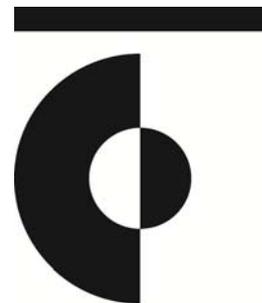


6 March 2013



**Telecommunications
Industry
Ombudsman**

Simon Cohen
Ombudsman

Ms Nadine Coutts
Acting Director, Consumer Access and Equity
Consumer Policy and Post Branch
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Dear Ms Coutts

Exposure Draft: Telecommunications Legislation Amendment (Consumer Protection) Bill 2013

Thank you for giving the Telecommunications Industry Ombudsman ('the TIO') the opportunity to comment on the Exposure Draft of the Telecommunications Legislation Amendment (Consumer Protection) Bill 2013 ('the Exposure Draft'), forwarded to us by the Department of Broadband, Communications and the Digital Economy ('the DBCDE') on 28 February 2013.

My brief comments on the proposed amendments are outlined below.

Proposed amendments to the Do Not Call Register Act 2006 ('DNCR Act')

1. The proposed amendments to the DNCR Act provide greater clarity around and strengthen the existing legislative obligations on the parties who are responsible for making telemarketing calls or sending marketing faxes.

Proposed amendments to the Telecommunications Act 1997

1. The requirement for submissions (whether from the public or industry members) to a draft code or draft variations to a code be published on the website of the industry association should promote the transparency of the code development process. However, some submissions may contain confidential or sensitive information. The party making the submission may not wish to have parts or all of their submission published for this reason, or alternatively may not provide a submission if a guarantee of confidentiality cannot be given. It is unclear whether the proposed amendments in the Exposure Draft will allow for this exception. This is a matter that should be specifically considered in the amendment.
2. The inclusion of a new requirement to allow a code to be varied instead of being replaced in its entirety will provide flexibility and adaptability to the code

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development process. This will ensure that new and emerging issues that impact the industry or consumers can be addressed in a timely and effective manner. It is noted that safeguards support this amendment, including the requirement for the TIO to be consulted about the draft code variations prior to registration.

Proposed amendments to the Telecommunications (Consumer Protection and Service Standards) Act 1999 (TCPSS Act)

1. Legislative instrument to determine standards for the TIO

The proposed amendments to section 128 of the TCPSS Act are proposed to give effect to Recommendation 1 in the DBCDE Report on *Reform of the TIO* issued in May 2012.

That recommendation proposed an amendment to the TCPSS Act to allow, through a legislative instrument such as a ministerial determination, greater clarity around the role of the TIO scheme and expected standards of operation. This included:

- requiring the TIO scheme to comply with the Benchmarks for Industry-based Customer Dispute Resolution Schemes ('the Benchmarks')
- the development of framework principles for complying with the Benchmarks.

The proposed amendments set out in the Exposure Draft seek to meet this recommendation by permitting the Minister, by legislative instrument, to determine standards with which the TIO scheme must comply. The proposed subsection 128(1) provides for the matters which the Minister must have regard, and these reflect the headings of the 6 principles in the Benchmarks – accessibility, independence, fairness, accountability, efficiency and effectiveness – and also includes '*such other matters (if any) as the Minister considers relevant*'. The amendment also provides for consultation with the TIO and Australian Communication and Media Authority ('ACMA').

My only comment in respect of the proposed amendment relates to the non-inclusion of a reference to the Benchmarks.

The TIO scheme is already committed, under its Constitution, to the principles set out in the Benchmarks (see clause 2A). For this reason, and because the Benchmarks are the current standard of good practice in external dispute resolution, I have advised that I have no concern with the recommendation in the DBCDE Report.

The proposed amendment to section 128, while making reference to the matters the Minister must have regard to in determining standards for the TIO scheme, does not specifically reference the Benchmarks. I understand, through discussions between my office and the DBCDE, that the legislation needs to be durable and able to accommodate changes, including possible changes to the Benchmarks, and for this reason specific reference to the Benchmarks has not been included. However, in my view the intention that any Ministerial standard is to have full regard to the Benchmarks should be stated clearly and appropriately. Possible solutions may include:

- that the legislation provide that the Minister must have regard to any relevant industry standard for external dispute resolution including the Benchmarks
- that the intention that the Ministerial standard reflects the Benchmarks be clearly expressed in notes of memoranda accompanying the amendment.

2. Reviews of the TIO scheme

The proposed new section 133A provides for reviews of the TIO scheme.

The legislative requirement reflects in part the current requirement, in clause 19 of the TIO Ltd Articles of Association, for the Board of TIO Ltd to commission reviews of the scheme.

There are two matters about which I have brief comments.

The first matter concerns sub-section 133A(1), which will require the 'Telecommunications Industry Ombudsman' to 'cause to be conducted reviews of the operation of the Telecommunications Industry Ombudsman scheme'.

I have previously raised concerns with the DBCDE about whether the new subsection should place this requirement on the 'Telecommunications Industry Ombudsman' or on the TIO scheme. I noted in this respect that it may promote the effectiveness of a review if the Ombudsman's role is principally as an active participant in the review.

I understand that my comments have been considered, and that the DBCDE has been advised by drafters of the legislation that the review obligation must be attached to an entity, and that the most appropriate entity is the Ombudsman.

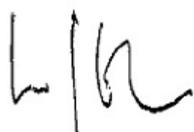
The second matter concerns the timing of the first review. The proposed subsection 133A(2) provides that the first review must be completed within 3 years after the commencement of the new section.

I have suggested that this provision would better provide for a specific date – that is 1 May 2017 or 5 years after the release of the DBCDE Report on *Reform of the TIO*. This would make the timing of the first review consistent with subsequent reviews provided for in subsection 133A(3).

I understand that my comments have been considered. I also understand that the proposed 3-year timeframe for the first review will not commence until proclamation or six months after the Bill receives Royal Assent – as provided for section 2 of the Exposure Draft. While the drafting does not reflect what I consider to be a preferable position, I have no further comments in respect of this matter.

I trust that the TIO's comments are of assistance to the DBCDE. Please contact David Brockman, Executive Director – Industry, Community and Government on 03 8600 8700 if you require any further information.

Yours sincerely



Simon Cohen
Ombudsman