

28 August 2020

Telecommunications Industry Ombudsman
PublicConsultation@tio.com.au

Modernising the Telecommunications Industry Ombudsman Terms of Reference

TPG Telecom Limited (TPG) welcomes the opportunity to respond to the discussion paper: *Telecommunications Industry Ombudsman (TIO) Terms of Reference July 2020* (the Guidance).

TPG agrees with the TIO that it is important to keep pace with the rapidly changing landscape and evolving technologies.

The proposed terms of reference include a number of changes supported by TPG and some changes that we do not.

While it is important to review and ensure that the Terms of Reference are fit for purpose there needs to be consideration of the effect of any planned change and whether such change is warranted.

While we are in the early stages of merging the former Vodafone Hutchison Australia and TPG Group brands, we have a great deal of experience in understanding how to provide excellent customer care and to how to minimise the number of complaints requiring dispute resolution, with the Vodafone brand leading the major suppliers with the lowest complaints in context score. We will continue to ensure that we deal with complaints promptly, including those that require dispute resolution. The TIO can assist with greater transparency in the TIO's complaint handling processes and an escalation structure for cases where the TIO is delaying the complaint resolution.

Informed by our experiences in managing customer complaints in a way that minimises those needing a dispute resolution process, we provide our comments against the proposed changes to the Terms of Reference for the TIO's consideration in Annexure A.

Please direct any questions regarding this submission to Alexander R. Osborne, Head of Regulatory.
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Annexure A

TIO questions /TPG response

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?

- TPG's view is that linking to the ACL is appropriate, however it must be linked to the correct aspect of the ACL.
- The ACL definition of consumer - also used in the TCP Code and the ACMA's consumer experience instruments, including the Complaints Handling Standard – explains which 'small businesses' would be captured (Section 3 of the ACL). It is based on spend limits.
- The section of the ACL on Unfair Contract Terms is legal – 'only a court or tribunal can determine whether a term is unfair' (<https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms/determining-whether-a-contract-term-is-unfair>) and thus less/not relevant here.
- The TCP Code, Complaints Handling Standard and other instruments have all been drafted to align with the ACL's definition based on spend limit. We recommend the TIO do the same as it is critical to maintain consistency.
- The TIO should also take into account whether a business has in fact advised their service provider that they are a business when considering compensation for business loss. There should be a component that acknowledges the business customer's due diligence to disclose the use of their service to the service provider.

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Questions for consultation:

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

Financial Limit:

- TPG believes the limit should remain at \$50,000.
- There needs to be greater reason than 'for simplicity' for a higher limit to be the standard.
- This does not align with the Government Benchmarks/Key Practices for Dispute Resolution. Key practice 6.2 b) states that "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 with the nature, extent and value of customer transactions in the relevant industry."¹
- Considering that the small business limit is up to \$40,000 annual spend, and individual customers spend significantly less, the \$50,000 limit is already higher than the benchmarks would recommend.

Non-financial loss:

- TPG does not agree that there should be non-financial loss compensation, widely interpreted as compensation for pain, suffering, inconvenience, etc. included in a TIO dispute resolution.
- While members may offer a goodwill payment, this should be left to the discretion of the member.
- Before consideration of applying any non-financial loss compensation approach the TIO should develop much more specific information around the circumstances in which it could be appropriate and the manner in which it would be calculated and provide further opportunity for members to discuss the model and provide feedback. For example, AFCA's Rules provide details about when they consider non-financial loss to be appropriate.²
- Any claim for non-financial loss compensation must clarify this is not for punitive damages per Benchmarks (6.3)³

¹ https://treasury.gov.au/sites/default/files/2019-03/key_pract_ind_cust_dispute_resol.pdf, p 21

² <https://www.afca.org.au/media/907/download>, p 39

³ https://treasury.gov.au/sites/default/files/2019-03/key_pract_ind_cust_dispute_resol.pdf, p21

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Questions for consultation:

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

TPG does not agree to expanding the scope of complaints outside of the supply of telecommunications services and devices supplied by the service provider.

- The TIO authorising legislation clearly states “complaints about carriage services by end-users of those services”
- The Benchmarks and Key Practices specifically reference ‘the relevant industry or service area’ – despite being named the Telecommunications Industry Ombudsman, the ‘service area’ in the TIO’s remit is carriage services.
- The ACCC already provides guidance on mobile device protections under the ACL, clearly establishing that this falls within their jurisdiction – see pages 3 and 11: https://consumerlaw.gov.au/sites/consumer/files/inline-files/ACL-guidance-durability_0.pdf
- It is not appropriate for consumers to have different forums for the same product – if one consumer purchases a phone at JB Hi-fi and other purchases it from a CSP, they should both have the same rights, via their state consumer protection agency.

There is already a trend for the TIO to accept billing complaints for non-carriage services on a carriage service bill. However, as service providers expand capability to provide other services, the fact that a charge appears on a bill that contains both telecommunications and other products does not mean that the TIO should provide a complaint resolution service, nor indeed will the TIO have the necessary expertise to deal with that complaint, particularly where there is another more appropriate ombudsman. For example:

- Insurance – AFCA
- Electricity – state ombudsmen.

Will the TIO defer to another ombudsman for a telecommunications service billed on an energy supply company bill?

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Questions for consultation:

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

TPG agree to the principle of joining other members to a complaint as this may assist with faster dispute resolution, where another member has been an integral part of the event that caused the complaint. The key challenge will be determining whether another member had any control in the circumstances, maintaining transparency of the involved parties and an appropriate fee structures and data attribution – including determining who is at fault for the complaint.

Of concern is that the TIO:

- has a history of mis-attributing inappropriate churn complaints to the losing provider;
- approach to let a consumer raise a complaint against whomever they choose, at times outside of the TIO's charter;
- accepting complaints from non-customers (for example, a complaint about construction in someone's street) – at times outside of the TIO's charter.

Issues:

- Fee structure – In the event of joining other members to a complaint the TIO should review who is at fault and any proportionality, not simply ascribe fee's, or share fault across members. If more than one party is at fault, the degree of fault must be considered and the cost should be shared accordingly, the joining of members to a complaint should not be used as a revenue raising stream through multiplying the fees across members. For example; where a member contributed to 20% of the reason for complaint, they should be responsible for 20% of the cost, rather than attributing 100% of cost to two members.
- TPG would like to understand how the TIO would attribute complaints in their data?
- How will this be done while also retaining continuity of complaints data over the years?
- TPG question the measure of one complaint number for both providers given the suggested charging.
- Of concern to TPG is that one member may not have the power to change the outcome and yet be charged for a dispute caused by another party.

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- TPG suggest that members, or member and another party complaints are raised under separate dispute numbers and that these are linked and addressed by one DRO and charging occurs individually based on the outcome, as suggested above.
- TPG also suggest pausing a complaint at its current level should no further information be required. This process will also require a higher degree of transparency.
- The TIO will need to ensure that in capturing complaints data, the joining of parties to a dispute does not result in what looks like an increase in the total number of complaints across the sector, for example one complaint marked against three members could look like a significant increase in complaints across the sector. Which could lead to further punitive regulation.

Questions for consultation:

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?

In general, TPG have a concern about transparency of the TIO's decisions and the timeframes to adjudicate on a dispute and provide a response to a member.

In the Board management section (7.3), TPG is concerned that there is insufficient clarity in how the Board operates in relation to the Terms of Reference to ensure transparency in the operation of the office of the Ombudsman.

The approach of giving 'Independence of the Ombudsman' must not be used to remove the accountability of the Ombudsman to the Board with respect to the running of the company in a way that is consistent with Board approved strategies.

The office has a number of different roles, including the Ombudsman of the Scheme and the CEO of the company. These are currently performed by the one person. This is not an appropriate way to ensure the office is run as effectively and as transparently as possible.

The independence of the Ombudsman should be focussed on the ability to make decisions in relation to complaints. There should be a separate requirement that the Board ensure that adequate funds are available to enable the Ombudsman to discharge the role of a dispute resolution body in the most effective, efficient and transparent way possible.

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Although, as the CEO of TIO Ltd, the Ombudsman is accountable to the Board consistent with normal Corp Law requirements, the Board role should not be reduced to a passive monitoring role.

Complaints about the office

Benchmarks should be included in the Terms of Reference for procedures in place for receiving complaints about the office (6.7, 6.8) and the Board should include a function to receive complaints about the operations of the office (2.9c). This is not presently included in the Terms of Reference, or anywhere else in operations.⁴

Greater transparency in decision making

TPG would like to see a greater effort in substantiating a complainant's claim prior to making a decision, with member access to information and interactions between the Dispute Resolution Officer and the complainant.
TPG would also like to see greater transparency in the TIO hierarchy, the path of each complaint and the staff involved.

⁴ https://treasury.gov.au/sites/default/files/2019-03/key_pract_ind_cust_dispute_resol.pdf

TPG has the following additional comments on other changes made to the Terms of Reference that were not called out in the TIO's Discussion Paper, but which TPG considers having a significant impact on the operations of the TIO.

Other comments
<p>Part 1 Introduction</p> <p>1.1(1.2): Changes “service” to “industry” This is a major change in remit that takes the TIO beyond its area of expertise in dealing with telecommunications services and the change is inappropriate. As the telecommunications industry provides a greater range on non-telecommunications services and products the dispute resolution service may be better dealt with by another dispute resolution body. Refer response to Q.6 above and Part 2 below.</p>
<p>Part 2 Complaint Handling Role</p> <p>In general, TPG has concerns about the broadening of complaints that the TIO might deal with and the removal of exclusions.</p> <p>As members may offer a range of different types of services, where telecommunications services may be only one type of service being offered, the jurisdiction of the TIO should be limited to complaints relating to the supply of a telecommunications service and not any other services that the member may offer.</p> <p>2.1(2.7a): We can handle complaints made by consumers about members of our scheme. This should clarify that the TIO “can handle complaints....about telecommunications services provided by members of our scheme.”</p> <p>2.2f(2.7): The loss of an email is a new addition to the Terms of Reference. It's unclear what this means. Loss of an email address? Loss of an email capability? Loss of an individual email? Emails are an over the top service, not a carriage service, email addresses are not issued to a customer and there is no rights of use associated with an email address in the same manner as rules that apply to public numbers. The supply of an email service is at the discretion of the supplier and subject to commercial terms and conditions which may vary at any time. It is inappropriate to consider emails as subject to any conditions that the TIO might seek to impose as part of a complaint resolution and is not appropriate for this inclusion in the Terms of Reference.</p> <p>Complaints we do not handle: TPG is concerned that this section has been significantly shortened by removing a number of clarifications in current 2.10. TPG would like to see these clarifications re-instated.</p>

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2.7(2.11): TPG is concerned about the change of language, from; “where the specific issues...have been dealt with or are likely to be dealt with...[other body]” to “if we decide it is more appropriately dealt with...” this provides more opportunity for scope creep and is not appropriate.

2.9 in the current Terms of Reference establishes that the TIO can also handle complaints about agents, dealers, contractors, etc, and goes into detail on why and if they will hold the member responsible. TPG is concerned that the detail of why and if a member will be held responsible seems to have been removed from the draft Terms of Reference, together with other changes in the Terms of Reference seems to expand the remit of the TIO into area’s in which it may not have expertise and where there may be more appropriate dispute resolution services.

How we handle complaints

TPG notes the changed structure appears to skip the stages of working to resolve a complaint prior to investigation (3.5 in current Term of Reference) and jump towards investigation, rulings, and recommendations.

2.17(2.5): Has had a significant change by use of ‘reasonable opportunity to consider the issues’, whereas the current approach is ‘after the complaint has been made to the provider.’ TPG s of the view that a Complaint must have been made (or reasonably attempted to have been made). Benchmarks also directly state that organisation has to have had the opportunity to deal with the complaint through their internal dispute resolution mechanism.⁵ TPG would like to see the text ‘*If we receive a complaint before the matter has been raised with a member, we may assist the consumer or occupier to raise the complaint with the member*’ changed to: If we receive a complaint before the matter has been raised with a member, we **will** assist the consumer or occupier to raise the complaint with the member **before undertaking dispute resolution, except where there is reasonable evidence that a member has failed to acknowledge a complaint**’

Temporary Ruling

2.28(4.1): Temporary Rulings in current Terms of Reference are limited to credit management actions. The Draft Terms of Reference removes this specificity and makes Temporary Rulings an option for all complaints. TPG consider this a major change that is not appropriate, as we require a written confirmation of any ruling.

(4.3): The Draft Terms of Reference removes the statement that the TIO will provide written reasons for the temporary ruling. TPG does not agree with this position as we expect to have a written confirmation of any ruling in line with the Benchmarks.⁶

5.2(4.4): The Draft Terms of Reference removes the statement that the TIO will not publish the name of the member, and the new section in 5.2 states that the TIO can publish reports on topics including temporary rulings that may include names of members. TPG considers this change to

⁵ https://treasury.gov.au/sites/default/files/2019-03/key_pract_ind_cust_dispute_resol.pdf, p 19

⁶ *ibid* p 15.

name members publicly as inappropriate, as there is no recourse available to members from such publication, other than a member or a number of members offering an alternative public view. Having public discourse about a matter serves neither consumers, TIO members, or the TIO interests.

Decisions

2.32(3.9): See our previous comments re Temporary Ruling. The draft Terms of Reference omit the statement that the TIO will provide written reasons for decision, which is inconsistent with Benchmarks.⁶

2.33d(3.11): The addition of non-financial loss is addressed in the section on Questions for Consultation.

2.35(3.12): Current Terms of Reference state a consumer must respond within 21 days, the Draft Terms of Reference says “within the timeframe we specify” TPG would like to understand the reason for this change and in particular how the TIO considers what impact this might have on the members management of complaints and its processes, such as holding back credit management activity. Also, there is no SLA for the TIO to make a decision. We have many cases where a long delay by the TIO has had further implications for members. Impacts include increased staff to manage cases pending decision, loss of revenue, loss of customers due to customers blaming the member for the delay, etc.

Part 4: Our Industry Improvement Role

TPG notes there has been a significant shift in the jurisdiction of the TIO. The primary role of the TIO is dispute resolution, while the TIO may assist in identifying opportunities for improvement, it is not the role of the TIO to determine its own view of regulation via its idea of ‘good industry practice’. Much time is spent in the review and finesses of regulation and members have a role in development of ‘good industry practice’ through guidelines and industry guidance notes that the TIO could assist in developing, rather than creating its own that often go above the obligations in industry codes and ACMA standards. TPG would welcome the TIO involvement in developing ‘good industry practice’ guidelines with Communications Alliance together with members, as often occurred in the past, to ensure that the resultant ‘good industry practice’ was produced by Communications Alliance and was not inconsistent with regulation, nor imposed a greater burden than intended in the regulation.

How we handle systemic issues

4.2c: TPG considers the approach of considering non-compliance to ‘good industry practice’ to be problematic. See previous comments re ‘good industry practice’.

4.3(5.1): *We can identify and investigate a systemic issue with or without a complaint*

The Draft Terms of Reference change to investigating systemic complaints where there is no complaint indicates that the TIO is looking to take on a policy role in determining industry practice, currently in the purview of the Department of Infrastructure, Transport, Regional Development and Communications and the Australian Communications and Media Authority, TPG considers this inappropriate. The current Terms of Reference say

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the TIO will 'work with the relevant TIO member' on a systemic issue. The TIO performs a valuable role in identifying and assessing issues that drive complaints, but it is inappropriate for the TIO to take on a role of assessing industry performance where there are no complaints.

4.6(5.1, 5.2): TPG considers some of the level of detail inappropriate for inclusion in the Terms of Reference. For example; there is an assumption that there will be an ability to escalate internally. While this may be true for members with a large customer base, it may not be true for members with few customers. The level of detail included in the Draft Terms of Reference (timeframes, internal escalation) is significantly more detailed than the current Terms of Reference, which says member 'must consider recommendations'. TPG suggests the following changes:

- 4.6 (b) change 'should' to 'may';
- 4.6 (c) change to: discuss and agree with the member suitable timeframes for any agreed action;
- 4.6 (d) delete

4.7 Please see previous comment re naming members.

4.7 – 4.10(6.6): The new focus on publishing the systemics does not align with the Benchmarks (6.4, 5.5) which state that the Ombudsman is to raise concerns with the regulator, department, etc.

Therefore, where a member has shown systemic disregard for a regulated obligation, they should be referred to the ACMA, not publicly named by the TIO, particularly if the member has only been inconsistent with the TIO's 'good industry practice'.

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Part 5: Public Reporting and Information Sharing

5.2(3.18, 4.4, 6.6): TPG note that this clause has added a more general ability to publish the names of members. While this was previously allowed for Decisions (4.18), it was not allowed for other publications. The existing ability to publish the identity of a member in publishing a decision does not align with Benchmark 4.3 the expansion in the Draft Terms of Reference are further away from the Benchmark. TPG see no justifiable reason for the TIO to make this change, that is inconsistent with the Benchmark.

Part 6: Member obligations

6.3(3.6): TPG notes the change of timeframe from “we will be reasonable...but not more than 28 days” to “the timeframe we specify”
The timeframe must consider a range of environmental factors relating to, not just the particular matter under review, but the broader environment. For example; in the current COVID environment there are a range of factors that affect the ability of members to carry out their business and respond to requests from customers, the TIO, regulators, etc. This clause should change to ‘the timeframe we discuss and agree with the member’.
It should be noted that there should also be SLA’s on the TIO to carry its functions within agreed timeframes. TPG have in the past raised concern about the timeframe for the TIO to undertake its activity impacting on our ability to resolve a complaint and the reporting of TIO complaints we have on hand at any one time. The lack of TIO SLA’s and its slow response results in a poor consumer experience and can make matters worse for the consumer if the complaint is not upheld and where we are holding off collection activity for a lengthy period of time, putting the consumer at risk.

Legal Action

6.7b(4.6b): TPG notes that the current Terms of Reference say a provider can take legal action if the TIO did not deal with the complaint within a reasonable time, while the Draft says ‘**we agree** that we did not deal with...in a reasonable time’ TPG does not agree with this change as there may be evidence that the TIO did not deal with the complaint in a reasonable time, but disagree with this. TPG does not agree to this change and the current approach should remain.

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