Telecommunications Legislation Amendment (Consumer Protection) Bill 2013

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Law and Bills Digest Section

This is a revised version of Bills Digest No. 130 2012-13, prepared for an earlier version of this Bill introduced into the 43rd Parliament.

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Date introduced: 14 November 2013
House: House of Representatives
Portfolio: Communications
Commencement: Various dates set out in the table in section 2 of the Bill.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
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History of the Bill

A previous version of the Telecommunications Legislation Amendment (Consumer Protection) Bill 2013 (the previous Bill) was introduced into the 43rd Parliament on 21 March 2013. There had been no debate on the Bill and the Bill had not been passed when the Parliament was prorogued on 5 August 2013. As a result, the previous Bill lapsed.

This Bill differs slightly from the previous Bill as it contains additional amendments to the Telecommunications Act 1997 in Part 1 of Schedule 1. Those additional amendments respond to comments made in relation to the previous Bill by the Senate Environment and Communications Committee. They are discussed under the heading ‘Key issues and provisions’ of this Bills Digest.

Purpose of the Bill

The purpose of the Telecommunications Legislation Amendment (Consumer Protection) Bill 2013 (the Bill) is to amend various telecommunications statutes to strengthen consumer protections and improve the telecommunications co-regulatory framework.

Structure of the Bill

The Bill contains three Parts:

- Part 1 of the Bill amends the Do Not Call Register Act 2006 to clarify when a person is taken to have ‘caused’ a third party to make telemarketing calls or send marketing faxes in carrying out marketing activities.
- Part 1 of the Bill also amends the Telecommunications Act to streamline and improve the process for developing and amending industry codes under Part 6 of the Telecommunications Act.
- Part 2 of the Bill amends the Telecommunications (Consumer Protection and Service Standards) Act 1999 (Consumer Protection Act) to:
  - require the Telecommunications Industry Ombudsman (TIO) scheme to comply with standards determined by the Minister and
  - require periodic public reviews of the TIO scheme to be conducted by an independent person or body.
- Part 3 of the Bill amends the Telecommunications Act to insert a reference to the Australian Privacy Principles.

Committee consideration

Senate Selection of Bills Committee

On 13 November 2013, the Senate Standing Committee for the Selection of Bills determined that the Bill would not be referred for inquiry and report.

Senate Environment and Communications Committee

However, the previous Bill was referred to the Senate Environment and Communications Committee (Environment and Communications Committee) for inquiry and report by 17 June 2013. Six submissions were made to the Environment and Communications Committee. The submitters were broadly in favour of the measures in the previous Bill.

The Environment and Communications Committee published its report on 13 June 2013. The report recommended that:

7. The Senate Environment and Communications Committee inquiry page contains the terms of reference, submissions to and the final report of the Committee.
Subject to that recommendation, the Environment and Communications Committee recommended that the previous Bill be passed. As stated above, that recommendation has been put into effect in this Bill.

**Senate Standing Committee for the Scrutiny of Bills**
The Standing Committee for the Scrutiny of Bills had no comment on the previous Bill. At the time of writing this Bills Digest the Standing Committee for the Scrutiny of Bills has made no comment on this Bill.

**Statement of Compatibility with Human Rights**
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

**Parliamentary Joint Committee on Human Rights**
The previous Government considered that the previous Bill also was compatible.

However, in relation to its consideration of the previous Bill, the Parliamentary Joint Committee on Human Rights (Joint Human Rights Committee) expressed concern that the Do Not Call Register Act engages the right to freedom of expression in article 19 of the International Covenant on Civil and Political Rights (ICCPR). That being the case, the Joint Human Rights Committee wrote to the Minister for Broadband, Communications and the Digital Economy seeking clarification not only about whether the amendments in the previous Bill to the Do Not Call Register Act might limit the right to freedom of expression, but also whether the Do Not Call Register Act of itself is compatible with the freedom of expression.

The Joint Human Rights Committee published MinisterConroy’s response in its tenth report of 2013. The Minister clarifies the requirements of the Do Not Call Register Act as follows:

>[It] does not require any numbers to be listed on the Register. Registration is voluntary—Australians can choose whether or not to register their telephone and fax numbers, and can elect to remove their number(s) from the Register at any time. Accordingly, the DNCR Act does not restrict the right to receive information about commercial matters protected by Article 19(2) of the ICCPR.

The DNCR Act prohibits the making of unsolicited telemarketing calls and the sending of unsolicited marketing faxes to numbers on the Register (subject to certain exceptions) and, to this extent, the DNCR Act may limit the rights of some people to impart information about commercial matters. Since most telemarketing and fax marketing is undertaken by businesses, it is businesses that are more particularly impacted by these prohibitions rather than natural persons.

Article 19(3) of the ICCPR, however, emphasises that there are special duties and responsibilities associated with Article 19(2) and, for this reason, restrictions on the right to freedom of expression are permitted in limited circumstances, including to secure or promote the rights of others (but only to the extent necessary and proportionate). In this instance, the relevant right is the right to privacy contained in Article 17 of the ICCPR.

The Statement of Compatibility for this Bill reflects those comments.

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10. The Statement of Compatibility with Human Rights can be found at pages 3–4 of the Explanatory Memorandum to the Bill.
Policy position of the Australian Greens

Before the debate on the previous Bill had been scheduled, Adam Bandt of the Australian Greens (the Greens) put forward an amendment to the previous Bill in the House of Representatives. The amendment would have inserted proposed section 61A into the Telecommunications Act to provide that a carrier licence held by Telstra is subject to the condition that any work undertaken by, or at the request of, Telstra or its subsidiaries to produce a Telstra directory (such as the white pages or yellow pages) must be undertaken in Australia. The amendment was a response to concerns, aired at that time, that Sensis, the advertising and directories arm of Telstra, was planning to relocate up to 700 jobs to India.

Whilst the Environment and Communications Committee shared Mr Bandt’s concern about the loss of local jobs it concluded that the amendments were ‘inconsistent with the scheme of [the previous] Bill and ought to be subject of a stand-alone bill directed to the purpose proposed by the amendments’.

Key issues and provisions

Amendments to the Do Not Call Register Act

The amendments to the Do Not Call Register Act which are contained in Part 1 of the Bill are in equivalent terms to those in the previous Bill. They commence on the day after Royal Assent.

Background

The purpose of the Do Not Call Register Act is to regulate unsolicited and unwanted telemarketing calls. The main elements of the Do Not Call Register Act are:

- a prohibition on making telemarketing calls to an Australian number which is registered on the Do Not Call Register, subject to certain exemptions. The penalty provision is aimed at calls made from an Australian number or from overseas to an Australian number

- a requirement that agreements for the making of telemarketing calls must require compliance with this Act. This requirement is aimed at organisations which may contract with another party to provide telemarketing services on their behalf

- a requirement for a Do Not Call Register to be established, enabling individuals to register their private or domestic numbers on the register

- a civil sanctions regime. These prohibitions are civil penalty provisions, not criminal offences. Breach of a provision may attract a substantial monetary penalty.

- a tiered enforcement regime which provides for a range of enforcement measures to be initiated by the ACMA, depending upon the seriousness of the breach of a penalty provision. The enforcement measures available to the ACMA include a formal warning, acceptance of an enforceable undertaking, or the issuing of an infringement notice. The ACMA may also apply to the Federal Court for an injunction.

- The ACMA may institute proceedings in the Federal Court or the Federal Magistrates Court for breach of a civil penalty provision. As well as ordering a person to pay a substantial monetary penalty, the Court may make an order to recover financial benefits that are attributable to the contravention of the civil penalty

provision, or may order compensation to be paid to a victim who has suffered loss or damage as a result of the contravention.\(^{18}\)

**Relevant provisions**

**Items 1–7 of Part 1** of the Bill amend the *Do Not Call Register Act*. Subsection 11(1) of the *Do Not Call Register Act* provides that a person must not make, or *cause* to be made, a telemarketing call to an Australian number if the number is registered on the Do Not Call Register and the call is not a designated telemarketing call.\(^{19}\) Subsection 11(9) provides an extended meaning of *cause* so that a person (referred to as the *first person*) who contracts another person to make telemarketing calls on his, or her, behalf causes a telemarketing call to be made for the purposes of subsection 11(1). In addition, section 12 prohibits the *first person* from entering into a contract with another party to undertake telemarketing calls where the contract does not contain an express provision that requires the other party to comply with the Do Not Call Register Act.

The equivalent provisions in respect of marketing faxes are as follows:

- subsection 12B(1) sets out the prohibition on the sending of a *designated marketing fax*\(^{20}\)
- subsection 12B(10) contains an extended meaning of *cause* and
- section 12C prohibits the *first person* from entering into a contract with another party to send marketing faxes where the contract does not contain an express provision that requires the other party to comply with the *Do Not Call Register Act*.

Where there has been a contravention of subsection 11(1) or subsection 12B(1), the Australian Communications and Media Authority (ACMA) is empowered to institute proceedings in the Federal Court for the recovery of pecuniary penalties.\(^{21}\)

According to the Explanatory Memorandum:

In some instances, the ACMA has encountered difficulty in establishing evidentiary links between the first person and the other party providing the telemarketing and/or fax marketing services. This has commonly arisen because agreements between the parties relate to the sale and/or marketing of the first person’s goods or services without any specific reference to the means by which the goods or services are to be sold and/or marketed.\(^{22}\)

The amendments to the *Do Not Call Register Act* in this Bill are a response to these difficulties.

**Item 1 of Part 1** of the Bill inserts the definition of the term *give effect to* (a contract, arrangement or understanding) into section 4 of the *Do Not Call Register Act* to include any act or thing done in pursuance of, or in accordance with, the contract, arrangement or understanding.\(^{23}\)

**Item 2 of Part 1** of the Bill repeals paragraph 11(9)(b) of the *Do Not Call Register Act*. This amendment operates so that a person (referred to as the *first person*) who enters into a contract or arrangement, or arrives at an understanding with another person has caused a telemarketing call to be made if the other person gives effect to the contract, arrangement or understanding by making a telemarketing call. That is, the requirement that the contract, arrangement or understanding expressly provides for the making of a telemarketing call is removed.

**Item 3 of Part 1** of the Bill repeals and substitutes paragraph 12(1)(a) of the *Do Not Call Register Act* so that a person must not enter into a contract or arrangement or arrive at an understanding with another person if there is a reasonable likelihood that the other person will give effect to the contract, arrangement or understanding by

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19. The term *telemarketing call* is defined in section 5 of the *Do Not Call Register Act*.
20. The meaning of the term *designated marketing fax* is contained in Schedule 1A to the *Do Not Call Register Act 2006*.
23. The definition is equivalent to the definition of *give effect to* in section 4 of the *Competition and Consumer Act 2010*. An act, or thing, may be done in accordance with a contract, arrangement or understanding even though the person who did the act or thing did not have the contract, arrangement or understanding in mind at the time. See: *Re Trade Practices Commission v TNT Management Pty Ltd* [1985] FCA 23, (12 February 1985), accessed 15 November 2013.
making a telemarketing call or by causing his, or her, employees or agents to make such calls. Again, the requirement that the contract, arrangement or understanding expressly provides for the making of telemarketing calls is removed.

Item 4 of Part 1 of the Bill amends paragraph 12(1)(c) to remove the reference to the making of telemarketing call being ‘covered by’ the contract, arrangement or understanding and substitutes a requirement that the telemarketing calls are made to give effect to the contract, arrangement or understanding. This means that the prohibition in subsection 12(1) of the Do Not Call Register Act will apply even if the contract, arrangement or understanding does not specifically refer to making telemarketing calls.

The amendments in items 5-7 of Part 1 of the Bill amend paragraphs 12B(10)(b), 12C(1)(a) and 12C(1)(c) (about marketing faxes) in equivalent terms to items 2-4 as discussed above.

Financial implications

According to the Explanatory Memorandum, the amendments to the Do Not Call Register Act will not have a significant impact on Commonwealth expenditure or revenue.  

Amendments to the Telecommunications Act

The amendments to the Telecommunications Act in Part 1 of the Bill are equivalent to those in the previous Bill—with the addition of proposed section 119B and consequential amendments to reflect the terms of the new section. They commence on the day after Royal Assent.

Background

The objects of the Telecommunications Act are, amongst other things:

- to promote the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community and
- to provide appropriate community safeguards in relation to telecommunications activities and to regulate adequately participants in sections of the Australian telecommunications industry.

According to section 4 of the Telecommunications Act, the Parliament intends that telecommunications be regulated in a manner that promotes the greatest practicable use of industry self-regulation and does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry—but does not compromise the effectiveness of regulation in achieving the objects stated above. Together these sections underpin the consumer protection framework for telecommunications which:

... is based on a form of co-regulation. It includes high-level legislation that provides for the development and registration of industry codes of conduct on consumer issues, with a regulator in place to monitor codes and enforce non-compliance.

Industry codes can be developed by industry bodies and associations that represent sections of the telecommunications industry, on any matter which relates to a telecommunications activity.  

ACMA maintains the Register of Industry Codes. Once the code is registered, subsection 121(1) of the Telecommunications Act provides that the ACMA can direct a participant in a section of the telecommunications industry which is breaching the code to comply with it, whether they are a voluntary code signatory or not.

28. The term telecommunications activity is defined in section 109 of the Telecommunications Act and includes an activity that consists of carrying on business as a carrier; carrying on business as a carriage service provider; supplying goods or services for use in connection with the supply of a listed carriage service; supplying a content service using a listed carriage service; manufacturing or importing customer equipment or customer cabling; installing, maintaining, operating or providing access to a telecommunications network or a facility used to supply a listed carriage service; or carrying on business as an electronic messaging service provider.
29. Subsection 121(2) of the Telecommunications Act provides that a person must comply with such a direction. Subsection 121(4) of the Telecommunications Act provides that subsection 121(2) is a civil penalty provision. A failure to comply with the direction enlivens section 569 of the Telecommunications Act which provides that pecuniary penalties are payable for a contravention of a civil penalty provision. Where the
The Explanatory Memorandum for the Bill states that the amendments relating to the process for registering industry codes ‘have been prepared in response to recommendations coming out of a review conducted by the Department of Broadband, Communications and the Digital Economy, now the Department of Communications’.\textsuperscript{31} The review was conducted internally and the final report is not in the public domain.\textsuperscript{32} It may be that the review arose from an issues paper\textsuperscript{33} and subsequent report prepared by Galexia Pty Ltd on behalf of Choice in 2008.\textsuperscript{34}

That report was critical of the process of code development which is set out in Part 6 of the \textit{Telecommunications Act} stating:

The legislation is vague on the code development process. There are no provisions that require independent consumer input to code development or prevent ACMA from registering a code which does not have consumer input. There are no requirements for adequate consultation with affected consumers or their representatives. There is no provision for the funding of consumer input, or a requirement that consumer consultation should be adequate and reasonable (e.g. regarding the time allowed for consultation). All of these elements are common in other industry sectors.

The exact status of a registered code is also complex and there are different views amongst the industry, regulators and consumer advocates about code status. A registered code is listed as subordinate legislation—this lends it a certain credibility and gravitas. However there is no proactive requirement for parties to comply with any code, even a registered code. Although the Act contains a specific provision requiring parties to comply with an industry standard (section 128) there are no similar requirements for compliance with an industry code ...

This structure is apparently unique in Australian and international approaches to coregulation and has caused considerable confusion. In our view, this structure is inappropriate and should be reviewed.\textsuperscript{35}

And further:

Under section 120 of the Act, changes to registered codes must be effected by the registration of a new code and not by amending the old code. This has resulted in multiple versions of codes. Signatories to a previous code do not automatically become signatories to a new code—so the number of code signatories has fallen significantly for more recent codes.\textsuperscript{36}

In March 2009, in a speech to the CommsDay Summit, then Minister for Broadband, Communications and the Digital Economy, Senator Conroy noted that:

Under the current regime, emphasis has been given to providing consumer protections in the form of ‘codes of practice’ developed by industry. However, in practice, the co-regulatory consumer protection framework has not lived up to expectations.

Over recent years, consumer advocacy groups have expressed concerns that the current consumer protection framework:

- it is too slow to respond to emerging technologies and market developments

\begin{itemize}
\item Federal Court is satisfied that a \textbf{person} has breached a civil penalty provision the Court may order the payment of a pecuniary penalty of an amount not exceeding $50,000 for each contravention: subsections 570(1) and 570(4) of the \textit{Telecommunications Act}. Where the Federal Court is satisfied that a \textbf{body corporate} has breached a civil penalty provision, the Court may order the payment of a pecuniary penalty of an amount not exceeding $250,000 for each contravention: subsections 570(1) and 570(3) of the \textit{Telecommunications Act}.
\end{itemize}

\textsuperscript{30}. ACMA website, \textit{‘Register of telco industry codes and standards’}, accessed 15 November 2013.
\textsuperscript{32}. Telephone inquiry made by Parliamentary Library to an officer of the former Department of Broadband, Communications and the Digital Economy confirmed this.
\textsuperscript{33}. Galexia Pty Ltd (on behalf of Choice), \textit{Consumer protection in the communications industry: moving to best practice}, op. cit.
\textsuperscript{34}. Ibid.
\textsuperscript{35}. Ibid., p. 7.
\textsuperscript{36}. Ibid., p. 12.
• it does not provide consumers with sufficient opportunity to be heard
• it is not always complied with by industry, and
• it lacks adequate enforcement mechanisms.

A common criticism of the co-regulatory framework is the lengthy timeframes that accompany the development of new codes. 37

That being the case, Senator Conroy announced an examination of the consumer code development process stating:

The review will examine the efficiency, effectiveness and responsiveness of the consumer code development processes under the current co-regulatory regime. It will also look at opportunities for improvement.

The review will be driven by my Department which will work closely with ACMA as well as the Communications Alliance and consumer representatives.

An issues paper on the key issues to be considered by the review, and which seeks public submissions, is available on the Department’s website.

In particular, I’ve asked the Department to advise me how we can reduce the lengthy timeframes taken to develop codes. 38

In a subsequent media release, Senator Conroy stated that ‘if co-regulation is to remain viable, industry must ensure that the code processes are more responsive to consumer needs’. 39

Relevant provisions
Subsection 117(1) of the Telecommunications Act sets out the process for registration of industry codes. That process broadly requires the ACMA to be satisfied that:
• a body or association represents a particular section of the telecommunications industry, the e-marketing industry, the telemarketing industry or the fax marketing industry
• the body or association has developed an industry code that applies to participants in that section of the industry and has given a copy of the code to the ACMA
• the code provides appropriate community safeguards where relevant
• the body or association published a draft of the code and invited participants in that section of the industry to make submissions about the draft within a specified period (being no less than 30 days), and gave consideration to any submissions that were received
• before giving the copy of the code to the ACMA the body or association published a draft of the code and invited members of the public to make submissions about the draft within a specified period (being no less than 30 days), and gave consideration to any submissions that were received and
• the Australian Competition and Consumer Commission (ACCC), the TIO and the Information Commissioner have been consulted about the development of the code where relevant.

Once the ACMA is satisfied of the above, the industry code must be registered on the Industry Codes Register.

Items 8–11 of Part 1 of the Bill amend subsection 117(1) of the Telecommunications Act so that when the body or association publishes a draft of the code and invites participants in that section of the industry to make submissions about the draft (as required by section 117 of the Telecommunications Act), those submissions are

38. Ibid.
also published on the website of the body or association.\textsuperscript{40} In addition, when the body or association publishes a draft of the code and invites members of the public to make submissions about the draft (as required by section 117 of the \textit{Telecommunications Act}), those submissions are also published on the website of the body or association.\textsuperscript{41}

\textbf{Item 12 of Part 1} of the Bill inserts \textit{proposed sections 119A and 119B} into the \textit{Telecommunications Act}.

\textbf{Proposed section 119A} allows for the variation of industry codes rather than the total replacement of a code. It requires the body or association that developed the code to give a draft variation of the code to the ACMA. In that case, broadly, the ACMA must be satisfied of the same matters in relation to the proposed variations as those set out in the initial registration process outlined in section 117. To that end, \textit{proposed paragraphs 119A(1)(c)–(k)} are in equivalent terms to paragraphs 117(1)(c)–(k) of the \textit{Telecommunications Act}. Essentially then, the rigorous consultation which is required before the registration of an industry code is duplicated in respect of those matters that are to be varied in the code, unless the variation is of a minor nature.

Once the ACMA is satisfied of the above, the ACMA must, by written notice to the body or association, approve the draft variation.

\textbf{Proposed section 119B} responds to the concerns of the Environment and Communications Committee in relation to the previous Bill. It provides that submissions made to a body or association containing confidential or commercially sensitive material and submissions containing material which is defamatory, or likely to be defamatory, are not required to be published or may be published in part with the relevant material removed. Consequential amendments have been made to proposed subparagraphs 117(1)(e)(iii), 117(1)(f)(iii), 119A(1)(e)(iii) and 119A(1)(f)(iii) to reflect the this.

\textbf{Items 13–15 of Part 1} of the Bill contain consequential amendments to section 120 of the \textit{Telecommunications Act} to allow for the variation, rather than the total replacement, of an industry code.

Sections 136B and 136C of the \textit{Telecommunications Act} allow for the ACMA to make an irrevocable declaration that an estimate of the total of refundable costs likely to be incurred by a body or association in developing an industry code is reasonable and to give a written notice to the body or association of the amount that it is entitled to be reimbursed.\textsuperscript{42}

\textbf{Items 25 and 28} of Part 1 of the Bill insert \textit{proposed subsections 136B(2A) and (2B) and 136C(3A), (3B) and (3C)} into the \textit{Telecommunications Act}, so that the process outlined above will also apply to a variation of an industry code.

\textbf{Financial implications}

According to the Explanatory Memorandum:

\begin{quote}
Although the proposed amendments to the current reimbursement scheme may result in an increase in Commonwealth expenditure, the amount of additional expenditure in a financial year (being the total amount of costs reimbursed to industry bodies and associations by the ACMA in relation to variations to consumer-related industry codes) is directly referable to the additional amount of revenue the Commonwealth will obtain during the next financial year through an increase in carrier licence charges permitted by the \textit{Telecommunications (Carrier Licence Charges) Act 1997}. The Commonwealth’s additional expenditure, through the ACMA, on funding variations to telecommunications consumer-related industry codes is recouped from telecommunications carriers through carrier licence charges. For this reason, extending the application of the reimbursement scheme to also reimburse industry bodies and associations for their costs in varying consumer-related industry codes ... is not expected to have a financial impact on Commonwealth revenue or expenditure.\textsuperscript{43}
\end{quote}

\textsuperscript{40} Proposed subparagraph 117(1)(e)(iii) of the \textit{Telecommunications Act}.

\textsuperscript{41} Proposed subparagraph 117(1)(f)(iii) of the \textit{Telecommunications Act}.

\textsuperscript{42} Information about the reimbursement process is available on the ACMA website, ‘\textit{Reimbursement of telco code development costs}’, accessed 15 November 2013.

Amendments to the Consumer Protection Act

The amendments to the Consumer Protection Act which are contained in Part 2 of the Bill are in equivalent terms to those in the previous Bill. They commence on the earlier of a single day to be fixed by Proclamation or six months after Royal Assent.

Background

The TIO is established by the Consumer Protection Act to provide a fast, free and fair dispute resolution service for small business and residential customers who have a complaint about their telephone or internet service in Australia. The TIO is operated by Telecommunications Industry Ombudsman Ltd—a company limited by guarantee—and is independent of industry, the government and consumer organisations.

The TIO is governed by a Council and a Board of Directors, and is managed by an independent Ombudsman and a Deputy Ombudsman. The Board’s responsibilities include financial management of the TIO and ensuring the TIO complies with the Memorandum and Articles of Association and the Constitution.

Review of TIO

On 4 March 2011, Senator Conroy announced the release of a discussion paper examining opportunities to reform the TIO scheme. The discussion paper sought views on the effectiveness of the TIO dispute resolution mechanism in the areas of:

- speed, fairness and efficiency
- consistency with current Alternative Dispute Resolution best practice and
- ability to promote and encourage industry efforts to deliver quality complaint resolution prior to outside intervention.

The report (reform report) and accompanying recommendations arising from the discussion paper were published in May 2012.

Improved regulatory framework

In August 1997, the then Minister for Customs and Consumer Affairs, Chris Ellison, released Benchmarks for Industry-based Customer Dispute Resolution Schemes (DIST benchmarks). This publication identified best practice including from existing schemes, to provide a guide to industry in making improvements in their ADRs. This followed the release in 1995 of an Australian Standard (AS 4269-1995) on complaint handling.

The DIST benchmarks refer to principles of independence, accessibility, fairness, accountability, efficiency and effectiveness. The TIO Constitution provides that in exercising its functions and developing complaint resolution
procedures it will ‘have regard to the benchmarks as well as to the law, good industry practice and what is fair and reasonable in all the circumstances’. 56

However, according to the reform report:

… there are currently no framework principles set out in legislation or regulation by which the TIO must abide. This gives rise to a perception that the TIO is not bound by any particular regulatory standards, and there is some uncertainty as to the status and binding nature of the DIST benchmarks in respect to telecommunications services. 57

The occasional paper entitled, Fair Go: Complaint Resolution for Digital Australia, published by the Australian Communications Consumer Action Network (ACCAN) canvasses common elements in dispute resolution schemes. 58 In particular, the occasional paper notes 59 that in 2007, the OECD Council adopted a recommendation on requirements for dispute resolution and redress mechanisms including that:

- the mechanisms should be designed to be sufficiently accessible and easy to use to enable consumers to elect to conduct the procedure without need for legal representation or assistance as far as possible
- consumers should be provided with clear, comprehensible, and accurate information on the procedure, including the process for initiating a complaint and selecting a dispute resolution mechanism, expected costs and duration of the procedure, possible outcomes, avenues for appeal, and whether the outcome is binding
- the mechanisms should be designed so that they can be used by consumers with only minimal additional information or help (for example through the use of standard forms to facilitate the submission of necessary documents) and
- the special needs of disadvantaged or vulnerable consumers should be considered so that they, or their representatives, can access these mechanisms. 60

Having regard to these best practice principles, the occasional paper suggests that the TIO scheme’s underpinning standards should be elevated in order to meet future needs and to deliver effective outcomes for consumers.

Consistent with the occasional paper, the reform report recommended that the Consumer Protection Act be amended to require the TIO scheme to comply with the DIST benchmarks of Industry-based Customer Dispute Resolution Schemes and the development of framework principles for complying with the DIST benchmarks. 61

Relevant provisions

**Item 31 of Part 2** of the Bill inserts proposed subsections 128(8)–(11) into the Consumer Protection Act. Existing section 128 of the Consumer Protection Act establishes the TIO scheme. Under the amendments the Minister may, by legislative instrument, determine standards. 62 In making a determination about the relevant standards, the Minister must have regard to a range of matters, consistent with the DIST benchmarks, which are listed in proposed subsection 128(10) of the Consumer Protection Act. Before making the determination the Minister must consult both the ACMA and the TIO. 63 Once standards have been determined the TIO scheme must comply with them. 64

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59. Ibid., p. 13.
64. *Telecommunications (Consumer Protection and Service Standards) Act*, proposed subsection 128(8).
**Statutory review**

The DIST benchmarks recommend that any external dispute resolution scheme should conduct periodic independent reviews of its performance.65

However, according to the reform report:

... there is no formal mechanism under which the TIO is reviewed independently against the DIST benchmarks, or any wider public review of its performance. While the TIO memorandum and articles of association provide that the TIO will conduct a review of its operations every three years, in practice reviews of the TIO have not been regular or public. There is also a perception that these reviews were captured by the TIO board and appear somewhat impotent with the adoption of any findings or outcomes remaining subject to the views of the board. For example, the TIO board commissioned a review ahead of the department’s discussion paper in late 2010. However, no public announcement was made about the review or its terms of reference and no opportunity was provided for public submissions.66

Whilst there were differing views about the time frame for conducting reviews, the reform report notes that ‘numerous submissions support the idea that the TIO should submit to regular and public reviews ... that enable it to adapt to changes in the industry’.67

In line with this view, the reform report recommended that the Consumer Protection Act be amended to introduce a mandatory, independent and public review of the TIO scheme three years after introduction of the reforms listed in that report, and every five years after that to assess the TIO’s performance against the DIST benchmarks, the established framework principles for complying with the DIST benchmarks, and the TIO Constitution.68

**Relevant provisions**

**Item 32 of Part 2** of the Bill inserts proposed section 133A into the Consumer Protection Act requiring the TIO to ensure that reviews of the TIO scheme are conducted. The features of the reviews are as follows:

- the first review is to be completed within three years after the commencement of proposed section 133A69
- each subsequent review must be completed within five years after the completion of the previous review70
- the review must be conducted by a person who is independent of the TIO and the telecommunications industry71
- the review must include public consultation as well as consultation with the ACMA and the TIO72 and
- the report of the review must be given to the TIO who must give a copy to the Minister73 and publish the report on the TIO’s website.74

**Financial implications**

According to the Explanatory Memorandum, the amendments to the Consumer Protection Act will not have a significant impact on Commonwealth expenditure or revenue.75

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67. Ibid., p. 62.
70. *Telecommunications (Consumer Protection and Service Standards) Act*, proposed subsection 133A(3).
Other provisions
The amendments to the Telecommunications Act which are contained in Part 3 of the Bill were not included in the previous Bill. They commence on the later of Royal Assent and the commencement of Schedule 1 to the Privacy Amendment (Enhancing Privacy Protection) Act 2012, being 12 March 2014.\(^{76}\)

Relevant provisions
Item 33 in Part 3 of the Bill amends subparagraph 119A(1)(k)(i) of the Telecommunications Act which is inserted by item 12 in Part 1 of the Bill. Item 33 changes the reference in subparagraph 119A(1)(k)(i) to ‘National Privacy Principles’ to ‘Australian Privacy Principles’. The provision is consequent upon the commencement of Schedule 1 of the Privacy Amendment (Enhancing Privacy Protection) Act 2012, which will replace the current Information Privacy Principles and National Privacy Principles with the Australian Privacy Principles—a single set of privacy principles applying to both Commonwealth agencies and private sector organisations.\(^{77}\)

Financial implications
According to the Explanatory Memorandum, the amendments in Part 3 of the Bill will not have a significant impact on Commonwealth expenditure or revenue.\(^{78}\)


