THE CORPORATISATION AND PRIVATISATION OF THE AUSTRALIAN TELECOMMUNICATIONS INDUSTRY: THE ROLE OF THE TELECOMMUNICATIONS INDUSTRY OMBUDSMAN

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The Telecommunications Industry Ombudsman Scheme (TIO Scheme) is a world first. The creation of an industry based Ombudsman to resolve consumer complaints in telecommunications is a unique Australian innovation. This article examines the origins, structure, functions, role, powers and obligations of the TIO Scheme. It concludes that while the TIO Scheme is a competent organisation which performs a crucial role in the new telecommunications regulatory regime introduced on 1 July 1997, there are a number of systemic criticisms which can be made of the new Ombudsman. In short, the "jury is still out on the TIO".[1]

I. INTRODUCTION

The national[2] TIO Scheme establishes the world's first telecommunications ombudsman.[3] In 1991 the Hawke Labor Government announced that a telecommunications ombudsman would take over the functions previously performed by the Commonwealth Ombudsman and be established by the

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1 Telephone interview with Consumers' Telecommunications Network (CTN), Monday 9 February 1998.

2 The Commonwealth is given power to make laws with respect to telecommunications under s 51(v) of the Constitution. Section 51(v) states that the Commonwealth Parliament may make laws with respect to "postal, telegraphic, telephonic and other like services".

3 W Smith, "Consumer redress and the TIO model" (1994) 2(3) *Telecommunications Law & Policy Review* 40.

beginning of January 1, 1993.[4] In accordance with that policy the first Telecommunications Industry Ombudsman was appointed in August 1993 and the TIO Scheme was established on 1 December 1993.[5]

The TIO Scheme was established as "one of the cornerstones of Australia's recently deregulated and re-shaped telecommunications industry".[6] Now in its fifth year of operation, the TIO Scheme has been expanded and strengthened by the new *Telecommunications Act* 1997 (Cth) which became effective on 1 July 1997.[7] Arguably this expansion can be seen as a recognition of the perceived success of the TIO Scheme as a key element in the new competitive self regulated telecommunications industry.[8]

With a long term view to increase competition in telecommunications in Australia[9] the TIO Scheme was conceived to be the mechanism by which industry could resolve consumer complaints. In essence, it is a telecommunications industry scheme which aims to provide a cheap and efficient alternative dispute resolution process for consumers of telecommunications services. It uses the alternative dispute resolution techniques of investigation, mediation, conciliation and negotiation to provide for increased consumer protection for smaller end-users in the new Australian telecommunications regime.[10] This function is reflected in the mission statement and motto of the TIO Scheme which appears on all official TIO publications – "providing free, independent, just, informal, speedy resolution of complaints from residential and small business consumers about telecommunications services".

The TIO Scheme is unique because it is an industry ombudsman. The telecommunications Ombudsman was modelled on the Australian Banking Industry Ombudsman[11] (ABIO) which, prior to the creation of the TIO, was the only example of an industry ombudsman in Australia.[12] As with the ABIO, the TIO Scheme is an industry sponsored scheme being "established by private agreement and cooperation within the telecommunications industry".[13] While

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4 Press Release by the Minister for Transport and Communications, K Beazley, "Key Decisions Made on Competition in Telecommunications", Media Release, No 18/91, 17 April 1991 at 3. The need for a Telecommunications Industry Ombudsman in a more open, competitive market was examined in the Report from the House of Representatives Standing Committee on Transport, Communications & Infrastructure, *Telecommunications Handling of Customer Complaints*, May 1991 at 39: the report actually recommended that a Telecommunications Industry Ombudsman be located within AUSTEL but its location was left open in the carrier licences.

5 Telecommunications Industry Ombudsman, *Annual Report 1994* at 2.1; M Armstrong, (ed) *Communications Law and Policy in Australia*, Vol. 1, Butterworths (1992) at [46,000].

6 KPMG Management Consulting, *Telecommunications Industry Ombudsman: Business and Establishment Plan*, March 1993 at 6.

7 Telecommunications Industry Ombudsman, *Briefing Paper*, 12 June 1997, at 1.

8 Telecommunications Industry Ombudsman, *Annual Report 1997* at 9.

9 TIO, note 7 *supra* at 1.

10 M Dundas, "New powers for TIO" (1997) 133 *Communications Update* 6.

11 Letter from B Collins, Minister for Transport and Communications dated 23/6/1992 to Sir Brian Inglis AC, Chairman, Optus Communications Pty Ltd at 1.

12 Communications Law Centre, Recommendations Paper, Prepared for the Telecom Australia Consumers Council, *The Handling of Telecommunications Complaints*, May 1991 at 22 .

13 M Armstrong (ed), note 5 *supra* at [46,000].

the *Telecommunications Act 1997* (Cth) does refer to the TIO[14], the Scheme is not based on an Act of Parliament.[15] Instead the governance structure of the TIO Scheme is based on a corporate vehicle called the Telecommunications Industry Ombudsman Ltd—a company limited by guarantee.[16]

At first blush, the TIO Scheme appears to be a practical initiative in response to a changing telecommunications regime. As the telecommunications industry in Australia moves towards competition and industry self-regulation the TIO Scheme has been created as a cheap and accessible means for industry to address the complaints of the end-user about telecommunications services.[17] The question which this article raises is: how effective is the TIO Scheme in this role and how does it attempt to achieve it?

II. THE TELECOMMUNICATIONS INDUSTRY OMBUDSMAN

A. Why Was the TIO Introduced?

Following the Cold War,[18] nations on every continent moved to market driven economies—selling state owned enterprises and restructuring industry to encourage private sector investment and market competition.[19] The telecommunications industry is part of that process. Worldwide telecommunications is undergoing rapid change.[20] Many countries have broken up vertically integrated monopolies in order to generate price reductions through competition and others have gone further still—privatising state owned enterprises to improve efficiency and quality.[21] The direction of change that international government policy has taken has been diverse.[22] For example, in New Zealand the telecommunications industry was exposed to full private ownership with an ultra light-handed regulatory regime[23] while in the United

14 See *Telecommunications Act* 1997 (Cth), part 10.

15 Armstrong M (ed), note 5 *supra* at [46,000].

16 *Ibid* at [46,060].

17 Letter from Bob Collins, note 11 *supra* at 2.

18 It has been argued that this process of moving Australian government business enterprises out of the public or government owned sector into the private began in Australia in the 1880s: see R Wettenhall, "Corporations and Corporatisation: An Administrative History Perspective" (1995) 6 *Public Law Review* 7.

19 JA Armstrong, "Unplugged? The Effect of the New World Electric Power Order on Renewable Energy Industries" (1997) 22 *North Carolina Journal of International Law and Commercial Regulation* 449 at 451.

20 EPAC, BIE & IC forming the Productivity Commission, Staff Information Paper, *International Telecommunications Reform in Australia*, June 1997, AGPS at iii.

21 R Alston, "Senate Telstra Inquiry Government Senators' Report: A Comprehensive, Rigorous Summary of the Evidence'', Media Release, 9 September 1996.

22 MS Snow, *Marketplace for Telecommunications: Regulation and Deregulation in Industrialized Democracies*, Longman (1986) at 153.

23 L Longdin, "NZ's titled playing field" (1996) 119 *Communications Update* 14.

Kingdom a monopoly moved to a duopoly to a fully competitive market which is heavily regulated by OFTEL, a regulator independent of government.[24]

This trend of change in telecommunications is nowhere more apparent than in Australia.[25] The Australian telecommunications service industry is in a process of transition from a statutory monopoly which was fully government owned and operated to a competitive industry with high private sector participation.[26] This movement has been particularly evident over the past decade as the Australian telecommunications industry has moved from a government supplied monopoly (Telecom/Telstra)[27] to a legislated duopoly of Telstra/Optus in 1991 to a deregulated telecommunication sector on 1 July 1997 with one third of the government owned Telstra being privatised in 1997. Mirroring this process of transition of telecommunications from the public sector to the private sector in Australia are a number of significant policy statements[28] and institutional changes which have resulted in the creation of new competitive structures, such as the TIO Scheme.[29]

B. Structure of the TIO

The office of the TIO is an industry self-regulated body that operates primarily as an office of "last resort" for unresolved complaints made by residential and small business customers about telecommunications services.[30] The TIO Scheme is a forum for consumer complaints it does not deal with industry complaints.[31]

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24 C Scott, "The future of telecommunications regulation in the United Kingdom: tinkering, regulatory reform or deregulation?" (1995) *Utilities Law Review* 13 at 17.

25 EPAC et al, note 20 *supra* at iii.

26 *Ibid* at xiii.

27 "Telstra's origins date back to 1901, when the Postmaster-General's Department (PMG) was established to manage all domestic telephone, telegraph and postal services. The Overseas Telecommunications Commission (OTC) was established in 1946 to manage Australia's international telecommunications. The Australian Telecommunications Commission, trading as Telecom Australia, was created as a separate entity in July 1975 following the break up of the PMG. OTC and Telecom Australia became the Australian and Overseas telecommunications Corporation (AOTC) following a merger in February 1992. Telstra Corporation Limited became the legal corporate name of the merged entity in April 1993. The domestic trading name, Telecom Australia, was changed to Telstra on 1 July 1995 to distinguish the corporation from other telecommunications companies in the increasingly competitive and deregulated market. The Corporation has been trading as Telstra internationally since 1993.": from Telstra, *Annual Report 1995*, cover.

28 For example, the May 1988 Hawke Government *Australian Telecommunications Services: A New Framework*, and *Reshaping the Transport and Communications Government Business Enterprises*, November 1990 *Microeconomic Reform: Progress Telecommunications*, cited in M Armstrong (ed), note 5 *supra* at [2185]; [2215].

29 R Joseph, "Politics and Telecommunications Deregulation" (1996) 46(1) *Telecommunications Journal of Australia* at 9.

30 Communications Law Centre, *Australian Telecommunications Regulation*, Washington Press (1997) p 38.

31 Telecommunications Industry Ombudsman, *TIO Talks*, No 9, January-March 1997, at 1. However the office states that it is "committed to finding practical solutions to a number of current issues so that consumers do not bear the burnt of industry issues. In this context, the TIO will use its good offices to assist carriers and service providers to resolve these issues". See Telecommunications Industry Ombudsman, *TIO Talks*, No 6, April 1996, at 3.

The TIO Scheme is industry funded and is independent of government.[32] With the introduction of the *Telecommunications Act 1997,* the TIO Scheme moved onto a legislative footing. Specifically, the TIO Scheme is a company limited by guarantee with no share capital. The Memorandum and Articles of Association of the Telecommunications Industry Ombudsman Limited establish a three tier structure:

- a Council;
- a Board of Directors; and
- the Telecommunications Industry Ombudsman.

(i) Council

The TIO Council has responsibility for:[33]

- overseeing the TIO Scheme;
- addressing complaint handling policy issues;
- maintaining the independence of the Ombudsman; and
- acting as an intermediary between the Ombudsman and the Board.

Pursuant to Article 12.1 of the Articles of Association the Board establishes the Council which is "composed of equal representation of member representatives (industry) and of consumer and community interests, chaired by an independent Chairperson".[34] In effect the Council is comprised of 9 individuals including 4 persons sourced from members of the TIO[35] (carriers and service providers such as Telstra); 4 persons from user and pubic interest groups[36] (such as the Consumers' Association and National Farmers Federation); and one independent Chairman (position held by Lionel Bowen and now Tony Staley).

(ii) Board of Directors

The TIO Board is responsible for the formal administration of the company and exercises final authority in relation to its financial affairs.[37] The Board of Directors is "composed primarily of directors appointed by members and vested with traditional corporate management responsibilities".[38] The Board may have up to eight Directors: Telstra and Optus having the right to appoint two Directors; Vodafone one; a Carriage Service Provider one; and a Member other than Telstra, Optus or Vodafone one; and an independent Director. Since

32 Telecommunications Industry Ombudsman, note 5 *supra* at 12.

33 *Ibid.*

34 *Ibid.*

35 Members are appointed pursuant to Article 12.2. In 1997 the members were AAP Telecommunications, Vodafone Pty Ltd, Telstra Corporation Ltd; Optus Communications Pty Ltd: see TIO, note 8 *supra* at 6.

36 *Ibid.* In 1997 the user and public interest group representatives were the Australian Consumers' Association, Community Information and Referral Service of ACT, The Small Business Enterprise Telecommunications Centre (SETEL) and the National Farmers' Federation.

37 Articles of Association, Article 10.1.

38 TIO, note 5 *supra* at 12.

inception the Board has had only five members, from a mixture of Telstra, Optus and, at times, Vodafone and a Carriage Service Provider.

(iii) Telecommunications Industry Ombudsman

The Ombudsman is responsible for complaint handling and the day to day administration of the TIO Scheme.[39] The Ombudsman is "vested with authority under the TIO Constitution to receive, investigate and facilitate the resolution of complaints and disputes".[40] The Ombudsman may only deal with complaints which are within its jurisdiction.[41] The jurisdiction of the Ombudsman is set out in the Telecommunications Industry Ombudsman Constitution. For example, while the Ombudsman has jurisdiction to resolve complaints concerning the provision of a standard telephone service, he or she may not investigate the content of a service, such as the information provided by a 0055 service provider.

C. The TIO—Complaints and Funding

The TIO Scheme was opened as an office of last resort. Complaints should be made to the carrier or service provider at first instance and then, if no satisfactory outcome is achieved, the Ombudsman may investigate.[42] The function of the TIO Scheme as an office of last resort is to encourage:[43]

- an efficient customer service approach by the carriers;
- improved initial satisfaction for telecommunications consumers;
- increased awareness by the carriers of the volume and level of complaints; and
- concentration of efforts and resources only on difficult, unresolved complaints.

Since its inception the TIO Scheme has handled an increasing number of complaints.[44] The current growth rate of cases is around 12 per cent per quarter or nearly 50 per cent per annum.[45] The most recent figures available show that the Ombudsman handled 11,963 cases in the quarter ending March 1997—an 11.12 per cent increase on the previous quarter.[46] This does not however fully reflect the number of approaches made to the office as a 'case' is a matter which requires resolution through conciliation, mediation or investigation.[47] In its first

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39 Telecommunications Industry Ombudsman, *Annual Report 1995* at 1. The position of TIO has been held by Warwick Smith and is currently held by John Pinnock.

40 TIO, note 5 *supra* at 12.

41 Articles of Association, Article 12.8.

42 Telecommunications Industry Ombudsman, *TIO Talks*, No 5, August 1995, at 3.

43 *Ibid.*

44 The most common source of complaint is billing (around 40 per cent of all complaints annually), Telecommunications Industry Ombudsman, *TIO Talks*, No 9, January-March 1997 at 3.

45 *Ibid.* The number of cases grew from 17,205 in 1994/95 to 26,905 in 1995/6; the TIO has taken 32,000 cases in 1998 with one quarter to go.

46 *Ibid* at 2.

47 Telecommunications Industry Ombudsman, *Annual Report 1995* at 12.

full year of operation (1994-95) for example, the office received a total of 33,551 approaches which raised 17,205 cases;[48] in 1995-1996 the office generated 26,905 cases from a total of 45,472 calls[49] and in 1996-1997 43,715 cases were logged from 68 696 calls.[50]

The Ombudsman has various powers it can utilise in solving a complaint from directing a carriage or service provider to act or not to act through to making binding awards of up to $10,000 as well as making recommendations for the payment of compensation or action on the part of a participant up to $50,000 (where the case involves an amount in excess of $50,000 the Ombudsman may make a 'finding of fact' only).[51] The Ombudsman has also developed an arbitration procedure for dealing with large complex claims as an alternative to making a finding of fact.[52]

The TIO Scheme is industry funded. It has developed a demand driven funding mechanism which aims to ensure that costs are kept in line with the number of complaints against the particular carrier or service provider.[53] This requirement upon the participants of the TIO Scheme to meet the costs in handling cases attempts to provide the incentive and discipline necessary to reduce complaints.[54] It also provides financial incentives to speedy resolution of complaints by costing the carrier or service provider more each time a matter is elevated to the next stage of the case process.[55]

A case passes through successive stages until resolution,the first phase is called an inquiry, the second a consultation, the third a complaint and the final stage raises the matter to the level of a dispute.[56] While inquiries are typically dealt with on the telephone within 24 hours the Ombudsman has established time frames for dealing with the consultations—14 days and the complaints—28 days.[57] When a case is not dealt with by a carrier in the time period it is upgraded to the next stage. Currently a participant is billed $15 for any inquiry that the TIO Scheme receives concerning the participant; $140 for a consultation; $292 for a complaint and $1,130 for a full scale dispute. The costs are cumulative.[58] The TIO Schemes annual budget since inception has been close to $2 million.

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48 *Ibid* at 4.
49 Telecommunications Industry Ombudsman, *Annual Report 1996* at 22.
50 TIO, note 8 *supra* at 21.
51 TIO, note 47 *supra* at 11.
52 *Ibid.*
53 *Ibid* at 10.
54 *Ibid.*
55 *Ibid.*
56 *Ibid* at 12.
57 TIO, note 49 *supra* at 6.
58 Clayton Utz, "Providing Telecommunications services in Australia A Guide to the Post July '97 Regime" 2 February 1998 <http://www.corpnet.com.au/corpnet/clients/clayton-utz-114/FRAMESET/telatug-06regulators.html>.

D. The TIO's Increasing Role in the New Regulatory Regime

The new telecommunications regulatory regime was introduced by the Howard Government on 1 July 1997. The telecommunications industry became subject to a new regulatory framework which was contained in a package of 11 Commonwealth Acts and amending Acts, the most important of which are:[59]

- *Telecommunications Act* 1997 (Cth)
- *Trade Practices (Amendment Act)* 1997 (Cth) (inserts Parts XIB and XIC into the *Trade Practices Act* 1974 (Cth))
- *Radiocommunications Amendment Act* 1997 (Cth) (amends the *Radiocommunications Act* 1992 (Cth)) and
- *Australian Communications Authority Act* 1997 (Cth).

From this legislation it is Part 10 of the *Telecommunications Act* 1997 (Cth) which gives legislative recognition to the TIO Scheme. The new regulatory framework established by the *Telecommunications Act* 1997 (Cth) leaves the details of the TIO Scheme to its industry members to determine, extends the mandatory membership base to all carriers and eligible service providers and confers new jurisdiction on the TIO in relation to the development of Codes of Practice and to investigate complaints about breaches of both Codes and the Customer Service Guarantee.[60] In short the new regulatory regime has seen an increase in both the scope and effect of the TIO's powers making it the central point for consumer complaints about telecommunications services.[61]

One of the aims of the *Telecommunications Act* 1997 (Cth) was to 're-enact and reinvigorate'[62] the Telecommunications Industry Ombudsman. Indeed, the jurisdiction of the Ombudsman increased following the changes introduced by the *Telecommunications Act* 1997 (Cth) and amending legislation. There are three areas where the TIO experienced significant change:[63]

i. The new groups of service providers over which the TIO will have jurisdiction;

ii. The role the TIO will play in the new self-regulatory codes; and

iii. The impact of the new Customer Service Guarantee.

Each of these is dealt with below.

(i) The New Groups of Service Providers over Which the TIO Will Have Jurisdiction

In 1993 when the TIO Scheme was established, Australia's three major carriers were required to join the scheme pursuant to conditions inserted into their licensing agreements. This requirement arose under s 64 of the *Telecommunications Act* 1991 (Cth). The licences were granted by the Minister

59 *Ibid* Section 1.
60 TIO, note 8 *supra* at 9.
61 Communications Law Centre, note 30 *supra*, p 132.
62 Second Reading Speech, Telecommunications Bill 1996, p 58.
63 Telecommunications Industry Ombudsman, *TIO Talks*, No 8, July-December 1996 at 1.

and enforced by the regulator, AUSTEL.[64] The three major carriers licensed under that scheme were Telstra Corporation (general and mobile licences), Optus Communications Pty Ltd (general and mobile licences) and Vodafone Pty Ltd (mobile licence only).[65]

While the three major carriers were required to join the TIO Scheme service providers were not. Service providers comprise organisations that both supplement and compete with the carriers they can be very small or large like AAP telecommunications.[66] More specifically, service providers now include Internet service providers; mobile telecommunications services; those supplying telephone services to residential and small business customers; all carriage service providers and carriage service intermediaries.[67] Up until 1997 the Office did handle complaints about service providers (or reseller sector)[68] but such providers had joined the TIO voluntarily.[69]

The 1997 legislative changes now make it mandatory for all carriage service providers to join the TIO Scheme.[70] The role of the TIO has thus been expanded considerably—in practice the increased jurisdiction from 1 July 1997 means up to 550 new members—an estimated additional 75 telecommunications service providers and 475 Internet service providers.[71] The role of the TIO remains as a forum for consumer complaints it will not deal with industry complaints. The 1997 legislative changes thus implemented a marked increase in the role which the TIO plays in the telecommunications industry.

(ii) The Role the TIO Will Play in the New Self-Regulatory Codes

In accord with one of the stated aims of the *Telecommunications Act* 1997 (Cth) "to promote the greatest practicable use of industry self regulation"[72] the telecommunications industry itself is given the power under the new regulatory regime to develop industry codes of conduct which will then be registered with the Australian Communications Authority (ACA). The 1997 regime provides for these industry codes and standards to play an important role in self regulation, covering issues such as customer information about goods and services, prices and terms of goods and services, billing information, credit etc.[73]

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64 TIO, note 47 *supra* at 8.

65 *Ibid.*

66 TIO, note 49 *supra* at 12.

67 Telecommunications Industry Ombudsman, *TIO Talks*, No 9, January-March 1997 at 1 all other carriage service providers are still eligible to join the TIO.

68 *Ibid* at 3. This function began in October 1995.

69 In 1995 there were 10 from an estimated 80 who had joined the scheme: TIO, note 47 *supra* at 15, in 1996 there were 16; in 1997 there were 19, set to rise as at 30 June 1997 to at least several hundred; TIO, note 8 *supra* at 9. Once a provider is a member of the scheme the Ombudsman has the jurisdiction to investigate consumers' complaints about the carriage services of the provider see TIO, note 67 *supra* at 1.

70 TIO, note 67 *supra* at 1. See also Part 10 of the *Telecommunications Act* 1997 (Cth) s 245 for the statutory definition of 'eligible service provider'.

71 M Dundas, note 10 *supra* at 6.

72 *Telecommunications Act* 1997 (Cth) s 4.

73 TIO, note 67 *supra* at 2.

The TIO has been given an increased jurisdiction in these matters. For example, the ACA will not be able to register an industry code unless it is satisfied that the TIO has been consulted about the development of the code.[74] Where industry is unable to develop a code the ACA will determine the industry standard but not without first consulting the TIO and the Australian Competition and Consumer Commission (ACCC). This also applies where the ACA wishes to vary or revoke an industry standard. Further, the TIO will investigate consumer complaints about the operation of the codes or standards once they are in operation.[75]

(iii) The Impact of the New Customer Service Guarantee (CSG)

The Customer Service Guarantee was actually in force prior to the 1997 legislative changes. The CSG was established by the *Telstra (Dilution of Public Ownership) Act* 1996 (Cth). The CSG will involve the ACA determining performance standards for carriers and carriage service providers concerning services such as keeping appointments and fixing faults.[76] The Ombudsman may assist in enforcing the CSG in two ways. First, if the Ombudsman consents, the Minister may confer on the TIO the power to issue an evidentiary certificate which will set out the circumstances of the breach the certificate could be relied upon in court proceedings. Second, where a customer complains to the TIO about the breach of a CSG, the TIO may investigate and determine the complaint in the usual manner.[77]

Already the TIO has seen the volume of complaints rise about phone companies failing to adhere to the strict customer service guarantee which came into effect on January 1 1998. Indeed, since January 1 1998 340 complaints to the TIO have been about phone carriers breaching the new guidelines.[78] This is 5 per cent of all complaints made to the TIO in January and February 1998.

E. Conclusion

The TIO Scheme is an essential part of the deregulation of telecommunications in Australia. Created specifically to resolve and investigate complaints between consumers and the telecommunications industry the TIO has seen its jurisdiction and workload increase significantly since 1993 when it first came into operation. The TIO Scheme has become a key element in the competitive telecommunications market. Testimonial to this is the increased role it will play under the new telecommunications regulatory regime which was introduced by the Howard Government on 1 July 1997. The question is: how effective or desirable is the TIO?

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74 TIO, note 63 *supra* at 2.

75 TIO, note 67 *supra* at 2.

76 *Ibid* (for example, under the guarantee faults in metropolitan areas should be fixed by the next working day).

77 *Ibid* at 2.

78 J O'Rourke, "Phone repair complaints off the dial" *The Sun-Herald*, 22 February 1998, p 25.

III. THE CHANGING FACE OF AUSTRALIAN TELECOMMUNICATIONS IN THE 1990s: ROLLING BACK THE STATE AND BRINGING IN THE OMBUDSMAN

Ombudsman are fast becoming permanent fixtures in the private sector. The TIO is typical of such private sector ombudsman which regulate industry including corporatised and privatised Government Business Enterprises (GBEs) and are divorced from government. The increasing numbers of industry Ombudsman and the diversity of the industries they regulate seems testimonial to their success. As Morris has stated:[79]

> all the evidence suggests that ombudsmen are destined to become permanent fixtures in the private sector and indeed, at least in crude quantitative terms, could eventually supplant the legal process as the primary forum for the formal and informal resolution of disputes between business enterprise and consumers.

Indeed, since the late 1980s there has been a proliferation of industry based Ombudsman schemes in Australia.[80] The use of industry Ombudsman has occurred at a state and federal level across a wide variety of industries - electricity, banking, insurance, credit and now of course, telecommunications.[81]

The new industry Ombudsman are modelled on traditional public law Ombudsman which are part of the accountability mechanisms which comprise public administrative law.[82] In Australia, the traditional public law Ombudsman is "...an independent advocate for the aggrieved citizen"[83] who acts as a complaint investigator between the State and the citizen - investigating and making recommendations to government concerning administrative action.[84] This aspect of the traditional Ombudsman has been picked up by the new industry Ombudsman. However instead of acting between the State and citizen the industry Ombudsman acts between industry and consumer, the aim of an industry Ombudsman scheme being an independent alternative dispute resolution scheme used by industry for self regulation.

Currently both the traditional public law Commonwealth Ombudsman and the newly created industry based private law TIO have a role to play in the investigation and resolution of complaints in telecommunications. This is because even after the 1 July 1997 deregulation, Telstra remains wholly within the Commonwealth Ombudsman's jurisdiction, notwithstanding the fact that

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79 P Morris, "The Banking Ombudsman – 1" 1987 *Journal of Business Law* 131 at 132.

80 The banking announced its intention to adopt the Ombudsman based on the English model in 1989: see D Everett, "Australian Banking Industry Ombudsman" (1990) 5(10) *Banking Law Bulletin* 213 at 214.

81 Alan Cameron, a Commonwealth Ombudsman from April 1991 to December 1992 described this proliferation of industry Ombudsman as "ombudsmania". See "Chronology of the Ombudsman" in Commonwealth Ombudsman's Office, *Twenty years of the Commonwealth Ombudsman 1977-1997*, Canberra, June 1997 at 19.

82 Traditional Ombudsman investigation is a relatively informal method of judicial review, usually without formal hearings and published decisions, see S Pidgeon, "The Ombudsman and the Protection of Individual Rights" in J McMillan (ed), *Administrative Law: Does the Public Benefit?*, Proceedings of the Australian Institute of Administrative Law Forum, Canberra, April, 1992 p 75.

83 MC Harris, "South Australian Administrative Law: A Survey of Recent Developments" (1977) 6(1) *Adelaide Law Review* 77 at 78.

84 M Allars, "Administrative Law and the Level Playing Field" (1989) 12 UNSWLJ 114.

Telstra is a GBE which has been partially privatised. In practice the Commonwealth Ombudsman uses the discretion given under s 6 of the *Ombudsman Act* 1976 (Cth) not to investigate complaints relating to action taken by Telstra if it could be more conveniently or effectively dealt with by the TIO Scheme. This discretion has been exercised rigorously by the Commonwealth Ombudsman.[85] The telecommunications matters which the Commonwealth Ombudsman does continue to investigate (only with reference to Telstra) include:[86]

- tenders and other commercial disputes;
- human resources issues (such as workers compensation);
- cabling, other than cabling associated with the installation of a standard telephone service;
- *Yellow Pages* directories;
- freedom of information; and
- nuisance calls (to the extent of any *Freedom of Information Act* 1982 (Cth) issues).

It seems 'clear cut' that this limited role of the Commonwealth Ombudsman will soon end.[87] The 1997 Telstra prospectus indicated that administrative law would be removed from the company once privatised. The introduction of the TIO has therefore coincided with a shrinkage, and ultimately the removal, of the involvement of the traditional public law Commonwealth Ombudsman in telecommunications.

This use of an industry Ombudsman to regulate a private sector industry formally governed by public law mechanisms of administrative review raises a number of novel questions which to date have not been addressed. For example, why has the Ombudsman model been adapted? Are such Ombudsman independent? Does this signify the end of traditional administrative law? Is the use of the Ombudsman model in the private sector appropriate? Is the term 'Ombudsman' correctly used in the private sector context? This part addresses these questions.

A. Traditional Role of the Ombudsman[88]

While the use of an ombudsman type figure has appeared in many societies in different forms, the modern concept of an ombudsman has its roots in Sweden in 1809 where the Swedish Constitution provided for an institution of Justitieombudsman the holder of that office being a representative of Parliament who would supervise the application of the law by public servants and prosecute

85 Commonwealth Ombudsman, *Annual Report 1993-1994*, AGPS 1994, at 69.

86 *Ibid* at 69-70.

87 Telephone interview with Brian Dodson, Commonwealth Ombudsman's Office, Melbourne, 16 February 1998.

88 Note that the use of the word has been discussed due to the fact that in English it may not be seen to be gender neutral this approach was resisted due to the Swedish origins of the word. For this reason the word is not pluralised as Ombudsmen.

those who did not perform their duties properly.[89] More than a century elapsed before the second country, Finland, appointed an ombudsman in 1919. New Zealand became the first English speaking country to appoint an ombudsman in 1962.[90] Australia appointed a Commonwealth Ombudsman in 1977.[91]

Although the term 'ombudsman' is widely used it is difficult to define. Each country has moulded the ombudsman institution to suit its unique constitutional, political and social characteristics.[92] In Australia the office of the Ombudsman has become synonymous with the idea of an independent external reviewer of government administration as government has grown larger the need for regularised accountability has increased this philosophy is central to the concept of the Australian Ombudsman.[93] Indeed, in Australia the Commonwealth Ombudsman is seen as an effective and successful mechanism by citizens sustaining injustice as the consequence of poor quality administrative action on the part of the state and its officials.[94] The Ombudsman in Australia is not a member of Parliament, he or she operates independently of government.[95]

In Australia the Commonwealth Ombudsman was introduced by the *Ombudsman Act* 1976 (Cth) as part of the 'new administrative law' package which was introduced in the 1970s.[96] The Ombudsman may however be distinguished from the other traditional mechanisms of review such as judicial review or the Administrative Appeals Tribunal, as the Ombudsman determines his or her own working methods normally operating informally and in private and is not a distinctly judicial office.[97] The role of the Ombudsman was envisaged as being that of an "inquisitor or auditor".[98] Thus the Ombudsman does not fit neatly into a model of 'legal' controls on government action. The fact that the Ombudsman can act informally, investigate on his or her own instigation, and is free from adversarial rules and strict forms of evidence sets the Ombudsman apart from other forms of more 'legal' administrative review.[99]

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89 The Romans installed an officer called the tribune; both India and China have records of officials functioning as ombudsman 3000 years ago: see A Satyanand, "The role of the Ombudsman" [1996] *New Zealand Law Journal* 206; see also Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, AGPS Canberra, December 1991 at 5.

90 Commonwealth Ombudsman's First Annual Report, "The Concept of Ombudsman" in *The Ombudsman through the Looking Glass*, Proceedings of a Seminar at the Law School The Australia National University, 7 September 1985 at 214.

91 All of the State Ombudsman were also established in the 1970s: Western Australia 1971; South Australia 1972; Victoria 1973; Queensland 1974; New South Wales 1974; Tasmania 1978.

92 J Robertson, "The Ombudsman and the world", note 81 *supra* at 66.

93 E Grotte, "The Ombudsman: investigating and calling to account" (1989) 27(2) *Law Society Journal* 62.

94 P Morris, note 79 *supra* at 131.

95 There is also criticism of this model see C Kernot, "New tricks for an old watchdog: a Democrat's view of the future of the Commonwealth Ombudsman", note 81 *supra* at 75-77.

96 For a history of the 'new administrative law' package see J Goldring, "Foundations of the 'New Administrative Law' in Australia" (1981) *Australian Journal of Public Administration* 79.

97 JE Richardson, "The Ombudsman Guardian, Mentor, Diplomat, Servant and Protector", note 90 *supra* at 222.

98 J Goldring, "The Ombudsman and the new administrative law", note 90 *supra* at 286.

99 *Ibid* at 291.

The Ombudsman is expected to effect change through persuasion. The main focus of the Ombudsman's operations are:[100]

- processing individual complaints through contact, frequently informal, with the agencies that are the subject of complaints;
- transmission of information in both directions between complainants and the agencies about which they have complained; and
- attempting to bring complaints to a resolution in which both sides agree on the facts of the complaint and on the fairness of whatever final decision is made by the agency following the Ombudsman's intercession.

The role of the Ombudsman is to be neutral—favouring neither the complainant nor the decision-maker.[101] Dennis Pearce, a former Commonwealth Ombudsman states that the "best description of the Ombudsman is that of a person who redresses the power imbalance".[102] As Pearce points out, the power imbalance may be between government and citizen or organisation and consumer. The fact that the office exists implies that other institutions which intend to protect people from abuse of power do not necessarily work. For example, an ombudsman may be introduced because courts are too slow and expensive or because procedures of courts and many tribunals may be too formal and intimidating, or where Parliament or equivalent private sector gatherings such as shareholders are ineffectual in protecting the interests of individuals.

B. Are the 'New' Industry Ombudsman Really Ombudsman?

The utility of the ombudsman concept is reflected in the explosion of ombudsman worldwide. The latest count is that the institution now exists in 84 countries which have some 215 Parliamentary type positions.[103] It is not just the public sector which has witnessed an explosion of ombudsman since the introduction of the Australian Banking Industry Ombudsman which was announced in May 1989 and commenced operation in 1990 the private sector in this country has embraced the concept.[104]

However, inasmuch as there has been little empirical or theoretical work examining ombudsman generally, there has been even less analysis of the effect upon industry of the new Ombudsman.[105] It is therefore perhaps unsurprising that the industry ombudsman have been met with a degree of criticism:

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100 Senate Standing Committee on Finance and Public Administration, note 89 *supra* at 12.

101 D Pearce, 'Who needs an Ombudsman?', note 90 *supra* at 51.

102 *Ibid* at 52.

103 J Robertson, "The Ombudsman and the world" in note 90 *supra* at 65.

104 It should be questioned as to whether the industry Ombudsman are really 'new' at all. Prior to the establishment of the public law Ombudsman in Australia in the 1970s three Australian newspapers each appointed an 'ombudsman' to review readers complaints about government agencies in the mid 1960s and the Shire of Albert in south-east Queensland appointed an Ombudsman in 1965 see Senate Standing Committee on Finance and Public Administration, note 89 *supra* at 7.

105 R Watt, "Student Ombudsman: role, function and powers in the University" paper presented for completion of LLM, UTS, 1997 at 1.

> The recent establishment of specific industry Ombudsman schemes points to both the desirability of the ombudsman concept in more commercial activities, but also the care that is needed to ensure that standards of independence are maintained before that title can be ascribed.[106]

and also:

> The attraction of the office to the public and its method of operation has been influential in Ombudsman-type offices being adopted in the private sector ... It must, however, be noted that despite the asserted adherence to the Ombudsman principles by industry, industry Ombudsmen are not independent of the private sector in which they operate and are therefore more likely to find themselves abolished or their jurisdiction reduced. There is also the danger that they will be captured by the industry that they are to review and this will influence their willingness to question decisions.[107]

Given such warnings it is perhaps not surprising that concern has been expressed at the use of the title 'ombudsman' in a context other than for traditional Parliamentary ombudsman.[108] It has been argued that the adoption of the title 'Ombudsman' which belongs to the public sector is a deliberate tactic used by the industry ombudsman schemes to emulate the "prestigious public review bodies".[109] Internationally, this argument has been given legislative backing. For example, since 1991 in New Zealand it has been necessary to have a statutory appointment or permission of the Chief Ombudsman before the title is used. Certainly the NSW Ombudsman would like similar legislation[110] and it also appears to be a concern for the Commonwealth. The *Justice Statement* 1995 (Cth)[111] raised the issue of the proliferation of private schemes but instead of condemning them felt that they do have a place in consumer protection the report went on to note the potential misuse of the name 'Ombudsman' and recommended an appropriate mechanism for the protection of that name through the application of standards.[112]

Thus this argument over the usage of the title 'ombudsman' is really a question as to whether industry ombudsman are genuine ombudsman. Naturally, the answer to such a question will vary according to the terms in which it is asked. For example, the question as to whether the industry ombudsman are 'true' ombudsman may depend upon the definition or description of ombudsman which is used. If one asserts that there is no one 'pure' style of ombudsman, rather that the ombudsman is a person who investigates complaints, then industry ombudsman are quintessentially ombudsman. If however the essence of the ombudsman role is described as defending the individual citizen against the unfair administration of the state, then industry ombudsman are not

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106 P Smith, "Twenty years of the Ombudsman", note 81 *supra* at 1.

107 *Ibid* at 51.

108 "Chronology of the Ombudsman", note 81 *supra* at 19; see also Access to Justice Advisory Committee, *Access to Justice: an Action Plan*, AGPS, Canberra 1994.

109 J Barnes, "Administrative Law" (1993) 21 *Australian Business Law Review* 66 at 68.

110 NSW Ombudsman, *Annual Report 1989*.

111 See Chapter 12 "Ombudsman and Consumer Complaints Schemes".

112 The standards are: independence and impartiality, accessibility, efficiency and effectiveness, openness and accountability.

ombudsman.[113] It follows that a better way to evaluate the performance and existence of industry ombudsman is against set criteria rather than a description to which a label can be affixed. Such criteria have been developed by the current Commonwealth Ombudsman, Ms Philippa Smith, as a "checklist against which an Ombudsman needs to be tested":[114]

i. Independence
ii. Jurisdictional criteria
iii. Powers
iv. Accountability
v. Statements in the public interest
vi. Accessibility

This checklist applies to both industry and traditional ombudsman. The next part sets out the details of this checklist out in full and uses it to evaluate the performance of the TIO.

C. Evaluating the 'New' Industry Ombudsman—The TIO

The Government announced the establishment of the TIO in 1991 with no details on how an industry ombudsman would be established or funded, or what its powers and functions would be.[115] By June 1992 the Government had moved away from some of the above policy intentions and progressed to four possible models for the TIO

> a statutory authority; a scheme that is set up and administered by the carriers themselves along the lines of the Banking Industry Ombudsman; an establishment within AUSTEL or within the Office of the Commonwealth Ombudsman[116].

The model which was chosen—a scheme set up along the lines of the ABIO—is typical of that of the new industry Ombudsman and is perhaps the most obvious example of applying and moulding the traditional ombudsman public law accountability mechanism to the private sector. This model was outlined above.

Thus, although there was no clear precedent existing in the telecommunications industry upon which the TIO could be modelled,[117] its structure was 'borrowed' from the Australian Banking Industry Ombudsman and its British counterpart[118] and thus many of the criticisms which apply to those models may also apply to the TIO.

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113 A Satyanand, note 89 *supra* at 207.
114 P Smith, note 106 *supra* at 4-5.
115 Communications Law Centre, *Telecommunications Industry Ombudsman*, Discussion paper, March 1992 at 3.
116 Letter from B Collins, note 11 *supra* at 1.
117 TIO, note 47 *supra* at 8.
118 Britain had an insurance ombudsman in 1981 and the banking ombudsman was established in 1986: P Morris, note 79 *supra* at 131.

(i) Independence

- The Ombudsman should be independent of those being investigated and the complainant.
- The Ombudsman should be appointed for a set term (such a term would be capable of being renewed), with removal only on the basis of incapacity/proven misconduct or bankruptcy.
- The Ombudsman should be provided with sufficient funding to enable complaints/disputes to be properly investigated.

The TIO is a company limited by guarantee which tries to replicate the impartiality of the judicial process.[119] Indeed the motto of the TIO is to provide "independent, just, informal, speedy resolution of complaints".[120] In the TIO a:

> ... division of functions separates the development of policy (such as the Ombudsman's jurisdiction and methods of handling and resolving complaints) which is a matter for the TIO Council from the carriers and service providers, who are funding the Scheme, and ensures a crucial contribution of consumer and user opinion. Similarly, the members of the Scheme may not control the appointment of the Ombudsman. That is the task of the Council.[121]

However as stated previously, the TIO is modelled upon its British and Commonwealth banking industry counterparts and as such is open to many of the same criticisms.[122] In particular, the corporate structure of the Banking Ombudsman and therefore the TIO has been criticised for being unable to afford the Ombudsman impartiality and dependence.[123] This lack of independence stems from:

1. The Composition of the Council.

The main guarantee of the Ombudsman's independence resides in the institution set up of the office - in particular the powers allocated to each of the three tiers of the TIO Scheme.[124] The Council is in charge of preserving the integrity and the independence of the Ombudsman. As outlined above, the Council has nine members five of whom (including the Chairperson) are non industry members while the remaining five are industry members. It is envisaged that, like the ABIO, the Council will act as a buffer between the Board and the Ombudsman insulating the Ombudsman from improper pressure by the former.[125]

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119 M Rayner, "Industry tribunals and Ombudsmen - no complaints, so far" *The Australian*, 16 March 1996 p 15.

120 This motto appears on all official publications of the Telecommunications Industry Ombudsman.

121 TIO, note 8 *supra* at 4.

122 See also A Stuhmcke, "Administrative Law and the Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry" (1997) 4(4) *Australian Journal of Administrative Law* 185 at 189.

123 P Morris, note 79 *supra* at 136; see also D Everett, note 80 *supra*.

124 P Morris, note 79 *supra* at 135.

125 *Ibid.*

As Morris points out[126] with respect to the English Banking Industry Ombudsman, a concern that may be applied to both the ABIO and the TIO, a lay majority of one is a very slender foundation for the preservation of the independence of the ombudsman. Indeed, it may be argued that the presence of any telecommunications industry representatives on the Council is prohibitive to the proper performance of the Council as a buffer and that the industry interests should be confined to the Board.

2. The Appointment of the Council.

One of the major difficulties with the separation of the Board from the Council is that under Article 12.1 of the Articles of Association the Board appoints the industry and consumer Council members. Even though this is done after a requirement of consultation with the Federal minister responsible for consumer affairs policy there seems to be no reason why the Board should have a role to play in appointing the consumer representatives to the Council especially since the Council is intended to act as a buffer between the TIO and the Board. The ability of the Board to appoint the consumer representatives may give the perception that the Board will appoint 'tame cat' appointees from the consumer, user and public interest groups.[127] Similar criticisms apply to the selection of the Council chairperson.[128]

3. The Ability of the Industry Board to Change the Constitution under Which the Ombudsman Operates.

Paragraph 11.2 of the TIO Constitution states "Final authority for approval of amendments to the TIO Constitution rests with the Board after consultation with the federal ministers responsible for communications and consumer affairs policy". While there is the requirement for consultation which is positive there is no detail as to what type or form it must take. The ability of the TIO Scheme Constitution to be altered by the Board whose members are the very industry which the TIO is attempting to regulate, places the TIO's independence under scrutiny.

To be a credible ombudsman the TIO must be independent and also be seen to be independent - arguably such independence involves a guarantee as to the continuing independence of the TIO. Giving the Board power to alter the Constitution does not go far enough to ensure that the TIO Scheme is seen to remain independent from industry. As suggested by Everett[129] the Board could support the independence of the scheme by either accepting the amendments recommended by the Council and TIO as is required under paragraph 11.2 of the Constitution or by publishing its reasons for failing to do so. Alternatively the

126 *Ibid.*

127 Letter from B Dee, Director of Self Regulation, Trade Practices Commission to Mr Ross Ramsay, Manager, OPTUS, commenting on *AOTC/Optus Proposal for a Telecommunications Industry Ombudsman*, August 1992 at 1.

128 Communications Law Centre & Australian Consumers' Association, *AOTC/Optus Proposal for a Telecommunications Industry Ombudsman*, August 1992 at 5

129 D Everett, note 80 *supra* at 216.

consultation to federal parliament by the Board should be replaced with the appraisal of constitutional change by an impartial committee comprised of the ACCC; an industry member; the federal minister and ACA.

4. The TIO Receiving Its Funding from the Industry that It Monitors.

As explained above the TIO Scheme is entirely self financing. The industry pays for the scheme.[130] Under the TIO Constitution the Board sets the global limits for funding. The Council and the TIO consider and submit budget plans to the Board and the Board ultimately sets the funding limits and has the responsibility to "guarantee sufficient funding for the operation of the TIO Scheme".[131] The Council and the TIO must then ensure that the TIO Scheme is operated efficiently within the global limits set for funding.[132]

It is both sensible and convenient for the industry to assume responsibility for the raising of the funds - but, as Morris points out, the credibility of the TIO Scheme would be strengthened if control of the budget was passed to the Council.[133] The TIO Scheme does go someway to attempting to ensure that the Council has input into the budget as the Board is to take into account any comments the Council has in relation to its global funding limits under Article 6.6 of the Articles of Association. However there is no onus upon the Board to accept those recommendations. Apart from this there are obvious problems with an institution being funded by the industry it is supposed to supervise. Independence of the TIO Scheme from industry can only really be seen to take place when the TIO is free from any inherent bias which may come from attempting to maintain sufficient funding.

5. Appointment and Termination of the TIO.

Arguably the conditions for the appointment and termination of the TIO could be strengthened. The TIO is appointed for a fixed renewable term - the length of that term is not specified in the TIO Scheme documentation.[134] The termination of the TIO is recommended by the Council.[135] An Acting Ombudsman will be appointed if the appointment of the Ombudsman has expired; the Ombudsman is rendered physically or mentally incapable of carrying out his or her duties; or the Ombudsman is to be absent and unable to perform his or her duties for an extended period.[136] There is no mention made of bankruptcy or proven misconduct as the criteria set by the Commonwealth Ombudsman recommend.

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130 In reality it may end up being the consumer of telecommunications who will do the funding as the costs are passed back to them by the industry in the form of higher charges. This has happened with the banking industry ombudsman in England: P Morris, note 79 *supra* at 135.

131 Paragraph 11.3.

132 *Ibid.*

133 P Morris, note 79 *supra* at 136.

134 TIO, note 8 *supra* at 7 states that John Pinnock's term (the current Ombudsman) had expired and he had been appointed for another three year term. A telephone conversation with the TIO office on 1 March 1998 confirmed that all staff of the TIO are appointed on 3 year contracts.

135 Paragraph 9.

136 Articles of Association, article 13.2.

(ii) Jurisdictional Criteria

- The Ombudsman should have the right to investigate any complaint without the need for any prior consent of any person or body against whom the complaint is made.
- In the context of industry ombudsman schemes, desirably, the jurisdiction should give 100 per cent coverage but at the very least, a majority of service providers should be subject to the Ombudsman's jurisdiction.

In accord with the above criteria the TIO does not require the prior consent of any person whom it will investigate. Further, the recent changes to telecommunications have resulted in an almost total coverage of the industry by the TIO. The TIO also has the right to raise cases against any eligible organisation which doers not join the scheme and failure to comply with the scheme is a breach of the *Telecommunications Act* 1997 (Cth) which the TIO will report to the ACA.

However, one difficulty given the recent change is that the Ombudsman himself does not know the precise limits of the jurisdiction.[137] This seems to extend not only to the recent and radical nature of the change which has been introduced but also to the nature of the industry itself. For example, the TIO has recently been given jurisdiction over telecommunications service providers but has no accurate information as to who or even how many service providers there may be. There have been differences in estimates as to how many service providers exist. Industry estimates repeatedly refer to some 150 participants, however the TIO, relying on lists provided by AUSTEL, the Service Provider Action Network (SPAN) and the carriers has identified less than 80.[138]

Apart from the fact that not all transactions with the telecommunications industry are covered by the jurisdiction of the TIO, the major criticisms by consumer and small business groups directed at the jurisdiction of the TIO have been primarily concerned with the monetary limit of binding determinations which the TIO may make. This is currently set at $10,000. The Small Enterprise Telecommunications Centre Ltd (SETEL) suggested an upper limit of $25,000,[139] while the Communications Law Centre and the Australian Consumer's Association recommended $20,000.[140] The raising of this limit was seen as important for rural areas and the operation of small businesses. The suggestion was not taken up. It is interesting to note that it is also the limit of the

137 J Sinclair & J Rouw, "Deregulation off to a push-and-shove start" *The Sydney Morning Herald*, 8 July 1997, p 7.

138 TIO, note 8 *supra* at 14. This is a result of the Service Provider Rules – the TIO is not the only one who does not know how many service providers there are – the Government and the regulator also do not know.

139 Letter from ED Brown, Executive Director of SETEL to Mr Ross Ramsay Optus Communications commenting upon *AOTC/Optus Proposal for a Telecommunications Industry Ombudsman*, 1 September 1992 at 2.

140 Note 128 *supra* at 8.

monetary jurisdiction placed on the ABIO which to date has attracted most complaint.[141]

(iii) Powers

- The Ombudsman's procedures should accord with principles of natural justice.
- The criteria against which cases are investigated include a reference to "fairness in all the circumstances".
- The Ombudsman should have the right to require all relevant information, documents and other materials from those who are being investigated, or from other parties capable of providing information relevant to an investigation.

The Parliamentary Ombudsman has the statutory power to access information from a third party and the power to summons a witness on oath. The Parliamentary Ombudsman can also provide protection for privileged information so gained. The Industry Ombudsman does not have such powers or the capacity to provide such protection. As a consequence, there maybe some limitations on the information capable of being obtained by the Industry Ombudsman.

1. Natural Justice and Fairness.

Given the informal nature of Ombudsman investigation, the principal of natural justice is crucial to ensure that both the complainant and the body or person complained against receive fair and equal treatment. It is therefore unsurprising that the influence and effectiveness of the Ombudsman is seen by some commentators as depending upon the quality of the investigations and the wisdom and balance of the person who makes the reports.[142] In other words, on this view, the integrity of the Ombudsman himself or herself is crucial to the manner in which the role is performed.

The TIO Scheme does attempt to provide for an impartial person to be Ombudsman. The TIO is appointed by the Board upon the recommendation of the Council.[143] The TIO is supported by a Deputy Ombudsman and neither can be associated with any member of the industry. The TIO in pursuing the handling of complaints must pursue the objective of "fair, just, economical, informal and expeditious resolution".[144] While it may be questioned whether the goals of fairness and justness will always coincide with economy and expedition there is provision for the TIO to determine how this is best done in consultation with the Council.[145]

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141 A Lampe, "Gripped by Gripes" *The Sydney Morning Herald*, 23 April 1997 p 5; House of Representatives Standing Committee on Finance and Public Administration, Recommendation 79, *A Pocket Full of Change: Banking and Deregulation* 1991, AGPS at 403.

142 G Brennan, "The Ombudsman and the new Commonwealth Administrative Law" note 81 *supra* at 36.

143 Articles of Association, article 13.1.

144 Telecommunications Industry Ombudsman Constitution, para 5.1.

145 *Ibid.*

2. Power to Acquire Documents and Other Materials.

This absence of power in industry ombudsman to compel production of relevant documents or information is also present in the TIO. This has been identified as a problem in the United Kingdom and Australian banking ombudsman schemes as well.[146] Arguably a scheme cannot be regarded as fair in the absence of such a power. Apart from the fact that it may result in the TIO being unable to obtain all relevant information or unaware of such information's existence, this existing process places the onus on consumers to identify the required information and convince the TIO that the information is relevant to the dispute.[147]

(iv) Accountability

- Parliamentary Ombudsman should be responsible to Parliament.
- Industry Ombudsman should be responsible to a body made up of both industry and client groups, with an independent Chair, and with the proviso that the numbers of industry members of such a group do not predominate.
- The Ombudsman should publish an annual report to the public about the activities of the office, and should have the right to name agencies which are the subject of a complaint and give anonymous case notes.

The TIO reports to the Council. While the numbers of industry members do not predominate over client groups the independence and impartiality of the groups appointed may be questioned (see comments under *independence* above).

The TIO must prepare an annual report under paragraph 7.1(k) of the Constitution. In these reports the Ombudsman does give case studies and name agencies. The TIO is also given power "at the TIO's discretion, [to make] general observations about the operation of the TIO Scheme in any public forum".[148] This has been done. For example, in 1995 the Deputy Ombudsman, Wally Rothwell gave a speech to ATUG which contained explanation and some criticism of both industry and the TIO office.[149]

(v) Statements in the Public Interest

- The Ombudsman should have the ability to make statements in the public interest on matters within the jurisdiction of the Ombudsman.
- The Ombudsman and staff should either be protected from, or indemnified against, any civil litigation which may arise as a result of the exercise of the Ombudsman's powers.

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146 D Everett, note 80 *supra* at 215.

147 *Ibid.*

148 Telecommunications Industry Ombudsman Constitution, para 7.1(m).

149 W Rothwell, "The Ombudsman's Year in Review", presented at ATUG '95, Australian Telecommunications and Data Networking Conference and Exhibition, Sydney, 1 May 1995.

1. Statements in the Public Interest.

In the 1997 Annual Report the TIO Scheme stated its position on public statements:[150]

> the TIO assumes a duty to comment on issues of public concern. In an endeavour to have industry address the root cause of complaints, the Ombudsman has raised a number of systemic issues through public media, such as radio and television interviews, a regular weekly article in *The Australian* and in the quarterly editions of *TIO Talks*.

Naturally the extent to which industry takes note of these comments is a matter for industry rather than the TIO. This is a matter which the above criteria also does not address.

2. Indemnification.

Paragraph 21 of the Constitution offers indemnity for every "Director, auditor, Secretary, Council member and other officer for the time being of TIO Limited...". It is thus unclear as to whether the Ombudsman, Deputy Ombudsman or Acting Ombudsman are indemnified.[151]

(vi) Accessibility

- The office of the Ombudsman should be directly accessible to complainants.
- The Ombudsman should be enabled to ensure the scheme is made known to potential users.

The office of the TIO is accessible by every Australian through a toll free number published in the White Pages. The fact that the service is free is a positive step in this regard.

The TIO itself views its success as depending upon consumer access to the Scheme.[152] This success is arguable in February 1996 only 7 per cent of Australians had a 'top of mind' awareness of the TIO while approximately 31 per cent knew there was somewhere they could complain about phone services but did not know the name.[153] Awareness of the TIO and therefore access to its services is skewed towards higher socio-economic groups, in particular upper white or upper blue collar workers, males, trade or tertiary qualified, on incomes above $40,000 and towards metropolitan areas.[154] The TIO is attempting to improve this through publicity campaigns including regular radio and print advertising.[155]

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150 TIO, note 8 *supra* at 5.

151 Telephone conversation with TIO Office, 1 March 1998, could not confirm indemnification.

152 TIO, note 8 *supra* at 14; 10 per cent of its budget is spent on efforts to raise the level of community awareness of the Scheme including media briefings, interviews etc.

153 *Ibid.*

154 TIO, note 49 *supra* at 11.

155 The carriers are being asked to help with this: see note 8 *supra* at 14.

Of course the ability of the TIO to raise public awareness also depends upon the cooperation of the industry. This extends not only to decisions by the Board as to funding. For example, in 1994 KPMG Consulting recommended that cooperative marketing of the Scheme between industry and TIO be carried out through placing a message of the existence and role of the TIO on all carrier bills.[156] The TIO has pursued this as a matter of priority but it remains in limbo.

IV. CONCLUSIONS

The TIO is open to criticism based on the criteria set down by the Commonwealth Ombudsman. However it must be acknowledged that many of the complaints which apply to industry ombudsman also apply to their public law equivalent. For example:

- Just as industry may alter the jurisdiction of the TIO, the Federal Government whom the Commonwealth Ombudsman regulates may alter the powers and jurisdiction of the Ombudsman. Further, the powers of the Commonwealth Ombudsman are recommendatory only and therefore government support is needed for it to be effective.[157] Moreover, the government may and has ignored reports made to it by the Commonwealth Ombudsman.[158]
- The office of the ombudsman, irrespective of whether it is public or private depends upon the quality and methods of operation of particular ombudsman. Just as with industry ombudsman, public law ombudsman have been criticised for using or having the ability to use methods which may be inconsistent with various legal principles.[159]
- There is also ambiguity in the nature of the ombudsman's role. Some see the public law Ombudsman as having significant potential for encouraging systemic change in the administration while others see it primarily as an inexpensive and simple means of correcting particular administrative errors or providing reassurances that errors were not made.[160] This ambiguity seems to be inherent in the nature of the ombudsman's office and is thus applicable to industry ombudsman. This often gives rise to tension over the scope of the issues appropriate for ombudsman review a tension that has been conveyed in the metaphor of "hunting lions versus swatting flies"[161]
- Just as the separation of the TIO from the telecommunications industry which it is designed to regulate may be questioned so may the

156 TIO, note 49 *supra* at 12.
157 See for example the account of J Richardson, "The first Commonwealth Ombudsman - as it all began" note 81 *supra* at 41-42.
158 *Ibid* at 42-43.
159 Senate Standing Committee on Finance and Public Administration, note 89 *supra* at 15.
160 *Ibid* at 14.
161 *Ibid.*

independence of the public law Ombudsman from government. For example, the amount of funding given by the government to the Ombudsman has constantly dogged the performance of the public law Ombudsman.[162] Recently the Commonwealth Ombudsman has stated that the decreasing amount of funding available to her office may affect its viability.[163] This same problem is apparent in the TIO where, as with the Commonwealth Ombudsman, the body who determines the funding is also the body subject to regulation.

- Just as with the TIO, accessibility is also viewed as a problem by the Commonwealth Ombudsman's office.[164] In 1992-93 54 per cent of Australians knew of the Commonwealth Ombudsman's office.[165] This result prompted the office to undertake outreach programmes for groups who were underrepresented such as people from non English speaking backgrounds, youth and Aboriginals.

In essence an industry ombudsman pursues many of the same objectives as their public law counterpart and is subject to many of the same advantages and criticisms. It may even be argued that the office of ombudsman, when set up according to established criteria, is more suited to the private sector than to the public. This is because the office, when in private industry, is not part of the legal system of administrative review. Thus the industry ombudsman is not subject to the same tension which applies to the public law ombudsman, who on the one hand is seen as part of the legal system of administrative review and on the other hand is an office which is intended to supply a non-legalistic grievance settling mechanism[166] However, given the criticisms which apply to both private and public law ombudsman, perhaps a better approach is not to compare the industry ombudsman with their public counterparts as has been done in the limited analysis which has taken place to date but rather to ensure the optimal performance of both schemes.

Such an approach would seem to be advisable given that industry ombudsman are not only rapidly proliferating but are also seen as desirable by the users of such ombudsman. Indeed, the TIO has the support of both industry and consumers. The Consumers' Telecommunications Network[167] for example, is in favour of having an Ombudsman for the resolution of complaints for consumers. Although the TIO does not act as an advocate on behalf of consumers[168] the CTN feels that the alternative (the court system) would offer

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162 Commonwealth Ombudsman's First Annual Report, note 90 *supra* at 242; 224.

163 P Smith, note 106 *supra* at 3.

164 The contacts made to the Commonwealth Ombudsman's office were 42 000 in 1995-96 see note 81 *supra* at 23.

165 *Ibid* at 20.

166 Senate Standing Committee on Finance and Public Administration, note 89 *supra* at 14.

167 The role of the consumer movement in telecommunications peaked in 1989 with the formation of the consumer group Consumer Telecommunications' Network. The CTN is a national coalition of consumer and community organisations concerned with Australian telecommunications issues.

168 The Telecommunications Industry Ombudsman does advise complainants as to how they may provide evidence etc in support of their cases, see note 8 *supra* at 5.

little solace for consumers in terms of speed, outcome and cost.[169] The same outlook is reflected in industry. Indeed even prior to the introduction of the industry ombudsman in 1991 Jim Holmes, Corporate Secretary of Telecom, told a Senate Committee investigating the Office of the Commonwealth Ombudsman:

> We are not victims of the Ombudsman ... Overall, the Ombudsman has added value to our operations. That is why we do not want to go and break chains; we do not feel that we are in chains.[170]

Just as the office of the Ombudsman legitimise government decision making[171] as the authority of government decision making processes is dependent upon the public perception of them as being legitimate the office of the industry ombudsman has a major public relations function for industry.[172] This fact is recognised by the major stakeholders in the telecommunications industry the industry itself and the consumer.

The legitimacy of the TIO Scheme thus depends upon its integrity[173] and viability. When an industry such as telecommunications is a government owned and operated business enterprise public law operates in the public sector to promote values of openness, rationality, fairness and participation[174] with respect to the relationship between the individual and the state. Once telecommunications is deregulated and shifted into the private sector the citizen no longer has a relationship with the state and instead becomes simply a consumer of services whose relationship is a private contract with industry.[175]

As government enterprises have been transferred from the public sector to the private with increasing frequency Australia has seen an increase in industry ombudsman such as the TIO being installed into the private sector as a cheap and easy means of inquiring into asserted industry deficiencies. The creation of the TIO Scheme is an attempt to provide consumers with an effective and speedy redress when conflict arises in their commercial dealings with the telecommunications industry. Indeed, the ombudsman model seems ideally suited to industry. While there is no doubt that the TIO Scheme is subject to

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169 Telephone interview with CTN, Monday 9 February 1998. This informal correction of wrongs by the Ombudsman is seen as one of the advantages of the office: for a more comprehensive coverage of advantages of the Ombudsman, see K Holmgren, "The Need For An Ombudsman Too" in DC Rowat (ed), *The Ombudsman: Citizen's Defender*, George Allen & Unwin (1965) at 227-30.

170 Senate Standing Committee on Finance and Public Administration, note 89 *supra* at 42.

171 R Tomasic, "Administrative law reform: Who benefits?" (1987) 12 *Legal Service Bulletin* 262 at 263.

172 *Ibid.*

173 There are external factors which can be utilised to ensure this, for example, the Australian Standards for Complaint Handling (AS4269 - 1995) and Commonwealth Ombudsman's Office, *A Good Practice Guide for Effective Complaint Handling* 1997.

174 M Allars, "Private Law But Public Power: Removing Administrative Law Review From Government Business Enterprises" (1995) 6 *PLR* 44.

175 This point as to whether administrative law principles apply to former GBEs and the promotion of the values of openness, rationality, fairness and participation in the public sector has been the subject of debate. One argument is that as these services are no longer in the public sphere they should not be subject to such principles: see C Sampford, "Law, Institutions and the Public/Private Divide" (1991) 20 *Federal Law Review* 185 at 211. An alternative argument is that if the GBE is involved in a collectively consumed resource/service such as water (and presumably telecommunications) then administrative law mechanisms should apply as this is the exercise by the former GBE of a public power even though it occurs in the private sector see: M Allars, *Ibid.*

valid criticism over its structure and implementation the application of the traditional public law concept of the ombudsman to industry is novel and deserves exploration.