

Telecommunications Industry Ombudsman Limited

Options Paper

Possible Amendments to Constitution

Arising from the Telecommunications Consumer
Safeguards Review

20 May 2019

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1. Introduction

1.1 Background – the Telecommunications Consumer Safeguards Review

In April 2018 the Australian Government announced the Terms of Reference for a Telecommunications Consumer Safeguards Review to prepare the telecommunications consumer protections framework in Australia for the environment after rollout of the NBN is completed in 2020 (the **Review**).

The objective of the Review is to develop the next generation of consumer safeguards. The review is in three parts covering:

- A. effective consumer redress and complaints handling;
- B. reliability of telecommunications services; and
- C. choice and fairness in the retail relationship between the customer and their provider.

The TIO scheme has been operated by Telecommunications Industry Ombudsman Limited (**TIO Limited**) since December 1993. In that time the telecommunications landscape in Australia has changed vastly. In response, the scheme itself has evolved continuously over that period.

TIO Limited agrees that there should be ongoing consideration of possible adjustments to the TIO scheme to ensure the scheme continues to perform its functions well in a dynamic environment.

On 26 September 2018 a report was issued regarding Part A of the Review (the **Report**). The Report includes numerous recommendations relating to consumer redress and complaints handling. Those include a number of recommendations that if adopted, would require changes to TIO Limited's Constitution.

This Options Paper seeks TIO scheme stakeholders' views on some important recommendations made in the Report, which would require changes to the Constitution and would therefore require the support of the TIO scheme's Members.

1.2 Key recommendations of the Report

The Report identified strong support for the TIO scheme by industry and consumer groups and recommended implementing reforms to the TIO Scheme rather than establishing an alternative external dispute resolution scheme.

The specific recommendations of the Report that are of most direct relevance to the TIO scheme can be summarised as follows. The Report recommended:

- that the TIO scheme be more transparent about how changes to the scheme's processes and operations are made;

- that changes to the "ownership" of TIO Limited be considered (the Members of TIO Limited currently "own" TIO Limited in that they are the members, in the legal sense, of the company – the company's members collectively have the power, subject to various legal requirements, to amend the Constitution and take other actions that require a vote of the members);
- that the Australian Communications and Media Authority (the **ACMA**) have observer status at TIO Limited's board meetings;
- some changes to the TIO scheme's complaint handling processes;
- that the TIO scheme enhance its engagement with stakeholders and the ACMA;
- some changes to the structure of TIO Limited's board of directors and the way directors are appointed (these recommended changes are discussed in part 2 of this paper);
- that the Government consider instituting an authorisation process for the operation of the TIO scheme, with the ACMA to have regulatory oversight of the TIO scheme including a role in approving any material changes to the TIO scheme and a role in advising the Minister for Communications on appropriate standards and performance benchmarks to be met by the TIO scheme; and
- that TIO Limited should implement the recommendations that are within its remit, within a 12 month timeframe.

1.3 TIO Limited's initial response to the Report

Since the Report was issued TIO Limited has liaised with the Minister for Communications and the Department of Communications and the Arts in relation to the Report's recommendations. As a result of those discussions TIO Limited is prioritising consideration of some of the recommendations, including those discussed in detail in this Options Paper. Others of the recommendations will be considered subsequently.

1.4 Purpose of this Options Paper

The purpose of this Options Paper is for TIO Limited to consult with the TIO scheme's stakeholders about certain of the Report's recommendations that would require changes to be made to TIO Limited's Constitution. The support of the TIO scheme's Members would be required in order to amend the Constitution (see section 3.2 below for details of the process to amend the Constitution).

TIO Limited considers it appropriate to consult with stakeholders on the particular recommendations discussed in this Options Paper because:

- adopting the recommendations would involve making changes to elements of the Constitution that are material to the governance of TIO Limited; and
- there may be differing views amongst stakeholders on whether the recommendations should be adopted, or if adopted, how they should be implemented.

TIO Limited's Board therefore wishes to ensure it takes into account stakeholders' views before making any recommendation to Members to adopt any or all of the recommendations discussed in this Options Paper.

2. Options on which stakeholder feedback is sought

This section outlines changes to TIO Limited's Constitution that could be made, to implement certain important recommendations made by the Report. Discussion is provided about the benefits and possible drawbacks of making the changes.

2.1 Independence of directors

Should all of TIO Limited's directors be independent of any current employment or engagement by Members?

The Report's recommendation

The Report recommends that to remove conflicts of interest, perceived or otherwise, no director of TIO Limited should be in the current employ of or be engaged by any telecommunications provider.

Current position

Currently, the Board is made up of:

- three Directors With Consumer Experience;
- three Directors With Industry Experience;
- two Independent Directors; and
- the Independent Chair.

There is no requirement that the Directors With Industry Experience be independent of telecommunications industry participants. They are often employed by industry participants, i.e. Members of the TIO scheme.

Discussion

The Report found that consumer interests and the interests of small Members would be better served by transitioning the Board to a model made up of non-executive directors with a balance of skills and experience across industry and consumer sectors, with Directors With Industry Experience not being current employees of, or otherwise engaged by, Members.

Directors of a company are legally required to exercise their powers and discharge their duties in good faith in the best interests of that company. However it is possible that a director of TIO Limited employed or engaged by a Member might, despite their legal obligation, see themselves as there to protect the interests of "industry" broadly, or the interests of their "home" Member specifically. Mitigation measures such as TIO Limited making it clear to all directors in its Board's Charter that their legal obligation is to act in TIO Limited's best interests, may arguably be insufficient to manage this risk. Requiring all directors to be independent of (i.e. not employed or engaged by) industry entities might perhaps be necessary to more fully address this risk.

There is also a related risk that the "home" Members of the relevant directors (i.e. the Members that employ or engage the directors) may themselves take the view that the directors should act in those Members' interests, not (as legally required) the interests of TIO Limited.

Further, there is a risk that external observers might perceive that the governance of TIO Limited is subject to influence by the Members that employ or engage "industry" directors. For example a consumer might perceive that if a director is employed by a Member, the TIO scheme's ability to impartially and independently handle a complaint against that Member is compromised.

On the other hand it is arguable that this would merely be an erroneous conclusion by the consumer since if a director correctly understands and performs their role, they will act in the best interests of TIO Limited and will

not seek to advance the interests of any particular Member to the detriment of TIO Limited, nor to become involved in the handling by the TIO scheme of any complaint. In that case the best way to address this erroneous perception may be for the TIO scheme to implement further measures to educate consumers as to how the scheme operates, particularly the measures in place to support the scheme's independence.

The Australian and New Zealand Ombudsman Association (the peak body for ombudsman schemes in Australia and New Zealand) states in its [Essential Criteria for Describing a Body as an Ombudsman](#) that "The office of Ombudsman must be established... so that it is independent of the organisations being investigated." The same document states that an industry-based ombudsman should be responsible "to an independent board", albeit a board "of industry and consumer representatives".

The current approach, where Directors With Industry Experience are often employed by industry participants, arguably has a number of benefits. It is fundamental to the nature of an industry ombudsman scheme that there is representation at Board level by directors with deep industry knowledge and experience. Individuals with close current connections to industry participants may be best placed to have such knowledge and experience. It is typical amongst industry ombudsman schemes currently operating in Australia for "industry" directors to be employed or engaged by industry participants.

The [Commonwealth Government's Key Practices for Industry based Customer Dispute Resolution](#) seem to support the benefits of "industry" directors having current connections with industry participants. They state (on page 12) that an overseeing body for an industry ombudsman scheme may usually consist of "an independent chair, consumer member or members, member or members from participating organisations and, where relevant, other stakeholder member or members".

Arguably, adopting the Report's recommendation may result in Board representation without a nuanced and detailed understanding of current industry issues – which understanding may be seen as a fundamental requirement of an industry ombudsman scheme.

But on one view, perhaps the recommendation does not go far enough. Perhaps there should be a requirement that the "industry" directors appointed must not currently be, and must not have been previously (at least in some specified period, for example five years), employed or engaged by industry entities. The counter-argument would be that taking the reasoning underlying the recommendation to its "logical conclusion" in this way points up the problem with the recommendation, namely that if "industry" directors are required to be fully independent of current and recent employment-type connections with industry participants then it may be very difficult to identify directors who can provide a suitable and current "industry" perspective.

Request for feedback

TIO Limited welcomes stakeholders' views on all issues raised in the above discussion, including the Report's recommendation that no director of TIO Limited should be in the current employ of or be engaged by any telecommunications provider.

2.2 Right for the largest and second largest Members to nominate Directors

Should the right for the largest and second largest Members to each fill a Director role be removed?

The Report's recommendation

The Report recommends that the current right for the largest and second largest Members to each fill a Director role should be removed to support the Board being an independent, skills based Board.

Current position

Currently the Board includes three Directors With Industry Experience (as defined in the Constitution). The Largest Member and Second Largest Member (as defined in the Constitution) nominate candidates for two of the Director With Industry Experience positions.

The process set out in the Constitution requires that when a vacancy arises, the Largest Member or Second Largest Member (as applicable) must nominate at least two candidates who are suitable for the role.

The process generally requires that the Nominations Committee then considers these candidates and if they meet the criteria in the Constitution, the Nominations Committee recommends to the Board one of the candidates for appointment as a director. The Board may then appoint that person as a director.

Discussion

The Report mentioned feedback from stakeholders that the current selection process for directors potentially skews Board decision making towards the interests of the largest Members.

While the Report recognises the importance of the Board continuing to have equal numbers of Directors with "consumer" skills and "industry" skills, it is arguably no longer appropriate to privilege the largest and second largest Members over other Members in the selection of directors with "industry" skills. It might be preferable for all three Directors With Industry Experience to be appointed "on their merits" through a common appointment process, in order to appoint the best available candidates put forward from among the whole body of Members.

On the other hand, since the earliest days of the TIO scheme the largest Members have had rights specified in the Constitution (previously known as the Articles of Association) to appoint representatives to the Board, on the basis that as the largest industry stakeholders in an industry ombudsman scheme (to which they are significant financial contributors) they should be assured a formal role in the good governance of the TIO scheme.

By correctly understanding the legal responsibilities of directors, the Largest Member and Second Largest Member will always nominate candidates who will be able to serve TIO Limited well as directors, not candidates who will represent the interests of those Members. This follows from the fact that once appointed as Directors, these individuals owe their legal duties as directors to TIO Limited – they must act in the best interests of TIO Limited and not promote their own Member organisations' interests to the detriment of TIO Limited. In that sense when acting as directors they are (and are legally required to be) independent of the Members.

Two ways in which the Report's recommendation could be implemented are outlined below. Stakeholders are invited to provide feedback on these and on any alternatives that they wish to raise.

(a) **Nominations Committee to recommend candidates from amongst all industry participants**

Under this approach the Constitution would be amended so that when any of the three Director With Industry Experience roles becomes vacant the Nominations Committee will identify and recommend suitable candidates

from amongst all telecommunications industry participants, based on the criteria set out in clause 12.4(e)(i) of TIO Limited's Constitution (the **Appointment Criteria**) which include:

- expertise in corporate governance;
- ability to provide effective input on policy and jurisdiction issues;
- ability to uphold the Ombudsman's independence;
- expertise in the telecommunications industry; and
- capacity and willingness to consult with Members.

The Nominations Committee would advertise the position, as a minimum, in a major national newspaper and would follow a transparent process to consider a wide range of candidates (see clauses 12.4(e)(iii) and (iv) of the current Constitution). Members would be invited to make nominations for the positions, which is already required by clause 12.4(e)(ii) of the Constitution, in relation to the Director With Industry Experience position not filled by the largest or second largest Member). The Nominations Committee could potentially also circulate the call for nominations through the industry bodies, Communications Alliance and Commpete.

All Members, including the largest and second largest Members, would be free to put forward candidates through the above process.

The Board would generally only be able to appoint a director to fill the vacant role if that person has been recommended by the Nominations Committee (under current clause 12.2(c) of the Constitution).

This option would implement a "skills based" approach to selecting and appointing Directors With Industry Experience rather than two positions being restricted to candidates put forward by the largest and second largest Members. This may reduce the potential for criticism that the TIO scheme lacks independence from the two largest Members.

On the other hand, it is arguable that the two largest Members deserve to have a special role in nominating Board candidates, given their significant interests (financial and otherwise) in ensuring the TIO scheme is properly governed. It is important to note again that once appointed as directors, the nominees of the two largest Members are required to act independently of those Members – they must act in the best interests of TIO Limited, even where that may be against the interests of those Members. The two largest Members therefore have a strong incentive to put forward candidates for Director With Industry Experience positions who have good experience and credentials for such a role, bearing in mind the Appointment Criteria.

(b) Members vote for candidates after a wide call for nominations

Under this approach the Constitution would be amended so that when any of the three Director With Industry Experience roles becomes vacant a wide call for nominations is made (through advertising, direct contact by the Nominations Committee with Members and perhaps contact by the Nominations Committee with Communications Alliance and Commpete) and all Members can vote amongst the suitably qualified nominated candidates.

This option would give all Members (not just the largest and second largest Members) a direct role in helping appoint suitable Directors With Industry Experience. It would be "fair" to all Members in that they would all be able to have direct input, by voting on the appointment of these directors. Voting could be proportional to each Member's financial contribution to TIO Limited's operational costs in the preceding financial year (this is how the Constitution provides that voting will occur on a poll in a general meeting of Members), meaning that the Largest Member and Second Largest Member would still be likely to have considerable influence in the process.

However, this option may not always result in the best candidate being appointed as they will not have been selected through the scrutiny of the Nominations Committee. The Nominations Committee currently fills a very important role in carefully testing and evaluating candidates against the Appointment Criteria. In an election process, each candidate could be asked to make available to Members a statement of their qualifications for the role but there would be limited opportunity for Members to test that information or

interrogate the candidate, and there would be no guarantee that Members would carefully consider such statements before casting their votes. Further, having an election may tend to lead to the erroneous view amongst Members and perhaps even the appointed Directors With Industry Experience that the role of those directors is to represent the interests of Members when their role is actually to act in the best interests of TIO Limited.

Request for feedback

TIO Limited welcomes stakeholders' views on all issues raised in the above discussion, including the Report's recommendation that the current right for the largest and second largest Members to each fill a Director role should be removed.

2.3 External advertising of vacant Board positions AND Composition of the Nominations Committee

Should the TIO Constitution require all vacant director positions be externally advertised?

Should the composition of the Nominations Committee, which recommends to the Board individuals for appointment to Board positions, be altered?

The Report's recommendation

The Report recommends that vacant director positions should be externally advertised and that the selection committee for Board candidates be made up of:

- the Independent Chair of TIO Limited's Board (who would chair the selection committee);
- a representative of the ACMA;
- a person with industry skills nominated by the Board; and
- a person with consumer skills nominated by the Board,

with all but the Independent Chair being independent of the Board.

The Board would remain responsible for appointing a director from amongst the preferred candidates nominated by the selection committee.

Current position

Under clause 12.2(g) of TIO Limited's Constitution the Nominations Committee normally comprises:

- the Independent Chair of TIO Limited's Board (who chairs the Nominations Committee);
- one Director With Consumer Experience;
- one Director With Industry Experience;
- one person nominated by a peak group representing users of telecommunications services or public interest issues relevant to telecommunications services; and
- one person nominated by a peak group representing the telecommunications industry.

The Constitution provides that the Nominations Committee may be constituted differently in certain specific circumstances, for example if the Nominations Committee needs to consider the appointment of an Independent Chair and the current Independent Chair is or may be a candidate, the Board will select an Independent Director of TIO Limited to act as chair of the Nominations Committee for that purpose.

The Constitution requires that if there is a vacancy in any Director With Consumer Experience position, or in the position of the Director With Industry Experience who is not nominated by the largest or second largest Member, the position will be advertised, as a minimum, in a major national newspaper. It does not specify that the positions of the two Independent Directors or of the Independent Chair, if vacant, will be advertised. However the Constitution provides that the nomination and appointment processes for those directors must be transparent, accountable and cost effective.

Discussion: external advertising of all vacant Board positions

Although the Constitution does not specify that the positions of the two Independent Directors or of the Independent Chair, if vacant, will be advertised, it has been TIO Limited's practice to advertise those positions. While there are cost considerations in undertaking external advertising for these positions, there is likely to be benefit in reaching a broad pool of potential candidates to let them know about the roles.

Since, as outlined above, there are already requirements in the Constitution to advertise certain other director roles when they become vacant, a cogent argument can be made that the Constitution should be amended to

require the same type of advertising when the position of an Independent Director or of the Independent Chair becomes vacant.

However, query whether the Constitution should require the advertising to be in a major national newspaper, which may be unduly restrictive especially given the relative decline of newspaper advertising as a means of identifying candidates for senior roles. It may be more suitable to require the advertising (for any director role) to occur "in a medium or media likely to reach a substantial pool of potential candidates", rather than prescribing that the advertising be in a newspaper. For example, it may be appropriate to advertise the role on a major employment website and/or through an organisation like the Australian Institute of Company Directors.

Discussion: composition of Nominations Committee

The selection committee proposed by the Report would essentially fulfil the role currently played by the Nominations Committee, so the Report's recommendation can be understood as a recommendation to change the composition of the Nominations Committee.

The Report takes the view that the proposed changes to the composition of the Nominations Committee would strengthen the representativeness and independence of the Board selection process.

The Report's recommendation includes the suggestion that the Nominations Committee should include a representative of the ACMA. Having the ACMA directly involved in the process of appointing directors to TIO Limited's board may arguably impede the ACMA's independence in relation to any role the ACMA has in future in providing regulatory oversight of the TIO scheme.

The current structure of the Nominations Committee was intended to ensure that viewpoints of consumer and industry stakeholders are taken into account when the Nominations Committee recommends a person to be appointed as a director of TIO Limited.

If the ACMA representative recommended by the Report is excluded, both the current Nominations Committee structure and the Report's recommended structure would comprise an independent chair and members who bring a balance of industry and consumer perspectives to the Committee.

The structure recommended by the Report would not include any Director With Consumer Experience or Director With Industry Experience. This may arguably reduce the risks of those Directors influencing the Nominations Committee to select candidates whom they expect will advance the interests of consumers or industry respectively, or towards whom they (perhaps unconsciously) feel an affinity bias or similarity bias (i.e. there may be a human tendency to recruit people we like, or who are similar to ourselves). On the other hand, those risks may still be present to some degree under the structure recommended by the Report since the Nominations Committee would still include members with industry skills and consumer skills, selected by the Board.

It is arguable that the current Nominations Committee structure has an independence advantage over the structure recommended by the Report in that the current structure includes two individuals nominated by external bodies – one nominated by a peak group representing users of telecommunications services or public interest issues relevant to telecommunications services, and one nominated by a peak group representing the telecommunications industry. Under the Report's model the Committee members with industry skills and consumer skills would both be nominated by the Board.

An advantage of the Report's model might be that (leaving aside the recommended ACMA representative) no external bodies would need to be involved in appointing individuals to the Nominations Committee. Involving those bodies adds complexity and potential cost to the functioning of the Nominations Committee. However persons with industry skills and consumer skills would still need to be appointed to the Committee, presumably from outside TIO Limited, so there may in fact be little or no advantage.

It is of course possible to conceive of other models that are a hybrid of the current Nominations Committee structure and the structure proposed by the Report. For example the Nominations Committee could comprise:

- the Independent Chair of TIO Limited's Board (who would chair the Nominations Committee);
- one person nominated by a peak group representing users of telecommunications services or public interest issues relevant to telecommunications services; and
- one person nominated by a peak group representing the telecommunications industry.

Another option would be to amend the Constitution to give the Board discretion to determine the number, identities and qualifications of persons appointed to the Nominations Committee, rather than prescribing in the Constitution any particular composition structure for the Committee. This is the more usual approach, used by most companies. This approach would remove complexity from the Constitution and give the Board the flexibility to determine a suitable composition for the Nominations Committee without necessarily having to include any external persons on the Committee. However under that model:

- the functioning of the Nominations Committee would not necessarily have an appropriate degree of independence from the Board, i.e. it could (unless it were otherwise specified in the Constitution) be comprised entirely of directors of TIO Limited; and
- while it is perhaps unlikely given the "balanced" structure of the current Board, it would be possible for the Board to appoint a Nominations Committee that was not informed by "consumer" and "industry" perspectives to a suitable extent.

Another option could be to defer any decision on composition of the Nominations Committee pending clarity on composition of the Board itself.

Request for feedback

TIO Limited welcomes stakeholders' views on all issues raised in the above discussion, including the Report's recommendations as to:

- advertising vacant director positions; and
- the composition of the selection committee for Board candidates.

3. Process for consultation and amendment of the TIO Scheme

3.1 How stakeholders can provide feedback

TIO Limited's Board wishes to consult with stakeholders about the Report's recommendations discussed above. The Board seeks feedback on options for implementing the recommendations (or some variation on the recommendations). The Board will take into account any feedback provided by stakeholders before making a recommendation to TIO Limited's Members as to which options and amendments, if any, should be pursued.

Stakeholders can provide feedback on the matters discussed in this Options Paper by contacting the Company Secretary of TIO Limited, Ms Gayle Neville-Hill at OptionsPaper@tio.com.au by Thursday 27 June 2019.

3.2 Process to amend TIO Limited's Constitution

If, after consultation, the Board considers it appropriate to recommend amendments, then the Board will put specific amendments of the Constitution to a general meeting of the Members of TIO Limited with a recommendation that they be approved by the Members by special resolution.

To be passed, a special resolution requires the support of 75% of Members present and entitled to vote. Because of additional requirements specified in the Constitution, the Constitution would only be amended if this special resolution is passed by the Members and:

- at least five Members vote in favour of the special resolution; and
- at least one Carrier Member and one Carriage Service Provider Member vote in favour of the special resolution.