Submission 037

[redacted]

Telecommunications
Industry
Ombudsman

Simon Cohen
Ombudsman

7 August 2012

Ms Natalya Wells
Inquiry Secretary
Standing Committee on Social Policy and Legal Affairs
Department of the House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Ms Wells

Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012

Thank you for providing the Telecommunications Industry Ombudsman (TIO) with the opportunity to comment on the Parliamentary Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012.

Please find attached our comments, including some background information about the types of privacy and credit reporting complaints we receive. Please note that this submission reflects comments made by the TIO on 18 July 2012 in a submission to the Senate Standing Committee on Legal and Constitutional Affairs regarding the same Bill.

Please do not hesitate to contact the Executive Director for Industry, Community and Government, David Brockman on [redacted] if you have any queries.

Yours sincerely

[redacted]

Simon Cohen
Ombudsman

Telecommunications Industry Ombudsman

Telecommunications Industry Ombudsman Submission to Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012

July 2012

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About the TIO

The Telecommunications Industry Ombudsman (TIO) is the external dispute resolution (EDR) scheme for the telecommunications industry. When a consumer contacts the TIO 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'. Complaints are recorded according to the types of issues that these complaints present, such as connection delays, credit management disputes (including disputes about the accuracy of credit files and complaints about the actions of collection agents), contractual disputes, customer service/complaint handling and billing disputes.

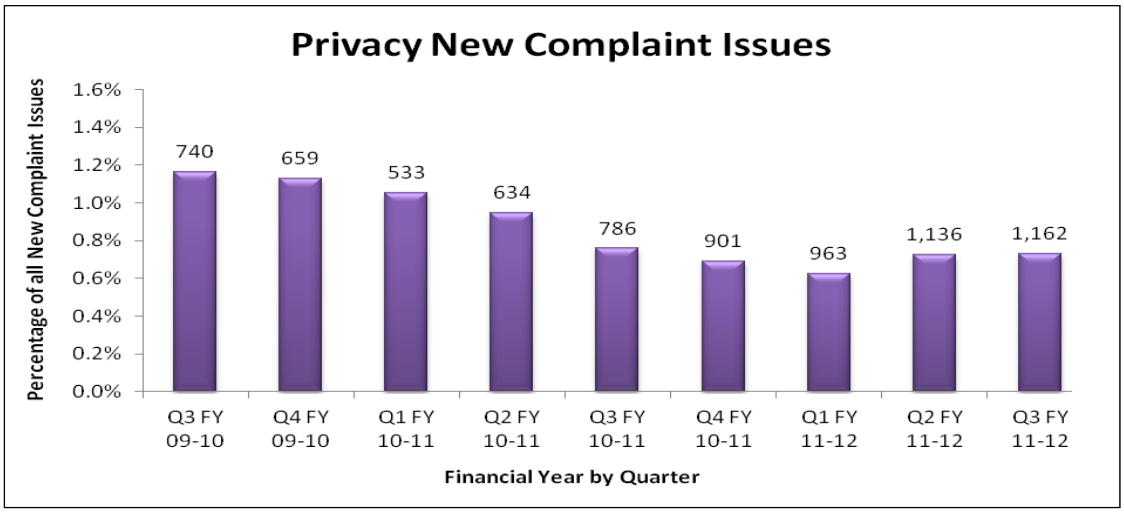
Each new complaint brought by a consumer to the TIO may be associated with one or more issues. For example, a complaint about a provider not updating the customer's billing address as requested may include a privacy issue (access to/accuracy of personal information), a billing and payments issue (bill not received/delayed) and a customer service issue (failure to action request).

Privacy related new complaint issues

The TIO records a variety of privacy related new complaint issues, including issues related to telemarketing, access to and disclosure of personal information, spam, and unwelcome/life threatening communications.

Graph 1 shows the number of privacy related new complaint issues we recorded per quarter, between 1 January 2010 (Q3 09-10) and 31 March 2012 (Q3 11-12). This graph also shows the percentage of new complaint privacy issues compared with the total number of new complaint issues recorded in each quarter. For example, between January and March 2012, we recorded 1,162 new complaint issues about privacy, and this number represents 0.7% of the total new complaint issues recorded for that quarter.

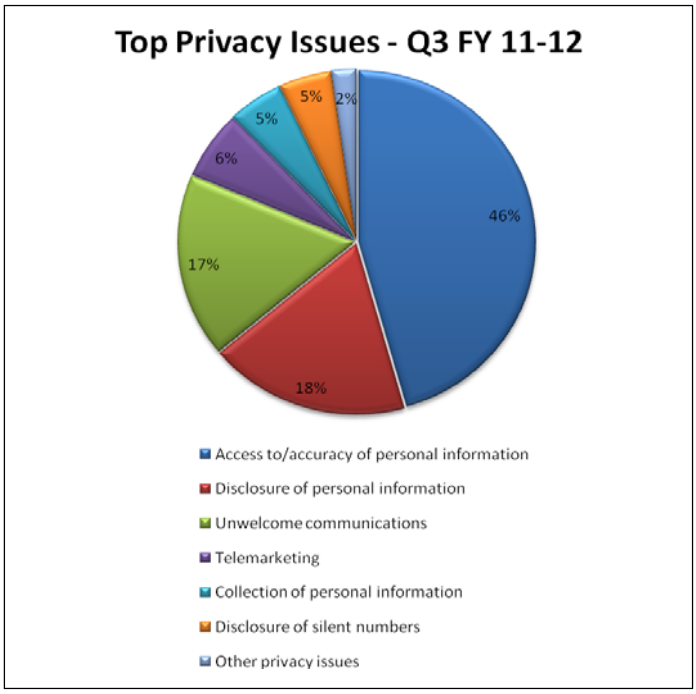
Graph 1: The number of new complaint privacy issues and the percentage of these issues compared with the total number of new complaint issues per quarter



Graph 1 shows that recently we have received an increase in new complaint issues about privacy, however, when compared with the total number of new complaints received, the percentage of new complaint issues about privacy has decreased over the period.

Graph 2 shows the top six privacy related new complaint issues we recorded between January and March 2012 (Q3 11-12). The most common privacy issue, 'access to/accuracy of personal information', made up 46% of the complaint issues recorded. This issue refers to complaints where the consumer claims their access to information has been denied, or, where the consumer claims the information held by their provider or former provider is inaccurate. These complaints commonly relate to incorrect billing information (usually an incorrect address) recorded in the provider's system.

Graph 2: New complaint privacy issues recorded between January and March 2012



The second most common privacy related new complaint issue we received, 'disclosure of personal information', refers to complaints about the disclosure of personal information related to a customer's account (other than an unlisted number). For example, this may occur where a consumer claims their provider sent their bill to an incorrect address (to their ex-partner) and now the ex-partner can see their new phone number. Another example may be where a provider publishes a customer's address in a directory where the customer claims they requested that this not occur.

'Unwelcome communications' refers to complaints about a provider not following the procedure to deal with unwelcome communications, as set out in the 'Handling of life threatening and unwelcome communications' code. 'Telemarketing' refers to complaints about telemarketing continuing after a request to stop where the Do Not Call Register cannot assist. 'Collection of personal information' relates to complaints about information being collected, stored or disposed inappropriately, for example, a customer receives a loan handset from their provider with someone else's photos or messages and details stored in the handset.

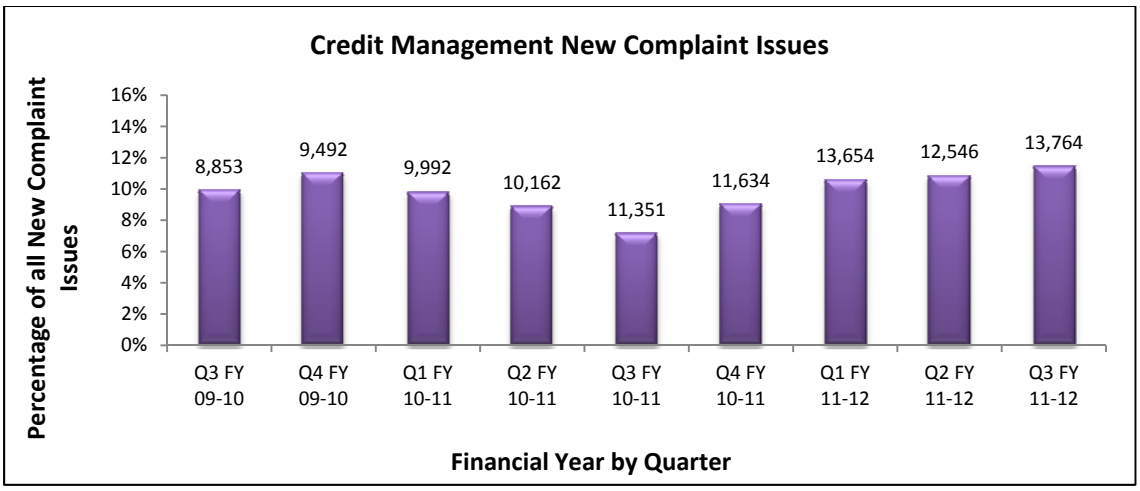
'Disclosure of silent numbers' is an issue recorded when a customer's unlisted number is published, and 'Other privacy issues' may include complaints about receiving spam or life threatening communications.

Credit management new complaint issues

The TIO records a variety of issues related to credit management, including issues related to credit default listings and over commitment.

Graph 3 shows the number of credit management related new complaint issues we recorded per quarter, between 1 January 2010 (Q3 09-10) and 31 March 2012 (Q3 11-12). This graph also shows the percentage of new complaint credit management issues compared with the total number of new complaint issues recorded in each quarter. For example, between January and March 2012, we recorded 13,764 new complaint issues about credit management, and this number represents around 11% of the total new complaint issues recorded for that quarter.

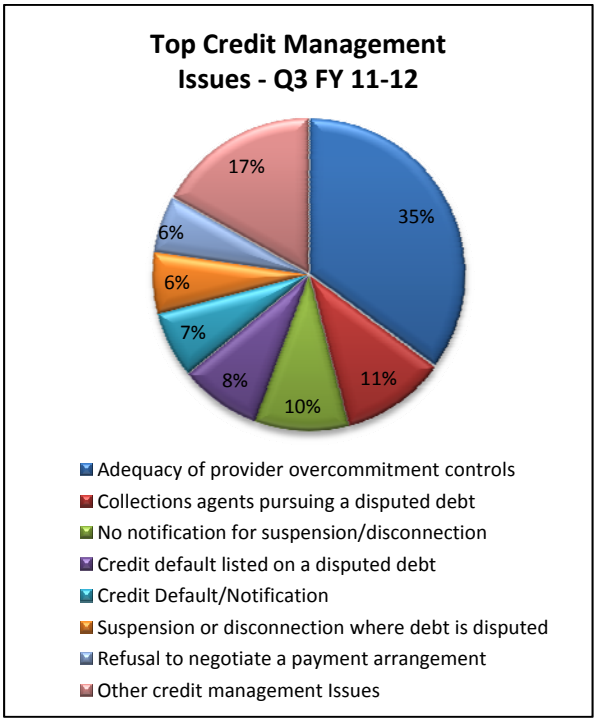
Graph 3: The number of new complaint credit management issues and the percentage of these issues compared with the total number of new complaint issues per quarter



Graph 3 shows that over the period the number of new complaint issues about credit management has increased, however, when compared with the total number of new complaints received, the percentage of new complaint issues about credit management has remained fairly steady at around 10-11%.

Graph 4 shows the top seven credit management related new complaint issues we recorded between January and March 2012 (Q3 11-12). While the most common issues concern matters such as spend-management controls, the conduct of collections agents and the suspension and disconnection of services, a significant proportion (15 per cent) concern credit default listing issues, including complaints about a service provider listing a credit default on a consumer's file while the debt is under dispute, and disputes more generally about the listing of the credit default.

Graph 4: New complaint credit management issues recorded between January and March 2012



TIO's comments on the Privacy Amendment (Enhancing Privacy Protection) Bill 2012

The TIO notes that the Standing Committee has invited submissions to focus on the following areas:

(a) the adequacy of the proposed Australian Privacy Principles;
(b) the efficacy of the proposed measures relating to credit reporting;
(c) whether defences to contraventions should extend to inadvertent disclosures where systems incorporate appropriate protections; and
(d) whether provisions relating to use of depersonalised data are appropriate.

Our specific comments are limited to comments about items (a) and (b) since these are most directly relevant to TIO operations.

Adequacy of the proposed Australian Privacy Principles

Australian Privacy Principle 5

In 2004 there was a joint submission by alternative dispute resolution (ADR) schemes[1] to the Review of the Private Sector provisions of the Act. This submission raised the uncertainty around the extent that ADR schemes must notify individuals of information that has been indirectly collected about

[1] The joint submission by the Banking and Financial Services Ombudsman, the Energy and Water Ombudsman, the Financial Industry Complaints Service, the Insurance Ombudsman Service and the TIO in December 2004

them. We note that this issue has not been clarified in the Bill. Specifically, Australian Privacy Principle 5[2] continues to require APP entities (including organisations such as the TIO) to "take such steps (if any) as are reasonable in the circumstances" to notify individuals about any indirect information collection and ancillary matters (such as how the individual may access that information).

It would be useful if the Bill could clarify the expectations of APP entities. Depending on the intended operation of APP 5, ADR schemes may require an exemption relating to notifying third parties about information indirectly collected.

Section 16A: Permitted general situations: concept of "reasonably necessary for the purposes of a confidential alternative dispute resolution process"

One of the permitted general situations specified under the proposed s16A relates to a condition where the collection, use or disclosure of personal information is "reasonably necessary for the purposes of a confidential alternative dispute resolution process" (see s16A).

The TIO notes that these concepts are not defined within the Bill, and that there may be benefits in some further clarity. For example, what processes would be considered to be a "confidential alternative dispute resolution process"?

There is also no mechanism for the Commissioner to "recognise" an ADR scheme or its activities (such as the TIO) as a confidential ADR process for the purpose of s16A. A recognition process similar to that under the proposed s35A may help reduce ambiguity in this regard.

Efficacy of the proposed measures relating to credit reporting

In May 2011 the TIO submitted comments to the Senate Finance and Public Administration Committee (copy attached in Appendix A) on the exposure draft of the Australian Privacy Amendment Legislation – Part 2 Credit Reporting. Some of the clauses that the TIO commented on in the Exposure Draft have been reproduced in the Bill, although most now have a new proposed section number. Where the wording has remained essentially the same, the TIO reiterates the comments it made in May 2011 below:

Proposed Part IIIA[3] – Div 2 – Subdivision D – section 20K (1) and 20K (3) - No use or disclosure of credit reporting information during a ban period

The TIO notes that 20K(3)(i) has been amended so that the ban period ends 21 days after the day on which the ban request is made, not 14 days as previously stated.

The TIO's experience of investigating complaints about disputed default listings suggests that even 21 days is not an adequate period of time for a consumer to have a complaint:

a) Considered by the CRB,
b) Considered by the service provider which listed the debt, or
c) Considered by an external dispute resolution (EDR) scheme.

[2] Clause 104 of Schedule 1 of the Bill.
[3] The proposed replacement of Part IIIA is inserted by clause 72 of Schedule 2 of the Bill.

While an extension to this period is provided for, it is not clear what the nature of such an extension might be, or in what circumstances it would be granted. Some disputes regarding disputed defaults can take several months to resolve and, in circumstances where such a dispute has been referred to an EDR scheme (including the TIO) which have their own procedural requirements before a case is raised, it is perhaps worth considering:

- Whether 21 days will be adequate enough as a ban period in instances where an external dispute resolution scheme is investigating the complaint?
- Whether a credit provider which is considering a consumer complaint could request a ban period to be applied while it investigates the complaint?
- Whether a recognised EDR scheme such as the TIO could be enabled to request a ban period to be applied and/or request an extension on the 21 days period due to the likely time taken to investigate the complaint?

Having regard to the above questions, in circumstances where an individual believes that, for example, they are a victim of fraud, it may be reasonable for the individual to be able to request a ban period that:

a) is consistent with complaint handling guidelines pertinent to the credit provider responsible for investigating the matter, which for telecommunications companies would be 30 days; or
b) where the matter is referred to an EDR scheme, lasts until the case is closed.

Proposed Part IIIA – Div 2 – Subdivision F – section 20S and 20T - Correction of credit reporting information and Individual may request the correction of credit information etc

Proposed sections 20S and 20T relate to circumstances where an individual's credit reporting profile is to be corrected, either because the CRB has identified that information may be incorrect, or where the individual has requested that information on their credit file be corrected. The TIO notes that the clauses have been amended to include the word 'misleading' as a reason to potentially correct credit reporting information.

Given the significant detriment that can be associated with credit defaults – often the inability to seek finance for homes or cars – the timely removal of incorrect information is critical.

While proposed sections 20S and 20T confer a general responsibility on CRBs to correct information they find to be inaccurate, the timeliness in which such corrections should occur is also very important. Proposed section 20S indicates that CRBs should take "such steps (if any) as are reasonable in the circumstances" to correct information on a credit file to ensure it is accurate, however there appears to be no indication of a timeframe in which this must occur. Proposed section 20T, applying to circumstances where the individual has identified that personal information needs to be corrected, states that CRBs must take steps to correct the information within 30 days of the day the request is made.

In our view, a period of 30 days to correct information on a credit file is too long when it may have the potential to compound difficulties experienced by consumers, particularly where they need to apply for finance and where incorrect information on their credit file is impeding them from doing so. The Telecommunications Consumer Protection (TCP) Code requires that where a telephone or internet company becomes aware that their customer has been default listed in error, they must inform the CRB within one (1) working day. This requirement, developed by the telecommunications industry, appears to recognise the significant detriment that can be caused by incorrect information on a person's credit file.

Proposed Part IIIA – Div 3 – Subdivision C – section 21D (3) (d) (i) and (ii) - Disclosure of credit information to a credit reporting body

There are a number of exceptions to the requirement in proposed section 21D that a credit provider must not disclose credit information about an individual to a CRB. One of these exceptions, as outlined in proposed subsection 21D (3) (d), is where a credit provider has given written notice to an individual stating that the credit provider intends to disclose information to a CRB. The underlying cause of many complaints to the TIO is the consumer's view that they were not informed of the default or of the telephone or internet company's intention to make a report to a CRB. Therefore, it would perhaps be preferable for credit providers to be required to give a defined period of notice to the individual in order to encourage that any potential grievances are identified early and are therefore easier to resolve.

There would be greater certainty for consumers, and consequently fewer complaints, if credit providers were given a specific timeframe after which they can disclose credit information to a CRB. The provision that credit providers must wait "a reasonable period" after having notified the individual could cause confusion for providers, individuals and EDR schemes tasked with assessing complaints. Also, given that credit defaults are noted against a person's credit file for a fixed period, it would seem fair that the listing be placed within a short period of time so as not to disadvantage that person for a longer period of time.

Proposed Part IIIA – Div 3 – Subdivision D – section 21P (2) Notification of a refusal of an application for consumer credit

In circumstances where an application for consumer credit has been refused, proposed section 21P (2) indicates that the credit provider must inform the individual in writing of the refusal 'within a reasonable period'. Given the circumstances that typically underlie an application for credit, for example the finance of house purchases, the timely notification to individuals where such an application has been refused is important. In this respect, the TIO notes it is often in circumstances where an application for finance is rejected that consumers claim they first become aware of a default on their credit file.

A specific timeframe during which a credit provider must notify an individual of a refused application would be helpful. A period of seven (7) days may be preferable in order that an individual, in circumstances where they believe they may be a victim of fraud, can more effectively exercise their right to request a ban under proposed section 20K.

A notification of a refusal to approve consumer credit under proposed section 21P should, where applicable, include details of relevant credit default listing(s), including the name and contact details for the credit provider that requested the listing(s).

This is potentially relevant where the individual subsequently seeks to dispute the information upon which their application has been refused because, as noted above, proposed section 20T currently specifies that it may take a CRB up to 30 days to correct an inaccurate listing.

Proposed Part IIIA – Div 3 – Subdivision F – section 21V - Individual may request the correction of credit information etc.

In the TIO's experience, consumers will typically request the correction of inaccurate information on their credit file in circumstances where that information is impeding their ability to be approved for finance. Accordingly, a period of up to 30 days to correct information which has been identified as inaccurate or out of date has the potential to cause further disadvantage to people who have applied for finance. As mentioned above, the telecommunications industry includes as part of its TCP Code the requirement that where a telephone or internet company becomes aware that their customer has been default listed in error, they must inform the CRB within one (1) working day.

Proposed Part IIIA – Div 5 – section 23B (1) and (4) - Dealing with complaints

While the TIO agrees that providing minimum acknowledgement timeframes for complaints is necessary, we would question whether a written acknowledgement with an associated seven (7) day timeframe for a complaint that has been made informally over the telephone, will meet the expectations of credit providers, CRBs and consumers. In this respect, it is likely that some simple matters will be able to be dealt with quickly and the requirement to go through a formal process of acknowledgement may present an obstacle to speedy and effective dispute resolution.

There are often serious consequences as a result of incorrect credit defaults. Therefore, timeframes for investigations into such matters need to be examined carefully. While the requirement for a written notice of the respondent's determination is positive in some respects, where an outcome is unfavourable for a consumer, they should be notified as soon as possible in order that they may consider approaching alternative dispute resolution forums.

The proposed requirements also state that a recipient to a complaint must investigate, make a decision about and provide written notice (of the outcome and options for further redress where relevant) to the consumer. In addition, the requirements state that if the respondent for the complaint considers that it is necessary to consult a CRB or a credit provider about the complaint, that the respondent must do so.

The Australasian Retail Credit Association (ARCA), in its submission to the Exposure Draft of the Australian Privacy Amendment Legislation in March 2011, expressed concern over the requirement in the exposure draft for the body that receives the complaint to be the body responsible to manage the complaint. This requirement appears to be still present in the current Bill. The ARCA submission suggested that it may be preferable to refer the consumer to the most appropriate respondent, which may be the credit provider, not the CRB, where relevant. ARCA suggested that industry should take responsibility for an effective referral process to ensure the complaint is acknowledged, managed and resolved by the relevant supplier of the disputed credit reporting information, rather

than by the first point of contact. This view was supported by other EDR schemes, including my office, the Financial Ombudsman Service (FOS), and the Energy & Water Ombudsman NSW (EWON).

In our view, such a referral mechanism could appropriately be included in the Bill, to make clear the responsibilities of CRBs and credit providers in circumstances where the most appropriate manner of handling a complaint is to refer it to another respondent for investigation and decision.

Referral of unresolved complaints

In circumstances where a consumer remains dissatisfied with the outcome to their complaint, there should be an onus on the respondent to identify the relevant EDR scheme(s) (such as the TIO where the respondent is a telephone or internet service provider that is also a credit provider) that the consumer may approach, including the relevant contact information. This information should be provided as early as possible in the complaint handling process.