6 August 2014

Manager, Consumer Policy Framework Unit
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

**Consultation Paper: Extending Unfair Contract Term Protections to Small Businesses**

Thank you for giving the Telecommunications Industry Ombudsman (TIO) the opportunity to comment on the Consultation Paper released by the Consumer Affairs Australia and New Zealand (CAANZ) on *Extending Unfair Contract Term Protections to Small Businesses* (the Consultation Paper).

***TIO submission in response to the Consultation Paper***

In this submission, we respond to the proposals and questions in the Consultation Paper that are relevant to our experience in handling small business-related complaints about telecommunications services in the Australian telecommunications industry.

We set out in this submission:

1. Our approach to small business complaints

2. An overview of TIO complaints and issues data in small business new complaints

3. Contractual issues in small business new complaints relevant to unfair contract term protections, with associated case studies in the **Appendix**, and

4. Our responses to specific questions in the Consultation Paper to the extent these are relevant to the TIO's experience.

We trust that the information in this submission will assist the Australian Treasury, on behalf of CAANZ, in its consultation process.

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***Further information***

If you require further information, please contact David Brockman, the TIO Executive Director – Industry, Community and Government on 03 8600 8700 or by email (david.brockman@tio.com.au).

Yours faithfully

Simon Cohen
**OMBUDSMAN**

Telecommunications Industry Ombudsman

# Telecommunications Industry Ombudsman – Submission on extending unfair contract term protections to small businesses

August 2014

## Contents

## About the TIO

The Telecommunications Industry Ombudsman (TIO) is authorised under Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to provide an independent alternative dispute resolution service for small business and individual consumers in Australia who have a complaint about their telecommunications services.

We aim to resolve these complaints quickly in a fair, independent and informal way, having regard not only to the law and to good industry practice, but also to what is fair and reasonable in all the circumstances. Before the TIO becomes involved in a complaint, the service provider is given an opportunity to resolve the complaint with its customer.

We are independent of telecommunications companies, consumer groups and government.

For most complaints we receive, we establish the issues in dispute and the resolution sought, and then refer the consumer or small business to a designated point of contact at the relevant telephone or internet service provider. The provider is given a further opportunity to resolve the matter with the consumer, without the TIO's direct involvement. Around 88 per cent of consumers we refer do not contact the TIO for further assistance after this stage of the process.

Where the consumer and service provider do not reach an agreement and the consumer returns to the TIO, we become more directly involved by seeking to conciliate an agreed resolution between the parties.

Complaints that cannot be resolved by conciliation are progressed for formal investigation by the TIO. If the complaint remains unresolved after formal investigation and the TIO is of the view that it would be fair and reasonable to do so, the TIO can make binding determinations up to a value of $50,000 and non-binding recommendations up to a value of $100,000 in respect of each complaint.

We record complaints according to service types – internet, mobile and landline services, and by the types of issues that these complaints present. These issues include connection and fault repair delays, credit management disputes, contractual disputes, customer service/complaint handling and billing disputes. Every complaint involves at least one issue. Some complaints can involve multiple issues – for example, a complaint about a delay in rectifying a faulty landline service may also involve a claim that the consumer's complaint about this fault was not acknowledged or progressed (a complaint handling issue).

Further information about the TIO is available at www.tio.com.au.

## TIO submission on extending unfair contract term protections to small businesses

The TIO welcomes the opportunity to contribute to the Consultation Paper released by the Consumer Affairs Australia and New Zealand (CAANZ) on *Extending Unfair Contract Term Protections to Small Businesses* (the Consultation Paper).

In this submission, we respond to the proposals and questions in the Consultation Paper that are relevant to our experience in handling small business-related complaints about telecommunications services in the Australian telecommunications industry.

We set out in this submission:

(a) Our approach to small business complaints

(b) An overview of TIO complaints and issues data in small business new complaints

(c) Contractual issues in small business new complaints relevant to unfair contract term protections, with associated case studies in the **Appendix**, and

(d) Our responses to specific questions in the Consultation Paper to the extent these are relevant to the TIO's experience.

We trust that the information in this submission will assist the Australian Treasury, on behalf of CAANZ, in its consultation process.

## TIO approach to small business complaints

### TIO's current approach

The TIO deals with complaints from small businesses about a range of issues, including the supply and connection of standard telephone services, mobile services and internet services, the billing of these services and the repair of faulty services. We also handle complaints – specifically from small businesses – about point of sale advice concerning the bundling of telecommunications services with equipment that may be on finance leases.

We deal with around 80 new complaints from small businesses each day.

The TIO's approach to limiting our services to small business and individual consumer complaints rests on the premise that small business consumers, like individuals, are less likely to have the resources necessary to pursue a grievance through the formal legal system.

As such, small businesses with telecommunications complaints require access to the TIO in its role as an independent and free external dispute resolution scheme. As well as being typically better resourced, medium and large businesses may seek resolutions that are beyond the scope of the TIO's determinative powers (the TIO is able to make binding decisions up to a value of $50,000 and recommendations up to a value of $100,000).

We actively help small business consumers and their telecommunications providers resolve disputes through our effective referral process, and through the expeditious conciliation of more complex disputes. Very few small business complaints require resolution through our more formal investigation process.

Our experience in dealing with small business commissioners in a range of jurisdictions has been very positive and we continue to maintain good working relationships with them. We also regularly attend forums such as the annual National Small Business Summit organised by the Council of Small Business Australia (COSBOA).

### How we define a small business

We take a flexible approach to defining a 'small business'. The criteria we use to define what a small business is include the following:

- the number of employees of the business. The TIO would generally consider 20 employees or less to be indicative of a small business. However, we will categorise some businesses with more than 20 employees as small businesses, for example, agricultural businesses that seasonally employ more than 20 employees, or goods manufacturing businesses with fewer than 100 employees.
- the business' annual turnover. The TIO generally considers that a small business will have an annual turnover of less than three million dollars.
- the nature of the business, and if it is typically small or not-for-profit. Here we also consider if the nature of the business gives it little or no bargaining power to negotiate the terms of a telecommunications contract with a service provider.
- the way the business is structured or managed. For example, a business independently owned and funded by a small number of individuals who make most important business decisions is

likely to be a small business. Conversely, one of several subsidiary businesses with a parent company that makes the major business decisions for the subsidiary is not likely to be a small business.

- the issue in dispute. For example, we consider whether or not the complaint relates to complex technologies or systems not generally purchased by individuals or small businesses.

These criteria are set out on our website (at http://www.tio.com.au/consumers/small-businesses).

Where a business is not a small business, the TIO will exercise discretion not to investigate a complaint and it will record this matter as an enquiry. Similarly, complaints from small businesses where the subject matter of the complaint is outside the scope of the TIO scheme are recorded as enquiries.

In these circumstances, we may refer the business to a more appropriate body (for example, the Australian Competition and Consumer Commission (ACCC), state-based small business commissioners, state Offices of Fair Trading or a small claims tribunal) or suggest that the business seeks independent legal advice.

We note that small business consumers do not always identify as such. In the telecommunications industry, this can manifest itself in the type of 'plan' the consumer is on – for example, small business consumers may be on 'residential plans'. This may also influence how a consumer is categorised when we record their complaint (as an individual or small business consumer), particularly in the case of sole traders. Our data may therefore underestimate the number of small business complaints.

## Complaints to the TIO

### New complaints from small business consumers

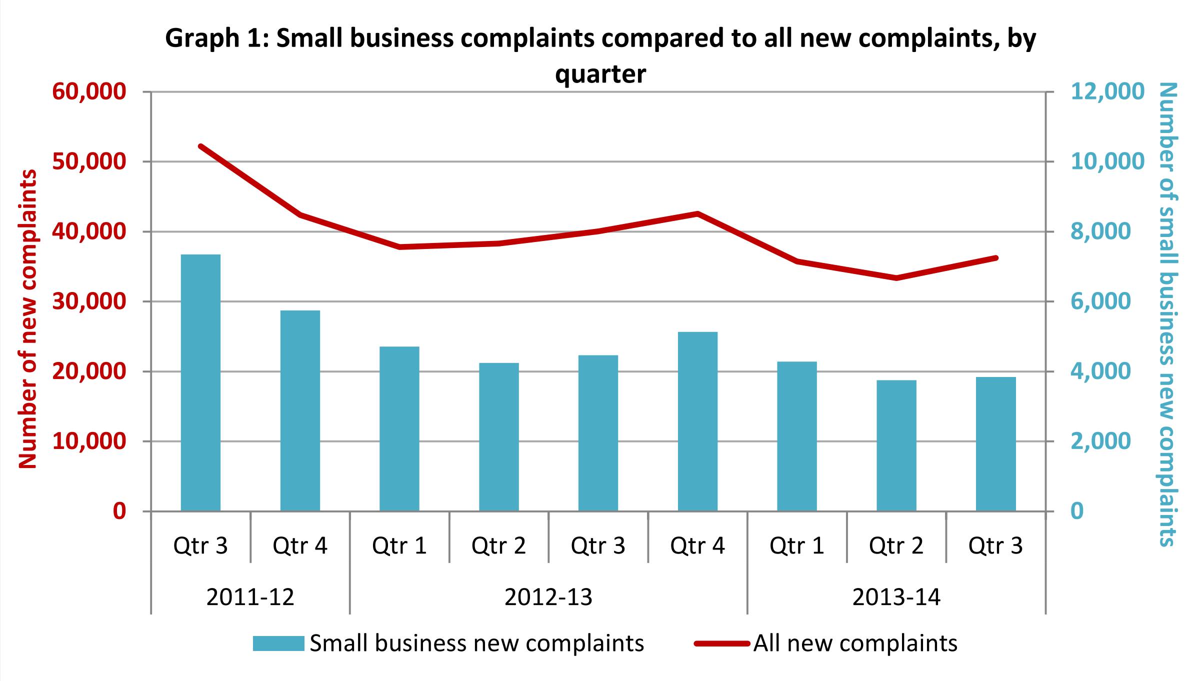
When a consumer – an individual or a small business – contacts us about an expression of grievance or dissatisfaction about a matter within the TIO's jurisdiction that the service provider has had an opportunity to consider, we record this as a 'new complaint'.

The TIO recorded and handled 158,652 new complaints from small business and individual consumers in 2012-13. This compares with 167,772 new complaints recorded during 2009-10, 197,682 in 2010-11 and 193,702 in 2011-12. Over the first three quarters of 2013-14, the TIO recorded and handled 105,363 new complaints from small business and individual consumers.

In 2012-13 we received 18,423 new complaints from small businesses around Australia, compared to 14,955 new complaints in 2009-10, 22,836 in 2010-11 and 27,008 in 2011-12. In the first three quarters of 2013-14 we received 11,872 new complaints from small businesses around Australia.

We have seen a decrease in new complaints from small businesses in 2012-13 and again over the first three quarters in 2013-14, consistent with the overall decrease in all new complaints received by the TIO over similar periods.

Graph 1 shows the comparison between all new complaints and small business new complaints recorded by the TIO over the past nine quarters.

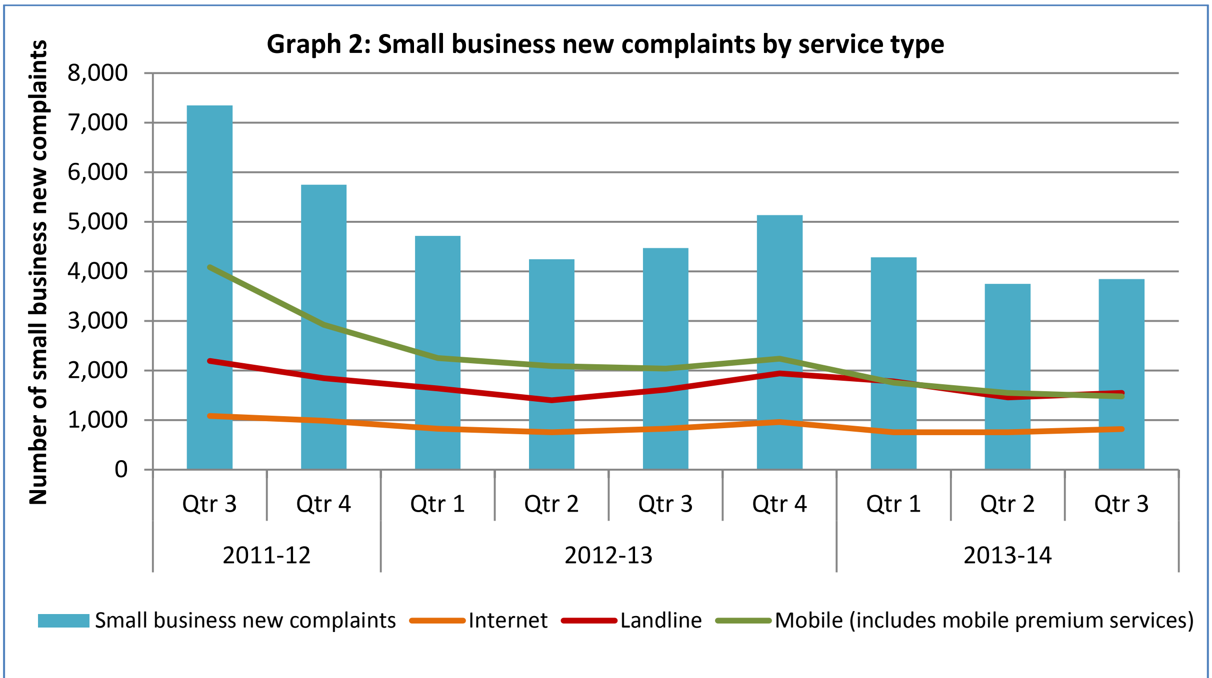



**Small business new complaints by service type**

Small business consumers are as likely to complain about landline services as about mobile services, with each of these categories forming around 40 per cent of all small business new complaints. This is particularly more recently over the past three quarters.

In contrast, the majority of all new complaints recorded by the TIO are about mobile phone services, forming over 50 per cent.

Graph 2 shows the new complaints recorded by the TIO from small business consumers over the past nine quarters, by service type.



**Issues in small business new complaints**

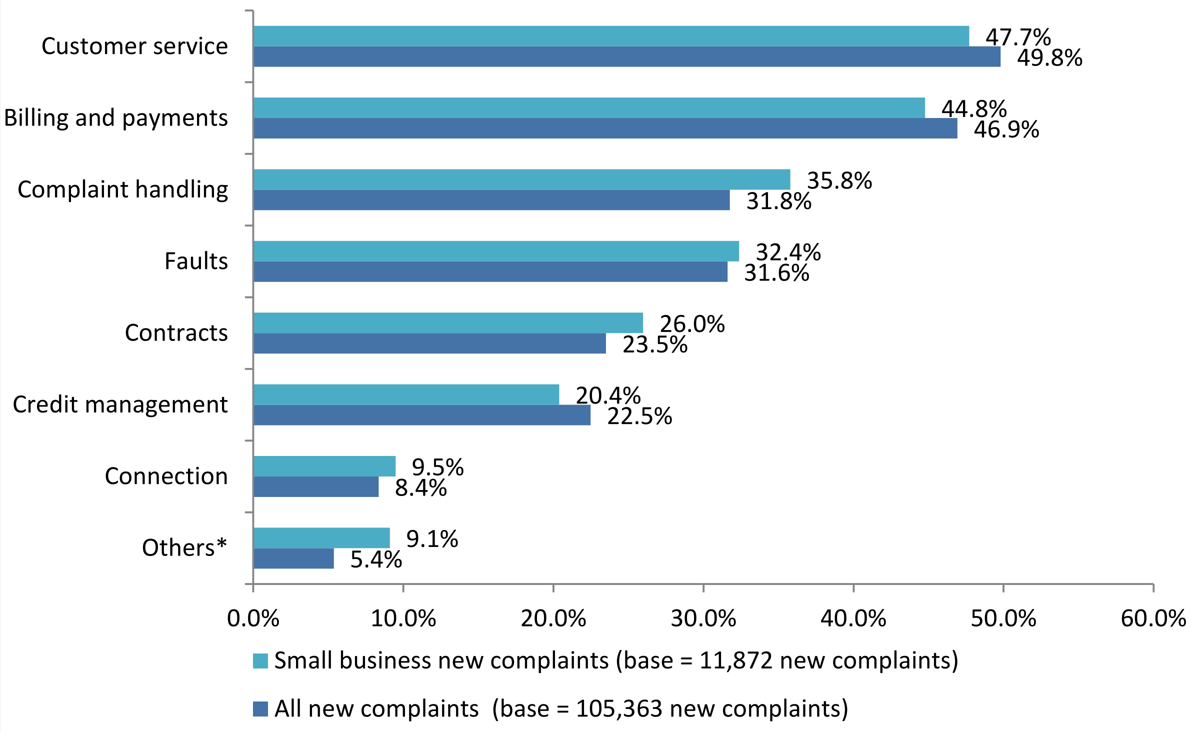
We record new complaints by the types of issues that these complaints present. Issues are selected from a choice of keywords that are aligned to industry codes or common complaint categories that the TIO has identified. These issues include connection and fault repair delays, credit management disputes, privacy issues, contractual or transfer disputes, customer service/complaint handling issues and billing disputes.

Every new complaint involves at least one complaint issue. Some complaints can involve multiple complaint issues – for example, a complaint about disputed mobile charges may also involve a concern over the point of sale advice given by the service provider about the mobile plan. In such circumstances, the TIO would record one complaint comprising two issues – a billing issue and a contracts issue.

For the first three quarters of 2013-14, issues about customer service formed the largest category of small business new complaints followed closely by billing and payment issues. Issues about complaint handling, faults and contracts were proportionally more common in small business new complaints when compared against all new complaints over this period. One in every four small business new complaints involved at least one contractual issue.

Graph 3 sets out the types of issues in proportion to new complaints from small businesses compared to all new complaints in the first three quarters of 2013-14.

**Graph 3: Issues in proportion to new complaints Q1 to Q3 2013-14**




** Others include issues about transfers, privacy, directories and land access.*

## Small business contractual issues relevant to unfair contract term protections

### Contractual issues in small business new complaints

Table 1 sets out the types of contractual issues in small business new complaints recorded by the TIO from 1 July 2012 to 31 March 2014. These include issues about:

- point of sale advice including potentially misleading or incomplete information about the product and terms, cooling off periods, coverage or termination fees, forming 51.9 per cent of all contractual issues
- lack of knowledge of a contract or not obtaining informed consent, forming 13.0 per cent of all contractual issues
- enforcement of terms of the contract in circumstances when it may be unfair to do so, forming 10.2 per cent of all contractual issues
- delay or failure to terminate a contract when appropriate, forming 8.7 per cent of all contractual issues
- potentially unfair contract terms, forming approximately 8.4 per cent of all contractual issues (the categories highlighted in blue below). These include issues about the imposition of termination fees that may be a penalty, the cancellation of the contract at will by the provider, unilateral variation of terms, renewal of the contract by the provider without consent, and enforcement of unfair terms.

| Table 1: Contractual issues in small business new complaints (1 July 2012 to 31 March 2014) | Proportion of contracts issues |
|---|---|
| Disputed point of sale advice | 51.9% |
| Lack of informed consent or denial of knowledge of contract | 13.0% |
| Enforcement of terms in circumstances when it may be unfair to do so | 10.2% |
| Delay or failure to terminate a contract | 8.7% |
| Termination fee may be a penalty or contract cancelled at will | 3.9% |
| Variation of terms | 3.1% |
| Failure to provide contract | 2.7% |
| Sales tactics | 1.7% |
| Consumer held to terms despite cancellation within cooling off period | 1.3% |
| Bundling of multiple services as a bundled package | 1.0% |
| Contract renewal allowed by provider, but not consumer | 0.8% |
| Enforcement of unfair terms | 0.6% |
| Others (e.g. advertising, written communication of terms, etc) | 0.9% |

*Note: Multiple issues can be recorded in each new complaint*

### Contractual issues relevant to unfair contract term protections

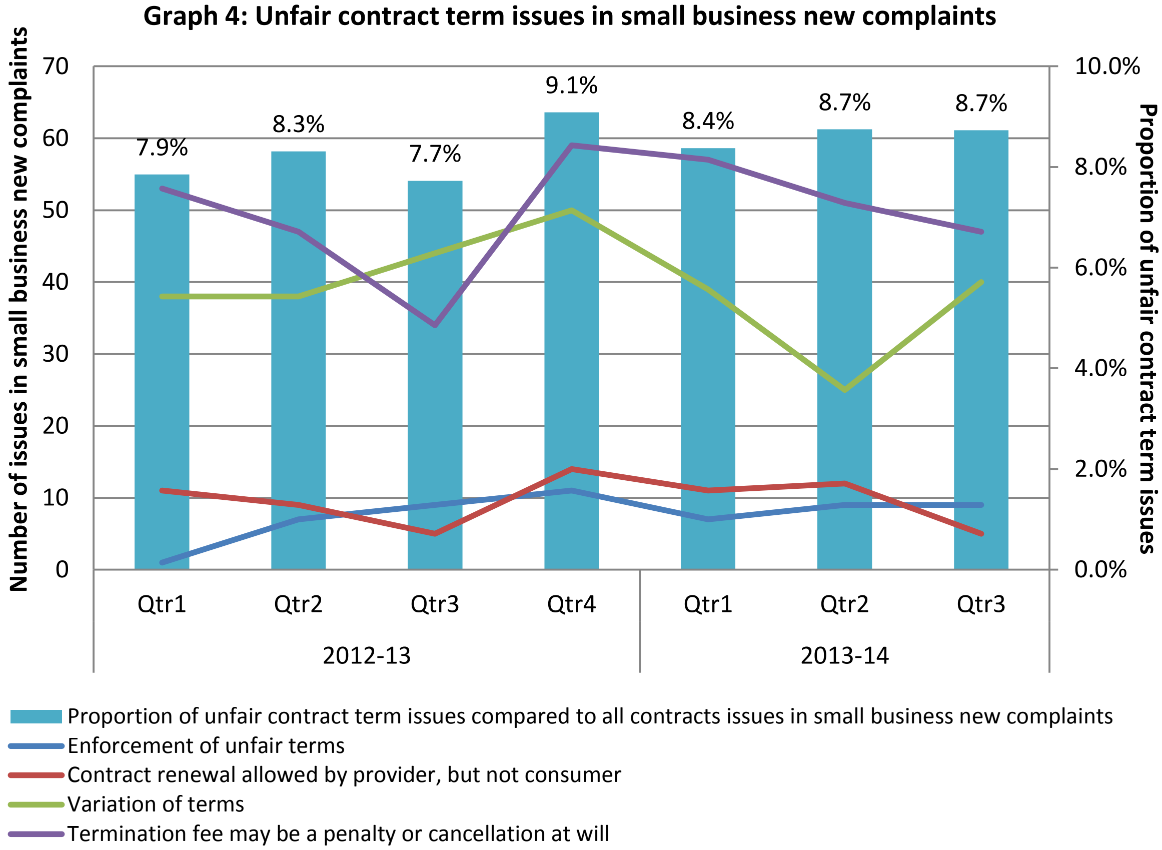
The issues highlighted in blue in Table 1 above are the most likely categories of contractual issues recorded by the TIO that are relevant to unfair contract term protections.

These issues are likely to involve potentially unfair contract terms such as those terms that permit, or have the effect of permitting one party (but not another party) to vary the terms of the contract, renew or not renew the contract, avoid or limit performance of the contract, or terminate the contract. Other potentially unfair contract terms include terms that penalise, or have the effect of penalising, one party (but not another party) for a breach or termination of the contract.

We recorded on average, around 100 small business new complaints with at least one issue relevant to unfair contract term protections, each quarter (approximately 8.4 per cent of all contractual issues in small business new complaints) over the period from 1 July 2012 to 31 March 2014.

Graph 4 shows the issues relevant to unfair contract term protections recorded by the TIO from small business consumers over the past seven quarters.

**Graph 4: Unfair contract term issues in small business new complaints**




It must be noted that contractual issues relevant to unfair contract term protections are also likely to be present in the other categories listed in Table 1, for example, disputed point of sale advice or enforcement of terms in circumstances when it may be unfair to do so.

**Problems faced by small businesses about potentially unfair contract terms**

We analysed a sample of small business new complaints with issues about potentially unfair contract terms to draw out some of the common problems faced by small business consumers in the telecommunications industry. These problems and relevant case studies are outlined below.

***Unilateral variation of contract***

Many telecommunications standard forms of agreement reviewed by the TIO in our handling of complaints include a term that allows the provider to vary the contract during its life with or without the consent of the small business consumer. In some instances, a unilateral variation clause may also include the right of the consumer to exit the contract without early termination fees (for fixed term contracts) if the variation has a major detriment to the consumer. In other instances, the unilateral variation clause may require that notice is given to the consumer, but does not specify the notice period or how notice is to be communicated.

The complaints that we receive about providers unilaterally varying their standard forms of agreement can arise both in the context of pre-paid services, month to month contracts or fixed term contracts. These complaints can also present in a number of different ways, for example:

- The provider unilaterally varies the contract due to upstream supplier changes, by increasing the price of the plan or by changing the included data allowance in the plan. The provider may offer the small business consumer the choice of cancelling the fixed term contract early but ends up charging early termination fees if they do so.
- The provider unilaterally varies the contract, gives reasonable notice of the change and offers to put the small business consumer on alternative plans. Although notice of the variation is provided, the provider does not offer the consumer the option of cancellation of the contract without early termination fees because alternative plans are available. However, these alternative plans are not suitable for the small business consumer as they cost much more.
- The provider unilaterally changes the small business consumer's mobile plans by reducing the included value for calls. The provider then makes further changes where calls to particular countries are now removed from the included value. The provider refuses to release the small business consumer from the contract without early termination fees.

These types of complaints can give rise to other issues such as disputed excess usage charges, suspension or disconnection of services and even default listings against the small business consumer.

**Case Study 1** and **Case Study 2** highlight the issues that small business consumers can face when a provider unilaterally changes the terms or conditions of their telecommunications service.

***Automatic renewal of contract without notice or consent***

A number of telecommunications standard forms of agreement relied on by service providers in complaints dealt with by the TIO include a term that allows the provider to automatically renew a fixed term contract without notice of renewal or the consent of the small business consumer. Sometimes, this type of term may require the consumer to give notice if they do not wish to renew, by a specific timeframe prior to the expiry of the existing contract.

Although in some instances an automatic renewal of the contract may provide certainty and continuity of service to small businesses, there may also be instances when this type of clause can result in the small business consumer being locked into an ongoing indefinite contract with the provider.

The complaints we receive about automatic renewal of telecommunications standard forms of agreement can present in a number of different ways, for example:

- The small business consumer is charged for a directory listing in the White Pages by their provider even though they had not requested this. The provider has done so based on an automatic renewal clause in the contract that does not require it to seek the consumer's consent prior to renewing the contract. The small business consumer has not had the opportunity to review the listing or verify the accuracy of the details, nor agree to the new price charged for the new listing.

- The small business consumer transfers their services to another provider after their three year telecommunications contract came to an end. However, they are charged early termination fees as the contract was automatically renewed by their current provider for a further term without notice prior to the expiry of the original contract.

- The small business consumer is charged for a directory listing in the White Pages by their provider as a result of an automatic renewal of their directory listing contract. The small business consumer had only given verbal authorisation for a listing for one year. The contract term provides for an automatic renewal of the contract unless consumer opts out of this by giving 60 days' notice, however, this term was not brought to consumer's attention at the point of sale nor prior to the expiry of the contract.

Service providers may seek to impose early termination fees if the small business consumer disputes the automatic renewal of the contract, and the circumstances may lead to debt collection or other credit management action that can cause disruption to services.

**Case Study 3** and **Case Study 4** highlight the issues that small business consumers can face when a provider automatically renews a fixed term contract without notice or without consent.

***Enforcement of terms that limit performance or impose early termination fees***

Some telecommunications standard forms of agreement relied upon by service providers in complaints to the TIO include terms that allow the provider (but not the consumer) to avoid or limit its performance, terminate the contract at will, or impose early termination charges for breach of the contract without giving the other party a right to respond. These terms may seek to lock small business consumers into long term contracts even when the provider may fall short of delivering on the contract or has poor levels of service.

The complaints we receive about these types of potentially unfair terms can present in a number of different ways, for example:

- The small business consumer faces problems with their services for example, coverage, faulty handsets, delayed connection or fault repair. The small business consumer then cancels the contract because of poor quality of the service or product and because of the impact this has had on their business – including loss of business. The provider imposes an early termination fee under the terms of the contract in circumstances where there has been poor performance on its part.

- The small business consumer is upgraded onto a new plan (via telemarketing or other sales contact) with the same provider. In some instances, the small business consumer is told there would be no early termination fees for the original contract, in other instances, the small business consumer is not told that there would be such fees. The provider then imposes early termination fees for the original contract.

- The small business consumer is given incorrect or misleading information at the point of sale about the terms of the contract. The small business consumer then tries to cancel the contract after becoming aware of the actual terms of the contract. The provider imposes early termination fees for early cancellation of the contract.

**Case Study 5** and **Case Study 6** highlight the issues that small business consumers can face when a provider seeks to enforce terms that may be unfair terms – for example, early termination fees for termination of a contract in circumstances where the provider has sought to limit or avoid its performance under the contract.

***Bundled telecommunications services with leased equipment***

Some years ago, the TIO saw a number of complaints from small businesses about "bundled" services that comprise telecommunications services and equipment, where one or more elements of the bundle was provided by a TIO member. These complaints commonly included issues about finance agreements for the provision of equipment as part of the bundle of services.

Disputes arose, for example, in circumstances where small business consumers stated that point-of-sale information provided to them was inaccurate or misleading. Small business consumers with these disputes often claimed that while they can terminate their telephone service agreement, they were unable to terminate the finance contract without incurring substantial early termination fees.

We have recently again seen a number of these types of complaints from small business consumers.

**Case Study 7** and **Case Study 8** highlight the issues faced by small business consumers as a result of some of the terms in these types of agreements.

**Resolution of small business complaints relevant to unfair contract terms**

Our complaints data indicates that the majority of small business complaints are resolved quickly by referral back to the senior complaint handling area of the service provider or by facilitated agreement through our conciliation process. Most small business complaints about potentially unfair contract terms are similarly resolved through our referral process. When these complaints remain unresolved, the TIO progresses these cases to conciliation.

During conciliation, the parties are encouraged to discuss a range of options and arrive at a mutually agreed resolution. Most of the conciliated small business cases involving potentially unfair contract terms are eventually resolved in a similar manner to individual consumer complaints that involve these types of issues. This is primarily due to:

- similarities in the standard forms of agreement used by a number of providers for individual consumers and for small businesses (see the section on standard form agreements below)
- similarities in the types of telecommunications services that small business consumers and individual consumers use
- the presence of other contractual issues, such as incorrect or confusing point of sale advice or limited performance of obligations under the contract by the provider, and

- the TIO's approach in seeking to resolve the complaint as a whole, having regard to the law, good industry practice and what is fair and reasonable in the circumstances. In this respect, we use TIO position statements to guide how these types of complaints may be resolved[1]. TIO position statements set out our views on particular issues where there may be gaps in the law or good industry practice, and also set out reasonable expectations around the resolution of those issues.

## Specific questions in the Consultation Paper

**Standard form agreements in the telecommunications industry (Question 1, Question 2)**

In our experience, most if not all small business consumers who come to the TIO with a problem with their telecommunications services or contracts have entered into standard form agreements with their service provider. They do not usually negotiate any of the terms and conditions of their services with their provider. In most instances, small business consumers are offered similar plans and products as individual consumers.

We recently undertook a desktop review of the standard form agreements of six of the larger telecommunications providers to see if there were any major differences between the standard form agreements for individual consumers and for small business consumers. In most of these agreements, the terms about unilateral variation of contract, renewal of contract and conditions under which early termination fees may be imposed were very similar. We did not make any assessment as to whether these terms were potentially unfair. We further note that our desktop review did not include smaller providers or those providers who offer services only to small businesses.

**Potentially unfair contract terms in telecommunications standard form agreements and impacts on small business consumers (Question 7, Question 8, Question 9)**

Please see our analysis above and the case studies in the **Appendix** about the problems and detriment that may be faced by small business consumers in relation to potentially unfair contract terms.

In addition, we note that the Australian Competition and Consumer Commission (ACCC) recently conducted an examination of a range of standard form contracts including those in the telecommunications industry. The ACCC's March 2013 report *Unfair Contract Terms – Industry Review Outcomes* report[2] raised concerns over a number of terms in the standard form agreements – applicable to individual consumers – in the telecommunications industry and whether these complied with the unfair contract term provisions of the Australian Consumer Law (ACL). The ACCC's review and findings relating to standard form contracts are likely to be equally relevant to standard form agreements used for small business consumers in the telecommunications industry.

**How small business consumers currently deal with potentially unfair contract term issues (Question 15)**

[1] See for example, the TIO position statement on Early termination fees for fixed term contracts.
[2] ACCC, March 2013, *Unfair Contract Terms – Industry Review Outcomes* report.

From the complaints we receive, we know that small business consumers usually first seek to resolve their complaints – including those involving unfair contract term issues – directly with their service providers. When these complaints remain unresolved, small business consumers may turn to other avenues of redress, including external dispute resolution schemes such as the TIO.

Telecommunications service providers are required to have robust and effective internal dispute resolution (IDR) processes to help them respond to and resolve their customers' complaints. The industry's Telecommunications Consumer Protections (TCP) Code 2012 has a number of obligations that require accessible, effective, efficient and fair internal complaint handling practices by service providers. The TCP Code also has regard to the standards and requirements in the Australian Standard – Complaint Handling AS ISO 10002-2006.

Where IDR does not address or resolve the complaint, telecommunications service providers are required under the TCP Code to refer their customers to external avenues of redress, including the TIO.

The TIO has proven to be an essential component of the consumer protection regime within the telecommunications industry. We help thousands of small business consumers each year resolve complaints with their telecommunications service providers[3]. We also help many service providers who are members of the TIO scheme improve their complaint handling skills, processes and procedures to provide better outcomes for their customers.

We may also undertake investigations into systemic problems[4] arising from consumer complaints to the TIO. Where a formal systemic investigation does not appear to be practical, for example where an issue needs to be resolved very quickly to avoid significant consumer detriment, the TIO may adopt a more informal approach and engage with the relevant service provider to explore resolutions.

If a particular complaint cannot be resolved through our standard complaint handling processes or our systemic processes (for example, due to a service provider's non-compliance with the TIO scheme), we may refer that complaint or the provider to the relevant regulators, including the Australian Communications and Media Authority (the ACMA) and the ACCC.

**Existing mechanisms for protection for small businesses, including industry initiatives and disclosure requirements (Question 19, Question 24)**

In addition to the various protections in the Australian Consumer Law that apply to both individual and small business consumers, there are other protections in legislation and industry codes that may provide a level of additional protection for small business consumers in the telecommunications industry. Many of these are not specifically intended to protect small businesses, but provide protection for small businesses in their capacity of consumers within the telecommunications industry. Some of these protections are briefly outlined below.

[3] See our complaints data and analysis above.
[4] See clause 5A.1 of the TIO Terms of Reference.

***Standard forms of agreement in the telecommunications industry***

Under Part 23 of the Telecommunications Act 1997, a telecommunications provider is entitled to set out the terms and conditions for most of its telecommunications products in its standard form of agreement. The Telecommunications (Standard Form of Agreement Information) Determination 2003 sets the following requirements for standard forms of agreement:

- A provider must give a consumer a summary of the standard form of agreement at the time it supplies the product, or as soon as practicable afterwards.
- Information required in the summary includes information about:
  - the terms of the contract, including any minimum term, any minimum period of notice to terminate the contract, the events that would give either party a right to terminate the contract, and the charge (or method of working out the charge) for terminating the contract before the end of its term
  - any terms and conditions applying to the renewal of the contract
  - in relation to variations that would cause detriment, the minimum period of notice to be given to customers before the variations take effect, and the way in which customers will be informed of the variations.
- A provider must give reasonable notice if it intends to vary the terms and conditions of a standard form of agreement, and the variation could be reasonably expected to adversely affect the customer.

***Industry code: Telecommunications Consumer Protection Code***

The Telecommunications Consumer Protections (TCP) Code 2012 provides a range of protections for individual and small business consumers in connection with their telecommunications services. These include obligations on service providers around point of sale information, selling practices, billing, credit management and debt collection, financial hardship, transfer of services and complaint handling. It also sets out a framework for code compliance and monitoring.

We note that the TCP Code has a more restrictive interpretation of a small business compared to the criteria that the TIO uses for small businesses. The TCP Code defines a small business as one that does not have a genuine and reasonable opportunity to negotiate the terms of the contract with the provider, and has an annual spend of not more than $20,000. Some of the protections in the TCP Code do not apply to small business consumer contracts (for example usage notifications under Clause 6.5.2).

The TCP Code protection in Clause 4.5.3 imposes an obligation on providers to not include terms in standard form contracts that would be unfair under the law. However, we note that this Clause links the obligation to the unfair contract terms provisions in Part 2-3 of the Australian Consumer Law (ACL)[5]. The effect of this is that the obligations in Clause 4.5.3 of the TCP Code do not extend the unfair contract terms protections in the ACL to small business consumers.

[5] We note that the obligation in Clause 4.5.3 of the TCP Code is different to its predecessor clause under the previous TCP Code 2007, where the obligation imposed was to ensure that a term of the contract must not be unfair, without reference to the specific unfair contract term provisions in the legislation.

***Disclosure requirements in the telecommunications sector***

Telecommunications service providers are required by the TCP Code to provide consumers with a Critical Information Summary (CIS) before a consumer enters into a contract for a new service or plan.

Clause 4.1.2 of the TCP Code requires providers to set out a range of specific information in the CIS, including information about what the offer includes, detailed information about pricing for the specific plan or service and other information (such as where to get information about call and data usage, and warnings about roaming costs). The CIS must also include customer service contact details, as well information about how to access internal dispute resolution processes, and contact details for the TIO.

Each CIS must be no longer than two A4 pages when all its mandatory contents are included and it must be available as a standalone document.

The Telecommunications (International Mobile Roaming) Industry Standard 2013 contains a number of disclosure obligations on providers that offer international mobile roaming services. These include:

- before entering into a contract for international mobile roaming services, informing their customers of available spend management tools and how these can be accessed
- until 23 May 2016, a provider that does not have its own mobile network must give its customers a range of pre-departure information before or while supplying international mobile roaming services on post-paid or pre-paid services that are automatically topped up.

Disclosure requirements in the telecommunications sector, such as CIS and IMR Standard may impact on small businesses' decision to consider terms in telecommunications standard form contracts.

***TIO position statements***

As mentioned above, the TIO issues a range of position statements that set out our views on particular issues where there may be gaps in the law or good industry practice. These position statements also set out reasonable expectations on providers and consumers (including small business consumers) around the resolution of those issues. Some of our position statements address the issues that can arise as a result of potentially unfair contract terms, for example, the imposition of an early termination fee that may be a penalty, or unilateral variation of a contract[6].

We use our position statements to help resolve complaints from both individuals and small businesses.

**Options proposed in the Consultation Paper**

TIO data suggests that small business consumers – at least in the context of the telecommunications industry – experience detriment arising from potentially unfair contract terms.

[6] See for example, the TIO position statements on Early termination fees for fixed term contracts and Variation to contracts. We are currently reviewing all TIO position statements – these are likely to be updated and changed by the end of the calendar year.

From our experience, we find that most small business consumers who come to the TIO:

- have not negotiated any of the terms of their telecommunications services
- have been offered those services on standard form agreements by their providers
- use similar telecommunications services as do individual consumers
- may present as individual consumers, especially when they are home based, involve traders or professionals, do not necessarily belong to any industry association, and are usually quite small
- face similar contractual issues with their telecommunications services as do individual consumers, including potentially unfair contract terms
- may face other contractual issues, such as incorrect or confusing point of sale advice or limited performance of obligations under the contract by the provider, and
- do not have the resources to seek legal advice or deal with these types of issues through other forums, other than directly with their provider or through the TIO.

As mentioned above, the larger telecommunications service providers usually include similar terms for variation of contract, renewal of contract and imposition of early termination fees, in their standard form agreements used for individuals and for small businesses.

These are relevant matters in considering the options for extending the unfair contract term protections to small businesses. We would observe that, in many respects, the same considerations that led to the unfair contract term laws to protect individual consumers are equally relevant when considering small business contracts.

**Definition of a small business (Question 42)**

The Consultation Paper proposes a number of definitions of 'small business' that may be considered if the unfair contract term protections are extended to small businesses. While we do not propose to comment on these definitions, we would like to note that we recently considered our own definition of a small business in light of various different approaches taken in Australia.

As a result of our review, we took a more flexible approach to the definition of a small business. We decided to use a combination of criteria namely the annual turnover of the business, the number of employees, the nature of the business and if it is typically small or not-for-profit, the way the business is structured or managed, and the issues in dispute[7]. We moved away from defining a small business on the basis of a transaction threshold, as this could be impacted by the nature of the business. Our approach was informed through consultation with the ACCC, state based small business commissioners and small business representatives.

We have found that this flexible approach ensures that we are able to provide dispute resolution services to a comprehensive range of genuinely small business consumers. We suggest that a similar approach may be considered when deciding on any of the options to extending unfair contract term protections to small businesses.

[7] See how we define a small business above, and also on the TIO website at www.tio.com.au.

## Appendix: Case Studies

These are summaries of actual complaints dealt with by the TIO. The names of the small business consumers and service providers have been changed to ensure confidentiality of the TIO's dispute resolution process.

**Case Study 1 – Unilateral variation of month to month contract**

Ms Cyan operates a small entertainment business. In October 2013, Ms Cyan organised to transfer the hosting of her 1300 numbers from Telco ABC to Telco LMN. Her business' 1300 numbers were hosted by Telco ABC on a month-to-month basis (no fixed term contract was in effect).

When she contacted Telco ABC to organise the transfer, Ms Cyan was told that she would need to pay a $150 cancellation fee for each 1300 number. Ms Cyan disputed this cancellation fee, as this was not part of the original terms that she had agreed to.

In response, Telco ABC told Ms Cyan that its terms and conditions included that it could vary, alter, replace or revoke any term or condition if its customers continued to use the service 14 days after Telco ABC provided notice of the change.

Telco ABC told Ms Cyan that it had sent a written notification in December 2012 to consumers alerting them to the fact that Telco ABC would be implementing the cancellation fee. As Ms Cyan had not contacted Telco ABC within 14 days of the notification, they had assumed that she had accepted the change.

Ms Cyan then checked her bill for December 2012, and noticed that, in small font on the second page of the bill, was the text: "We just wanted to let you know that we've made some changes to your Telco ABC terms and conditions. These changes are effective 20 December 2012. The updated terms and conditions are available on the Telco ABC website."

In December 2013, Ms Cyan contacted the TIO to lodge a complaint. In response to the TIO complaint referral, Telco ABC reiterated that as Ms Cyan had not objected to the change of terms, she was liable for the termination charges. Telco ABC also added late payment fees to Ms Cyan's account.

Dissatisfied, Ms Cyan contacted the TIO again, and the case was progressed to conciliation. During the TIO's conciliation, Telco ABC agreed to waive both the termination charges and the late payment fees.

**Case Study 2 – Unilateral variation of billing cycle without notice**

Mr Pink owns a small business specialising in building consultancy, and his business landline service had been provided by BBB Telco for the past 15 years. Mr Pink was billed on a 90 day billing cycle, which meant that he typically paid $150 per quarter for his landline.

In April 2012, Mr Pink noticed that his billing cycle had changed from 90 days to 30 days. Mr Pink wrote a letter to BBB Telco objecting to the change, and disputing $70 in charges, but received no response. Mr Pink wrote a second letter to BBB Telco's CEO. In response, a case manager from BBB Telco called Mr Pink in July 2012. During the phone call, it confirmed that it had changed its billing cycle without notifying Mr Pink.

When Mr Pink informed BBB Telco of his intention of continuing to pay 90 days in advance, BBB Telco charged a late fee to his account.

Again, Mr Pink wrote to BBB Telco to dispute the charges and to request details about the variation to the contract. He also disputed the late fee, as he understood he was still within his agreed 90-day payment cycle.

Mr Pink received a number of bills with different amounts due. He asked BBB Telco to itemise charges on his phone bills, but no single correct amount was confirmed by BBB Telco.

In July 2012, BBB Telco suspended Mr Pink's business landline for non-payment. In August, Mr Pink's service was disconnected, and BBB Telco referred the amount owing to a debt collector. In September of 2012, Mr Pink contacted the TIO to make a complaint.

In response to the TIO's referral, BBB Telco contacted Mr Pink, but its response did not address all of his concerns. When Mr Pink returned to the TIO for further assistance resolving his complaint, it was progressed to conciliation.

During the conciliation, BBB Telco offered to waive the disputed charges. However, BBB Telco's response also did not address possible Customer Service Guarantee compensation due to the disconnection, which may not have followed legislative requirements.

The TIO progressed the case to investigation. At investigation, the TIO found that the notification of disconnection did not adequately follow legislative requirements to give 21 days' explicit notice, did not refer Mr Pink to the TIO, and did not inform Mr Pink that he could request reconsideration of the decision. BBB Telco credited Mr Pink with $450 in compensation under the CSG Standard.

Mr Pink was satisfied with the outcome and the case was closed.

**Case Study 3 – Automatic renewal of contract without notice**

In July 2011, Mr Mustard engaged Telco CDE to provide his business with mobile and landline services under a two year contract. In August 2013, after the contract had expired, Mr Mustard emailed Telco CDE and asked to maintain a month-to-month relationship.

Three weeks later, a Telco CDE account manager told Mr Mustard that his contract had been automatically renewed. This was because the original contract that Mr Mustard had signed included a clause that renewed the contract for a 12 month period unless the consumer notified the provider of termination 60 days before the contract's end date.

No notification of this termination window had been provided to Mr Mustard at the end of the original contract term, nor had he received any paperwork about the renewed contract.

When Mr Mustard raised a complaint with Telco CDE, he was told that the issue had been looked at by its legal team, and as no notification of termination had been received, Mr Mustard's contract was not due to expire until July 2014. Frustrated, Mr Mustard contacted the TIO to make a complaint in October 2013.

In response to the TIO's referral, Telco CDE called Mr Mustard and promised to get in touch about the complaint soon. Telco CDE had made no further contact with Mr Mustard.

Mr Mustard contacted the TIO and the case was progressed to conciliation in November 2013. As a result of the TIO's involvement, Telco CDE offered to cancel Mr Mustard's services as of November 2013. Telco CDE also offered to waive termination charges of over $11,000.

Mr Mustard was satisfied with the offer, and the complaint was closed.

**Case Study 4 – Perpetual/evergreen contract for a directory listing**

In August 2013, Ms Gray received a letter of demand from a debt collection company for $1,150. The amount was in relation to an AAA Telco debt relating to the White Pages listing for her business. Ms Gray was surprised to receive the demand, as she was under the impression that her White Pages listing was for a 12 month period only.

Despite the directory arrangement being between AAA Telco and her company, the debt collector advised Ms Gray that if she did not pay the $1,150 debt, she would be default listed for the amount.

When Ms Gray contacted AAA Telco, she was advised that the agreement for the directory listing was not for a 12 month period, but was instead a perpetual contract. She asked for paperwork confirming the contract, but was advised by AAA Telco that all arrangements were confirmed via voice recordings.

Dissatisfied, Ms Gray contacted the TIO to lodge a complaint. In response to the TIO's referral, AAA Telco offered to waive the $1,150 debt. Ms Gray accepted this resolution.

Six weeks later, Ms Gray contacted the TIO again, because the debt collector again sought payment of the debt. The TIO progressed the case to conciliation.

In response, AAA Telco confirmed that the debt was waived, and credited Ms Gray's account with $1,150 to leave her account with a nil balance.

**Case Study 5 – Incorrect advice about contract renewal and imposition of exit fees**

Mr Green operated a small business, and had a 24 month mobile contract with XYZ Telco at a cost of $99 per month. Twelve months after agreeing to the 24 month service, Mr Green was forced to close down his business.

Mr Green called XYZ Telco to request a cancellation of the service, and was advised that he would incur cancellation fees if he did so. XYZ Telco offered to recontract him for another 24 months, noting that he could then exit the new contract without a fee two months later. Mr Green agreed to this arrangement.

Two months later, he contacted XYZ Telco to cancel the service. XYZ Telco told him that he could not exit the contract without a termination fee.

Mr Green lodged a complaint with the TIO. In response to the referral, XYZ Telco advised the consumer that his contract was binding, and that he would be required to pay termination fees if he wished to cancel his service.

Although he was no longer using the service as the business had closed, Mr Green continued to be charged $99 per month. XYZ Telco told Mr Green that it had a copy of a voice recording authorising the contract renewal for 24 months. Mr Green disputed this, but XYZ Telco declined to provide Mr Green with a copy of the recording.

As the case remained unresolved, the TIO progressed the case to conciliation. At conciliation, XYZ Telco acknowledged that there had been no usage on Mr Green's mobile service for the past 15 months. It offered to release him from his contract without early termination fees, and to credit him with the 15 months' worth of service charges that he had paid.

**Case Study 6 – Imposition of early termination fees although service not provided**

Mr Scarlett operates a plumbing business. He had telephone and internet services with his provider and, in January 2013, he decided to move out of his current workshop and run his office from home. He spoke with a local dealership operating on behalf of his provider, and it agreed to relocate his business services to his home.

By March 2013, Mr Scarlett's services had not yet been transferred to his home office. Because Mr Scarlett made most of his bookings and did most of his ordering online, he had to purchase a new mobile internet service to keep his business operating, and subsequently incurred high excess usage charges on that service.

In August 2013, after several attempts to move his services, Mr Scarlett's provider informed him that it could not be done. His provider asked him to keep paying for the services until his contract expired even though he could no longer use them. Mr Scarlett disputed this, because he had been paying monthly access charges of approximately $400 per month since January 2013 even though he had not been able to use the services. Mr Scarlett asked his provider to refund those charges, refund the excess usage charges on his mobile internet service and to release him from his contract without early termination fees. His provider did not resolve his complaint.

Mr Scarlett complained to the TIO and his complaint was referred to the senior complaint handling area at his provider. His provider called him and said they would investigate the complaint and call him back, but this did not happen.

Mr Scarlett returned to the TIO for assistance in September 2013. After the TIO commenced conciliation, the provider agreed to release Mr Scarlett from his contract without early termination fees, and allowed him to move his business phone numbers to another provider without any cost. Mr Scarlett's provider also refunded the charges he had paid from January 2013 onwards for the services and some of the excess data charges he had incurred in keeping his business operating. Mr Scarlett's provider also offered to try and connect a different bundle of services at his home if this would be more convenient than transferring to a new provider, but Mr Scarlett declined this offer.

Mr Scarlett was satisfied with the outcome to his complaint and the TIO closed the case.

**Case Study 7 – Bundle of telecommunications and equipment services**

In August of 2013, Ms Black received a brochure in the mail about Example Telco services. Ms Black arranged for an Example Telco services technician to visit her childcare business to find out whether Example Telco could supply her with the services she needed. Ms Black's business required a telephone system, several different phone lines, and internet access.

The Example Telco technician examined the current telecommunications systems, confirmed that it could provide the services, and contracts were agreed to by both parties. A month later, Example Telco technicians replaced the business' pre-existing telephone system. At this time, Example Telco advised Ms Black that the internet service could not be connected because Ms Black's existing internet provider was not the same provider that Example Telco had a wholesale relationship with. Example Telco advised Ms Black that a fee of $750 would apply to switch providers for the line that provided internet to the business. Example Telco also advised Ms Black that a significant downtime in internet services would be experienced as a result of the change.

Ms Black raised a complaint with Example Telco and advised it that an interruption to her internet service was not acceptable due to the nature of her business. Example Telco offered to waive the $750 fee, but could not change the interruption to the internet services. Ms Black was unhappy with this response, and due to Example Telco's inability to fulfil the contract as initially advised, asked Example Telco to cancel the contract without termination fees, and restore all services to their previous arrangement.

In response, Example Telco told Ms Black that a $5,000 cancellation fee would be applied if the contracts were cancelled, and an additional $5,000 fee would be applied for the equipment already supplied. Example Telco also offered to place billing on hold, but then sent Ms Black written demands for payment and notices of intent to disconnect.

Ms Black lodged a complaint with the TIO. Example Telco did not respond to the TIO's referral of the complaint, so the case was progressed to conciliation.

Example Telco told the TIO the Ms Black had signed three contracts at the same time. One of these contracts was for landline, internet and mobile services for 24 months with Example Telco. A second contract was a 60 month agreement for phone equipment with ABC Finance Company, and a third contract was for maintenance of the phone equipment, also with ABC Finance Company.

While Example Telco had offered to release Ms Black without a termination fee from the landline, internet and mobile services contract, it did not view that it was liable for termination fees associated with the ABC Finance Company's contracts.

Ms Black told the TIO that she was unaware that the three agreements were separate, as she believed that she was entering into one agreement with only Example Telco. During the conciliation, Example Telco told the TIO that in order to have the ABC Finance Company agreement cancelled, Ms Black must identify a material breach of the contract by Example Telco. It claimed that as there had been no breach, there were no grounds for it to cancel the equipment and maintenance agreements.

In discussing the complaint with Example Telco, the TIO raised the fact that Example Telco was aware at point of sale that Ms Black's internet services were provided by a provider that they had no relationship with. The TIO took into consideration the fact that the equipment and maintenance were discussed with Ms Black as part of the bundle of services as a whole, that ABC Finance Company did not independently accept Ms Black as a customer, and that it was Example Telco that was billing Ms Black for the equipment and maintenance charges.

The case was resolved when Example Telco agreed to pay out ABC Finance Company's termination fees, allowing Ms Black to exit all contracts without early termination fees. Example Telco also sent a technician to uninstall and retrieve the equipment from Ms Black's business premises. Ms Black accepted this resolution to her complaint.

**Case Study 8 – Bundle of telecommunications and equipment services**

Mr White owns a small fashion store, and in January 2011 he moved his business across town. Telco55, the provider of his business telephony, offered him a Samsung phone system as part of a new 24 month contract.

Telco55 told Mr White that he would pay approximately $4,500 for the new system during the life of the contract, and that the monthly costs of his calls would be heavily reduced. Mr White was told that as part of the contract, he would also receive free calls from his landline to his company mobiles. Based on this advice, he accepted the offer.

Soon after the contract started, Mr White began to be charged for calls made from his business landline to his business mobiles. When he contacted Telco55 to complain about the charges, he was told that the calls were being charged, but was given no reason for this.

Over the next three years, Mr White frequently contacted Telco55 about the billing of internet charges. At point of sale he was told that the charge would be $60 per month, but he was being charged $80 per month. When Mr White spoke to Telco55 about the charges, he was repeatedly promised credits and a fix to the billing, but this did not occur. Mr White also disputed the addition of a “service pack” costing $55 per month. This service was not requested by Mr White, and he was not told what the service pack payment was for.

In August 2013, Mr White called Hello Finance, the finance company who had provided the Samsung phone system. Hello Finance told Mr White that his repayments for the phone system had been calculated as if the total cost of the phone system was actually $7,500, not $4,500. This meant that Mr White had been making repayments at $70 per month more than he should have paid. Finally, Hello Finance informed Mr White that he was only renting the equipment, not purchasing it over time.

Mr White asked both Hello Finance and Telco55 for a copy of the contract, but neither company provided it to him.

In October 2013, Mr White contacted the TIO to lodge a complaint. Telco55 did not respond to the TIO’s referral, so when Mr White contacted the TIO again for further assistance, the complaint was progressed to conciliation.

After conciliation of the complaint, Telco55 refunded Mr White $70 per month for the duration of the contract to offset the miscalculated monthly fees for the Samsung phone system. Additionally, Telco 55 provided a credit of $55 for the duration of the contract to offset the service pack.

Telco 55 also credited $1,500 to Mr White’s account to compensate for calls being charged between the business landline and business mobiles.

Mr White also received a $20 credit for every month that his internet service had been charged at $80 rather than $60. As his internet service plan was no longer under contract, Telco55 gave him the option of cancelling the service with no exit fees.

Lastly, Mr White received an apology from Telco55 for the inconvenience he had experienced.

Mr White was satisfied with the outcome and the complaint was closed.