



Response to Senate inquiry regarding the adequacy of protections for the privacy of Australians online

Submission by the Australian Communications Consumer Action Network
to the Senate Standing Committee on Environment, Communications and
the Arts



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The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will activate its broad and diverse membership base to campaign to get a better deal for all communications consumers.

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Introduction

ACCAN is committed to protecting and promoting the privacy of communications as a critical aspect of our vision for available, accessible and affordable communications for all Australians.

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.

Privacy issues also occur in an international context, making them complex to deal with. International coordination is crucial, as is development of both international and domestic frameworks that are based on international best practices.

This submission highlights privacy complaint paths, an area in which we have recently conducted research through our Grants Scheme¹. The privacy complaints research, conducted by the University of New South Wales Cyberspace Law and Policy Centre, will be publically released shortly (a full copy will be forwarded to the Senate Committee). This submission summarises the report's key findings and recommendations.

Effective and efficient privacy complaint paths are essential

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, as are complaint paths.

Privacy Complaints Research project

The study examined and compared 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.

¹ More information on ACCAN's Grant Scheme can be found at <http://www.accan.org.au/grants.php>

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 aim of the study was to analyse and compare the three complaints paths, and then develop recommendations for a more straightforward, fairer system for managing complaints in the sector which optimises outcomes for consumers.

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 (OPC, ACMA and 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.

Disparity in complaint numbers across complaint bodies

The research found that there is an obvious disparity in the number of complaints received by the three complaints bodies:

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.

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.

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. None of the three complaints bodies 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.

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 are basically in the same circumstances as other complainants, including where complaints are made/lodged 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 in 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. 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.

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 MOU 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).