

20 March 2013

Mr Tim Bryant
Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600



**Telecommunications
Industry
Ombudsman**

Simon Cohen
Ombudsman

Dear Mr Bryant

Small Business Commissioner Bill 2013

Thank you for giving the Telecommunications Industry Ombudsman (TIO) the opportunity to comment on the *Small Business Commissioner Bill 2013* (the Bill).

We enclose our submission on this Bill. In this submission, we have focused our comments on the following:

- (a) Our current approach to dealing with complaints from small businesses about their telecommunications services
- (b) TIO complaints data relating to small businesses complaints, the issues involved in these complaints and the contacts made by businesses about matters outside the TIO's jurisdiction, and
- (c) Our response to specific issues in the Bill.

We trust that our submission is of assistance to the Senate Economics Legislation Committee.

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

Yours sincerely

Simon Cohen
Ombudsman

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

Telecommunications Industry Ombudsman Ltd ABN 46 057 634 787

Website: www.tio.com.au
Email: tio@tio.com.au

Postal address:
PO Box 276
COLLINS ST WEST VIC 8007

Street address:
Level 3
595 Collins Street
MELBOURNE VIC 3000

Tel freecall*: 1800 062 058
Fax freecall*: 1800 630 614
Telephone: (03) 8600 8700
Fax: (03) 8600 8797
TTY: 1800 675 692
*calls from mobile phones may incur charges



Telecommunications Industry Ombudsman

**Telecommunications Industry
Ombudsman – Submission on the
Small Business Commissioner Bill
2013**

March 2013



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About the TIO

The Telecommunications Industry Ombudsman (TIO) is authorised through 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 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.

Complaints to the TIO

New complaints from small business consumers

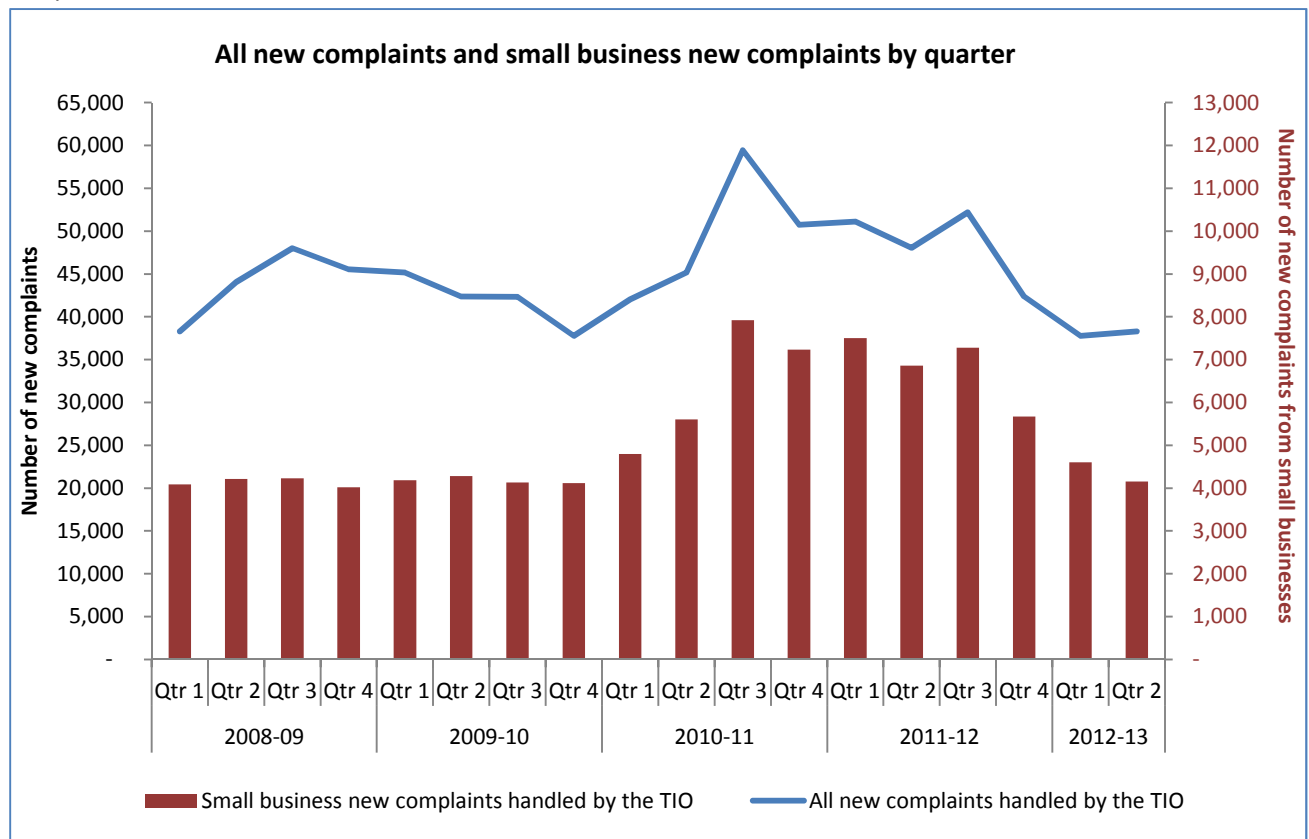
When a consumer – residential or small business – contacts the TIO with a grievance or an expression of dissatisfaction about a matter within the TIO’s jurisdiction that the service provider has had an opportunity to consider, we record this as a ‘new complaint’.

The TIO recorded and handled 193,702 new complaints from small business and residential consumers in 2011-12, compared to 197,682 new complaints in 2010-11.

The number of small business new complaints recorded and handled by the TIO has increased over each of the last four years. In 2011-12, we received around 27,008 new complaints from small businesses, compared to 22,836 new complaints in 2010-11 and 14,955 new complaints in 2009-10. We have seen a decrease in new complaints from small businesses over the first two quarters in 2012-13, consistent with the overall decrease in all new complaints received by the TIO over this period.

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

Graph 1: New complaints received by the TIO – all new complaints compared to small business new complaints



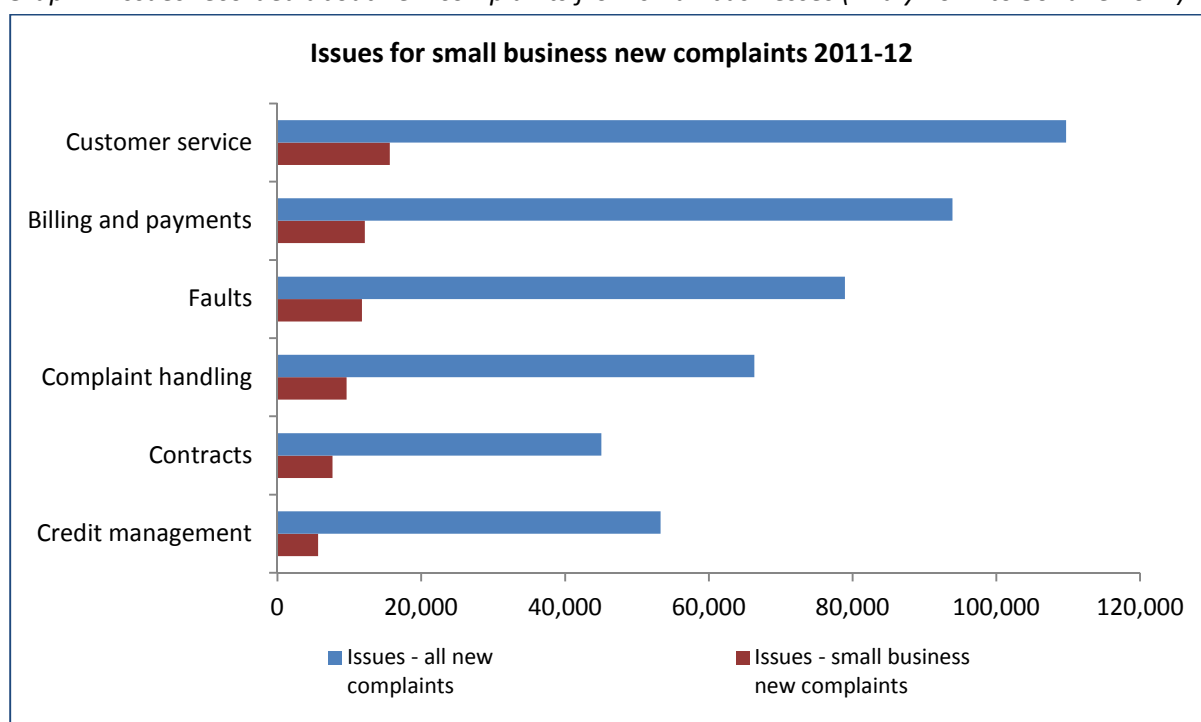
Issues raised in small business new complaints

The TIO categorises the individual 'issues' that are presented by each new complaint.

Issues about customer service formed the largest category of small business new complaints in the financial year 2011-12, followed by issues about billing and payments, faults, complaint handling, contracts and credit management. Over this period, issues about contracts were proportionally more common in small business new complaints when compared against all new complaints. During this time, issues about billing and payments, and credit management were proportionally less in small business when compared with all new complaints.

Graph 2 shows the top six issues recorded for new complaints from small businesses compared to the issues recorded for all new complaints in 2011-12.

Graph 2: Issues recorded about new complaints from small businesses (1 July 2011 to 30 June 2012)



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 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:

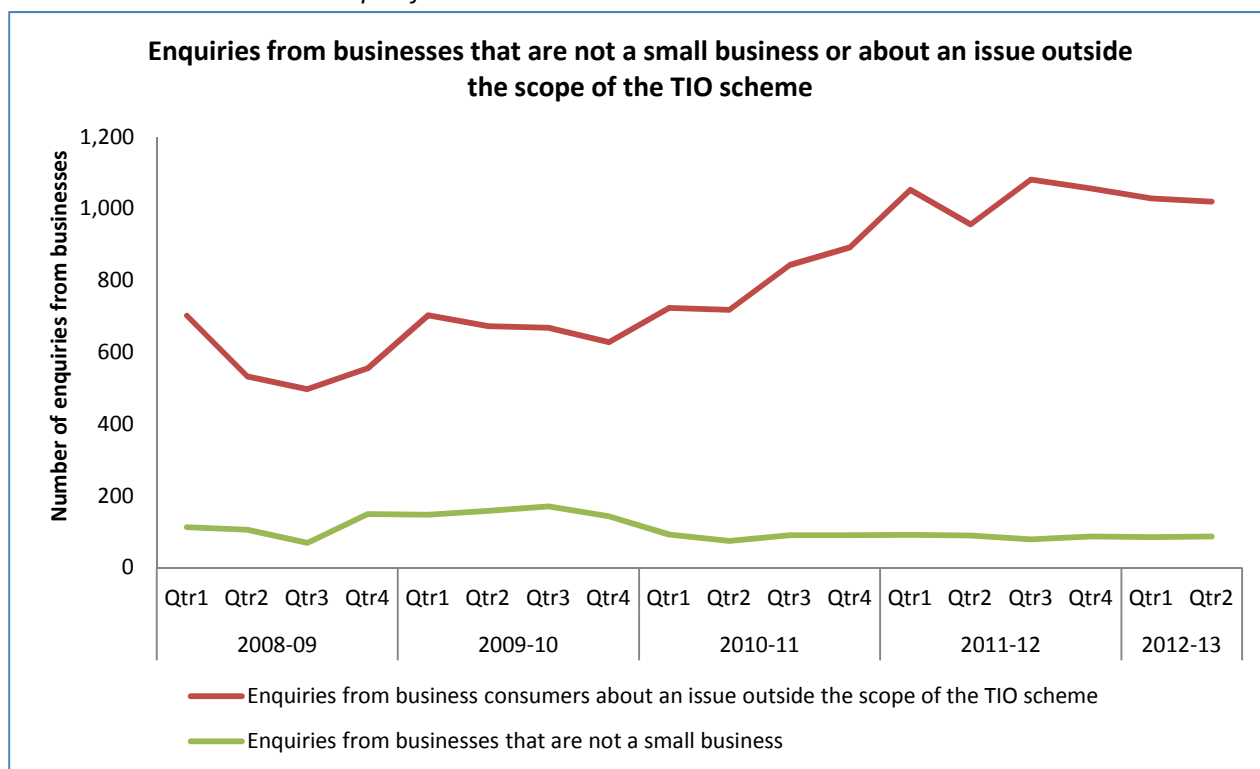
- the small business consumer contacted the TIO prior to giving their service provider an opportunity to consider the complaint. In these instances, the small business consumer is asked

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 four-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.

Graph 3: Number of enquiries made by businesses that were either not considered as small or were about an issue outside the scope of the TIO scheme



As indicated in the graph above, the TIO is seeing an increase in the number of enquiries from businesses about issues that are outside the scope of the TIO scheme. This highlights an opportunity for these businesses to have an alternative avenue of recourse for assistance with resolving their disputes.

TIO response to the Small Business Commissioner Bill 2013

The Small Business Commissioner Bill 2013

The TIO welcomes the proposed Small Business Commissioner Bill 2013 (the Bill). The Bill has the potential to make a positive impact on Australian small businesses as it establishes a dedicated agency – the Small Business Commissioner – to facilitate and resolve disputes between small businesses and Commonwealth agencies or departments; and between small businesses and other businesses subject to certain constitutional limitations.

This is, in our view, an important legislative initiative to safeguard and promote small businesses in Australia.

The TIO makes several suggestions about the Bill that may further strengthen the functions and powers of the Small Business Commissioner in its role to assist small businesses resolve their disputes.

Part 1 – Section 3: Definition of a Small Business

Section 3 of the Bill sets out the definition of terms used in the Bill. This includes defining a small business as a business that has 19 or fewer employees.

We suggest this definition may prove unnecessarily restrictive and could impede the Small Business Commissioner in its role as an advocate and representative of small business.

Our view is that the definition of a small business should depend on whether the business has the resources necessary to pursue a grievance through the formal legal system. Where the business does not have these resources, it may require access to the Small Business Commissioner to facilitate fair treatment in its commercial arrangements with the Commonwealth or with other businesses.

In our view, while the number of employees is an indicator of the resources available to a business, it is not determinative. For example, an agricultural business might have a small number of permanent employees but a large number of seasonal employees. If its total number of employees is more than 19, the Bill in its current form would not allow the Small Business Commissioner to assist this business. This would be the case even though this business may not have sufficient resources to pursue a grievance through the formal legal system.

The TIO suggests that this issue could be resolved by adopting a more flexible approach to the definition of small business in the Bill. In particular, in deciding whether a business is a small business, the Small Business Commissioner could consider other factors in addition to the total number of employees. These factors could include, for example, the turnover of the business, the structure or ownership of the business, the seasonal variations impacting on the business, the amount involved or the issue in the dispute.

A more flexible approach to the definition of a small business is likely to ensure that more small businesses have access to the services of the Small Business Commissioner.

Part 2, Division 2 – Section 8: Dispute Resolution Functions and Powers

Section 8 of the Bill sets out the dispute resolution functions and powers of the Small Business Commissioner. This includes at sub-section 8(d), the power of the Commissioner, subject to certain

constitutional limitations, to 'undertake any action that is appropriate for the purpose of facilitating the fair treatment of small business in commercial arrangements with other businesses'.

The TIO considers that this could, to some extent, lead to overlapping jurisdiction between the Small Business Commissioner and other external dispute resolution (EDR) schemes such as the TIO. This may cause:

- inefficiency and wasted resources. The Small Business Commissioner 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, experience and well-tested processes to resolve such disputes. This could also reduce the resources available to the Small Business Commissioner 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 Small Business Commissioner or those of the other EDR scheme. This could reduce the possibility of resolving disputes in an economical, fair and timely manner.
- 'forum shopping' where a small business chooses the forum it believes it will achieve the most favourable result. This could result in different small businesses, with similar disputes, achieving different results, merely because of the forum in which they chose to resolve their dispute. This would likely lead to the other party raising objections about the appropriateness of the forum that is selected by the small business to resolve the dispute – which may also unduly delay the effective resolution of the dispute.

For these reasons, we suggest the Small Business Commissioner should not generally deal with matters where other, specialist EDR schemes (such as the TIO) already can deal with the dispute.

We suggest that the Bill should allow the Small Business Commissioner to refer disputes between small businesses and other businesses to any relevant EDR schemes where this is appropriate. We note that there may be instances where it may be more appropriate for the Small Business Commissioner to deal with some of these disputes, for example, where the dispute is an intra-industry dispute and involves a small telecommunications service provider and its wholesale or upstream provider that is a larger corporation.

Part 2, Division 2 – Section 11: Information Sharing

Section 11 of the Bill allows the Small Business Commissioner to share information obtained in the exercise of its functions and powers with the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission.

We believe that this is a positive outcome as it will facilitate the resolution of disputes if the Small Business Commissioner, the ACCC and ASIC can share the information they have already gained in investigating a dispute. It will also help these bodies avoid costly duplication of information gathering and be better informed about industry trends.

For similar reasons, we suggest that the Bill could allow the Small Business Commissioner to share information with EDR schemes if this is appropriate. This could be achieved through a provision in the Bill that empowers the Small Business Commissioner to enter into a memorandum of understanding with EDR schemes.