



28 August 2020

Judi Jones

Telecommunications Industry Ombudsman

publicconsultation@tio.com.au

Dear Judi,

nbn response to 'Modernising the Telecommunications Industry Ombudsman Terms of Reference July 2020' Consultation Paper

Thank you for the opportunity to comment on the TIO's proposed Terms of Reference Consultation Paper.

nbn supports the TIO modernising its Terms of Reference to keep pace with the transformation of the telecommunications sector and the Government's Benchmarks for Industry-Based Customer Dispute Resolution.

Our comments in this submission focus on some of the specific changes proposed in the Consultation Paper to ensure that the scope employed to modernise the Terms of Reference aligns with established industry practice, in particular in relation to:

- the small business definition;
- increase in compensation limits;
- joining more than one member to a specific complaint;
- complaints made by occupiers; and
- clarifying comments in the current Terms of Reference.

Small business definition

nbn is comfortable with the proposed amendment to change the current small business definition to one that reflects the Australian Consumer Law. Although we consider that the use of this new definition is more likely to directly impact RSPs than wholesale providers, we think it is important to take account of the number of other regulations and industry codes that specify other small business definitions as they relate to telecommunications-specific rules and obligations.

nbn recommends the TIO confirm whether and how these particular definitions will be taken into account when determining if a member has acted in accordance with their specific obligations. For example, the ACMA's *Telecommunications (Consumer Complaints Handling) Industry Standard 2018 (Complaint Handling Standard)* uses a different definition that includes a sub-set of small businesses. This Standard governs the processes, and timeframes, by which members must accept and resolve complaints. It would therefore be reasonable to expect when assessing a member's actions to resolve a complaint for a small business, including **nbn**'s role of providing reasonable assistance to RSPs, that the TIO measures those actions against the definition under the Complaint



Handling Standard rather than the broader Australian Consumer Law definition. Clarification of these issues in the Terms of Reference would help to improve clarity, certainty and ease of understanding¹.

Increase in compensation limit

nbn supports simplifying the increased compensation limit for financial losses. We do not believe replacing the recommendation limit of \$100,000 with a higher maximum compensation limit of the same value is likely to change the number or nature of complaints **nbn** receives or manages via the TIO.

However, we do have concerns over the proposal for the TIO to award compensation for *non-financial* loss. **nbn's** strong preference is for this additional power not to be included in the Terms of Reference. The nature of this type of loss is very difficult to quantify and, as a result, the circumstance by which financial compensation could be applied are very limited. The TIO's consideration of any compensation awarded must continue to be consistent "with the nature, extent and value of customer transactions in the relevant industry"² and not on the relatively subjective factor of non-financial loss.

A high bar should be set for any compensation that is awarded and should be focused on the value of the telecommunications contract the consumer has with their retail service provider, rather than any claims for remuneration for other non-financial circumstances. Should the TIO decide to keep this new provision in its Terms of Reference, **nbn** suggests clear guidance be provided to both consumers and providers on what hardship threshold would need to be reached for compensation to be considered for non-financial loss. For example, the Australian Financial Complaints Authority (**AFCA**) will only award compensation for non-financial loss where a consumer has felt "an unusual amount of physical inconvenience, time taken to resolve a situation, or interference with the complainant's expectation of enjoyment or peace of mind."³

nbn strongly recommends any financial limit be capped at a level that is designed to encourage resolution only for complaints where genuine and extensive hardship has been felt. Compensation for non-financial loss should not be an exercise in sourcing additional punitive damages from a consumer's provider or risk indirectly influencing a member's interpretation of reasonable industry practice.

AFCA has determined a maximum compensation limit of \$5,000 for complaints about financial services, noting these services are usually of far greater value than telecommunications services for consumers and small businesses. It would be appropriate to set a cap that is similarly proportionate to the value of the contract the consumer has with its provider.

Joining more than one member to a single complaint

nbn has established effective and robust processes and systems that support its obligations under the Complaint Handling Standard to provide 'reasonable assistance' to:

- the TIO where they request **nbn's** assistance to investigate a complaint; and

¹ Telecommunications industry Ombudsman, Draft Terms of Reference – July 2020. p3

² Key Practices for Industry-Based Customer Dispute Resolution, clause 6.2(b), p21

³ Australian Financial Complaints Authority, *The AFCA Approach to nonfinancial loss claims*, p2



- RSPs when they determine they need **nbn**'s assistance to manage and resolve a complaint about a service on the **nbn** network, regardless of whether the complaint has been referred from the TIO or not.

It is **nbn**'s strong preference that the existing assistance arrangements are retained, rather than any new process where a service provider is tied as a second member to a particular complaint. In the context of **nbn**'s role as a wholesale network provider, there are many instances where **nbn**'s actions have no bearing on the circumstances of a complaint even if the service is provided over the **nbn** network. In the circumstances where **nbn** activity has had a bearing on the circumstances of a consumer's complaint, the existing mechanisms are sufficient and working effectively to manage and resolve complaints in partnership with our access seeker customers. The new clause 2.20 of the draft Terms of Reference⁴ runs counter to this process if applied without careful clarification of the circumstances the TIO intends to use this power. We remain of the view that the current practice of assigning a case handling fee to the consumer's current provider is the most appropriate framework to use.

The TIO has referred to the statutory infrastructure provider (SIP) legislation as an example where this new ability may be useful. **nbn** does not consider that this legislation is likely to result in an increase in complaints involving more than one provider. The ACMA is in the process of mapping all the areas where carriers other than **nbn** will be the SIP. This process will result in clear information for end users and RSPs about where **nbn** is the SIP or where another carrier is the SIP for an end user's premises. As a result, we do not consider that there should be an increase in complaints (over and above those that exist today) where **nbn** and another member would need to be joined to the same complaint.

Complaints made by occupiers

We note the TIO has amended their Terms of Reference to clarify that an occupier of a premises may make any type of complaint to the TIO. In the context of complaints the TIO has referred directly to **nbn**, particularly those complaints in relation to connection or maintenance activity carried out within a public access area for a Multi-Dwelling Unit, care should be taken to clarify when a member may be able to handle a complaint from an occupier. There are many instances where a member cannot directly address a complaint brought to it by an occupier and in compliance with other regulation must liaise directly with the property owner, body corporate or strata management; for example, where a complaint involves common telecommunication infrastructure for multi-dwelling units such as a Main Distribution Frame located in common area requiring access or relocation.

Clarifying notes in current Terms of Reference

Finally, **nbn** suggests the TIO retain some of clarifying notes within its current Terms of Reference, including explicit exclusions where the TIO will not investigate a complaint. These have proven to be a useful guidance to **nbn** when considering whether there are differences of views on the TIO's jurisdiction. The draft Terms of Reference 2020 no longer includes these notes and some clarification would be beneficial to the TIO's members and consumers alike.

⁴ Telecommunications Industry Ombudsman, Draft Terms of Reference, July 2020. p5.



nbn would be pleased to discuss this response further with you. Please contact Xanthe Corbett-Jones on xanthe.corbett-jones@nbnco.com.au for more information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J. Crichton', is positioned below the 'Yours sincerely' text. The signature is fluid and cursive, with a long horizontal stroke at the end.

Jennifer Crichton
Executive General Manager, Head of Regulatory