 2012-13 and again over the first two quarters in 2013-14, consistent with the overall decrease in all new complaints received by the TIO over similar periods.

Graph 1 shows the comparison between all new complaints and small business new complaints recorded by the TIO over the past three-and-a-half years.



Resolution of small business complaints

Our complaints data indicates that the majority of small business complaints are resolved quickly by referral back to the senior complaint handling area of the service provider or by facilitated agreement through our conciliation process.

Of the 18,423 new complaints we received from small businesses in 2012-13, 14.4 per cent (2,659 small business consumers) returned to the TIO for further assistance to conciliate their complaints. This was 4 percentage points higher than the rate across all new complaints for the same period.

Only 113 out of the 2,659 conciliated small business cases in 2012-13 required progression to full investigation by the TIO. This is a very low progression rate of about 4.2 per cent of all conciliated cases. This rate was 1.7 percentage points higher than the rate across all conciliated cases during the same period.

In the first two quarters of 2013-14, we have seen some improvement in the rate of resolution of small business complaints. Out of 8,044 small business new complaints we received during this period, only 1,002 or 12.5 per cent returned to the TIO to have their complaints conciliated. This was 1.7 percentage points higher than the rate across all complaints for the same period.

The rate of progression from conciliation to investigation has also improved to 2.8 per cent during the first two quarters of 2013-14, 0.2 percentage points lower than the rate across all conciliated cases.

Issues raised in small business new complaints

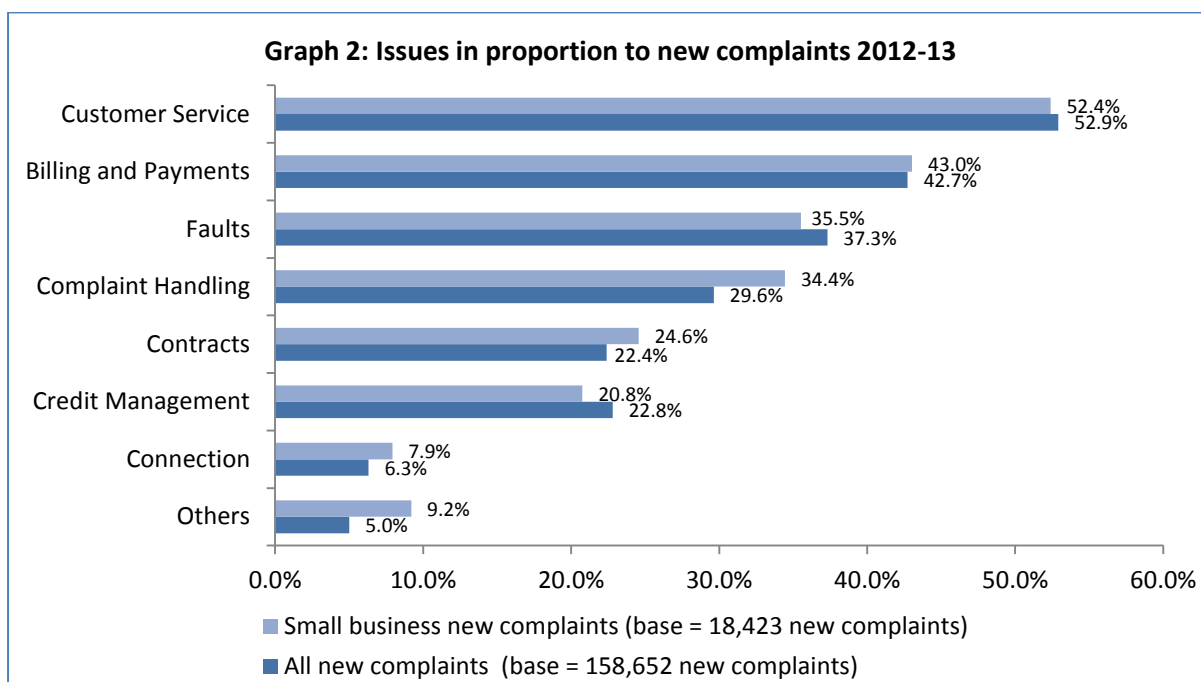
We record new complaints by the types of issues that these complaints present. Issues are selected from a choice of keywords that are aligned to industry codes or common complaint categories that the TIO has identified. These issues include connection and fault repair delays, credit management

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.

Issues about customer service formed the largest category of small business new complaints in the financial year 2012-13, followed by issues about billing and payments, faults, complaint handling, contracts and credit management. Over this period, issues about billing and payments, complaint handling, contracts and connection were proportionally more common in small business new complaints when compared against all new complaints. In particular, the higher incidence of complaint handling issues in small business complaints reflects the proportionately larger impact on many of those businesses when complaints cannot be quickly and efficiently resolved.

Graph 2 sets out the types of issues in proportion to new complaints from small businesses compared to all new complaints in 2012-13.



Matters outside the scope of the TIO scheme

Each year, we receive a number of contacts from businesses that are considered to be outside the scope of the TIO scheme because:

1. the business does not meet the TIO’s criteria for a small business, or
2. the complaints are from small businesses but involve issues that are outside the scope of the TIO scheme.

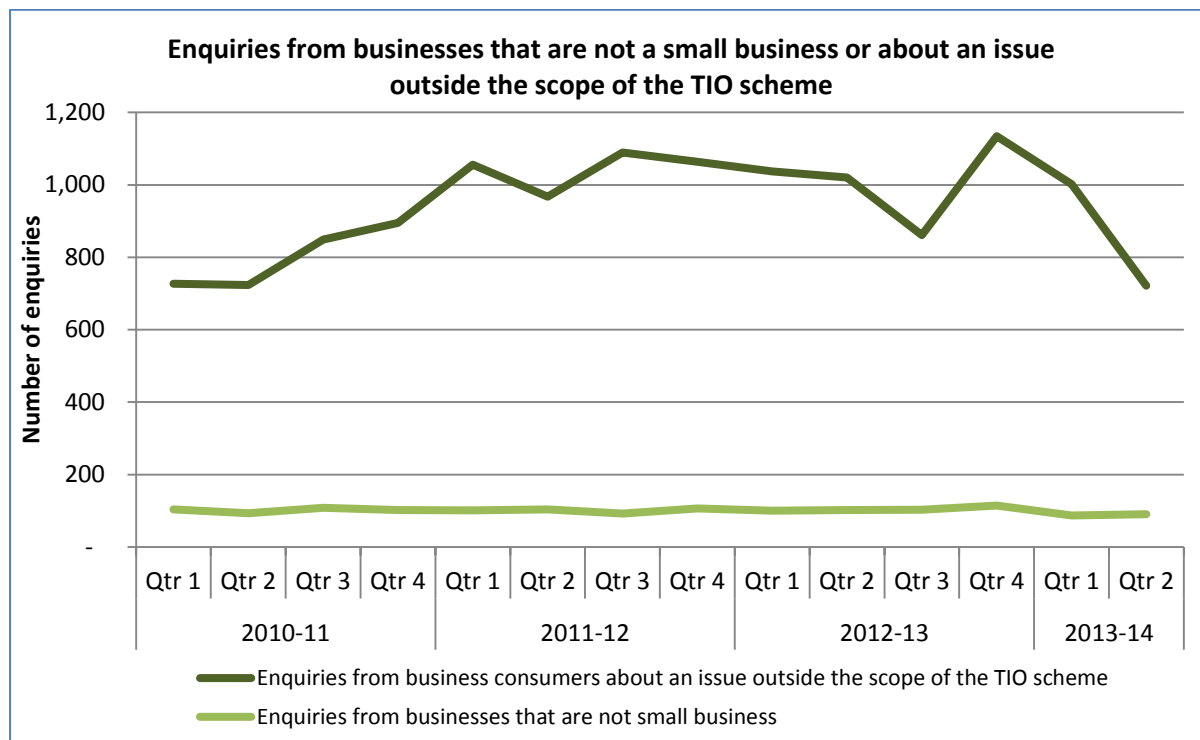
We record these contacts as enquiries. We may refer the business to a more appropriate body (for example, the Australian Competition and Consumer Commission, state based small business

commissioners, state Offices of Fair Trading or a small claims tribunal) or suggest that the business seeks independent legal advice.

Common small business enquiries outside the scope of the TIO scheme include:

- the small business consumer contacted the TIO prior to giving their service provider an opportunity to consider the complaint. In these instances, the small business consumer is asked to first contact their service provider to attempt to resolve the matter. If the matter remains unresolved, the small business consumer can then return to the TIO for assistance.
- the issue relates to customer premises equipment. While the TIO is able to deal with some equipment related complaints (where, for example, they are ‘bundled’ with a telecommunications service), we cannot deal with complaints where the equipment is not part of a bundled contract or the issue is related to equipment that is defined as customer premises equipment (for example, a PABX system).
- the issue involved a service provider’s commercial decision that is outside of the scope of the TIO scheme (for example, the setting of tariffs).
- the issue does not relate to a telecommunications service (for example, it relates to domain names or website hosting).

Graph 3 shows the number of enquiries received over the past three-and-a-half years from businesses that were either not considered as small or were about an issue outside the scope of the TIO scheme.



TIO response to the proposal for a Small Business and Family Enterprise Ombudsman

An effective voice for small businesses

The TIO has a very positive relationship with small business commissioners already established, and we readily understand the opportunity for a statutory Australian Small Business Commissioner to be a purposeful, empowered and effective advocate for small businesses in government and the community.

We readily appreciate the potential value of the proposed new agency as a concierge for small business dispute resolution services, given the high incidence of complaints from small businesses to the TIO about how poorly their concerns have been handled by their telecommunications service providers.

We are concerned over the appropriateness of the proposal to call this agency an 'Ombudsman' (the Small Business and Family Enterprise Ombudsman) and the potential for conflict between its dispute resolution function and its advocacy function.

We outline below our responses on the following issues:

- Use of the title 'Ombudsman' and the potential conflict with the advocacy role
- Information about and referrals to existing dispute resolution services, and
- Information sharing between the proposed new agency and the TIO.

Use of the title 'Ombudsman' and potential conflict with the advocacy role

In the foreword to the Discussion Paper, the Minister for Small Business emphasises the role of the proposed agency as a genuine independent advocate for small business.

We suggest that calling the proposed agency an Ombudsman, and providing for a role as an advocate may lead to confusion and false expectations for small businesses that approach the agency and impede its effective functioning. It also has the potential to reduce the community's understanding of an Ombudsman's role. These outcomes will be to the detriment of both the new agency, and Ombudsmen more generally.

As quoted in the Discussion Paper, the Australian and New Zealand Ombudsman Association (ANZOA) considers that an Ombudsman should comply with six essential criteria:

- be independent (that is, an Ombudsman must not be subject to direction, and must not be, or perceived to be, an advocate for any group);
- have a clearly defined jurisdiction;
- have sufficient powers to investigate matters within its jurisdiction, both in relation to individual complaints and systemic issues;
- be accessible;
- afford procedural fairness (the action of the ombudsman must not give rise to a reasonable apprehension of partiality, bias or prejudice); and

- be accountable.¹

In his presentation on the expanding Ombudsman role to the Australia Pacific Ombudsman Region meeting in March 2008, Professor John McMillan, the then Commonwealth Ombudsman, stated that “the effectiveness and durability of the Ombudsman will ultimately rest on whether the office adheres to fundamental precepts of the Ombudsman model”, and that the Ombudsman “is not an advocate or agent of the complainant or the agency”, and at most “the Ombudsman is an advocate for good administration, and for practical and effective resolution of the problems that people encounter with government”.² This could be achieved for example through auditing agency records, legislative reviews, conducting training seminars, or publishing guides to good decision making and complaint handling.

We strongly urge the reconsideration of the title of ‘Ombudsman’ for the proposed new agency as this conflicts with its proposed role as an advocate. We suggest that the new agency could be retitled to more accurately reflect its aims and functions, for example the Commissioner or Advocate for Small Business and Family Enterprise. This would ensure that the agency’s function is clear to the small businesses and family enterprises it aims to assist.

We also suggest that there should be clear separation of the proposed agency’s mediation function and its advocacy role to ensure that it can maintain both actual and perceived independence when carrying out its dispute resolution function.

Information about and referrals to existing dispute resolution services

We support the proposal to extend the current Australian Small Business Commissioner’s complaints information and referral functions to the proposed new agency, as well as providing a ‘triage’ service by undertaking preliminary discussions and enquiries to determine the most appropriate course of action.

We understand that many small businesses will not have the time or resources to find the right agency to assist them in resolving their disputes. Giving small businesses appropriate information about and referral to the most suitable dispute resolution service will assist them resolve their disputes more quickly and effectively.

It is important that the proposed agency’s dispute resolution functions are well defined, to avoid any overlapping jurisdiction between this agency and other existing dispute resolution services such as the TIO. A lack of clarity in this regard may result in less than preferable outcomes such as:

- inefficiency and wasted resources. The proposed agency may find itself involved in the resolution of disputes arising from a small business’s commercial arrangements with for example, its telecommunications service provider, even though the TIO has the expertise,

¹ See *Essential criteria for describing a body as an ombudsman*, Australian and New Zealand Ombudsman Association, 2010, www.ombudsman.gov.au/docs/anza/anza_essential_criteria_for_describing_a_body_as_an_ombudsman.pdf, accessed on 14 May 2014.

² See *The expanding Ombudsman role: What fits? What doesn’t*, presentation by Prof. John McMillan to Australia Pacific Ombudsman Region meeting in Melbourne, 27 March 2008, http://www.ombudsman.gov.au/files/27_March_2008_The_expanding_Ombudsman_role_What_fits_What_doesnt.pdf, accessed on 14 May 2014.

experience and well-tested processes to resolve such disputes. This could also reduce the resources available to the proposed agency to resolve other disputes involving small businesses.

- confusion for small businesses, in that they may be uncertain whether to use the dispute resolution processes of the proposed agency or those of the other dispute resolution services (such as an industry Ombudsman). This could reduce the possibility of resolving disputes in an economical, fair and timely manner.³

Each year, Ombudsman and other complaint handling agencies refer small business consumers to the TIO, including by direct referral, warm transfers, email, and also through having well established links to the TIO from their website.

Similarly, we refer small business complaints that are outside the scope of the TIO scheme (see Graph 3) to more appropriate agencies or bodies, including the relevant small business commissioners.

We note the proposed concierge function of the proposed new agency, and that this will be highly dependent upon an effective referral process to Ombudsmen such as the TIO and other dispute resolution services. This referral process could be supported by a memorandum of understanding (MoU) between the parties, and a specific legislative provision for the new agency to enter into such MoUs.

Information sharing between the proposed new agency and the TIO

The TIO and the current Australian Small Business Commissioner have formed a working relationship, and we have provided information to the current Commissioner about small business complaints trends and concerns raised by small businesses about their telecommunications services. We believe that this has assisted the Commissioner in better understanding the challenges faced by the small business community about their telecommunication services.

We suggest that a similar collaborative arrangement could be entered into between the TIO and the proposed new agency and – where appropriate – extended to other dispute resolution services that deal with complaints from small businesses. Sharing of information about complaint trends and common issues faced by small businesses across industry sectors, would provide better intelligence about these issues, assisting the proposed functions of the new agency.

This perhaps could be best achieved through a MoU as proposed above.

³ See our submission to the Senate Economics Legislation Committee on *Small Business Commissioner Bill 2013*, 20 March 2013 at http://www.tio.com.au/_data/assets/pdf_file/0018/131139/2013-03-20-TIO-submission-to-Senate-Economics-Legislation-Committee-Small-Business-Commissioner-Bill.pdf.

Appendix: Small business case studies

Case study 1

Gillian runs an online business that sells dried food products. On 16 December 2013 she called her service provider to advise that she was moving her business to a new address and that she would need her landline, fax and internet services to be relocated.

An appointment was made for the relocation to take place on 6 January 2014. When Gillian called to confirm the relocation on 3 January 2014, she was told that her order had been mistakenly cancelled and that she would have to wait a further 20 days for the connection to be provided.

Gillian approached the TIO for assistance at this point, because she claimed she was experiencing business loss because of the delayed connection. When she was contacted by her provider following referral of the complaint by the TIO, she was told that the connection would occur on 15 or 16 January 2014.

On 21 January 2014, Gillian contacted the TIO to complain again that her services still had not been connected. She said that she did have a temporary fax number connected at the new address, but being a temporary number her customers could not contact her. She was still without access to landline and internet, and the financial impact upon her business was increasing.

The TIO progressed the case to conciliation and Gillian's services were connected on 23 January 2014. In its response to the TIO, the service provider credited Gillian's account for the charges billed in January 2014. It also offered Gillian \$822.80 in Customer Service Guarantee (CSG) compensation.

Gillian was satisfied with the resolution offered by her service provider, and the TIO then finalised her case.

Case study 2

Steve, a small business owner, had his internet and two mobiles disconnected without warning. When Steve rang his provider to find out why, he was told that his business partner had called earlier to disconnect the service. Steve said he had been with his business partner all day and no such call had been made.

The provider agreed to reconnect the services. Steve's mobiles were restored, but not the internet. Steve told us that because of this, he almost lost a contract worth several thousand dollars. In a TIO investigation, we discovered that Steve may have been the victim of fraud. The representative who originally took the cancellation request had not properly identified the caller. The provider agreed to give information about the alleged fraud to the police. During the investigation, the provider also reconnected Steve's internet service.

Steve wanted the provider to tighten the security on his account because the person who had

fraudulently cancelled his service also changed his address details, which caused the delay in getting his internet reconnected.

The provider assured Steve that its security procedures were already tight, and his problem was caused by an intentional fraud. Nevertheless, the provider gave Steve six months' worth of credits. The provider also promised that if Steve was ever dissatisfied with his account's security again, it would release him from his contract without termination fees.

Steve accepted this as a resolution and we closed the complaint.

Case study 3

Matt operates a plumbing business. He had business services with his provider and, in January 2013, he decided to move out of his current workshop and run his office from home. He spoke with a local dealership operating on behalf of his provider, and it agreed to relocate his business services to his home.

By March 2013, Matt's services had not yet been transferred to his home office. Because Matt made most of his bookings and did most of his ordering online, he had to purchase a new mobile internet service to keep his business operating, which led to high excess usage charges on that service.

In August 2013, after several attempts to move the business services, Matt's provider informed him that it could not be done. His provider asked him to keep paying for the services until his contract expired even though he could no longer use them. Matt disputed this, because he had been paying monthly access charges of approximately \$400 per month since January 2013 even though he had not been able to use the services. Matt asked his provider to refund those charges, refund the excess usage charges on his mobile internet service and to release him from his contract without early termination fees. His provider did not resolve his complaint.

Matt complained to the TIO and his complaint was referred to the senior complaint handling area at his provider. His provider called him and said they would investigate the complaint and call him back, but this did not happen.

Matt returned to the TIO for assistance in September 2013. After the TIO commenced conciliation, the provider agreed to release Matt from his contract without early termination fees, and allowed him to move his business phone numbers to another provider without any cost. Matt's provider also refunded the charges he had paid from January 2013 onwards for the business services and some of the excess data charges he had incurred in keeping his business operating. Matt's provider also offered to try and connect a different bundle of services at his home if this would be more convenient than transferring to a new provider, but Matt declined this offer.

Matt was satisfied with the outcome to his complaint and the TIO closed the case in October 2013.