

TIO Submission to the Consultation on the Telecommunications Reform Package

1. To whom is the SIP obligation 'owed'?

- | |
|---|
| <p>(a) The SIP obligations to connect premises and designated equipment suggest the carriage service provider is acting as <i>agent</i> for the end-user (or owner/operator of the equipment).</p> <p>(b) This would appear to create new standing for the end-user (or owner/operator) in terms of their relationship with the SIP. This may give the end-user (or owner/operator) rights to claim a breach of SIP obligation against the SIP.</p> |
|---|

Are these consequences intended?

(a) Carriage service provider acting as agent

The SIP obligations to connect premises and designated equipment suggest the carriage service provider is acting as *agent* for the end-user (or owner/operator of the equipment).

The SIP obligation to connect:

- premises – requires the SIP to, *on reasonable request by a carriage service provider on behalf of an end-user at the premises*, connect the end-user to the network (whether for broadband fixed-line, wireless or satellite networks)¹
- designated equipment – requires the SIP to, *on reasonable request by the carriage service provider on behalf of the owner or operator of particular designated equipment*, connect the designated equipment to a telecommunications network².

We note: Schedule 3 of the Bill does not appear to include a new definition of 'telecommunications network', so the existing definition in the Act appears to apply³.

The use of 'on behalf' suggests a relationship of agency whereby the carriage service provider is acting as agent for the end-user (or owner/operator of the equipment). This suggests a change from the provider – customer relationship underpinned by a contract. We query whether this is an intended consequence, is practically workable, and whether the government intends that there is a contract between the SIP and the end-user.

This may be further complicated by aggregators in the market, operating as intermediaries for one or more carriage service providers. This may be in addition to carriage service providers who do business directly with a SIP. We note that such intermediaries are also defined as 'carriage service providers' under the Act, whether they act as an agent for another carriage service provider, the end-user or another person⁴.

These intermediaries are not presently members of the TIO. They do not have a contractual relationship with the end-user so they cannot identify the end-user without the assistance of the carriage service provider, and in our experience, are reluctant to assist the end-user and participate in the TIO's dispute resolution processes.

(b) Possible implications of agency

If 'agency' can be established at law, it would appear to create new standing for the end-user (or owner/operator) in terms of their relationship with the SIP.

¹ *Telecommunications Act 1997 (Cth)*, clauses 360P and 306A (definitions)

² *ibid*, clause 360S and 306A (definitions)

³ *ibid*, s7

⁴ *ibid*, s87

This may give the end-user (or owner/operator) rights to claim a breach of SIP obligation against the SIP. This is because the SIP obligation could be construed as also owing to the end-user (or owner/operator) who either benefits or is disadvantaged by whether the SIP complies with their obligations.

In the case of end-users, this can be contrasted with current contractual arrangements and protections required by law, which give an end-user rights against a carriage service provider for failure to meet certain performance standards regarding connection⁵. Presently, an end-user has no rights to claim directly against a network operator or SIP for failure to connect. This may have implications for complaints handling discussed further at Part 3 of our Submission.

2. How will the SIP regime operate?

- (a) In what circumstances might a request to connect or supply from a carriage service provider be 'unreasonable'?
- (b) Other than the Australian Communications and Media Authority (**ACMA**) being able to enforce the SIP regime in accordance with its existing powers, will there be any incentives for SIPs to comply with their SIP obligations?
- (c) It is not clear as to how the standards, benchmarks and rules the Minister may make on performance delivery will be developed and whether they will have regard to current customer service standards a carriage service provider must meet. We encourage performance-monitoring of compliance with any such standards, benchmarks and rules.

(a) 'Unreasonable' requests from carriage service providers

In what circumstances might a request to connect or supply from a carriage service provider be 'unreasonable'?

All of the SIP obligations to connect and supply are predicated on the carriage service provider making a *reasonable request* to the SIP⁶.

What is considered 'reasonable' may be subjective and depend on the particular circumstances of a case. Whether the standard of reasonableness is met may also be a highly contested matter between a SIP and carriage service provider.

Greater clarification could be provided to give guidance on what constitutes a reasonable request.

If a carriage service provider had an outstanding debt with a SIP, could the SIP legitimately argue that the request to connect a new end-user was unreasonable until the debt had been paid? The TIO deals with complaints from end-users against carriage service providers about restricting or stopping supply. When the underlying reason is a debt owed by the carriage service provider to the network provider, it is difficult to provide the end-user with a remedy.

Will the proposed SIP regime be able to adequately respond to these types of situations? What systems and arrangements will be put in place to guarantee supply to end-users?

(b) Incentives to comply with SIP obligations

Other than the ACMA being able to enforce the SIP regime in accordance with its existing powers⁷, will there be any incentives for SIPs to comply with their SIP obligations?

The Bill does not include any incentives to encourage SIPs to comply with their SIP obligations.

⁵ *Telecommunications (Customer Protection and Service Standards) Act 1999 (Cth)*, Part 5; *Telecommunications (Customer Service Guarantee) Standard 2011*

⁶ *Telecommunications Act 1997(Cth)*, clauses 360P – 360T

⁷ *Ibid*; *Australian Communications and Media Authority Act 2005 (Cth)*, ss8 and 9

Non-compliance with SIP obligations will defeat the purpose of the Bill and will lead to end-user detriment and complaints and disputes.

A regulatory framework that relies on enforcement action as the primary incentive to comply is potentially costly for government and tax-payers, and takes time to reach a conclusion. Such a framework assumes the ACMA will be sufficiently resourced and empowered to take action.

(c) Standards, benchmarks and rules for SIP obligations

It is not clear as to how the standards, benchmarks and rules the Minister may make on performance delivery will be developed and whether they will have regard to current customer service standards a carriage service provider must meet.

The Minister may make standards, benchmarks and rules regarding the performance delivery of the SIP obligations⁸.

They may be about:

- Reliability of service
- Timeframes within which to connect or supply
- Timeframes within which to rectify a fault or service
- Any other matter regarding connection and supply

The development of any performance standards, benchmarks or rules will have to have regard to their interaction with the performance standards currently applicable to carriage service providers⁹. Standards for SIPs should not be *inconsistent* with those currently applicable to carriage service providers, otherwise carriage service providers may unfairly bear the cost of a SIP failing to comply with their SIP obligations. This could create perverse incentives that may distort the market and impact end-users.

We encourage performance-monitoring of SIP compliance with any standards, benchmarks and rules.

3. How will disputes be handled if there is an alleged breach of SIP obligation?

- (a) The TIO's jurisdiction is primarily to handle consumer and small business complaints made against a carriage service provider (and in limited circumstances against a network provider (SIP) for disputes about land access and property damage¹⁰). Our current jurisdiction does not permit the handling of business-to-business, or 'commercial' disputes.
- (b) The proposed SIP regime may generate complaints and commercial disputes that may adversely affect the end-user, and over which the TIO will have no jurisdiction.
- (c) Will there be one designated alternative dispute resolution mechanism for handling SIP complaints and disputes?
- (d) Will the dispute handling rules the Minister may make have regard to dispute monitoring and systemic issues identification?

⁸ Ibid, clauses 360U and 260V

⁹ As above, note 4

¹⁰ *Telecommunications (Low-impact Facilities) Determination 1997*; *TIO Guidelines on the Installation and Maintenance of Low-Impact Facilities* (10 April 2015). See: https://www.tio.com.au/_data/assets/pdf_file/0008/168227/Guidelines-on-the-installation-and-maintenance-of-low-impact-facilities-APRIL-2015.pdf

(a) The TIO's complaints handling jurisdiction

The TIO's jurisdiction is primarily to handle consumer and small business complaints made against a carriage service provider (and in limited circumstances against a network provider (SIP) for disputes about land access and property damage¹¹).

The TIO's mandate as the Ombudsman scheme for the Australian telecommunications industry is set out in Part 6, *TCPSS Act* and supported by certain provisions of the *Act*.

Our current jurisdiction does not permit the handling of business-to-business, or 'commercial' disputes¹². However, we can handle complaints from an end-user about a carriage service provider that may involve failure to connect or supply a telecommunications service (including fault rectification issues).

Our jurisdiction and complaints handling procedures are set out in our Company Constitution and Terms of Reference¹³.

(b) Potential SIP complaints and disputes outside the TIO's jurisdiction

The proposed SIP regime may generate complaints and commercial disputes that may adversely affect the end-user, over which the TIO will have no jurisdiction.

These may include:

- commercial disputes between a SIP and carriage service provider regarding any of the SIP obligations
- commercial disputes between a carriage service provider and owner or operator of designated equipment where that owner or operator is not a small business (e.g. a bank, hospital, hotel or traffic control company)
- complaints between an end-user and a SIP, which is not a member of the TIO scheme, if a relationship of agency applies (as discussed above at Part 1 of our Submission).

(c) One designated alternative dispute resolution mechanism for handling SIP disputes

Will there be one designated alternative dispute resolution mechanism to address the possible SIP disputes that will fall outside the TIO's jurisdiction?

In our experience, two dispute jurisdictions considering the same issue can cause confusion, unfairness and lead to poor outcomes. This in turn can reduce consumer confidence and trust in the telecommunications industry, regulators and the alternative dispute resolution schemes.

Without specific jurisdictional powers for membership and complaints handling to cover SIPs and aggregators, the TIO will be unable to handle SIP disputes involving the end-user that may relate to failure to connect and supply (including rectifying faults). This is because the TIO would not have access to the information to be able to determine whether a 'reasonable' request had been made or whether there had been a failure to comply with a SIP obligation.

Any dispute resolution framework for handling SIP disputes will operate most effectively if there is a register of all industry participants. Such a register does not currently exist, but is needed to reduce end-user detriment when there are inter-carriage service provider disputes and SIP disputes.

If an agency relationship exists between an end-user and a carriage service provider, the dispute resolution mechanism needs to be able to handle the rights and obligations of all parties to the dispute: SIP, carriage service provider (including aggregator) and end-user (or owner/operator of designated equipment). This is in the interests of efficiency and effectiveness, by reducing duplication

¹¹ Ibid

¹² TIO Terms of Reference, clauses 2.2 and 2.3

¹³ See: <https://www.tio.com.au/about-us/terms-of-reference-and-company-constitution>

of dispute handling processes and providing outcomes based on a holistic approach that takes into account all the parties' interests.

(d) Ministerial dispute handling rules

We are interested in the possible rules the Minister may make about dispute resolution processes, and whether they will have regard to dispute monitoring and systemic issues identification. We consider these to be important features of an efficient and effective dispute resolution mechanism to enable 'root-cause' identification of issues.

This may be particularly important where a SIP services a significant geographical area, via many carriage service providers.

We encourage the development of any rules to have regard to how they may interact with the way in which carriage service providers must handle complaints¹⁴, whether using their internal dispute resolution process or TIO's processes.

¹⁴ C628:2015 *Telecommunications Consumer Protections Code*, Part 8