

23 March 2015

Mr John Stanton
Chief Executive Officer
Communications Alliance Limited
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MILSONS POINT NSW 1565

Dear Mr Stanton

Proposed Copyright Notice Scheme Code (public comment version C653:2015)

The Telecommunications Industry Ombudsman (TIO) welcomes the opportunity to comment on the proposed Copyright Notice Scheme Code (the proposed Code).

We have confined our comments about the proposed Code to three key areas:

1. governance arrangements under the proposed Code
2. review arrangements under the proposed Code, and
3. related consumer complaints arising from the proposed notice scheme.

Our brief comments on these issues are detailed below.

1. Governance arrangements under the proposed Code

As presently drafted, the governance arrangements for the establishment and responsibilities of the Copyright Information Panel (CIP) may not ensure an independent or balanced approach to the work of the CIP, nor the confidence of consumers or the community in the CIP.

Executive Committee: In particular, the composition of the Executive Committee of the CIP is heavily weighted toward industry representation, with only one consumer representative on a panel of five. These arrangements are considerably less balanced than, for example:

- the governance arrangements for the TIO, which provide for independent directors and a balance of other directors with industry and consumer experience
- the governance arrangements for Communications Compliance, which presently includes an independent Chair, a consumer representative, the Chairperson of Communications Alliance and the Executive Director, and
- the governance arrangements of industry Ombudsman generally, and of other Committees (for example, the Code Compliance Monitoring Committee), which have a balance of consumer and industry representation.

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The presence of balanced governance arrangements for the CIP is something that will be important for stakeholders (including consumers) to have confidence in the fairness of the proposed Code and its implementation.

Adjudication Panel: The proposed Code also does not outline the appointment process or term of tenure for the Adjudication Panel. In addition, it provides that the CIP itself will commission and oversee administrative support for the Adjudication Panel.

This proposal can be contrasted with the extensive arrangements in place for external dispute resolution (EDR) offices such as the TIO to ensure independence in dispute handling and decision making. These arrangements, embedded in constituent documents, include matters such as the appointment process for the Ombudsman, the right of the Ombudsman to appoint their own staff, and a clear delineation of complaint handling responsibilities (which are solely the Ombudsman's responsibilities) from other matters.

2. Review arrangements under the proposed Code

The proposed Code requires Internet Service Providers (ISPs) to send education, warning and final notices to account holders who are alleged to have infringed copyright in online work of rights holders. Upon receiving a final notice, an account holder can challenge the alleged infringement by seeking an independent review, via the Adjudication Panel.

Review only at final notice stage: Other than the challenge notice process for final notices, there are no other rights of review or dispute resolution mechanisms in the proposed Code. This means that, for some notices, there are no review rights at all (unless a final notice is issued), and for the final notice there is no right to request an internal review prior to approaching the Adjudication Panel. In addition, final notices may be included in final notice lists during the period that a challenge can be made. And there are no processes set out to deal with concerns about related matters (about privacy and process) which may arise.

The review mechanisms in the proposed Code fall short of the consumer safeguards and review mechanisms in other arrangements within the telecommunications industry, examples of which are set out in **Appendix 1**. Safeguards and review arrangements in these include:

- appropriate notice to a consumer before any decision is made or acted upon
- an opportunity to raise and resolve any dispute about a proposed decision with the service provider (internal review), and
- a right to access EDR at no charge – and for the TIO to undertake this EDR role.

Although there are some safeguards built into the notice requirements in the proposed Code, the requirements for internal review and access to independent EDR are not equivalent to arrangements in other comparable areas of telecommunications services.

Application fee for the review: An additional matter is that the proposed Code imposes a fee of \$25 to be paid by an account holder who seeks to challenge a final notice. This fee will present a barrier to some account holders who want to challenge a notice because they believe its issuance to them was wrong.

Such a charge is inconsistent with the rights of telecommunications consumers to seek external review by the TIO at no charge, for unresolved complaints against their ISP and related to their use of an internet service. It is a key practice to promote accessibility that there is no application charge required before a complaint is dealt with – reflected in, for example, the *Key Practices for Industry-based Customer Dispute Resolution*¹.

New body established to deal with reviews: Another matter relevant to dispute resolution is whether it is appropriate to establish a new body (the Adjudication Panel) to deal with any consumer complaints or reviews.

In this respect, the Productivity Commission, in its *Access to Justice Arrangements Report*², has reflected upon the effectiveness of industry ombudsmen in sectors where essential services are delivered by large providers. It also highlighted the risk of an increased proliferation of dispute resolution services leading to consumer confusion about where to go and the risk of inconsistent outcomes.

These concerns are in addition to other issues, outlined above, about the rigour of the arrangements to guarantee the independence of decision making by the proposed Adjudication Panel.

For consumers of internet services, it would be a reasonable expectation, and consistent with the reasoning of the Productivity Commission and arrangements already established in the telecommunications industry, that the TIO would deal with disputes about the issuance of notices by their ISP.

3. Related consumer complaints arising from the proposed notice scheme

In addition to disputes being raised with the Adjudication Panel following the issuance of final notices, there is a real likelihood that consumers will raise concerns that are consequent to the implementation of the proposed notice scheme. These may include, for example:

- a complaint by a consumer about the response (or non-response) of an ISP to concerns about a notice or its consequences, and
- a complaint by a consumer about the disclosure of personal information by an ISP, or access to personal information or records held by an ISP.

Where a consumer approaches the TIO with an unresolved complaint about these and any related aspects, we would be required to deal continue with these complaints consistent with our Terms of Reference. This is also a further reason that a single external office deal with reviews under the proposed Code and any other matters that may arise, as a one-stop shop.

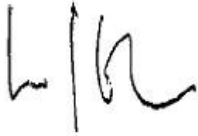
¹ The Australian Government Treasury, *Key Practices for Industry-based Customer Dispute Resolution*, March 2015, available at: <http://treasury.gov.au/PublicationsAndMedia/Publications/2015/key-pract-ind-cust-dis-reso>.

² Productivity Commission, *Access to Justice Arrangements Report*, volume 1, pp 334 – 335, available at: <http://www.pc.gov.au/inquiries/completed/access-justice/report>.

Further information

If you require further information, please contact David Brockman, Executive Director – Industry, Community and Government on 03 8600 8700 or by email (david.brockman@tio.com.au).

Yours sincerely



Simon Cohen
Ombudsman

Appendix 1

Examples of appropriate safeguards and review arrangements to balance consumer interests in respect of telecommunication services include:

- The *Telecommunications Universal Service Obligation (Standard Telephone Service - Requirements and Circumstances) Determination (No. 1) 2011* provides that if the primary universal service provider believes that it is not obliged to provide a standard telephone service, it must give notice to the consumer about its decision, and the consumer may request the provider to reconsider, and may also lodge a complaint with the TIO if they remain dissatisfied.
- The *Telecommunications (Customer Service Guarantee) Standard 2011* provides that carriage service providers must notify consumers about a decision to disconnect a CSG eligible service for non-payment of a charge, and the consumer is entitled to dispute the disconnection with provider first, and if dissatisfied with the provider's response, the consumer may make a complaint to the TIO.
- Schedule 3 to the *Telecommunications Act 1997* and the *Telecommunications Code of Practice 1997* (the Code) provide for notice to be given to land owners and occupiers (landholders) where a carrier proposes to conduct activities on land. For inspections and the installation and maintenance of low-impact facilities, the Code provides for a consultation process for the carrier and landholders to resolve any objections to these activities. Where these cannot be resolved by agreement, a landholder can request that the objections be referred to the TIO for direction.
- Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the TCPSSA) and the TIO Terms of Reference provide for a similar framework:
 - The TCPSSA requires that all carriage service providers who supply services (including a standard telephone service, public mobile telecommunications service or carriage service that enables end-users to access the Internet) must enter the TIO scheme, the functions of which are to include the investigation and determination of complaints by end-users.
 - The TIO Terms of Reference ensure that a service provider is given a chance to consider a complaint before any TIO handling of the complaint.
- Telecommunication industry codes which impact on consumers (in particular the *Telecommunications Consumer Protections Code C628:2012* (the TCP Code)) also generally provide that notice, internal review and EDR are provided to consumers in circumstances where their interests are potentially to be impacted. For example, the effect of clauses 6.7 and 6.8 and Chapter 8 of the TCP Code are that suppliers must:
 - give notice to customers prior to disconnecting, suspending or restricting their telecommunications service
 - review any decision to restrict, suspend or disconnect a service at the customer's request
 - advise the consumer, if they are dissatisfied with the outcome of the review, about how to make a complaint
 - provide information about EDR including the TIO.