COMMUNICATIONS
ALLIANCE LTD

Telecommunications Industry Ombudsman Draft Terms of Reference

COMMUNICATIONS ALLIANCE SUBMISSION

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EXECUTIVE SUMMARY

Communications Alliance and its members respect the Telecommunications Industry Ombudsman's (TIO) ongoing work to provide independent dispute resolution to consumers and providers of carriage services, and understand that the TIO's Terms of Reference (ToR) need to be updated periodically to ensure they are able to continue providing appropriate, targeted, and effective support.

However, we have significant concerns about a number of the proposed changes to the ToR. Many of the proposed changes are substantial, with impacts throughout the economy, and should have been consulted on in more detail prior to proposing new language. Additionally, there are numerous changes made to the proposed ToR that were not mentioned in the consultation paper, and we are concerned that this oversight may mean the TIO and its Board will not receive full and accurate input on the proposed changes.

Our submission is extensive and detailed, with the goal to provide constructive feedback on all proposed changes, and on the TIO's remit within the quickly evolving 'connected world.'

Our main concerns with the proposed ToR are summarised here.

Expansion of jurisdiction/remit: It is not the place for the TIO to attempt to change its remit beyond that which is set by its authorising legislation. The expansion to devices as specifically canvassed in the consultation paper will create imbalanced consumer protections and have a chilling effect on the market, and the other changes included in the proposed ToR are extensive, going beyond not only its authorising legislation, but its ability to effectively conciliate and resolve complaints.

We are aware that there is a need to acknowledge and adapt to the increasing complexity of the market, but this needs to be done via extensive consultation with all stakeholders - including bodies that have potentially overlapping jurisdictions – to design a framework within which each dispute resolution body clearly sits. This cannot be done via a near-unilateral revision to the TIO's ToR.

Compensation changes: Raising the limit of compensation the TIO can determine to $100,000 doubles the established precedent both within the industry and of comparable dispute resolution bodies and tribunals, and is in opposition to the Government's Key Practices for Industry-based Customer Dispute Resolution. Additionally, adding non-financial compensation to the powers of the TIO will create significant risk for the Scheme.

Added focus on 'policy role': The TIO's attempted expansion into a policy and regulatory space will negatively impact its ability to act as a respected and independent dispute resolution body. The factual input the TIO can and does provide to policy work is invaluable and should continue, but developing into an advocacy organisation is contrary to the goals set by its authorising legislation and the vital underlying independence of the organisation.

Changes to Board and Ombudsman powers in management of the scheme: There are multiple changes proposed to this section that we are concerned about, but our principal issue is with the blurring of the lines between the roles of independent Ombudsman of the Scheme and CEO of the Company who is answerable to a Board. It is not appropriate for the Board to abrogate its responsibilities to manage the operations of the company in the interest of the Ombudsman's 'independence,' as that independence is not related to their activities as CEO of the company.

Assigning multiple parties to a complaint: While we do not have a comment on the overarching principle of this proposal (but do raise a number of practical implementation issues that need to be resolved before any such change is made), the TIO's choice to begin doing such per their website[1] prior to the conclusion of this consultation and revision of Terms of Reference is inappropriate.

[1] https://www.tio.com.au/about-us/policies-and-procedures

Finally, Communications Alliance's members have ongoing concerns about a lack of consistency in the TIO's application of their current ToR and other rules, and a tendency towards opacity in operations. Neither of these align with the Government's Benchmarks or generally understood good practice. To achieve Benchmark 6, Effectiveness, the Key Principles state a dispute resolution scheme will have in place an internal complaints function to address these types of issues, which we strongly recommend adding.

We would like to reiterate our ongoing support for the TIO as an independent dispute resolution scheme, and appreciate their interest in ensuring their Terms of Reference are fit for purpose, but consider that many of the proposals in the proposed ToR will ultimately negatively impact the TIO's operations, efficacy and standing.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see http://www.commsalliance.com.au.

INTRODUCTION

Communications Alliance strongly supports the Telecommunications Industry Ombudsman (TIO), and we do not object to its desire to provide as comprehensive as possible an external dispute resolution framework for telecommunications consumers and small businesses. As stated in our submission to Part A of the Consumer Safeguards Review, the TIO is at present a widely respected body, supported by consumers and Industry as an independent arbiter."[2]

However, the proposed Terms of Reference (ToR) go beyond its legislative remit in multiple ways, and will have a negative impact on its functioning as an independent complaints resolution body.

The TIO has referenced the Government's Benchmarks for Industry-based Customer Dispute Resolution and associated Key Practices in its consultation paper and in the Terms of Reference themselves, but unfortunately those Benchmarks and Key Practices are not quite being reached, both in current operations and in the proposed ToR. We particularly see that there could be improvements to align closer with Benchmark 4 (Accountability) and Benchmark 5 (Efficiency), and reference back to the Key Practices throughout this submission.

We appreciate opportunity to offer our comments on the proposed ToR, and see this as an excellent opportunity for the TIO to more closely align with those Benchmarks.

However, we are disappointed that there wasn't opportunity to provide input on the topics to be changed prior to the stage of the proposed ToR, as there are many substantive changes proposed that may have been more appropriate to discuss in principle before proceeding to the stage of discussing detailed text.

Additionally, we have noted that there are numerous other changes proposed in the ToR not mentioned in the consultation paper or the comparison of clauses provided. To be more transparent in its intent, the TIO should have drawn attention to all of the changes made to the ToR and made the case for the need for change.

In this submission, we discuss both the Questions for Consultation and the impacts of the other proposed changes. We have addressed both principle and text changes in the paper – noting that some text changes created principle/operational changes that may not have been intentional, but those unintended changes must be considered regardless.

We strongly recommend further consultation on some of the key principle/approach changes prior to continuing with revision of ToR.

This submission does canvass specific and very detailed language, which may seem unnecessary – however, the detailed language is extremely important because our members have unfortunately encountered many circumstances where the TIO has attempted to expand their remit via any 'grey areas' in their existing ToR/Constitution, and in fact we have seen numerous circumstances in which the TIO takes actions that are in direct opposition to clear statements in the current ToR.

Additionally, although current Ombudsman and staff may have clear intentions for the language in the proposed ToR, it is important that the ToR is clearly established for all parties who read it – consumers, industry, regulators, etc – and that it remains clear in the coming years.

Finally, we are concerned that TIO appears to be acting upon these changes before they are voted on. There are two main examples, the first being that the TIO's website currently states that they can assign complaints to multiple members: "In some cases, we may decide that a complaint needs to be registered to two Providers."[3] The second is that we have seen ongoing expansion of focus and activity in systemic investigations not directly related to complaints/specific members in recent times.

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[2] Communications Alliance Submission to Part A, p 8
https://www.commsalliance.com.au/__data/assets/pdf_file/0016/61090/Comms-Alliance-Consumer-Safeguards-Review-Part-A-Submission-SUBMITTED.pdf

[3] https://www.tio.com.au/about-us/policies-and-procedures

QUESTIONS FOR CONSULTATION

Small Business

Questions for consultation:

Q1 Is the proposal to link the small business definition to the Australian Consumer Law the most appropriate test to use, or is there a better definition? What else should we consider when deciding whether a small business consumer is eligible to access our scheme?

We agree it will be helpful to have an established definition, versus the current practice of publishing a policy separate from the ToR.

We also agree it would be appropriate to align the definition with the Australian Consumer Law (ACL) – however, that is not exactly the solution being proposed, which we do not believe to be the appropriate test.

The Telecommunications Consumer Protections (TCP) Code, Complaints Handling Standard and other instruments have all been drafted to align with the ACL definition of Consumer (which clearly states which 'small businesses' are covered).[4]

The small business aspect of those definitions is based on the telecommunications 'spend' of the entity in question and their opportunity to negotiate the terms of the customer contract – both factors which should be included in the TIO's definition.

We strongly recommend the TIO do the same, because regulatory consistency is key for clarity and efficient operation by all stakeholders. The Complaints Handling Standard and the TCP Code are the two regulatory/co-regulatory instruments that most impact the TIO's daily work. Those two instruments, along with the main consumer protection law in Australia, have aligned definitions for what small businesses are covered. It would seem a bit unreasonable for the TIO to vary significantly from this.

Additionally, the TIO fills a perceived gap in telecommunications consumer protection by helping customers who do not have other reasonable options for redress. Possession of a reasonable opportunity for the customer to negotiate the terms of their supplier contract is a reasonable indicator that they have sufficient commercial power and would not need this type of support.

Adopting this consistent approach would mean that the definition of 'small business and not-for-profit' in the ToR would in fact be combined with the definition of Consumer.

As an additional note - the definition should be based on but not automatically link to the definition in the ACL – i.e., so updates to the ACL do not automatically transfer through to the TIO's ToR. The other instruments referenced take this approach, as it is important to ensure that any updates or changes only happen after consultation on their specific impacts for the use in question (in this case, to determine the TIO's remit).

Addressing the Unfair Contract Terms (UCT) proposal

The UCT section of the ACL in fact does not define small business, but specifically defines what a "small business contract" is.

The TIO acts as a dispute resolution service for the supply of goods and services. While at times those disputes may touch on contracts, underlying contract terms are not central to the TIO's remit. Additionally, the TIO cannot declare a contract term to be unfair, as per the ACCC "only a court or tribunal can determine whether a term is unfair."[5]

Also, we note that the TIO's proposal does not actually align directly with the UCT definition. While the TIO is proposing to align with the maximum number of full-time employees (currently 20 persons), it does not include the upfront price/contract duration qualifications. Only using the number of employees also does not align with the practices of other dispute resolution schemes, such as the Small Business and Family Enterprise Ombudsman which

[4] These definitions are all referenced in Appendix 1 of this submission.

[5] https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms/determining-whether-a-contract-term-is-unfair

takes into account both turnover and employees,[6] or the Energy & Water Ombudsman NSW that bases its consideration of if a small business falls within their remit on consumption, employees, turnover, and the capacity of the customer to seek redress without the Ombudsman's assistance.[7] What makes a business 'small' differs depending on the context, but is always a complex question that cannot solely be addressed by the number of employees.

Ultimately, the ACL has a clear definition of consumer and small business that is directly relevant to the TIO's remit of dispute resolution for telecommunications customers – the sub-section on UCT is separate to this, and not the appropriate reference for the TIO's ToR.

If the TIO does not wish to align with the definition used across the relevant telecommunications regulations, then there is no established need to change the definition, and it should remain as is.

Related matters:

Impact of definition on 'fair and reasonable'

If the TIO is judging actions taken by a member against a particular piece of regulation (e.g. TCP Code or the Complaint Handling Standard), then they should determine these actions against the specific definitions under that regulation. E.g. if an RSP treats the complaint of a business differently because they don't fit the definitions under the Complaint Handling Standard, then it would be reasonable for the TIO to take that into consideration when assessing the complaint.

Impact of service type on complaint handling

While not directly related to the definition of small business, this topic does raise the question about how the type of product a business has taken should impact their reasonable expectations of their provider.

Noting the TIO's recent publications on this topic, we would like to raise that the TIO should take into account whether a business has purchased a consumer-grade product for business use (and if so, if they have notified their telco they are a business) when considering compensation for business loss. In line with this, there should be a component that acknowledges the business customer's due diligence to disclose to RSP that they are using the service for a business and that despite this the customer has chosen to take a consumer grade product in order to avail themselves of a lower cost, noting that as a consequences of this it may not be appropriate for them to complain at a later date about features of that consumer grade product that make it unsuitable for their business use. If a service is being used for a reason apart from its advertised or intended purpose, compensation should not be considered for that other use.

Additionally, we feel that these discussions should require a reasonable level of evidence. We are concerned that customers may be able to claim that they are a business and thus receive different treatment and/or recommendations from the TIO, without providing any proof that this is the case.

We raise this because our members regularly encounter customers using residential services for business, who when purchasing the plan were unwilling to enter into a business level plan, but ultimately hold the same expectations as businesses who have done so.

[6] Australian Small Business and Family Enterprise Ombudsman Act 2015, Part 1 Section 5 https://www.legislation.gov.au/Details/C2019C00109

[7] https://www.ewon.com.au/page/making-a-complaint/what-can-i-complain-about

Increase in Compensation Limit

Questions for consultation:

Q2 Is $100,000 an appropriate financial limit for Telecommunications Industry Ombudsman decisions?

Q3 If not, what would be the more appropriate financial limit for Telecommunications Industry Ombudsman decisions and why?

Q4 Should we include a financial limit for non-financial loss compensation? If so, what is an appropriate financial limit?

Financial Limit:

$100,000 is absolutely not an appropriate financial limit for TIO decisions, and the limit should remain at $50,000. We are concerned that this extremely significant change was presented in the consultation paper as 'for simplicity' – the Recommendation power in the current ToR is very different than a Determination power. The consultation paper also does not present any consumer protection gap or other reason to make such a consequential change.

6.2 of the Government's Benchmark Key Practices states that "The scope of the office (including the decision-maker's powers) is sufficient to deal with…complaints involving monetary amounts up to a specified maximum that is consistent with the nature, extent and value of customer transactions in the relevant industry."[8]

Considering that the small business limit in the TCP Code and related ACMA rules is up to $40,000 annual spend, and individual customers spend significantly less, the $50,000 limit is already higher than the benchmarks would recommend. Additionally, per the TIO's Annual Report, the median value of decisions for the 18/19 FY was $405.[9]

If we examine other utility ombudsmen, the TIO already has higher limits than most. EWOV and WA Energy and Water Ombudsman have limits of $20,000 unless all parties agree to $50,000[10], EWON uses the 'Monetary Limit' applicable to NSW Civil and Administrative Tribunal ($40,000) or larger amount (not exceeding $50,000) to which the Member has agreed for a Complaint,[11] and New Zealand Telecommunications Dispute Resolution Scheme only accepts claims of $15,000 or less.[12]

In the consultation paper, the TIO does reference decisions that may be more appropriately dealt with by a court as "the issues in dispute are likely to be more complex."[13]

This is an important point, as due to limited oversight, TIO not being bound by letter of the law or rules of evidence, and lack of published precedents, the TIO should not be able to make determinations that reach into levels of courts.

Instead, tribunals (and small claims courts) are comparable. Examples around Australia vary, but they all have limits far below $100,000:

- NSW NCAT is $40,000
- Queensland QCAT consumer and trader disputes is up to and including $25,000
- ACT ACAT is $25,000
- Tasmania Civil Court is up to $5,000 for minor, $50,000 for civil – more than $50,000 if al parties agree
- NTCAT is up to $25,000.

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[8] Key Practices for Industry-based Customer Dispute Resolution, Australian Government: The Treasury, p 21 https://treasury.gov.au/sites/default/files/2019-03/key_pract_ind_cust_dispute_resol.pdf

[9] Telecommunications Industry Ombudsman Annual Report 2018-19, p 21. https://www.tio.com.au/sites/default/files/2019-09/TIO%20Annual%20Report%202018-19.pdf

[10] Energy and Water Ombudsman Victoria Charter, p 10 https://www.ewov.com.au/files/ewov_charter_140318.pdf

[11] Energy and Water Ombudsman NSW (EWON) Charter, p 3 https://www.ewon.com.au/content/Document/About%20us/EWON-Charter.pdf

[12] https://www.tdr.org.nz/making-a-complaint/types-of-disputes-covered

[13] Draft ToR Consutlation Paper, p6

Increasing the TIO's compensation limit to $100,000 would be contrary to established good practice for dispute resolution schemes and tribunals.

Non-financial loss:

The TIO should not be able to award compensation for non-financial loss.

Similar to the TIO's statement about the complex issues in dispute for large settlements, the issues in question for non-financial loss are not only complex, but would appropriately require provision of evidence by the customer that the TIO does not typically request.

Adding non-financial loss would create an unnecessary burden of proof which is challenging for all parties involved, and is best left to the courts or bodies with enhanced quasi-judicial capabilities.

Additionally, we have ongoing concerns with the lack of consistency in decisions by different levels of officers at the TIO. Adding the subjectivity of non-financial loss would raise serious risk for the TIO in light of those concerns.

<u>If non-financial loss is implemented:</u>

If, despite the significant risks this would present to the organisation, the TIO chooses to move ahead with this proposal, there would need to clear guidance and transparency on calculations.

The ToR must be much more specific around the circumstances in which it would be appropriate. For example, AFCA's Rules provide details about when they consider non-financial loss to be appropriate,[14] as does EWON.[15]

The ToR and all guidance to consumers and staff must clarify that this is not for punitive damages – per 6.3 of the Benchmark Key Practices.[16]

To ensure transparency, there must also be written documentation – provided to all parties - on exactly how the amount is calculated for each case, including clear and transparent reasoning. Considering the subjectivity of this issue, all non-financial loss awards must also be reviewed by the Ombudsman or Deputy Ombudsman before being finalised.

It is also important that the TIO clearly takes into account the cause of any 'non-financial' loss. At times, consumers can experience significant frustration resulting from circumstances that the relevant TIO member has no control over, whether that be from other members of the supply chain, or from a customer not taking the steps required for remediation.

There should absolutely be an established limit, but it cannot be used as a standard resolution request.

When considering what the limit might be, we looked at AFCAs rules. They limit non-financial loss to $5,000. The other claims they deal with regard significantly larger sums, up to $2 million but with a limit for most claims of $500,000. If we consider the proportionate amounts, that would set the appropriate non-financial loss limit for the TIO at only $10.

In light of this, $100 would be a proportionate limit.

Additionally, the TIO should provide flexibility on the form of compensation payment – for example, it may more appropriately include a credit against future services as opposed to a cash payment.

If this proposal is to move ahead, we strongly recommend further consultation on these details – potentially at an AGM - to ensure all TIO members have the appropriate opportunity to discuss the legal and commercial ramifications of such a significant change.

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[14] Australian Financial Complaints Authority (AFCA) Complaint Resolution Scheme Rules, 25 April 2020, p 39 https://www.afca.org.au/media/907/download

[15] EWON Charter, p 7

[16] Key Practices, p 21

Additional issue:

The proposed 2.33(e) states that the TIO can require a member to "pay compensation to reimburse the consumer or occupier for the expense of having to deal with the situation or complaint." This is entirely new and could have significant impacts on the overall costs of complaints. This change should not be made at this time, and further consultation and research should be undertaken on the impacts of such a proposal.

Remit for Complaints

Questions for consultation:

Q5 Are there any other things the Telecommunications Industry Ombudsman should consider when updating our remit for complaints?

Q6 Are there any particular devices and equipment that should be explicitly excluded from or included in the Telecommunications Industry Ombudsman's remit? If yes, what are these and why?

The complaint remit should not be expanded any further than the current remit.

This includes the proposed expansion to devices and equipment, but also other changes in the proposed ToR.

We are extremely concerned that the TIO feels it is appropriate to 'update' their remit, as it is clearly established in its authorising legislation.

Appropriate remit

The appropriate remit for the TIO is quite simply what is stated in its authorising legislation: "complaints about carriage services by end-users of those services." This is also stated in the TIO's Constitution: "Carriage Service" – "other than complaints in relation to the general telecommunications policy or commercial practices."

The consultation paper references the Government's Benchmarks and Key Practices as a reason to expand. However, the Key Practices specifically state 'the relevant industry or *service area*' – despite being named the Telecommunications Industry Ombudsman, the 'service area' in the TIO's remit is carriage services, which are a distinct subset of the range of services provided by the telecommunications industry.

The TIO exists to address unique issues in carriage services, due to the uniqueness of a carriage service (as opposed to broader consumer protection framework that covers most other goods and services in the economy). Where a product or service does not involve the supply of a carriage service (or the statutory land access powers for the purpose of installing or maintaining a carriage service), that rationale – for a unique ombudsman for this space – no longer exists.

The Constitution also allows for "other complaints as may by agreement with the complainant be referred to the Ombudsman by a Member, exercise such jurisdiction, powers and functions as may be conferred by or under any legislation or instrument."

However, if jurisdiction and functions are conferred under other legislation or instruments, then the TIO must conciliate and decide complaints under that remit per that specific instrument, as that jurisdiction does meld with its 'fair and reasonable' remit under legislation.

Clarity of remit

Clarity of remit for the TIO is absolutely vital, as we are seeing melding of telecommunications with almost all aspects of our lives, and we are also seeing RSPs provide a range of services such as electricity, managed IT infrastructure, and non-telecommunications devices.

Additionally, with the current consultations on the outcomes of the Digital Platforms Inquiry – which we understand has opened the possibility of the TIO taking on complaints in that area – there will need to be clear lines between complaints handled through any new powers out of that process, complaints about carriage services, and other powers conferred on the TIO.

This importance is also expressed in the Benchmark's Key Practice 1.13, which is that "The jurisdiction of the office is expressed clearly."[17]

Issues with current remit

There are currently problems with the existing remit, that we strongly recommend the TIO and Board consider and look to resolving as part of this ToR revision.

These include the TIO's practice of accepting Billing complaints for anything on a carriage service Bill. While we understand why this practice was originally put in place, with increasing convergence of telecommunications with other services, this needs to be recanvassed (see dot point in next section on overlap with other ombudsmen schemes)

Additionally, our members often encounter inconsistency in how the TIO applies their current remit, with numerous complaints accepted that should clearly be excluded (for example – cabling beyond the network boundary).

Issues with proposed changes – specific topics

While the expansion to devices and equipment is canvassed in the consultation paper, there are numerous changes in the proposed ToR that expand remit.

We have commented on those specific text changes in the relevant section of this submission ('Our complaint handling jurisdiction'), but discuss the larger principles here.

First, it is important to consider if there is a need for these changes. There are already extensive consumer protection rules that cover these issues, and this proposal is trying to fill a gap that does not exist. With the existence of state-based consumer tribunals and courts, there are well established mechanisms for enforcement of rights

Expanding the remit to devices or other non-carriage service offerings will have negative impacts across the economy.

It creates duplicative consumer protections, resulting in two different consumer protection spaces depending on where consumer purchases/obtains device, email address, etc. E.g., if one consumer purchases a phone at JB Hi-fi and another purchases it from an RSP, they should both have the same rights via the ACL and their state consumer protection agency.

It also has a dampening effect on competition by creating an unfair market. TIO members should be able to compete in the supply of these devices and services on the same grounds as companies who are not members of the TIO.

Many of these spaces (IOT, digital services such as emails, etc) are part of a larger conversation on regulation and consumer protections in evolving markets. We understand that discussions with a range of stakeholders – including ACCC, state based consumer tribunals, other ombudsmen and other industries need to happen on these topics, but it is not appropriate for TIO to lead this, as they are neither a regulator or policy body, and certainly not to unilaterally make changes in this space.

Finally, the TIO needs to consider its practical ability to implement these proposed changes. The TIO does not have the ability to enforce against participants outside of the carriage service space, as only Carriers and CSPs are required to join the scheme per Part 6 of the TCPSS Act 1999.

Connected Devices and Equipment

When considering the TIO's expansion, it is important to look at if there are established existing protections.

The ACCC already provides guidance on mobile device protections under the ACL, clearly establishing that these fall under their jurisdiction, and thus that of state consumer protection bodies.[18] While we understand that the TIO's current remit includes 'related' devices and equipment – such as a mobile phone – the inclusion of mobile devices in that guidance

[17] Ibid., p 8

[18] Guidance on the consumer guarantee as to acceptable quality and 'durability', Australian Consumer Law, ps 3, 11 https://consumerlaw.gov.au/sites/consumer/files/inline-files/ACL-guidance-durability_0.pdf

means that if they – directly used for telecommunications services – are covered by the ACCC and can be addressed by state bodies, then clearly other connected devices that are not used for the purpose of accessing a carriage service are also covered.

Beyond that, complaints about a device that is used for the primary purpose of accessing the carriage service supplied by the same organisation is extremely different from devices which make use of the carriage service, but are not the primary means for accessing it.

There are multiple factors in how a device connects to the internet (internal cabling, internal Wi-Fi, Bluetooth, etc) that could impact it that the RSP has no oversight over or knowledge of – and thus no ability to help resolve. Not only is it not appropriate for the TIO to expand to this space, but in light of that disconnect, complaints resolution expecting the RSP to be able to help with these issues will be ineffectual.

Also, in considering an expansion into the IOT space, we note that the ACMA recently published a paper canvassing the regulatory environment, and did not envision the TIO playing a dispute resolution role at this time.[19]

Finally, by extending into this space, the TIO opens up many other questions. For example, there are numerous scenarios (that must be excluded) where a telecommunications provider will supply telco service (i.e. SIM card) to a third-party provider, who then provides to a consumer as part of that device – for example, SIM cards used in IoT devices. In those cases, the RSP has no relationship with the consumer and is not responsible for the equipment. Any issues with the carriage service need to be resolved between the IOT device provider and RSP as part of their commercial relationship, as the carriage service is a service provided for resale. If customer has issue with that device or any related service, their issue is with the device provider and can be raised via the standard procedures under the ACL. We have proposed specific text clarifications to address this scenario in the section of this submission on Part 2 of the proposed ToR, but it is yet another example of why an expansion beyond the direct carriage service and consumer relationship is not appropriate.

Over time, almost everything will become a connected device. If the TIO proposes to expand to all connected devices, there is a significant risk that its remit will become unmanageable and overtake the established roles of the state consumer protections tribunals.

We note that the IoT Alliance Australia has made a submission on this topic, and while we have not sighted the final submission, we strongly encourage the TIO and the Board to give due consideration to the expertise of that body in considering the complex commercial and regulatory aspects of the IoT space.

Other devices

The proposed ToR also expand the TIO's remit by adding "customer equipment that is not for the purpose of accessing the service" (removing 2.10e in current ToR, added via 2.2 b in proposed ToR).

This is unquestionably problematic, per the points above on current consumer protections, preventing RSPs from competing in other markets, and going significantly beyond the TIO's legislative remit.

Email

The loss of an email is a substantive addition to the ToR. Emails are not a carriage service, they are an over the top service offered and sold by a range of companies not required to join the TIO (in fact, the majority of email providers are not members of or in any way connected to the TIO.

While we understand that email is an important service, there is no rights of use associated with an email address in the same manner as rules that apply to public numbers. The supply

[19] Internet of Things in media and communications occasional paper, ACMA, https://www.acma.gov.au/sites/default/files/2020-07/Internet%20of%20Things%20in%20media%20and%20communications_Occasional%20paper.pdf

of an email service is at the discretion of the supplier and subject to commercial terms and conditions which may vary at any time.

Although the TIO has previously accepted complaints about loss of access to an email service *when the member has requested or agreed*, this is very different from formally expanding the TIO's remit.

It is inappropriate to consider emails as subject to any conditions that the TIO might seek to impose as part of a complaint resolution and is not appropriate for this inclusion in the Terms of Reference.

Cabling

Under the current TOR, clause 2.7(b) states that the TIO will handle complaints about "cabling up to the consumer's first telephone that is part of a TIO member's telecommunications network". Clause 2.10(f) of the current TOR further reaffirms that the TIO do not handle complaints about "cabling beyond the end of a telecommunications network".

The proposed ToR removes this clarification, without any explanation or reasoning. Cabling that is not related to the service equipment or network infrastructure is not under an RSP's purview. They have no commercial relationship with it and no ability to control it.

While there is significant education being undertaken by regulators and providers to help customers understand how cabling can impact their service, many things in the home can impact a customer's experience. For example, brick or other solid walls are known to have impacts on wi-fi reach in the home, and yet this is not something that an RSP could reasonably be expected to address a complaint about.

The 000 Emergency Service

The current ToR excludes the 000 emergency service under 2.10(i). This exclusion is removed from the proposed ToR, but the definition of "telecommunications service" in the new ToR excludes the triple zero service.

We assume this means that the TIO will continue excluding the 000 service under their ToR, but consider that clarity should remain in the section on the TIO's jurisdiction in the ToR.

Potential addition

In considering the TIO's remit, we note that EWOV will not take complaints about "events beyond the company's reasonable control,"[20] and recommend the TIO add this clarification to their ToR. This would not only provide significant clarity for members, but would also assist consumers by ensuring their complaints are only heard in forums able to take or direct actions that can resolve their problem.

Overlaps with other Ombudsman Schemes

These comments are in relation to both the current remit and proposed expansion.

As noted earlier in this submission, currently the TIO accepts billing complaints for non-carriage services on a carriage service bill. While we have had concerns in the past, we have not ardently advocated against it. However, as we are seeing more combinations of services where there is (or may be) another more appropriate ombudsman.

For example, some RSPs are now also offering bundled electricity services (overlapping with the state electrical/utility ombudsmen), and there are already existing overlaps with AFCA and the OAIC.

While there is an established rule regarding overlap with the OAIC,[21] it is unclear how that interacts with the TCP Code provision on privacy rules, or if the TIO is strictly abiding by the current delegation from the OAIC.

[20] https://www.ewov.com.au/complaints/complaints-we-can-and-cant-take

[21] https://www.oaic.gov.au/privacy/privacy-registers/recognised-edr-schemes-register/

On the whole, there needs to be clarity on exact procedures for issues that can or have been dealt with by other ombudsmen or similar bodies.

This needs to be result of discussions/consultations with ACCC, industry, OAIC, utility ombudsmen, and other stakeholders, and not a unilateral change resulting from the TIO's revisions to the ToR.

In light of these overlaps, and particularly prior to a clear structure and delineation being put in place, there should be questions asked to consumers upon complaint lodgement about other complaint handling bodies they may have been to.

We note that there is guidance in the Benchmarks Key Practices on this topic, including that the TIO should have mechanisms for referring complaints and that the office will liaise with other forums.

Joining Multiple Members to a Complaint

Questions for consultation:

Q7 What issues are raised by joining more than one member to a complaint and how can we address these issues?

Members have differing viewpoints on the overall principle of this proposal, so CA does not have a comment on the change as a whole. That being said, there are shared queries about implementation, discussed here.

We do have a concern about the comment in the consultation paper that this will allow the TIO "to call on stronger powers" – this proposal does not change the powers of the TIO to direct members to take actions (which they currently do per 3.21 – 3.24 in current ToR), it only has an impact on fees and data recording. If the TIO is considering changing their powers as implied by that statement, those changes need to be clearly explained and further discussed, because the proposed draft does not change those powers.

It is also problematic that the TIO is already listing this ability on its website: "In some cases, we may decide that a complaint needs to be registered to two Providers."[22] This is different from the current ToR and appears to be a unilateral – not consulted on or Board approved – change in procedure.

Issues to be further consulted on:

The key challenge will be determining appropriate fee structure and data attribution – including determining who is at fault for the complaint.

Clarity on these issues is particularly necessary due to the following circumstances.

- Ongoing concerns about the TIO mis-attributing inappropriate churn complaints to the losing provider.
- The TIO's approach to let a consumer raise a complaint against whomever they choose – which is not appropriate for the 'fairness' of the scheme.
- The TIO previously accepting complaints from non-customers (for example, a complaint about construction in someone's street) – which is also outside of its legislation, which covers the end users of the relevant carriage service.

Fee structure:

Regardless of what 'structure' is finalised, fees should not be multiplied (same fee levied against members regardless of the number of members joined to a complaint). This could lead to a perception of an inappropriate financial incentive for assigning complaints to multiple members.

[22] https://www.tio.com.au/about-us/policies-and-procedures

There must be transparency in fee calculation (noting that we already have significant concerns about the lack of transparency in this space) – if the TIO is to charge multiple parties, all of the parties need to be able to reconcile those charges and understand how they are calculated.

We note that our members' views on how this should be structured vary, including some who think it should be divided equally across any member assigned and others who view that the fee should be attributed to the member at fault, as members should not be penalised if they are only assisting with a resolution but have not contributed to the issue. Comms Alliance has no particular view on this at this time.

Data

The TIO needs to clearly and transparently explain how complaints will be attributed to each member, and how this will be done while also retaining continuity of complaints data over the years.

Other issues

We note that there are numerous details in the current ToR about the operations of a complaint when there are multiple members involved (3.21 – 3.24) that have been removed. It may be appropriate to retain this level of detail in the new ToR.

Regarding acceptance of a complaint, there needs to be clarification on which RSP the consumer should have already raised a complaint with before the complaint can be accepted by the TIO.

We are also concerned that this change could lead to more incorrect referrals (misassignment of complaints).

Considering the above, if this amendment is approved, the reclassification process needs to be much more robust to cope with the significant increase in disputes the TIO is likely to receive when members disagree with being charged.

Other changes

Questions for consultation:

Q8 Looking at the Terms of Reference as a whole, are there other changes we should consider to ensure our scheme continues to meet community expectations for best practice external dispute resolution in the telecommunications sector?

Removal of arbitration power

We do not have any specific comment on the removal of arbitration power.

Complaints about the office

An issue that has not been addressed in the revised ToR (and does not exist in current operations) is that the Benchmarks Key Practices state that an Ombudsman should have procedures in place for receiving complaints about the office (6.7, 6.8) and that the Board should include a function to receive complaints about the operations of the office (2.9c).[23] We note that other dispute resolution schemes, such as AFCA, also have this in place.[24]

This should be added, especially considering the removal of the review of reclassifications function and the continual concerns about lack of consistency in application of the TIO's Terms of Reference and procedures.

If it would be helpful, we can provide an additional letter discussing the concerns we have that we view could be considered through such a complaint procedure.

[23] Key Practices

[24] AFCA Complaint Resolution Scheme Rules p19, with further details in the Guidelines, p 100 https://www.afca.org.au/media/739/download

Service Level Agreement

There are also changes to timeframe expectations of members throughout the proposed ToR. This raises an ongoing concern our members have, that there is not a mutual 'service level agreement' or other commitment from the TIO.

At times, extremely long (multiple month) wait times for resolving a complaint have had repercussions on the service provider. These include increased staff to manage cases pending a decision, loss of revenue, loss of customers due to customers blaming the RSP for the delay, or other problems caused when the RSP puts credit management or other actions on hold and are unable to appropriately plan for when the decision will be made. This can also negatively impact customers, who may incur significant debts while credit management actions are on hold.

The Benchmark Key Practices include 5.7 on Timeliness, while 3.3 states that "The office provides information to both parties at the same time, including timely ongoing communication on the progress of the investigation and decision."

We recommend the TIO consult on the establishment of an SLA to improve the dispute resolution experience for all involved.

Structure

Questions for consultation:

Q9 Are the proposed Terms of Reference easy to follow and understand?

We have offered a number of comments on clarity – both text and structure – throughout our submission, but have two overarching comments to provide here.

Examples

The proposed ToR removes several examples that provide clarification. We significantly prefer as much information as possible included in the ToR, as a central (fairly) static document.

Member Obligations

We do not have an issue with the change in structure that pulls 'Member Obligations' into a separate section, but think it would be easier to follow if it sat directly following "Part 2: Our Complaint Handling Role" as it is directly related to Complaint Handling.

COMMENTS ON DRAFT TERMS OF REFERENCE

There are many changes proposed to the ToR that are not canvassed in the consultation paper. We have addressed these in detail below.

Note: Clause numbers in bold are from the proposed ToR, with the relevant clause in the current ToR in parentheses. E.g: 1.1(1.2) addresses 1.1 in the proposed ToR and 1.2 in the current ToR. If there is no directly relevant clause, parentheses will be blank.

Part 1: Introduction

1.1(1.2): Changes "service" to "industry."

This change significantly expands the TIO's jurisdiction, as there are many products and services offered by members of the telecommunications industry which are not telecommunications services. As addressed in 'Remit,' this is not an appropriate change, and the text should either retain 'service', or read "We provide an independent external dispute resolution service for complaints relating to telecommunications ~~industry~~ services as set out in Part 2 of these Terms of Reference."

1.3(): The addition of the role in 'supporting improvements in industry practice and policy' to the introduction is a significant change.

This change of focus is problematic, and we have further commented on it in the section of the submission on Part 4: Our Industry Improvement Role.

1.4(1.5): Changes balance of what will be considered when handling complaints. In current ToR, 'what is fair and reasonable' is one factor equal with relevant laws and other issues, whereas in the proposed ToR it becomes the primary consideration, and the TIO will 'have regard' to other topics (laws, codes, practices).

While we understand that the TIO has the right to decide based on what is fair and reasonable, we are concerned that this limits the consideration the TIO will give existing rules and laws.

We would like to see the TIO clearly state that what is expected under a Code or law is 'fair and reasonable.' For example, if a carrier or RSP is providing reasonable assistance under specific legislation – i.e., Complaints Handling Standard – their actions should be judged against that legislation.

Part 2: Our Complaint Handling Role

Our complaint handling jurisdiction

As addressed in the Remit for Complaints section of this submission, it is not appropriate for the TIO to be expanding their remit as addressed in the consultation paper, and beyond that, there are proposed changes to the ToR not canvassed in the consultation paper that are also problematic.

While we have addressed the problems with these changes in principle in that earlier section, we have provided comments here on the specific proposed changes in the text of the draft ToR.

Complaints we handle:

2.1(2.7a): The proposed draft removes the clarification that complaints are about telecommunications services.

This proposed drafting would give the TIO jurisdiction to handle any complaint, not just those about telecommunications and/or carriage services.

Considering the additional services being offered by members of the scheme (electricity, , this should clarify that the TIO "can handle complaints….about telecommunications services provided by members of our scheme."

2.2a: This needs clarification that it only covers services offered/supplied directly to a consumer, to clearly exclude resale circumstances.

Should read: "telecommunications services that a member offers or supplies directly to the consumer."

2.2b(2.7b and 2.10e): The expansion in this clause is twofold, the first in adding 'device' without clarifying one used for the purpose of accessing the service, and the second in stating 'whether together with, or separately from, a telecommunications service.'

As addressed in the earlier remit section, neither of these changes are within the TIO's powers per their authorising legislation.

This clause should instead read:

"a problem with equipment or a device sold by a member directly to the consumer ~~, whether together~~ with~~, or separately from,~~ and for the main purpose of accessing a telecommunications service.

2.2c(2.7a): While the current ToR includes 'repair and maintenance services,' because of the changed structure of this section (2.7a in the current ToR provides some boundaries that 'repair and maintenance services' then falls under), it now requires some additional clarification.

This clause needs to specify that the TIO can only accept complaints about services related to relevant telecommunications. We recommend it read as follows – assuming that 2.2 (b) is appropriately revised:

"Services related to telecommunications services or equipment referred to in 2.2 (b), such as repair, maintenance and technical support".

2.2f(2.7a): A phone number is an entirely different service than an email address (and falls under rights of use rules, which email services do not). This issue is addressed in the section on Remit.

Emails need to be removed from this clause. Clause 2.4 sufficiently addresses the circumstances in which members and consumers agree to have the TIO handle a complaint outside of the ToR.

2.2e(2.7a): This clause adds 'delay' to the currently existing "faults with, or failure to supply, a telecommunications service or related goods."

While an unreasonable delay certainly falls within the TIO's remit, for clarification we think it would be beneficial to instead state "fault, failure or unreasonable delay in the supply of telecommunications services." This ensures that all parties understand that reasonable delays – for example, that it can take 24-48 hours to migrate a service – are an inherent part of the provision of telecommunications services.

2.2j(2.7a): This removes the language clarifying that it only covers codes "where we [the TIO] are allowed by the Code to handle a complaint."

As addressed previously, the TIO's legislative jurisdiction to handle complaints about carriage services is separate to their jurisdiction to the power to handle complaints conferred upon them by specific Codes.

Additionally, there may be language preferable to 'failure to comply with,' as the TIO is not the regulator, it is only the ACMA that can determine non-compliance.

We recommend "Complaints about matters arising under a relevant code or guideline that the TIO is authorised to handle."

2.4(2.8): The text about handling another type of complaint upon request/agreement has slightly changed – it previously specified exactly which parties had to agree. It would be helpful to retain this clarity.

Additionally, the change allows for consumers to request the TIO handle complaints outside of their remit. This may require significant resources for the TIO and RSP to consider these requests when they may not be appropriate.

We recommend that this clause remain as in the current ToR: "We also handle any other type of complaint if the provider has asked us to handle the complaint and the consumer has agreed."

[](2.9): The current ToR establishes that the TIO can also handle complaints about agents, dealers, contractors, etc, and goes into detail on why and if they will hold the member responsible. While we do have some concerns about the implementation of this clause, its removal eliminates the clarity provided by those examples.

We are unclear if there is an intention is that agents, dealers, etc are being removed from the TIO's remit. We would strongly support that change.

However, if there is no intended change to remit, this clause needs to be retained as is – including the 'for example' text – as this is a complex area which requires clear guidance.

Complaints we do not handle:

2.5(2.10)

While we understand the use of the term 'handle' here to align with the prior section, with the existence of clauses 2.38-2.39 on complaints that the TIO may stop handling, it would be clearer to instead label this section as "Complaints we will not accept." This would establish that the TIO won't accept these complaints up front, as opposed to stopping handling the complaints that fall under 2.38-2.39.

As to the specific contents of this section, the removal of examples and details (addressed in the earlier section of this submission on "Structure") creates confusion and changes the remit (potentially unintentionally).

We strongly recommend reinstating the level of detail currently in this section.

Specific removals of concern are as follows.

Cabling beyond the network boundary: This is addressed in the "Remit" section.

The 000 emergency service: This is addressed in the "Remit" section.

Commercial activity: We note that the intention may be to address this with 2.5(a), "the setting of pricing." However, this is very different from the language in the TIO's Constitution. 3(a)(i) of the Constitution includes the wording "other than complaints in relation to the general telecommunications policy or commercial practices of such a member." The current ToR states that the TIO does not handle complaints about "a commercial activity of a provider that is not related to providing a telecommunications service" (2.10(b)).

As the ToR and Constitution are intended to govern the scheme in harmony, the ToR should clearly align with the Constitution, which would be best achieved by retaining the language in 2.10(b) of the current ToR.

This clarity is important because commercial activity extends beyond the setting of prices – e.g., an RSP's decision to offer products to new customers and not existing customers is not connected to pricing, but is commercial activity appropriately outside of the remit of the TIO.

Telecommunications policy: As with the above on commercial activity, the language from the current ToR (2.10 (a)) should be retained so that the ToR and Constitution are aligned.

Devices not sold by members: As noted in the 'Remit' section of this submission and the previous note on proposed 2.2b, there needs to be clarity that the TIO will not handle complaints about equipment or devices not sold or supplied directly to the consumer by the member.

This might be addressed by our proposed changed text for 2.2.(b), or in an addition to 2.5.

2.6(2.11): Considering the range of regulators and forums in which proceedings can be begun on telecommunications related matters, we recommend this clause clarify that it covers regulators in addition to courts and tribunals, reading: "We will not handle a complaint where either party has commenced proceedings in a court or tribunal or by a regulator."

This would align this clause with the proposed 2.38(c), which does include a reference to other bodies.

2.7(2.11): The language here has changed from "where the specific issues…have been dealt with or are likely to be dealt with by…[other body]" to "*if we decide* it is more appropriately dealt with…".

This addition brings in subjectivity, and provides the TIO with unilateral power to determine what body is most appropriate to handle a specific issue. It also does not align with 5.1 of the Benchmarks, which use language similar to that in the existing ToR.[25]

As addressed in the section on "Overlaps with other Ombudsman schemes" this is not the appropriate approach to overlap.

This is relevant, as members already see examples of consumers 'venue shopping' their complaints – receiving a decision they disagree with from another body, and then approaching the TIO. Currently, members can apply for those complaints to be reclassified because the complaint has already been resolved elsewhere.

Not only is it unreasonable to expect an RSP to implement two different resolutions directed by two different bodies, but it also leaves it open for the TIO to rule on complaints dealt with by other bodies, raising questions of who takes precedent.

We strongly recommend this clause remain as in the current Terms of Reference (2.11), pending the outcomes of consultations on overlaps with other schemes.

2.8(3.11, 3.16): While we do not object to including information on the compensation limit to this section (whereas it was previously in the section on Decisions), the decision limit should not be increased to $100,000 as discussed in the section of this submission on "Increase in Compensation Limit"

This clause will need to be updated pending the outcomes of this consultation (whether that be decreasing to $50,000 or addressing the retention of the 'recommendation' power for amounts between $50,000 and $100,000).

[25] Key Practices, p 19

How we handle complaints

Acceptance:

2.17(2.5): The proposed ToR uses the language "after the member has had a reasonable opportunity to consider the issues," and states that the TIO "may assist the consumer…to raise the complaint."

This is a significant change from the current ToR, which clearly state that the TIO will "only handle complaints after the complaint has been made to the provider."

The Benchmarks directly state that the organisation (in this case, RSP) has to have had the opportunity to deal with the complaint through their internal dispute resolution mechanism, or that the organisation "has refused, or failed within a reasonable time, to deal with a complaint under its internal dispute resolution mechanism."[26] This new language does not align with that benchmark.

There are 3 issues here that need addressing.

- A complaint must have been made to the provider first, and the provider must have had a reasonable opportunity to deal with that complaint through their complaints process.
- There needs to be clear, narrow language for if a customer has attempted to make a complaint to a provider but has been unable to do so due to a fault of the provider.
    - This is particularly important because some of our members have expressed ongoing concerns about the TIO's previous statements that the consumer holds more weight when they state they have tried to contact a provider previously but have no evidence.
- If the TIO may assist the consumer to make a complaint when they have not yet contacted their provider, it needs to be clear that this will not be counted as a referral or otherwise (for data or fees), and will not change the path the complaint takes either within the TIO or at the member.

The following text could possibly be used in the ToR to address these concerns: "We will only consider a complaint after the complaint has been made to the member. If we receive a complaint before a complaint has been made to the member, we will assist the consumer or occupier to raise the complaint with the member before undertaking dispute resolution, except where there is reasonable evidence that a member has failed to acknowledge a complaint."

2.18: While 2.18 references a complaint within the TIO's jurisdiction, there is no specific clause about a process to 'filter' complaints before initially accepting.

The TIO has an ongoing pattern of accepting complaints prior to determining if they are appropriately within its jurisdiction, taking those steps after acceptance of the complaint – thus confusing consumers and causing complaints to be inappropriately counted against members (and charging those members).

This practice does not align with clause 2.5 in the current ToR (addressed directly above) about a complaint being made to the provider prior to the TIO accepting it, or the general statements in the ToR on what complaints the TIO will or will not handle.

The Benchmarks Key Practices have a section on Acceptance by Office (1.22 and 1.23), clearly laying out that the TIO should be assessing complaints when first received to determine the appropriate next steps "to ensure appropriate use of the office's resources and minimise the risk of unreasonable cost increases."

There is additional guidance under Benchmark 5, Efficiency, clarifying that "the office will only deal with complaints which are within its jurisdiction" (5.1) and that "the office has mechanisms and procedures for referring complaints that are not within its jurisdiction to other, more appropriate, forums" (5.3).

[26] Ibid., p 19

Initial assessment prior to acceptance is a clearly missing step in the TIO's complaints handling process and needs to be added to the ToR and procedures for the TIO to align with the Benchmarks and good EDR practice.

Reconciliation:

[](3.5): The structure of this section appears to skip the stages of working to resolve prior to investigation (3.5 in current ToR), jumping instead to investigation, rulings, and recommendations.

As the ToR is intended to provide both guidance and clarity on how the TIO handles complaints, we recommend retaining information on the initial attempts at resolution, to underline the importance of those first steps.

Temporary Ruling:

2.28(4.1): Temporary Rulings in the current ToR are only about credit management actions, whereas the proposed ToR removes this specificity and makes Temporary Rulings an option for all complaints.

This is a major change not canvassed in the consultation paper, with no clear driver or justification. While we understand the purpose of Temporary Rulings in relation to Credit Management actions, it is not appropriate to extend them to all complaints. This change will create significant confusion on the appropriate process.

2.25(4.3): The proposed ToR states that the TIO will provide reasons, but removes the statement that they will be written. Written reasoning for any decision – temporary or not – is absolutely vital for record keeping, transparency and accountability. 3.7 of the Benchmarks clearly states that providing written reasons for any decisions is key to 'procedural fairness'.[27]

5.2(4.4): The proposed ToR removes the statement that the TIO will not publish the name of the provider when publishing details on temporary rulings, and proposed clause 5.2 states that the TIO can publish reports on topics including temporary rulings that may include names of members.

It is harmful, and brings no benefit to consumers or the industry, for the TIO to identify specific members in publications on temporary rulings. Temporary Rulings are a very different power than decisions, with – to our understanding – less investigation taking place prior to the decision, and less oversight within the TIO. There is no recourse for publication, and it can have significant commercial impacts on a provider, which is particularly inappropriate considering the temporary/lesser nature of temporary rulings.

Additionally, 4.3 of the Benchmarks state that "Public reports of final determinations do not name parties involved" – which the TIO currently does. We understand that changing this practice is not being raised in this consultation, but it is an important piece of context in considering the appropriateness of identifying the member in publishing any information on temporary rulings.

Decisions:

2.32, 2.25(3.9): As with the section on Temporary Rulings, the proposed ToR has removed the specificity that reasons provided for decisions will be written. For the same reasons as under a Temporary Ruling, written reasons are vital for clarity of understanding, transparency – and learnings for members to improve going forward. Additionally, this is once again in opposition to the Benchmarks.[27]

[27] Ibid., p 15

2.33d(3.11): The addition of non-financial loss is not appropriate and is addressed in section on Questions for Consultation.

2.35(3.12): The current ToR states that the consumer must respond regarding accepting the decision within 21 days, while the proposed ToR says "within the timeframe we specify," removing the specific 21-day timeframe.

We strongly recommend retaining the 21-day timeframe. The new language creates uncertainty for consumers and RSPs on the timeframes for complaints and their responsibilities. Extending beyond 21 days would have significant impacts members' complaint management, credit management and other activities, but there no established need or reason for this change.

Depending on the reasons for this proposal it may be that adding a note that the TIO can specify a shorter timeframe if/when reasonable would address the existing issue.

Recommendations:

[](3.16-3.18): The proposed ToR fully removes the "Recommendation" option, moving complaints in the $50,000-$100,000 range to Decisions. As noted previously, this is not appropriate.

It would be sensible to retain the Recommendation section/power for complaints within the $50,000 - $100,000 range, or alternatively, not accept complaints over the $50,000 limit.

If this Recommendation section is retained, we note the definition of Recommendation in the proposed ToR will need to be appropriately revised.

We may stop handling a complaint in certain circumstances

2.38a: There are two clarifications that would be helpful for this clause.

- Directly reference what clauses in the ToR determine what places something outside of the ToR's jurisdiction; and
- Clarify what will happen in terms of data and fees if the TIO stops handling a complaint because it is outside of their jurisdiction (and therefore should not have been initially accepted).

This clause would then instead read:

"we form the view that it is outside our jurisdiction per clauses 2.1 – 2.12, in which case the complaint will not be recorded against the member and the member will not be charged."

2.39(3.20): The proposed clause removes two examples currently included in 3.20 of the ToR:

- "We think it is reasonable for the consumer to pay some or all of the provider's charges and the consumer refuses to pay this amount;"
- "We think the provider has made a fair offer to resolve the complaint and the consumer has not accepted the offer."

We assume that that the intention is for these clauses to be covered by the proposed 2.39(d), "the consumer's or occupier's conduct is unreasonable" – however, these two specific scenarios are common, and it would prevent confusion and provide clear guidelines to retain these examples.

Part 3: Land Access

We support separating clauses on this particular power into a unique section of the ToR, as the difference between this role and the TIO's consumer complaints handling role is important for clarity.

It would be useful to include the information that under this role the TIO does not not consider claims for compensation (as compensation for Land Access is addressed under Schedule 3, Clause 42 of the Telecommunications Act).

We also recommend that the TIO consider providing written records of land access determinations - either publicly or to interested parties on request – and include information on this in this section of the ToR. This transparency would assist all involved to understand the TIO's approach to these issues, with the ultimate goal of reducing objection referrals and increasing efficiency for everyone.

As regards the TIO's published guidance on land access, it would be beneficial for the TIO to engage with carriers on a yearly basis to discuss this guidance and other relevant issues. We do note that this that this specific recommendation may not be directly relevant to the ToR.

Finally, similar to the issues addressed in the next section, we do not view that it is appropriate for TIO to have a policy role in telecommunications land access policy. The TIO has a statutory function as an impartial body to make these determinations, but that remit does not extend to influencing policy decisions. This should be clarified in the Land Access section, once again underlining the significant difference between this role and the TIO's complaints handling role.

Part 4: Our Industry Improvement Role

The draft ToR propose a significant and problematic shift in focus for the TIO, which will negatively impact its ability to act as an independent dispute resolution service and does not align with the Government's Benchmarks.

The increased focus on systemics and new policy contribution role pull the TIO away from both its authorising legislation and the objects stated Part 3 of its Constitution – "to receive investigate, make decisions relating to give directions relating to and facilitate the resolution of [complaints]" and "to exercise such jurisdiction, powers and functions as may be conferred by or under any legislation or instrument."

While the TIO provides welcome and invaluable insights and data for policy and regulatory discussions, the statement in the consultation paper that "part of our industry improvement role is proactively shaping the policy debate" is inaccurate.

There are already multiple regulators and policy bodies in the telecommunications space. The TIO was set up as a separate body from these to ensure its ability to remain independent and be respected as a fair and effective dispute resolution service.

Systemic Issues

It is first important to consider the purpose of 'systemic issues.'

The Benchmarks Key Practices address this in multiple points in the Key Practice guidance, consistently making clear that an ombudsman should report and/or refer systemic problems to regulators or other relevant bodies.

Systemic Problems

6.4 The office has mechanisms for referring systemic industry problems, based on cases brought to dispute resolution, to an appropriate regulator for action if required.

6.5 The office has mechanisms to determine when to bring systemic problems to the attention of policy agencies or other relevant bodies, such as industry associations.

This is an important function for a dispute resolution scheme to fulfill.

However, identifying, investigating and referring systemic issues arising from complaints brought to the TIO is a very different proposition than beginning investigations without specific cause, and then publishing and using those results to influence industry practice and policy – which is not the role of the TIO.

We have expressed concerns about some of the specific proposed text below, but in addition the overarching approach and its impact on the TIO's standing as an independent body that is trusted to handle complaints – and thus its ability to fulfill its raison d'être - should be reconsidered.

4.2(5.1): The proposed text slightly changes the description of a systemic issue, removing the clarification that the issue affects a *significant* number of consumers. It is important that this process is used judiciously, and not applied to each and every topic that arises.

Thus, it is important to retain the clarity in the current ToR, with 4.2 then reading "a negative effect on a significant number of consumers."

4.2b: The language used in this clause needs to be clarified, for two key reasons. The first is that the TIO cannot determine non-compliance, as it is not a regulator, and the second is that compliance is not the appropriate term when referring to 'good industry practice.' We recommend replacing "non-compliance" with "disregard for" or something similar.

The language used here is important, because there must be a delineation between regulatory enforcement and the TIO's powers to resolve complaints.

4.3(5.1): The current ToR states the TIO can handle a systemic issue without a complaint, and the proposed ToR retains this. However, this is extremely problematic and needs to be reviewed as part of this revision of the ToRs.

That approach is in direct opposition to the current systemic issue powers in the ToR, and the Benchmarks which state:

> "Systemic problems can refer to issues or trends arising either out of many complaints about one participating organisation or out of many complaints (which are essentially similar) about more than one participating organisation."[28]

This is also not in line with the TIO's authorising legislation, which provides for the TIO to "investigate, make determinations relating to and give directions relating to complaints about carriage services by end-users of those services."

As noted above, there are (at least) two regulators in this space – more depending on the specific topic, and related Government Departments. There is an active consumer body that identifies and raises concerns with those bodies when needed.

There is no gap the TIO needs to fill here.

4.4: The language here is unclear. Our reading is that there is an implication that a systemic issue may not be related to a specific member. If that is the case, then the comments on 4.3 above also apply here. If not, we recommend redrafting this clause to clarify.

4.6(5.1): This clause adds a lot of detailed requirements on members (timeframes, internal escalation), whereas the current ToR simply states that the TIO will work with the relevant TIO member.

While the TIO has powers to direct member actions in the resolution of complaints, this change would be an expansion of powers, stepping into a much more regulatory space. It is also not appropriate for the TIO to attempt to influence how a member addresses issues within its own management structure.

We strongly recommend some specific changes to this text to make it more appropriate for the TIO's role:

> 4.6(b) suggest or discuss improvement and remedial actions a member may ~~should~~ take;
>
> 4.6(c) discuss and agree with ~~ask~~ the member ~~to commit to~~ suitable timeframes ~~set out~~ for any agreed actions.
>
> ~~4.6(d) ask the member to internally escalate the systemic issue to a more senior level.~~

4.7, 4.10(5.2, 6.6): The TIO should not be able to publish the name of a member related to a systemic investigation.

As addressed above, per the Benchmarks, systemic investigations are for the purpose of providing recommendations to members and/or referring the issue to other bodies – with the appropriate remit and powers to further investigate and address those problems.

Publicly naming a member can have significant impact, which is particularly problematic considering the vague nature of systemic problems, which can include simply being inconsistent with what the TIO considers to be good industry practice.

Making this change will also increase the risk of the TIO being caught up in litigation, if a member considers the TIO's findings inaccurate and the publication to then be libel,

[28] Ibid., p 17

particularly considering that systemics and their publication are activities outside of the TIO's remit under its authorising legislation.

4.9(5.2): This clause makes two concerning changes from the current ToR.

When a recommendation is made: The current ToR clarifies that recommendations are reserved for circumstances where the TIO and member(s) 'cannot resolve the systemic issue by agreement.' Considering that the TIO's aim should be to improve the customer experience, which will be more readily achieved by reaching agreement with the relevant member(s), this remains an important step in the systemics process and that clarity should be retained here.

"Must consider": The current ToR states - that a member 'must consider recommendations,' whereas the proposed language does not clarify what actions a member must take in light of the recommendation. As systemic recommendations are not directly related to the TIO's power of Direction to resolve complaints, all parties need a clear understanding of what the TIO's powers are in relation to systemics, thus the language of 'must consider' needs to remain.

Policy Contribution

4.11(4.11): As addressed previously, the shift towards a 'policy contribution role' will negatively impact the TIO's role in dispute resolution.

Industry already has concerns about the TIO developing its own guidance and publishing expectations of providers that are different than those set by regulation, as the TIO does not have the authority, remit, or knowledge to act as a regulator.

Regulation and policy are set through complex processes involving a range of stakeholders. We welcome and encourage the TIO to provide factual information to these processes and contribute to the development of industry guidance. This, however, is very different from 'influencing policy formulation and public debate.'

If and when the TIO chooses to make broad statements on what policies should be put in place, or otherwise become an active advocate for certain perspectives, it damages the TIO's independence and ability to fairly handle complaints.

In light of the above, Part 4 should be removed. The "Systemic Issues" section should be rolled into Part 5 (Reporting and Information Sharing), and 4.11 should be removed, as it is already addressed by the propose 5.8.

Part 5: Reporting and Information Sharing

Our comments below are in addition to our previous comments on the expansion of the TIO's ability to identify members in publications ('Temporary Rulings' and 'Systemic Issues') and the recommendation to roll Part 4 into this section.

5.2(3.18, 4.4, 6.6): This clause has added a more general ability to publish the names of members. While this was previously allowed for Decisions (4.18), it was not allowed for other publications.

Even the existing ability to publish the identify a member in publishing a decision does not align with the Benchmark's Key Practice 4.3: "Public reports of final determinations do not name parties involved." Expanding this ability goes beyond, and as addressed in the section of systemics, opens the TIO to significant risk.

Additionally, there is no established need for this extreme change. The TIO's ability to identify members in publications should remain clearly limited as in the current ToR.

Privacy(4.9): The proposed ToR removes any reference to the TIO's requirement to comply with privacy legislation and policies for info that its collect. This needs to remain.

Part 6: Member obligations

As this section directly relates to the handling of complaints, it should become Part 3, directly following "Our Complaint Handling Role" – the proposed location is a bit confusing.

6.3(3.6): The new ToR changes the timeframe for provision of information from "we will be reasonable in setting this deadline but it will not be more than 28 days" to "within the timeframe we specify."

The timeframe language should retain a reference to it being reasonable, instead reading "must provide…within the reasonable timeframe we specify."

[](4.8): The proposed ToR remove the clause stating that a member can report suspected criminal activity to a suitable authority at any time. This needs to be retained, as it is important for all parties to understand that this may occur.

Legal Action

6.7b(4.6b): The current ToR state a provider can take legal action if TIO did not deal with complaint within a reasonable time, while the proposed ToR include the language 'we agree that we did not deal with the complaint within a reasonable time.'

This is a significant change, as there may be evidence that the TIO did not deal with the complaint in a reasonable time, but they may disagree on this point. There is also no established need for this change. The introduction of this subjectivity is not appropriate, and the language should remain as in the current ToR.

Part 7: Management of the Scheme

The proposed ToR makes a number of changes to this part, including removing certain powers from the Board and eliminating the distinction between the TIO's roles as Ombudsman and as CEO of the company.

The Board's responsibilities vs the Ombudsman's responsibilities

It is not appropriate for the Board to abrogate its responsibilities to manage the operations of the company.

The importance of the independence of the Ombudsman must not be used to remove the accountability of the Ombudsman to the Board with respect to the running of the company consistent with Board approved strategies.

Although the different roles of the Ombudsman of the Scheme and the CEO of the company are currently performed by the one person, they are distinct functions.

The independence of the Ombudsman should be focused on their decision making in relation to complaints, and as appropriate, the ToR/Constitution should include a requirement that the Board ensure that adequate funds are available to enable the Ombudsman to discharge their role as a dispute resolution body.

However, as the CEO of TIO Ltd, the Ombudsman is accountable to the Board consistent with normal Corporations Law requirements, and in light of this, the Board role should not be reduced to a passive monitoring role.

Thus, **7.3f**(7.6i) should instead read "maintaining the Ombudsman's independence in the handling of complaints ~~the management and operation of the scheme~~."

We also query the proposed removal of 7.6(h) – "providing advice to the Ombudsman" and removal of all references to a Deputy Ombudsman (despite that role continuing to be referenced in the Constitution) from the current ToR, and would appreciate further information on the reasons for these proposed changes so we can offer input as appropriate.

Finances and Business

While the TIO's Constitution lays out specific financial powers held by the Board, the changes in the ToR do not reference those powers, and instead move the responsibility for budgets and finances to the Ombudsman.

The section on the Board's responsibilities should directly reference the relevant clauses in the Constitution to avoid confusion.

7.3b, 7.5a(7.6a): The proposed ToR moves the management and oversight of TIO Ltd's finances to the Ombudsman, with the Board being limited to a 'monitoring' role. This does not align with the Constitution, and the structure of the Ombudsman managing the operations with Board oversight of the Ombudsman's management of spending and other relevant points should be retained.

7.3d(7.6e): The Board is currently responsible for 'overseeing' the systems for risk management, auditing and legal compliance, whereas the proposal appears to minimise this role, instead stating that the Board would only be responsible for 'assuring the...risks…are identified and overseeing that…systems are in place.' Overseeing that systems are in place vs ongoing overseeing of those systems are two different roles, and once again, this appears to be a minimisation of Board powers.

Operations and Staff

7.3e(7.6f): The proposed ToR adds the language 'where appropriate' in relation to the Board's power to terminate the appointment of the Ombudsman. The power to terminate

the Ombudsman rests with the Board and there should not be any qualifications placed on this responsibility.

7.4(7.3): The proposed 7.4 includes a new reference to 'contributing to policy formulation.' As addressed earlier in this submission, the increased focus on this activity is not appropriate for the TIO or these ToR.

Procedures and Policies

7.5d(7.6g): This moves the overarching responsibility for policies and procedures from the Board to the Ombudsman.

While the current ToR (appropriately) allows for delegation of policies and procedures, noting that currently the Board delegates responsibility for complaint related policies and procedures, this is once again an instance of the 'CEO' role and the 'Ombudsman' role being mingled.

While our view is that there should be oversight from the Board of the complaint handling procedures of the Ombudsman, we understand that this view likely does not align with that of the Board.

That being said, to align with good practice ultimate oversight of policies and procedures that relate to the operation of the scheme, including issues such as dealing with external complaints (see the section on 'Complaints about the office' under 'Questions for Consultation' in this submission) need to remain with the Board.

Changing these Terms of Reference

7.11(7.9): This proposed clause removes the specificity that it is the Board who must inform the relevant Federal government ministers about proposed changes to the Terms of Reference. This is another example of the focus of management being moved from the Board to the Ombudsman, and the language should still specify that it is the Board who must inform the ministers.

Definitions

We appreciate the additional clarity of adding a specific Definitions section to the Terms of Reference, but have some comments on the proposed definitions.

Consumer and Small business or not-for-profit

As addressed in the question for consultation on the topic of small business, we view that the definition of Consumer in the TIO's ToR should align with definitions used throughout the industry, and with the ACL's definition of Consumer.

This would mean that these two definitions would be combined into one.

Complaint

In addition to the relevant points raised in the section of this submission on proposed clause 2.2(j), this definition is slightly confusing as it does not clarify if an issue is accepted by the TIO (i.e. within the TIO's jurisdiction). This definition would more appropriately clarify that a Complaint (for the TIO) is a matter that has been accepted under [relevant clauses of 'Complaints we handle].

Credit management action

Point (e) removes the clarification in the current 4.1 that it relates to '*debt recovery* legal proceedings.' We don't anticipate this would be a significant problem, but there may be rare circumstances where legal proceedings are called for, but entirely unrelated to the complaint being handled by the TIO and related credit management. It would be worthwhile retaining this clarification.

Telecommunications service

As addressed in this submission's section on Remit for Complaints, the remit of the TIO needs to be clearly outlined. "Including bundled and other telecommunications related services" is vague and open-ended, and that language should not be included.

Additionally, while we do not object to the reference to the triple zero service in this definition, as previously stated we think that clarification should also be included in the section on 'Complaints we do not handle.'

APPENDIX 1: DEFINITIONS OF CONSUMER

Australian Consumer Law:

(1) A person is taken to have acquired particular goods as a ***consumer*** if, and only if:

(a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:

(i) $40,000; or

(ii) if a greater amount is prescribed for the purposes of this paragraph—that greater amount; or

(b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or

(c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

Telecommunications Consumer Protections (TCP) Code:

Consumer

means:

a) an individual who acquires or may acquire a Telecommunications Product for the primary purpose of personal or domestic use and not for resale; or

b) a business or non-profit organisation which acquires or may acquire one or more Telecommunications Products which are not for resale and, at the time it enters into the Customer Contract, it:

(i) does not have a genuine and reasonable opportunity to negotiate the terms of the Customer Contract; and

(ii) has or will have an annual spend with the Supplier which is, or is estimated on reasonable grounds by the Supplier to be, no greater than $40,000, or, in the 5 months following Code commencement, an annual spend of $20,000.

A reference to a Consumer includes a reference to the Consumer's Authorised Representative.

A reference to a Consumer includes a reference to a Customer.

Complaints Handling Standard (and other ACMA NBN Consumer Experience Instruments):

The ACMA has consulted on increasing the threshold to $40,000 to align with the TCP Code, which we have supported in the interest of regulatory consistency.

consumer means:

(a) an individual who acquires or may acquire a telecommunications product for the primary purpose of personal or domestic use and not for resale; or

(b) a business or non-profit organisation which acquires or may acquire one or more telecommunications products which are not for resale and which, at the time it enters into the consumer contract:

(i) does not have a genuine and reasonable opportunity to negotiate the terms of the consumer contract; and

(ii) has or will have an annual spend with the carriage service provider which is, or is estimated on reasonable grounds by the carriage service provider to be, no greater than $20,000.

A reference to a consumer includes a reference to the consumer's representative.

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