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## **TELSTRA CORPORATION LIMITED**

### **Telecommunications Industry Ombudsman Terms of Reference modernisation**

**28 August 2020**



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## EXECUTIVE SUMMARY

We welcome the opportunity to comment on the Telecommunication Industry Ombudsman's (TIO) modernisation of its Terms of Reference (TOR). The TIO is an important part of the telecommunications industry and plays a valuable role as a first-point external dispute resolution service. We support the TIO's objectives in providing an effective mechanism for resolving consumer and land access issues. The TIO is generally working well and we continue to strive for customer service improvements so that our customers do not need to go to the TIO. We enjoy a collaborative relationship with the TIO and have collectively been able to deliver better outcomes for customers.

While it is important that the TIO reviews its TOR to remain effective and adapt to changing industry conditions and technology, the TIO proposes several significant changes to its TOR which cause us some concerns. The TIO also proposes some changes to its TOR which we support, bringing greater clarity to its land access role and some complaints handling jurisdiction and process issues. A summary of our positions and key points is below.

### **Any new small business definition should align with the TCP Code definition of 'Consumer'**

We do not support the TIO's proposal to align the definition of 'small business' with the definition that applies to the unfair contract terms in the Australian Consumer Law (ACL). If the TIO is to change its small business definition, it would be more appropriate for consistency and to avoid customer confusion to align it with the definition of 'consumer' (which specifically includes small business and non-profit organisations) in the Telecommunication Consumer Protection Code (TCP) Code which has an annual spend limit of \$40,000 and focusses on whether the customer has a genuine negotiating opportunity. These are the key protections consumers and small businesses need.

### **The current compensation limit of \$50,000 and scope (excluding non-financial compensation) are sufficient and appropriate and should remain unchanged**

We do not support the TIO's proposal to increase the compensation award limit from \$50,000 to \$100,000 (**proposed clause 2.8**). The current compensation cap of \$50,000 is sufficient, having regard to the nature of complaints received by the TIO. We have seen only three awards at or near the \$50,000 cap in the past 12 months and no recommendations above the \$50,000 cap. We also have concerns about the TIO's proposal to require a member to pay compensation for non-financial loss (**proposed clause 2.33(d)**) and what appears to be an expansion of the existing reasons for providing compensation. The proposed TOR does not define or specify any criteria or factors for consideration when calculating non-financial loss.

### **The TIO's jurisdiction to handle complaints relating to devices and equipment should not be expanded**

We do not support the TIO's proposal to extend its ability to handle complaints relating to devices and equipment (**proposed clause 2.2**) as it is unnecessary and inappropriate having regard to existing consumer statutory warranties, avenues for redress and the TIO's legislative remit.

### **The TIO should not expand its powers to join members to a single complaint**

We do not support the TIO's proposal to expand its powers to join members to a single complaint (**proposed clause 2.20**). However, we do support the TIO's proposal to retain its powers to require a member to assist in the resolution of complaints (**proposed clause 2.19**) to ensure the consumer is remediated in a timely and appropriate manner.



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## Clarifying complaint handling jurisdiction and processes

The TIO proposes several amendments to its TOR which seek to clarify its complaint handling jurisdiction and processes. Some of these proposals are helpful and we support them. These include giving members a reasonable opportunity to resolve a complaint and providing reasons to parties for decisions (we suggest these should be in writing).

There are some proposals which we do not support as they are either unclear or could have unintended consequences. These include: the TIO referring to codes or guidelines outside its remit; the TIO handling a complaint where another regulator has commenced court or tribunal proceedings; providing unclear timeframes; expanding temporary ruling provisions beyond existing credit management scope; removing helpful examples of when the TIO would stop handling a complaint; referring to complaints related to the broader 'telecommunications industry' rather than 'telecommunications services'; and holding members responsible for any delay, irrespective of cause or timing.

## Land access role should be clarified and separated into its own Part

We support the TIO's proposal to explain its statutory land access role in a new, separate part (**proposed Part 3**) and suggest amendments to clarify this role further regarding compensation, transparency and engagement with carriers. We suggest Proposed Part 3 (Land Access Role) should clarify that the TIO does not consider claims for compensation from a property owner or any property in which a person has an interest which are dealt with under clause 42, Schedule 3 of the Telecommunications Act (the Act). The TIO should also consider measures to provide wider visibility of its land access determinations to provide carriers and others with greater insight into the TIO's assessment of objection matters including determination outcomes. Further, we suggest the TIO consider yearly proactive engagement with carriers to identify and discuss trending land access issues. This could assist the TIO in identifying opportunities to update more regularly the TIO's published land access guidelines<sup>1</sup> to assist occupiers and carriers to resolve land access objections without the need for objection referral and TIO Determination. Finally, in light of recent TIO public submissions to the Department of Communications, we suggest that while it is desirable and appropriate for the TIO to provide to policy makers data, insight and expertise on matters within its remit, it is inappropriate for the TIO to be promoting particular policy outcomes in the development of telecommunications land access policy.

## Clarifying the TIO's industry improvement role

We appreciate the TIO's interest in, and the potential improvements to industry through, the TIO identifying and investigating systemic issues and contributing to policy by providing data, insight and expertise on matters within its remit which is helpful to policy makers. The TIO has clarified that industry improvement is a key part of its role and seeks to clarify and promote this role in its proposed Part 4. We suggest amendments to clarify this role further regarding the definition of 'systemic issue', consulting members before recommending actions, and clarifying that recommendations are not binding. We also suggest amendments to include privacy compliance commitments for information sharing, and to limit the naming of members to published decisions only.

## A Member's ability to take legal action should not be dependent on the TIO deciding whether its conduct is reasonable

Proposed clause 6.7(b) states that the member cannot take legal action about the complaint unless the TIO agrees that it did not deal with the complaint within a reasonable time. We do not agree that the TIO should decide whether its own conduct was reasonable and the wording in the current TOR should be retained.



## 01 Proposed changes to jurisdiction and process

### 1.1. New small business definition linked to the Australian Consumer Law

We do not support the TIO's proposal to align the definition of 'small business' with the definition that applies to the unfair contract terms in the Australian Consumer Law (ACL). This would remove the current \$3 million turnover limit and retain the upper limit of 20 employees and is at odds with the definition of 'consumer' (which includes a small business) in the Telecommunications Consumer Protection Code (TCP Code). If the TIO is to change its small business definition, it would be more appropriate to align it with the definition of 'consumer' in the TCP Code.

The TCP Code is recognised as the industry-specific code "*designed to ensure good service and fair outcomes for all Consumers of Telecommunications Products in Australia*"<sup>1</sup>. The TCP Code definition of 'consumer' includes:

*"A business or non-profit organisation which acquires or may acquire one or more Telecommunications Products which are not for resale and, at the time it enters into the Customer Contract, it:*

- (i) does not have a genuine and reasonable opportunity to negotiate the terms of the Customer Contract; and*
- (ii) has or will have an annual spend with the Supplier which is, or is estimated on reasonable grounds by the Supplier to be, no greater than \$40,000, or, in the 5 months following Code commencement, an annual spend of \$40,000."*

The TCP Code's definition of consumer is mirrored in the *Telecommunications (Consumer Complaints Handling) Industry Standard 2018* (Industry Standard) and it is the instrument used to interpret the types of small businesses that would be captured as a consumer under section 3 of the ACL (which covers its general consumer provisions, as distinct from provisions in relation to unfair contract terms). The definition of consumer under the TCP Code, the Industry Standard and section 3 of the ACL are all aligned to include spend limits as part of the defined criteria.

The TCP Code's definition of consumer also focusses on the customer's negotiating opportunity which we think, with the annual spend limit, are the key protections consumers and small businesses need. This means larger 'enterprise' customers that do not meet the definition of consumer under the TCP Code, are not able to access the TIO's complaint resolution service, which was set up to deal with small, less complex consumer complaints. All of Telstra's consumer and small business products are designed around and offered to ensure compliance with the requirements of the TCP Code and the ACL general consumer provisions.

### 1.2. Increase in compensation limit and scope

The current compensation limit of \$50,000 and scope (excluding non-financial compensation) are sufficient and appropriate and therefore should remain unchanged.

We do not support the TIO's proposal to increase the compensation award limit from \$50,000 to \$100,000 (**proposed clause 2.8**). We consider the existing limit of \$50,000 allows for sufficient compensation having regard to the simple, non-complex nature of consumer and small business complaints that the TIO manages. Increasing the compensation award limit to \$100,000 also does not align with the position stated in the Key Practices for Industry based Customer Dispute Resolution:

*"The scope of the office (including the decision-maker's powers) is sufficient to deal with...complaints involving monetary **amounts up to a specified maximum that is consistent***

<sup>1</sup> Telecommunications Consumer Protection Code C628:2019.




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***with the nature, extent and value of customer transactions in the relevant industry***  
(emphasis added).<sup>2</sup>

The proposed change effectively doubles the compensation cap without a demonstrated need for any increase. We have seen only three awards at or near the \$50,000 cap in the past 12 months and no recommendations above the \$50,000 cap.

We also have concerns about the TIO's proposal to require a member to pay compensation for non-financial loss (**proposed clause 2.33(d)**) and what appears to be an expansion of the existing reasons for providing compensation. The proposed TOR does not define or specify any criteria or factors for consideration when calculating non-financial loss. Given the highly discretionary and complex nature of calculating non-financial loss, we strongly suggest removing this proposal as it would create an unnecessary burden of proof which is challenging for all parties involved, and would require a significant enhancement in the TIO's capability and associated resourcing commensurate with a quasi-judicial body.

If the TIO were to implement the proposed changes to include non-financial loss as a separate category of compensation, which we do not support, we suggest placing a sub-cap on the award amount within, the total upper limit of all types of compensation. It would be crucial for these limits and definition of non-financial loss to be made abundantly clear to members, consumers and the TIO to avoid uncertainty and undue complexity in resolving the complaint.

### 1.3. Complaints relating to devices and equipment

We do not support the TIO's proposal to extend its ability to handle complaints relating to devices and equipment (**proposed clause 2.2**) as it is unnecessary and inappropriate having regard to existing consumer statutory warranties, avenues for redress and the TIO's legislative remit. The proposed TOR would allow complaints about goods that are unrelated to the telecommunications service provided by the member, which is inappropriate because the member has no control over these goods or responsibility for them (beyond the already sufficient consumer statutory warranties).

Firstly, the TIO is authorised under the *Telecommunications (Consumer Protection and Services Standards) Act 1999* 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.*<sup>3</sup> (emphasis added)

The proposed TOR seeks to expand the TIO's existing remit of carriage service delivery to include handling complaints about equipment and devices that are potentially unrelated to telecommunications services. Specifically:

- Proposed clause 2.1 would give the TIO jurisdiction to handle *any* complaint made about a member of the scheme. The object of the TIO is limited to accepting certain classes of complaint and it cannot accept any complaint outside of that remit.<sup>4</sup>
- Proposed clause 2.2(a) expands the jurisdiction of the TIO to cover problems with equipment or a device whether offered or supplied with a telecommunications service.
- Proposed clause 2.2(b) expands the remit of the TIO to cover disputes over services "separately from" a telecommunications service (which could include an Internet of Things (IoT) service from an IoT provider).

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<sup>2</sup> [https://treasury.gov.au/sites/default/files/2019-03/key\\_pract\\_ind\\_cust\\_dispute\\_resol.pdf](https://treasury.gov.au/sites/default/files/2019-03/key_pract_ind_cust_dispute_resol.pdf), page 21.

<sup>3</sup> Section 128(4), *Telecommunications (Consumer Protection and Services Standards) Act 1999*

<sup>4</sup> Constitution of the Telecommunications Industry Ombudsman, [https://www.tio.com.au/sites/default/files/2020-03/TIO-Constitution\\_as%20amended%2012%20November%202019.pdf](https://www.tio.com.au/sites/default/files/2020-03/TIO-Constitution_as%20amended%2012%20November%202019.pdf), section 3, page 3.



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- Proposed clause 2.2(c) expands the remit of the TIO to cover complaints about the repair, maintenance and technical support of any equipment which could include devices which we did not sell.

Secondly, the proposed TOR would duplicate existing resolution mechanisms to regulate IoT service providers. For example, the ACCC provides guidance on mobile device protections under the ACL.<sup>5</sup> If the TIO implements the proposed changes to the TOR and expands its remit, this would mean its members would be subject to both the TIO scheme in addition to the ACCC and state-based consumer bodies when they sell equipment or devices that are unrelated to telecommunications services. This seems to be double-handling and inappropriate given the TIO has not provided evidence to suggest complaints relating to devices and equipment are unable to be handled under the current regulatory framework. Further, this change would create an uneven playing field. Consumers purchasing equipment from third parties would not be able to go to the TIO, while customers purchasing equipment from members would be able to approach the TIO. This unnecessarily increases members' costs given that the ACL and various State based regimes already provide sufficient protection to consumers.

Thirdly, we acknowledge the current TOR covers "related goods" under clause 2.7(a) and various types of equipment under clause 2.7(b) as part of the TIO's current remit. However, the wording in the proposed TOR is wholly different to the current TOR. For instance, any goods supplied under the second dot point of clause 2.7(a) must be *related* to a telecommunications service for it to be covered by the TIO's current remit. Whereas under the proposed TOR (**proposed clause 2.2(b)**), the equipment or device is no longer required to be *related* to telecommunications service as it can be "separate from a telecommunications service".

In relation to the first dot point under clause 2.7(b) of the current TOR, we understand the TIO considers it has a remit to handle complaints about "handsets, modems, routers and other types of equipment that a consumer uses to *access a telecommunications service*." However such complaints are limited to a consumer accessing a telecommunications service and when read in conjunction with the second dot point "cabling up to the consumer's first telephone that is part of a TIO member's telecommunications network", we consider the TIO's remit is limited to complaints about equipment on the upstream side of the network boundary point.

The TIO has removed the second dot point of clause 2.7(b) regarding network boundary points from the proposed TOR which we strongly oppose and suggest this be reinstated in the proposed TOR. Clause 2.7(b) of the current TOR states that the TIO will handle complaints about "*cabling up to the consumer's first telephone that is part of a TIO member's telecommunications network*". Clause 2.10 (f) of the current TOR further reaffirms that the TIO does not handle complaints about "*cabling beyond the end of a telecommunications network*". The proposed TOR removes both references to the network boundary point in the scope of the complaints the TIO handles without explanation. It is operationally critical for us to have a physical network boundary as any issues outside of the boundary are not within our control.

Finally, if the TIO proceeds with the amendments to the TOR (which we do not support), we suggest:

- (a) **Proposed clause 2.2(a)** should be amended so that it excludes scenarios where we supply the telecommunications service to a third-party provider rather than to the consumer directly. There are examples where we supply a telecommunications service with a related equipment or device (such as SIMs and associated connectivity), but we do not sell the equipment or device itself (for example, SIM cards used in IoT devices). In these cases, we have no direct relationship with the consumer, nor are we responsible for the equipment or device.

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<sup>5</sup> [https://consumerlaw.gov.au/sites/consumer/files/inline-files/ACL-guidance-durability\\_0.pdf](https://consumerlaw.gov.au/sites/consumer/files/inline-files/ACL-guidance-durability_0.pdf)



For example, most cars sold will have a SIM card in them<sup>6</sup>, which is related to a telecommunications service. The telecommunications service (SIM card) is typically sold to an overseas Mobile Virtual Network Operator, who then sells the service to a vehicle manufacturer, who then sells a car (through a dealer) to a consumer. This scenario should be excluded from the TIO's remit under proposed clause 2.2(a) which requires the telecommunications service to be supplied to a *consumer*. In this case we have sold the telecommunications service to a third-party provider, and as such, we believe these use cases should not fall within the TIOs remit. We suggest proposed clause 2.2(a) to be amended as follows:

*"2.2(a) telecommunications services that a member offers or supplies directly to the consumer"*

- (b) **Proposed Clause 2.2(c)** should be amended for consistency with clause 2.2(a) and 2.2(b) so that it is limited to telecommunications services or equipment *sold* by a member.

There are many devices that we do not sell that ultimately connect to a telecommunications service. These include consumer devices such as fitness trackers, smart-TVs, laptops, and tablets which can connect over Wi-Fi or Bluetooth to a home broadband gateway or pair with a mobile phone to send or access data over the internet. There are also complex IoT solutions which may use a combination of Wi-Fi, Bluetooth, Satellite or SIMs or other technology to connect to a telecommunications service. These devices are predominantly sold to large enterprise customers, and to a smaller extent small business customers. Examples include smart metering, industrial and agricultural IoT solutions, tracking and monitoring devices and telematics.

We are concerned that we would have limited capability to assist a customer with configuring a smart TV<sup>7</sup>, fitness tracker, smart-speaker or other similar devices as we have not sold them the device (despite having sold them the telecommunications service) and therefore will not be able to assist with trouble-shooting connectivity problems. For the business IoT solutions listed above, we provide comprehensive guidelines<sup>8</sup> for manufacturers to comply with for optimum performance on our network, but we have no visibility as to how these myriad of devices work and would be unable to provide technical support for customers for these devices – rather the manufacturer of the device is the appropriate company to provide support.

While we expect most consumers to understand our limitations, a small minority may not, and may wish to escalate their dissatisfaction to the TIO. We cannot be familiar with every device capable of connecting to the internet (including those we did not sell) via one of our telecommunications services. We suggest proposed clause 2.2(c) to be amended as follows:

*"2.2(c) services related to telecommunications services or equipment sold by a member, such as repair, maintenance and technical support"*

We also strongly recommend a new clause is added after clause 2.5 to avoid an unintended expansion of the TIO's jurisdiction to devices not sold by a member that may connect to a telecommunications service:

- (c) **Proposed Clause 2.6** *"We will not handle a complaint related to equipment or a device not sold or supplied by a member."*

<sup>6</sup> It is projected that connected car shipments will exceed 76.3 million units globally by 2023. This figure compares to a little over 50 million units in 2019. Between 2018 and 2019, the connected car market grew by a staggering 45 percent. Source: <https://www.statista.com/statistics/743400/estimated-connected-car-shipments-globally/>

<sup>7</sup> Wikipedia cites at least twenty (20) smart-TV **platforms**. That's not manufacturers or models; that's just the number of platforms. [https://en.wikipedia.org/wiki/Smart\\_TV](https://en.wikipedia.org/wiki/Smart_TV)

<sup>8</sup> <https://www.telstra.com.au/content/dam/shared-component-assets/tecom/iot/capabilities/Telstra%20Wireless%20Application%20Development%20Guideline%20Sep%202019.pdf>





## 1.4. Joining more than one member to a single complaint

We do not support the TIO's proposal to expand its powers to join members to a single complaint. (**proposed clause 2.20**). However, we do support the TIO's proposal to retain its powers to require a member to assist in the resolution of complaints (**proposed clause 2.19**).

We are uncertain as to how the proposal to join members to a single complaint will operate and if doing so will be beneficial. We consider the TIO's current powers to require a member to assist in the resolution of complaints, where necessary, are on the whole working well to ensure cooperation and assistance to resolve multiple member complaints. It is unclear what additional benefits for consumers, members, or the TIO could flow from joining multiple members; especially where we are not the provider and have limited power to provide a full resolution. On the other hand, as a major provider, we would also expect to be joined to many more complaints, leading to an increase in administrative and potential cost burdens, including increased staff costs and potential fee costs.

The TIO's role is to mediate between the consumer and the member organisation, rather than mediate between two (or more) members. Our concern is that if the TIO was to join multiple parties to one complaint, it would be similar to asking the parties to mediate rather than the TIO taking an active investigation role to assist in the resolution of the complaint. Any changes to the current system would need further detailed consideration on the practical and cost implications of doing so, and above all, the articulation of a clear benefit.

## 02 Improved clarity

### 2.1. Clarifying complaint handling jurisdiction

The TIO proposes several amendments to its TOR, which seek to clarify its complaint handling jurisdiction. While some of these proposals are helpful and we support them, there are some proposals which we do not support, as they are either unclear or could have unintended consequences. We have suggested proposed amendments, where possible, to assist the TIO below or in the relevant text above.

We have already noted our suggested amendments for consistency and to avoid an unintended expansion of the TIO's jurisdiction relating to equipment and devices in section 1.4 above.

The expansion to telecommunications 'industry' is inappropriate in proposed clause 1.1 and should be limited to telecommunications services as defined within the proposed TOR. We suggest:

- (a) **Proposed clause 1.1:** "*We provide an independent external dispute resolution service for complaints relating to telecommunications industry services as set out in Part 2 of these Terms of Reference.*"

It is not appropriate for any delay, irrespective of cause or timing, to be the subject of a complaint. We suggest:

- (b) **Proposed clause 2.2(e):** "*fault, failure or unreasonable delay in the supply of telecommunications services*".

### 2.2. Clarifying complaint handling process

The TIO proposes several amendments to its TOR which seek to clarify its complaint handling process. While some of these proposals are helpful and we support them, there are some proposals which we do not support as they are either unclear or could have unintended consequences. Where possible, we have suggested proposed amendments to assist the TIO below.



It is not appropriate for the TIO to refer to codes or guidelines outside its remit or handle a complaint where another regulator has commenced court or tribunal proceedings. We suggest:

- (a) **Proposed clause 2.2(j):** *“failure to comply with a relevant code or guideline that the TIO is authorised to handle”.*
- (b) **Proposed clause 2.6:** *“We will not handle a complaint where either party has commenced proceedings in a court or tribunal; or the complaint is being dealt with by another regulator.”*

Members should be provided with an opportunity to resolve the customer complaints in the first instance, prior to engaging the TIO to resolve the complaint (**proposed clause 2.17**). As outlined in the Complaint Handling Standards, there are many channels through which a customer can complain and in each, a Reference Number should be provided to the customer to allow for proper investigation of the matter and appropriate record keeping. In our recent experience, some customers have not previously sought to resolve the complaint by engaging with us first and the TIO has taken the customer at face value when asked if we had been contacted in the first instance without seeking simple supporting confirmation from the customer.

To ensure we are provided a reasonable opportunity to resolve the customer’s issue in the first instance, we suggest:

- The customer should provide the complaint Reference Number to the TIO prior to the TIO accepting and processing the complaint;
- The TIO should allow a reasonable time (for example, the commitment to the customer recorded in our customer handling system) for resolution of the complaint, prior to it accepting and processing the complaint; and
- The customer can engage the TIO prior to the above timeframe if a resolution has been proposed and the customer remains dissatisfied.

To emphasise the need to provide members with a reasonable opportunity to resolve complaints, we suggest:

- (c) **Proposed clause 2.17:** *“We will only consider a complaint after the member has had a reasonable opportunity to consider the issues. If we receive a complaint before the matter has been raised with the member, we may assist the consumer or occupier to raise the complaint with the member but we will not consider the complaint until the member has had a reasonable opportunity to consider the issues.”*

For clarity and to facilitate compliance, it would be helpful if the TIO provides its recommendations, temporary rulings or decisions in writing. We suggest:

- (d) **Proposed clause 2.25:** *“Where we make a recommendation, temporary ruling or decision, we will provide the parties to the complaint with our reasons in writing.”*

While proposed clause 2.29 specifies a non-exhaustive list of actions which are mostly associated with credit management, proposed clause 2.28 removes this wording and should be reinstated for clarity. We suggest:

- (e) **Proposed clause 2.28:** *“We may issue a temporary ruling about a member’s credit management actions while we are handling a complaint.”*

It would be helpful if timeframes are clear and specific in proposed clause 2.35, rather than the proposed change from 21 days in the current TOR to *“within the timeframe we specify”*. We suggest:



(f) **Proposed clause 2.35** “...no later than 21 days or earlier timeframe we specify”.

It would be helpful and provide clarity if the TIO reinstated in proposed clause 2.39 the two examples in clause 3.20 of the current TOR of when it will stop handling a complaint. These two examples are important as those scenarios are common, and we agree it would be appropriate for the TIO to stop handling the complaint.

(g) **Proposed clause 2.39**

“.....

- We think it is reasonable for the consumer to pay some or all of the provider’s charges and the consumer refuses to pay this amount;
- We think the provider has made a fair offer to resolve the complaint and the consumer has not accepted the offer.”

### 2.3. Simplifying land access jurisdiction

We support the TIO’s proposal to explain its statutory land access role in a new, separate part (**proposed Part 3**) and suggest amendments to clarify this role further regarding compensation, transparency and engagement with carriers.

Separating the TIO’s legislative role overseeing land access determinations (a statutory process with occupiers) from the TIO’s consumer complaints handling role provides a clear and helpful differentiation between the TIO’s two roles.

We suggest proposed Part 3 (Land Access Role) should clarify that the TIO does not consider claims for compensation from a property owner or any property in which a person has an interest which are dealt with under clause 42, Schedule 3 of the Telecommunications Act. (the Act) The statutory process to resolve this type of compensation claim under the Act specifies it should be resolved by agreement between the carrier and the compensation claimant, or failing agreement as is determined by a court of competent jurisdiction.

The TIO should also consider measures to provide wider visibility of its land access determinations to provide carriers and others with greater insight into the TIO’s assessment of objection matters including determination outcomes. Such transparency would provide the basis for a wider understanding of determined land access matters for all parties hence providing the opportunity to reduce objection referrals to the TIO to determine and creating timing and costs efficiencies for carriers and non-carriers. Measures could include making available on request, or publishing, an anonymised determination.

We also suggest the TIO consider yearly proactive engagement with carriers to identify and discuss trending land access issues to assist the TIO in identifying opportunities to more regularly update the TIO’s published land access guidelines<sup>9</sup> in order to assist occupiers and carriers to resolve land access objections without the need for objection referral and TIO Determination.

The TIO has recently made public submissions to consultations from the Department of Communications regarding Commonwealth statutory carrier powers and immunities reform. In the TIO’s submissions, it appears to be promoting particular policy outcomes. While it is desirable and appropriate for the TIO to provide to policy makers data, insight and expertise on matters within its remit, it is inappropriate for the TIO to be promoting particular policy outcomes in the development of telecommunications land access policy. The TIO has a prescribed statutory function as an impartial body making land access determinations within the parameters of the Act and subordinate instruments/codes. We note there is currently no remit for the TIO to be contributing to public land access policy in this broader sense of

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<sup>9</sup> INDUSTRY OMBUDSMAN Guidelines on the Installation and Maintenance of Low-Impact Facilities  
<https://www.tio.com.au/sites/default/files/2019-05/Land-Access-Guidelines-2018-Revision.pdf>



promoting or supporting particular policy outcomes and we do not support including proposed clauses 4.11(a) and (b) in the proposed TOR.

## 2.4. Giving prominence to the TIO's industry improvement and information sharing roles

We appreciate the TIO's interest in and the potential improvements to industry through the TIO identifying and investigating systemic issues and contributing to policy by providing data, insight and expertise on matters within its remit which is helpful to policy makers. The TIO has clarified that industry improvement is a key part of its role and seeks to clarify and promote this role in its proposed Part 4. We suggest amendments to clarify this role further regarding the definition of 'systemic issue', consulting members before recommending actions, and clarifying that recommendations are not binding. We also suggest amendments to include privacy compliance commitments for information sharing, and to limit the naming of members to published decisions only.

'Significant' should be included when defining a systemic issue in proposed clause 4.2 as it is important to reflect the TIO's intention of investigating systemic issues which affect many consumers. This wording is also included in clause 5.1 of the current TOR. We suggest:

- (a) **Proposed clause 4.2:** *"A systemic issue is one that has or is likely to have a negative effect on a significant number of consumers..."*

The additional requirements listed in proposed 4.6 are prescriptive and unnecessary. They may also hamper appropriate consideration of TIO recommendations within the member's own resolution framework. We suggest that the member be consulted before requesting the member to undertake any actions under proposed clause 4.6. We suggest:

- (b) **Proposed clause 4.6:** *"As part of handling and investigating a systemic issue, we may, in consultation with the member..."*

Proposed clause 4.9(a) allows the TIO to recommend that a member *"do or refrain from doing anything necessary to address a systemic issue"*. This is extremely broad and appears to be an overreach of its obligations. We suggest:

- (c) **Proposed clause 4.9 (a)** *"...a member do or refrain from doing anything necessary to address a systemic issue (but any recommendation made by us is not binding on a member and the member is not required to comply with the recommendation)..."*

Proposed Part 5 (Our reporting and information sharing roles), does not refer to the TIO's compliance with privacy legislation and policies for information it collects which is contained in clause 4.9 of the current TOR. We suggest this clause is reinstated in proposed Part 5.

Proposed clause 5.2 allows the TIO to publish names of members in reports which include a decision, temporary ruling, recommendation or a systemic issue. This is an expansion from the current TOR which allows names to be published in decisions only. It is inappropriate for the TIO to extend this ability more generally where it has not fully investigated and determined an issue as it could have significant impacts on the member's reputation and there is no established need for the change. We request proposed clause 5.2 be amended so that the names of members are published in decisions made by the TIO only once the TIO has fully investigated and determined an issue.

## 2.5. Setting out member obligations

Proposed clause 6.7(b) states that the member cannot take legal action about the complaint unless the TIO agrees that it did not deal with the complaint within a reasonable time. We do not agree that the TIO should decide whether its own conduct was reasonable and the wording in clause 4.6(b) of the current TOR should be retained. We suggest: **Proposed clause 6.7(b)** *"...~~we agree that~~ we did not deal with the complaint within a reasonable time"*.