CHAPTER 5

TELECOMMUNICATIONS

Introduction

5.1 In this Chapter, the Committee examines the effectiveness of self-regulation by two major sectors within the telecommunications industry - telephony and the Internet.

5.2 Two systems of self-regulation apply to telephony and the Internet. The first regulates the *carriage* of information and operates under the *Telecommunications Act 1997* (the Telecommunications Act). Principally, it regulates the display of restricted or prohibited content on the Internet. It deals with issues such as the terms on which carriers offer their services, their connection, billing and disconnection practices, their debt collection and consumer credit policies, and their privacy policies.

5.3 The second system for self-regulation deals with *content* of information and operates under the *Broadcasting Services Act 1992* (the Broadcasting Services Act). The Committee considered this regulatory scheme in its May 1999 Report[1] on the *Broadcasting Services Amendment (Online Services) Act 1999.* The Chapter summarises the May 1999 Report, and reports on any further developments since that time.

Regulation of carriage of information by telephony and the Internet

5.4 The self-regulation of the carriage of information by way of telephony and the Internet, is achieved in two ways: (i) under the Telecommunications Industry Ombudsman (TIO) Scheme; and (ii) through a scheme of co-regulation where the telecommunications industry develops self-regulatory codes and the Australian Communications Authority (ACA) develops industry standards. The TIO scheme was established in 1997. The self-regulatory codes have not yet been finalised.

The Telecommunications Industry Ombudsman Scheme

5.5 Complaints about the carriage of information by a telephone or Internet service provider may be dealt with by the Telecommunications Industry Ombudsman (TIO), if the complainant is not able to resolve the matter with the service provider in the first instance.

5.6 The TIO hears and resolves complaints against telecommunications carriers, telephone and Internet service providers. It is an industry-sponsored scheme, deriving its funding solely from members who are charged fees for complaint resolution

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1 A copy of the Report can be obtained at http://www.aph.gov.au/senate/committee/it_ctte/index.htm, as at 21 February 2000.

services provided by the TIO. Members consist of telecommunications carriers (2.8 per cent), telephone service providers (8.8 per cent) and Internet Service Providers (86.7 per cent).[2] All telephone and Internet service providers are obliged to join the TIO Scheme under the Telecommunications Act.

5.7 The TIO handled 64 934 complaints in 1998-99, compared to 52 138 in 1997-98 and 43 715 in 1996-97. The increases were attributed by the TIO to increased public awareness of the existence of the Scheme.[3] Billing issues have consistently made up more than one-third of the cases dealt with by the TIO.[4] Privacy cases amounted to 3.0 per cent of the cases in 1998-99, and 3.08 per cent in 1997-98.[5]

5.8 The TIO classifies the complaints that it receives into four different categories. Table 5.1 lists these categories, and the amount that the TIO charges for each. The Table also indicates the frequency of each type of complaint.

Table 5.1

Complaints handled by the TIO in 1998-99

Complaint category	Fee	Number (approximate)	% of all complaints (approximate)
Enquiry	$15.00	61 200	95
Consultation	$140.00	2 000	3
Complaint	$292.00	1 300	2
Dispute	$1 130.00	300	0.05

Source: Telecommunications Industry Ombudsman, Annual Report 1998-99

5.9 Approximately 94 per cent of the complaints were about telephone services, and approximately 6 per cent about Internet service providers.

Self-regulatory codes of practice

5.10 The Telecommunications Act states that the telecommunications industry should be regulated in a manner that promotes the greatest practicable use of industry self-regulation. Consequently, it makes provision for industry codes of practice that

2 Telecommunications Industry Ombudsman *Annual Report 1998-99*, p. 11, available at www.tio.com.au, as at 21 February 2000.

3 Telecommunications Industry Ombudsman, *Annual Report 1997-98*, p. 9; *Annual Report 1997-98*, p. 2; and *Official Committee Hansard*, Canberra, 15 April 1998, p. 285.

4 Telecommunications Industry Ombudsman, *Annual Report 1997-98*, p. 20, *Annual Report 1998-99*, p. 17.

5 Telecommunications Industry Ombudsman, *Annual Report 1997*-98, p. 45 and *Annual Report 1997-98*, p. 31.

are registered with the ACA. Compliance with a code is voluntary, unless the ACA directs a particular industry participant to comply.

5.11 The Australian Communications Industry Forum (ACIF) was established by the industry as the industry-representative body through which it would implement and manage the new self-regulatory regime.[6] The Committee was told that in particular, ACIF has the task of developing most of the industry codes and specifications necessary for the successful working of self-regulation.[7] Its members include corporations such as Telstra, Optus and Vodafone as well as organisations such as the Australian Telecommunications Industry Association, the Australian Information Industry Association, the Australian Telecommunications Users Group and the Consumers Telecommunications Network.

5.12 In its 1998-99 Annual Report, the TIO stated that work is currently in progress on six consumer codes that deal with the following issues:

- prices, terms and conditions
- privacy – Calling Number Display
- privacy – Customer Personal Information
- internal complaint handling
- billing; and
- credit management.[8]

5.13 The ACA has a reserve power to make an 'industry standard' if the self-regulatory code is deficient or non-existent. Compliance with industry standards is mandatory. It is intended that industry standards serve as a 'back-up': they are to be made only in the event that industry self-regulation using a code fails. Similarly, if the Privacy Commissioner does not approve a code in its application to privacy, the privacy code will apply by default.

5.14 Not all matters can be covered by self-regulatory codes. Matters such as emergency calls and directory services continue to be regulated under the Telecommunications Act or in carrier licence conditions.[9] In addition, Part 9 of the Telecommunications Act provides for performance standards for customer service that carriage service providers must comply with. The ACA has set a Customer Service Guarantee Standard which came into force on 1 January 1998. It includes a scale of

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6 Australian Communications Industry Forum, Submission 2, p. 2.

7 Australian Telecommunications Users Group, Submission 6, p. 157.

8 Telecommunications Industry Ombudsman, *Annual Report 1998-99*, p. 15.

9 *Telecommunications Act 1997*, Part 12 (Provision of emergency call services), Part 13 (Protection of communications)

damages that are payable by carriage service providers who do not comply with it, and it provides for investigation of complaints by the TIO.[10]

5.15 As of February 2000, no self-regulatory codes of practice have been implemented by the telecommunications industry. It is expected that some codes will be finalised by the end of the 1999-2000 financial year.[11]

Complaints-handling process

5.16 The TIO Scheme has been in operation for approximately three years, and has operated without self-regulatory codes. When the codes come into practice, they will introduce industry-wide standards, against which complaints can be made. Without the self-regulatory codes, the standards are derived from undertakings that are given by the telephone and Internet service providers, or, if a clear undertaking is absent, a standard of reasonableness will be imposed.

5.17 The TIO is an office of last resort, and requires individuals to address their complaints to their service provider at the first instance. The TIO will investigate a complaint according to its 'complaint escalation guidelines'.[12] These guidelines provide for four categories of complaints. Figure 5.1 describes each of the categories. A complaint will be upgraded if the service provider fails to respond in time or provides an unsatisfactory response to the TIO.

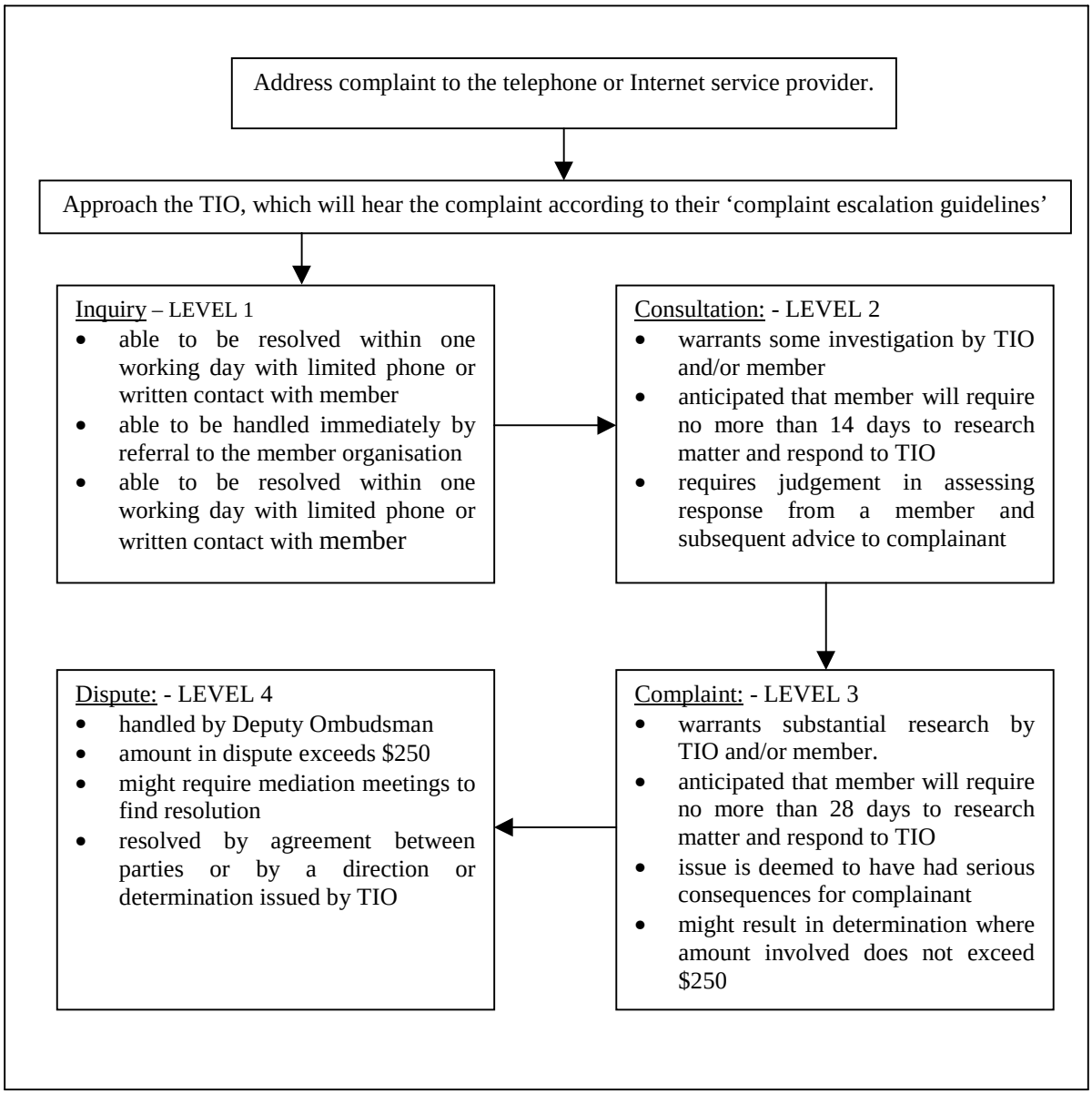
10 Department of Communication and the Arts, Submission 34, p. 1060.

11 Telecommunications Industry Ombudsman, *Annual Report 1998-99*, p. 15.

12 TIO Complaint Escalation Guidelines, provided by the office of the Telecommunications Industry Ombudsman, telephone: 1800 062 058

Figure 5.1

TIO complaints-handling procedures



The effectiveness of regulation of the carriage of information

5.18 The Committee heard evidence that suggested that the TIO Scheme is operating effectively. Optus stated that:

> The TIO scheme is widely recognised as a successful model for self-regulation … Experience with the TIO demonstrates that fierce competitors

> can co-operate in pursuit of a common goal of effective and independent complaint handling.[13]

5.19 The Committee notes that in its 1997 annual report, the TIO refers to independent research that the TIO had commissioned to measure complainants' satisfaction with its procedures. According to the annual report, 'the research confirmed that the TIO has effective procedures and a high level of client satisfaction'.[14] However, the most recent survey on complainants' satisfaction carried out by the TIO revealed 'some aspects where the TIO had fallen short on past performances'.[15] The TIO has stated that the downturn in performance may be due to the increases in the number and complexity of complaints.[16]

5.20 The January 1998 submission from Electronic Frontiers Australia said that the TIO's system for handling consumer complaints about Internet service providers 'seems to be working well, despite the occasional assertion that the mechanism is open to vexatious complaints'.[17] The TIO handled 1 662 Internet-related cases in the first year of its new jurisdiction over this area.[18] In 1998-99, this increased to 3 864 Internet-related cases. The main issues dealt with related to billing (55.8 per cent in 1998-99, 52.4 per cent in 1997-98) and to access, including congestion and slow down-load speeds (17.9 per cent in 1998-99, 19.3 per cent in 1997-98). Privacy-related issues accounted for only 0.91 per cent of the issues dealt with in 1997-98. The number of Internet-related cases taken to the TIO continues to increase as more Internet service providers have become Scheme members and Internet users have become more aware of the TIO Scheme.[19]

Criticisms of the self-regulatory scheme

5.21 The main criticisms raised in evidence of the self-regulatory scheme for the carriage of information are as follows:

- inefficient development of self-regulatory codes;
- inadequate coverage of the self-regulatory models;
- ineffective monitoring and enforcement mechanisms; and

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13 Optus Communications, Submission 9, p. 320; *Official Committee Hansard*, Sydney, 22 April 1998, p. 406.

14 Telecommunications Industry Ombudsman, *Annual Report 1997-98*, p. 20.

15 Telecommunications Industry Ombudsman, *Annual Report 1998-99*, p. 19.

16 Telecommunications Industry Ombudsman, *Annual Report 1998-99*, p. 19.

17 Electronic Frontiers Australia, Submission 25, p. 3.

18 Telecommunications Industry Ombudsman, *Annual Report 1997-98*, p. 34. Some cases raised multiple issues, and some cases raised issues that were outside the TIO's jurisdiction, such as Internet content.

19 Telecommunications Industry Ombudsman, *TIO Talks*, No. 14, December 1998, p. 3: Internet-related cases made up 4.6% of all TIO cases in the September 1998 quarter, up from 4% the previous quarter and 3.6% the quarter before.

- inadequate standard for data protection.

Inefficient development of self-regulatory codes

5.22 Some concerns were raised that the process for developing industry codes and putting them into operation is not proceeding sufficiently quickly. For example, the submission by the Australian Privacy Charter Council stated that it will take too long to achieve coverage of the issues, leaving opportunities for abuse by business.[20]

5.23 In its 1998 submission to the Committee, Optus explained some of the obstacles faced in developing the codes of practice:

> Development of codes imposes a significant financial and administrative burden on industry participants, in particular in fulfilling the requirement to undertake wide public consultation in the development of codes. This necessarily means that the process of code development can be slow and that not all areas can be addressed at the same time. The resource constraints that confront carriers and carriage service providers in developing codes across a broad range of activities should be taken into account by the Committee in its evaluation of current codes and codes now under development. Code development is also accelerating as industry learns from experience in development of previous codes.[21]

5.24 In its July 1999 submission, Cable and Wireless Optus Limited was able to inform the Committee of the progress made in the development of the codes. It reported that delays in the development of the codes had been longer than it had anticipated. The delays are due in part to the diversity of interests for which consultation is required and across which consensus must be achieved. Also, external factors impeded the development of codes. For example, the finalisation of the Customer Personal Information Code was delayed pending the outcomes of the Privacy Commissioner's review of the National Privacy Principles.

5.25 The ACA informed the Committee that it had written to ACIF outlining the priority of issues requiring the development of codes and standards. In doing so, it had identified consumer privacy matters as the highest ranked items, particularly a code to address Calling Number Display (CND) implementation.[22] Telstra advised the Committee in February 1998 that the 'code on the calling number display is in the final stages of production'.[23] However, ACIF advised the Committee in November 1998 that the CND code had yet to be finalised, but a draft for public comment was expected to be released in December.[24] ACIF also said that the Customer Personal

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20 Australian Privacy Charter Council, Submission 21, p. 757.

21 Optus Communications, Submission 9, p. 322.

22 Australian Communications Authority, Submission 11, p. 337.

23 *Official Committee Hansard*, Melbourne, 6 February 1998, p. 107.

24 *Correspondence*, Ms R Rowe, Project Manager, Consumer Codes Reference Panel, Australian Communications Industry Forum, 11 November 1998.

Information code, which deals with privacy, had been drafted to achieve consistency with the Privacy Commissioner's National Privacy Principles. Release of a draft of the code for public comment had been delayed to await the findings of a review of the National Privacy Principles.

5.26 The ACA also emphasised the priority of developing a code for the supply of products and services to customers. ACIF advised that completion of the code on these matters was anticipated in February 1999.[25] ACIF anticipated that drafts of other consumer codes dealing with billing, credit management and complaint handling would occur in March 1999. In relation to developing all these consumer codes, ACIF said that the complexity of issues and the balancing of various stakeholder views was a major challenge, and therefore the timeline for their development was difficult to predict.

5.27 The TIO told the Committee in April 1998 that progress to date on developing codes had been reasonable, given the nature of some of the issues that are being dealt with.[26] The TIO 1997-98 Annual Report states that:

> … although significant progress has been made in the development of industry codes the industry underestimated the resources needed to accomplish this task and hence the speed with which it could be completed. The year ahead will be a telling time for the industry as its ability to implement a wide-ranging system of self-regulatory codes will be a real measure of the success of the new telecommunications environment.[27]

5.28 ACIF had by August 1998 released eight draft codes for public and industry comment and convened in excess of 30 working committees for the development of codes.[28]

5.29 Participation in the development of industry codes clearly imposes costs. The Committee was told of the burdens this placed on under-resourced consumer participants and on small business participants, in comparison to what were seen as the much better-resourced major industry participants. The submission from the Australian Telecommunications Users Group said that progress on developing codes had been reasonable:

> It is however fair to say that the user and consumer groups find some difficulty in matching the resources offered up by the supply side of the industry.
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> The slowness of government to respond to the concept of supporting user and consumer groups as provided for in the legislation and highlighted

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25 *Correspondence*, Ms R Rowe, Project Manager, Consumer Codes Reference Panel, Australian Communications Industry Forum, 11 November 1998.

26 *Official Committee Hansard*, Canberra, 15 April 1998, p. 278.

27 Telecommunications Industry Ombudsman, *Annual Report 1997-98*, p. 8.

28 ACA, Media Release No. 34 of 1998, 7 August 1998, 'ACA releases guide to industry code registration'.

> toward the end of the Senate debate on the Post'97 legislation packages has been disappointing.
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> For the processes of industry self-regulation to be seen as credible by the wider community as well as having an open approach in place, participation by the demand side of the industry must be enabled and promoted, a role which must be at least in part shared by the Government.[29]

5.30 The Australian Privacy Charter Council informed the Committee that the ACIF process is consuming very large amounts of participants' time, and said that it is inevitable that the well-resourced major carriers will be able to have a disproportionate influence compared to consumer groups and small businesses. The Council also said these latter interests not only find it difficult to afford continued participation, but are also prone to changes of representatives (many of whom are volunteers), thereby losing continuity.

Inadequate coverage of the self-regulatory model

5.31 The Committee heard evidence that the self-regulatory model fails to regulate the activities of all members of the telecommunications industry. The Privacy Charter Council informed the Committee that:

> An alarming example of abuse has been the carriers' handling of the introduction of Calling Number Display services. Despite a stated commitment to comply with the existing AUSTEL Guidelines, the carriers have variously ignored or only selectively complied with these guidelines, unashamedly taking advantage of the period before an equivalent code is developed and registered with the ACA. … The CND case provides a depressing precedent for the future. If carriers cannot be trusted to act in good faith in accordance with self-regulatory guidelines carefully and painstakingly developed in a consultative forum (the AUSTEL Privacy Advisory Committee), what confidence can consumers have that the ACIF framework will be any more effective?[30]

5.32 Under the Telecommunications Act, Internet service providers (ISPs) are required to become members of the TIO Scheme. The Committee notes that some ISPs have resisted doing so. At the end of October 1998, the TIO was aware of some 170 service providers who were not yet members of the Scheme.[31] It appears that many ISPs see themselves as customers of telecommunications providers rather than as industry participants. In addition, some ISPs disagree with the policy of the TIO Scheme that it will not deal with complaints by one industry member against another.[32] For example, the Internet Industry Association has argued that the TIO

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29 Australian Telecommunications Users Group, Submission 6, pp. 158-159.

30 Australian Privacy Charter Council, Submission 21, pp. 761-762.

31 Telecommunications Industry Ombudsman, *TIO Talks*, December 1998, p. 2.

32 Telecommunications Industry Ombudsman, *Annual Report 1997-98*, p. 8. The TIO noted in its August 1998 newsletter, *TIO Talks* (No. 13, p. 7), that 'There are moves to establish dispute resolution processes

Scheme was established to enable small businesses, amongst others, to bring complaints against the three founder-members – Telstra, Optus and Vodaphone – and it was not envisaged that small businesses would become TIO members. The Internet Industry Association argues that the addition of further members:

> … has resulted in a policy whereby the new members of the TIO, who are mostly ISPs, are unable to resort to the TIO when all other avenues of complaint have been exhausted. This has removed an invaluable resource from our options for fighting for fair treatment from the large telcos and has also put the TIO in a position where it is not fulfilling its role as originally devised.
>
> Ideally the IIA would like a distinction to be made of small business members of the TIO and for these members to be able to call upon the TIO to arbitrate disputes as any other small business is able to. We will be pursuing this option in all avenues possible.[33]

5.33 The TIO can only deal with complaints if they are brought against members. The TIO noted that in 1997-98 complainants raised some 125 issues which it could not deal with because they related to non-member ISPs. He commented: 'non-member ISPs have been a frustration to both the TIO and consumers'.[34] In October 1998, the ACA for the first time exercised its power under the Telecommunications Act to direct an ISP to join the TIO Scheme.[35] Failure to comply with such an ACA direction can lead to court action, and ultimately to fines of up to $50,000. The ACA also issued a formal warning to two other ISPs who had failed to join.

5.34 The Committee heard in evidence that the scope of the definition of the telecommunications industry used in the Telecommunications Act excludes organisations that arguably are part of the industry. Currently, they are not subject to self-regulation.

5.35 For example, the Australian Competition and Consumer Commission (ACCC) advised the Committee that a code developed pursuant to Part 6 of the Telecommunications Act cannot regulate conduct such as commerce conducted over the Internet or telephone. The ACCC gave as an example the draft code being prepared by the Internet Industry Association to protect consumers. The 'industry' covered by the draft code includes content providers such as advertisers, information providers and vendors. This definition is wider than that used in the

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within the industry through the Australian Communications Industry Forum and the Internet Industry Association'.

33 Internet Industry Association, 'IAA Position Paper on TIO Obligations of Small ISPs', 16 July 1998, pp. 1-2 (available online at http://www.iia.net.au/index2.html, as at 21 February 2000).

34 Telecommunications Industry Ombudsman, *Annual Report 1997-98*, p. 34.

35 ACA, Media Release No. 40 of 1998, 2 October 1998, 'ACA warns Internet service providers – you must join the TIO scheme'.

Telecommunications Act. Consequently, the draft code cannot be registered under Part 6 of the Act.[36] It has, therefore, to be an entirely voluntary code.

5.36 A second example was provided in the submission from the TIO and related to Calling Number Display (CND) services:

> Consumers are concerned about the ways in which commercial enterprises which receive CND might use that information eg by linking the telephone number to an information database. Such enterprises are not participants in a section of the telecommunications industry and it is difficult to see how the code could cover their activities. A proposal, by Telstra, to enforce compliance with guidelines on CND use through its carrier-customer contractual relationship with these enterprises is not only an extremely cumbersome mechanism, but likely to be ineffective.[37]

5.37 Mr Tim Dixon, Secretary of the Australian Privacy Charter Council, also referred to the CND example:

> There is a real difficulty about the extent of jurisdiction because your legislation only covers the telecommunications industry, and what we are seeking to address here is really an issue of the business use of the calling number display data. We have not been able to progress that issue; that issue has been blocked. That is an issue more broadly of the privacy protection in the entire community.[38]

5.38 The Australian Privacy Charter Council referred more generally to the boundary between what was and was not covered by the Telecommunications Act definition. It said that it is already clear that many businesses using telecommunications in the course of providing goods and services will not fall within this definition. The Council argued that similar breaches of privacy will be committed by both those within and outside the defined 'industry', with consumers not being able to distinguish readily why one is subject to the codes and the TIO process, while the other remains totally unregulated: 'This arbitrary boundary is likely to lead to considerable, and justifiable, discontent'.[39]

5.39 The TIO provided two further examples of the limited reach of the regulatory regime under the Telecommunications Act. One related to telemarketing. The TIO noted that a privacy code under the regime could deal with the intrusive use of telemarketing by carriers or service providers. However, the code would not be able to cover the activities of other direct-marketing companies who build up databases and

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36 Australian Competition and Consumer Commission, Submission 26, pp. 863, 881-882.

37 Telecommunications Industry Ombudsman, Submission 40, pp. 1143-1144; *Official Committee Hansard*, Canberra, 15 April 1998, p. 279.

38 *Official Committee Hansard*, Sydney, 22 April 1998, p. 384. See also *Official Committee Hansard*, Canberra, 15 April 1998, Telecommunications Industry Ombudsman, pp. 278-79.

39 Australian Privacy Charter Council, Submission 21, p. 762.

use either random dialling techniques or reverse directories to telemarket potential customers.[40] Further, the TIO noted that at present the Australian Direct Marketing Association has a code regulating this type of activity but membership of the Association is voluntary.

5.40 The other example related to the code being developed on prices, terms and conditions of goods and services. The code can cover dealers who provide goods and services or sell goods on behalf of a carriage service provider. But it cannot cover an organisation that is purely a retail operator and perhaps just sells pieces of telecommunications equipment, without any accompanying services. If they simply sell the latter they are not a sector of the defined 'telecommunications industry'. The TIO, Mr John Pinnock, told the Committee:

> The pragmatic decision that has been made in relation to that code, which has not been finalised yet, is that we will go after the agents and the dealers, but we cannot cover every single potential retailer. So, again, you have this gap there.[41]

Monitoring and enforcement mechanisms

5.41 The Australian Privacy Charter Council claimed in its January 1998 submission that the extent to which the codes of practice will be monitored and enforced is uncertain. It noted that ACIF has proposed that the breaches of codes should be dealt with by the TIO, but said it was not yet clear that the TIO will either definitely take on this role or have the resources to effectively investigate and resolve all complaints. The Council also argued:

> In any case, the TIO does not have a pro-active audit or inspection role, and has only a limited public education budget. Particularly in the privacy area. Consumers can only make complaints if they are aware of their rights and of the rules and standards, and many privacy breaches will never come to the consumers notice. In comparison, the ability of the Privacy Commissioner to conduct 'own motion' investigations and audits has been essential in keeping Commonwealth agencies and credit providers 'on their toes' in respect of compliance with privacy principles.[42]

5.42 The ACA provided further details about enforcement mechanisms under the Telecommunications Act in its August 1999 submission:

> [O]nce a code is registered sections 121 and 122 of the Act provide the ACA with a number of powers to enforce the code. The ACA's powers include the ability to enforce the code against any participant of the

40 Telecommunications Industry Ombudsman, Submission 40, p. 1144.

41 *Official Committee Hansard*, Canberra, 15 April 1998, p. 279.

42 Australian Privacy Charter Council, Submission 21, p. 762.

industry, whether or not they have previously voluntarily agreed to comply with the code.[43]

5.43 The Telecommunications Act states that the ACA may direct the participant to comply with the industry code. If the participant fails to comply with the direction they may be subject to a pecuniary penalty. The amount of the penalty is set by the Federal Court on a case by case basis.

Inadequate standard for data protection

5.44 The European Union (EU) has developed standards on privacy protection that limit the transmission of privacy-sensitive data from its member countries to other countries if the receiving countries do not have adequate regimes in place to protect the privacy of the data. The standards were issued in the form of a European Union Directive to its member states which came into force in October 1998, although it is expected to be some time before all the member states have legislated to give effect to the Directive.[44]

5.45 The Australian Privacy Charter Council stated that the self-regulatory regime is deficient in that it may not comply with the European Union standards.[45] On 30 October 1998, the Internet Industry Association wrote to the Prime Minister stating that Commonwealth privacy legislation covering the private sector should be considered in response to the EU's action.[46] The Internet Industry Association said that, notwithstanding its general commitment to self-regulation, such privacy legislation could provide a safety net to catch businesses that are not prepared to assume responsibility for themselves.

5.46 The Committee has not examined this important issue in any detail. It would not have been practical for it to do so in advance of a clear indication of what the European Union standards would require. The Committee notes, however, that the issue was considered as part of an inquiry by the Senate Legal and Constitutional References Committee on privacy in the private sector. It also notes the April 1998 advice from the National Office for the Information Economy that the 'interaction of Australia's self-regulatory scheme with the EU Directive is currently under discussion with domestic interests and other countries'.[47]

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43 Australian Communications Authority, Submission 15/39, p. 486.

44 Directive on the protection of personal data (95/46/EC).

45 Australian Privacy Charter Council, Submission 21, p. 758; *Official Committee Hansard*, Australian Privacy Charter Council, Sydney, 22 April 1998, pp. 387-88.

46 Internet Industry Association, Letter to Prime Minister on Privacy Legislation, 30 October 1998, p. 1 (available online at http://www.iia.net.au/index2.html as at 21 February 2000).

47 National Office for the Information Economy, Submission 42, p. 1187.

Regulation of content of information on the Internet

Internet Industry Codes of Practice

5.47 The *Broadcasting Services Amendment (Online Services) Act 1999* in July 1999 established within the Broadcasting Services Act a regulatory framework for the content of online services. The main elements of the proposed framework are that:

- a complaints mechanism will be established in which any person can complain to the ABA about offensive material online;
- material that will trigger action by the ABA will be defined, on the basis of current National Classification Board guidelines for film, as material Refused Classification and rated X, and material rated R that is not protected by adult verification procedures;
- the ABA will be given powers to issue notices to service providers aimed at preventing access to prohibited material which is subject to a complaint if it is hosted in Australia or, if the material is sourced overseas, to take reasonable steps to prevent access if technically feasible;
- a community advisory body will be established to monitor material, operate a 'hotline' to receive complaints about illegal material and pass this information to the ABA and police authorities, and advise the public about options such as filtering software that are available to address concerns about online content.[48]

5.48 The model for the regulation of content on the Internet is a co-regulatory model similar to television and radio. The Internet industry has lodged its own self-regulatory code – the Internet Industry Codes of Practice – with the ABA, which approved the Codes on 16 December 1999.

5.49 The aims of the Internet Industry Codes of Practice are as follows:

- to establish confidence in and encourage the use of the Internet;
- to support systems for - management of access to content on the Internet including, without limitation, resource discovery schemes and metadata systems;
- to improve the fairness and accuracy of disclosure to users of the Internet and the community in general;
- to provide standards of confidentiality and privacy afforded to users of the Internet;

48 Broadcasting Services Amendment (Online Services) Bill 1999, Explanatory Memorandum, pp. 1-2

- to provide a transparent mechanism for complaint handling for the Internet industry and ensure that complaints against Code Subscribers are handled in a fair and efficient manner; and

- to promote positive user relations with the Internet industry.

5.50 The Internet Industry Association has released guidelines on measures that ISPs must take in order to comply with the Internet Industry Codes of Practice[49] and therefore reflect the obligations that ISPs face as part of self-regulation. Three of the guidelines provide as follows:

> Under the registered codes of practice for content regulation, ISPs who provide access to users within Australia will be required to:
>
> - take reasonable steps to ensure that Internet access accounts are not provided to persons under the age of 18 years without the consent of a parent, teacher or other responsible adult;
>
> - take reasonable steps to encourage *commercial* content providers to use appropriate labelling systems and to inform them of their legal responsibilities in regard to the content they publish; and
>
> - take reasonable steps to provide users with information about:
>
> - supervising and controlling children's access to Internet content
>
> - procedures which parents can implement to control children's access to Internet content
>
> - their right to make complaints to the ABA about online content
>
> - procedures by which such complaints can be made.[50]

5.51 The self-regulatory codes aim to protect the community from restricted content on the Internet. However, the guidelines, in their emphasis on the standard of reasonableness, indicate that restricting access to Internet content can prove to be technically difficult.

Complaints-handling process

5.52 Individuals who wish to complain about content on the Internet must direct their complaint directly to the ABA. The relevant content host or service provider is not involved in the complaints-handling process. This model minimises industry compliance costs. Further, as ISPs are primarily carriers of material, rather than originators, it is unreasonable to expect them to adjudicate on complaints about material for which they are not responsible.

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49 Internet Content Regulation Checklist, http://www.iia.net.au/index2.html, as at 9 February 2000.

50 Internet Content Regulation Checklist, http://www.iia.net.au/index2.html, as at 9 February 2000, p. 1.

5.53 In its evidence to the Committee, the ABA stated that it had reservations about this type of complaints-handling model. It said that the 'ABC believes that the legislation should have adopted an approach to industry codes and complaints handling more consistent with that of the [Broadcasting Services Act] in general'.[51]

5.54 The complaints-handling model includes the establishment, at Government expense, of a community advisory body, called NetWatch, which will receive complaints and pass them on to the ABA. This NetWatch initiative is an example of a one-stop shop for expert consumer advice, community education and complaints. However, the NetWatch service is not a formal part of the complaints-handling process. A complaint may be addressed directly to the ABA, without any input from NetWatch, by filling out an 'Internet Content Complaint Form' provided on the ABA Internet homepage.[52]

5.55 Once the ABA receives a complaint, it must then decide whether or not the content is prohibited. If the content is prohibited, the ABA will issue the ISP with a take-down notice, which directs that the content no longer be hosted by the ISP.

5.56 If the ABA is satisfied that the content is prohibited, it may issue a final take-down notice, directing the ISP not to host the prohibited content. However, if the ABA is satisfied that there is a substantial likelihood that the content would be classified as RC or X, the ABA must issue the ISP with an interim take-down notice directing the ISP not to host the content pending an actual classification by the Classification Board. The ABA must then notify the ISP of the result of the classification and, where the result is that the content is prohibited, the ABA must issue a final take-down notice.

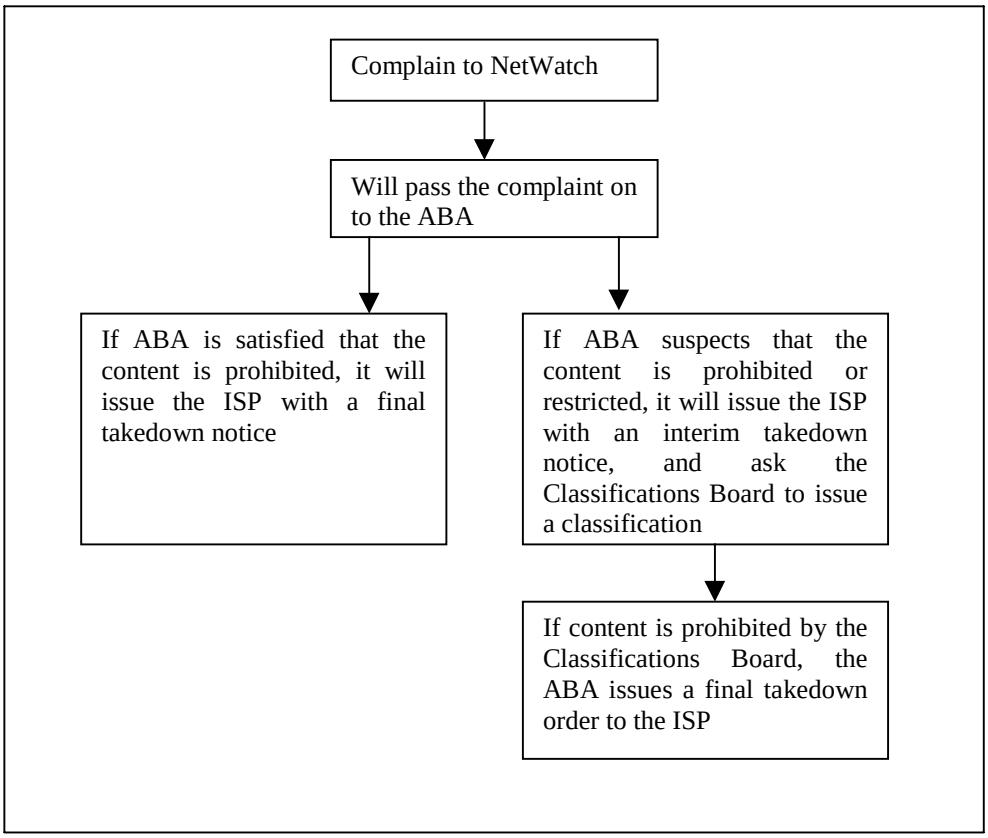
5.57 The complaints-handling process is outlined in Figure 5.2.

51 ABC, Submission 11/39, p. 330.

52 http://www.aba.gov.au/what/online/complaints/index.html, as at 15 February 2000.

Figure 5.2

Complaints-handling process for Internet content



Privacy

5.58 The Federal Privacy Commissioner's *National Principles for the Fair Handling of Personal Information* (NPPs) and the Government's December 1998 announcement that it would legislate to support and strengthen self-regulatory privacy protection in the private sector, are intended to be generally applicable to online services.

5.59 However, the extent to which this is practicable is somewhat questionable, especially with the global nature of the Internet. While content providers can be held, for example, accountable under defamation laws or for breaching section 85ZE of the *Crimes Act 1914* (which makes it an offence to use a carriage service to menace or harass another person or used in an offensive way) when their identity is known and they are within Australia's jurisdiction, such protections are largely nugatory when such pre-conditions do not apply.

5.60 The relative absence of privacy protection online was drawn to the Committee's attention by the publication of photographs and addresses of politicians' and public servants' homes by a Queensland-based pro-gun lobbyist.[53] There is essentially no restriction on what materials, deformations or misinformation may appear on the Internet, except by way of comparison to existing media guidelines and codes of practice.

5.61 The more common invasions of privacy involve the use of personal information by marketeers who gain information from Web users either voluntarily or through software technology. The Committee notes that the most recent Internet Industry Association draft code states:

> 8.2 Code subscribers will comply with the National Principles for the fair handling of personal information… The provisions of this Code are in addition to and not in reduction of the obligation of Code Subscribers under those Principles.
>
> 8.6 Code subscribers will:
>
> (a) keep confidential the business records, personal details and information of or relating to each user and will respect the privacy of users' personal communications;
>
> (b) take adequate steps to ensure the confidentiality of business records, personal details and information;
>
> (c) not sell or exchange the business records, personal details or information of a user other than to another Code Subscriber as part of the sale of the Code Subscriber's business as a going concern;
>
> (d) refrain from intentionally examining or tampering with a user's business records, personal details or information without the express prior consent of the user except to the extent required by a properly qualified officer for the maintenance of system security or data integrity;
>
> (e) treat email as private content whether in transit or in storage.[54]

5.62 The Committee urges the ABA to pay particular attention to the adequacy of these provisions in its examination of the self-regulatory codes.

Distinction between carriage and content

5.63 The Committee wishes to draw attention to one residual area of concern which had been raised with it in submissions and evidence prior to the passage of the legislation to regulate online content.

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53 'Pro-gun magazine sets sights on leaders', *Weekend Australian*, 17-18 April 1999.

54 Internet Industry Code of Practice, Draft Version 5, 31 August 1999.

5.64 Earlier in this Chapter, the Committee set out the current approach in which the carriage of material over telecommunications networks is regulated under the framework in the Telecommunications Act, while the content of what is carried is to be regulated under the Broadcasting Services Act.

5.65 The TIO's submission provided that: '[e]ffectively, the Committee's Terms of Reference raise the adequacy of the distinction between carriage and content services, in the regulatory context …'.[55] The TIO illustrated this by referring to the 0055, 190 and 0011 telephone information services. Those providing the content are outside the TIO's jurisdiction, which does not deal with content.[56] The content is regulated by a Code administered by the Telephone Information Services Standards Council. However the TIO has jurisdiction to deal with complaints about billing of and barring of access to these services, because these issues relate to the activities of telecommunications carriers such as Telstra and Optus. Potential complainants need to appreciate the distinction, and the different complaints avenues involved.

5.66 The TIO said that the distinction had not proven to be a significant difficulty so far. However, he advised:

> There is a strong possibility, however, that the simple distinction between content and carriage for complaint handling agencies such as the TIO and ABA will be placed under strain by the tendency towards convergence and, in relation particularly to privacy, mirror the increasingly fragmented nature of current protection. Such a development would leave consumers facing a maze of possible alternative remedies, with no guarantee they would make the right choice.[57]

5.67 The TIO stated that while recent trends, particularly technological convergence, showed that the distinction is under increasing stress, it is not clear whether a new self-regulatory model should be developed, much less what that model should be.[58] However, the TIO considered that there were strong arguments for remedying the fragmentation of privacy protection.

5.68 The Australian Privacy Charter Council also referred to the fragmentation of privacy protection under the current carriage/content approach. Mr Nigel Waters, its Vice President, advised the Committee that the approach did not recognise the increasing convergence of technologies and the blurring of the boundaries between the traditional media and means of communication:

> I think we are in danger of ending up with a situation where both consumers and businesses are very confused that they are possibly having to comply

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55 Telecommunications Industry Ombudsman, Submission 40, p. 1138.

56 Telecommunications Industry Ombudsman, Submission 40, pp. 1144-47.

57 Telecommunications Industry Ombudsman, Submission 40, p. 1147.

58 Telecommunications Industry Ombudsman, Submission 40, p. 1147; and *Official Committee Hansard*, Canberra, 15 April 1998, pp. 275-76.

> with different sets of rules when it is actually the same organisation. Those sorts of sector boundaries are becoming irrelevant, and it does not make sense any more to deal with a sectoral approach. We need consistent principles across the board.[59]

5.69 The National Office for the Information Economy supported the distinction between carriage and content for the purposes of regulation.[60] It said that this approach had the advantage of being technology neutral. However, it noted that a unique characteristic of the Internet is that it functions simultaneously as a medium for both publishing and private communication. Unlike the traditional media, the Internet supports a variety of communication modes: one-to-one, one-to-many, many-to-many. An Internet user may 'speak' or 'listen' interchangeably. At any given time, a receiver can become content provider, of his own accord or through 'reposting' of content by a third party. The Internet therefore is different from traditional broadcasting and from a traditional telecommunication service:

> This constant shift from 'publishing mode' to 'private communication mode' constitutes one of the main challenges for Internet regulation, as the content of these two modes is governed traditionally by very different legal regimes. Regulatory regimes will need to be flexible to be able to deal with this blurring of roles.[61]

5.70 The Committee urges the Government to monitor the practical implications of convergence, with a view to ensuring the continuing appropriateness of the current fragmented approach based on sectoral regulation.

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59 *Official Committee Hansard*, Sydney, 22 April 1998, p. 380.

60 National Office for the Information Economy, Submission 42, p. 1177.

61 National Office for the Information Economy, Submission 42, p. 1177.