



# Communications privacy complaints: In search of the right path

A consumer research report by the Cyberspace Law and Policy Centre, UNSW



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A consumer research report by the Cyberspace Law and Policy Centre, University of New South Wales.

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## **1. Executive Summary**

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### **1.1. Introduction**

Privacy issues in the communications sector are increasingly prevalent as new technology and new applications enter the market, such as social networking and the use of location based information. These new technology privacy issues add to the existing privacy issues in the sector, such as spam, telemarketing and the misuse of silent telephone numbers.

Complaints are a vital element in privacy protection – indeed, the entire system of privacy protection in the communications sector is built on the receipt and management of complaints. There are few proactive requirements to protect privacy in the sector, and the volume and scale of business in the sector is so large that no regulator could hope to monitor compliance without relying heavily on complaints. Proactive steps are necessary and crucial, but this report focuses on complaint paths.

The aim of this study is to analyse and compare common communications privacy complaint paths in order to obtain optimum outcomes for consumers through the development of a more straightforward, fairer system for managing privacy complaints in the sector.

### **1.2. Methodology**

This study examines and compares three commonly used complaint paths for privacy complaints in the Australian communications sector:

1. Complaints to the Office of the Privacy Commissioner (OPC) – typically general privacy complaints, telemarketing complaints and Internet related complaints.
2. Complaints to the Australian Communications and Media Authority (ACMA) – typically spam and Do Not Call complaints, plus a small number of general privacy complaints.
3. Complaints to the Telecommunications Industry Ombudsman (TIO) – typically general privacy complaints and Internet related complaints.

The study has included the collection of data and case studies from the three complaints bodies, plus interviews with key staff and a brief survey of community organisations who assist complainants. A more detailed description of the methodology is contained in Appendix 1.

### **1.3. Key Findings and Recommendations**

All three complaint paths receive hundreds of privacy complaints each year from consumers of telecommunications and Internet products and services. Despite the similar nature of privacy complaints, the outcome for both consumers and industry varies to a significant degree, depending on the complaint path chosen by the consumer.

This study has found that there is disparity in complaint numbers across complaint bodies. The communications sector generates around 21,000 privacy complaints each year, although these are not evenly spread across the three complaints bodies. The Australian Communications and Media Authority receives around 16,000 communications sector privacy complaints and the Telecommunications Industry Ombudsman receives around 5,000 communications sector privacy complaints. The Office of the Privacy Commissioner only receives around 110 communications sector privacy complaints despite its broad and in some cases unique jurisdiction, high profile and significant resources.

In some respects the three complaints bodies treat the management of communications sector privacy complaints as if the three regulators were acting as a single entity. For example, a complaint to one regulator may preclude the individual from complaining to any of the other complaints bodies, yet there is only a system of informal referrals between them. However, in many other respects, the three complaints bodies act independently, and display very different approaches to complaints management.

The study has found that there is inconsistent resolution times and process issues. A significant disparity exists, for instance, in the complaint resolution times between the Office of the Privacy Commissioner and the other complaints bodies. Further, information given to potential complainants can be inconsistent and ad hoc, and complaint services challenging to access. In terms of action on complaints, the complaint bodies differ again on the range and focus of remedies employed. Some remedies focus to varying degrees on resolution for consumers, including compensation, and others to varying degrees on business conduct.

These and other factors result in inconsistent and diverse outcomes for consumers depending on the complaints path they have selected, or the path that has been chosen for them by jurisdictional issues. This situation is unacceptable and is not delivering efficient or effective regulation of privacy complaints in the sector. It is not the result of a careful or planned policy decision to treat communications privacy complaints in this way. It is the result of ad hoc complaints processes, overlaps in jurisdiction, and the individual culture and approach of the three complaints bodies.

This study therefore makes a number of recommendations aimed at delivering a more consistent and higher quality outcome for all privacy complaints in the communications sector. These include (see Section 10 for full details):

- Improvements in complaint resolution times, specifically by the Office of the Privacy Commissioner;
- Frank and consistent information given to consumers, especially regarding resolution times;
- Collection of demographic profiles of complainants to better target services;
- Better coordination between the three complaints bodies;
- Consistent messages to complainants on where to complain, and to industry on compliance;
- A full range of regulatory tools and remedies on offer and used – *any* privacy complaint in the communications sector lodged with *any* complaints body should be able to achieve all of the outcomes that are desirable in a best practice regulatory environment:
  - Compensation for the individual;
  - An apology for the individual;
  - Prompt correction or removal of personal data;
  - A change to business practice at the individual company;
  - A change to broader industry practice for systemic issues;
  - Occasional naming of individual companies as a warning to other consumers and a lesson for industry; and
  - Occasional enforcement action in order to promote compliance.

## 2. Overview of the complaints bodies

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### 2.1. Australian Communications and Media Authority (ACMA)

The Australian Communications and Media Authority (ACMA)<sup>1</sup> is a statutory authority, responsible for the regulation of:

- Broadcasting;
- The Internet;
- Radio; and
- Telecommunications.

They play an important role in privacy protection in the communications sector, as they administer two key, specific pieces of privacy legislation:

- *Spam Act 2003*
- *Do Not Call Register Act 2006*

In addition, they have a general consumer protection role in relation to telecommunications, based on matters arising from breaches of Part 13 of the Telecommunications Act which sets out requirements for the handling of personal information and the administration of the Integrated Public Number Database (IPND).

The ACMA publishes separate complaints handling policies for general complaints, spam complaints and Do Not Call Register complaints, although they all share common elements:

- Spam complaints policy:  
<[http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_311907](http://www.acma.gov.au/WEB/STANDARD/pc=PC_311907)>
- Do Not Call Register complaints policy  
<<https://www.donotcall.gov.au/enqcomp.cfm>>

The common elements of each process are:

- Complaints must be in writing (an email is acceptable for spam and Do Not Call register complaints). This is mainly seen as a customer authentication step by ACMA staff;
- Complainants are encouraged to complain to the organisation in the first instance, but it is not an essential requirement;
- Complainants have appeal rights and can request a review of their complaint if dissatisfied with the outcome to the complaint. (In the first instance, the officer who initially handled the complaint will reconsider the matter. If that officer maintains his/her previous view, the complaint will be referred to another officer.)
- Each complaint is also reviewable by the Commonwealth Ombudsman.

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<sup>1</sup> <<http://www.acma.gov.au>>

## **2.2. Office of the Privacy Commissioner (OPC)**

The Office of the Privacy Commissioner (OPC)<sup>2</sup> is the generic complaints body for privacy issues that fall under the Privacy Act 1988. Their jurisdiction covers Commonwealth government agencies, parts of the private sector (businesses with an annual turnover greater than \$3 million and health service providers) and credit reporting agencies.

Although they are not a specific communications sector regulator they have coverage of all telecommunications providers and Internet Service Providers. They are also the only regulator where individuals can complain about a privacy breach from the broader ICT sector, such as a complaint about Google or Facebook.

Staff advise that the OPC has a focus on conciliation and that they only have a limited range of regulatory powers when compared with other complaints bodies. Some community organisations disagree with this interpretation of the *Privacy Act* and believe that the OPC could exercise a greater range of regulatory powers (such as determinations) if it was willing to do so. This has been a point of contention between the OPC and community organisations for some time. In any case, proposals for the reform of the *Privacy Act* by the Australian Law Reform Commission<sup>3</sup> (and accepted in principle by government<sup>4</sup>) would lead to a significant expansion of OPC powers, including the provision of a new civil penalty regime.

The OPC provides detailed guidance to complainants. The key elements of their complaints process are:

- Complaints must be in writing (otherwise the contact is noted as an inquiry);
- Complainants must have contacted the respondent in the first instance;
- The respondent must have been given a reasonable time to respond before the OPC will accept a complaint;
- No appeal on the merits of the complaint is available, although review mechanisms are available for process issues (Tribunal) or delay (Commonwealth Ombudsman).

In 2009 the OPC declined to investigate 41% of the complaints it received. However, for matters that it decided to investigate it found that 61% of private sector complaints were substantiated.

## **2.3. Telecommunications Industry Ombudsman (TIO)**

The Telecommunications Industry Ombudsman (TIO)<sup>5</sup> is an independent dispute resolution provider, funded by industry with an independent governance structure.

The TIO can investigate complaints relating to breaches of privacy by telecommunications providers or Internet Service Providers, where such organisations are members of the TIO. They have excellent industry coverage due to the requirements of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* which requires all licensed providers in the sector to be members of the TIO.

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<sup>2</sup> <<http://www.privacy.gov.au>>

<sup>3</sup> ALRC Report 108 - *For Your Information: Australian Privacy Law and Practice Report* (August 2008), <<http://www.austlii.edu.au/au/other/alrc/publications/reports/108/>>

<sup>4</sup> Prime Minister & Cabinet - *Enhancing National Privacy Protection - First stage Government response to the ALRC Report 108* (October 2009), <<http://www.pmc.gov.au/privacy/alrc.cfm>>

<sup>5</sup> <<http://www.tio.com.au>>

The TIO has a carefully structured complaints process:

- **Inquiries**  
If the first contact to the TIO occurs prior to contacting the service provider, it is treated as an inquiry.
- **Level 1 complaints**  
If the complainant has contacted the service provider and is still unhappy, it becomes a level 1 complaint and the TIO provides a direct senior contact at the service provider. The complaint is forwarded to the senior contact and they have 10 days to resolve it.
- **Level 2 complaints**  
If the complaint remains unresolved after 10 days, an Investigation Officer will speak individually to the complainant and the company and write follow up letters.
- **Level 3 complaints**  
Complex matters requiring a more formal investigation.
- **Level 4 complaints**  
Complex matters where no fair and reasonable settlement is possible between the parties, and the TIO may have to consider a binding determination.

There is also an internal review process available for any challenges regarding procedural fairness – an independent officer will review the entire file.

### **3. Complaint statistics**

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This section examines statistics on the number and type of complaints received by each of the three bodies. Statistics in this section are restricted to complaints relating to the communications sector, including complaints against telecommunications or Internet companies, or complaints relating to spam and telemarketing.

#### **3.1. Australian Communications and Media Authority (ACMA)**

The ACMA has a broad jurisdiction, and can receive complaints about radio, television, telecommunications and Internet content. In this study we have only examined complaints about the communications sector.

The ACMA receives a very large volume of privacy complaints under the Spam Act (4,000 a year) and the Do Not Call Register Act (12,000 a year).<sup>6</sup>

Other than spam and DNC register complaints, the ACMA only receives a small handful of communications privacy complaints – the number is too small to appear in corporate statistics. ACMA staff estimate that they receive 10 complaints each year about privacy issues associated with silent numbers and the Integrated Public Number Database (IPND) – usually these are related to accuracy issues or misuse of the data.

#### **3.2. Office of the Privacy Commissioner (OPC)**

The OPC receives about 20,000 inquiries each year, but only receives around 1,000 complaints each year.<sup>7</sup>

Around 700 of the inquiries and 110 of the complaints are categorised as relating to the ‘telecommunications’ sector. These include general privacy complaints and credit reporting privacy complaints.

The OPC 2009 annual report also notes that 117 complaints (out of a total of 1089) were declined because the complainant had not contacted the respondent, or they had not provided adequate time to the respondent to address the complaint. It is important to note that these would be counted as *inquiries* by both the ACMA and the TIO and not counted as complaints. This categorisation inflates the OPC figures by around 10% (from a very small base).

#### **3.3. Telecommunications Industry Ombudsman (TIO)**

The TIO receives a very high volume of complaints – more than 260,000 each year. Around 5,000 of these are privacy complaints, although some complaints combine privacy issues with other concerns (such as customer service and complaint handling).<sup>8</sup>

The TIO provides the most detailed complaints statistics relating to communications privacy complaints, so it is worthwhile to include some further detail here.

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<sup>6</sup> Australian Communications and Media Authority (ACMA), *Annual Report 2009*, part 2.

<sup>7</sup> Office of the Privacy Commissioner (OPC) *Annual Report 2009*, <<http://www.privacy.gov.au/materials/types/reports/view/6961>>

<sup>8</sup> Telecommunications Industry Ombudsman (TIO), *Annual Report 2009*, <[http://www.tio.com.au/publications/annual\\_reports/ar2009/annual\\_2009\\_complaintissue10.html](http://www.tio.com.au/publications/annual_reports/ar2009/annual_2009_complaintissue10.html)>

The following table summarises privacy complaints by issue:

Issue	2008 (number)	2008 (%)	2009 (number)	2009 (%)
Customer personal information, inaccurate information or unauthorised disclosure	1 443	45.5%	3 390	68.6%
Unwelcome calls (menacing, offensive or harassing calls or communications)	837	26.4%	924	18.7%
Telemarketing provider continues telemarketing after being asked to stop	813	25.6%	520	10.5%
Life threatening calls or communications	35	1.1%	54	1.1%
Spam inadequate advice about preventing spam	29	0.9%	32	0.6%
Spam from internet or telecommunications service provider	14	0.4%	22	0.4%
<b>Total</b>	<b>3 171</b>		<b>4 942</b>	

Interestingly, the TIO also publishes the names of organisations that receive more than 25 complaints in any year, and breaks these statistics down into categories. Not surprisingly, the complaints statistics tend to reflect market share. For example in the 2009 landline category, Optus is responsible for 242 privacy complaints and Telstra is responsible for 2095 privacy complaints.

The following table summarises privacy complaints to the TIO by service provider:

Privacy complaints to Telecommunications Industry Ombudsman (2009)	Total issues	Total Land Line	Privacy	Total Mobile	Privacy	Total Internet	Privacy
AAPT	10,094	6,623	54	789	9	2,682	17
Dodo Australia	8,957	2,646	36	1,260	10	5,051	27
GOtalk Australia	6,597	3,925	22	314	3	2,358	2
Hutchison 3G	27,266	0	0	21,865	242	5,401	11
iiNet Ltd	2,647	1,058	13	0	0	1,589	1
Optus Broadband	12,010	0	0	0	0	12,010	50
Optus Mobile	35,022	0	0	35,022	397	0	0
Optus Networks	17,624	13,744	242	0	0	3,880	13
People Telecommunications	3,689	2,028	23	632	1	1,029	4
Primus	7,973	4,300	42	270	1	3,403	13
Soul Communications	21,525	5589	25	11,688	46	4,248	6
Telstra Big Pond	49,285	0	0	0	0	49,285	337
Telstra Corporation	174,123	104,058	2,095	70,065	690	0	0
TPG Internet	7,510	297	1	2,035	12	5,178	20
Virgin Mobile	16,731	2,485	10	9,204	54	5,042	5
Vodafone	18,818	0	0	15,600	195	3,218	8

### 3.4. Summary

The following table summarises the number of communications privacy complaints received by each of the agencies in 2009. (Available figures for 2010 are broadly in line with 2009, apart from a significant increase in complaints about spam to the ACMA.)

Agency	Communications privacy inquiries (2009)	Communications privacy complaints (2009)
ACMA – General	(not counted)	10
ACMA – Spam	(not counted)	3,947
ACMA – DNC	(not counted)	12,057
OPC	715	113
TIO	(not counted)	4942

There is a significant disparity between the large number of complaints received by the ACMA and the TIO compared to the small number received by the OPC.

This is partly a natural result of the jurisdiction of the ACMA – as spam and Do Not Call Register complaints will always be the largest categories of privacy complaints in the sector. However, the number of complaints made to the OPC is very low, considering their broad jurisdiction, high profile and significant resources.

## 4. Timing and process issues

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### 4.1. Australian Communications and Media Authority (ACMA)

The ACMA is committed to dealing with privacy complaints quickly, and it publishes targets for how quickly complaints will be resolved.

The following table shows that the ACMA is exceeding these targets:

Complaint	Target	Actual (2009)
Telemarketing	50% complaints closed within 7 days	90%
Telemarketing	75% complaints closed within 14 days	96%
Telemarketing	90% complaints closed within 21 days	98%
Spam	90% complaints acted on within 8 days	Not published

The ACMA spam team also provided the following information on timing and process issues:

On average, a straightforward spam complaint would take about 20 minutes to resolve. However, a number of factors can extend this resolution time, including:

- Complexity of the issues being complained about;
- Insufficient information provided by the complainant that requires more questions to be asked;
- Difficulty tracking down the spam message sender to make contact; and
- The volume of complaints in the queue that also require attention (they can receive up to 850 contacts about spam per month and this is expected to increase).

No target is set for the resolution of general privacy complaints. These tend to be more complex, and ACMA staff advised that a typical IPND complaint takes 1-2 months to resolve. There have been rare occasions where complex complaints have taken up to six months to resolve.

### 4.2. Office of the Privacy Commissioner (OPC)

The OPC does not set targets for the resolution of complaints, but OPC staff advised that the time taken to resolve complaints has improved in recent years. OPC staff advise that the current average is around 6 months, with a range of 2 weeks to 12 months. Some complex matters have taken longer than 12 months to resolve.

The OPC staff noted that there was no financial incentive for the private sector to resolve complaints to the OPC quickly as the OPC does not charge any party for dispute resolution. This contrasts with the position at the TIO, where a delay may lead to an escalation of a complaint to a more expensive level.

In any case, the OPC focus is on conciliation, so this process can take a long time if both parties are in entrenched positions.

The OPC staff also noted that credit reporting complaints in the telecommunications sector can often take a long time to resolve, especially where there is a requirement to gather billing and payment information from archives. There is a joint Government / industry proposal to address these delays in the credit reporting sector, and the draft Australasian Retail Credit Association (ARCA) *Credit Reporting Code of Conduct* imposes a 30 day limit on credit providers to verify the accuracy of information.<sup>9</sup> If this proposal is implemented, it should lead to a substantial reduction in the length of time taken by the OPC to resolve credit reporting complaints.

Some complaints have been made to the Commonwealth Ombudsman regarding unacceptable delays in the resolution of complaints by the OPC. However, no findings have been made against the OPC after review.

### 4.3. Telecommunications Industry Ombudsman (TIO)

The TIO has a strong focus on speedy resolution of complaints, and it resolves more than 90% of complaints within 10 days. The TIO directs complainants to a senior contact within the target organisation, and they only have 10 days to resolve the complaint before it escalates to a higher level, and incurs additional expense for the member organisation. This practice appears to deliver prompt results for the consumer.

A small number of complex matters result in formal investigations – these may take 3-4 months maximum to resolve, but they are rare. Level 4 complaints include TIO binding powers for a decision up to \$30,000 and recommendation up to \$85,000.

### 4.4. Summary

The following table summarises the time taken to resolve typical privacy complaints by each of the regulators. All figures are approximate and are based on annual reports and interviews with staff:

Agency	Simple Matters	Complex Matters	Average
ACMA – General (silent number / IPND)	1-2 weeks	2-3 months	30 days
ACMA – Spam	1-2 days	1-2 months	5 days
ACMA – DNC	1-2 days	1-2 months	5 days
OPC	2 months	6-12 months	180 days
TIO	2-3 days	1-2 months	10 days

It is remarkable that the average time for dispute resolution could vary between 5 days (ACMA), 10 days (TIO) and 180 days (OPC). A small delay is to be expected at the OPC as they have a strong focus on conciliation and some of their matters may be more complex. However, no consumer should be waiting 6 months to have a privacy complaint in the communications sector resolved, and there appears to be little justification for the long delays at the OPC when they only handle around 1000 complaints in total each year.

<sup>9</sup> <<http://www.arca.net.au/>>

Resolution times are acceptable at the ACMA and the TIO. However, resolution times are unacceptable at the OPC and this cannot be considered an effective form of privacy protection. A significant delay in the complaints process is a heavy disadvantage to the consumer, and will typically be to the benefit of the business (as many consumers will be discouraged from pursuing complaints). Consumers are already at a significant disadvantage in attempting to resolve complaints against well-resourced businesses – this unacceptable delay further tips the balance against consumers.

It is also important to consider the information that is provided to consumers regarding the time taken to resolve complaints.

The following table summarises information provided to consumers about complaints times by the three complaints bodies in this study:

Agency	Website	Annual Report	Verbal
ACMA – General	No information.	No information.	2-3 weeks
ACMA – Spam	No information.	90% complaints acted on within 8 days	No information.
ACMA – DNC	No information.	50% complaints closed within 7 days 75% complaints closed within 14 days 90% complaints closed within 21 days	No information.
OPC	“Some complaints are resolved within weeks, but more complex complaints may take longer. The Office aims to resolve all complaints within 12 months.”	No information.	Some consumers advised that the average is 6 months.
TIO	“Level 1 complaints – a company has 10 working days to investigate your complaint, negotiate with you and propose a resolution Level 2 complaints can take 6 to 8 weeks to be resolved Level 3 complaints can take 6 to 12 weeks to be resolved Level 4 complaints can take a number of months to resolve. Only a small number of complaints are escalated to Level 4.”	90% of complaints resolved within 10 days.	Most consumer advised that complaint will take around 10 days.

Consumers should be given accurate and frank information about expected resolution times, especially in the communications sector where they may have other options for resolving complaints. Also, the information provided to consumers is an opportunity to set targets, and to help drive down resolution times.

As can be seen from the summary table, the information provided to consumers is fairly ad hoc. Consistent information should be provided prominently in websites, annual reports and in consumer brochures. There should also be a standard response provided to any verbal requests.

It is also alarming that the OPC information does not set a reasonable target or aspiration for the speedy resolution of complaints. Advising consumers that the OPC “aims to resolve all matters within 12 months” does not place any downward pressure on resolution times, and this statement is likely to discourage many consumers from pursuing a complaint.

## **5. Accessibility**

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This section examines accessibility issues for each of the complaints bodies. Many disadvantaged consumers face barriers in accessing dispute resolution services, and some seek assistance from community organisations in writing and lodging their complaints. Complaints bodies can also provide direct assistance, complemented by the provision of information in multiple languages, translation services and communication services for people with disabilities.

### **5.1. Australian Communications and Media Authority (ACMA)**

The ACMA is required by its charter to provide assistance to any complaint who requires assistance. Typically this will involve the use of interpreters and / or different media for people with disabilities.

The ACMA receives very few complaints from community organisations, and ACMA is discussing options to enhance community assistance (for example in discussions with ACCAN).

The ACMA does not collect demographic information on complainants and currently does not have a useful profile of complainants. They do not have data on languages spoken, disabilities, level of income or other indicators of disadvantage.

### **5.2. Office of the Privacy Commissioner (OPC)**

The OPC has a range of tools to help people access information about privacy complaints, and they also provide direct assistance to individuals.

The OPC has an excellent web based jurisdiction tool – the interactive ‘complaint checker’ helps many people determine whether the OPC can accept their complaint:

<<http://www.privacy.gov.au/complaints/who/complaintchecker>>

The OPC also offers a free translation service, multi-lingual documents (website and hard copies) and OPC staff can assist with writing a complaint if needed.

Some consumers receive assistance, especially in relation to credit report complaints, from consumer organisations and legal centres. The OPC staff noted some “mixed quality” in the provision of such assistance.

The OPC does collect some limited demographic data on complainants. However, this is in the form of a one page voluntary survey, and OPC staff dismissed the data as unreliable and unhelpful. The OPC does not have reliable data on languages spoken, disabilities, level of income or other indicators of disadvantage.

### **5.3. Telecommunications Industry Ombudsman (TIO)**

The TIO receive complaints by email, phone and post – approximately 85% of complaints are by telephone and 13% by email. The TIO offer a free interpreter service, and they have produced multi-language fact sheets.

The TIO engage in regular outreach to difficult target groups with other ombudsman services through the Good Service Forum – e.g. indigenous communities. People with disabilities can use TTY or can ask for direct staff assistance.

TIO staff noted an increase in people who were assisted by community legal centres and financial counsellors.

The TIO does not collect any demographic information and they do not have profile information on complainants apart from post code information.

#### **5.4. Summary**

All three complaints bodies provide a range of assistance tools and direct assistance to disadvantaged consumers, resulting in a high overall level of accessibility. The stand-out accessibility tool is the excellent interactive ‘complaint checker’ provided by the OPC.

However, there is a history of complaints bodies struggling to meet the needs of disadvantaged and vulnerable consumers, who tend not to utilise these types of services.<sup>10</sup>

All three complaints bodies do not have any data on the profile of their complainants. It would be worthwhile to conduct some research on the profile of complainants to make sure that services were reaching all parts of society.

All three complaint bodies reported that some complainants received assistance from community organisations, but the numbers were low.

The responses to the survey questionnaire indicated that community organisations only receive very small numbers of privacy complaints in the communications sector, with credit reporting complaints being the most common. Consumer organisations and financial counsellors tended to assist people with complaints to both the OPC and the TIO. Civil liberty groups had the highest awareness of the OPC. No organisations reported regular utilisation of the ACMA complaints processes and awareness levels of the ACMA were low.

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<sup>10</sup> See for example the findings of the Commonwealth Treasury *Self Regulation Taskforce*, 2000, <<http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1131>>.

## 6. Referrals

Despite the existence of three complaints bodies with overlapping jurisdiction for communications privacy complaints, there are no general agreements or Memorandum of Understandings (MOUs) between the three complaints bodies.

A network of informal contact between the three organisations appears to exist, and in many ways is working well. None of the organisations' staff interviewed in this study saw an MOU as a priority issue.

Referrals were common between the three bodies – the following table summarises some of the key referrals:

Issue	Referral	Occurrence
IPND	Australian Communications and Media Authority (ACMA) receives the majority of IPND complaints, sometimes referred via the Telecommunications Industry Ombudsman (TIO) but most are direct referrals from service providers	Rare
Spam	Both Office of the Privacy Commissioner (OPC) and TIO refer spam straight to the ACMA.	Common
Do Not Call Register	OPC refers all DNC matters to ACMA. TIO refers all DNC matters to ACMA but may also take additional action where the telemarketer is a TIO member.	Common <sup>11</sup>
Silent numbers	Very unclear – all three parties noted some complaints in this area.	Rare
Credit reporting	ACMA has no jurisdiction. TIO and OPC both take complaints regarding credit reporting.	Common
Unwelcome, life-threatening calls	These complaints all appear to be referred to the TIO.	Rare

There have been some cases of complaints being made to two or even all three of the complaints bodies. All three complaint bodies advised that they took steps to ensure that complainants could only pursue their complaint once, with one complaints body.

In some respects the three complaints bodies treat the management of communications sector privacy complaints as if the three regulators were acting as a single entity. For example, a complaint to one regulator may preclude the individual from complaining to any of the other complaints bodies, and there is a system of informal referrals between the Australian Communications and Media Authority (ACMA), the Office of the Privacy Commissioner (OPC) and the Telecommunications Industry Ombudsman (TIO).

However, in many other respects, the three complaints bodies act independently, and display very different approaches to complaints management.

As will be seen in the following sections, this results in diverse outcomes for consumers depending on the complaints path they have selected, or the path that has been chosen for them by jurisdictional issues.

<sup>11</sup> The OPC 2009 Annual Report shows that the OPC received 91 calls regarding the Do Not Call Register.

## **7. Outcomes for Consumers (Complainants)**

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### **7.1. Australian Communications and Media Authority (ACMA)**

The ACMA receives privacy complaints in three areas, and their outcomes for individuals are slightly different depending on the category of complaint:

- **General privacy complaints**  
The main outcome is correction of inaccurate data (usually in the IPND) or provision of a new number (usually because a silent number has been published).  
  
No compensation is provided, although some telecommunications providers might offer a new silent number without charge.
- **Spam**  
ACMA staff explain:  
  
“The standard outcome we aspire to achieve is to ensure that the complainant no longer receives messages from the message sender. If the complaint is about e-marketing messages from a specific business, we advise every complainant that we have contacted the message sender and requested the removal of their electronic address from the database. In other circumstances, we may provide general advice on ways to reduce spam, such as obtaining spam-filtering software. Should messages continue and we decide to escalate to an investigation, the complainant is also kept up-to-date on the matter to ensure we can obtain further information.”  
  
There is no compensation for individuals.
- **Do Not Call Register**  
Generally an individual might have their name removed from a marketing list, but there is no compensation or other remedies. The main result is that the organisation will change behaviour and improve compliance.

### **7.2. Office of the Privacy Commissioner (OPC)**

The OPC focuses on individual outcomes for the consumer, and they have resolved complaints utilising a wide range of measures, including:

- Apologies;
- Removal / correction of personal information;
- Free in kind services (e.g. security services);
- Correction of credit reports; and
- Confidential financial settlements (typically \$500 to \$2,000, although at least two settlements were over \$20,000 in 2009).

OPC staff noted that some complainants were not concerned with individual outcomes – they wanted to achieve a systemic change to practices and were worried about the data of other people as well as their own.

### **7.3. Telecommunications Industry Ombudsman (TIO)**

The TIO has resolved complaints utilising a wide range of measures, including:

- Apology;
- Free services;
- Minor financial compensation;
- Correction / removal of personal information;
- Credits on bills;
- Re-connection of services; and
- Correction of credit reports.

The TIO rarely has to make a binding decision – most matters are settled.

TIO staff noted that the most expensive privacy matters usually involve the relocation of consumer after a silent number has been published by mistake – e.g. where the consumer is at risk. Compensation in these cases may amount to thousands of dollars.

### **7.4. Summary**

The outcome for individuals varies significantly between the three complaints bodies:

- The focus of the OPC and TIO is on resolution of the complaint for the individual consumer, and this results in a broader range of remedies for individual consumers, including regular compensation payments.
- The ACMA appears to focus on broader changes to business conduct, and remedies for individuals are rare.

## 8. Outcomes for Businesses (Targets of complaints)

### 8.1. Australian Communications and Media Authority (ACMA)

The ACMA has a full suite of strong regulatory powers available, and it uses all of them to address poor industry conduct.

The following table summarises their enforcement action in relation to Do Not Call Register complaints and spam complaints in 2009.

Enforcement Tool	Telemarketing	Spam
Complaints opened	12,057	3,947
Advisory / warning letters	380	967
Investigations	21	25
Formal warnings	6	3
Infringement notices	7	7
Enforceable undertakings	8	2

The ACMA enforcement action has included undertaking that the organisation will conduct independent external compliance processes and audits. Enforcement action has also included large fines.

The ACMA use of enforcement action reflects current best practice in regulation – a small proportion of high profile, high impact enforcement actions are used to influence business conduct, allowing the ACMA to use lower impact enforcement tools (such as warning letters) in the majority of cases.

The following three case studies provide examples of the typical enforcement action taken by ACMA. [See Appendix 2 for additional case studies]

Name	Optus
Date	January 2009
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	infringement notice and fine of \$110,000
Enforcement action	Infringement notice
Time taken to resolve complaint	Approx 6 months
Public education outcome	Media release on ACMA website – warning that “ACMA will use its stronger enforcement powers where undertakings offered are not considered an adequate response to the compliance issues raised”.
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned

Name	Optus
Case Summary	<p>Optus paid the second highest penalty (at the time) for a breach of the Spam Act 2003 after the sending electronic messages without accurate sender identification.</p> <p>The penalty related to 20,000 commercial electronic messages sent by Optus that failed to provide clear and accurate sender identification. The messages promoted the OptusZoo entertainment service to Optus customer mobile phones.</p> <p>ACMA and Optus initially commenced discussions in relation to the offer of an enforceable undertaking by Optus in order to resolve this matter. However, consensus could not be reached on the terms of such an undertaking and ACMA decided to proceed with issuing the infringement notices.</p>

Name	Lance Thomas Atkinson
Date	December 2009
Source	<a href="http://www.acma.gov.au/WEB/STANDARD/pc=PC_311998">http://www.acma.gov.au/WEB/STANDARD/pc=PC_311998</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	Civil penalty of \$210,000
Enforcement action	Court action, declarations, injunction and civil penalty.
Time taken to resolve complaint	Approx 6 months
Public education outcome	Media release on ACMA website, public judgment.
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	<p>The Federal Court in Brisbane issued declarations, injunctions and a penalty of \$210,000 under the Spam Act 2003 against Lance Thomas Atkinson.</p> <p>The court found that Mr Atkinson caused unsolicited spam emails advertising herbal products, watches and other items to be sent to Australians. The ACMA tendered evidence to the court that it has received more than 100,000 reports from Australians about email messages which Atkinson caused to be sent.</p> <p>the court restrained Mr Atkinson from sending or being involved in sending unsolicited commercial electronic messages to or from Australia for a period of seven years.</p>

Name	Jobspy and Others
Date	December 2009
Source	<a href="http://www.acma.gov.au/WEB/STANDARD/pc=PC_311986">http://www.acma.gov.au/WEB/STANDARD/pc=PC_311986</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	Civil penalty of \$22.25 million
Enforcement action	Court action, declarations, injunction and civil penalty.
Time taken to resolve complaint	Approx 12 months
Public education outcome	<p>Media release on ACMA website, public judgment.</p> <p>Warning from ACMA that "This matter should also serve as a warning to all parties involved in sending commercial electronic messages that non-compliance with the Spam Act can carry with it very significant consequences."</p>
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned

Name	Jobspy and Others
Case Summary	<p>The Federal Court in Brisbane imposed \$22.25 million dollars in penalties against Jobspy and other respondents in proceedings brought by the ACMA against SMS spammers.</p> <p>The ACMA alleged that Jobspy and others were involved in a complicated scheme whereby they established fake dating website profiles to obtain mobile telephone numbers of genuine dating website users. These mobile phone numbers were then sent messages from people pretending to want to meet and form a relationship with the recipient. Users who responded to the messages were charged approximately \$5 per message.</p> <p>The ACMA alleged that the scheme had cost Australian mobile phone users in excess of \$4 million since its commencement in late 2005.</p>

## 8.2. Office of the Privacy Commissioner (OPC)

It is extremely rare for the OPC to take any enforcement action against a business.

One OPC case study notes that the organisation was required to conduct an audit and change some processes (see below). No other case studies provide any detail of enforcement action and no other media releases or annual reports provide examples of enforcement action in a telecommunications privacy complaint.

Name	P v Telco Service Provider [2005] PrivCmrA 15
Date	2005
Source	<a href="http://www.privacy.gov.au/">http://www.privacy.gov.au/</a>
Outcome for the consumer	Compensation (amount not disclosed)
Outcome for the broader community	New audit requirement for the business.
Financial impact	Compensation (amount not disclosed)
Enforcement action	None
Time taken to resolve complaint	Unknown
Public education outcome	None
Naming of the parties	No party named.
Vulnerable consumer	No
Case Summary	<p>The complainant received mobile phone services from a telecommunications service provider. At the complainant's request, the number was treated as 'silent' and was not listed in any publicly available telephone directory.</p> <p>The complainant later upgraded the mobile telephone service and in doing so, was allocated a secondary mobile telephone number. The complainant later found that this number appeared as a mobile telephone number, in the publicly available residential telephone directory listed beside the complainant's previously undisclosed residential address.</p> <p>The provider conceded that it had disclosed the complainant's personal information in error, and that this error had resulted in the personal information being published.</p> <p>The Privacy Commissioner formed the view that the disclosure was in breach of National Privacy Principle 2. The Privacy Commissioner also took the view that there was a systemic flaw in the telecommunications service provider's operational software that led to the disclosure of the complainant's personal information and that accordingly the telecommunications service provider had not taken reasonable steps to protect the complainant's personal information.</p> <p>The telecommunications service provider offered the complainant an amount of compensation in full and final settlement of the complaint. In addition, the telecommunications service provider implemented new audit procedures.</p> <p>The complainant accepted the offer of compensation.</p>

The OPC, in contrast to other regulators, has never named a telecommunications organisation that has having breached privacy, and there have been no formal determinations against any private sector organisation since 2005.

OPC staff advised that naming would be used if this power was available, although it would be used sparingly.

Community organisations query whether the lack of naming and enforcement action is a reflection of OPC culture and attitude rather than a lack of powers. Naming is available now as part of a Section 52 determination, but the OPC appear reluctant to use determinations. Naming is also available for Own Motion Investigations, but it is rare for the published Own Motion Investigations or summaries to name the offending organisation, and this has never occurred in the communications sector.

OPC staff also noted that the Privacy Act requires them to investigate matters “in private”, but this does not prevent naming an organisation if there is a determination.

Overall it is very difficult to understand why the other complaints bodies have named organisations on a regular basis, but the OPC never names any organisation. This cannot be explained by reference to the legislation and the powers available to each of the regulators.

In contrast to the ACMA, the complete absence of any high profile / high impact enforcement action by the OPC means that business organisations are under no pressure to comply with privacy laws, or to respond to complaints quickly. As no organisations are ever named by the OPC, there is no potential for adverse publicity.

The OPC approach to enforcement action does not represent regulator best practice. It is the source of considerable frustration in the community sector.

The OPC defend their approach by pointing to limitations in their powers (which they hope to see removed in the next round of legislative reform), but this argument does not stand up to scrutiny of their existing powers, which could easily be used to issue occasional determinations and name organisations that have breached privacy.

### **8.3. Telecommunications Industry Ombudsman (TIO)**

The TIO has a broad range of powers for level 4 complaints, but the majority of complaints do not reach this stage. TIO staff advised that it can become expensive for a member organisation if a complaint escalates to level 4, and this provides a financial incentive for the early resolution of complaints.

Some TIO determinations, including naming of the party do occur, but these are rare. It is more likely that a business would be named in an aggregate report showing the number of complaints received about that organisation in a year.

The naming of organisations by the TIO has had some impact, as the resulting adverse publicity has lead to considerable public debate and Government and regulator intervention on major issues such as customer service and complaint handling.<sup>12</sup>

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<sup>12</sup> See for example the TIO announcements regarding complaints and the *connect.resolve* campaign in 2009 at <<http://www.tio.com.au/members/MemberPublications/Mnews/connect-resolve.htm>> 2009 and the ACMA announcement regarding complaints and their *Reconnecting the Customer* campaign in 2010 at <[http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_312100](http://www.acma.gov.au/WEB/STANDARD/pc=PC_312100)> .

## **9. Outcomes for the broader Community**

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### **9.1. Australian Communications and Media Authority (ACMA)**

The ACMA will name the party in serious privacy cases. This provides an alert mechanism for other consumers, and a warning for other businesses regarding their own conduct.

ACMA also uses complaints for broader campaigns regarding law reform and industry practice. For example, intervention on SMS spam was identified as a priority after an increase in complaints to the ACMA.

The ACMA also issues media releases to accompany its enforcement action, often with a direct reference to this action being a ‘lesson’ or ‘warning’ for the wider industry.

### **9.2. Office of the Privacy Commissioner (OPC)**

The OPC appears to only play a very limited role in highlighting community concerns based on complaints. Although the OPC sometimes conducts own motion investigations, and issues FAQs and guidelines on key privacy issues, this has not occurred in relation to the communications sector.

The OPC has not issued any media releases in 5 years noting breaches of privacy law in the communications sector, nor any media releases containing any criticism or warning regarding business conduct in the communications sector. However, in 2008 the OPC issued numerous press releases relating to the Privacy Awards, including a nomination and award for Telstra.<sup>13</sup>

### **9.3. Telecommunications Industry Ombudsman (TIO)**

The TIO has an extremely large volume of complaints, so it attempts to identify systemic issues and trends based on complaints statistics and case studies. The TIO reports a number of systemic issues each year to the ACMA.

The TIO has also used complaints to drive industry improvements, though programs such as the *connect.resolve* campaign in 2009.<sup>14</sup>

The TIO lists all organisations who have been the subject of complaints, including listing the exact number of privacy complaints received in relation to each member organisation. [See section 3.3 for further details.]

### **9.4. Summary**

Both the ACMA and the TIO play an active role in utilising complaints to warn the community about major privacy issues and to pressure industry to improve business practice. This includes the use of media releases and the regular naming of organisations.

In contrast, the OPC issues no information on breaches of privacy and has not named any communications organisation for a breach of privacy.

It is very difficult to understand the approach by the OPC. Without naming organisations or highlighting privacy breaches, the broader community impact of complaints is effectively zero.

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<sup>13</sup> <<http://www.privacy.gov.au/materials/types/media/view/6242>>

<sup>14</sup> <<http://www.tio.com.au/Members/MemberPublications/MNews/connect-resolve.htm>>

## 10. Conclusions and Recommendations

### 10.1. Disparity in complaint numbers across complaint bodies

There is an obvious disparity in the number of complaints received by the Australian Communications and Media Authority (ACMA), the Office of the Privacy Commissioner (OPC), and the Telecommunications Industry Ombudsman (TIO):

Agency	Communications privacy inquiries (2009)	Communications privacy complaints (2009)
ACMA – General	-	10
ACMA – Spam	-	3,947
ACMA – DNC	-	12,057
OPC	715	113
TIO	-	4942

This disparity may be even greater than the 2009 figures reveal, as there has been a growth in spam complaints to the ACMA in 2010 (to date) and a general growth in TIO complaints in 2010 (to date). However, OPC complaints are displaying a slight downwards trend.

In addition, OPC categorises declined complaints (where the respondent has not been contacted) as complaints rather than inquiries, and this inflates the OPC figures by around 10%.

This disparity is partly a natural result of the jurisdiction of the ACMA – as spam and Do Not Call Register complaints will always be the largest categories of privacy complaints in the sector. However, the number of complaints made to the OPC is very low.

It is concerning that the major privacy regulator, with all of the skills, jurisdiction and resources available at the OPC, only receives a tiny fraction of the privacy complaints in the communications sector, and only manages a very small number of overall privacy complaints.

### 10.2. Inconsistent resolution times and process issues

The average time for dispute resolution varies between 5 days at the ACMA, 10 days at the TIO and 180 days at the OPC. A small delay is to be expected at the OPC as they have a strong focus on conciliation and some of their matters may be more complex. However, no consumer should be waiting 6 months to have a privacy complaint in the communications sector resolved, and there appears to be little justification for the long delays at the OPC when they only handle around 1000 complaints in total each year.

Resolution times are acceptable at the ACMA and the TIO. However, resolution times are unacceptable at the OPC and this cannot be considered an effective form of privacy protection.

#### **Recommendation 1: Complaints resolution times**

There must be a significant improvement in time taken to resolve complaints at the OPC. They have significant resources, skills and expertise in privacy protection, and they only receive a tiny fraction of the complaints in the sector. The OPC should aim to resolve the majority of complaints within 30 days.

It is important to consider the information that is provided to consumers regarding the time taken to resolve complaints – as this will have an impact on decisions made by consumers regarding the pursuit of their complaint, and their selection of a complaints path.

Consumers should be given accurate and frank information about expected resolution times, especially in the communications sector where they may have other options for resolving complaints. Also, the information provided to consumers is an opportunity to set targets, and to help drive down resolution times.

The information provided to consumers may also have an impact on internal resolution times. For example, if the information sets out a very generous timeline, there is no internal pressure to resolve complaints quickly.

In practice, the information provided to consumers is fairly ad hoc and inconsistent

#### **Recommendation 2: Information provided to complainants**

There must be a significant improvement in the information provided to individuals about resolution times. Information should be consistent (across the website, annual report and verbal advice). It should be frank – e.g. exact timing targets, or an exact average based on prior complaints. It is very poor practice to accept a complaint without warning the consumer that it may take 6 months to resolve, especially when other avenues for resolution are available.

### **10.3. Little accessibility data captured**

All three complaints bodies provide a range of assistance tools and direct assistance to disadvantaged consumers, resulting in a high overall level of accessibility.

However, there is a history of complaints bodies struggling to meet the needs of disadvantaged and vulnerable consumers, who tend not to utilise these types of services. All three complaints bodies do not have any data on the profile of their complainants. It would be worthwhile to conduct some research on the profile of complainants to make sure that services were reaching all parts of society.

#### **Recommendation 3: Demographic profiles**

All three complaints bodies should undertake research to assess the demographic profiles of their complainants, to gain a better understanding of special needs such as language and disability access. This research will also identify whether some disadvantaged groups are not utilising the services of these complaint bodies, and this information could be used to design outreach and targeting programs.

Although it is outside the scope of this current study, the authors also support efforts to make all complaints processes more simple, efficient and accessible for disadvantaged consumers.

### **10.4. Uncertain and inconsistent outcomes for consumers**

The most significant finding in this study is the wide disparity of outcomes that result from complaints in this sector, depending on the complaints path.

This results in a situation where complainants that have the same basic fact scenario as other complainants, even lodging complaints against the same business, could achieve completely different outcomes depending on the complaints path they select. The outcome will not only differ for the individual complainant, but also for the business and the community.

Each of the three complaints bodies has individual strengths.

- If a complainant is seeking compensation and / or an apology, they should use the OPC or the TIO (but not the ACMA).
- If a complainant is seeking the prompt correction / removal of personal information, use the ACMA (spam and DNC) of the TIO (general privacy complaints). The OPC will not deliver prompt action.
- If a complainant is seeking enforcement action, such as a fine, a determination or naming of the business, use the ACMA (and to a lesser extent the TIO). The OPC will never take enforcement action or name the business.
- If a complainant is seeking to address a systemic issue, such as a change in industry practice, use the TIO or ACMA. However, if the complainant is seeking to Address a systemic issue at an individual business, the OPC can also deliver this result.

This situation is unacceptable and is not delivering efficient or effective regulation of privacy complaints in the sector. It is not the result of a careful or planned policy decision to treat communications privacy complaints in this way. It is the result of ad hoc complaints processes, overlaps in jurisdiction, and the individual culture and approach of the three complaints bodies.

In some respects the three complaints bodies treat the management of communications sector privacy complaints as if the three regulators were acting as a single entity. For example, a complaint to one regulator may preclude the individual from complaining to any of the other complaints bodies, and there is a system of informal referrals between the ACMA, OPC and TIO.

It seems unfair that the three bodies will act collectively in this way, to manage and even exclude some complaints, but will not act collectively when it comes to outcomes.

*Any* privacy complaint in the communications sector lodged with *any* complaints body should be able to achieve all of the outcomes that are desirable in a best practice regulatory environment.<sup>15</sup> These include:

- Compensation for the individual;
- An apology for the individual;
- Prompt correction or removal of personal data;
- A change to business practice at the individual company;
- A change to broader industry practice for systemic issues;
- Occasional naming of individual companies as a warning to other consumers and a lesson for industry; and
- Occasional enforcement action in order to promote compliance.

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<sup>15</sup> For a discussion of best practice regulation, see Ayres I and J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate*, 1992 Oxford University Press, Oxford.

These consistent outcomes should not be difficult to achieve. The following recommendations set out steps that can be taken towards achieving this goal.

**Recommendation 4: Coordination**

There should be better coordination amongst the three complaints bodies, with the aim of reducing the adverse consequences for consumers of the current perceived disconnection. A formal Memorandum of Understanding should be developed between the three complaint bodies. This agreement should include fair and transparent criteria for the management of complaints and for referrals between the three organisations. A process for sharing the identity of business parties to a complaint should be developed in order to enhance the recognition of systemic issues across the sector.

**Recommendation 5: Consistent message to consumers**

Consumers should be provided with consistent information about where they should complain. This should include information on jurisdiction issues, but also on timelines and expected outcomes where these differ between the three complaints paths. It should be widely accessible and available to consumers contemplating or initiating complaints.

**Recommendation 6: Consistent message to industry**

Industry should be provided with consistent information about compliance. There should be no circumstances where industry is receiving a message from one complaints body that everything is fine, while another complaints body is issuing warnings or enforcement action for non-compliance. Again, this should be widely accessible and available for relevant industry personnel.

**Recommendation 7: Regulatory tools**

All three complaints bodies must ensure that they offer (and use) the full range of regulatory tools and remedies. These include:

1. Compensation for the individual;
2. An apology for the individual;
3. Prompt correction or removal of personal data;
4. A change to business practice at the individual company;
5. A change to broader industry practice for systemic issues;
6. Occasional naming of individual companies as a warning to inform other consumers, and a lesson for industry that reputation consequences may arise from poor complaint outcomes; and
7. Occasional enforcement action in order to promote compliance.

In practice this recommendation will necessitate a change of approach at the OPC, so that they utilise their naming and enforcement powers, and a change of approach at the ACMA so that they offer greater individual remedies (such as compensation and apologies).

## **11. Appendix 1 – Methodology**

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This study gathered information from three four sources for each complaint path:

### **1. Complaint Statistics**

The study collected both public and private data on complaints from the three dispute resolution providers – the Office of the Privacy Commissioner (OPC), Australian Communications and Media Authority (ACMA), and Telecommunications Industry Ombudsman (TIO). These statistics typically revealed the number of complaints, the categorisation of complaints, complaint timelines, and complaint outcomes.

### **2. Case Studies**

All three dispute resolution providers publish case studies on privacy complaints in the communications sector. This information was used to complement and illustrate the statistical findings.

### **3. Interviews**

The study team conduct brief interviews with the complaints management personnel of each of the three dispute resolution providers (OPC, ACMA and TIO).

### **4. Stakeholder survey**

The study team undertook a brief stakeholder survey of agencies that provide assistance to complainants, regarding their experience with each of the three dispute resolution providers, in order to validate some of the key findings in the report. Respondents include privacy, civil liberty and consumer assistance organisations.

NOTE: No interviews were conducted with individual complainants, and all data and case studies rely on anonymised or aggregate data.

The research team would like to thank the staff of the here complaints bodies for their helpful assistance, and also thank the organisations who completed the survey.

## 12. Appendix 2 – Additional Case Studies

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### *Australian Communications and Media Authority (ACMA)*

Name	AustralianSMS
Date	July 2007
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking
Time taken to resolve complaint	Approx 13 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	AustralianSMS is a supplier of gateway service for SMS. It is alleged it sent emails in contravention of the SPAM Act 2003. AustralianSMS undertakes to no longer send messages without user consent and ensures that staff receive a copy of this undertaking.

Name	Victoria Electricity
Date	October 2009
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking - maintaining records, independent consultant, opt out procedures
Time taken to resolve complaint	Approx 9 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	Victoria Electricity is a supplier / retailer of electricity and gas. It is alleged that it called or caused calls to be made to numbers on the Do Not Call Register. Victoria Electricity agrees to maintain additional records and make these available for audit. In engaging third parties, it must sufficiently satisfy itself there the company has enough internal controls to wash numbers on the Register. It will also hire an Independent Consultant to ensure internal controls are in place to wash numbers. It will also provide additional training for workers involved in telemarketing their services.

Name	Telstra
Date	August 2009
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	Infringement notice with a \$101,200 fine

Name	Telstra
Enforcement action	Enforceable Undertaking - maintaining records, independent consultant, opt out procedures
Time taken to resolve complaint	Approx 23 months
Public education outcome	Enforceable undertaking and media release on ACMA website – “The market leaders in the telco industry should consider themselves soundly on notice – size and complexity are no excuses for non-compliant practice”.
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	Telstra was alleged to have made telemarketing calls to numbers on the Do Not Call Register. Telstra agrees to maintain additional records and make these available for audit. In engaging third parties, it must sufficiently satisfy itself there the company has enough internal controls to wash numbers on the Register. It will also hire an Independent Consultant to ensure internal controls are in place to wash numbers. It will also provide additional training for workers involved in telemarketing their services.

Name	StarTel Communications
Date	April 2009
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking - maintaining records and allowing audits by ACMA
Time taken to resolve complaint	Approx 5months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	StarTel agrees to maintain additional records and make these available for audit. In engaging third parties, it must sufficiently satisfy itself there the company has enough internal controls to wash numbers on the Register.

Name	People Telecom
Date	January 2009
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking - maintaining records and allowing audits by ACMA
Time taken to resolve complaint	Approx 14 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	People Telecom engaged a third party who then in turn engaged an overseas telemarketing company to sell telecommunication services to Australian numbers. Complaints were received by ACMA from people who have their numbers on the Do Not Call Register. People Telecom agrees to maintain additional records and make these available for audit. In engaging third parties, it must sufficiently satisfy itself there the company has enough internal controls to wash numbers on the Register.

<b>Name</b>	<b>Lifestyle Dynamics</b>
Date	September 2008
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking - maintaining records and allowing audits by ACMA. Call line identification.
Time taken to resolve complaint	Approx 11 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	Lifestyle Dynamics outsourced telemarketing functions to overseas companies. Complaints were received by ACMA from those on the Do Not Call Register that they were contacted by Lifestyle Dynamics or their representatives. Lifestyle Dynamics undertakes to perform additional record keeping and audit requirements. Also if it engages foreign companies for telemarketing service, it is to be routed through a call line identification system.

<b>Name</b>	<b>Freedom Escapes</b>
Date	February 2009
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking - maintaining records and allowing audits by ACMA
Time taken to resolve complaint	Approx 4 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	Freedom Escapes is a telemarketing firm that sells holiday packages and trades as both Freedom Escapes and My Platinum Blue. ACMA received complaints from those on the Do Not Call Register that they received telemarketing calls. Freedom Escapes agrees to additional record keeping and auditing. If it engages third party contractors outside Australia, it will inform ACMA and ensure they use call line identification. It also agrees to provide additional training to employees and third parties who are making telemarketing calls.

<b>Name</b>	<b>Excite Mobile</b>
Date	December 2009
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking - maintaining records and allowing audits by ACMA
Time taken to resolve complaint	Approx 7 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named

<b>Name</b>	<b>Excite Mobile</b>
Vulnerable consumer	None mentioned
Case Summary	Excite Mobile is a telecommunications company. It engaged a third party to make telemarketing calls. It did not ensure that numbers on the Do Not Call Register were washed from the calling lists. Excite Mobile agrees to additional record keeping and auditing. If it engages third party contractors outside Australia, it will inform ACMA and ensure they use call line identification. It also agrees to provide additional training to employees and third parties who are making telemarketing calls.

<b>Name</b>	<b>Dodo</b>
Date	August 2008
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	Civil Penalty of \$147,400
Enforcement action	Enforceable Undertaking - maintaining records and allowing audits by ACMA
Time taken to resolve complaint	Approx 10 months
Public education outcome	Enforceable undertaking and media release on ACMA website – warning to other companies using offshore call centres.
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	Dodo is a telecommunications company. It engaged 3 call centres to make telemarketing calls on its behalf without making sure that numbers on the Do Not Call Register was removed. Dodo agrees to engage in additional record keeping subject to audit by ACMA. It agrees only to engage Acquire Asia Pacific Philippines to conduct its telemarketing in the next 12 months. For the 2 years thereafter, ACMA must be informed of any other third parties Dodo engages to make telemarketing calls. It must use a call identification system and employ an independent consultant

<b>Name</b>	<b>Dean Iwin</b>
Date	September 2008
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking - maintaining records and allowing audits by ACMA
Time taken to resolve complaint	Approx 3 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	Dean Iwin operated a business One Connect which has now ceased operation. Mr. Iwin has set up a new business Edwin Pty Ltd which engages in telemarketing of Mobile phone services. One Connect before it ceased operation, made telemarketing calls to numbers on the Do Not Call Register. Mr Iwin agrees in the Enforceable Undertaking, in the operation of his businesses including that of Edwin Pty Ltd to extra reporting and auditing standards, wash numbers to remove those on the register and provide extra training for his staff.

<b>Name</b>	<b>Connex Communications</b>
Date	March 2010

<b>Name</b>	<b>Connex Communications</b>
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking - maintaining records and allowing audits by ACMA
Time taken to resolve complaint	Approx 10 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	Connex Communications is a telecommunications business in Brisbane. It is alleged that between 14 May and 31 May 2009, Connex Communications made telemarketing calls to numbers registered in the Do Not Call register. Connex Communications agrees in its enforceable undertaking to keep additional records which are subject to audit by ACMA. It also agrees to use of a CSP to allow call line identification and ensure additional training is provided about the Do Not Call register.

<b>Name</b>	<b>Brystart trading as Bruce Hall Real Estate</b>
Date	March 2010
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking - maintaining records and allowing audits by ACMA
Time taken to resolve complaint	Approx 5 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	Bruce Hall is a real estate business in Queensland. It made calls to numbers on the Do Not Call Register. It agrees to additional record keeping and audit requirements. It also agrees to implement a system to wash numbers and additional staff training

<b>Name</b>	<b>Astron Communications and Information Services</b>
Date	August 2008
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable undertaking – Increased documentation of calls, audit by ACMA and distribution of undertaking to employees, increased training
Time taken to resolve complaint	Approx 9 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned

Name	Astron Communications and Information Services
Case Summary	<p>Astron Communications and Information Services engaged telemarketing firms to promote its products and services via telephone.</p> <p>Astron Communications and Information Services agrees in its enforceable undertaking to wash numbers to ensure removal of numbers on the Do Not Call Register in its databases. It also agrees to keep additional records which are subject to audit by ACMA. It also agrees to use of a CSP to allow call line identification and ensure distribution of enforceable undertaking third party telemarketing. Will also provide additional training to employees in the compliance of the Do Not Call Register.</p>

Name	AMD Telecom
Date	July 2009
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable undertaking – Increased documentation of calls, audit by ACMA and distribution of undertaking to employees
Time taken to resolve complaint	18 months approx
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	<p>AMD Telecom is a telemarketing contractor that promotes products and services on behalf of other parties'. AMD Telecom agrees in its enforceable undertaking to keep additional records which are subject to audit by ACMA. It also agrees to use of a CSP to allow call line identification and ensure distribution of enforceable undertaking to employees or third parties they may have subcontracted work to.</p>

Name	24x7_Direct
Date	December 2009
Source	<a href="http://www.acma.gov.au/WEB/STANDARD/pc=PC_311984">http://www.acma.gov.au/WEB/STANDARD/pc=PC_311984</a>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	\$8,800 infringement notice
Enforcement action	Infringement notice
Time taken to resolve complaint	Approx 13 months
Public education outcome	Media release on ACMA website Warning that "The call centre industry should consider the ACMA's action in this matter as a wake-up call."
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	<p>24x7 Direct is a telemarketing contractor that is engaged by businesses make telemarketing calls to Australian numbers. It is alleged that numbers on the Do Not Call register were called between 26 September and 9 October 2008. 24x7 Direct agrees in its enforceable undertaking to keep additional records which are subject to audit by ACMA. It also agrees to use of a CSP to allow call line identification.</p>

Name	Wyndham Vacation Resorts
Date	March 2009
Source	<a href="http://www.acma.gov.au">http://www.acma.gov.au</a>

<b>Name</b>	<b>Wyndham Vacation Resorts</b>
Outcome for the consumer	None mentioned
Outcome for the broader community	None mentioned
Financial impact	None mentioned
Enforcement action	Enforceable Undertaking - maintaining records
Time taken to resolve complaint	Approx 20 months
Public education outcome	Enforceable undertaking and media release on ACMA website
Naming of the parties	Offending company named
Vulnerable consumer	None mentioned
Case Summary	It was alleged Wyndham Vacation Resorts made calls to numbers on the Do Not Call Register. ACMA investigations showed that while Wyndham made some attempts to wash numbers, there were some cases where it was unable to locate evidence for consent to make the calls. Wyndham Vacation resorts agrees to maintain additional records and make these available for audit.

### *Office of the Privacy Commissioner (OPC)*

<b>Name</b>	<b>W v Telecommunications Company [2007] PrivCmrA 25</b>
Date	2007
Source	<a href="http://www.privacy.gov.au">http://www.privacy.gov.au</a>
Outcome for the consumer	Confidential settlement between the parties
Outcome for the broader community	None
Financial impact	None
Enforcement action	None
Time taken to resolve complaint	Unknown
Public education outcome	None
Naming of the parties	None
Vulnerable consumer	Unknown
Case Summary	<p>The complainant paid for a combined phone and fax number that operated using a single line. The primary phone number was listed in hard copy and electronic telephone directories, but with their address suppressed. A new agreement with the telecommunications company resulted in the addition of a separate dedicated fax number. After publication of the directories, the complainant found that a new listing had been created in relation to the fax number, which included their address.</p> <p>The OPC found that the telecommunications company had in place a number of policies and mechanisms for the proper collection and use of data, and that the publication of the address had occurred as a result of an uncommon combination of events. Therefore the Commissioner was satisfied that the company had taken reasonable steps to ensure its policies and procedures complied with the Privacy Act.</p> <p>The OPC also found that the complainant had attempted to resolve the matter with the telecommunications company a number of times, but the company did not take timely action to correct the error once they were informed of it. The complainant subsequently agreed to an undisclosed settlement proposed by the telecommunications company.</p>

<b>Name</b>	<b>R v Internet Service Provider [2005] PrivCmrA 17</b>
Date	2005
Source	<a href="http://www.privacy.gov.au">http://www.privacy.gov.au</a>
Outcome for the consumer	Confidential settlement between the parties
Outcome for the broader community	None
Financial impact	None

<b>Name</b>	<b><i>R v Internet Service Provider [2005] PrivCmrA 17</i></b>
Enforcement action	None
Time taken to resolve complaint	Unknown
Public education outcome	None
Naming of the parties	None
Vulnerable consumer	Unknown
Case Summary	<p>Complainant's ISP reset password for their account at request of a third party purporting to be complainant and without following, in full, its standard procedures. As a consequence, a third party accessed the account. The ISP had clear procedures for processing request for change of password where staff required individual lodging the request to correctly answer security questions.</p> <p>OPC investigated and found the ISP did have relevant security procedures in place, but they were not correctly or consistently followed. In the Commissioner's view, the ISP failed to take reasonable steps to protect personal information from misuse and loss and from unauthorised access, modification and disclosure and improperly disclosed the complainant's personal information to a third party. The OPC conciliated, and the matter was concluded with a confidential settlement.</p>

### ***Telecommunications Industry Ombudsman (TIO)***

<b>Name</b>	<b>Small Business Operator v Telemarketers</b>
Date	Not disclosed
Source	<a href="http://www.tio.com.au">http://www.tio.com.au</a>
Outcome for the consumer	Was accidentally taken from Do Not Call list and put onto the calling list. This was rectified.
Outcome for the broader community	None
Financial impact	None
Enforcement action	Merely investigation – Company rectified errors
Time taken to resolve complaint	Unknown
Public education outcome	None
Naming of the parties	Unnamed
Vulnerable consumer	Small Business Manager
Case Summary	<p>Proprietor of small business with 2 business numbers and a home number: all 3 diverted to mobile in her car for work. She must answer all calls as they may be customers. Telemarketing comes on all three numbers; she pays for all as diverted calls. She asked to be taken off each telemarketing list and registered with ADMA's Do Not Contact list. Contacted TIO; after calling a provider, calls stop but restart 6 months later. Returns to TIO.</p> <p>TIO contacted most frequent provider, asked how it sought to prevent further calls. The provider placed her on a Do Not Contact list, circulated to its dealers, agents and sales staff. It had clear telemarketing guidelines; staff and agents could be disciplined or dismissed for breach. Assurances, but calls continued. TIO sought a further response.</p> <p>Provider said some numbers on its Do Not Contact list were mistakenly on its telemarketing list. It had taken steps to rectify. As complainant's details were on its updated Do Not Contact list it was confident she'd not receive calls. It had reissued the advice to its staff and agents re discipline if anyone on the new Do Not Contact list received telemarketing calls. No further communication from complainant were received..</p>

<b>Name</b>	<b>Complainant v Carriage Service Provider</b>
Date	August 2005
Source	<a href="http://www.tio.com.au">http://www.tio.com.au</a>

Name	Complainant v Carriage Service Provider
Outcome for the consumer	Formal Determination – Waive all charges incurred and transfer service back to the original provider
Outcome for the broader community	Ability to rectify circumstances when unauthorised personnel make contracts (as to telecommunication services) on your behalf Doctor's certificate to prove mental incapacity not needed when agent is in fact not authorised to make the contract.
Financial impact	Determination for charges to be waived
Enforcement action	Formal determination
Time taken to resolve complaint	6 months
Public education outcome	Publication of the formal determination as a case study.
Naming of the parties	Confidential
Vulnerable consumer	-Brain injuries -Contracts agreed to by unauthorized agents
<b>Case Summary</b>	<p>The complainant claimed that she received an unexpected bill from a service provider and discovered that the telephone account for her business had been transferred from her preferred service provider to a new CSP without her authorisation. She stated that her daughter informed her that while she was temporarily out of the office, her daughter had answered a telemarketing call from the CSP and believed that she simply agreed for the CSP to fax her some information.</p> <p>The complainant advised the TIO that her daughter has an acquired brain injury as the result of a serious car accident. She does not have authorisation to make any decisions about the business.</p> <p>Following referral by the TIO to the CSP's senior level of complaint, the complainant advised the TIO that the CSP had agreed to waive the disputed charges, provided that she produced a doctor's certificate regarding her daughter's mental capacity. The complainant did not believe that it was appropriate for the CSP to require this evidence, as she considered it essentially irrelevant.</p> <p>The TIO asked the CSP to explain on what basis it believes that a contract is legally binding and enforceable, if it is entered into by a party who is not the legal lessee of the service (regardless of the mental capacity of that person). In its response of 17 May 2005, the CSP argued that "a legally binding and enforceable contract existed with the business. This contract was entered into by the daughter as representative of the business, who purported to be authorised to initiate the transfer of telephone service."</p> <p>In this instance, the daughter was not the owner of the business, nor was she a legally authorised representative. As she did not have the power to bind the business, the TIO does not believe that a legally binding contract was entered into between the CSP and the complainant. Accordingly, the TIO does not believe that the CSP has a legal basis on which to pursue payment for the disputed charges.</p> <p>The TIO determined that the CSP should waive all charges incurred on the account by the business, prior to the account being transferred back to the complainant's preferred service provider.</p>

### 13. Appendix 3 – Survey questionnaire

## – Communications Privacy Complaints - Survey Questionnaire – (June 2010)

[Extract]

#### Awareness

This question assesses how aware your organisation is of the three complaints bodies. Please place a cross in the box which best reflects the *overall* awareness of your organisation.

	No knowledge	Aware they exist	Aware of their basic role and powers	Detailed knowledge of their complaints process	Actual experience using their complaints process
ACMA					
OPC					
TIO					

#### Figures regarding consumer privacy complaints / inquiries in the communications sector (telephones, mobiles, Internet).

We expect that most organisations will not have collected detailed statistics on privacy complaints. If you can only provide estimates, these will still be useful.

	Estimate	Actual figure (where available)
Number of privacy related INQUIRIES regarding the communications industry (each year)		
Number of privacy related COMPLAINTS regarding the communications industry (each year)		

**Specific type of privacy complaints regarding the communications sector (telephones, mobiles, Internet).**

We expect that most organisations will not have collected detailed statistics on privacy complaints. If you can only provide estimates, these will still be useful. Please place a cross in the most appropriate box:

	No complaints	Occasional complaints (Low volume)	Regular complaints (Moderate volume)	Numerous complaints (High volume)	Unsure (no data)
Personal information used or disclosed without consent					
Spam					
Telemarketing (including breach of the Do Not Call Register)					
Silent numbers (cost, misuse inaccuracy)					
Credit reporting (telecommunications only)					
Other					

## Advice / action provided

We expect that most organisations will not have collected detailed statistics on advice provided / action taken for complaints. If you can only provide estimates, these will still be useful. Please place a cross in the most appropriate box:

	No complaints	Occasional (Low volume)	Regular (Moderate volume)	Numerous (High volume)	Unsure (no data)
Unable to assist (jurisdiction / resources)					
General advice about privacy and security practices					
Referred to ACMA (no further assistance)					
Assisted with complaint to ACMA					
Referred to OPC (no further assistance)					
Assisted with complaint to OPC					
Referred to TIO (no further assistance)					
Assisted with complaint to TIO					

## Experience

This question assesses the experience that your organisation has had for each of the three complaints bodies. In this question you can place a cross in ANY of the boxes that best reflect the *overall* experience of your organisation (you can place a cross in multiple boxes in the same row or column).

	The complaints body is accessible to people with disabilities and language barriers.	The complaints body resolves complaints quickly	The complaints body delivers useful outcomes for complainants (apologies, corrections, compensation)	The complaints body identifies and manages systemic issues	The complaints body delivers useful lessons for industry (fines, enforcement action, media releases)
ACMA					
OPC					
TIO					

