

# Telecommunications Industry Ombudsman Terms of Reference Review

Submission by Legal Aid Queensland



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Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Telecommunications Industry Ombudsman (TIO) Terms of Reference Review.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Civil Justice Services Unit lawyers provide advice and representation to vulnerable clients in banking and finance, credit and debt, insurance, telecommunications and consumer law, including clients who use the TIO’s dispute resolution services.

### Questions for Consultation

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

LAQ supports a definition of small business that is consistent with the Australian Financial Complaints Authority’s (AFCA’s) definition of small business. AFCA defines small business “as an organisation with less than 100 employees.”

In LAQ’s view, a definition of small business that is wider than the ACL definition is more appropriate because:

- (a) It allows a wider range of small business to access the services of the TIO.
- (b) It is important to ensure consistency in definitions across all Ombudsman and external dispute resolution services.

**Q2 Is \$100,000 an appropriate financial limit for Telecommunications Industry Ombudsman decisions?****Q3 If not, what would be the more appropriate financial limit for Telecommunications Industry Ombudsman decisions and why?**

LAQ supports a financial limit being placed on TIO decisions. However, in LAQ's submission it would be more appropriate that the TIO's financial limit be \$250,000.

This higher limit would:

- (a) Encourage small business to bring its higher value disputes to the TIO.
- (b) Ensure the TIO's jurisdictional limit is more comparable with other consumer External Dispute Resolution schemes such as AFCA.
- (c) Encourage more complex and higher value disputes to be brought before the TIO.

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

In LAQ's submission, any award for non-financial loss should not be included in the TIO's financial limit for decisions. LAQ also does not support a financial limit or cap on compensation for non-financial loss. It is important that the Ombudsman retains the discretion to respond appropriately to inappropriate conduct and the circumstances of cases and the impact those circumstances have on the lives of consumers.

In LAQ's view, breaches of privacy, particularly the release of phone numbers and location of consumers cause substantial detriment to the consumers. It's difficult to put an appropriate financial limit on these claims as the consequences for consumers can vary. It has been our experience that consumers have had to relocate because of the release of information by the telecommunications company that has enabled a violent ex-partner to find the person.

Also, the impact of a failure to provide a telephone service can have life threatening consequences for the person unable to contact emergency services and it would be inappropriate to set a financial limit on the potential award for non-financial loss in this type of case.

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

LAQ believes that it is appropriate that the TIO can handle a complaint that is before a court or tribunal

- If the Court claim is commenced by the member; and
- before a judgement has been obtained.

This approach would be consistent with the approach used in AFCA. Once the complaint is accepted by the TIO legal action should be stayed unless there are legitimate reasons for pursuing the matter such as those described in 6.7 (c) (i) and (ii) or to preserve time limits to bring a claim in Court.

Once a complaint is received by the TIO the member should be restrained from taking any enforcement/collection action until the matter is resolved. Clause 6.7 of the Proposed TOR only refers to limiting the ability to take legal action and not other forms of enforcement action. Other enforcement

action could include taking possession of secured or leased goods or reporting default information to a credit reporting body.

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

LAQ supports the list set out in Clause 2.2(b) of the Terms of Reference (TOR) but it should be made clear that the TIO can also include devices leased or where goods are sold by a third party but billed by the member

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

In LAQ's submission it is appropriate that the TIO has strong powers to deal with the complaints of a consumer in its entirety.

When consumers lodge a complaint with an Ombudsman they seek a dispute process that is:

- (a) Fair
- (b) Efficient
- (c) Independent
- (d) Accessible
- (e) Accountable
- (f) Effective and
- (g) Provides resolution of and a finality to disputes.

In the circumstances of some cases, the only way that an ombudsman scheme can provide a fair, effective, efficient and final resolution to a dispute is by joining all relevant parties to the dispute. This joinder of parties allows all of the issues to a dispute to be considered in a fair and independent manner so that the dispute can be resolved.

In our view the way in which any award is apportioned is irrelevant for the consumer. They should not have to make numerous complaints to obtain compensation or redress from different members

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

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

In LAQ's view, generally speaking the TOR is easy to follow and understand. However, LAQ has a number of concerns with particular clauses in the TOR which have been set out below:

- (a) Clause 2.17 requires members to be given "reasonable opportunity to consider an issue." This clause is uncertain and does not provide members or consumers with any certainty about the nature of a member's rights and obligations when they are considering an issue that a consumer has raised. In LAQ's submission, a specific timeframe of 14 days should be included in this clause to provide certainty and ensure

transparency. Where urgent action is required 14 days maybe too long and timeframes should be substantially less than 14 days

- (b) Clause 2.35 requires consumers to “accept our decision within the timeframe we specify.” This clause suggests that different timeframe could be imposed on different consumers for accepting decisions. For reasons of fairness, consistency and certainty, a timeframe of 14 days should be specified in this clause.
- (c) Clause 2.15 gives the TIO a power to, in certain circumstances require a complaint to be in writing or through a representative. In LAQ’s submission, such a power must be used sparingly because vulnerable consumers who might struggle to present their complaint in writing or who might not have access to a representative need to be able to access justice by lodging a complaint on the phone. In circumstances where a representative is required, the TIO should pay for the cost of the representation.
- (d) Under Clause 6.3 there does not appear to be a consequence for a member if information or documents relevant to a dispute are not provided to the TIO. In LAQ’s submission, the lack of a consequence means that there is no incentive for members to provide the information in a timely manner. In LAQ’s submission, the TIO should have the power to draw an adverse inference against a member in a dispute when documents requested of the member have not been provided.