



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

SECOND REPORT
OF
2014

5 March 2014

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator Helen Polley (Chair)
Senator Anne Ruston (Deputy Chair)
Senator Cory Bernardi
Senator the Hon Kate Lundy
Senator the Hon Ian Macdonald
Senator Rachel Siewert

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT OF 2014

The committee presents its *Second Report of 2014* to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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Telecommunications Legislation Amendment (Consumer Protection) Bill 2013

Introduced into the House of Representatives on 14 November 2013

Passed both Houses on 13 February 2014

Portfolio: Communications

Introduction

The committee dealt with this bill in *Alert Digest No.8 of 2013*. The Minister responded to the committee's comments in a letter dated 10 February 2014. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2013 - extract

Background

This bill amends the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to:

- provide greater clarity about the Telecommunication Industry Ombudsman's (TIO) role and expected standards of operation by requiring the TIO scheme to comply with standards determined by the Minister; and
- require periodic public reviews of the TIO scheme conducted by a person or body independent of the TIO and the telecommunications industry.

The bill amends the *Telecommunications Act 1997* to:

- enable industry codes to be varied;
- extend the application of the reimbursement scheme for developing consumer-related industry codes to also apply to varying consumer-related industry codes; and
- require code developers to conduct transparent and accountable code development processes by publishing on their websites:
 - draft codes and draft variations; and
 - any submissions received from industry participants and members of the public about the draft code or draft variation.

The bill also amends the *Do Not Call Register Act 2006* to clarify the meaning of 'cause' in relation to the party responsible for making telemarketing calls and sending marketing faxes where third parties are carrying out the marketing activities.

Delegation of legislative power

Schedule 1; item 31, proposed subsection 128(9)

This proposed amendment confers on the Minister a discretionary power to, by legislative instrument, determine standards with which the Telecommunications Industry Ombudsman scheme must comply. It is mandatory for each telecommunications carrier and eligible carrier service provider to enter into a scheme providing for the Telecommunications Industry Ombudsman.

The purpose of this amendment is to respond to the *Reform of the Telecommunications Industry Ombudsman* report (4 May 2013), which recommended that legislative 'amendments be made to provide greater regulatory clarity around the TIO's role and its expected standards of operation'. More particularly, as the explanatory memorandum states, 'the report recommended that a set of framework principles should be legislatively established for the operation of the TIO scheme, based on the *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (originally released by the Minister for Customs and Consumer Affairs in August 1997)' (at page 15).

What is less clear, however, is why the recommended standards cannot be included in the primary legislation. Proposed subsection 128(10) sets out matters to which the Minister must have regard—matters which 'are derived from the *Benchmarks for Industry-based Customer Dispute Resolution Schemes*'—when exercising the power to determine standards and proposed subsection 128(11) requires that the Minister must consult the TIO and the ACMA. In justification of the delegation of the significant power to make regulatory standards to the Minister, the explanatory memorandum explains:

The intent of this amendment is to enable the Minister to establish a set of framework principles to underpin the TIO's operations that are both consistent with best practice for other external dispute resolution schemes and relevant to the telecommunications industry. The Minister may update the standards from time to time to take into account developments in best practice for external dispute resolution schemes.

On the other hand, it may be observed that the model benchmarks were developed some time ago and that standards regulating investigations undertaken by public sector ombudsman are contained within the primary legislation. It is also the case that although there is a requirement on the Minister to consult the regulator (ACMA) and the TIO, there is no requirement to consult any relevant consumer bodies or the public. In these circumstances it is not clear why at least the core standards cannot be included in the primary legislation, possibly with a Ministerial power to determine further standards if the need arises.

The committee therefore seeks further information as to why these standards should not be included in the primary legislation.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Minister's response - extract

1. Telecommunications Industry Ombudsman (TIO) Scheme Standards

The Senate Standing Committee has requested further information about why the standards in the proposed amendments (which confer on the Minister the power to determine standards with which the Telecommunications Industry Ombudsman (TIO) scheme must comply) are not included in the primary legislation (that is, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act)).

The main reason for including these standards in a Ministerial determination rather than in the primary legislation is to provide the flexibility to make changes to these standards from time to time in order to ensure they continue to represent better practice. Changes to primary legislation can take some time and are dependent on many factors including the current legislative schedule. Using the proposed approach would still provide scope for parliamentary scrutiny and consultation, but would be more responsive to improvements in practice than primary legislation. Further information on this issue is outlined below.

TIO Governance

The TIO scheme is established under Part 6 of the TCPSS Act and is operated by TIO Limited. Under its Memorandum and Articles of Association, TIO Limited is established as a public company governed by a Council and a Board of Directors and funded by its members. The Articles of Association also allow for the creation and amendment of the TIO Constitution and bind the TIO and its members to the constitutional requirements.

The Council is comprised of five representatives from service providers and five consumer representatives, with an independent chairman. The Council provides advice on policy and procedural matters. The Board is comprised of at least eight directors and responsible for financial management and compliance with governance arrangements.

The structure of the TIO scheme ensures it is independent of government, industry and consumer groups.

Inclusion of standards

The TIO scheme is not currently required to comply with any regulatory-based standards. By providing the Minister with the power to make standards, it will enable the Minister to establish a set of framework principles to underpin the TIO's operation. These principles will be consistent with best practice for external dispute resolution schemes and relevant to the telecommunications industry.

The TIO currently complies with the *Benchmarks for Industry-based Consumer Dispute Resolution Scheme* (DIST benchmarks). Since their release in 1997, these benchmarks have become the established standards for guiding effective practices for industry-based dispute resolution schemes, such as the TIO. In recognition of their importance, these six benchmarks are listed in the TLA Bill (proposed ss128(10) of the TCPSS Act) as being factors that must be considered when making a standards determination.

In considering the most effective means of applying standards to the TIO scheme, consideration was given to the following two key factors:

- (1) Comparison with other external dispute resolution (EDR) schemes in operation in Australia.

Under the *Corporations Act 2001*, Australian financial services licensees are required to be members of an Australian Securities Investment Commission (ASIC) - approved EDR scheme. Under the *Corporation Regulations*, ASIC has the power to approve an EDR scheme. These regulations further specify that ASIC must take into account the same seven factors that have been listed in proposed ss128(10) when considering whether or not to approve the EDR scheme.

Since the TIO is an independent telecommunications EDR scheme, comparison with a scheme such as the Financial Ombudsman Service is more relevant than standards that regulate a public sector ombudsman.

- (2) The Commonwealth Consumer Affairs Advisory Council's (CCAAC) is currently reviewing the ongoing relevance and underlying principles in the DIST benchmarks.

The CCAAC commenced reviewing the ongoing relevance and underlying principles of the DIST benchmarks in April 2013. I understand that this review is not expected to be finalised until mid-2014. If there are any changes to the DIST benchmarks as a result of the CCAAC review, these can be included in a timelier manner through the proposed Ministerial determination.

Any determination is a disallowable instrument

A Ministerial determination provides the appropriate balance of flexibility, accountability and responsiveness to change in the telecommunications industry or other EDR schemes. If such a determination is made, it will be disallowable pursuant to section 42 of the *Legislative Instruments Act 2003* and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances. The Minister must also consult with the TIO and industry regulator, the ACMA before making a determination. However, the determination will enable the TIO to be more responsive to change.

2. Ministerial consultation on any determination

The Senate Standing Committee also made reference on page 52 of the Alert Digest (No. 8 of 2013) that there is no requirement for the Minister to consult with any relevant consumer bodies or the public on a determination. Under the provisions in the TLA Bill (proposed ss128(11)), the Minister is required to consult with the TIO and the ACMA before making a determination.

As part of this ministerial consultation with the TIO, industry and consumers groups will be given the opportunity to comment on any determination through their representatives on the TIO Council and TIO Board. It is therefore not necessary to consult these groups again as a separate exercise.

Committee Response

The committee thanks the Minister for this detailed response, though it is disappointing that it was not received before the bill was passed by both Houses of Parliament. The committee notes that the requirement to consult the TIO before making a determination means that the consumer and industry members of the TIO will have an opportunity to comment on any determination and that the disallowance provisions of the *Legislative Instruments Act 2003* will apply. **This information would have been useful in the explanatory memorandum.**

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee, particularly as to whether the content of any ministerial determination is more appropriate for parliamentary enactment and the explanation of any consultation undertaken before a determination is made.

Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013

Introduced into the House of Representatives on 12 December 2013

Received Assent on 28 February 2014

Portfolio: Communications

Introduction

The committee dealt with this bill in *Alert Digest No.8 of 2013*. The Minister responded to the committee's comments in a letter dated 10 February 2014. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2014 - extract

Background

This bill amends Veterans' Affairs and other portfolio legislation to:

- clarify arrangements for the payment of travel expenses for treatment under the Veterans' Entitlements Act and the Australian Participants in British Nuclear Tests (Treatment) Act;
- provide for the more timely provision of special assistance by way of a legislative instrument in place of the current arrangement requiring a regulation;
- ensure that the debt recovery provisions will be applicable to all relevant provisions of the Veterans' Entitlements Act, the regulations and any legislative instrument made under the Veterans' Entitlements Act;
- make technical amendments to provisions in the Military Rehabilitation and Compensation Act that refer to legislative instruments;
- amend the Military Rehabilitation and Compensation Act to replace obsolete references to pharmaceutical allowance and telephone allowance with references to the MRCA supplement;
- rationalise the maintenance income provisions of the Veterans' Entitlements Act by repealing the redundant definitions and operative provisions and aligning the remaining definitions with those used in the social security law; and
- make minor technical amendments.

Legislative Instrument Schedule 1, item 20

The bill makes a number of amendments, which are consequential to the enactment of the *Legislative Instruments Act 2003*. Item 20 relates to the power for the Military Rehabilitation and Compensation Commission to require a person to undergo a medical examination.

Subsection 328(6) provides that the Minister may, by notice in writing, set a limit on the frequency of examinations. Current subsection 328(7), which is being repealed as it is obsolete, provides that a subsection (6) notice is a disallowable instrument for the purposes of (the now repealed) section 46A of the *Acts Interpretation Act 1901*.

It appears to the committee that the proposed removal of subsection 328(7) might give rise to uncertainty as to whether or not a subsection (6) notice is disallowable and this is not addressed in the explanatory memorandum. **The committee therefore seeks the Minister's clarification as to whether a subsection (6) notice will remain disallowable. If so, the committee requests that the bill be amended to clarify this.**

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Minister's response - extract

The Bill has now passed both Houses and is expected to shortly receive the Royal Assent. However, it is appropriate that I address the concerns that have been raised by the Committee's letter.

The Committee sought advice concerning the amendment made by Item 20 of Schedule I of the Bill repealing subsection 328(7) of the *Military Rehabilitation and Compensation Act 2004* (the MRCA).

Section 328 of the MRCA is applicable to all current and former Defence Force members who make a claim or on whose behalf a claim is made under the MRCA. Section 328 gives the Military Rehabilitation and Compensation Commission the power to require the claimant to undergo a medical examination with a medical practitioner of its own choosing.

Subsection 328(6) provides that the Minister for Veterans' Affairs may, by legislative instrument, set a limit on the frequency of examinations.

The repeal of subsection 328(7) removes the obsolete reference to that notice being a disallowable instrument for the purposes of (the now repealed) section 46A of the *Acts Interpretation Act 1901*.

The concern of the Committee was that the proposed removal of subsection 328(7) might give rise to uncertainty as to whether or not a notice issued under subsection 328(6) was disallowable as the issue was not addressed in the explanatory memorandum.

The committee has sought clarification as to whether a legislative instrument made under subsection 328(6) is disallowable and, if so, requested that the Bill be amended to clarify this.

The explanatory memorandum makes it clear that the amendments to the MRCA that were included in Schedule 1 of the Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013 were consequential amendments resulting from the enactment of the *Legislative Instruments Act 2003* (the LIA).

The explanatory memorandum made no specific reference as to whether or not the legislative instrument would continue to be disallowable as the new scheme for legislative instruments put in place by the LIA and the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* provided that all legislative instruments would be disallowable unless they were specifically exempted. Section 44 of the LIA and Schedule 2 of the *Legislative Instruments Regulations 2004* list certain legislative instruments that are not disallowable.

All of the legislative instruments made under the MRCA are disallowable instruments under the LIA with the exception of determinations of warlike or non-warlike service made by the Defence Minister under subsection 6(1).

The amendment was essentially a housekeeping amendment to make a consequential amendment to the MRCA that should have been made when the LIA was enacted.

As there was no change in the disallowable status of legislative instruments issued under subsection 328(6) and other similarly amended provisions of the MRCA, no specific reference to the disallowable status of the instruments was included in the explanatory memorandum for the Bill.

I hope the information I have provided is of assistance to the Committee.

Committee Response

The committee thanks the Minister for his response and notes his advice that the amendment ‘...made no change in the disallowable status of legislative instruments issued under subsection 328(6) and other similarly amended provisions of the [Military Rehabilitation and Compensation Act 2004].’ The committee welcomes the Minister’s confirmation that any ‘notice in writing’ made under subsection 328(6) will be a disallowable legislative instrument (and would not be considered, for example, to be a notice that is administrative in character).

The committee is aware of, and supports, the practice that has developed since the commencement of the *Legislative Instrument Act 2003* of explicitly declaring in the enabling legislation whether or not an instrument (including a ‘notice in writing’) is a legislative instrument. The committee also encourages the practice of including advice in the explanatory memorandum as to whether this is as a result of deeming or a consequence of the character of the instrument. The committee therefore recommends that the Minister considers amending the MCRA to this effect at the next opportunity.

Senator Helen Polley
Chair



The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

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12 FEB 2014

Senate Standing Cttee
for the Scrutiny
of Bills

10 FEB 2014

Senator Helen Polley
Chair
Senate Standing Committee for Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

Telecommunications Legislation Amendment (Consumer Protection) Bill 2013

Dear Senator Polley

I refer to the letter dated 5 December 2013 from the Secretary of the Standing Committee for the Scrutiny of Bills, Ms Toni Dawes, concerning a request for information about two issues identified in the Telecommunications Legislation Amendment (Consumer Protection) Bill 2013 (the TLA Bill). These issues are (1) whether standards for the operation of the Telecommunications Industry Ombudsman (TIO) should be contained in primary legislation rather than in regulatory standards determined by the Minister; and (2) requirements for consultation on these standards.

1. Telecommunications Industry Ombudsman (TIO) Scheme Standards

The Senate Standing Committee has requested further information about why the standards in the proposed amendments (which confer on the Minister the power to determine standards with which the Telecommunications Industry Ombudsman (TIO) scheme must comply) are not included in the primary legislation (that is, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act)).

The main reason for including these standards in a Ministerial determination rather than in the primary legislation is to provide the flexibility to make changes to these standards from time to time in order to ensure they continue to represent better practice. Changes to primary legislation can take some time and are dependent on many factors including the current legislative schedule. Using the proposed approach would still provide scope for parliamentary scrutiny and consultation, but would be more responsive to improvements in practice than primary legislation. Further information on this issue is outlined below.

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The structure of the TIO scheme ensures it is independent of government, industry and consumer groups.

Inclusion of standards

The TIO scheme is not currently required to comply with any regulatory-based standards. By providing the Minister with the power to make standards, it will enable the Minister to establish a set of framework principles to underpin the TIO's operation. These principles will be consistent with best practice for external dispute resolution schemes and relevant to the telecommunications industry.

The TIO currently complies with the *Benchmarks for Industry-based Consumer Dispute Resolution Scheme* (DIST benchmarks). Since their release in 1997, these benchmarks have become the established standards for guiding effective practices for industry-based dispute resolution schemes, such as the TIO. In recognition of their importance, these six benchmarks are listed in the TLA Bill (proposed ss128 (10) of the TCPSS Act) as being factors that must be considered when making a standards determination.

In considering the most effective means of applying standards to the TIO scheme, consideration was given to the following two key factors:

- (1) Comparison with other external dispute resolution (EDR) schemes in operation in Australia.

Under the *Corporations Act 2001*, Australian financial services licensees are required to be members of an Australian Securities Investment Commission (ASIC) – approved EDR scheme. Under the *Corporation Regulations*, ASIC has the power to approve an EDR scheme. These regulations further specify that ASIC must take into account the same seven factors that have been listed in proposed ss128 (10) when considering whether or not to approve the EDR scheme.

Since the TIO is an independent telecommunications EDR scheme, comparison with a scheme such as the Financial Ombudsman Service is more relevant than standards that regulate a public sector ombudsman.

- (2) The Commonwealth Consumer Affairs Advisory Council's (CCAAC) is currently reviewing the ongoing relevance and underlying principles in the DIST benchmarks.

The CCAAC commenced reviewing the ongoing relevance and underlying principles of the DIST benchmarks in April 2013. I understand that this review is not expected to be finalised until mid-2014. If there are any changes to the DIST benchmarks as a result of the CCAAC review, these can be included in a timelier manner through the proposed Ministerial determination.

Any determination is a disallowable instrument

A Ministerial determination provides the appropriate balance of flexibility, accountability and responsiveness to change in the telecommunications industry or other EDR schemes.

If such a determination is made, it will be disallowable pursuant to section 42 of the *Legislative Instruments Act 2003* and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances. The Minister must also consult with the TIO and industry regulator, the ACMA before making a determination. However, the determination will enable the TIO to be more responsive to change.

2. Ministerial consultation on any determination

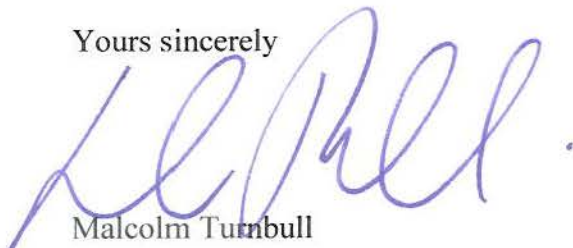
The Senate Standing Committee also made reference on page 52 of the Alerts Digest (No. 8 of 2013) that there is no requirement for the Minister to consult with any relevant consumer bodies or the public on a determination.

Under the provisions in the TLA Bill (proposed ss128(11)), the Minister is required to consult with the TIO and the ACMA before making a determination.

As part of this ministerial consultation with the TIO, industry and consumers groups will be given the opportunity to comment on any determination through their representatives on the TIO Council and TIO Board. It is therefore not necessary to consult these groups again as a separate exercise.

If you require any additional information, please contact Mr Duncan McIntyre, Assistant Secretary, Consumer and Post by email at duncan.mcintyre@communications.gov.au or by telephone on 02 6271 1188.

Yours sincerely



Malcolm Turnbull



Senator the Hon. Michael Ronaldson

Minister for Veterans' Affairs
Minister Assisting the Prime Minister for the Centenary of ANZAC
Special Minister of State

Ref: M14/0501

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

RECEIVED

- 4 MAR 2014

Senate Standing C'ttee
for the Scrutiny
of Bills


Dear Senator Polley,

I refer to the Committee Secretary's letter of 13 February 2014 advising of the Committee's comments relating to the Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013 (the Bill). I note that the Committee has raised concerns about an amendment made by the Bill in its *Alert Digest No. 1 of 2014*.

The Bill has now passed both Houses and is expected to shortly receive the Royal Assent. However, it is appropriate that I address the concerns that have been raised by the Committee's letter.

The Committee sought advice concerning the amendment made by Item 20 of Schedule 1 of the Bill repealing subsection 328(7) of the *Military Rehabilitation and Compensation Act 2004* (the MRCA).

Section 328 of the MRCA is applicable to all current and former Defence Force members who make a claim or on whose behalf a claim is made under the MRCA. Section 328 gives the Military Rehabilitation and Compensation Commission the power to require the claimant to undergo a medical examination with a medical practitioner of its own choosing.

Subsection 328(6) provides that the Minister for Veterans' Affairs may, by legislative instrument, set a limit on the frequency of examinations.

The repeal of subsection 328(7) removes the obsolete reference to that notice being a disallowable instrument for the purposes of (the now repealed) section 46A of the *Acts Interpretation Act 1901*.

The concern of the Committee was that the proposed removal of subsection 328(7) might give rise to uncertainty as to whether or not a notice issued under subsection 328(6) was disallowable as the issue was not addressed in the explanatory memorandum.

The committee has sought clarification as to whether a legislative instrument made under subsection 328(6) is disallowable and, if so, requested that the Bill be amended to clarify this.

The explanatory memorandum makes it clear that the amendments to the MRCA that were included in Schedule 1 of the Veterans' Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013 were consequential amendments resulting from the enactment of the *Legislative Instruments Act 2003* (the LIA).

The explanatory memorandum made no specific reference as to whether or not the legislative instrument would continue to be disallowable as the new scheme for legislative instruments put in place by the LIA and the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* provided that all legislative instruments would be disallowable unless they were specifically exempted. Section 44 of the LIA and Schedule 2 of the *Legislative Instruments Regulations 2004* list certain legislative instruments that are not disallowable.

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The amendment was essentially a housekeeping amendment to make a consequential amendment to the MRCA that should have been made when the LIA was enacted.

As there was no change in the disallowable status of legislative instruments issued under subsection 328(6) and other similarly amended provisions of the MRCA, no specific reference to the disallowable status of the instruments was included in the explanatory memorandum for the Bill.

I hope the information I have provided is of assistance to the Committee.

Yours sincerely,

SENATOR THE HON. MICHAEL RONALDSON

26 FEB 2014