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**Telecommunications Industry Ombudsman
Independent Review
Report**

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1. Introduction

Telecommunications Industry Ombudsman Limited (TIO) is a private sector company that has a statutory mandate to operate a dispute resolution scheme to deal with complaints about carriage services by end users of those services¹. This means that the TIO handles complaints about landline, mobile and internet services that the customer has been unable to resolve with their telecommunications provider.

The TIO was established nearly 25 years ago as a company limited by guarantee. It is funded by industry and governed by a Board that includes industry, consumer and independent directors. The TIO currently has a staff of around 240 people (including casual staff from agencies). The current Ombudsman was appointed to the role in March 2016.

The Telecommunications (Consumer Protection and Services Standards) Act 1999 was amended 3 years ago to require the TIO to cause regular reviews of its operations to be undertaken². This is the first such review.

cameron. ralph. khoury have been engaged to undertake the review. We are specialists in external disputes resolution, having reviewed ombudsman schemes in the financial services, legal, energy and water, internet and public transport industries, based in Australia, New Zealand, Canada and the United States.

1.1. Review Scope

Written terms of reference set out the scope of our review. These provide:

1. The review will examine the authorising environment and dispute resolution processes of the Telecommunications Industry Ombudsman to consider whether changes to current processes are necessary to deliver effective dispute resolution in a high volume and volatile complaint demand environment.
2. The review will make findings and recommendations relating to:
 - the effectiveness of the Telecommunications Industry Ombudsman's complaint resolution processes, systems and resources
 - the effectiveness of the Telecommunications Industry Ombudsman's approach to systemic issues in improving telecommunications provider practices
 - the adequacy of the Telecommunications Industry Ombudsman's authorising environment (including the legislative framework and the Telecommunications

¹ Section 128 Telecommunications (Consumer Protection and Services Standards) Act 1999

² Section 133A Telecommunications (Consumer Protection and Services Standards) Act 1999

Industry Ombudsman's Constitution and Terms of Reference) and how this impacts on the independence of the Telecommunications Industry Ombudsman and its effectiveness in resolving disputes between consumers and telecommunications providers

- the effectiveness of the Telecommunications Industry Ombudsman's engagement with government, regulators, consumers, industry and other stakeholders.

As would be expected, our terms of reference specified that we must undertake a public consultation and invite submissions from a range of stakeholders including consumers, regulators and industry.

2. Executive summary

The TIO is one of Australia's best known and arguably most influential Ombudsman schemes. Over many years it has built a high level of awareness and credibility and contributed to better consumer outcomes in a critical sector that continues to grow in importance for all Australians.

Our review is set against that background of success. We apologise in advance if our commentary forgets some of these successes as it inevitably focuses on areas open to improvement.

2.1. The environment

1. The sector in which the TIO operates is one of dynamic change, characterised by waves of new technology and products and services, higher and higher consumer adoption rates and as these products and services are increasingly seen as 'essential' - consumers being willing to pay for them, frequently via credit.
2. The sector's structure is unique to Australia, dominated by a single very large provider and, at the other end of the scale, low barriers to entry allowing hundreds of micro-businesses to operate.
3. The telecommunications sector is in the political spotlight, in particular as it is currently subject to a multi-billion dollar government broadband investment through nbn co. It operates under a unique co-regulatory framework with federal legislation, a federal Department, two federal regulators, an industry association, a latticework of industry Codes and the TIO all seen as part of the framework.
4. The result is that many stakeholders, including government regulators, expect the TIO to do more than a typical industry ombudsman. On the other hand, many telecommunications providers do not understand that this is part of the trade-off for a regulatory framework where industry has a key development role and which is not just the domain of government through detailed legislation. This places some stress on the organisation.

2.2. Key Themes

Submissions to our review almost invariably expressed strong support for the TIO, before going on to express concern around one or more of the following five themes:

1. Process and fees-related irritations from telecommunications providers
2. Differing views around the TIO's role – some urging a narrowing, others a broadening
3. Concerns that the TIO complaint-handling model is no longer adequate for an increasingly disaggregated industry with service to consumers being delivered through a 'value-chain' of telecommunications providers

4. A desire for greater engagement with the TIO – from telecommunications providers, government, industry bodies, regulators and consumer representatives
5. A desire for greater access to information about the sector through TIO collection and reporting of complaints-related information

2.3. Key findings

We found:

1. A large scale, high volume complaints scheme with considerable accumulated skill in handling the unique nature of consumer complaints in the telecommunications sector.
2. High levels of support for the organisation from most stakeholder groups.
3. Some criticism of TIO process – that is in part due to a lack of understanding of how an ombudsman must operate, particularly in a high volume environment, in part because of a lack of visibility of how the TIO actually operates and in part, valid suggestions for improvement .
4. A fee structure that is generating quite some aggravation – in particular for small telecommunications providers – putting some pressure to relieve this aggravation on the funding review that is currently underway.
5. An organisation that has been put under some internal pressure as a result of the need to scale down in size over a few years – and scale back up again more recently. That period of downsizing coincided with pressure from industry for TIO to also scale back its activity regarded as ‘non-core’ (policy, awareness, consumer engagement, etc).
6. An organisation that has adjusted its operating stance in recent times – sometimes re-thinking an approach, sometimes a temporary adjustment, sometimes in response to external forces – which has triggered some concerns from key stakeholders. These concerns are not that the TIO is currently failing in some significant way. However, to the extent that these stakeholders see these directions as the TIO ‘withdrawing’ from its broader role, from active engagement with stakeholders, from contributing to the co-regulatory framework, from leveraging its knowledge for continuous improvement - they are not comfortable with the directions signalled by these adjustments and would be significantly more concerned if the direction is maintained.
7. While some stakeholders continue to argue for the TIO to ‘stick to complaints-handling’ and keep focusing on lowering costs, many stakeholders are asking for more transparency, better reporting, greater engagement, continuing contribution to co-regulation and policy and a more proactive role in systemic improvement of outcomes in the sector.

2.4. Summary of key recommendations

We recommend:

1. Recognising that this is a matter of differing stakeholder views, a stronger public stance by the TIO Board and Management of acceptance and championing of the broader role that the TIO is expected to play as compared with ombudsman schemes in other industries – along with fully resourcing these responsibilities.
2. Changes to both the Terms of Reference and, as necessary, the law to empower the TIO to effectively deal with multi-provider complaints. Also a refinement of a number of aspects of the Terms of Reference – mostly to clarify the intent and to close a few gaps in its application.
3. Improved assistance and guidance information for consumers and service providers to help them understand and work more effectively with the TIO.
4. A number of detail changes to the TIO dispute resolution processes, including additional decision making powers, some delegation of decision making to senior staff, eliminating an unnecessary review step, permitting some ‘fast-tracking’ and working more closely with industry to reduce timeframes for dispute resolution.
5. A strengthening of quality assurance for telephone enquiries, for consumer review/appeals and a process for quality assurance on outcomes for consumers referred back to their service providers.
6. A more assertive approach to matters such as the speed and quality of internet services.
7. Strengthening of the TIO’s access to technical skills and experience for complaints resolution.
8. A significant expansion of the TIO’s systemic investigation capacity, a greater readiness to refer unresolved systemic issues to the relevant regulator and to focus immediate effort on issues relating to the national broadband network.
9. A greater emphasis on value-adding public reporting of TIO insights into the sector, of provision of value-adding reporting to industry and of a willingness to consult with key stakeholders on its complaint classification process and reporting.
10. Enhancements to the TIO’s processes for complaints about its own performance.
11. A progressive re-strengthening of TIO engagement with stakeholders including trialling an annual conference and establishing a consumer advisory group.

3. PROJECT APPROACH

3.1. Methodology

Our review began with the release of a brief Issues Paper that publicised the review and invited submissions. Whilst the paper set out a number of questions, we encouraged submitters to raise any other issues of concern. We noted, however, that the TIO's funding model was outside the scope of our review and that the TIO has been separately consulting about this.

We were pleased with the response to the issues paper, having received 22 submissions including 7 from former TIO complainants, 3 from consumer representative groups, 7 from telecommunications providers and their industry association and 3 from policy makers and regulators.

Other consultation included one-on-one meetings, telecommunications provider forums and a forum with consumer representatives.

To pursue issues raised in submissions and to form a view about the TIO's accessibility, fairness, independence, accountability, efficiency and effectiveness, we undertook the following steps:

- review of relevant government reports;
- review of TIO website materials;
- review of the TIO's training materials for its staff and interviews of TIO managers to obtain a detailed understanding of TIO processes;
- review of about 50 dispute files, 9 systemic issues files and 9 files where complaints were made about the TIO;
- telephone interviews of 21 previous complainants;
- review of TIO data; and
- meetings with TIO Management to clarify issues and discuss our findings.

3.2. Structure of our Report

We have followed the structure of the key themes raised with us – as the most effective way to present the results. By way of reconciliation, we have also provided a summary assessment of the TIO against the Australian Government's Benchmarks for Industry-based Customer Dispute Resolution.

3.3. Terminology

In our report, we use a number of abbreviations.

- ACCAN is Australian Communications Consumer Action Network, a non-governmental body, that is Australia's peak body for consumer representation in communications.
- The ACCC is the Australian Competition and Consumer Commission. It the Commonwealth government regulator that enforces the Australian Consumer Law.
- The ACMA is the Australian Communications and Media Authority. Also a Commonwealth government regulator, its telecommunications responsibilities include licensing carriers, registering industry codes and enforcing the Telecommunications Act 1997.
- Communications Alliance (full name Communications Alliance Ltd) is the peak industry body for the Australian communications industry.
- nbn co. (full name nbn co. ltd) is the government business enterprise that is responsible for the development and rollout of the national broadband network and also for the satellite service Sky Muster designed to provide broadband to regional and remote Australia.
- The TCP Code is the Telecommunications Consumer Protection Code C628:2015 that was first developed by Communications Alliance in 2007 on behalf of the telecommunications industry and registered by the ACMA. The current version of the TCP Code is the third edition and incorporates a variation made in 2016. There are more than 20 telecommunications codes. Of these, the TCP Code sets out the key consumer protection obligations of telecommunications providers.

3.4. Acknowledgements

Our thanks go to all the TIO staff who patiently assisted us and to industry, consumer advocates and government stakeholders who provided submissions, gave of their time and answered our myriad questions.

4. Scheme Overview

4.1. Membership of TIO scheme

As at 30 June 2017, there were 1,518 telecommunication service providers that were registered as members. Reflecting the dynamics of the industry, this number included 172 companies that had joined in the previous year. 210 telecommunication service providers left the industry and so terminated their membership during the same year.

TIO's membership includes:

- carriers (holders of carrier licences that own telecommunications facilities known as "network units") – there are currently 276 entities that hold a carrier licence (albeit they may not be currently providing telecommunications infrastructure services);
- some but not all wholesalers (suppliers to retailers of access to telecommunications facilities); and
- retailers and their agents (suppliers to the public of access to telecommunications facilities – this access may be through a wholesaler or directly through a carrier).

4.2. TIO's workload

The TIO receives enquiries and complaints about mobile, internet and landline services. After experiencing a significant decline in numbers of complaints in the 5 years to 30 June 2016, the TIO is now experiencing a strong increase in complaint numbers. In the 6 months to 31 December 2016, the TIO received nearly 66,000 new complaints – a 34% increase from the same 6 month period in the preceding year. Since that time, complaint numbers have continued to increase.

Needless to say, the extent of this change in complaint volumes has had a significant organisational impact, with re-structuring and staff redundancies as a result of the decline and re-structuring, recruitment and greater reliance on agency staff following the more recent increases.

4.3. Complaint processes

The TIO's complaint handling process involves the following key stages:

1. Initial contact from the consumer

Typically a matter is instigated by the consumer phoning the TIO or using the TIO's online complaint form to raise their issue with the TIO.

The TIO assesses the information provided by the consumer and classifies the contact as an enquiry if it is not specific to a particular TIO member, if it is outside the TIO's jurisdiction or if the TIO member has not had an adequate chance to respond to the issue. In the latter case, the contact is referred to the TIO member (called an enquiry referral and for which no fee is charged to the member).

Where a consumer tells the TIO that they have already raised the matter with their telecommunications provider, the TIO will classify the matter as a complaint (Level 1). The TIO's usual process is to refer the complaint to the provider and allow it 10 business days to resolve the complaint. This referral is intended to be escalated to a higher level within the telecommunications provider's organisational structure, however with very small providers this may not practically be different from the consumer's initial point of contact.

For the TIO, the vast majority of complaints end at this stage and do not return to the TIO for further action. The consumer is either satisfied with the telecommunications provider's response to this referral process or chooses not to pursue the matter further.

2. Conciliation stage

In about 10% of complaints, the consumer re-contacts the TIO to advise that the complaint has not resolved in the 10 business day period allowed to the telecommunications provider. If so, a TIO dispute resolution officer notifies the telecommunications provider by email of the complaint (Level 2), with a copy provided to the consumer. Generally the telecommunications provider is given a further 10 business days to respond to the TIO and provide any documents that the TIO may request. The TIO's practice is only to ask for key documents.

Almost all complaints that return to the TIO are resolved through a conciliation process by an offer from the provider that the consumer accepts. A much smaller number of complaints resolve through a TIO assessment that an offer from the telecommunications provider is fair and reasonable, although not accepted by the consumer, and/or no further action by the TIO is appropriate.

3. Investigation stage

A very small number of complaints progress beyond the conciliation stage through to investigation (Level 3), which can result in a binding decision being made by the Ombudsman. In 2015/16, there were 66 investigations finalised. An investigation begins with the TIO making a more detailed request for information and allowing the telecommunications provider 20 business days to respond.

As shown in the TIO's 2016 Annual Report, a somewhat different pathway applies for land access objections. In 2015/16, there were 7 land access objections decided by the TIO.

4.4. Complaint fees

While there is a separate review looking at TIO funding (and therefore fees) – it is also important for our review to note that the fees incurred by telecommunications providers have been the source of greater discontent than in other industries with which we are familiar. The high numbers of complaints and the relatively small value of the complaints along with at-times tight profit margins means that the fees charged by the TIO to their telecommunications provider members can become a real ‘pain point’ for them.

The TIO must of course recover its costs from its members. Where the TIO can deal with a complaint quickly, as is the case if a telecommunications provider promptly resolves a complaint upon the TIO’s referral, the TIO’s fees are much lower than for complaints that return to the TIO for conciliation. Higher fees again are charged for complaints that progress to the investigation stage.

Small telecommunications providers complain bitterly that the conciliation stage fee is so high that, to avoid incurring this fee, they often feel that they have no choice but to make unjustifiable (in their view) offers to the consumer. They perceive this as profoundly unfair. The submission by the Australian Small Business and Family Enterprise Ombudsman draws out this issue. Feeling runs so strongly on this issue that we found it was almost impossible for smaller telecommunications providers to separate the issue of fees from the objective or process of resolving the complaint. Even for larger telecommunications providers, lots of (largely unproductive) energy is wasted on processes to challenge classification of complaints for the purposes of levying of fees – particularly by the handful of companies that allow the TIO to publicly disclose their number of complaints.

Whilst case fees for all ombudsman schemes play some incentive role in encouraging resolution, if members perceive the fees to be at a level that is out of proportion to what is in dispute – it can generate considerable resentment. While not all outcomes for conciliated complaints involve financial outcomes (around 28% do not), it is possible to look to the average financial outcome for conciliated TIO complaints as an indicator of the scale of what is in dispute. In 2015/16, the average financial outcome for conciliated complaints was \$314.60, whereas TIO fees for the conciliation stage may be 3 to 4 times higher than this including the initial referral stage fee).

While it can be easy to dismiss member aggravation about fees as self-interest, we think this would be a mistake. From our interviews with smaller telecommunications providers, it is clear that there is a deeply held view that the fees operate as a blunt instrument designed to put pressure on them to ‘roll over’. In their minds, it is the antithesis of ‘fair and independent’.

The TIO funding review should, if possible, address this problem, however we caution from experience of many ombudsman schemes that there are many conflicting objectives to attempt to balance in the design of any fees regime. In an ideal world, a fees framework must simultaneously attempt to:

- Be efficient and easy to collect
- Be simple for members of the scheme to understand

- Recover costs as nearly as possible from those that use the service most (user-pays)
- Provide for escalation points to act as an incentive for providers to take the time to fully consider their position
- Have fee points that 'seem' reasonably proportionate to the apparent 'size' of the issue
- Have fee points that are reasonably proportionate to the effort incurred by the ombudsman scheme
- Accommodate the practicalities for very large and very small members, including avoiding 'sticker-shock' to first-time complaint-handlers
- Provide for reasonable predictability of funding for the ombudsman scheme
- Allow for managing volatility in complaint volumes (eg. scaling up or scaling down)
- Cover the costs of essential activity that is not related to an individual complaint, such as governance, policy contribution, continuous improvement in the industry, awareness and outreach to consumers, liaison with industry, government and regulators, educating new members
- Provide for a small amount of reserves to allow for revenue volatility or 'events' such as a provider collapse

Balancing all of these objectives is a task for others, we simply caution against over-simplification of the design issues and that solving for one problem may well introduce new problems elsewhere. The most important thing an ombudsman scheme can do is educate its members to understand that, in a cost-recovery framework, there are rarely easy solutions and any reduction in funding from one area must be made up somewhere else.

5. TIO authorising environment

The TIO contributes to a telecommunications co-regulatory framework in which the key roles are played by government, two regulators in the ACMA and ACCC and the telecommunications industry association, Communications Alliance. In the TIO's submission on 1 May 2017 to the Joint Standing Committee Inquiry into the NBN, the TIO set out the following roles and responsibilities matrix.

Figure 1: Roles and responsibilities in the telecommunications industry

GOVERNMENT	REGULATORS	CONSUMER REPRESENTATIVES	INDUSTRY ASSOCIATIONS	DISPUTE RESOLUTION
<p>Federal Minister for Communications</p> <p>Federal Minister for Regional Communications</p> <p>Department of Communications and the Arts</p> <ul style="list-style-type: none"> collectively responsible for setting overarching telecommunications policy and coordinating implementation administers the mobile blackspot funding program <p>State/Territory Governments</p> <ul style="list-style-type: none"> some contribute to mobile black spot funding 	<p>ACMA</p> <ul style="list-style-type: none"> administers the telecommunications licensing and conduct regime enforces compliance with TIO scheme membership and Ombudsman decisions approves industry codes <p>ACCC</p> <ul style="list-style-type: none"> regulates the network and market competition administers the Australian Consumer Law, including ensuring fair market practices 	<p>Australian Communications Consumer Action Network</p> <ul style="list-style-type: none"> peak body for consumer education, advocacy and research (telecommunications specific) <p>Financial Counselling Australia</p> <ul style="list-style-type: none"> consumer case work and advice contributes to policy debates; hardship and debt focus <p>Other Consumer Law Centres</p> <ul style="list-style-type: none"> consumer case work and legal advice <p>CHOICE and Consumers Federation of Australia</p>	<p>Communications Alliance</p> <ul style="list-style-type: none"> develops industry codes, standards and guidelines advocates for industry <p>Communications Compliance</p> <ul style="list-style-type: none"> monitors compliance of industry codes <p>Other associations for internet and mobile</p>	<p>Telecommunications Industry Ombudsman</p> <ul style="list-style-type: none"> facilitates the resolution of residential and small business consumer complaints identifies and resolves broader issues makes determinations on land access objections

The TIO's authorising environment is complex with legislation, industry codes and the TIO's Constitution and Terms of Reference all playing a part in defining the TIO's mandate. Our review was specifically asked to consider whether any changes should be made to the authorising environment in the interests of enhancing the effectiveness of dispute resolution.

5.1.1. Legislative framing

The Telecommunications (Consumer Protection and Service Standards) Act 1999 obliges the TIO to operate a scheme "to investigate, make determinations relating to and give directions relating to complaints about carriage services by end-users of those services". The end-user is not liable to pay any fee or charge to the provider in respect of a complaint.

The scheme must comply with any standards set by the Minister. Standards set by the Minister must have regard to accessibility, independence, fairness, accountability, efficiency, effectiveness and such other matters as the Minister considers relevant³. We understand that the Minister has not specified any standards.

The legislation requires telecommunication carriers and carriage service providers to be a member of the TIO and to comply with the scheme⁴. The ACMA has the power to determine that a class of carriage service provider must enter into the TIO scheme⁵ and to direct an individual carriage service provider to enter into the scheme⁶. In addition, the ACMA has exemption powers. ACMA's website lists 20 telecommunications providers that have been granted an exemption (webpage last updated 31 March 2017).

5.1.2. Industry Codes

The Telecommunications Act 1997 provides that the TIO may consent to the conferral of functions and powers on it by industry codes or standards.

Communications Alliance has developed over 20 industry codes. These are registered by the ACMA. Some but not all of these expressly confer power on the TIO (with its consent) to deal with complaints arising under the Code. For example:

1. C628:2015 Telecommunications Consumer Protections Code paragraph 1.7
2. C515: 2015 Pre-selection paragraph 1.5
3. C525: 2017 Handling of Life Threatening and Unwelcome Communications paragraph 1.6
4. C540: 2013 Local Number Portability paragraph 1.5

5.1.3. TIO Constitution and Terms of Reference

A company limited by guarantee, the TIO has a Constitution that sets out its governance framework and its purposes. It has a Board of 9 directors including industry directors, consumer directors, independent directors and an independent Chair.

Clause 3 of the Constitution provides that the objects of TIO are to operate the TIO scheme and exercise jurisdiction, powers and functions conferred under legislation or instrument and deal with complaints:

³ Section 128(8) to (11) Telecommunications (Consumer Protection and Services Standards) Act 1999

⁴ Section 128(1) and 132 Telecommunications (Consumer Protection and Services Standards) Act 1999

⁵ Section 131 Telecommunications (Consumer Protection and Services Standards) Act 1999

⁶ Section 130 Telecommunications (Consumer Protection and Services Standards) Act 1999

- as to the provision or supply of a carriage service by a TIO member;
- from owners or occupiers of land about the exercise of statutory powers as a carrier by the holder of a carrier licence; and
- as may by agreement with the complainant be referred by a TIO member.

Clause 17 requires TIO to operate in accordance with the Terms of Reference annexed to the Constitution as modified from time to time.

The current Terms of Reference were published on 1 December 2014. These explain the TIO's functions, the types of complaints and how the TIO handles these. Paragraph 1.5 of the Terms of Reference states that when handling complaints the TIO will consider relevant law, good practice and what is fair and reasonable. The Terms of Reference also commit the TIO to consider the Commonwealth Government dispute resolution scheme benchmarks.

A telecommunications provider that applies for membership of the TIO explicitly agrees on the membership form to be bound by and comply with the TIO's Constitution and Terms of Reference.

5.1.4. Adequacy of authorising environment

The TIO's current authorising environment was shaped by reviews that took place in 2011 and 2012.

In September 2011, the ACMA released the final report of *Reconnecting the Customer*. This concluded that poor customer care practices by telecommunications providers were creating very large numbers of complaints. Driving this were poor pre-sale marketing and advertising practices and practices that led to consumers receiving unexpectedly high bills. To address these issues, it was recommended that the TCP Code should be amended to improve advertising, product disclosure, billing and customer care practices. It was also recommended that changes should be made to the TIO scheme to meet best practices standards for external dispute resolution schemes including in relation to governance and systemic issues reporting. The report was clear that if self-regulation did not achieve the reform objectives the ACMA would use default mechanisms, typically an ACMA-made industry standard. The report stated that: "It is arguable that the weighting given to self-regulation no longer suits the diverse and dynamic nature of the industry."

In May 2012, the Department of Broadband, Communications and the Digital Economy released *Reform of the Telecommunications Industry Ombudsman*. This recommended the amendment of the Telecommunications (Consumer Protections and Services Standards) Act 1999 to clarify the TIO's role and expected standards of operation. The report also recommended some changes to TIO internal management practices and that the TIO amend its constituent documents:

- to clarify when it mandatorily refers non-compliance to the ACMA;

- to allow it to publicly report telecommunications provider members who fail to comply with the scheme or who are the subject of a binding Ombudsman determination;
- to strengthen its role in assisting members to improve their IDR processes;
- to strengthen its systemic issues mandate including to require more transparency in reporting;
- to establish a unitary governance structure; and
- to clarify its complaints jurisdiction.

Following these two reviews, amendments were made to the Telecommunications (Consumer Protections and Services Standards) Act 1999, the TCP Code, the TIO's Constitution and the TIO's Terms of Reference.

Despite these changes, there are still criticisms today of the regulatory environment. ACCAN's submission stated:

"ACCAN's consultation with its members revealed a general perception that the TIO is not as strong or effective as the Financial Ombudsman Service or the Credit and Investments Ombudsman. There is a view that this could be due to weaker regulation than in the financial and energy sectors.

A framework around an industry-based EDR scheme requires a strong regulator with powers to ensure that EDR meets benchmarks and continuously improves access to justice for consumers. The regulator should also issue detailed benchmark guidance for the EDR scheme. There is some concern that in the telecommunications industry, there is a disconnect between the TIO and the ACMA as regulator, and limited transparency over how the ACMA picks up and addresses systemic issues identified by the TIO.

A disconnected relationship between the ACMA, industry participants, and consumers may be a contributing factor to the impression held by consumer representative organisations that the TIO 'lacks teeth'."

While we have been asked to comment on the authorising environment for the TIO, we think it is beyond our place (nor have we done the work) to advise on what to do with the legislative framework outside of the aspects dealing with how the TIO handles complaints. Equally it is not our place to specify the priority that should be given by the ACMA and the ACCC to enforcing the regulatory obligations of telecommunications providers. Our comments about the adequacy of the TIO's authorising environment are more confined in scope.

1. A number of people we spoke with expressed frustration that the regulatory regime overseen by ACMA does not include a basic registration or licensing of small commercial operators (retailers, resellers, etc). We can see that the absence of this presents some problems for the TIO in identifying participants and can complicate the risk of 'phoenixing' (eg. where a retailer goes out of business, transferring its client base to another near-identical new business).

We understand this expectation, although with some experience of the weaknesses of registration regimes, we understand that this may not deliver as much as is often assumed. We also recognise that the ACMA has a wide range of responsibilities in a complex environment and we would be reluctant to be presuming to make recommendations in this space.

2. We have identified one legislative issue of particular importance to the TIO that we think the TIO should discuss with the ACMA, that is, the issue of who must be a member of the TIO. We think that all wholesalers should be members and discuss this in some detail in Part 9.4 of our report.
3. More generally, we think that the TIO should continue to work to improve the legislative framework by taking opportunities afforded by government reviews to make submissions that build from the TIO's complaints handling experience and data. The contribution that the TIO can offer was recognised in the ACCC's submission to our review which acknowledged the value of the TIO's submission to the Australian Consumer Law review.
4. Our review was not focused on governance, however during our consultations with consumer representatives, we heard positive commentary about the current Board structure (introduced in 2014) and that this has resulted in better scrutiny and understanding of the issues.

Both the TIO and some of its stakeholders told us, however, about opportunities to simplify or introduce more flexibility into the Constitution, for example, in relation to the Board appointment processes. From our high level review, it is clear that the TIO's Constitution is more prescriptive in some areas than other ombudsman scheme constitutions – and we would encourage this to be addressed. It would be possible to propose amendments to deal with this, in conjunction with proposed changes coming out of the funding review.

5. We have looked in more detail at the TIO's Terms of Reference and think that these need amendment to clarify and complete them. This is discussed at Part 7.1 of our report.
6. Finally we think that the nature of the TIO's authorising environment creates particular imperatives for the TIO's role. This is discussed in the next chapter.

6. TIO role

6.1. The telecommunications environment

In the connected world of today, telecommunications services are increasingly seen as essential services. In particular, mobile phones and internet access are vital for work, access to information, social interaction and entertainment.

The environment is both highly technical and rapidly evolving. It is characterised by waves of new products and services (eg. early internet, mobile phones, cellular data, cable services, tablets, cable and ADSL broadband, mobile broadband and now fibre broadband). Premium products are high cost and often purchased through credit. Each new wave of products and services increases complexity and creates the opportunity for overpromising, misinformation, consumer confusion, significant cost and often much customer dissatisfaction. Over time, the market, consumers and industry codes adapt to better accommodate the new services. But at best, there is a lag time before this occurs.

The speed at which these new technologies emerge is a significant factor in understanding the TIO's particular challenges. Speed brings with it urgency – for providers to invest and deploy, to gain access, to capture market share ahead of competitors, to sell customers on the benefits of the technology overall and the provider's own version of that technological opportunity, to make revenue early while profit margins are (hopefully) healthy and before the technology is commoditised and price wars reduce profitable returns – or worse before the technology is superseded and overtaken by the next thing.

For customers, it is no different – eagerness to adopt, to gain the benefits, to have the latest thing and, particularly in internet access, to reduce a source of great frustration!

For the TIO, it is about gaining an understanding of what is being promised, what consumers understand about the technology, what goes wrong, what product, packaging and service options are problematic, and like everyone, to cut through the seemingly unavoidable hype.

This is true for the ACMA and the ACCC as regulators also. It takes time to obtain data about what is happening, to understand the trends and to devise a regulatory response (if needed). Despite the inexorable increase in the importance of telecommunication services, and the speed of change, there are relatively low barriers to entry to the telecommunications industry and there are frequent new entrants. We understand that this is because of successive government's desire to promote open competition in the sector – in particular in light of Telstra's perceived dominance.

A side-effect of the low barriers to entry is that it can provide the opportunity for some egregious sales and service practices to rapidly appear, and in some cases for fly-by-night opportunists to set up to take advantage of consumer ignorance. In this environment, the TIO, through complaints made to it, may become aware of a new entrant before the ACMA does. The TIO may also have information about consumer problems before the ACCC is aware of those issues.

In this environment, government regulators expect the TIO to support them in their regulatory efforts – arguably to an extent that is beyond that of other ombudsman schemes in Australia. This was borne out by submissions to our review. The ACMA placed importance in its submission on the TIO continuing “its active participation in the development of consumer codes” and “contribut[ing] to broader policy and regulatory reform processes imminent or in train”. Its submission also emphasised the contribution the TIO makes to regulatory compliance by “encourage[ing] new providers to join the scheme and .. refer[ring] ‘membership’ non-compliance to the ACMA” and stated that it “would .. be beneficial to government and regulators to have access to enhanced information about where the root cause of a complaint lies in the supply chain and the nature of the complaint to inform potential policy or regulatory interventions.”

The ACCC referred in its submission to the importance of TIO information to “help to ensure that public resources are directed at the most pressing and widespread consumer problems in the telecommunications industry”. So also the Department of Communications and the Arts in its submission referred to the importance of TIO information to inform government about actions to improve consumer outcomes.

A further factor shaping government’s expectations of the TIO is the government’s very significant investment in better broadband access for Australia. nbn co, a government owned enterprise, is responsible for designing, building and operating Australia’s new high-speed, wholesale local access broadband network. As demonstrated in hearings held by the Joint Standing Committee on the National Broadband Network, there is an expectation that the TIO’s complaints data will help to shine a light on consumer experience of the national broadband network in the interests of public sector accountability. From our review, it is evident that many smaller telecommunications providers also share that expectation. All of this creates a quite different context for the TIO as compared with other ombudsman services, many of which, we have observed, are able to manage stakeholder expectations in part by adhering to their unique ‘core’ dispute resolution role and to reasonably well-understood limitations to their scope.

While in our view, there is great value to be had from the TIO’s unique experience and data, we recognise that there are significant constraints upon the TIO’s ability to respond to these expectations of government, politicians, media, regulators and, to a lesser extent, telecommunications providers.

1. The TIO only sees a small fraction of the complaints that are made across the industry.

This is not unusual for any ombudsman scheme. Whilst there is not publicly available data as to the percentage of telecommunications providers’ complaints that escalate to the TIO, it is evident that it is a fraction of the total.

Second, it cannot be assumed that the issues raised in TIO complaints are representative of the complaints across the sector. While, there is no doubt that there is value in understanding what the TIO does see, it is highly likely that TIO complaints that are actually conciliated or investigated represent the more difficult or intractable complaints that arise.

2. The TIO's visibility of the underlying complaint causes is very limited.

For a complaint that the TIO receives, refers to the telecommunications provider and that does not return to the TIO as an unresolved complaint (the pathway of 90% of the complaints that the TIO receives), the TIO is not in a position to judge whether or not it was reasonably based, what the likely cause was or even which company or companies, were responsible.

The TIO has somewhat better visibility in relation to the 10% of complaints that return to the TIO. It is only for these complaints, that the TIO will (usually) have the telecommunications provider's response to the complaint as well as the consumer's assertions. But even these complaints are typically conciliated without a full investigation – the most common outcome being the consumer accepting an offer from the telecommunications provider to resolve the complaint.

The TIO does take a more in depth look at investigated complaints. In 2015/16, only 48 new investigations began and only 1 complaint and 5 land access objections reached the stage of a decision by the Ombudsman.

This process design means that the TIO has considerable information about consumer problems – but limited insight into the root causes of consumer problems or in a multi-party scenario, which company in the supply chain is most responsible for the problems the consumer is experiencing.

3. There is much pressure on the TIO to efficiently resolve complaints

In an environment of high complaint volumes and typically low financial value of complaints, there is considerable pressure on the TIO from telecommunications providers to resolve complaints quickly and in a cost effective manner. As a corollary of this, some of the submissions we received from industry were critical of the TIO devoting too many resources to what they saw as 'extra-curricular activities' such as helping regulators or publicly commenting or reporting.

Pressure on the TIO to efficiently resolve complaints also comes from consumers who want a timely and streamlined process that does not make excessive demands on their time. In our interviews of consumers, we heard criticism about TIO information requests that seemed unnecessary or repetitive and that were part of a TIO process that detracted from the benefit of the ultimate outcome. Whilst some complaints are not time-critical (for example, a complaint seeking a small refund or credit), a consumer who is without a working service invariably views their complaint as urgent.

In this environment, we think:

1. More than other ombudsman services, the TIO must be able to adapt quickly to changes in the market. It must operate as transparently as practicable and be highly engaged with its stakeholders. It must do more than most ombudsman schemes to ensure that its role is understood by stakeholders.

2. The TIO's focus should continue to be where it can add most value – in helping to fix consumer issues – rather than a heavy focus on causes and allocating responsibility as between the various telecommunications providers involved in delivering telecommunications infrastructure and services to the consumer.
3. Whilst it is appropriate for the TIO in the course of its complaints resolution work to do its best to shape consumers' expectations to what is reasonable, the TIO should not be expected to take on a broader consumer education role (as was suggested in one submission by a telecommunications provider).
4. Nor do we think that the TIO can reasonably be expected to act as an information collector for regulatory intelligence or government policy needs in the sector (ie. to collect extra information or to undertake extra investigatory steps, not needed to resolve complaints), unless it is explicitly charged by government with this role, stakeholders are clear about this and the TIO is funded for it. Without that, TIO's processes must be prioritised to what is needed to resolve complaints quickly and efficiently.
5. The TIO can, however, be expected to contribute the insights and information that it does have to enhance the regulatory environment, telecommunications providers' performance and consumers' experience. Whilst all ombudsman schemes are expected to do this, we think that the nature of the telecommunications industry and the co-regulatory model requires the TIO to do rather more of this than the 'typical' ombudsman scheme.
6. The TIO can also be expected to be transparent about its expectations of telecommunications providers, by way of fairness to both telecommunications providers and other users of the TIO's service, and to lend its efforts to the minimisation of future complaints. Again, we think that the context requires the TIO to do more of this than the 'typical' ombudsman scheme.

To meet these imperatives, we think that the TIO should increase its focus and efforts in the following areas:

- Contributing to the development of codes by bringing its complaints perspectives to the review of new or revised versions of codes.
- Providing more guidance and transparency about the TIO's expectations in relation to commonly occurring complaint scenarios – by publishing guidance as the TIO's view as to what is "good practice" and what is "fair and reasonable" and publishing decisions that demonstrate that guidance in operation.
- Reporting to the regulators where the TIO identifies non-compliance by telecommunications providers – eg. industry entrants that are not members of the scheme, fraudulent behaviour such as unauthorised porting of services
- Working with industry and regulators to minimise complaints
- Providing fulsome annual reports to make its data (even with its limitations) and insights publicly known

We discuss these issues, and what we are envisaging, in more detail in the succeeding chapters of this report.

We recognise that if, as we recommend, the TIO expends more effort and resources on these functions, this will involve some cost for the scheme (and hence for the industry that funds that scheme). We also recognise that in the last 12 months, in the face of ballooning complaint numbers, the TIO has been working hard to keep its costs to a practical minimum and that this has included paring back its resourcing of activities perceived to be outside its 'core' function of individual dispute resolution.

It is, of course, commendable that the TIO is focused on cost efficiency and our work identified some clear fruits of this focus. There are however, significant strategic risks, some already emerging, if this focus limits the ability of the scheme to properly fulfil its role. In an environment where there is constant pressure on the TIO from telecommunications providers to keep costs to a minimum, it is important that the Board of the TIO and the peak industry body remains cognisant that, as one government agency put to us, Australia's unique co-regulatory model for telecommunications depends upon the government regulators, the industry association and the TIO all playing their role. It is also important to remember that co-regulation demands proactivity (ie. cannot afford to be seen to be complacent) and may be only one disaster or scandal away from being replaced by all-embracing, prescriptive legislative rules.

In conclusion, we think that for the telecommunications industry, a key part of the trade-off of the co-regulatory model and the government's infrastructure support is an ombudsman scheme that more actively supports government and regulators than is the case in other industries. Yet the TIO as currently configured is, we think, devoting less resources and efforts to these functions than are ombudsmen schemes in more intensely regulated environments, such as financial services and energy and water. Again later chapters in our report provide some comparative data as to this.

In making these comments, we do not mean to criticise any of the players in the system. We are conscious that a new Ombudsman will often want to re-organise and re-shape some of this activity. We are conscious that with the pressure of dealing with an escalating complaint load over the last 12 months and given the difficulties of scaling the TIO up quickly to meet that increased load, it was inevitable that for a time at least, that functions perceived to be 'non-core' may suffer a loss of focus and resourcing. It is often not until a review of the kind that we are undertaking that there is the space and time for detailed reflection about the nature of the environment and what this means for priorities.

We think that the TIO should unapologetically be giving focus and resources to contributing to the development of codes, publishing more guidance as to the TIO's approach in relation to commonly occurring complaint scenarios, working with regulators and industry to minimise complaints and address poor practices by telecommunications providers and making its complaints data and insights publicly available. To the extent that this may have been temporarily reduced, we recommend later in this report that it should be restored to a level that the Ombudsman and Board are satisfied meets the need.

To legitimise these activities, we think that the TIO's Terms of Reference should specify these functions as core parts of the TIO's role. (Currently section 6 of the TIO's Terms of Reference headed "Our Other Roles" refers to other roles and to things that the TIO "can" do – but does not convey clearly the full extent of the role that many stakeholders think the TIO needs to play.) The aim should be to make expectations of the TIO clear to telecommunications providers that are funding the organisation. It is unfair to the TIO and its Board to be placed in a position of 'wrestling' with telecommunications providers over what is 'core' and what is 'non-core' activity.

The TIO should also give prominence to these roles and functions in its public communications about what it does.

Recommendation 1

The TIO should ensure that stakeholders understand and accept its role as an important support of the telecommunications industry co-regulatory model. The TIO should:

- a) give more focus and resources to working with regulators and industry to minimise complaints through activities including development of Codes, publishing the TIO's approach to commonly occurring complaints, addressing poor practices by telecommunications providers and making its complaints data and insights publicly available;
- b) legitimise and support these activities through amendments to the roles statements in the Terms of Reference; and
- c) give prominence to these functions in its public communications about its roles and functions.

The TIO Board should be seen to actively support and defend this broader role and ensure that the scheme is resourced and capable of fulfilling these vital responsibilities.

7. Clarity about TIO's scope and approach

The TIO's Terms of Reference explain how the TIO scheme operates. This document has the advantage that it is easy to read, but it is not as fulsome or precise as the terms of reference of other ombudsman schemes. This is always a question of balance and it was an issue that we explored.

Our review also considered whether the TIO's website materials provide enough clarity and guidance as to the TIO's approach to dispute resolution.

7.1. Terms of Reference

The TIO briefed us about a number of practical issues that arise because of lack of clarity or detail in the Terms of Reference. These include:

1. Structure of the Terms of Reference

The Terms of Reference are divided into paragraphs, many of which are followed by commentary in italics. Some commentary refers to TIO published procedures. It is unclear whether the commentary in italics or in fact the referenced TIO published procedures, form part of the contract between the TIO and users of its service or whether it is in the nature of non-binding guidance. Wording that we understand has been particularly problematic is the text that follows paragraphs 2.7(a) and 2.7(c) of the Terms of Reference.

We think that the Terms of Reference should be restructured to clarify and address this issue.

2. Status of the Benchmarks for Industry-based Customer Dispute Resolution

Paragraph 1.6 of the Terms of Reference states that the TIO will "consider" any benchmarks the Commonwealth Government publishes about dispute resolution schemes. This wording can lead to an impression that the benchmarks are optional. This is notwithstanding that, as referred to in earlier in our report, the Telecommunications (Consumer Protection and Services Standards) Act 1999 explicitly sets out the six benchmarks.

To address this, we think that the Terms of Reference should include a clear commitment to comply with these benchmarks. In particular, this would help industry to understand that awareness raising and other liaison and industry activity is a core function (see also Part 8.1 of our report).

3. Complaints by a business

The Terms of Reference refer to TIO published policy as to the businesses that are able to bring a complaint to the TIO. This policy is set out in a webpage headed "Small Business Complaints" that explains that generally the TIO will only handle a complaint by a business that has up to 20 full time employees and up to \$3 million annual turnover.

We think that it is an important threshold issue as to what size of businesses are able to access the TIO and so the Terms of Reference should set this out, as is the case for other ombudsman schemes.

4. Types of complaints that the TIO handles

The wording of paragraph 2.2(b) in combination with paragraph 2.7(c) creates uncertainty as to whether the TIO's scope includes some complaints about property damage, for example, a property damage complaint brought by the neighbour of the customer of the telecommunications provider responsible for the damage.

There is uncertainty as to whether the TIO's scope includes complaints about the safety of infrastructure, for example cabling, that does not affect the consumer accessing the telecommunication service. A further problem with paragraph 2.7(b) is that it appears to lead to the anomalous result that a complaint cannot be made to the TIO about defective equipment (eg. a mobile phone with a cracked screen) if the defect is not one that prevents access to a telecommunication service.

Paragraph 2.8 is also problematic to the extent that it appears to suggest that the TIO must handle a complaint that is otherwise outside its scope if the parties agree. Typically an ombudsman scheme has a discretion as to whether to do this – which we think is essential.

Lastly paragraph 2.10 and 2.11 set out exclusions from the TIO's scope: some of these exclusions are expressed in shorthand that could lead to an interpretation that is at odds with that customary for an ombudsman scheme. For example, we think that paragraph 2.10(a) should not exclude a telecommunications provider's policy, if that policy fails to comply with a legal obligation or if the policy is improperly applied (eg. discriminates unlawfully). On the other hand, the exclusion in paragraph 2.11 should be broadened so as to prevent the TIO from handling a complaint that, for example, the Privacy Commissioner has already dealt with.

We think that these are important issues that need to be addressed in a revised Terms of Reference.

5. Land access objections

The Terms of Reference treat land access objections as a species of complaints and appear to suggest that these matters will be dealt with by the TIO as for other complaints. In practice, however, a different process is followed, consistent with the role for the TIO set out in the Telecommunications (Low Impact Facilities) Determination 1997 and the Telecommunications Code of Practice 1997. Essentially these legislative instruments oblige the TIO to decide the objection, which can involve the TIO giving the carrier a direction as to what it must do. The Terms of Reference should be amended to deal with land access objections separately from complaints.

6. Making a complaint

Paragraph 3.2 appears to give all consumers a right to make a complaint by telephone. The Terms of Reference should give the TIO a discretion to withdraw that right where the TIO considers this is necessary to protect the TIO's staff from abusive behaviour.

Paragraph 3.3 enables a consumer to use a representative. Other ombudsman schemes include a discretion to exclude a complaint where a paid representative is used who is not acting in the best interests of the consumer.

Again, we think that the Terms of Reference should be amended to address these issues.

7. Complaints that involve more than one telecommunications provider

The Terms of Reference are silent as to how the TIO should deal with a complaint that involves more than one telecommunications provider member. Other ombudsman scheme terms of reference address this issue, for example, by permitting the scheme to join another member of the scheme as a party to the complaint, where the ombudsman scheme considers this will assist with resolution of the complaint. We discuss this further in Part 9.4 of our report.

8. Stopping handling of a complaint

Paragraph 3.20 enables the TIO to stop handling a complaint at any time if it is fair and reasonable to do so. Words in italics provide examples of when this might be fair and reasonable. Comparing this with the terms of reference of other ombudsman schemes, we think that there are some obvious omissions, for example, a complaint that is frivolous and vexatious or that is lacking in substance.

9. Remedial action

Paragraph 3.11 enables the TIO to require "action" with a value of up to \$50,000. This language is unclear. We think that the monetary cap should only apply to financial compensation, that is, refunds or waiving debt or charges and only on an individual consumer basis (and so not encompass systems or process change). This is how monetary caps operates for other ombudsman schemes with which we have worked. In addition, like other ombudsman schemes, the TIO should be expressly permitted by its Terms of Reference to be able, in exceptional circumstances, to award modest compensation for non-financial loss or indirect loss. We suggest an amount of up to \$1,000 would be appropriate.

10. Systemic issues

Paragraph 5 sets out the TIO's systemic issues jurisdiction. Commentary in italics states that the TIO is able to handle a systemic issue with or without a complaint. Notwithstanding this, the TIO has told us that its Terms of Reference do not permit it to raise a systemic issue with a member other than the telecommunications provider against which the complaint has been raised.

This demonstrates the problem of the uncertain status of the commentary in italics. As we understand, the amendments made to the Terms of Reference in response to the Department of Broadband, Communications and the Digital Economy's report *Reform of the Telecommunications Industry Ombudsman*, May 2012, were intended to free the TIO to undertake a systemic investigation even if there was not a previous complaint against the telecommunications provider in relation to the issue⁷. If there is continuing ambiguity, the Terms of Reference should be amended to put this beyond any doubt.

Clearly these are important issues that need to be addressed. The jurisdictional ambiguities create the risk that some complaints are placed outside scope that should be within the TIO's jurisdiction. A lack of clarity about process, powers and remedies is likely to result in the TIO spending unproductive time debating with consumers and with telecommunications providers how the Terms of Reference should be interpreted.

Clarity is also important from a consumer accessibility perspective. As put by Legal Aid Queensland in its submission to our review:

"the desire to keep the TOR [Terms of Reference] succinct has not improved consumer accessibility to the TOR. The reason for this is that vulnerable consumers are less likely to consult multiple documents in order to understand their rights. The references in the TIO's TOR to "we have a published policy" and "we have a procedure about this" do not assist consumers.

In LAQ's submission, the TIO should develop a TOR that is in plain English that still includes the important details concerning for example, what complaints the TIO can take on and in what circumstances the TIO can refuse to consider a complaint."

For changes to be made to the Terms of Reference, the TIO needs a special resolution of the Board. As a matter of good practice, there should also be a proper stakeholder consultation process to test proposed new wording and to minimise the risk of any unintended consequences.

Recommendation 2

The TIO should revise its Terms of Reference for clarity and greater definition as to the scope of the TIO's remit and its complaints handling process. Proposed changes should be tested via a full stakeholder consultation process.

⁷ The ACMA recommended that the TIO should be able to conduct own motion investigations based on intelligence from third parties: see Recommendation 3 and discussion at pages 44 and 45 of that report.

7.2. TIO's process guidance

In addition to the Terms of Reference (and perhaps because of some lack of definition within that document), the TIO has a range of website guidance as to its dispute resolution process. This includes:

- Complaint Handling Procedures;
- a page headed "Complaints we handle" that also specifies exclusions from scope;
- a page headed "How to complain";
- factsheets and brochures, for example, about the conciliation process.

These documents are filed under different tabs including "Consumer Complaints", "Publications" and "About us".

Feedback in consumer representative submissions made to our review is that this guidance could be improved. ACCAN's submission suggested that:

"The TIO should ... provide and publicise better information about the complaints process, with clear step-by-step instructions on how to make an effective complaint. Information currently available on the TIO website is inadequate and can be confusing for consumers. For example, consumers will often withhold payments from their RSP if in a dispute as they feel this is the only thing within their power to do. Consequently the consumer ends up with a larger amount owing, and potentially negatively affecting their credit rating.

"instead of locating detail about how the scheme works in several documents, there could be one single document in Plain English that contains all relevant information about the scheme. This would be useful as feedback is that once a consumer is asked to look at multiple documents, they are likely to stop paying attention or switch off".

We think that the TIO should overhaul its website with a view to consolidating and better locating the guidance available as to its dispute resolution processes. We are also concerned that at present the website does not include consumer guidance in languages other than English. We think that this should be done in the interests of enhancing the TIO's accessibility and the assistance that it provides to non-English speaking consumers.

Recommendation 3

To make it easier for consumers and small businesses to find and navigate the TIO's assistance material, the TIO should:

- a) review and rewrite its website guidance about its complaints handling process, to consolidate the guidance; and
- b) include consumer guidance in languages other than English that are commonly spoken in Australia.

7.3. TIO's approach to commonly occurring complaints

Like other ombudsman schemes, the TIO considers relevant laws, good practice and what is fair and reasonable when handling complaints (paragraph 1.5 of Terms of Reference). This is a broad discretion. To provide some predictability for users of the TIO's dispute resolution scheme, to inform telecommunications providers' internal dispute resolution and to discourage unmeritorious complaints being made to the TIO, it is important that the TIO publishes website information about its approach to commonly occurring complaint scenarios.

Some ombudsman schemes do this by publishing ombudsman scheme decisions (details of parties anonymised) and having functionality that permits these to be searched by topic. We think that this is the best way to provide transparency as to the ombudsman scheme's approach to commonly occurring complaints.

The TIO's website includes 12 Ombudsman Determinations with the most recent dated 17 June 2014. We understand that since that date there have been a further 12 Ombudsman Determinations with all but 2 of these being land access objection decisions.

We would encourage the publication of all Ombudsman Determinations, however, we are conscious that Ombudsman Determinations only provide limited insight into the TIO's decision making. This is partly because the small number means that Ombudsman Determinations do not encompass the range of commonly occurring complaints, but also because in practice Determinations are only made against telecommunications providers. Where the TIO decides a complaint against a consumer, this is done by a dispute resolution officer exercising the power under paragraph 3.20 of the Terms of Reference to stop handling the complaint on the basis that it is fair and reasonable to do so. The numbers of these greatly exceed the numbers of Determinations, with 1,636 decisions of this type made in 2015/16 alone. We think that at least a sample of these decisions, including a rehearsal of the reasons, should also be published on the TIO's website.

An alternative way that ombudsman schemes provide transparency is via a series of published case studies that each set out the fact scenario, the information that was obtained to test assertions, the outcome reached and why the outcome was fair and reasonable. The TIO has 6 case studies published on its website, all in 2011. These provide very scant details and so give limited insight into how the TIO tested the claims that were being made and how the outcome was derived. In addition to these, each year the TIO's Annual Report includes case studies. Those published last year were more fulsome than the website case studies and so more useful. We think that the Annual Report case studies should also be published on the TIO's website under the "Case studies" tab so as to be readily available for future reference.

The TIO's 28 Position Statements are an additional source of guidance about the TIO's approach to commonly occurring complaint scenarios. These are published under topic headings on the TIO's website (somewhat unexpectedly under the "About us" tab rather than the "Publications" or a specific-purpose tab). The Position Statements were last updated in 2015 and the current iteration have 11 March 2016 as their effective date. We understand that the TIO is in the process of reviewing and re-issuing these (and plans to use a descriptor other than 'Position Statements' in the future).

We think that the Position Statements are an excellent resource. Some smaller telecommunications providers referred to the way in which these can assist with the predictability of TIO complaint outcomes. Ideally, Position Statements should be reviewed at least once per year to ensure that they are maintained as an authoritative source of guidance and address new issues as these arise (see Recommendation 15 that addresses one gap that we identified). They should also be readily locatable on the TIO's website. The aim should be that regular users of the TIO's dispute resolution service look to the Position Statements as a key source of guidance as to the TIO's approach to commonly occurring complaint scenarios. TIO resourcing should never be in a position where these cannot be properly maintained – the downstream benefits are too great.

Recommendation 4

The TIO should provide more guidance on its website on its approach to commonly occurring complaints, by publishing:

- a) all Ombudsman Determinations – on an anonymised basis;
- b) a sample of decisions (appropriately anonymous) to stop handling a complaint on the basis that it is fair and reasonable to do so (Terms of Reference paragraph 3.20 decisions);
- c) a more extensive body of case studies including those from TIO Annual Reports – explaining the facts, the information obtained by the TIO to test assertions, the outcome and why the outcome was fair and reasonable; and
- d) maintaining Position Statements (or equivalent authoritative guidance) by regularly updating these and developing new guidance as required – and ensuring that they are readily locatable on the TIO's website.

8. Accessible dispute resolution

The TIO's obligation to be accessible include an obligation "to ensure that those in the community who may require its services are aware of its existence", to "promote its services in such a way as to be sensitive and inclusive of customers with particular requirements"⁸. The TIO also needs to ensure that its staff provide appropriate assistance to consumers making complaints⁹.

8.1. Awareness raising initiatives

The TIO's 2015/16 Annual Report reported that the TIO has "a year-round calendar of community outreach and regularly present[s] to intermediaries and community groups". In that year, the TIO attended 43 events, with a particular focus on Aboriginal and Torres Strait Islander consumers, people with disabilities and culturally and linguistically diverse communities. In 2015/16, this dropped to 10 events.

The TIO's Stakeholder Engagement Team support the TIO's awareness raising work. Their assistance includes analysis of available consumer demographic information and planning of outreach activity. The draft Stakeholder Engagement Plan 2017 (currently being settled with the TIO's Board) proposes evidence based awareness efforts and use of digital channels to engage with stakeholders ie online, through social media and multimedia.

Stakeholders expressed divergent views about the TIO's awareness raising initiatives. Communications Alliance's submission referred to the TIO's participation in community events and awareness-raising as "activity outside of their Terms of Reference [that] may be creating a drain on resources". On the other hand, ACCAN's submission expressed concern that the TIO may be reducing its outreach efforts.

"The TIO should work collaboratively with other industry ombudsmen to engage with vulnerable communities, such as Indigenous, newly arrived, deaf, and culturally and linguistically diverse communities. The TIO should also increase its engagement with regional, rural, and remote communities, to promote a better understanding of consumer rights to redress.

Financial services ombudsman schemes such as FOS and the CIO are known to work collaboratively with Legal Aid and similar community organisations on community outreach. Other schemes, such as the Energy and Water

⁸ Australian Government, The Treasury, *Key Practices for Industry-based Customer Dispute Resolution*, February 2015, paragraphs 1.1 and 1.7.

⁹ Australian Government, The Treasury, *Key Practices for Industry-based Customer Dispute Resolution*, February 2015, paragraphs 1.17.

Ombudsman of NSW, employ Aboriginal engagement officers to do outreach in Indigenous communities and assist consumers to lodge complaints on-site. This goes beyond simply promoting a service and demonstrates an active commitment to vulnerable consumers. This type of engagement increases community buy-in and improves the accessibility and take-up of EDR schemes.

The TIO could improve the targeting of outreach and promotional activities by collecting demographic data about the people who contact it (e.g. age, gender, Aboriginal and Torres Strait Islander status, cultural background), thereby getting a clearer picture of who is, and who is not, accessing its services.

In addition the TIO could make better use of the data that it does collect, such as postcode. Currently statistical reports only list complaints by state or territory; however an analysis of postcode data by remoteness indices would provide richer data and enable more meaningful targeting in areas where fewer complaints are originating.

ACCAN has previously advocated for information about the TIO such as its role, contact details, and website, to be printed on all bills issued by RSPs. Currently this information is provided in the critical information summary (CIS) the customer is given when signing up for a service. Following consultation with its members, ACCAN would now go further and recommend that this information must be provided not only on bills, but all important points of contact the consumer has with RSP, such as when they sign up for a service, make a complaint, or receive a warning or reminder notice."

We think that the TIO's awareness raising initiatives are not 'an optional extra' but rather that this work is a core function of a modern, effective ombudsman service. This is entirely consistent with the Australian Government's Benchmarks for Industry-based Customer Dispute Resolution and the Telecommunications (Consumer Protection and Services Standards) Act. To address industry misunderstanding about what is expected of the TIO in this space, we have recommended earlier in our report that the TIO's Terms of Reference should mandate compliance with the Benchmarks which would include the accessibility benchmark (see Chapter 6 of our report). We have also recommended that the TIO Board adequately resource and be seen to actively support the TIO in this work (see Recommendation 1.).

At the same time, it is important that the TIO undertakes its awareness raising initiatives in as efficient a manner as possible. We agree with the TIO that this is best done on an evidence-basis, that is, analysing the TIO's consumer demographic data to identify areas of the community who are under utilising the TIO and targeting the TIO's awareness raising accordingly. Digital outreach would also seem to be efficient – and we think that this is particularly appropriate for an ombudsman scheme operating in the telecommunications industry. We encourage the TIO's experimentation with this and we accept that effective use of these techniques provide some opportunity to reduce attendance at in-person outreach events. On this basis, we have not made a specific recommendation that the TIO increase its outreach efforts however, to some extent, the methods used for outreach must meet

community expectations and we would like to see the TIO monitoring the impact of the decline in in-person outreach activity on perceptions of TIO engagement and awareness-raising.

We do not, however, support ACCAN's recommendation that reference should be made to the TIO on telecommunication service bills and all other critical points of contact with consumers. This would not be supported by telecommunications providers and we agree that it would risk consumers failing to understand that their first point of contact about a complaint should be with their telecommunications provider. As it is, the TIO already receives almost 12,000 'first point contacts' from consumers per year.

8.2. Consumer assistance

Consumer representative organisations questioned whether the TIO is currently doing enough to support consumers through the complaints process. ACCAN's submission stated:

"ACCAN has been contacted by three consumers with disability in the past 12 months who have had difficulty in their engagement with the TIO. All have experienced a complex communication process due to their disability and the way they were treated by TIO staff. In each case, the actual complaint with the RSP has taken a back seat to the complaint the consumers have been making about the TIO process and the way it communicates.

There is room for improvement in the way the TIO communicates with consumers with disability. One suggestion is creating a disability-specific complaints area within the TIO, staffed by TIO officers that have specific training in disability awareness and appropriate ways to deal with complaints complicated by an individual's disability."

"Financial counsellors reported to ACCAN that TIO staff have become increasingly angry and judgemental of complainants in recent times, and they have received more reports from clients that TIO staff are rude to them. They have not received similar feedback about other EDR schemes. It is important that the TIO trains its staff to deal appropriately and patiently with consumers, who are likely to be in vulnerable situations already.

Understandably, an ombudsman scheme is expected to demonstrate a 'gold standard' of customer service. It cannot do less given that it is in the business of making judgments about others' customer service. So, it is essential that TIO staff are seen as being patient and courteous to users of the TIO's service, particularly consumers with disability.

Our observations of the TIO at work, discussions with TIO staff and review of training make it clear that this is the culture that the TIO aspires to and overwhelmingly the service that it

provides. We are, however, concerned about the feedback from ACCAN, also supported by Financial Counselling Australia. This is particularly the case given that, in 19 of the 72 complaints about the TIO's own performance that were made in the January to March 2017 quarter, there were claims by consumers of rudeness on the part of TIO officers (see Part 13.4 of our report).

We recognise that complaints handling, particularly in a call centre environment, can be draining. Consumers with a complaint can be angry, frustrated and at times aggressive. The TIO is focusing efforts on recruiting staff whose personal disposition is suited to the work – something we commend.

In addition, we think that the TIO should introduce a more structured program to monitor officers' telephone calls. At present, team leaders are expected to randomly select calls to listen in to. This is good practice, but could be made more robust by setting a minimum number of calls that must be monitored per team member, and a routine process to report to more senior managers the outcomes from this work.

We considered but in the end did not support ACCAN's suggestion of a specialist team to deal with consumers with disability - for a few reasons. First, we think it is quite likely that a significant percentage of those who bring their complaint to the TIO could be categorised as needing additional support – because they are aged, unfamiliar with technology, have health issues, language difficulties, or disabilities. Rather than a small specialist team dealing with a segment of those needing additional support, we think that all TIO staff need to have the personal resources to deal well with consumers who need extra support. Secondly, we think that interacting with a diverse range of consumers creates a better work dynamic for TIO dispute resolution officers and so ultimately leads to a stronger complaints handling service.

Recommendation 5

The TIO should strengthen its program of team leader monitoring of randomly selected telephone calls for each officer within their team. This should include more robust management reporting and action to address instances of below-standard customer service.

9. Handling disputes efficiently and effectively

This Report refers earlier to the high volume of complaints and the urgency of at least some complaints given the essential service nature of telecommunications today.

Clearly it is important that the TIO's processes are as efficient as possible, consistent with a fair outcome being achieved. From our review of procedures and file review, we think that for the most part this is the case. Whilst some improvements are possible – and we discuss these below – some of the suggestions by a few telecommunications providers are manifestly not possible to implement. To respond to some views that we heard:

- The TIO is not in a position to challenge a consumer's assertion that they have already raised their complaint with their telecommunications provider, until the TIO has heard from the telecommunications provider and been provided with information showing that this was not the case.
- The TIO, an independent ombudsman scheme, cannot refuse to accept a consumer's complaint simply because it is self-evident to the telecommunications provider that it has no merit. For the TIO to form a view that a complaint has no merit, the TIO invariably needs information from the telecommunications provider and must weigh up any competing assertions – in other words, with few exceptions, the TIO needs to commence its conciliation process to be in a position to form that view.

(Note that the discussion in this section of our report does not apply to land access objections for which a different process is employed. This process was not criticised in submissions to our review and our examination of processes and a sample of closed files indicated that these are being handled efficiently and effectively. For that reason, this report does not deal with these matters, although we recognise that these are often highly significant for the parties to the objection.)

9.1. Complaint initiation

The TIO makes the enquiry and complaint initiation process easy for consumers. In 2015/16, 59% of new complaints were made to the TIO by telephone. We understand that this percentage declined in 2016/17 and the percentage of complaints made using the TIO's website form increased correspondingly.

Stakeholders raised with us a few issues in relation to the efficiency and effectiveness of the front end processes.

9.1.1. Chatbot

Communications Alliance's submission suggested that the TIO investigate the efficiency benefits of a chatbot to answer common queries and so filter the enquiries that flow through to the TIO's enquiries officers.

We agree that this might work well for some consumers and may provide an alternative route to a telephone general enquiry (last financial year the TIO handled more than 20,000 telephone general enquiries). The TIO would, however, need to investigate the economics of a chatbot in light of the current demand for general information.

9.1.2. Online complaint form

One submission suggested that the TIO's web form is currently deficient in that it does not ask the complainant if they have contacted their telecommunications provider about the complaint and that it would be more efficient if this was built into the form.

The webform does in fact have a preliminary question "Have you contacted your telecommunications provider about your complaint". If the complainant clicks on the "no" box, the website advises that:

"The TIO cannot accept your complaint unless you have given the service provider an opportunity to consider the complaint."

Nor did we identify any other changes that could be made to the complaint form to make the complaint process more efficient and effective.

9.1.3. Contact details for telecommunications providers

ACCAN's submission recommended that the TIO's website should list telecommunications providers' escalated internal dispute resolution contact numbers – not just the call centre numbers – so that consumers can more readily resolve their complaints without going to the TIO.

We agree that there might be some reduction in complaints (and some efficiency for consumers, telecommunications providers and the TIO alike) if large telecommunications providers enhance consumer accessibility to their team that handles escalated disputes by listing that team's contact number on the TIO's website. This is, however, an internal management issue for each telecommunications provider to decide – accepting that they may have higher TIO complaint numbers and hence TIO complaint fees if they choose to list the call centre contact number rather than the escalated disputes team contact number.

9.1.4. Consumer identification steps

Communications Alliance's submission to our review expressed concern that the TIO is not sufficiently rigorous in its consumer identity verification steps. The TIO's practice is to accept a claimed identity on the basis of name, address, telephone number and telecommunications provider and then expect the telecommunications provider to respond to that person's demands.

It has been suggested that this provides a low hurdle for an identity thief and thereby opens the possibility of the TIO's complaint processes being used to circumvent the telecommunications provider's identity verification steps, for example, to obtain another person's call records or other private information or even to seek the transfer of another person's mobile phone number to a SIM in the identity thief's possession. One

telecommunications provider has suggested that the TIO should at the outset require a consumer to cite their telecommunications provider's complaint reference number (the TCP Code requires telecommunications providers to give complainants a reference number) and check this with the telecommunications provider as a way of verifying the person's identity.

We are by no means sure that this is appropriate. Our concern is that if a consumer fails to record (or accurately record) their telecommunications provider complaint reference number, the customer would not be able to progress the complaint through the TIO, but instead would need to return to their telecommunications provider. This creates an unhelpful barrier to access to the TIO. On the other hand, we are aware of the risks of breach of privacy and of fraud (recognising that mobile telephone numbers are often used by banks¹⁰ and other organisations to re-set passwords etc.). The issue is where the appropriate balance lies between guarding against these risks whilst minimising barriers to access to the complaints handling process.

These are matters of judgement, with no 'correct' answer. The material we were able to see did not provide definitive evidence that would enable us to arrive at an authoritative view of how the balance of risks is being managed. The TIO has a firm view that it is correct – as does the telecommunications provider most concerned about the risk. We don't think that an impasse on a matter as sensitive as this is very satisfactory. As a form of 'circuit-breaker', we suggest that the TIO ask either Communications Alliance or the Office of the Information Commissioner to facilitate a discussion amongst relevant stakeholders (including the Office of Australian Information Commissioner and representatives of industry) to develop a shared understanding of the risks and to evaluate what safeguards are appropriate. In our consultations with telecommunications providers, we heard some support for a roundtable approach to this issue which seems sensible.

Recommendation 6

The TIO should request that Communications Alliance or the Office of the Information Commissioner convene a roundtable with stakeholders to explore whether the TIO's current practices strike the right balance between ensuring access to the TIO and protection against the risk of breach of customer privacy or identity fraud.

¹⁰ See *Sydney Morning Herald*, 9 July 2016, Han, E "ID theft in three steps: 'Adequate Telstra and telco identity checks questioned'"

9.1.5. 'Value-adding' by TIO

In our meetings with telecommunications providers, we heard a perception from a number that the TIO is not sufficiently 'value-adding' when taking down the details of a complaint. They expect TIO's enquiries officers to be clarifying the nature of the complaint and clearly expressing this in the information sent to the telecommunications provider, to be managing consumers' expectations from the outset and to be filtering out complaints that are clearly outside the TIO's scope under its Terms of Reference.

We agree that these steps are all important. Our review of TIO data and a randomly selected group of closed complaints suggested however, that TIO enquiries officers are doing all of these things – albeit not as visibly as they might be.

We compared the quality of information given to telecommunications providers in relation to complaints that are made via the TIO's website (where enquiries officers do not have opportunity to clarify and reframe the complaint) with that of complaints made by telephoning the TIO (where enquiries officers do have that opportunity). To our observation, there is typically a much clearer description of the complaint when the enquiries officer has recorded it – and a couple of telecommunications providers agreed with us that this is the case. We see this as evidence that the TIO's telephone service is 'adding value'.

Enquiry officers' notes of these first calls with consumers routinely record that consumers are being provided with advice about what the possible outcomes might be, to ensure that consumers' expectations are realistic. We think that it is highly likely that this early advice by enquiries officers contributes to subsequent resolution by the provider.

As shown in the next table, TIO data for 2015/16 records show that, of the 159,296 new enquiries and complaints received by the TIO in that year, 11,611 were categorised as outside the TIO's proper scope. As a result, these were not referred to the consumer's telecommunications provider.

Figure 2: Complaints excluded in 2015/16 by TIO at the initial enquiry stage and therefore not referred to the telecommunications provider

Category of exclusion	No.	% of total enquiries
Member commercial decision > Policy or procedure, supply of service or tariffs	2734	5.8%
Content service > Non-content: Pay TV	966	2.1%
Customer equipment > Purchased outright (not locked) or not bundled	547	1.1%
Business directories	498	1%
Content service > Content: App, Pay TV, Social Media, Website, etc	393	0.8%
Domain names or website hosting	238	0.5%

Customer equipment > Not affecting access to a carriage service	193	0.4%
Content of law, regulation or government policy	178	0.4%
Cabling beyond network boundary	158	0.3%
Intra-industry complaint	35	0.1%
Legal proceedings underway	27	0.1%
Over six years	10	>0.1%
Complaint better handled by another agency (Do Not Call Register, Fair Trading etc)	3151	6.7%
Ombudsman discretion > Service unavailable: ADSL, NBN interim satellite	1764	3.7%
Ombudsman discretion > Not landowner or occupier	308	6.5%
Ombudsman discretion > TIO action inappropriate > Mass service disruption (MSD)	300	6.4%
Ombudsman discretion > TIO action inappropriate > Wholesale issue	105	0.2%
Ombudsman discretion > Request to resubmit information	3	>0.1%
Ombudsman discretion > TIO action inappropriate > Between 2-6 years: unreasonable delay or impact	2	>0.1%
Ombudsman discretion > TIO action inappropriate > Natural disaster emergency assistance	1	>0.1%
Total	11,611	36.1%

In addition, TIO data for 2015/16 records that they were 11,716 complaints where the TIO assessed that the consumer had not given the telecommunications provider an adequate opportunity to respond to the complaint and so that were referred to the telecommunications provider as an enquiry referral (no complaint fee payable by the telecommunications provider to the TIO).

We support the TIO undertaking this jurisdictional assessment at the outset of its process. It is efficient for the TIO and for telecommunications providers to do so and it is better for consumers to learn sooner rather than later if the TIO cannot help them. To our mind, this data is further evidence that the TIO is 'value-adding' and not just unthinkingly passing on all matters to telecommunications providers.

For awareness and for accountability purposes, the TIO should, however, publish this type of data each year in its Annual Report so that telecommunications providers and consumer representative organisations alike can see what exclusions are occurring and why. We understand that the TIO has not done this to date because it has been concerned that the

complexity of its categorisation system might have meant that categorisation errors occurred. From 1 July 2017, the TIO has been employing a simplified categorisation structure that it considers will produce more reliable data. We understand that the new exclusion categories for complaints are:

- Not a telecommunications provider
- Not a member
- Commercial policy (network infrastructure, nbn rollout, price setting)
- Outside time limits (over 6 years old)
- Not owner/ occupier (in case of land access objection)
- Not end user/ authorised representative
- Content service
- Already handled by another forum
- Business directory
- Emergency services
- Complaint withdrawn
- Mass service disruption
- Large business
- Unreasonable consumer conduct
- Other forum more appropriate

The number of excluded complaints for each of these categories should, therefore, be reported in the TIO's Annual Report (see Recommendation 26 at the conclusion of the discussion of public reporting in Part 12.2 of this report).

9.2. Referral processes

ACCAN's submission to our review expressed the frustration of many consumers who are referred by the TIO back to their telecommunications provider as the first step in the TIO process (the TIO classifies these as Level 1 complaints). The submission noted that:

"Once consumers have reached the point of contacting the TIO, they are understandably unwilling to take up the issue again with their provider directly."

We understand that for some consumers the further referral to the telecommunications provider can feel like a pointless delay. However, the fact that the complaint has been made to the TIO does frequently change the dynamic with the telecommunications provider, as

attested by some consumers who were part of our random sample of interviewees. For this reason, we think that it is appropriate for the TIO's process to build in a further opportunity for the telecommunications provider to try and resolve the complaint without the active involvement of the TIO. This is both efficient from a time and cost perspective and best preserves the relationship between the telecommunications provider and the consumer.

It is, however, important that the TIO is prepared to dispense with this step in appropriate cases, for example, where it is clear that the relationship between the telecommunications provider and the consumer has irreparably broken down – and we note here that in 2015/16 there were 563 complaints that moved directly to conciliation without a further referral to the telecommunications provider. We understand that a smaller number of complaints moved directly to conciliation in 2016/17, notwithstanding that complaint numbers increased. This is a trend that the TIO should monitor.

The ACANN submission also expressed concern about consumers “falling out of” the complaints handling process because the telecommunications provider fails to respond to the TIO referred complaint. Similarly the Legal Aid Queensland submission referred to consumers having “negative experience with case managers and dispute resolution officers from industry members” following the TIO's referral of their complaint back to their telecommunications provider. The ACCAN submission suggested that the TIO should register all complaints as a way of guarding against problems.

The TIO retains a record of all complaints referred to telecommunications providers and so has a 'register' of these. The TIO does not, however, obtain a report back from either consumers or telecommunications providers as to what happened as a consequence of the referral.

We think that there would be little public benefit in the TIO requiring all telecommunications providers to report back on the results of referred complaints. We have seen this attempted in other settings without much success. Without checking and calibrating telecommunications providers' information with the affected consumer, we think that this information would add little.

Nor do we think it would be efficient for the TIO to follow up all consumers whose complaints are referred back to their telecommunications provider. To do so would be a huge, resource intensive exercise, given that this is some 10 times the number actually dealt with through conciliation at the moment.

However, it is important that there is public confidence in the way in which telecommunications providers respond to TIO referrals. This is also an important issue for the TIO's reputation. At the moment, we think that there are some unanswered questions: it is not clear why in the financial years ending 30 June 2015 and 30 June 2016 there was a significantly greater percentage decline in the number of TIO conciliated complaints (complaints that returned to the TIO and are classified as Level 2 complaints) as compared with the percentage decline in the number of TIO new complaints (complaints classified as Level 1 complaints). It is possible that this period saw an improvement in telecommunications providers' complaints handling. But it is also possible that more consumers were becoming discouraged in pursuing legitimate complaints. In comparison, in 2017 the percentage annual increase in conciliated complaints was higher than the percentage annual increase in new complaints. It is possible that this was

because the higher complaint numbers placed telecommunications providers' complaints handling teams under more pressure. But without further research, this is speculation.

Figure 3: Comparison of the decline in new complaints vis a viz the decline in conciliated complaints (ie. those returned to the TIO after the initial referral of the complaint by TIO to the provider)

Year	% decline in new complaints as compared with previous year	% decline in conciliated complaints as compared with previous year
2013	18.1%	17.7%
2014	12.4%	1%
2015	10.5%	29.7%
2016	9.6%	17.3% ¹¹

We think that, for any ombudsman scheme, it not enough to simply assume that satisfactory outcomes are obtained by consumers who do not return to the scheme. Some assurance steps are appropriate. This is part of the obligation that the TIO owes to those who have turned to the TIO for help. In other environments, we have heard it argued that this would be tantamount to the ombudsman scheme supervising internal dispute resolution. But in the case of the TIO, there is an expectation by government that the TIO will oversight internal dispute resolution – see page 35 of Australian Government, Department of Broadband, Communications and the Digital Economy, *Reform of the Telecommunications Industry Ombudsman*, May 2012 – an expectation that the TIO responded to by amending its Terms of Reference to introduce paragraph 6.5..

Whilst we fully expect that most of the referrals that do not return to the TIO are properly dealt with by the telecommunications provider, there is ample evidence that this is unlikely to be universally the case. It is known that there is quite poor customer service amongst some telecommunications providers. Around 150 telecommunications providers exit the industry every year, often under financial pressure, if not liquidation, affecting a significant number of their customers. We also heard evidence in our interviews that TIO-referred complaints sometimes do not get escalated (within even large providers) and are instead sent straight back into the original channel and the customer gets no different consideration of their complaint. In addition, customer complaint fatigue is a well-documented feature of dispute resolution. The risk is that there are disappointed customers going away not only without the right outcome, but feeling that the TIO has also let them down.

¹¹ This number was provided to us by the TIO. However p.11 of the 2015/16 Annual Report stated that there was a 20.7% decline in conciliated complaints that year.

The issue is what action the TIO should take. We have seen other ombudsman schemes undertake pilot projects to obtain information from providers about the fate of referrals. In our view, although we understand this has the apparent attraction of being less effort, that is not the most effective place to begin. In our view, it is the consumer who will provide the best initial information as to the outcome of the referral.

We recommend that to assure the integrity of the further-opportunity-to-resolve process, the TIO should undertake a limited exercise of periodic telephone surveying of a randomly selected group of consumers whose complaint does not return to the TIO as a conciliated (Level 2) complaint – to check that their complaint was reasonably and fairly dealt with. We think that this data should be collated and analysed with a view to identifying anything that the TIO could be improving about its referral process, any common types of complaints that are not being fairly dealt with or any telecommunications providers that appear not to be resolving complaints in good faith. The aim is assurance about how well the referral process is working and an opportunity for continuous improvement of that process.

The suggested telephone technique is the one that we as reviewers use and is reasonably time-effective – however we do understand that a follow-up contact from the TIO itself (rather than a third party), may well prompt any dissatisfied consumers to want to revisit the complaint or have it re-opened. While this has some resourcing implications, it would be hard to consider this as anything but reasonable from the point of view of the consumer.

We do not think this is a significant impediment. The process we propose is a small sampling exercise and of that sample, we would expect only a small number are likely to be dissatisfied. Any consumers that are dissatisfied and wish to take their complaint further would simply be put into the conciliation process (Level 2) as for anyone else. It would be possible for the TIO to contract this follow-up surveying out, however we do not think that is a good substitute for obtaining the feedback first-hand.

Recommendation 7

The TIO should undertake a limited exercise of periodic telephone surveying of a randomly selected group of consumers whose complaint does not return to the TIO as a conciliated (Level 2) complaint – to check that they were satisfied that their complaint was reasonably and fairly dealt with by the provider and, if not, why they did not pursue their complaint through the TIO. This data should be collated and analysed with a view to identifying any weaknesses in the process that should be addressed and trends over time.

9.3. Conciliation and investigation process

If the TIO's referral of a complaint to the telecommunications provider does not result in the resolution of the complaint, the consumer may contact the TIO to re-open their complaint. The complaint is then dealt with by the TIO's conciliation process and classified as a Level 2 complaint. This process involves:

- Contacting the telecommunications provider to obtain their written response to the complaint and any key documents that may be required. Typically 10 business days are allowed for the telecommunications provider's response but a shorter timeframe may be imposed if the complaint is urgent.
- Telephone contact by the TIO with the parties thereafter with the aim of achieving a conciliated outcome.
- If the telecommunications provider's response does not satisfy the consumer, the TIO assesses the response and if it considers the response fair and reasonable the TIO will close the complaint.

If the issues are complicated or the telecommunications provider is unresponsive, the complaint may be escalated to the investigation stage of the TIO's process (classified as Level 3 complaint). If so, this process begins by allowing the telecommunications provider 20 business days to respond to the TIO's information request. In practice, there are few complaints that reach the investigation stage – less than 1% of conciliated complaints, or 0.01% of total complaints in 2015/16.

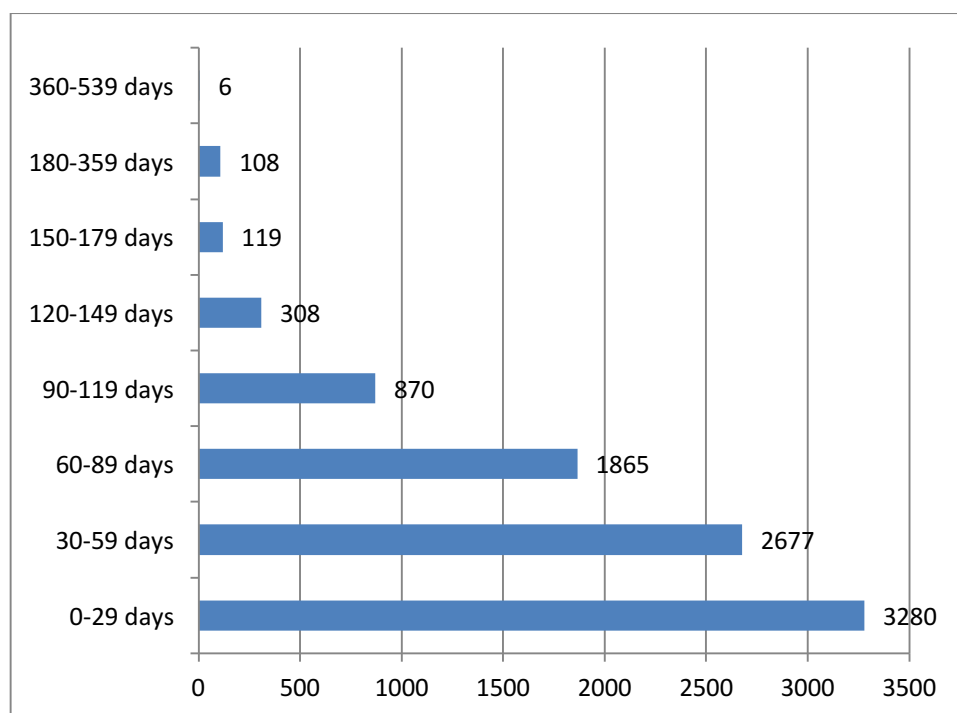
The table below provides information about the outcomes of conciliation complaints in 2015/16 (excluding the complaints that were escalated to investigations).

Figure 4: Outcomes of conciliated (Level 2) complaints in 2015/16

Type of outcome	No.
Discontinued/ withdrawn by consumer	140
No further investigation – fair offer	917
No further investigation – further involvement not required/ inappropriate	719
Resolved by agreement	7,313
Total	9,089

The next chart provides information about how long the conciliation and investigation process takes, that is the period between the complaint being opened as a conciliated complaint and resolving. This excludes the time involved in the initial referral to the telecommunications provider and also the time in the queue pending commencement of the conciliation process (which is now typically a 1 to 3 weeks wait time but which last year for a time extended out to a 3 month wait period).

Figure 5: Timeframes for conciliated (Level 2) and investigated (Level 3) complaints in 2015/16



9.3.1. Criticism of timeframes

ACCAN's submission to our review criticised the TIO's timeframes for the resolution of complaints that progress to conciliation. As the ACCAN submission pointed out, long timeframes reduce the accessibility of the scheme and can contribute to consumers giving up on meritorious complaints.

Submissions made by ACCAN and by a couple of individual consumers suggested that telecommunications providers should be able to respond to TIO requests for information more quickly than the 10 business days that the TIO allows them and that this would speed up the resolution process. ACCAN and Legal Aid Queensland also suggested that the TIO should look to the example of FOS's fast-track program for simpler complaints that involves "fewer touch points, more active engagement between FOS staff and both parties to the dispute [and] enables a simpler, faster, and improved experience for both applicants and financial services providers".

The TIO's Annual Report for 2015/16 noted that the increase in complaint volumes in the second half of the year resulted in a build-up of unresolved cases and meant that the TIO did not meet targeted response and closure times. The Annual Report also noted an increase of almost 10% in "technical complaints" and that these take longer to resolve, with a median timeframe of 33 business days as compared with 28 business days for other complaints.

We think that it is part of best practice for any ombudsman scheme to be continuously innovating and refining its approach and recognising that solutions that may work in one set of

circumstances will need to be revisited as the environment changes. For the TIO, with its variable volumes and 'waves' of new types of complaints, it is even more important.

We found that the TIO is conscious of the need to improve timeframes and has been experimenting with different approaches, with the result that it has successfully overcome recent backlogs. Batching of complaints has occurred for 5 large telecommunications providers and has been found to be efficient. The TIO is also devising new ways to resolve complaints involving carriers or wholesalers. This is discussed further in the next section of our report.

Nevertheless more is required to reduce median timeframes and the tail of up to 1 year to conciliate and investigate some complaints – a timeframe that is clearly far too long. Shorter TIO timeframes would also have the advantage of reducing the instances when a complaint is passed from one TIO officer to another (because of staff departures, changes in responsibility, holidays etc) a problem that we observed in the course of our file review.

The way forward would seem to be for the TIO to continue to work with industry to improve processes and reduce timeframes. Our consultations suggested that large telecommunications providers are willing to partner the TIO in these kinds of efforts.

1. The TIO should look to the experience of other ombudsman scheme to see what other collaborative techniques may be applicable in this environment (eg. when Energy and Water Ombudsman Victoria experienced a ballooning number of complaints it experimented with real-time resolution and introduced shorter timeframes for response by industry members, particularly for time sensitive complaints).
2. The TIO needs to be active in following up response deadlines imposed on telecommunications providers and, if this occurs more than once or twice without a compelling reason being provided for the delay, should take action to address the problem which could include escalating the issue to a more senior person within the telecommunications provider's organisation or even a monetary consequence for the provider. Here we note consumer submissions to our review that refer to their experience of telecommunications providers failing to respond on time – and the TIO simply pushing out the deadline, sometimes repeatedly. Whilst this was not a major problem that we observed in the course of our file review, we did see a few complaints where this scenario played out. This is a particular issue for reputation, with consumers who have experienced this describing how this adds to an impression of TIO 'toothlessness'.
3. Systems improvements and new capability should be a priority for the TIO. One telecommunications provider put to us that the TIO is undertaking its complaints handling with last century's technology. That may be something of an overstatement, however it is important that the TIO is active and seen to be active in seeking out and, where appropriate, applying the technology that telecommunications providers use.

Recommendation 8

The TIO should broaden its efforts to work with industry to see if there are ways in which

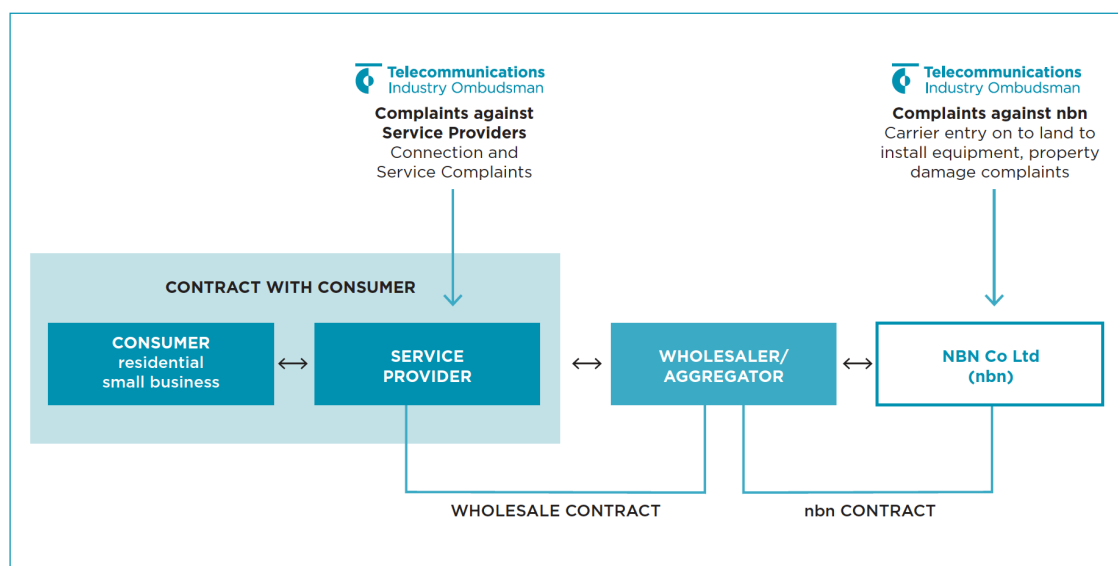
together they can reduce conciliation and investigation timeframes. The TIO should:

- a) look to the experience of other ombudsman scheme to see what other collaborative techniques may be applicable;
- b) be more active in following up response deadlines imposed on telecommunications providers and develop a suite of responses to address repeat instances of failure to meet deadlines; and
- c) continuously investigate potential systems improvements and new capability to help to reduce timeframes.

9.4. Complaints that involve carriers or wholesalers

The TIO operates on the basis that the retail services provider is responsible for the relationship with the customer and for the resolution of any complaint, even if the problem was caused by a company 'up the supply chain' such as a carrier or other wholesaler. Accordingly a complaint is generally referred by the TIO to the retail services provider and the TIO's requests for information are made of that company. Where, however, the consumer's complaint arises out of direct contact by the consumer with a carrier, for example nbn co., the TIO will direct the complaint to that carrier. The next diagram, sourced from the TIO's submission on 1 May 2017 to the Joint Standing Committee on the National Broadband Network depicts this.

Figure 6: TIO complaints about national broadband network supply issues



Not surprisingly, the process whereby the retail services provider is expected to 'manage up the supply chain' can be slow and frustrating for all concerned. In submissions and during our consultations, a number of small telecommunications providers expressed considerable frustration about managing complaints that they say are caused by nbn co. For a small telecommunications provider with a handful of staff, the process is seen as a significant

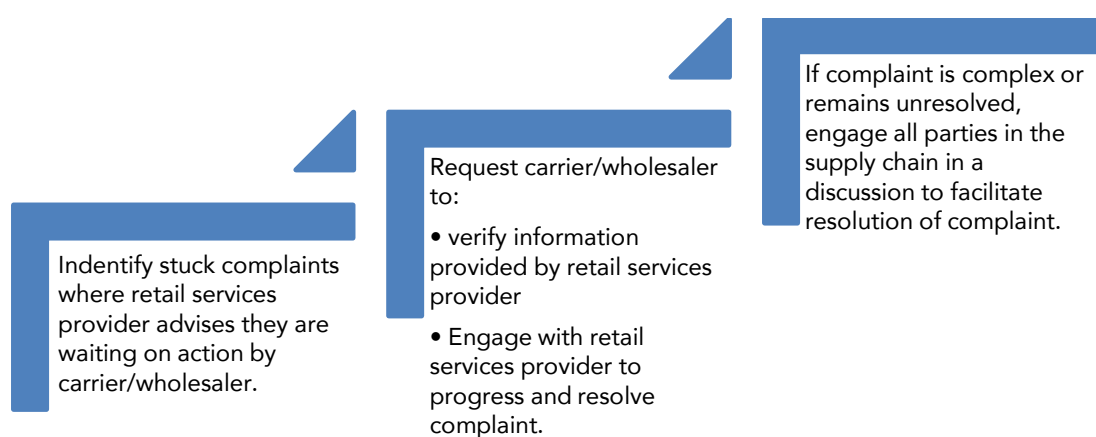
resource impost (one telecommunications provider spoke of spending 60 hours per week dealing with complaints about nbn co.).

To add to their frustration, they incur TIO complaint fees, which can exceed the annual revenue from the customer. Small telecommunications providers do not have the commercial ‘muscle’ to recover the amount of these fees from the company up the supply chain responsible for the problem that gave rise to the complaint. The Australian Small Business and Family Enterprise Ombudsman’s submission to our review highlighted these issues.

Similarly consumers find the situation extraordinarily frustrating. Our file review found many examples of complaints where the retail services provider blamed the carrier or other wholesaler for the continuing problem and the consumer waited and waited for their problems to be resolved. This echoes the unhappy experience of a customer whose story was reported in the Fairfax press on 11 July 2017 who found himself “caught in the middle” between nbn co. and Optus and without a landline or internet service for 4 months.

We are aware that the TIO is working towards new approaches to disputes where the retail services provider advises that they are waiting on action from the carrier or other wholesaler. As a pilot initiative, the TIO is planning to directly engage with the carrier (and intermediate wholesaler where there is one) in these situations. The following diagram demonstrates the new proposed approach.

Figure 7: Diagram of the TIO’s proposed process for dealing with aged complaints that involve a carrier or other wholesaler



We think that this initiative is sensible in the context of the TIO’s current Terms of Reference, however given the complexities, a more far-reaching solution is required. The ACMA in its submission to our review suggested:

“If the ‘root case’ of a consumer or small business problem lies at the wholesale level, it is arguable that the TIO should be able to make a determination that binds the wholesale level provider (for example, a determination requiring the wholesaler to compensate the consumer or reimburse the retailer). Arguably, the TIO should also be able to apportion its complaint handling costs to the party or parties best placed to resolve the complaint. Such an institutional change is likely

to strengthen the incentives for wholesalers to address problems promptly even without TIO intervention.”

We agree that the TIO needs more extensive powers and suggest the amendment of the TIO's Terms of Reference so that the TIO can:

1. require a carrier or wholesaler that is not a party to a complaint to provide the TIO with information on request and otherwise co-operate with the TIO's handling of the complaint;
2. join a carrier or other wholesaler as a party to a complaint (whether at the outset of the complaint or at any time thereafter) where the TIO thinks this is appropriate, in the interests of speeding up the resolution of the complaint and reducing the expectations on the retail services provider to manage up through the supply chain; and
3. levy a complaint fee on a carrier or wholesaler joined as a party to a complaint to at least partly cover the TIO's costs of dealing with the carrier or wholesaler and to provide the carrier or wholesaler with an incentive to resolve the complaint and prevent complaint fees escalating for the retail services provider. (Unlike the ACMA, we do not think that the TIO should apportion fees between a retail services provider and wholesaler because that would distract the TIO from complaint resolution into a process of determining which telecommunications provider caused the consumer's problem. In our view, the carrier or other wholesaler fee should be in addition to the fee charged to the retail services provider. This is simpler and likely reflects the additional work required of the TIO in dealing with more than one provider.)

This approach would, however, only be effective if all wholesale telecommunications providers are members of the TIO. Currently there are some wholesalers that are not members of the TIO. Some have the benefit of an ACMA exemption from the membership obligation. Other wholesalers do not have an exemption, but nevertheless are not TIO members. This may be a compliance issue or it may be the result of a view by some that membership is not required by the undoubtedly complex (in our view obscure) legislative provisions¹². We think that the TIO should discuss these issues with the Department of Communications and the Arts and the ACMA with a view to achieving membership of the TIO by all wholesale telecommunications providers.

We recognise that our recommended solutions for dealing with complaints involving carriers and wholesalers may be unpopular with carriers and wholesalers. nbn co.'s submission to our review took the opposite approach, proposing greater "clarity" that the TIO's complaint

¹² During our review, we heard a view that non-carrier wholesalers are required to be TIO members because they are "eligible carriage service providers" for the purposes of section 127 of the Telecommunication (Consumer Protection and Service Standards) Act 1999. To understand the meaning of that term, reference must be made to complex definitions in subsections 87(1) and 87(5) and section 88 of the Telecommunications Act 1997. Our discussions with industry suggested that there are currently divergent views as to how the legislation should be interpreted.

resolution focus is on the retail services provider not wholesalers. In our view, however, the current system has not kept up with the increasing complexity in the supply chain and is not working either for telecommunications providers that only operate at the retail level or for consumers. Carriers and wholesalers need to be part of the solution.

Recommendation 9

The TIO should discuss with the Department of Communications and the Arts and the ACMA the merits of all wholesalers being required to join the TIO. Achieving this is likely to require the amendment of the Telecommunications (Consumer Protection and Services Standards) Act 1999.

Recommendation 10

The TIO should amend its Terms of Reference so that:

- a) where the TIO considers it appropriate, the TIO may join another telecommunications provider as a party to a complaint by a consumer against a service provider. The Terms of Reference should apply to a joined telecommunications provider in the same way as if the complaint was against the provider and TIO complaint fees should be able to be charged to the joined telecommunications provider; and
- b) a TIO member is obliged to comply with any request made by the TIO in the course of handling a complaint, even if the TIO member is not a party to the complaint.

9.5. Streamlining decision making

Whilst some complaints take a long time to resolve because they involve complex supply chain issues or technical issues, other complaints take a long time to resolve because the telecommunications provider is unresponsive to the TIO's view as to what is fair and reasonable. For these complaints, the TIO's process is to proceed to a Preliminary View by the Ombudsman and, if this is not accepted by the telecommunications provider, to an Ombudsman Determination that is binding upon the provider if accepted by the consumer. In 2015/16, the Ombudsman issued one Preliminary View and one Ombudsman Determinations (these statistics exclude land access objections).

As part of our review of a randomly selected group of closed complaints, we reviewed two complaints that demonstrated the prolonged timeframe for a Determination.

1. A complaint was made in October 2015, alleging the unauthorised transfer of a business landline. The telecommunications provider agreed to settle the dispute, but then failed to refund the agreed amount (the \$600 break fee that the company had improperly extracted from the business). The complaint was escalated to a TIO investigation (Level 3) and further documents collected. Again, the provider agreed to settle the complaint, but once again reneged. An Ombudsman Preliminary View was then drafted but before this was

sent to the parties, the telecommunications provider went into liquidation. The TIO then had to advise the consumer that it was unable to make a decision because the provider was no longer a member of the scheme. The complaint was closed after some 16 months, in February 2017 without the consumer receiving any remedy.

2. A complaint was made in February 2016 by a pensioner who agreed in a cold call to transfer her service and who claimed that she did not receive what she had been promised. The telecommunications provider agreed to waive all charges and refund a payment of \$129, but then failed to do so. The matter was escalated to an investigation (Level 3) and an Ombudsman Preliminary View was sent to the telecommunications provider in January 2017. In March 2017, the TIO advised the consumer that the Federal Court had ordered the winding up of the telecommunications provider and that there was little prospect of recovery of \$129, so the file would be closed without an Ombudsman Determination being made.

In our view, the TIO's processes should enable straight-forward complaints such as these to be decided against the telecommunications provider much more quickly than occurred in these situations. Faster resolution would be possible if there were a broader group of TIO staff (not just the Ombudsman) able to make decisions (both Preliminary Views and Determinations). Whilst we recognise that this may be seen as a break with tradition, it is hardly radical. TIO dispute resolution officers already have authority to decide a complaint against a consumer (ie. to decide in accordance with paragraph 3.20 of the TIO's Terms of Reference that the TIO should stop handling a complaint on the basis that it is fair and reasonable to do so). It seems somewhat inequitable (and unusual for a large ombudsman scheme) that a decision against a telecommunications provider must be escalated to the Ombudsman.

There is, of course, the question of whether the legislation that mandates the TIO scheme restricts the Ombudsman from authorising TIO officers to make determinations¹³. To the extent that the TIO's Terms of Reference contemplate that the Ombudsman may delegate to the Deputy Ombudsman the ability to decide complaints, it would appear that the TIO's view is that the principle of delegation is established. It may be prudent for the TIO to approach the Department of Communications and the Arts, to discuss amendment of the legislation to put this beyond doubt.

In any event, we recommend that the TIO take the necessary steps to empower a small number of senior staff (perhaps designated as Adjudicators) to make decisions (Preliminary Views and Determinations) in relation to certain categories of complaints (likely ones of lower value and more straight forward). A collateral benefit of this proposal is that this would lead to

¹³ Section 128(4) of the Telecommunications (Consumer Protection and Service Standards) Act 1999 provides: "The scheme must provide for the Telecommunications Industry Ombudsman to:

- (a) investigate; and
- (b) make determinations relating to; and
- (c) give directions relating to:

complaints about carriage services by end-users of those services.

more Determinations being made and so add to the body of decisions published on the website.

In our view, complaints decision making would also be more efficient if, in appropriate cases, the complaint proceeds straight to a Determination without a Preliminary View. Of course, in contentious matters, it would be prudent and appropriate for a Preliminary View to be issued to test the TIO's understanding of the facts and relevant issues. But we think that there are straight forward matters of the type we describe above where it is wasteful and time-inefficient to have a multi-step process. Other ombudsman schemes have recognised exactly this and have changed their procedures so that they have the ability in appropriate cases to proceed directly to an Ombudsman Determination. We note that this is most unlikely to involve large numbers of complaints.

Recommendation 11

The TIO should take the necessary steps to amend its Terms of Reference to permit senior staff (perhaps designated as Adjudicators) to make decisions (both Preliminary Views and Determinations) in relation to lower value, more straight forward complaints.

Recommendation 12

The TIO should streamline its decision making processes for straight forward matters to enable these to proceed straight to a Determination without a Preliminary View first being issued.

9.6. Streamlining reclassification process

In submissions and consultations with telecommunications providers, we heard much criticism about the TIO's reclassification process. This is the process whereby a telecommunications provider can object to the levying of a fee. Most commonly, telecommunications providers object to the levying of a Level 1 complaint fee on the basis that they have not had a sufficient opportunity to consider the complaint and so the complaint should have been passed to them as an enquiry referral for which no fee is payable. As stated in Communications Alliance's submission:

"One provider undertook a trial focusing on reclassification of Level 1 Complaints. During this time, they sent back 30% of the complaints received for reclassification. The TIO approved 50% of those complaints to be reclassified. This process meant the TIO had to double-handle many complaints and prevented the service provider from being able to focus on assisting customers.

Many members echoed that they had similar concerns, and although they had not seen similar proportions of complaints which needed reclassification, they

did feel that the TIO referred and escalated a high number of complaints inappropriately.”

Whilst the reclassification process is undoubtedly resource intensive for both telecommunications providers and for the TIO, it seems to us that this process is an inevitable consequence of the TIO’s funding model. If the TIO continues to have a different charging approach for enquiry referrals and Level 1 complaints, it becomes necessary for the TIO to have a process to revisit whether it has charged a telecommunications provider at the appropriate fee level. Inevitably there will be considerable numbers of reclassifications, for example, because of new information provided to the TIO by the telecommunications provider that contradicts previous assertions by the consumer as to whether the provider has had a sufficient opportunity to respond to the complaint.

We are aware, however, that some streamlining opportunities exist, particularly in dealing with reclassification requests by providers with large number of complaints, for example, by encouraging these requests to be submitted to the TIO in batches. We think that the TIO should work with large telecommunications providers to identify streamlining opportunities.

While we understand the logic, in the interests of efficiency, we also think that the TIO should dispense with its current internal appeal process for reclassification decisions (where a telecommunications provider asks the TIO to review a previous rejection of a reclassification request). In practice, we understand that, on appeal, the TIO invariably upholds its previous reclassification decision. We think that one opportunity for review is sufficient and this appeal process is an unnecessary layer.

Recommendation 13

The TIO should work with large telecommunications providers to streamline its reclassification processes, for example, to enable these to be submitted in batches with brief details set out in a spreadsheet and supporting documents attached. The internal reclassification decision appeal process should be dispensed with.

10. Fairness of dispute resolution

The TIO operates in a rapidly changing environment that requires its dispute resolution officers to keep abreast with new products, new technologies, new supply arrangements, complex legislation, an ever-expanding body of judicial decisions about the Australian Consumer Law, new guidance by regulators, over 20 industry codes and more. The challenge of all of this for the TIO is exacerbated by the recent rapid growth in complaint numbers which has seen the TIO increase staffing by 40% last financial year and of course, there is a delay in these staff becoming fully effective as they need to be trained and closely supervised while they up-skill on the job. The TIO has also responded to the increase in complaints by utilising more casual staff engaged through an agency. The TIO is in the process of stabilising its workforce and we understand has reduced its use of casuals with [11%] of the TIO's staff now engaged through this arrangement.

It is perhaps not surprising in this environment that submissions raised some issues about the fairness of outcomes of some TIO conciliated complaints. We discuss these issues in this chapter, but again note that some criticisms of the TIO in fact demonstrated a lack of understanding of the role of an ombudsman. To respond to some of these issues:

- Where a complaint has been brought to an ombudsman scheme, it is expected that the industry participant will provide the ombudsman scheme with an opportunity to resolve the complaint and not circumvent that by taking debt recovery proceedings against the consumer or instituting legal proceedings (see *Debt Collection Guidelines for collectors and creditors* issued by the ACCC, July 2017, paragraph 19(j) and 24(c) and *Key Practices for Industry-based Dispute Resolution Schemes* issued by Australian Government The Treasury, February 2015, paragraph 1.29). This is a public policy position that the TIO must work within.
- The remedies that an ombudsman scheme typically provides are directed to restoring the consumer's position – but typically not providing damages for stress and aggravation and the time involved in pursuing the complaint.
- It is the responsibility of a complainant to an ombudsman scheme to provide information that substantiates the loss they incurred because of the industry participant's failures. Ombudsman schemes do not simply make assumptions about the extent of loss that is likely to have been incurred. Whilst this may mean that the complainant has to reveal private or confidential information to the ombudsman scheme, this is a part of the choice that the complainant makes when deciding to access the ombudsman scheme.
- It is the nature of an ombudsman scheme that the industry participant is bound by a scheme decision if accepted by the consumer, whereas the consumer is free to pursue their action in another forum if their complaint is not upheld by the scheme (see *Key Practices for Industry-based Dispute Resolution Schemes* issued by Australian Government The Treasury, February 2015, paragraph 6.12). Again this is a public policy position that the TIO must work within.

10.1. Application of relevant guidelines

As referred to earlier, the TIO's Terms of Reference require it to consider relevant laws, good practice and what is fair and reasonable. Submissions to our review demonstrated different views as to how the TIO should determine what is fair and reasonable and good practice.

Communications Alliance's submission stated:

"Inevitably, circumstances will arise from time to time that are not explicitly captured by industry Code provisions. In these cases the TIO must take into account good practice and other reference points when handling complaints. There is concern, however, that this is being taken to an extreme which is detrimental to the industry.

When Industry, stakeholders, and the ACMA determine what information should be included in a Code and what information is more appropriately left to Guidelines or individual providers to evaluate, there are often extensive consultations on the matter, including with consumer groups.

However, the TIO has regularly relied upon Guidelines or other non-enforceable documents to guide its decision-making, as seen in Case 1. This means providers are left with unclear information on practices they may need to comply with, as opposed to the known requirements of relevant Codes and hard regulation."

On the other hand, ACCAN criticised the TIO for not consistently applying available guidance as to good practice.

"When it comes to dealing with consumers experiencing financial hardship, ACCAN heard that the TIO could improve its complaint handling by applying the same financial hardship guidelines that RSPs are expected to follow. The TIO has worked with industry and consumer organisations to develop these guidelines."

10.1.1. Communications Alliance guidance documents

We recognise that there is a hierarchy of Communications Alliance good practice guidance material, with industry codes and standards at the top of the hierarchy (the ACMA has the power under the Telecommunications Act 1997 to direct a telecommunications provider to comply with these). Other guidance material includes non-binding guidelines and industry guidance notes.

The TIO is able and, in our view, should make reference to the full suite of guidance for the purposes of determining what is fair and reasonable and good practice. However, we agree that the TIO should take the flexible approach that is intended when applying Communications Alliance non-binding guidance and should make it clear that it will focus on the policy intent of the guidance, rather than taking a strict compliance approach. In other words, it might be possible for a telecommunications provider to establish that it has applied good practice where

the telecommunications provider's practice meets the aims of the guidance document, even if it does not fully meet all the suggested detail. The question is whether or not the consumer has been detrimentally affected by the failure to follow the letter of the guidance document.

Clearly, at times this will involve some balance and judgment by the TIO. To minimise the risk of uncertainty for telecommunications providers referred to by Communications Alliance, the TIO should be transparent about its expectations and its approach (see Recommendation 4). Equally, for this to work, telecommunications providers will need to accept the TIO's 'umpire's call'.

Recommendation 14

Where the TIO refers to non-binding industry guidance when handling a complaint, the TIO should do so in a way that focuses on the intent of the guidance document.

10.1.2. Financial hardship guidance

For financial hardship complaints, our expectation is that the TIO would use *Responding to Customers in Financial Hardship: Principles and Practices for Telecommunications Service Providers*, 2nd version released 1 May 2017 as a statement of good practice. This document was a joint initiative of Communications Alliance, Financial Counselling Australia and the TIO.

We randomly selected 6 conciliated (Level 2) financial hardship complaints to test whether in fact the stance taken by the TIO and the complaint outcomes were consistent with that guidance. We found that the TIO's conciliation notices consistently referred to the TIO's Position Statement *Financial hardship*, effective date 11 March 2016, which in turn refers to *Responding to Customers in Financial Hardship: Principles and Practices for Telecommunications Service Providers*.

In the reviewed complaints (albeit a small sample), it seemed to us that the telecommunications providers responded flexibly to the consumer's financial hardship, for example, releasing the consumer from a fixed term post-paid plan and enabling the consumer to stay connected by entering into a prepaid plan, waiving charges and agreeing payment arrangements. We did, however, see that for several complaints, the overdue debt had been sold to a collections agency – there was no apparent enquiry by the TIO as to whether or not this had occurred after the consumer sought financial hardship assistance. We think that if in fact a telecommunications provider routinely sells consumers' unpaid debts after the provider was on notice of the consumer's financial hardship, this would be a systemic issue that would warrant inquiry.

Our review did not find evidence in support of ACANN's assertion that the TIO is failing to apply the financial hardship guideline. The TIO may wish to invite ACANN to provide details of any specific cases to check.

10.1.3. Regulator guidance

We would also expect that the TIO would apply relevant regulator guidance as to what is fair and reasonable and good practice. By way of example, we think that the TIO should be applying the ACCC's interim guidance released in February 2017 about broadband speed sales representations.

However, when we reviewed 3 recent complaints where the consumer claimed that their telecommunications provider failed to deliver on the broadband speed claims made during the sale process, we found no reference by the TIO to the ACCC's interim guidance. We also note that the TIO's website guidance on this issue *What affects the speed of an internet connection?* is dated 13 September 2011 and does not reference the ACCC's interim guidance.

We recognise that the ACCC has been undertaking further work in relation to broadband speed claims and on 21 August issued a more detailed guide. Nevertheless, we think that given the high numbers of complaints of this type (the ACCC February guidance states that this was the single largest issue for TIO consumer complaints in 2015/16), ideally the TIO would have promptly followed the ACCC's February guidance with a Position Statement referring to this and setting out how it intended to deal with complaints about non-compliance with broadband speed sales claims.

In our consultations, we heard some criticism from small telecommunications providers about inconsistent complaint outcomes where in fact, there is not a Position Statement to guide TIO dispute resolution officers. This underscores the importance of this development work (see Recommendation 4).

Recommendation 15

The TIO should publish TIO guidance as to how it will deal with complaints about a telecommunications provider's non-compliance with broadband speed sales claims. This should refer to the ACCC's guidance as to the principles that should be met to ensure that broadband speed sales claims are not misleading.

10.2. Technical complexity

To conciliate fair outcomes for telecommunications providers and complainants alike, TIO dispute resolution officers need to have sound understanding of the technical telecommunications issues that arise in complaints. In submissions to our review, there were some criticisms by industry of a lack of technical expertise.

From our discussions with the TIO, it is evident that the TIO is working to improve organisational technical knowledge. A key step forward was the recruitment in 2016 of a telecommunications engineer. He has been developing technical training for enquiries officers and dispute resolution officers. He also provides advice to dispute resolution officers on request. To enhance the development of expertise, the TIO has also structured its disputes

resolution division so that a specialist team deals with technical complaints. We think that these are all highly positive steps.

Nevertheless we think that more is required. We are concerned about key person dependency and think that the TIO, as an organisation of some 240 people, should have more than one telecommunications expert. In addition to providing an advice and training service, we think it would be highly beneficial for internal telecommunications experts to be involved in developing published guidance that raise technical telecommunications issues and also to be periodically reviewing a sampling of closed conciliated complaints that raise technical issues. Insights from these reviews could then inform future training.

We are aware that some telecommunications providers prepare some graphics that the TIO uses in staff training materials – we encourage this and think that the TIO should actively seek more of this support from a broader range of telecommunications providers. In addition, we think that the TIO should consider establishing a panel of external technical experts that could be used to provide occasional advice on a confidential basis about good practice issues arising from complaints that raise new issues for the TIO. Other ombudsman schemes with which we have worked have arrangements of this kind, utilising representatives of participating organisations and have found these arrangements to be highly beneficial.

Recommendation 16

The TIO should take additional steps to build its telecommunications technical competency, including:

- a) recruitment of additional telecommunications experts to assist with training, advice, quality assurance and the development of TIO published guidance that involves technical issues;
- b) drawing upon telecommunications providers' resources to enhance TIO training for its staff; and
- c) establishing a technical panel that could be used to provide occasional advice, where the TIO considers that panel advice would assist, on a confidential basis, about issues arising in complex technical complaints.

10.3. Fairness of perspective

As we noted in our Issues Paper, it takes judgment and often fine tuning for an ombudsman scheme to achieve the 'right' balance when conciliating, investigating and deciding complaints. An ombudsman scheme must be neutral. At the same time, it must recognise that there is almost invariably, an asymmetry in power and knowledge as between the consumer and the industry participant and so a need to provide some guidance to the consumer as to their rights and what they may be entitled to ask for (or not entitled to).

We asked stakeholders for comment about whether the TIO is achieving the 'right' balance. As is often the case when undertaking these types of reviews, the industry submissions and the consumer representative submissions expressed very different views.

Communications Alliance's submission included:

"While recognising that striking an appropriate balance in this respect can often be challenging, service providers have concerns that complaints are sometimes handled as though the TIO is a consumer advocacy organisation, rather than a neutral mediator.

.....

Providers have ... identified an increase in TIO staff members suggesting that level 2 cases will be escalated to investigations if the consumer is not given the resolution they are looking for - once again without apparent dispassionate consideration of whether that resolution would be appropriate.

.....

As an example of questionable balance in resolution, there have been instances in which the TIO has continually requested additional information from the Provider, raising the question of when in the process the TIO should make a determination, instead of continuing to draw out an issue."

Similarly Aussie Broadband's submission stated:

"While most of the TIO staff are helpful and pleasant to deal with, we do occasionally come across individuals who are hostile to ISPs with an automatic starting assumption that the ISP is in the wrong, and a tendency to immediately escalate a complaint to level 2 whether it is warranted or not.

We understand that TIO staff have the unenviable task of being the "meat in the middle", but we feel that an impartial starting position is the best way to achieve an outcome."

On the other hand, ACCAN's submission argued:

"There is .. a perception that the TIO aligns itself with service providers rather than clients, and clients and their representatives feel as though the onus is placed on the consumer to prove that they are not in the wrong. Given the information asymmetry and power imbalance between consumer and RSP, this would suggest that the TIO's approach is could be better balanced.

Specific and concerning feedback provided to ACCAN by a financial counsellor was that none of their clients would have had a win with the TIO without their advocacy and assistance guiding the clients through the TIO process.”

Similarly, Legal Aid Queensland’s submission stated:

“LAQ has advised a number of consumers who feel that the TIO has not remained neutral in the process because the industry arguments have been presented strongly by a staff member of the TIO. In LAQ’s experience this problem is nearly always created by the staff member’s use of language in letters or phone conversations and the consumer’s lack of knowledge and understanding of the process.

In LAQ’s recommendation it is important that until a binding determination is made the TIO’s interactions with consumers highlight that:

- (i) the arguments presented by the industry have not yet been accepted by the TIO; and*
- (ii) the TIO provide consumers with greater guidance on what further information or evidence it is looking for in response to the industry’s submissions. “*

We used our review of a random selection of complaint files to test views put forward by stakeholders. Whilst our sample was small, we did not find an evident bias towards either industry or consumers.

What we did find from the telephone call notes and emails in the more contentious complaints was that, often, the TIO dispute resolution officer asked questions of both the consumer and the telecommunications provider that challenged their positions, but that the parties did not necessarily have visibility of the TIO’s challenge of the other party. It was apparent to us however, that this process of challenging both parties’ positions helped with the resolution of these complaints and we would certainly not recommend any reduction in this. We also recognise that it is difficult within the constraints of the conciliation process to provide any great perspective of how the other side might be being challenged.

The issue of fairness of perspective is, however, an issue that needs continual vigilance. So too, the TIO needs to be vigilant in framing its correspondence with consumers in a way that they will understand. We are aware that the TIO has a well-structured supervision and quality assurance process for conciliated (Level 2) and investigated (Level 3) complaints and are satisfied that this vigilance is occurring.

10.4. Internal review

Where the TIO exercises the power under paragraph 3.20 of the Terms of Reference to decide to stop handling a complaint on the basis that it is fair and reasonable to do so, the consumer has a right to request an internal review of this decision. We think that this is an important fairness control given the significance of the decision for the consumer. Recognising this, the TIO has long confined the review responsibility to the most senior levels of the TIO.

The TIO used to have an internal review officer who undertook reviews. Now internal reviews are undertaken by dispute resolution specialists who also provide advice and undertake some quality checking of dispute resolution officers' work. To ensure that fresh thinking is brought to an internal review, a dispute resolution specialist will not undertake a review if they have previously been involved in the handling of the complaint.

We think that these arrangements are sound. We note, however, that 'overturn rates' have reduced since the new arrangements were put in place. This may be because of improvements in the quality of reviewed decisions – and we are aware that the TIO has been working intensively to improve these. However, we think that to calibrate the internal reviews undertaken by dispute resolution specialists and to provide assurance that the TIO has a genuinely willingness to reconsider the merits of decisions to stop handling complaints, some reviews should be undertaken by an appropriately experienced person from another part of the organisation, for example, the Deputy Ombudsman or Legal Counsel, and a comparison undertaken of 'overturn rates' by the dispute resolution specialists. If differences in results do emerge, the reasons would need to be investigated and addressed as appropriate.

It would be possible for an external expert to conduct these sampling reviews, as TIO has in the past, however we think that knowledge of the telecommunications sector and the internal workings of the TIO are important and the task is better done internally.

Recommendation 17

A small proportion of TIO internal reviews for consumers whose complaint has been closed (perhaps 10%) should be undertaken by an appropriately experienced person from outside the dispute resolution division to provide a calibration of 'overturn rates' by the dispute resolution specialists. If differences in results do emerge, reasons should be investigated and addressed as appropriate.

11. Minimising complaints

All ombudsman schemes are expected to play a role in preventative action to minimise the occurrence of issues that give rise to meritorious complaints. As discussed earlier in our report, we think that the telecommunications co-regulatory environment creates a particular need for the TIO to be active in this space.

11.1. Systemic issues

The Benchmarks for Industry-based Customer Dispute Resolution issued by the Australian Government The Treasury, most recently in February 2015, place emphasis on systemic issues reporting as a key plank of the accountability principle¹⁴.

More particularly, the Australian Government, Department of Broadband, Communications and the Digital Economy, *Reform of the Telecommunications Industry Ombudsman*, May 2012, emphasised the importance of the TIO's work in relation to systemic issues. Consistent with this, the TIO's Terms of Reference provide that the TIO will work with the telecommunications provider where a systemic issue is identified. Where the issue cannot be resolved by agreement, paragraph 5.2 of the Terms of Reference gives the TIO the power to make recommendations to the telecommunications provider which must consider these recommendations and take steps to resolve the issue.

The TIO's memorandum of understanding with the ACMA sets out arrangements for the referral by the TIO of systemic issues to the ACMA. It also includes an obligation on the TIO to assist the ACMA to collate evidence required for an ACMA investigation.

The TIO's Complaint Handling Procedures specify a 4 stage process for systemic issues.

1. Identification:

Systemic issues can be identified through complaints, complaint trends or other information sources.

2. Notification:

The issue will be raised with the telecommunications provider for response.

¹⁴ The Accountability Principle is described as: *"The office publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating reporting [by the office of] any systemic problems to its participating organisations, policy agencies and regulators"*.

3. Investigation:

An investigation may include requests for information from the telecommunications provider, suggested solutions and a meeting between the TIO and the telecommunications provider. Current practice is for the Ombudsman to attend that meeting. This may lead to a negotiated outcome. If a resolution cannot be agreed, the TIO will decide what action to take. Options include using its power to make recommendations to the telecommunications provider, reporting the systemic issue to the telecommunications provider's Chief Executive Officer and referring the systemic issue to the appropriate regulator such as the ACMA.

4. Report:

The TIO reports on its systemic issues work to regulators as requested by them, to telecommunications providers or their representative organisations and to the community including in the TIO's Annual Report.

In 2015/16, the TIO inquired into 47 potentially systemic issues. 34 of these matters were referred to the telecommunications provider and 13 of these matters proceeded to investigation. The Annual Report described 3 matters where remedial steps were taken by the telecommunications provider (new scripts for complaint handling staff to ensure they complied with the telecommunications provider's obligation not to restrict consumer access to the TIO, change to contract terms to conform with Telecommunications Consumer Protection Code obligations and changes to product material to clarify the terms of an international mobile roaming product). Last financial year, the TIO inquired into 43 potentially systemic issues.

11.1.1. Stakeholder views

Submissions to our review by the ACMA and the ACCC stress the importance of the TIO's work in identifying and informing them about systemic issues.

"Historically, the ACMA and TIO have coordinated their approaches to potential systemic issues. This coordination should continue and, where possible, be enhanced. For example, the ACMA would welcome heightened engagement with the TIO on:

- a. the ACMA's relatively new priority telecommunications consumer protection compliance and education approach; and*
- b. outreach to new providers to ensure they have a clear understanding of the important role of the TIO and consumer safeguards more generally."*

The ACCC referred to the "critical role" the TIO has to play and that:

"[it] may achieve cooperative outcomes with industry in circumstances where numerous individual complainants are experiencing a recurring issue. This type

of efficient complaints resolution may forestall future complaints and “nip a problem in the bud” before requiring regulatory or enforcement action....

[it] has the opportunity to identify systemic issues, and where systemic issues suggest potential breaches of the Australian Consumer Law or the Telecommunications Consumer Protections Code, may refer systemic issues to the appropriate regulator [and], by doing so, helps to ensure that public resources are directed at the most pressing and widespread consumer problems in the telecommunications industry.”

“it is imperative that any systemic issues that are identified are passed on [by the TIO] to the relevant regulator so that consumer detriment does not go undetected and particular issues can be addressed to prevent other consumers from being impacted by the issues identified”.

Similarly the submissions made by individual consumers and consumer representative organisations placed emphasis on the TIO addressing systemic issues. ACCAN’s submission stated:

“The TIO needs to increase the transparency of how it identifies and investigates systemic issues, and what its processes are for reporting systemic issues to industry and regulators. As noted in the Issues Paper, the 2016 Annual Report identified 47 systemic issues, however there is no transparency over how the quarter of those that were investigated were chosen. To increase transparency the TIO should be required to report regularly on what it is doing to address systemic issues.

ACCAN’s members have reported that the TIO has been ineffective in dealing with systemic issues. The general impression is that the same issues keep arising with the same RSPs and it is unclear what the TIO is doing to ensure that RSPs are following its advice and addressing systemic issues. However, it must be acknowledged that little improvement in systemic issues is not solely attributable to the TIO as the regulator and industry also have large roles to play, particularly when the TIO is unable to find a solution.

The TIO needs to commit to identifying, monitoring, and resolving systemic issues and to do this should be given increased powers to compel service providers to address systemic issues. The TIO also needs to work more closely with and apply more pressure to the regulator when it is unable to change industry behaviour.”

The submission by Communications Alliance agreed that the identification by the TIO of systemic issues can be helpful, however expressed a preference for the more informal way in which systemic issues were previously raised with a telecommunications provider by a TIO account manager.

11.1.2. Findings

We reviewed the TIO's records of 9 systemic issues that the TIO has pursued this financial year. These satisfied us that the current processes achieve an appropriate balance between formality (letter setting out in specific terms the issues of concern and why) and a spirit of co-operation (inviting the telecommunications provider to inquire into the issues and advise the TIO of the outcomes of that inquiry).

We saw much to admire about the way in which the reviewed matters had been pursued, including good referencing by the TIO of specific individual complaints, good analysis by the TIO of the relevant obligations of the telecommunications provider, dogged pursuit of issues where the telecommunications provider was initially dismissive of the TIO's concerns, involvement of very senior TIO staff (including in two matters, the Ombudsman) to signal clearly to the telecommunications provider the seriousness of the issue from the TIO's perspective and some significant remedial action by telecommunications providers that are likely to reduce the flow of future complaints.

We are conscious that the TIO cannot alone be expected to deliver systemic improvement in the telecommunications industry. Telecommunications providers, their industry association and regulators all have some responsibility for this. Nevertheless, as we have observed earlier, the TIO has a unique window into areas where there are systemic problems and will often be aware of these well before any of the other major players. We think that the unique co-regulatory model for the telecommunications industry means that more is required from the TIO in order to fully play its part in identifying, escalating, resolving and providing transparency about systemic issues.

1. Resourcing of systemic issues work

The TIO systemic issues team is comprised of a very experienced dispute resolution specialist (who has responsibilities in addition to systemic issues) and one dispute resolution officer. We think that this resourcing is inadequate, particularly in the context of low barriers to telecommunications industry entry, the regular influx of new telecommunications providers, the regular liquidation of failed telecommunications providers and the high numbers of complaints made to the TIO.

By way of comparison, other Australian ombudsman schemes, arguably working in a less challenging environment, devote more resources to systemic issues analysis and investigation.

- The Energy and Water Ombudsman Victoria has a function that is a little smaller than that of the TIO, despite being a much smaller organisation (65 staff as compared with the TIO's 240 staff) and having much lower complaint numbers (32,000 complaints last year compared with the TIO's 112,000 complaints). The Energy and Water Ombudsman Victoria's systemic issues team used to be larger, but legislative change has led to the regulator building its compliance and enforcement capability with a consequent reduction in the systemic issues the ombudsman's office is seeing and hence its resourcing of this activity.

- The Financial Ombudsman Service, which received 34,000 complaints last year and has a total workforce of about 325 staff, has a team of 7 to 8 staff in its systemic issues team. It also operates in a much more intensely regulated environment than the telecommunications sector.

While we understand that comparisons should not necessarily drive TIO staffing and that resourcing is a management decision, to make it clear, we think that for the TIO to properly address systemic issues a team of more than double in size (at least 5 staff) is required. This should include someone with strong data analytics capability given the TIO's large database of complaints that the team needs to interrogate in order to be active in identifying possible systemic issues.

We recognise that a larger team would involve some greater cost for the TIO and hence for telecommunications providers. (We do not think this should be seen as a 'new impost' – rather it should be seen as a correction of current under-resourcing.) To ensure fairness in bearing these costs, we think that it would generally be appropriate for the TIO to charge the relevant telecommunications provider where a systemic issues investigation is undertaken. This need not be on a full cost recovery basis, may not always be practicable and will require some judgement. We understand that the Financial Ombudsman Service partially funds the cost of systemic issues investigations in this way.

We would also encourage telecommunications providers to take a long view in relation to TIO systemic issues funding and to recognise that this work has significant potential to reduce future complaints and so achieve a decline over time in both the telecommunications provider's complaints handling costs and the TIO complaint fees it incurs.

Recommendation 18

The TIO should increase the resourcing of its systemic issues team (in our view, by more than double) including at least one data analyst so as to better identify potentially systemic issues, to enable the team to take on more matters and to progress systemic investigations in a more timely fashion. To at least partially fund the work of the team, the TIO should generally, and where appropriate, charge systemic issues investigation fees.

2. National broadband network issues

In response to a question by the Joint Standing Committee on the National Broadband Network taken by the TIO on notice, the Ombudsman advised that none of the 47 systemic issues reported in the 2016 Annual Report were about the activities of nbn co. (although 7 systemic issues related to the activities of retail services providers selling national broadband

network products.) This is notwithstanding 1,066 TIO complaints in 2015/16 that raised the issue of nbn co. (or its contractor) missing an appointment to connect the premises¹⁵.

It appears from the Ombudsman's written submission to the Joint Standing Committee on the National Broadband Network dated 1 May 2017 that the issue of the technician appointment system was raised with nbn co. directly by the Ombudsman.

"A common theme in complaints received about connections was dissatisfaction with the nbn technician appointment system. The Ombudsman met with senior nbn representatives in August 2016 to discuss possible enhancements to their technician appointment system. We understand that following the discussion, nbn amended its technician call out system so consumers who had already experienced a missed NBN technician appointment did not have to go to the back of the queue."

It seems to us that this only partially addressed the issue. Because the matter was not investigated as a potentially systemic issue, it would seem that there has been no clarification as to what has caused this large number of complaints. Of course, the reasons for an individual missed appointment can be various, such as problems with the appointment booking system between nbn co. and the retail services provider, communication issues between nbn co., the retail services provider and the consumer about the appointment or change in appointment, and the consumer failing to be available.

The reasons driving the large numbers of these is what we believe a systemic issues investigation should have inquired into, so as to ascertain whether in fact nbn co.'s processes are adequate to address its obligations and, if not, what improvements should be made to minimise future complaints. In other words, we think that it is the expectation of stakeholders there should have been a broader approach, rather than a focus simply on nbn co.'s remedial procedures.

In addition, it appears that the TIO has not undertaken follow up monitoring of complaints about nbn co. missed appointments to ascertain whether the procedural change agreed to by nbn co. has reduced the flow of complaints to the TIO. Our review of matters dealt with by the systemic issues team suggests that this follow up monitoring is standard practice where remedial action is agreed with a telecommunications provider – and we think that this is an important aspect of an ombudsman scheme systemic issues jurisdiction.

In addition to the missed appointments issue, there have been suggestions of other repeat performance issues pertaining to the national broadband network including Sky Muster service instability, service disruption and slow reconnection times¹⁶, delayed rectification of national

¹⁵ TIO, *Joint Standing Committee on the National Broadband Network Questions on notice for the Telecommunications Industry Ombudsman*, p.1.

¹⁶ TIO, *Submission to the Joint Standing Committee Inquiry into the National Broadband Network*, p.13

broadband network faults and nbn co. poor handling of complaints¹⁷. We do not know how many complaints the TIO has received about these matters.

The ACCC submission urged the TIO to take action:

“In the ACCC’s opinion, the effective operation of the TIO Scheme must involve collecting and analysing NBN complaints data and dedicating resources to the investigation and identification of any systemic problems relating to services delivered over the NBN.”

It is not, of course, the TIO’s responsibility to oversee the rollout or performance of the national broadband network. That is a role for government. The ACMA plays a key role in this. Late last year, it commissioned research into the experience of consumers migrating to the national broadband network¹⁸. On 1 August 2017, the ACMA announced that, in coordination with the Department of Communications and the Arts, the ACMA is using its statutory powers to obtain clear and comparable information from industry participants involved in providing services using the national broadband network. The ACMA is also undertaking further research into the consumer experience before, during and after migration to the national broadband network, across the range of national broadband network technologies. In addition, the ACCC has a number of supervisory and monitoring roles, including collating statistics about services in operation and publishing a quarterly report as to this.

It is, however, the TIO’s role to interrogate its own data with a view to identifying potentially systemic issues. So far as we understand, this has not happened in relation to national broadband network complaints and in our view, this is overdue.

Recommendation 19

The TIO’s systemic issues team should analyse the TIO’s complaints database to identify potentially systemic issues pertaining to the national broadband network rollout and performance and pursue those issues consistent with its normal procedures.

¹⁷ ACCC submission to the Telecommunications Industry Ombudsman Independent Review, p.5 “Based on the information available to the ACCC, we have identified a number of key issues relating to consumer experiences on the NBN which appear to be widespread:

- delays in connections and fault rectifications; service faults and outages
- unclear responsibility for resolving problems and blame shifting between NBN and retail services providers (RSPs), and
- poor information provision to consumers.”

¹⁸ The ACMA, Migrating to the NBN. The experience of Australian consumers, December 2016.

3. Misleading marketing and unauthorised transfers

In our view, the TIO's systemic issues team should have the capability to be more active in identifying, and reporting to the ACCC, telecommunications providers that have been the subject of large numbers of complaints about misleading sales practices and unauthorised transfers of telecommunication services. The ACCC has clearly signalled its willingness to take action in relation to these matters, having applied successfully to the Federal Court, during the last 6 months, for the wind up of 3 telecommunications providers on these grounds.

We are aware that the TIO's systemic issues team has done some work in this area. For example, there was a systemic issues investigation late last year where the TIO raised with the telecommunications provider that it had received 69 complaints about misleading sales practices and unauthorised transfers during an 18 month period. The telecommunications provider responded by saying that it had ceased all marketing and was only servicing existing clients. The TIO closed its investigation on the basis that it would be re-opened if new complaints arose. We think that this action was too late and too little. We are also aware that the ACCC has from time to time sought information from the TIO about complaints about misleading sales practices and unauthorised transfers by telecommunications providers that have not been the subject of a systemic issues investigation.

There is, of course, considerable consumer detriment associated with misleading sales practices and unauthorised transfers. Our review of individual complaint files revealed the practical difficulties, financial hardship and distress that can ensue. Moreover these practices adversely affect consumer confidence in the telecommunications industry. We think that the TIO should prioritise identifying and reporting these rogue telecommunications providers to the ACCC.

Recommendation 20

The TIO's systemic issues team should have the capability to analyse the TIO's complaints database to proactively identify telecommunications providers that have been subject to repeat claims of misleading sales practices and unauthorised transfers. Where an investigation confirms that the misconduct is systemic, the TIO should report the telecommunications provider to the ACCC.

4. Efficiency of systemic issues investigations

A couple of the systemic issues investigation files that we reviewed were long running, with letters back and forth between the TIO and the telecommunications provider without much progress. In the case of one investigation, the TIO was able to achieve a breakthrough in a meeting with the telecommunications provider attended by the systemic issues dispute resolution specialist and by the Ombudsman. Another systemic issues investigation that we judge to have substance failed to resolve at such a meeting and so is still continuing.

Whilst it is entirely appropriate for the TIO to try and resolve systemic issues investigations co-operatively with the telecommunications providers, we think that the TIO should not allow the

telecommunications provider to extend the investigation unduly. Rather the TIO should take steps to escalate the matter to a more senior level at the telecommunications provider (as noted earlier, the TIO's Complaint Handling Procedures refer to escalation to the telecommunications provider's Chief Executive Officer) and to make a recommendation under paragraph 5.2 of the Terms of Reference that is referred to both the provider and the relevant regulator, usually the ACMA.

We think that more assertive action of this kind would be efficient. Our proposed approach would also recognise that the TIO's primary role is to identify systemic issues and that the TIO cannot compel the telecommunications provider to accept the TIO's view of the issue, nor compel the provider to accept the TIO's proposed resolution. Reporting the issue to the ACMA would provide the ACMA with the opportunity to assess the reasonableness of the telecommunications provider's rejection of the TIO's view. If in fact the ACMA agrees with the TIO that there is non-compliance, it would be up to the ACMA to take enforcement action.

Recommendation 21

Where a telecommunications provider makes it clear that it does not accept the TIO's view that its practice constitutes systemic non-compliance, the TIO should promptly escalate the matter to a more senior level at the provider and make a recommendation under paragraph 5.2 of the Terms of Reference that is referred to both the provider and the relevant regulator.

5. Public transparency

We agree with the submissions of ACCAN and Financial Counselling Australia that the TIO should provide more public transparency about its systemic issues work and processes. In last year's Annual Report minimal information was provided: brief information about how the TIO may approach a systemic issue, some data with comparison with the prior year (the number of informal notifications, the number of formal or informal investigations, the number of matters in progress) and brief details in relation to 3 matters where the telecommunications provider took some action in response to the TIO raising the issue. More detailed reporting would include:

- how the TIO identifies potentially systemic issues and the number of such matters the systemic issues team assessed;
- the number of matters that reached each of the subsequent stages of the TIO's systemic issues process;
- a list of the issues canvassed in systemic investigations;
- a list of the outcomes achieved as a result of this work;
- the number of telecommunications providers who were referred to a regulator because of a systemic issue and any publicly known outcomes of these referrals; and

- case studies from the systemic issues work.

More detailed public reporting was recommended in the Australian Government, Department of Broadband, Communications and the Digital Economy, *Reform of the Telecommunications Industry Ombudsman*, May 2012.

Recommendation 22

The TIO should provide more public transparency about its systemic issues work and processes. By way of example, we think that the TIO should report:

- how the TIO identifies potentially systemic issues and the number of such matters the systemic issues team assessed;
- the number of matters that reached each of the subsequent stages of the TIO's systemic issues process;
- a list of the issues canvassed in systemic investigations;
- a list of the outcomes achieved as a result of this work;
- the number of providers who were referred by the TIO to a regulator because of a systemic issue and any publicly known outcomes of these referrals; and
- case studies from the systemic issues work.

11.2. Equipping providers to understand performance issues

During our review, a couple of larger telecommunications providers stated that they would value individualised, private reporting by the TIO that enabled them to better understand their complaints performance. In particular, they were interested in a report that categorised complaints in some granularity and specified the percentage of total complaints in each category about their company. We were told that a telecommunications provider receiving such a report would be able to apply its knowledge of its market share to identify the areas where the company received higher than expected numbers of complaints (in their words, areas where the company underperformed). We were told that this information would assist the telecommunications provider to identify problem areas where process improvement is warranted.

We think that this makes good sense and that this type of reporting has the potential to help large telecommunications providers to minimise their complaints. We think that the TIO should discuss with telecommunications providers how it can meet this need. Of course, as a fairness to small telecommunications providers that are unlikely to be interested in this type of reporting, it may be appropriate for the TIO to recover from a telecommunications provider the cost associated with producing individualised, private reporting.

Recommendation 23

The TIO should discuss with large telecommunications providers the possibility of the TIO providing individualised, private reporting designed to enable the telecommunications

provider to better understand their complaints performance. This could be done on a cost recovery basis.

11.3. Development of industry codes

In the course of its complaints and particularly its systemic issues work, it is likely that the TIO will from time to time identify practices by telecommunications providers that give rise to complaints, that may not seem to be good practices and yet that may not constitute a contravention of the obligations applicable to telecommunications providers. This may be because of gaps or ambiguities in code obligations. It is these insights that the TIO is uniquely positioned to contribute when consulted about new industry codes or revisions to existing industry codes. The TIO did exactly this in its submissions this year about the proposed changes to C637:2011 *Mobile Premium Services* and the proposed replacement of C609:2007 *Priority Assistance for Life Threatening Medical Conditions* with a guideline.

Whilst we understand that there is a resource impost for the TIO in fulfilling this consultation role – and hence for the telecommunications providers that fund the TIO – we think that this role is not an ‘optional extra’ for the TIO but rather is a core function that the TIO has to perform. This is recognised in the Telecommunications Act 1997 which provides that generally the ACMA is only able to register a code if satisfied that the TIO has been consulted about the development of the code¹⁹. The TIO’s role in contributing to codes is highly valued by the ACMA. Its submission to our review urged the TIO to continue to play this role.

“The TIO is a long standing, respected contributor to the industry code development and review processes. It brings unique perspective to those processes and helps ensure that those codes that confer a role on the Ombudsman are effective.

With a broad ranging review of the TCP Code imminent, the TIO is encouraged to continue its active participation in the development of consumer codes.

It is also encouraged to contribute to broader policy and regulatory reform processes imminent or in train. These will shape the future of telecommunications user safeguards in Australia and a heightened focus on these ‘future facing’ issues will likely be of enormous long term value.”

As well as being expected by government, the role of contributing to codes enables the TIO to work to minimise complaints by playing its part in closing regulatory gaps. The review of the TCP Code, due to commence later this year, provides a particularly good opportunity for this. In contributing to the TCP Code review, we think that the TIO should be proactive, raising poor and inconsistent industry practices that adversely impact consumers – it should not constrain its

¹⁹ Telecommunications Act 1997 Section 117(1)(h)

contribution to merely commenting upon issues raised by industry. In our view, the extensiveness and importance of the TCP Code means that the TIO's contribution to the TCP Code review is likely to require some additional resourcing (the TIO currently has one Senior Policy Adviser who undertakes this type of work). The spread of knowledge needed suggests that it would be effective to use a team approach to the task that draws upon TIO staff with high level industry expertise and TIO staff with data analytical skills, as well as of course, TIO staff with policy expertise.

We offer the following examples of issues that we would encourage the TIO to raise during the TCP Code review process. These examples build from issues raised in the submissions to our review and also issues observed by us in the course of our case file review.

1. Responsible provision of credit

Paragraph 6.2 of the TCP Code is headed "Responsible provision of Telecommunication Products" and obliges a telecommunications provider to undertake a credit assessment before providing a post-paid service to a consumer. A credit assessment is defined to mean "the process by which a [telecommunications provider] determines the level of credit to be provided by it (if any) to a Consumer".

We think that the TCP Code would be more effective in promoting responsible provision of telecommunications products if the TCP Code is amended:

- to articulate what is involved in a credit assessment, that is, the minimum enquiries that must be made both for new and existing customers; and
- to provide that a telecommunications provider must not supply a post-paid service if it ought to have known (that is, an appropriate credit assessment would have shown) that the consumer would be unlikely to be able to afford the service without financial hardship.

The effect of this would be to elevate to the level of TCP Code obligation the approach described in the TIO's Position Statement *Assessing credit for a service* (March 2016). This would, we think, enhance assessment practices (described in ACCAN's submission as "often cursory" at present) and accordingly better protect vulnerable consumers. As stated in submissions to our review, premium post-paid mobile services are a source of substantial expense and can lead to significant debt and a negative credit rating that has a serious impact on the consumer into the future.

2. Debt occurred on behalf of a third party

The TCP Code does not currently establish any expectations of telecommunications providers as to the steps that they should take where they are aware that a vulnerable consumer is incurring substantial debt for telecommunication products and services to be used by someone else. In our view, this regulatory gap needs to be addressed to help mitigate, in particular, elder abuse and domestic financial abuse.

In our file review and in discussions with consumer representatives, we saw and heard of in-store sales where the telecommunications provider sales representative must have been aware

that a vulnerable person was incurring substantial debt for the benefit of someone else – and yet no cautionary steps were taken. We understand that this can be a difficult territory to chart for telecommunications providers. Banks have, however, taken some positive steps to address this problem – and their guidance could be looked to as an example of what is possible.

3. Identity authorisation steps

The TCP Code does not currently make it clear what identity authentication steps a telecommunications provider should undertake when dealing with a person purporting to be an existing customer²⁰. This issue arose in our review in two contexts: first, where a consumer is attempting to make changes such as a SIM swap and secondly, where a consumer is making or following up on a complaint.

Absent clear guidance, there have been different views as to where the balance properly lies between guarding against, on the one hand, the risks of fraud and breach of privacy and, on the other hand, ensuring the ease with which a consumer or their advocate may communicate with (including make a complaint to) their telecommunications provider. This has led to complaints being made to the TIO about some telecommunications providers' practices. So also, Legal Aid Queensland's submission to our review referred to a *"focus on the approach to privacy laws by industry members that appears to be designed to prevent consumer representatives gaining access to the information they need to assist clients."* Their view was that the TIO should be addressing this as a systemic issue.

We have recommended in Part 9.1.4 of our report that the TIO convene a roundtable to review its own processes and whether these create undue risk of identity theft and breach of privacy or fraud. It would also be opportune to use the roundtable to explore telecommunications providers' identity verification practices and to understand the risks and to determine collectively what is good practice in different situations. Ideally, the revised TCP would be the vehicle for entrenching agreed good practice steps by telecommunications providers.

Recommendation 24

The TIO should fully resource its legislatively-recognised role of contributing to the development and review of codes. A particular priority should be the review of the Telecommunications Consumer Protection Code due this year. When contributing to that review, the TIO should analyse complaints trends and use its experience with systemic investigations to identify enhancements that would promote fairness and would assist in minimising complaints. In particular, the TIO should consider whether to propose:

- a) enhancements to the responsible credit provisions;
- b) the introduction of measures to minimise the occurrence of vulnerable consumers

²⁰ See TCP Code paragraph 3.4(f) "A Supplier must ... take reasonable steps to balance the risks of fraud, privacy and security of Customers with facilitating the appointment of Authorised Representatives." Also paragraph 3.5.1 "A Supplier must ensure that a Customer can easily use an Advocate to communicate with the Supplier, if the Consumer requires."

suffering third party financial abuse; and

- c) the introduction of guidance as to the authentication steps that a telecommunications provider should undertake when dealing with a person purporting to be an existing customer.

12. TIO complaints data

We have discussed in Chapter 6 the desire, particularly by government, for the TIO to collect and make available more and better complaints data.

As set out in Chapter 6, our view is that the TIO's role is to collect the information that the TIO needs to resolve complaints (absent any specific funding for a broader data collection role). Given the large numbers of complaints to the TIO, longer telephone calls would increase costs of providing the TIO service. Even if funded to do so, collecting broader information would require TIO enquiries officers to ask additional questions of consumers, something many consumers would view as intrusive and burdensome. There are also job design issues for staff who already have a high key-stroke count in their regular data capture.

As we have previously discussed, the TIO data is limited by its processes of referral and conciliation and is likely to be skewed to more problematic complaints. Telecommunications providers' internal complaints data should be, by far the best source of information for regulators keen to understand the overall consumer experience. This has evidently been recognised by the ACMA which, as mentioned earlier in our report, announced on 1 August 2017 that it is using its statutory powers to obtain information from industry participants involved in providing services using the national broadband network.

Nevertheless, the TIO's data will always be important, as an independent source, as a cross-check to other data and for highlighting the hard-to-resolve complaints. The TIO must, therefore, ensure that the information it collects is categorised well and is comprehensively analysed, to enable it to fully contribute the insights available from its complaints database. We discuss those issues in this Chapter.

12.1. Categorisation of complaints

The TIO's categorisation process for complaints critically affects the TIO's ability to offer insights from its complaints database.

The TIO is very conscious of this. Earlier this year, it identified weaknesses in its categorisation system that amongst other things risked inconsistency in the approach taken by TIO staff and so undermined complaints data reliability. TIO has now revised its categorisation approach and from 1 July 2017, new complaints are categorised into 5 service types (landline, mobile phone, internet, multiple services and property) instead of the previous 3 service types (landline, mobile phone and internet). 79 keyword descriptors are now used to categorise complaint issues (reduced from 285). Training materials have been developed for TIO enquiries officers so that they understand the importance of accurate categorisation and how to apply the new approach and keyword descriptors.

As a further aid to classification of internet complaints, the TIO has asked nbn co. about the feasibility of an automated system-to-system enquiry of nbn co.'s database to obtain information about the technology utilised for national broadband services (fibre to the node,

fibre to the premises, HFC cable, wireless, satellite). Early signs are, however, that this is unlikely to happen in the near future.

We are not in a position to form a definitive view about the merits of the TIO's new categorisation approach. All categorisation approaches are a balance between comprehensiveness and efficiency, between detailed breakdowns and consistency. We do agree, however, that the consolidation of some similar categories is likely to lead to better consistency by TIO enquiries officers when categorising complaints. Also we note that the new approach addresses a couple of the criticisms of the TIO's past categorisation approach that were raised in submissions to our review.

1. Complaints about land access issues and property damage are now separated out, as urged by nbn co.
2. There are now separate categories for complaints about direct carrier billing charges and premium SMS charges, an issue raised by Oxygen8 Group.

We are, however, concerned that many industry and government stakeholders expressed disappointment to us that they were not given an adequate opportunity to provide input into the new categorisation approach. A particular point of focus from government was the services classification.

- The Department of Communications and the Arts considered that the services classifications are flawed because landline, mobile and internet are not actually separate categories given that internet services are delivered over fixed line, mobile and other wireless technologies. The Department instead proposed a classification that would distinguish new service/ continuing service.
- On the other hand, the ACMA proposed to us a categorisation process based on the delivery technology: fixed line/ cable/ fibre/ wireless/ satellite. Whilst the ACMA considered that TIO consumers may not understand the detail of the delivery technology, for example, whether fibre technology was to the premises or to the node, the ACMA considered that consumers would generally be able to tell the TIO the delivery technology to the level of detail that the ACMA was proposing and we note that the ACMA has considerable experience surveying consumers about their internet services.

If these suggestions are pursued, we would begin by assessing if these requests could be accommodated by way of sub-categorisation with the current 5 service categories retained. Our review of complaints suggests that the TIO usually collects the information that would be required, that is, whether the service is new or existing and, the type of delivery technology at the level of detail proposed by the ACMA. Accordingly we think that these suggestions could be implemented without adding much (if at all) to the length of calls between TIO enquiries officers and consumers.

As well as being of value to government regulators, we think that there could be a benefit to the TIO because this sub-categorisation approach could create efficiencies for the TIO in identifying potentially systemic issues. On the other hand, we are aware that the TIO has to be cautious for occupational health and safety reasons about adding to the keyboard work of its

enquiries officers. We think that the TIO should revisit its service categorisations to see whether sub-category enhancements can feasibly be implemented.

It will also be important for the TIO to undertake a post implementation review of its recent changes to the keyword descriptors that categorise complaint issues. This could be undertaken after the TIO has used the new keyword descriptors for 6 months and has released its December 2017 complaints report. Because the TIO's categorisation of complaint issues is so pivotal to its reporting about TIO complaints, it is an issue of considerable interest to telecommunications providers, government, politicians²¹, consumer representatives and the public and so the review should be publicised with adequate time for anyone interested to offer their views. The TIO should publish the results of the review with an explanation of any further changes to the keywords that are proposed to be made.

Recommendation 25

The TIO should make it clear to stakeholders that it is prepared to continue to refine its new keyword classifications over time, including by:

- a) Revisiting its service categorisations to see whether sub-category enhancements can be feasibly implemented, in particular, new/ existing service and the delivery technology: fixed line/ cable/ fibre/ wireless/ satellite; and
- b) Undertaking a post-implementation review of recent changes to the keyword descriptors that categorise complaint issues, (say) after the TIO has released its December 2017 complaints report. TIO's stakeholders should be informed of the review and given adequate time to offer their views. The results of the review should be published explaining any further changes to the keywords.

12.2. Public reporting of TIO data

The TIO currently releases analysis of its complaints data in an Annual Report and a six monthly update report. The Annual Report includes information about total complaint numbers, complaint outcomes, complaints by service type, issues raised in new complaints, complaints about the national broadband network, complaints by geographical location and complaints about 5 large telecommunications providers. Some trend information is included. The six monthly update traverses similar matters, but does not separate out information about the 5 large telecommunications providers.

The TIO, with Communications Alliance, also releases a report called "Telecommunications Complaints in Context" that sets out TIO new complaints as a proportion of services in operation for each telecommunications provider that agrees to have their data included in this

²¹ See for example the submission to our review by Senator Griff

report. The last report for April to June 2017 provided information about Telstra, Optus, Vodafone, amaysim and Pivotel.

Oxygen8 Group's submission to our review urged more granular reporting by the TIO about complaint issues. ACCAN's submission argued for more detailed reporting in a number of respects:

"A stated function of the TIO is "providing information and analysis to community, government, and members. The current periodic statistical reports provide only limited information and analysis about complaints. More transparency in statistical reports would be useful not only to assist in identifying systemic issues, but would also provide guidance for RSPs to improve.

An additional benefit of more detailed reporting would be to provide consumers with the appropriate 'language' with which to articulate their complaints. This is particularly important for vulnerable consumers who may struggle to identify or describe technical issues when dealing with RSPs, or where they are attempting to engage in alternative dispute resolution.

It would be useful if the TIO published more granular data more regularly than every six months. Reports should also contain more information about systemic issues – currently the number of issues identified is given but no extra detail is provided on their substance.

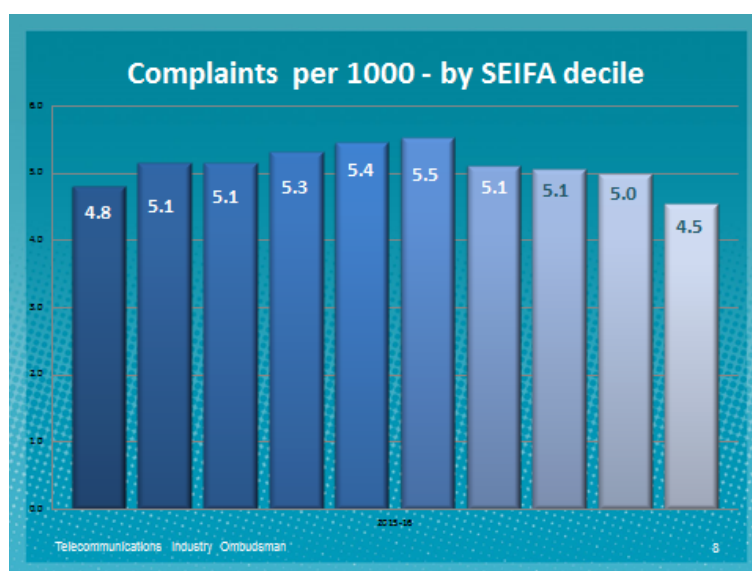
ACCAN finds the statistics and other reports released by the TIO highly valuable for its work, however has the following suggestions:

- *Provide detail on how each complaint reported on was resolved – i.e. was there a remedy?*
- *Provide the number of enquiries received each month*
- *Provide a breakdown of complaints by postcode*
- *Increase the scope of 'complaints in context' to cover a larger range of RSPs."*

Whilst clearly more frequent reporting would be welcomed by stakeholders, we would suggest that the first priority is for the TIO to continue the process of making its Annual Report and six monthly update more comprehensive.

1. The TIO cannot compel telecommunications providers to provide data about their number of services in operation as required for “Complaints in Context”. But it would be possible, and we think valuable, for the TIO to include in its Annual Report information about how many telecommunications providers had no TIO complaints, 1 to 10 TIO complaints, 11 to 50 TIO complaints, 51 to 500 TIO complaints, 501 to 2,000 TIO complaints, more than 2,000 TIO complaints (or other such categories). Other options would be to categorise according to the service type and to also provide a number band categorisation for conciliated complaints.
2. Last year’s Annual Report contained limited information about those using the TIO’s services. By way of example, we suggest the following additional information would be helpful and appreciated by stakeholders:
 - the number of unique visitors to the TIO’s website;
 - the number of consumers whose calls were mediated by the National Relay Service or for whom the TIO’s translation service was utilised;
 - information about what the TIO is doing to address the under-utilisation of the TIO’s services by Western Australian, Northern Territory and Tasmanian consumers (last year’s Annual Report showed that in these States there are less than 4.5 new complaints per 1,000 people as compared with other States where there are between 4.8 and 5.9 new complaints per 1,000 people); and
 - postcode information about consumers who make a complaint to the TIO – see Figure 8 below, sourced from the TIO.

Figure 8: No. of TIO complaints in 2015/16 per 1,000 people by Socio-Economic Index for Area (SEIFA) decile (postcode classification)



Whilst this chart suggests that the TIO is reaching those who live in areas of greatest disadvantage (the first decile), given the TIO’s accessibility responsibilities, this is clearly something to be watched.

3. Last year's Annual Report provided limited information about enquiries made to the TIO, just the total number of 46,778 and the percentage increase on the previous year. We think some categorisation of these calls would be helpful, including as discussed earlier in our report, the numbers of complaints excluded and categories of exclusion (see Part 9.1 of our report).
4. More granularity about issues raised in complaints is clearly wanted by stakeholders and would be desirable. Last year's Annual Report provided little information about the top issues in mobile phone complaints. For the issues across all service types, we think it would be appropriate to show the sub-issues that sit within each of these, for example, for connections – the number of complaints about delay, number problems and unauthorised transfers. For credit management, the new sub-issues are barring/ suspension/ disconnection, credit default report, debtor harassment, financial hardship/ repayment arrangement, not liable for debt, sold debt and statute barred debt/ bankrupt.
5. In addition to the information in last year's Annual Report about financial and non-financial redress from conciliated and investigated complaints, we think that there should be information about discontinued complaints and those closed by the TIO on the basis that this is fair and reasonable (see, for example, Figure 4 in our report).
6. There should be more comparison of statistics - eg. change in number of new complaints vis a viz change in number of conciliated complaints (see for example Figure 3 in our report) – and discussion of what this means.
7. There is clearly a desire for more detailed reporting about complaints involving services through the national broadband network (see, for example, comments in the ACCC's submission). The TIO's submission dated 1 May 2017 to the Joint Standing Committee on the national broadband network included some additional information that would be worthwhile including in the TIO's Annual Report and six monthly update: first, a comparison of the issues raised in these complaints and the issues raised in all complaints and secondly, more information about 5 common themes in complaints relating to the national broadband network and the action taken by the TIO in relation to these.
8. As previous discussed, there should be more information about the TIO's work in relation to systemic issues (see Recommendation 22).

Wherever possible, trend information over a meaningful period (say 3 years) should be provided.

We recognise that, despite its best endeavours, the TIO's data can only ever be indicative of consumer experience with telecommunications products and services and that the TIO will need to caution about drawing overly definitive conclusions from its reporting. Nevertheless we think that the TIO's independent status makes its data an important point of comparison with industry data.

Recommendation 26

While acknowledging the difficulties and limitations, the TIO should provide more detailed public reporting including information profiling telecommunications providers, information about users of the TIO's services, a categorisation of enquiries including the bases for the TIO excluding complaints, more granularity about complaint issues and more information about outcomes of complaints, complaints involving services through the national broadband network and systemic issues.

13. Stakeholder engagement

In Chapter 6 of our report, we discussed the unique nature of the telecommunications sector in Australia and how expectations of the TIO role have been very much shaped by that environment. We concluded that, more than other ombudsman services, this environment requires the TIO to be adaptive, transparent and engaged with its stakeholders. Our observations in this section are shaped by that perspective.

The TIO is equally aware of the importance of strong stakeholder relationships. Stakeholder engagement has been a focus for the Ombudsman since beginning at the TIO in March last year. Research has been conducted to ascertain how telecommunications providers want to engage with the TIO. Broader stakeholder research is planned for later this year. The past financial year has seen the establishment of new forums for telecommunications providers and new meeting arrangements with key stakeholders. The Ombudsman is currently working with the TIO Board to finalise a new Stakeholder Engagement Plan.

13.1. Telecommunications providers

With over 1500 members, the TIO is not, of course, able to meet with each telecommunications provider one-on-one. It would even be a considerable resource impost if the TIO met individually with new members (approximately 200 each year) as one telecommunications provider suggested - nor would this be particularly efficient given that the TIO does not receive any complaints about the vast majority of telecommunications providers.

Rather the TIO relies on a multi-faceted approach of website resources, newsletters, forums and meetings.

- The TIO's website includes information specifically directed to telecommunications providers (under the tab "Members"). This includes member online education structured into 3 modules "Introduction to the TIO", "TIO complaint handling procedures" and "Best practice complaint handling". Through the Members Portal, a telecommunications provider can obtain their complaint statistics. The TIO plans in the next 12 to 18 months to make this portal more interactive.
- The TIO emails a monthly newsletter to telecommunications providers.

Of course, these are one-way channels of providing information and it was clear to us that many providers, in particular small ones, will not always have the time or patience to fully utilise these. The TIO also has interactive ways of engaging with providers including:

- Dedicated telecommunications provider support channels – email, telephone and website.
- Small member forums (one per year) are being held in each State and Territory except the Northern Territory and Tasmania. In our consultations with small

telecommunications providers, we heard some positive feedback about this initiative.

- At least some of the larger telecommunications providers are meeting regularly (perhaps fortnightly or monthly) with the Ombudsman.

We would encourage the TIO to keep up the opportunities for interactive engagement with members and perhaps to explore more technology-based opportunities (eg. a video-conference based induction session for new members could be held say 2-3 times per year). Both new and existing members value the opportunity to interact with the TIO. It is apparent that many telecommunications providers are missing the TIO's former 'account manager' system whereby the telecommunications provider had a specified TIO staff member as their first line of contact.

We understand from the TIO that the 'account manager' system was abandoned primarily for efficiency reasons, in the context of the sharp increase in complaint numbers. The TIO felt that the 'account manager' system encouraged telecommunications providers to take queries or concerns about specific complaints to their 'account manager' rather than the TIO dispute resolution officer handling the complaint. From the TIO's perspective, this resulted in double handling and risked incorrect information being inadvertently provided.

We are sympathetic to this position in relation to the handling of individual complaints, however the removal of the 'account manager' has also cut off an avenue of communication with the TIO on more general matters that was clearly valued by the larger providers. While it is an internal management issue for the TIO as to how it staffs telecommunications provider support channels, there is no question that this has been perceived by industry as an example of the TIO 'withdrawing'.

Which leads us to what we think is the bigger criticism we received - that the TIO has not been sufficiently consultative. Communications Alliance submission stated:

"Communications Alliance and Industry have noticed improvements in the TIO's approach to stakeholder engagement. There is, however, room for improvement in this area, as we have not seen this emphasis on engagement born out in all activities.

In addition to the negative impacts on members of not having account managers, discussed under "Systemic Issues" and "Member Services," there have been numerous instances when there has been a lack of consultation with industry, or barriers to engaging with the TIO. Some examples are outlined below.

- *Data collection methodology: The data collected by the TIO and provided to individual providers and Communications Alliance is valuable in identifying patterns and finding key areas for improvement. The TIO recently sent out a list of proposed changes to service types and key word, which they will begin using on 1 July. While we appreciate that the*

changes were sent to us in advance, industry expertise and interest could have been valuable in assisting the TIO to develop these changes.

- *Focus of review: Industry was not aware of the timing of the current independent review. Early conversations with Industry would have allowed us to better prepare constructive input, and given us the opportunity to flag any issues we felt would be beneficial to include in the scope of the review.*
- *Systemic Issues: The TIO recently changed their approach to systemic issues without informing or consulting with providers, as mentioned in section D.*
- *Reporting review: Communications Alliance receives monthly reports on complaint numbers from the TIO, which allows us to evaluate if there are any emerging issues across industry and examine the continuing effectiveness and appropriateness of the Telecommunications Consumer Protection (TCP) Code. We have attempted to engage the TIO in conversations about how to improve the usefulness and effectiveness of these reports for quite some time. We were informed in February 2017 that the TIO would be reviewing their reporting procedures, and requested multiple times the opportunity to have input into this review. The TIO expressed that this review would be done internally and that they were not seeking external input to the review. Additionally, the timeline given for the outcomes of the review were pushed back repeatedly over multiple months. During this time, industry was seeing a rise in complaints and in order to analyse this we requested some additional data which had previously been provided in the monthly reports. However, Communications Alliance was told that this data would not be provided while the TIO was undertaking this review.*
- *Complaints in context survey: Communications Alliance and the TIO jointly publish the Complaints in Context report on a quarterly basis. Discussions began in 2016 on the possibility of updating the format, beginning with a survey of participants and non-participants. This survey was originally understood to be a collaborative effort between the two organisations, but that was not borne out through the process.*
- *6 month report: Communications Alliance first learned that the TIO's most recent 6 month report was to be published because we received media enquiries following the TIO's dissemination of the embargoed report and associated press release to media outlets."*

We agree that these are issues where industry could legitimately have expected more transparency by the TIO and earlier, clearer and better engagement and while there are sensitivities, we think that it is entirely possible for the TIO to do this without jeopardising its independence.

To the extent that engagement may have had less focus, we recognise that this is at least in part because of the increase in complaints and the pressures to reduce ‘non-core’ work in that environment. As we noted, however, earlier in our report, this can give rise to significant medium to long term strategic risks. The TIO needs to work closely with telecommunications providers to engender a co-operative complaints handling culture, to obtain the intelligence that assists the TIO with forecasting complaints volumes, to shorten complaints handling timeframes, to improve the fairness of outcomes and to address systemic issues in the interests of minimising complaints.

We think that a focus on openness and greater consultation needs to pervade the mechanisms that the TIO has put in place for stakeholder engagement. In addition, we support the suggestion made by some telecommunications providers of an annual TIO conference. We think that this could assist in fostering the right spirit of openness and co-operation and provide an opportunity to progress issues (for example, the consumer authentication issue referred to earlier in our report) and so recommend that the TIO trial this.

13.2. Consumer and small business representatives

The TIO’s outreach program is directed primarily to consumer representatives, and to a lesser extent small business representatives, as a way of building awareness of the TIO. These events also provide the TIO with a valuable opportunity to hear from consumer and small business representatives about the issues confronting their constituencies.

The 2015/16 Annual Report noted that the TIO attended 43 events around Australia including financial counsellor conferences, community legal centre events, multicultural advisory forums and a disability conference. We understand that the TIO also attended a small business conference. As discussed in Part 8.1 of our report, in 2016/17, the TIO attended just 10 community events – which we understand reflects a concern over the value of these attendances.

If this is so, we think that the TIO needs to establish a new mechanism to strengthen its engagement with consumer and small business customer representatives. We suggest that the TIO establish a consumer advisory group to meet with it twice per year to provide feedback about consumers’ experience both of telecommunications providers and the TIO. This would meet the suggestion in ACCAN’s submission:

“ . . . we have received consistent feedback from Consumer Action Law Centre, Financial Counsellors Australia (FCA), Legal Aid Queensland, and the Financial Rights Legal Centre, that the TIO could improve its frontline engagement with consumer bodies.

All parties would benefit from increased regularity and quality of engagement – the TIO by ascertaining likely upcoming issues, and consumer bodies in understanding how best to work with the TIO on behalf of their clients.”

13.3. Government

As we understand, the Ombudsman meets regularly with each of the ACMA, the ACCC, the Department of Communications and the Arts and the Minister's Office, although not at fixed intervals.

In Chapter 6 of our report, we set out at length the desire by government telecommunications policy makers and regulators for the TIO to actively partner with them. From our consultations, it was evident that more frequent and in-depth engagement would be welcomed. Like telecommunications providers, they were concerned that they had not been sufficiently consulted about some changes that the TIO had made, in particular, to its keyword descriptors used to categorise complaints (see Part 12.1 of our report).

One suggestion was quarterly meetings, with some one-on-one and some in groups, the Ombudsman meeting with the Department of Communications and the Arts, the ACMA and the ACCC together. There was also a view that more informal engagement at an officer level would be valuable, so that for example, telephone contact could readily be made with the systemic issues team.

We support these suggestions and while we understand the short-term pressures, in the medium term think that a more open and consultative engagement process with a structured program of meetings would assist the TIO to properly fulfil its role.

Recommendation 27

The TIO should enhance its stakeholder engagement by:

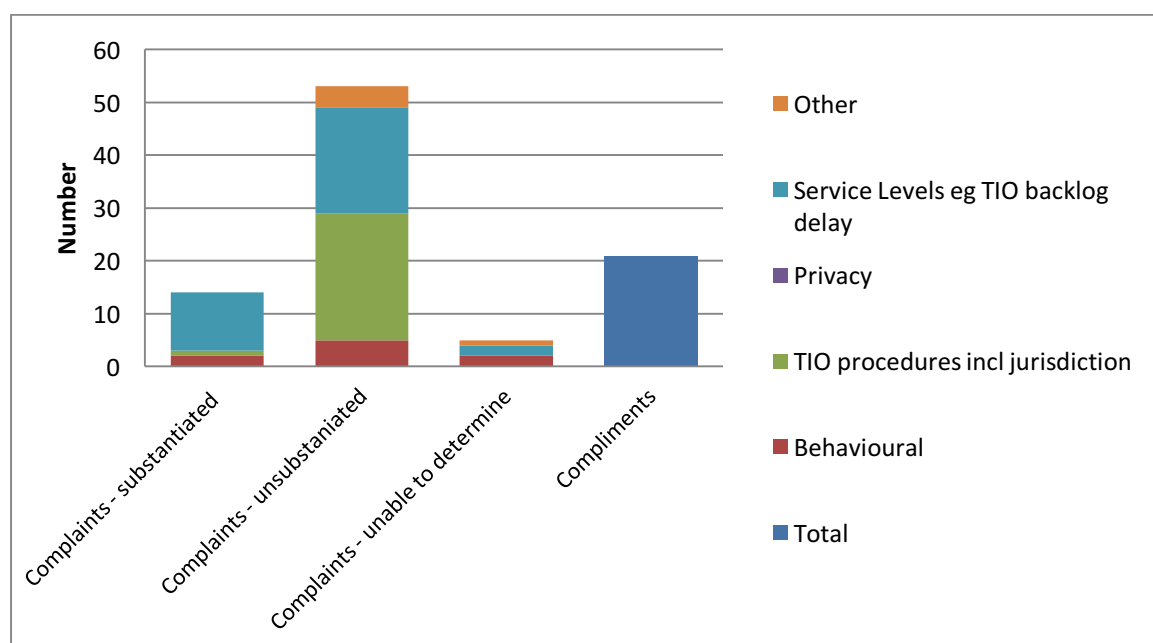
- a) being more open and consultative with stakeholders where the TIO reviews or changes its structures, systems or procedures;
- b) holding a conference for telecommunications providers – to be repeated in subsequent years if successful;
- c) establishing a consumer advisory group of representatives who work directly with the TIO – to meet twice per year to provide feedback about consumers' experience of telecommunications providers' products and services and complaints handling and their experience of the TIO's complaints handling;
- d) instead of the current ad hoc meetings, having a structured program of meetings (perhaps quarterly) with each of the Department of Communications and the Arts, the ACMA and the ACCC, some of which could be joint meetings; and
- e) broadening the contacts available to the Department of Communications and the Arts, the ACMA and the ACCC to include some key officers, for example, those with responsibility for functions of most interest to government such as the members register and systemic issues.

13.4. Complaints about the TIO

It is important that stakeholders have a mechanism for raising concerns with an ombudsman scheme. Key stakeholders will tend to have direct access to the Ombudsman or Deputy Ombudsman. This will not necessarily be the case for smaller telecommunications providers and certainly will not be the case for consumers who use the TIO’s services. For those stakeholders, it is important that a process exists that facilitates complaints about the TIO and ensures that these are properly investigated and responded to.

The TIO has a Compliments and Complaints Policy and feedback form, both of which are published on the TIO’s website. These commit to acknowledging complaints in 2 business days and to providing a response in relation to less serious matters within 5 business days and more serious matters within 20 business days. All compliments and complaints are recorded in a centralised database. An executive officer is responsible for investigating and responding to complaints. A report about compliments and complaints is provided to the Board on a quarterly basis.

Figure 9: Key issue raised in compliments and complaints Jan – March 2017 as reported by TIO management to the Board



We were not generally concerned by the number of complaints: these were in line with our expectations for a scheme of the size of the TIO. Our review of 9 randomly selected complaints found that the TIO provided the complainant with a timely and considered response. (In the case of one complaint, escalated within the TIO, the reply to the consumer could not be located for us.)

We did however, have a minor concern about the practice of classifying complaints according to the issue judged to be the principal issue, rather than reporting on all issues raised in complaints. The current approach results in some under-reporting of issues. By way of

example, there were actually 19 complaints during January to March 2017 where criticisms were made of TIO staff rudeness, however only 9 (where rudeness was judged to be the principal issue) were reported to the TIO Board for the period. While it could be argued that this is a minor issue for an Ombudsman dealing with tens of thousands of consumer complaints, in our view an Ombudsman's handling of complaints against itself should be above reproach. Given the very small numbers involved, simplifying the categories seems unnecessary.

We are also concerned that the absence of call recording means that complaints about staff telephone behaviour cannot be properly investigated to enable a reliable conclusion about the merits of these complaints (see Part 8.2 of our report where we discuss this issue further). The TIO's telephone system provides capacity for call recording. We think that this should occur and recordings should be retained for at least one month to permit review in the event of a complaint.

Recommendation 28

Reporting to the TIO Board about complaints about the TIO's performance should encompass all issues raised in complaints, not just the issue judged to be the most significant issue.

Recommendation 29

The TIO should institute telephone call recording. Recordings should be retained for at least 1 month so that if a complaint is made about an officer's telephone conduct the TIO is in a position to properly review, and if appropriate, address the conduct.

14. Dispute resolution Benchmarks

The terms of reference for our review did not specifically ask us to assess whether the TIO is meeting the Benchmarks for Industry-based Customer Dispute Resolution issued by the Australian Government The Treasury, February 2015 and the Key Practices that support those Benchmarks. For completeness, we undertook that exercise and found that the TIO has measures in place to meet those Benchmarks and Key Practices, albeit that there are some areas where we think that more is required of the TIO to fully achieve its role.

We set out in the Chapter a summary of those measures, with cross references to other chapters of our report where we have made recommendations or undertaken more detailed discussion there.

14.1. Accessibility

The office makes itself readily available to customers by promoting knowledge of its services, being easy to use and having no cost barriers.	
Summary of Benchmark Key Practices	Measures to comply with Key Practices
<p>Awareness/ promotion</p> <p>The scheme seeks to ensure the community is aware of its existence and promotes itself in the media, through consumer agencies and advocacy services or by other means in an inclusive way including information in appropriate languages, large text and audio.</p> <p>The scheme produces readily available explanatory material about the scheme and its timelines.</p> <p>The scheme requires scheme members to inform their customers about the scheme and that information about the scheme is available through scheme members.</p>	<p>See Recommendation 5 and Part 8.1 for discussion of the TIO's awareness raising initiatives.</p> <p>See Recommendation 3 and Part 7.2 for discussion of the explanatory material that the TIO produces for consumers.</p> <p>Paragraph 8.2 of the TCP Code requires telecommunications providers to inform dissatisfied consumers about the TIO.</p>
<p>Access</p> <p>The scheme seeks to ensure nation-wide access and appropriate facilities and assistance for disadvantaged complainants.</p> <p>Initial contact with the scheme can be oral or in writing but the complaint must ultimately be reduced to writing.</p> <p>Terms of Reference must be clear.</p> <p>'Virtual barriers are minimised for example by providing an online complaints form.</p>	<p>The TIO can be nationally accessed by calling the TIO's 1800 number. See Recommendation 3b) in relation to foreign language guidance material and Part 8.2 for discussion of support for consumers with disability.</p> <p>Complaints do not have to be reduced to writing by the consumer.</p> <p>As publicized on the TIO's website, the interpreter service or National Relay Service may be utilized. See Recommendation 3b) and Part 7.2 for discussion of the lack of explanatory</p>

	<p>materials in languages other than English.</p> <p>The TIO's website includes an online form that can be used to lodge a dispute.</p> <p>See Recommendation 2 and Part 7.1 for discussion of the TIO's Terms of Reference.</p>
<p>Cost</p> <p>No charge to customers.</p>	<p>The TIO provides a free service to consumers.</p>
<p>Staff Assistance</p> <p>Scheme's staff are able and adequately trained.</p> <p>Scheme's staff provide complainants with simple explanation of how the scheme operate.</p> <p>Scheme's staff assist complainants to make a complaint where assistance is needed.</p>	<p>The TIO provides structured induction training and ongoing training for its staff including telecommunications training. See Recommendation 16 and Part 10.2 for discussion of building technical competence.</p> <p>See Recommendation 5 and Part 8.2 for discussion of consumer assistance.</p> <p>See Part 9.1 for discussion of the complaint initiation process.</p>
<p>Use</p> <p>The scheme's processes are easy for complainants to understand and use with the consumer's case being presented verbally or in writing at the discretion of the scheme.</p> <p>Complainants may be supported by another person.</p>	<p>It is easy to lodge a complaint with the TIO. Its online dispute form is easy to complete. A consumer who wishes to be represented by another person must provide the TIO with a third party authorisation form. Much of the contact with consumers is by telephone.</p> <p>.</p>
<p>Acceptance by scheme</p> <p>Complaints are accepted or an appropriate and timely referral made where another dispute resolution office is more appropriate.</p> <p>A transparent process is followed for excluding potentially vexatious or frivolous complaints to ensure appropriate use of the scheme's resources and minimise unreasonable cost increases.</p>	<p>See discussion at Part 9.1 about exclusion of complaints outside the TIO's scope including referral to another agency.</p> <p>See Recommendation 2 and discussion at Part 7.1 for discussion of Terms of Reference complaint exclusion categories.</p>
<p>Non-adversarial approach</p> <p>The scheme uses appropriate techniques including conciliation, mediation and negotiation to settle complaints.</p> <p>Proceedings are informal, discouraging legalism.</p>	<p>The scheme makes extensive use of conciliation which resolves most complaints. See discussion in Part 9.3.</p> <p>Proceedings are informal.</p>
<p>Legal Representation</p> <p>The scheme permits the use of a support person but generally only allows legal representation with permission. If one party is granted permission, so will the other party. If the industry participant is legally represented, it will be required to pay the legal costs of the consumer.</p>	<p>The TIO does not restrict the parties from represented including by a lawyer. The third party authorisation form provides information that suggests that legal representation is not necessary. The TIO's Position Statement <i>Compensation Claims and the TIO</i> states that compensation for legal costs will only be considered in exceptional circumstances.</p>

14.2. Independence

The decision-making process and administration of the scheme are independent from participating organisations..	
Summary of Benchmark Key Practices	Measures to comply with Key Practices
<p>Decision-maker</p> <p>The scheme has a complaints decision-maker who is appointed for a fixed term. Neither the decision maker nor scheme staff are directly selected by scheme members or answerable to or having a relationship with them.</p>	<p>Paragraph 15.1 of the TIO's Constitution specifies that the Board has the power to appoint the Ombudsman (75% of those present and voting must support the resolution). The Ombudsman has a fixed term appointment.</p> <p>Paragraph 7.3 of the Terms of Reference specify that the Ombudsman is responsible for managing the TIO scheme's day-to-day operations and handling of complaints. Paragraph 7.6 of the Terms of Reference specify that the Board is responsible for maintaining the Ombudsman's independence.</p>
<p>Staff</p> <p>The scheme selects its own staff who are not answerable to scheme members.</p>	<p>The Ombudsman selects staff.</p>
<p>Overseeing entity</p> <p>There is a separate entity overseeing the scheme's independent operation with responsibility for appointing or dismissing the Ombudsman, recommending or approving the budget, receiving complaints about the scheme, recommending and being consulted about jurisdictional changes, receiving regular updates about operations and receiving information about systemic problems.</p> <p>The overseeing entity must have a balance of consumer, industry and where relevant other key stakeholders. Consumer representatives must be capable of reflecting consumer viewpoints and concerns and have consumers' and consumer organisations' confidence.</p>	<p>The TIO's Board is comprised of 3 directors with consumer experience, 3 directors with industry experience and 3 independent directors and an independent Chair. Paragraphs 12.3 and 12.4 of the TIO's Constitution particularise the process for appointment of consumer directors including what is required by way of consumer experience. A consumer directors is appointed after a Nominations Committee process (the committee must have a representative of the peak body representing users of telecommunications services) that includes Community and Consumer Groups being invited to make nominations.</p> <p>Clause 9.4 of the TIO's Constitution provides that the Board must set global funding limits for the TIO within which the budget is set and approve the budget.</p> <p>Paragraph 7.6 of the Terms of Reference specify that Board oversees capital management, funding and cashflows and monitors the performance and results of the TIO. Paragraph 7.9 specifies that the Board decides whether to make changes to the Terms of Reference.</p> <p>The Board receives reports about the scheme's operations</p>

<p>Transparency</p> <p>The scheme manages any actual or perceived conflict of interest and bias in a transparent manner.</p>	<p>Clause 14.9 of the TIO’s Constitution deals with conflicts of interest by directors. Clause 15.4 deals with conflicts of interest by the Ombudsman and Deputy Ombudsman.</p>
<p>Funding</p> <p>The scheme has sufficient funding to enable its caseload and other relevant functions to be handled in accordance with the Benchmarks.</p>	<p>Paragraph 7.6 of the Terms of Reference specifies that the TIO’s Board is responsible for ensuring the TIO has sufficient funding. The TIO is currently consulting with stakeholders about the funding model. See Chapter 6 for a discussion about the TIO’s role and resourcing of this. Recommendation 1 recommends better resourcing of aspects of the TIO’s role.</p>
<p>Terms of Reference</p> <p>Terms of Reference changes are made in consultation with relevant stakeholders including scheme members, industry and consumer organisations and government. Scheme members do not have a right to veto a change in jurisdiction, or to significant rules and procedures.</p>	<p>The TIO’s Board has the power to change its Terms of Reference by special resolution. The Terms of Reference do not give a power of veto to telecommunications providers in relation to Terms of Reference changes or even require consultation with stakeholders – but we consider that consultation would be good practice (see Recommendation 2 and Part 7.1).</p>

14.3. Fairness

<p>The procedures and decision-making of the office are fair and seen to be fair.</p>	
<p>Summary of Benchmark Key Practices</p>	<p>Measures to comply with Key Practices</p>
<p>Final Determinations</p> <p>The decision-maker bases determinations on what is fair and reasonable having regard to good industry practice, relevant industry codes of practice and the law.</p>	<p>Paragraph 1.5 of the Terms of Reference states that the TIO will consider relevant laws, good practice and what is fair and reasonable, when handling complaints.</p>
<p>Procedural fairness</p> <p>Complainants are told of their right to access the law if they are dissatisfied with the scheme’s decisions.</p> <p>Both parties are provided with information at the same time and can put their case, are told the arguments of the other party and can rebut these and are told the reasons for any decision in writing.</p> <p>Both parties are told why a complaint is outside jurisdiction or is otherwise excluded.</p>	<p>For a conciliated complaint, parties are provided with key correspondence from the other party or are orally advised. This provides them with an opportunity to provide counter arguments.</p> <p>If a decision is made to close a complaint on the basis that this is fair and reasonable, detailed written reasons are provided and the consumer told of their internal appeal rights and rights to access the law. An Ombudsman Determination also includes detailed reasons.</p> <p>If a telephone complaint is excluded, the consumer will be given the reason in the telephone conversation. If an email complaint is</p>

<p>Provision of information</p> <p>Complainants are encouraged but not compelled to provide information relevant to the complaint.</p> <p>Scheme members can be required to provide relevant information unless confidentiality or legal reasons prevent this.</p>	<p>excluded, an email will explain the reasons.</p> <p>Paragraph 3.20 of the Terms of Reference enables the TIO to stop handling a complaint if the consumer has failed to provide requested documents or evidence by a stated time, but only if this is fair and reasonable.</p> <p>Paragraph 3.6 of the Terms of Reference gives the TIO the power to tell the telecommunications provider to send the TIO any information or documents relevant to the complaint.</p>
<p>Confidentiality</p> <p>Scheme member information that identifies a third party may be provided to the other party with deletions.</p> <p>The scheme preserves confidentiality unless disclosure is required by law or for a purpose specified in the Benchmarks.</p>	<p>Paragraph 4.9 of the Terms of Reference commit the TIO to comply with privacy legislation and its privacy policies. Information is at times shared with the other party with deletions to protect some information.</p>

14.4. Accountability

<p>The office publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating organisations, policy agencies and regulators.</p>	
Summary of Benchmark Key Practices	Measures to comply with Key Practices
<p>Procedures</p> <p>Guidelines and policies for dealing with complaints are available to scheme members, complainants and other interested bodies.</p>	<p>Recommendations 3 and 4 and Parts 7.2 and 7.3 pertain to the TIO's website guidance and Position Statements.</p>
<p>Determinations</p> <p>Scheme members and other interested bodies have given availability to anonymized, written reports or summaries of determinations to educate them and to demonstrate consistency and fairness in decision-making.</p>	<p>The TIO has some published Ombudsman Determinations and some case studies on its website: see Recommendation 4 and Part 7.3.</p>
<p>Responding to complainants and scheme members</p>	<p>The TIO has a Complaints and Compliments Policy. Recommendations 28 and 29 and Part</p>

<p>The scheme uses comments from complainants and scheme members to inform continuous improvement of their internal processes and procedures and their public reporting.</p>	<p>13.4 pertain to this.</p>
<p>Annual Report</p> <p>The scheme publishes a detailed and informative annual report with statistical and other data about its performance including information about its jurisdiction, how the scheme works, how equitable access is ensured, new developments or key policy or education initiatives, scheme members and which has not met their obligations as scheme members.</p> <p>The report also includes the number and type of complaints and their outcomes, time taken to resolve complaints, systemic problems, representative case studies, information about how equitable access is ensured.</p> <p>The annual report is made public and distributed to scheme members and relevant stakeholders.</p>	<p>Recommendation 26 and Part 12.2 pertain to the TIO's Annual Report.</p>

14.5. Efficiency

<p>The office operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.</p>	
<p>Summary of Benchmark Key Practices</p>	<p>Measures to comply with Key Practices</p>
<p>Appropriate process or forum</p> <p>The scheme deals only with complaints that are within its jurisdiction. It will generally not deal with complaints that have been dealt with by another dispute resolution forum and where the scheme member's IDR procedures have not had reasonable opportunity to resolve the complaint.</p> <p>The scheme has mechanisms and procedures for referring complaints to other more appropriate fora.</p> <p>The scheme has mechanisms and procedures for dealing with systemic problems including investigating and referring these to relevant scheme members or regulators or policy makers.</p> <p>The scheme has a discretion to exclude vexatious and frivolous matters.</p>	<p>The TIO has sound processes to exclude complaints outside its jurisdiction: see Part 9.1.</p> <p>We think that the TIO needs to increase its resourcing of systemic issues investigations: see Recommendations 18 to 22 and Part 11.1.</p>

<p>Timeliness</p> <p>The scheme considers timeliness in all its processes including acknowledging, responding to, investigating and deciding complaints.</p>	<p>Recommendation 8, which is discussed in Part 9.3, aims to improve the TIO’s timeliness of conciliated complaints and Recommendation 12, which is discussed in Part 9.5, aims to improve the timeliness of the TIO’s decision making.</p>
<p>Tracking complaints</p> <p>The scheme has reasonable time limits for each of its processes which facilitate speedy resolution without compromising quality decision-making.</p> <p>The scheme has mechanisms to ensure compliance with time limits and track complaints.</p> <p>The parties are kept apprised of progress of complaints.</p>	<p>The TIO’s time limits for telecommunications providers and monitoring of these time limits is discussed in Part 9.3: see Recommendation 8.</p> <p>Our review of closed conciliated complaints suggests that the TIO generally keeps parties apprised of progress.</p>
<p>Professionalism</p> <p>The scheme recruits staff with the requisite skills, qualifications and experience to perform the work efficiently.</p>	<p>The increase in complaints has resulted in an increase in use of agency staff while the TIO has undertaken recruitment. Part 8.2 acknowledges that the TIO is seeking to recruit staff whose personal disposition is suited to the work. See discussion of technical knowledge at Part 10.2 and Recommendation 16.</p>

14.6. Effectiveness

<p>The office is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance.</p>	
<p>Summary of Benchmark Key Practices</p>	<p>Measures to comply with Key Practices</p>
<p>Coverage</p> <p>The scheme’s scope and powers of decision-maker are clear. These are sufficient to deal with the vast majority of complaints.</p> <p>The decision-maker has power to make monetary awards of sufficient size (consistent with the nature, extent and value of customer transactions) and other awards as appropriate.</p>	<p>The need for some changes to the Terms of Reference jurisdictional exclusions and clarification of jurisdiction is addressed in Recommendation 2 and the discussion in Part 7.1.</p> <p>Paragraph 3.11 permits an Ombudsman Determination to award up to \$50,000. As noted in Part 4.4, in 2015/16, the average financial outcomes for conciliated complaint was \$314.60. We are satisfied that the TIO’s monetary limit is sufficient given the types of complaints the TIO receives.</p>
<p>Systemic problems</p> <p>The scheme has mechanisms for referring systemic industry problems to an appropriate regulator for action if required. Also to bring</p>	<p>Part 11.1 discusses the TIO’s approach to referring systemic issues to regulators. Recommendation 20 proposes more vigorous action in relation to telecommunications</p>

systemic problems to the attention of policy agencies or other relevant bodies such as industry associations.

Scheme performance

The scheme has appropriately qualified staff and provides ongoing professional development and appropriate resources to allow staff to undertake their functions.

The scheme has procedures for receiving complaints about the scheme and referring these to the overseeing body.

The scheme responds to complaints and recommendations of the overseeing body in a timely and appropriate manner.

Internal dispute resolution mechanisms

Scheme members are required to set up internal dispute resolution mechanisms and to inform consumers about these. The scheme has the capacity to advise members about their internal dispute resolution mechanisms.

Compliance

The scheme has mechanisms to encourage scheme members to cooperate with the scheme and to abide by scheme rules. Final determinations are binding on scheme members if accepted by the complainant.

The scheme has methods to mandate or improve compliance with decisions and ensure redress for complainants when a scheme member is non-compliant with a final determination.

Periodic Independent review

The scheme is independently reviewed at set intervals. The review must be undertaken in consultation with stakeholders and include the scheme's progress towards meeting the Benchmarks, the appropriateness of the scope of the scheme, scheme members' and complainants' satisfaction with the scheme, whether the dispute resolution process is just and reasonable, the degree of equitable access to the scheme and the effectiveness of the scheme's constituent documents.

The results of the review must be available to stakeholders.

providers that have been subject to repeat claims of misleading sales practices or unauthorised transfers.

See Recommendation 16 and discussion at Part 10.2 about the TIO's technical expertise.

See Recommendations 28 and 29 and discussion at Part 13.4 about the TIO's approach to feedback from telecommunications providers and consumers.

The TCP Code imposes detailed complaints handling requirements. Paragraph 6.5 of the Terms Reference gives the TIO the power to make recommendations to telecommunications providers about how they can improve their complaints handling.

Clause 8(b) of the TIO's Constitution provides that the TIO may expel a telecommunications provider that neglects or wilfully refuse to comply with the Constitution, the Terms of Reference or any rules of the TIO.

Paragraph 3.14 of the Terms of Reference state that the telecommunications provider is bound by an Ombudsman Determination if the consumer accepts it

Section 133A of the Telecommunications (Consumer Protection and Service Standards) Act 1999 obliges the TIO to conduct regular independent reviews in consultation with stakeholders. The report must be published on the TIO's website.

Attachment 1 – List of Recommendations

No.	Recommendation
1	<p>The TIO should ensure that stakeholders understand and accept its role as an important support of the telecommunications industry co-regulatory model. The TIO should:</p> <ul style="list-style-type: none">a) give more focus and resources to working with regulators and industry to minimise complaints through activities including development of Codes, publishing the TIO’s approach to commonly occurring complaints, addressing poor practices by telecommunications providers and making its complaints data and insights publicly available;b) legitimise and support these activities through amendments to the roles statements in the Terms of Reference; andc) give prominence to these functions in its public communications about its role and functions. <p>The TIO Board should be seen to actively support and defend this broader role and ensure that the scheme is resourced and capable of fulfilling these vital responsibilities.</p>
2	<p>The TIO should revise its Terms of Reference for clarity and greater definition as to the scope of the TIO’s remit and its complaints handling process. Proposed changes should be tested via a full stakeholder consultation process.</p>
3	<p>To make it easier for consumers and small businesses to find and navigate the TIO’s assistance material, the TIO should:</p> <ul style="list-style-type: none">a) review and rewrite its website guidance about its complaints handling process, to consolidate the guidance; andb) include consumer guidance in languages other than English that are commonly spoken in Australia.

- 4 The TIO should provide more guidance on its website on its approach to commonly occurring complaints, by publishing:
- a) all Ombudsman Determinations – on an anonymised basis;
 - b) a sample of decisions (appropriately anonymous) to stop handling a complaint on the basis that it is fair and reasonable to do so (Terms of Reference paragraph 3.20 decisions);
 - c) a more extensive body of case studies including those from TIO Annual Reports – explaining the facts, the information obtained by the TIO to test assertions, the outcome and why the outcome was fair and reasonable; and
 - d) maintaining Position Statements (or equivalent authoritative guidance) by regularly updating these and developing new guidance as required – and ensuring that they are readily locatable on the TIO’s website.
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- 5 The TIO should strengthen its program of team leader monitoring of randomly selected telephone calls for each officer within their team. This should include more robust management reporting and action to address instances of below-standard customer service.
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- 6 The TIO should request that Communications Alliance or the Office of the Information Commissioner convene a roundtable with stakeholders to explore whether the TIO’s current practices strike the right balance between ensuring access to the TIO and protection against the risk of breach of customer privacy or identity fraud.
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- 7 The TIO should undertake a limited exercise of periodic telephone surveying of a randomly selected group of consumers whose complaint does not return to the TIO as a conciliated (Level 2) complaint – to check that they were satisfied that their complaint was reasonably and fairly dealt with by the provider and, if not, why they did not pursue their complaint through the TIO. This data should be collated and analysed with a view to identifying any weaknesses in the process that should be addressed and trends over time.
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- 8 The TIO should broaden its efforts to work with industry to see if there are ways in which together they can reduce conciliation and investigation timeframes. The TIO should:
- a) look to the experience of other ombudsman scheme to see what other collaborative techniques may be applicable;
 - b) be more active in following up response deadlines imposed on telecommunications providers and develop a suite of responses to address repeat instances of failure to meet deadlines; and
 - c) continuously investigate potential systems improvements and new capability to help to reduce timeframes.

- 9 The TIO should discuss with the Department of Communications and the Arts and the ACMA the merits of all wholesalers being required to join the TIO. Achieving this is likely to require the amendment of the Telecommunications (Consumer Protection and Services Standards) Act 1999.
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- 10 The TIO should amend its Terms of Reference so that:
- a) where the TIO considers it appropriate, the TIO may join another telecommunications provider as a party to a complaint by a consumer against a service provider. The Terms of Reference should apply to a joined telecommunications provider in the same way as if the complaint was against the provider and TIO complaint fees should be able to be charged to the joined telecommunications provider; and
 - b) a TIO member is obliged to comply with any request made by the TIO in the course of handling a complaint, even if the TIO member is not a party to the complaint.
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- 11 The TIO should take the necessary steps to amend its Terms of Reference to permit senior staff (perhaps designated as Adjudicators) to make decisions (both Preliminary Views and Determinations) in relation to lower value, more straight forward complaints.
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- 12 The TIO should streamline its decision making processes for straight forward matters to enable these to proceed straight to a Determination without a Preliminary View first being issued.
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- 13 The TIO should work with large telecommunications providers to streamline its reclassification processes, for example, to enable these to be submitted in batches with brief details set out in a spreadsheet and supporting documents attached. The internal reclassification decision appeal process should be dispensed with.
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- 14 Where the TIO refers to non-binding industry guidance when handling a complaint, the TIO should do so in a way that focuses on the intent of the guidance document.
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- 15 The TIO should publish TIO guidance as to how it will deal with complaints about a telecommunications provider's non-compliance with broadband speed sales claims. This should refer to the ACCC's guidance as to the principles that should be met to ensure that broadband speed sales claims are not misleading.

- 16 The TIO should take additional steps to build its telecommunications technical competency, including:
- a) recruitment of additional telecommunications experts to assist with training, advice, quality assurance and the development of TIO published guidance that involves technical issues;
 - b) drawing upon telecommunications providers' resources to enhance TIO training for its staff; and
 - c) establishing a technical panel that could be used to provide occasional advice, where the TIO considers that panel advice would assist, on a confidential basis, about issues arising in complex technical complaints.
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- 17 A small proportion of TIO internal reviews for consumers whose complaint has been closed (perhaps 10%) should be undertaken by an appropriately experienced person from outside the dispute resolution division to provide a calibration of 'overturn rates' by the dispute resolution specialists. If differences in results do emerge, reasons should be investigated and addressed as appropriate.
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- 18 The TIO should increase the resourcing of its systemic issues team (in our view, by more than double) including at least one data analyst so as to better identify potentially systemic issues, to enable the team to take on more matters and to progress systemic investigations in a more timely fashion. To at least partially fund the work of the team, the TIO should generally, and where appropriate, charge systemic issues investigation fees.
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- 19 The TIO's systemic issues team should analyse the TIO's complaints database to identify potentially systemic issues pertaining to the national broadband network rollout and performance and pursue those issues consistent with its normal procedures.
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- 20 The TIO's systemic issues team should have the capability to analyse the TIO's complaints database to proactively identify telecommunications providers that have been subject to repeat claims of misleading sales practices and unauthorised transfers. Where an investigation confirms that the misconduct is systemic, the TIO should report the telecommunications provider to the ACCC.
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- 21 Where a telecommunications provider makes it clear that it does not accept the TIO's view that its practice constitutes systemic non-compliance, the TIO should promptly escalate the matter to a more senior level at the provider and make a recommendation under paragraph 5.2 of the Terms of Reference that is referred to both the provider and the relevant regulator.

- 22 The TIO should provide more public transparency about its systemic issues work and processes. By way of example, we think that the TIO should report:
- how the TIO identifies potentially systemic issues and the number of such matters the systemic issues team assessed;
 - the number of matters that reached each of the subsequent stages of the TIO's systemic issues process;
 - a list of the issues canvassed in systemic investigations;
 - a list of the outcomes achieved as a result of this work;
 - the number of providers who were referred by the TIO to a regulator because of a systemic issue and any publicly known outcomes of these referrals; and
 - case studies from the systemic issues work.
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- 23 The TIO should discuss with large telecommunications providers the possibility of the TIO providing individualised, private reporting designed to enable the telecommunications provider to better understand their complaints performance. This could be done on a cost recovery basis.
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- 24 The TIO should fully resource its legislatively-recognised role of contributing to the development and review of codes. A particular priority should be the review of the Telecommunications Consumer Protection Code due this year. When contributing to that review, the TIO should analyse complaints trends and use its experience with systemic investigations to identify enhancements that would promote fairness and would assist in minimising complaints. In particular, the TIO should consider whether to propose:
- a) enhancements to the responsible credit provisions;
 - b) the introduction of measures to minimise the occurrence of vulnerable consumers suffering third party financial abuse; and
 - c) the introduction of guidance as to the authentication steps that a telecommunications provider should undertake when dealing with a person purporting to be an existing customer.
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- 25 The TIO should make it clear to stakeholders that it is prepared to continue to refine its new keyword classifications over time, including by:
- a) Revisiting its service categorisations to see whether sub-category enhancements can be feasibly implemented, in particular, new/ existing service and the delivery technology: fixed line/ cable/ fibre/ wireless/ satellite; and
 - b) Undertaking a post-implementation review of recent changes to the keyword descriptors that categorise complaint issues, (say) after the TIO has released its December 2017 complaints report. TIO's stakeholders should be informed of the review and given adequate time to offer their views. The results of the review should be published explaining any further changes to the keywords.

- 26 While acknowledging the difficulties and limitations, the TIO should provide more detailed public reporting including information profiling telecommunications providers, information about users of the TIO's services, a categorisation of enquiries including the bases for the TIO excluding complaints, more granularity about complaint issues and more information about outcomes of complaints, complaints involving services through the national broadband network and systemic issues.
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- 27 The TIO should enhance its stakeholder engagement by:
- a) being more open and consultative with stakeholders where the TIO reviews or changes its structures, systems or procedures;
 - b) holding a conference for telecommunications providers – to be repeated in subsequent years if successful;
 - c) establishing a consumer advisory group of representatives who work directly with the TIO – to meet twice per year to provide feedback about consumers' experience of telecommunications providers' products and services and complaints handling and their experience of the TIO's complaints handling;
 - d) instead of the current ad hoc meetings, having a structured program of meetings (perhaps quarterly) with each of the Department of Communications and the Arts, the ACMA and the ACCC, some of which could be joint meetings; and
 - e) broadening the contacts available to the Department of Communications and the Arts, the ACMA and the ACCC to include some key officers, for example, those with responsibility for functions of most interest to government such as the members register and systemic issues.
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- 28 Reporting to the TIO Board about complaints about the TIO's performance should encompass all issues raised in complaints, not just the issue judged to be the most significant issue.
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- 29 The TIO should institute telephone call recording. Recordings should be retained for at least 1 month so that if a complaint is made about an officer's telephone conduct the TIO is in a position to properly review, and if appropriate, address the conduct.