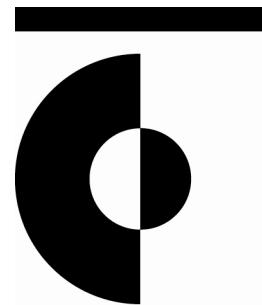


11 July 2011



**Telecommunications
Industry
Ombudsman**

Simon Cohen
Ombudsman

Mr Evan Holley
Small Business and Deregulation Branch
Department of Innovation, Industry, Science and Research
GPO Box 9839
Canberra ACT 2601
email: smallbusiness@innovation.gov.au

Dear Mr Holley

Resolution of Small Business Disputes Options Paper

Thank you for providing the Telecommunications Industry Ombudsman (TIO) with the opportunity to comment on the Resolution of Small Business Disputes Options Paper (the Options Paper) that was recently issued by the Minister for Small Business.

As you are aware, the TIO is the external disputes resolution (EDR) scheme for the telecommunications industry. We receive and investigate complaints from small business and residential consumers about their landline, mobile and internet services. These complaints relate to the billing, supply, connection or transfer of these services.

We recognise the need for small businesses to have access to a range of dispute resolution mechanisms to successfully resolve their business-to-business disputes. The Options Paper outlines several possible options that may address this need.

In our submission to the Options Paper, we have focused on the impact the proposed options could have on small businesses in respect of their ability to handle disputes quickly and effectively. We include in this submission:

- information about the TIO and how we resolve complaints
- a brief overview of the TIO's jurisdiction as it relates to small business consumers
- an overview of TIO statistics as well as the types of complaints that the TIO commonly receives from small businesses
- our comments in response to each of the four options presented in the Options Paper, in light of the TIO's role as an EDR scheme in the telecommunications industry.

We trust that the information in this submission will be of assistance to the Minister for Small Business and the Department of Innovation, Industry, Science and Research.

"... providing independent, just, informal and speedy resolution of complaints"

Telecommunications Industry Ombudsman Ltd ABN 46 057 634 787

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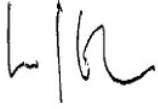
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Please do not hesitate to contact our Manager for Planning and Stakeholder Engagement, David Brockman, on 03 8600 8765 should you have any queries or require further information from the TIO.

Yours sincerely

A handwritten signature in black ink, appearing to be 'S. Cohen', written in a cursive style.

Simon Cohen
Ombudsman



Telecommunications Industry Ombudsman

Telecommunications Industry Ombudsman - Submission on the Resolution of Small Business Disputes Options Paper

July 2011



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About the TIO

The Telecommunications Industry Ombudsman (TIO) is a free and independent alternative dispute resolution service for small business and residential 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 final opportunity to resolve the matter directly with the consumer, without the TIO's direct involvement. Around 90% of complaints we receive each year are resolved at this stage of the process.

Where the consumer and service provider do not reach an agreement at this early stage, the TIO becomes more directly involved by seeking to conciliate an agreed resolution between the parties. Around 7% of complaints are resolved using this conciliation process.

Complaints that cannot be resolved by conciliation are escalated 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 \$30,000 and non-binding recommendations up to a value of \$85,000 in respect of each complaint.

We record complaints according to service types – internet, mobile, landline and mobile premium services (MPS), and by the types of issues that these complaints present. These issues include connection 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 escalated (a complaint handling issue).

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

TIO approach to the Resolution of Small Business Disputes Options Paper

The TIO welcomes the opportunity to provide our comments regarding the Resolution of Small Business Disputes Options Paper (the Options Paper). We recognise the need for small businesses to have access to a range of dispute resolution mechanisms, including external dispute resolution (EDR) schemes such as the TIO, in order to successfully resolve their business-to-business disputes.

In considering the proposed options, the TIO has concentrated on the impacts those options could have on small businesses in respect of their ability to handle disputes quickly and effectively.

We set out in this submission:

- a brief overview of the TIO's jurisdiction as it relates to small business consumers
- an overview of TIO statistics as well as the types of complaints that the TIO commonly receives from small businesses
- our comments in response to each of the four options presented in the Options Paper, in light of the TIO's role as an EDR scheme in the telecommunications industry.

TIO Jurisdiction

Jurisdiction of the TIO in relation to small businesses

The jurisdiction of the TIO is set out in the TIO Constitution (available at www.tio.com.au). We receive and handle complaints from small business and residential consumers of telecommunications services.

The TIO's jurisdiction extends to complaints about 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.

Small business consumers, like residential consumers, are less likely to have the resources necessary to pursue a grievance through the formal legal system and therefore require access to the TIO in its role as an independent, free EDR 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 \$30,000 and recommendations up to a value of \$85,000). For these reasons, the TIO does not handle complaints made by large or medium size businesses about their telecommunications services.

TIO's definition of 'small business'

The TIO has developed guidelines to help us decide whether a business is a small business. We take into consideration various factors including the following:

- the number of employees of the company (the TIO would generally consider 20 employees or less to be indicative of a small business)
- the company's annual expenditure on telecommunications services (the TIO would generally consider that a small business would spend \$20,000 or less per annum, excluding significant capital outlay)
- the company's annual turnover
- the amount in dispute
- the issue in dispute (for example, does it relate to complex technologies or systems not generally purchased by residential or small business consumers?).

Complaints to the TIO

New complaints from small business consumers

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

Consumers who contact us generally have their complaint referred to a designated complaint handling point at the service provider. The service provider has 10 business days to contact the consumer and resolve the complaint. Approximately 90% of TIO new complaints are resolved through this referral process.

Where the complaint raises issues that require an urgent response, shorter timeframes apply. Alternatively, the TIO can decide to deal with the matter directly rather than refer the complaint to the service provider.

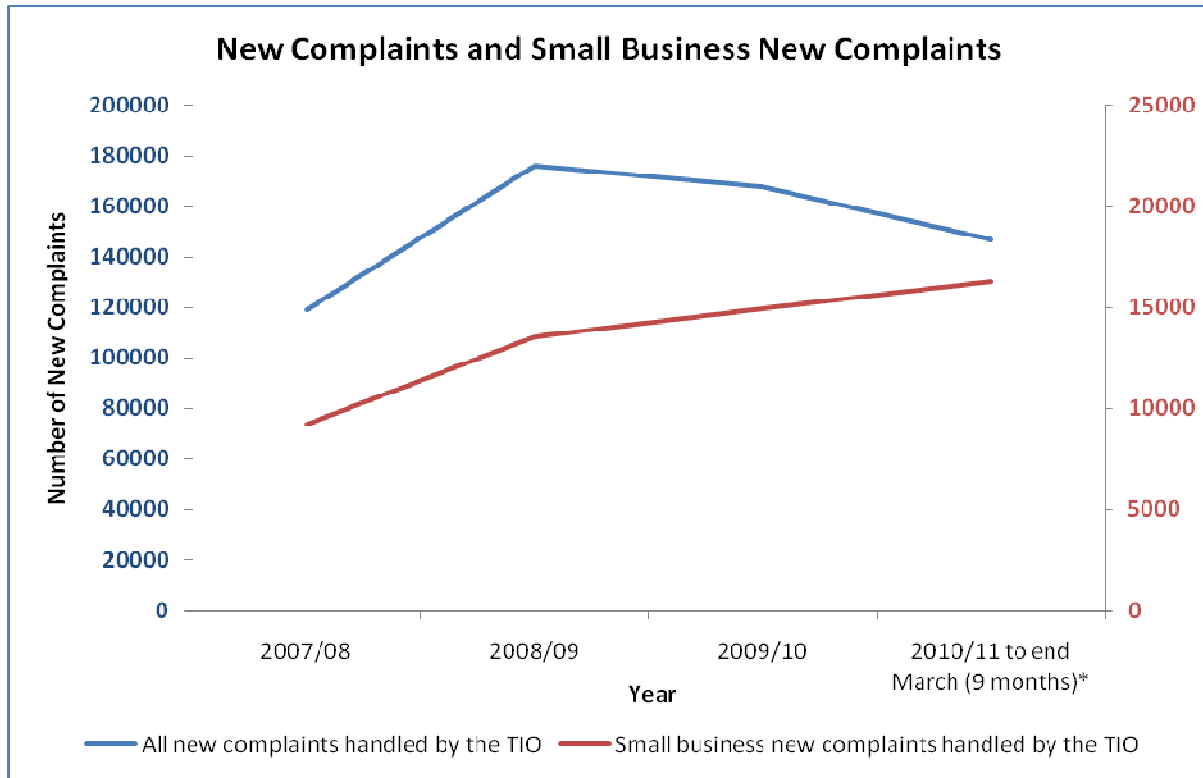
Where, after referral, a consumer comes back to the TIO with their complaint unresolved, we aim to conciliate an agreed resolution between the two parties. Cases that remain unresolved following the conciliation process are escalated for formal investigation and/or determination by the Ombudsman.

The TIO recorded and handled around 145,000 new complaints from small business and residential consumers in the first nine months of 2010/11, and 167,955 new complaints in 2009/10.

The number of small business new complaints recorded and handled by the TIO has increased over each of the last four years. In the first nine months of 2010/11, we received around 16,000 new complaints from small businesses, whereas we received 14,951 new complaints from small businesses in the full financial year in 2009/10. One reason for this difference could be the increase in the TIO's monetary jurisdiction that was introduced in May 2010 (where our powers to make binding decisions increased from \$10,000 to \$30,000 and our powers to make recommendations increased from \$50,000 to \$85,000).

Graph 1 shows the comparison between total new complaints and small business new complaints recorded by the TIO over the past four years.

Graph 1: New complaints received by the TIO - total new complaints compared to small business new complaints

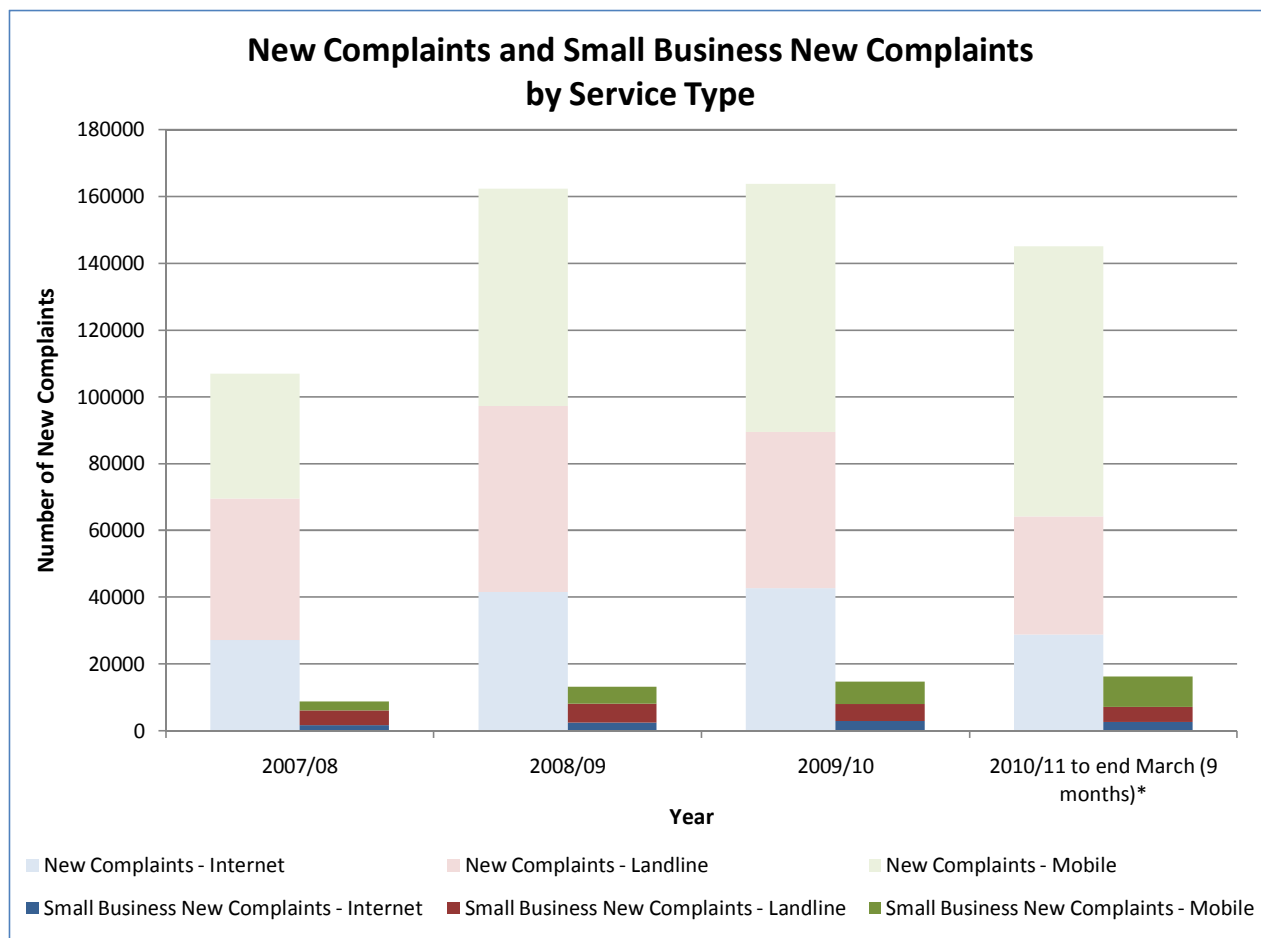


*This data is for the period 1 July 2010 to 31 March 2011 (9 months) and is included in this graph for indicative purposes.

Small business new complaints – service types

Graph 2 shows total new complaints and small business new complaints by service type. A particular trend identified over the first nine months in 2010/11 is an increase in new complaints about mobile services. This trend is connected with recent network problems experienced by one of the largest mobile carriers in Australia. Our data indicates that this issue has impacted small businesses as well as non-small business consumers.

Graph 2: New complaints by service type - total new complaints compared to small business new complaints by service type



*This data is for the period 1 July 2010 to 31 March 2011 (9 months) and is included in this graph for indicative purposes.

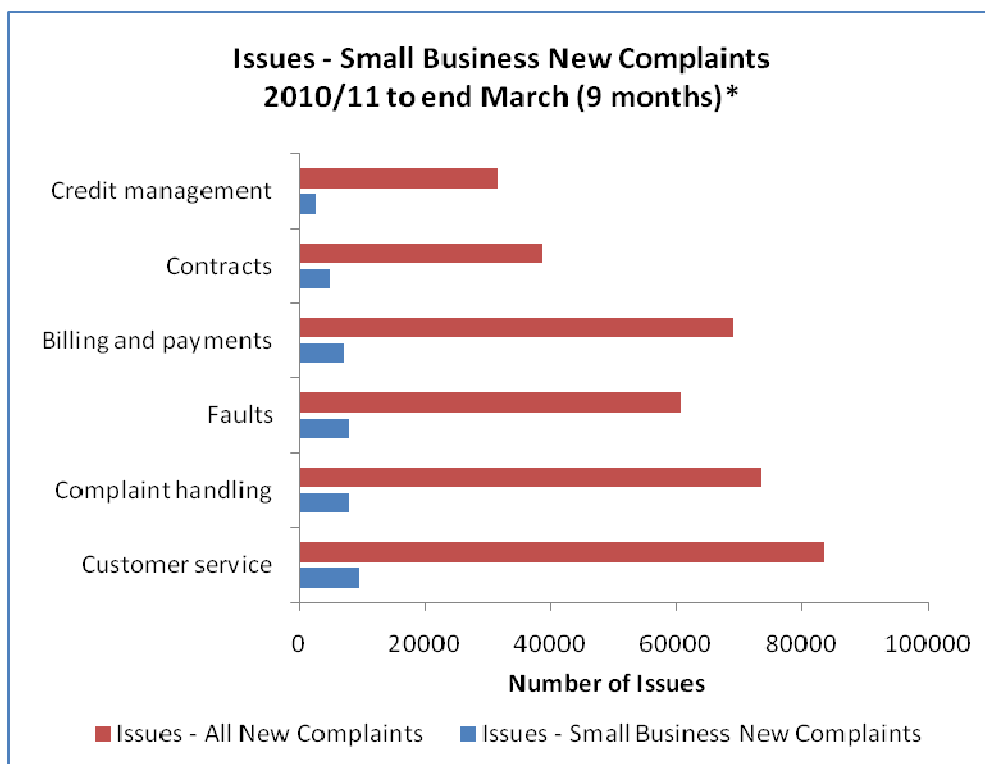
Issues raised in small business new complaints

The TIO categorises the individual 'issues' that are presented by each new complaint.

Issues about customer service formed the highest category of small business new complaints in the first nine months in 2010/11, followed by issues about complaint handling, billing and payments, and faults. Over this period, issues about faults and contracts were proportionally more common in small business new complaints.

Graph 3 shows the top six issues recorded for new complaints from small businesses compared to the issues recorded for all new complaints in the first nine months in 2010/11.

Graph 3: Issues recorded about new complaints from small businesses (1 July 2010 to 31 March 2011)



*This data is for the period 1 July 2010 to 31 March 2011 (9 months) and is included in this graph for indicative purposes.

Awareness of Small Business Consumers about the TIO

The TIO works to improve the awareness of, and accessibility to, the TIO Scheme. We undertake a number of activities each year to help raise awareness among specific communities. These include targeting consumers (residential and small businesses) in rural and regional areas, indigenous communities, culturally and linguistically diverse communities, consumers with disabilities, young consumers and the elderly.

We note that in our last Awareness Research commissioned in 2008¹, total awareness (including aided awareness)² about the TIO was around 82% for business consumers.

The Ipsos 'Dispute Resolution in Victoria: Community Survey 2007' commissioned by the Department of Justice Victoria, which surveyed 500 small businesses found that 75% of small business consumers had heard of the TIO³.

¹ Telecommunications Industry Ombudsman, *Telecommunications Industry Ombudsman Awareness Research – Final Report, 2008*, Sweeney Research. These results are similar to findings in 2006: see Telecommunications Industry Ombudsman, *Telecommunications Industry Ombudsman Awareness Research – Final Report, 2006*, Sweeney Research, [http://www.tio.com.au/publications/other_publications/documents/16-11-2006%20Final%20Report%20April%2006%20\(Web%20Version\).pdf](http://www.tio.com.au/publications/other_publications/documents/16-11-2006%20Final%20Report%20April%2006%20(Web%20Version).pdf).

² Aided awareness relates to how many consumers have already heard of the TIO Scheme or if they have at least heard of the name 'TIO'.

³ Department of Justice Victoria, *Dispute Resolution in Victoria: Small Business Survey 2007*, Ipsos Australia Pty Ltd, 2007,

The TIO continues to undertake various strategies to improve awareness of the TIO across the different segments of the community.

Matters outside the TIO's Jurisdiction

Each year, we receive a number of contacts from businesses that are considered to be outside the scope of the TIO's jurisdiction because:

1. the business does not meet the TIO's criteria for a small business
2. the complaints are from small businesses but involve issues that are outside the scope of the TIO scheme.

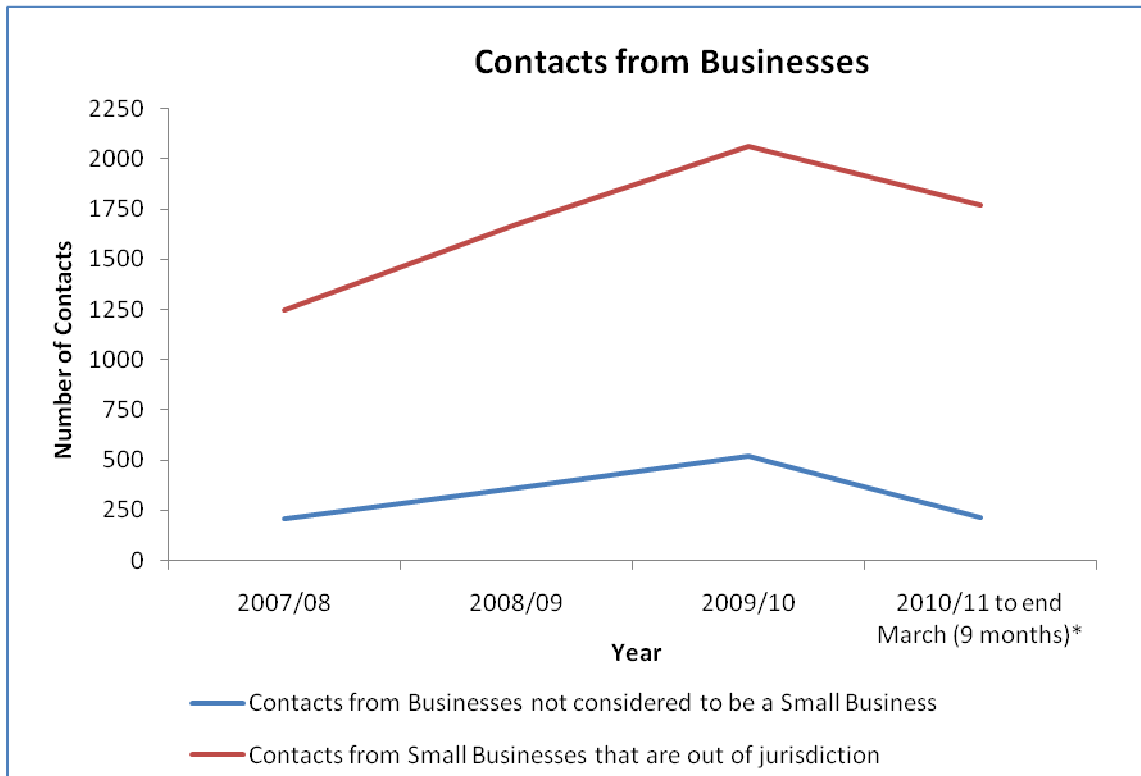
In these instances, we refer the business to a more appropriate body (for example, the Australian Competition and Consumer Commission or a small claims tribunal) or suggest that the business seeks independent legal advice.

Common small business contacts outside the scope of the TIO's jurisdiction include:

- the small business consumer contacted the TIO prior to giving their service provider an opportunity to consider the complaint
- the issue related to customer equipment. While the TIO is able to deal with some equipment related complaints (where, for example, they are 'bundled' with a telecommunications service), we cannot deal with complaints where the equipment is not part of a bundled contract or the issue related to equipment defined as customer premises equipment (for example, a PABX system)
- the issue involved a service provider's commercial decision that is outside of the scope of the TIO scheme (for example, setting of tariffs)
- the issue was not a carriage service issue (for example, it related to domain names or website hosting).

Graph 4 shows the number of contacts received over the past four years from businesses that were either not considered as small or were about an issue outside the scope of the TIO scheme.

Graph 4: Number of contacts made by businesses that were either not considered as small or were about an issue outside the scope of the TIO scheme



*This data is for the period 1 July 2010 to 31 March 2011 (9 months) and is included in this graph for indicative purposes.

Specific responses to the proposed Options

The Proposed Options

In the TIO's view, each of the four proposed options in the Options Paper has the potential to make a positive impact upon Australian small businesses. Each proposed option appears intended to complement and integrate with existing dispute resolution processes, something that is supported by the TIO. We also support an approach that promotes information provision, informal resolution and ease of use.

Option One: National Information and Referral Service

We note that the proposal in option one indicates that the information and referral service would provide small businesses with a range of information about how to avoid disputes, how to manage disputes, how alternative dispute resolution can help and what their rights and responsibilities may be. The proposed option also is intended to put any Australian small business in contact with the relevant existing dispute resolution service quickly.

The information and referral service proposed in the Options Paper – if widely publicised to small businesses – could help quickly direct small businesses to the most appropriate body that can assist in resolving their disputes. This option would contribute to increased awareness of dispute resolution services (including the TIO) on the part of small businesses. Such a referral service could also reduce the amount of time taken by small businesses in finding the most appropriate avenue for dispute resolution. We believe that this option has a very real potential to improve outcomes for small businesses that may be unaware of the existence and purpose of organisations such as the TIO.

We further note that an expert national information and referral service may reduce the number of businesses contacting the TIO where it is not appropriate. If the service has good knowledge of our jurisdiction and matters we can deal with, only those businesses we can assist will be referred to the TIO.

Option Two: National Dispute Resolution Service

We understand that, in part, the proposal in option two would include the national information and referral service (Option One), and also include a resolution service where no other service is available. We reiterate our comments above in relation to the information and referral aspects of the proposal in option two.

We agree with the proposal that the national dispute resolution service should not generally deal with matters where other, specialist dispute resolution services (such as the TIO) already can deal with the dispute.

If option two is intended to provide a national dispute resolution service, we suggest that the mechanisms used by this service to resolve disputes should not be limited to mediation only and that other appropriate dispute resolution processes (including conciliation) should be included

options for the service. In this respect, we suggest that the national dispute resolution service employs a flexible range of dispute resolution methods, including mediation, conciliation and other methods, so that the most appropriate method can be used to resolve particular disputes.

We further note that if this service imposes costs on small businesses, this may limit its accessibility. This is a matter that should be closely considered if option two is selected.

Option Three: National Small Business Tribunal

If the proposed option three is to be further explored, we support a number of the matters already raised in the discussion in the Options Paper. In particular:

- We support an approach to the proposed National Small Business Tribunal that does not attempt to duplicate existing services, as this may be inefficient and a waste of resources, and may result in confusion or indirectly lead to 'forum shopping'. It may also result in objections raised by the other party about the appropriateness of the forum that is selected by the small business to resolve the dispute – and this may unduly delay the effective resolution of the dispute.
- In addition, for dispute resolution services with subject matter expertise, a sound understanding of the technologies, platforms and applicable industry standards/codes, is critical in assisting parties (including small businesses) in resolving disputes fairly, quickly and economically.
- We suggest that if option three is selected, the proposed National Small Business Tribunal should employ a flexible range of dispute resolution methods, including mediation, conciliation and other methods, so that the most appropriate method can be used to resolve particular disputes prior to decision making.
- We further note that if this service imposes costs on small businesses, this may limit its accessibility. This is a matter that should be closely considered if option three is selected.

The information in the Options Paper does not clearly identify any strong basis to indicate that this option would deliver significant benefits to small businesses. Further information and analysis may be required if this option is to be considered further.

Option Four: Small Business Advocate

We note that option four considers the establishment of a Small Business Advocate who would act as an independent voice for small businesses and report directly to the Minister for Small Business.

We also note, and agree with, the term 'Ombudsman' not having been used to describe the functions to be undertaken by the proposed Small Business Advocate. As outlined by the Australian and New Zealand Ombudsman Association (ANZOA) in its Policy Statement⁴, there are a number of essential criteria that must be met before the term 'Ombudsman' can be used, including the independence of the Ombudsman from the disputing parties or government, and not acting or being perceived to act as an advocate for either party. In this regard, the phrase 'Small Business Advocate'

⁴ Australian and New Zealand Ombudsman Association (ANZOA), Policy Statement, 18 May 2010, at http://www.anzoa.com.au/ANZOA_Media-release_Essential-Criteria-for-use-of-the-term-Ombudsman.pdf.

or 'Small Business Commissioner' is an appropriate reflection of the functions and scope of the proposed dispute resolution mechanism as outlined in option four.

The education and support services that the proposed Small Business Advocate would provide to small businesses is (similarly to options one and two) likely to see an increase in awareness and uptake of the available dispute resolution services, including the TIO.

In addition to this, the extent to which the proposed Small Business Advocate educates small businesses about how to avoid and handle conflict would see some disputes be resolved between parties prior to EDR involvement. As such, this proposed option may over time reduce escalation of disputes as businesses become more skilled in handling and resolving issues before they become disputes.

The proposed option four envisages that the Small Business Advocate would have the power to research difficult areas of small business activity – this is an important function that has benefits for small business consumers because new, emerging issues over different industry sectors can be identified and addressed. It could provide an opportunity for the Small Business Advocate to work collaboratively with other stakeholders including dispute resolution services to identify relevant systemic issues that may involve more than one industry. In this way, small businesses could benefit from the identification and improvement of cross-industry issues that may otherwise go undetected.

