

ACMA submission to the discussion paper, *Modernising the Telecommunications Industry Ombudsman Terms of Reference*

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Executive summary

The Australian Communications and Media Authority (ACMA) welcomes the opportunity to make a submission to the Telecommunication Industry Ombudsman's (TIO) discussion paper, *Modernising the Telecommunication Industry Ombudsman Terms of Reference*.

The ACMA is the primary regulator for communications in Australia, with responsibility for telecommunication industry codes and standards, and oversight of important consumer safeguards under the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

The ACMA enforces carrier and carriage service provider (CSP) compliance with the obligation to be a member of the TIO scheme and with determinations issued by the TIO. The ACMA also administers applications by carriers and CSPs for an exemption from membership of the scheme.

To provide for effective consumer redress and complaints handling safeguards, we consider that the purpose and scope of the TIO scheme needs to be clear in relation to:

- > the nature of the complaints it handles
- > the providers that are covered by the scheme (criteria and requirements).

It is these lenses through which we considered the changes proposed to the TIO's Terms of Reference and our responses to the discussion paper's questions.

In summary, our submission:

- > supports the TIO's proposal to link the definition of 'small business' in its Terms of Reference to the definition in the Australian Consumer Law
- > notes the choice to increase the financial limit of compensation decisions rests with the TIO
- > supports the TIO's proposal to be able to award compensation for non-financial loss while noting that details of the potential exercise of this capability warrant careful consideration
- > notes if the TIO were to expand its remit to include complaints about devices and equipment not relevant to accessing a telecommunications service, consideration will need to be given to the regulatory framework under which complaints would be accepted and actioned
- > supports the TIO's proposal to be able to join more than one of its members to a single complaint.

Definition of small business linked to the Australian Consumer Law

The TIO asks:

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?

The current definition of a small business under the TIO's Terms of Reference does not align with corresponding definitions either in whole-of-economy consumer law, regulation or found in instruments that provide safeguards to telecommunication consumers.

Table 1: Definitions of small business

<p>Telecommunications Industry Ombudsman¹ currently defines a 'small business' as:</p> <ul style="list-style-type: none">> 20 or less full time employees;> up to \$3 million annual turnover; and> if the 'small business' is an Australian office of a large multinational company.
<p>Australian Consumer Law² defines a 'small business contract' as one where at least one party to the contract is a business that employs fewer than 20 full-time employees.</p>
<p>Telecommunications Consumer Protection Code³ does not specifically set out a definition of 'small business' but defines a consumer to include 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 Consumer Contract, and:</p> <ul style="list-style-type: none">> does not have a genuine and reasonable opportunity to negotiate the terms of the Consumer Contract; and> 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 \$20,000.

¹ Telecommunication Industry Ombudsman, *Addressing the Causes of Small Business Complaints Systemic Investigation Report, June 2020*, accessed on 11 August 2020 <<https://www.tio.com.au/addressing-the-causes-of-small-business-complaints-Systemic-Investigation-Report-June-2020>>.

² Section 23, Schedule 2 of the *Competition and Consumer Act 2010*.

³ Communications Alliance, *Industry Code C628:2019 Telecommunications Consumer Protections Code*, accessed 11 August 2020 <https://www.commsalliance.com.au/__data/assets/pdf_file/0011/64784/TCP-C628_2019.pdf>.

Telecommunications (Consumer Complaints Handling) Industry Standard⁴, Telecommunications (NBN Consumer Information) Industry Standard⁵, Telecommunications (NBN Continuity of Service) Industry Standard⁶ and Telecommunications Service Provider (NBN Service Migration)

Determination⁷ also do not define a 'small business'.⁸ However, the definition for consumers includes under these instruments includes:

a business or non-profit organisation which acquires or may acquire one or more telecommunications products which are not for resale and which, at the time it enters into the consumer contract:

- > does not have a genuine and reasonable opportunity to negotiate the terms of the consumer contract; and
- > has or will have an annual spend with the carriage service provider which is, or is estimated on reasonable grounds by the carriage service provider to be, no greater than \$20,000.

We recognise that, in its handling of consumer complaints, the TIO regularly has reference to both telecommunication sector-specific codes and regulatory instruments, and to the Australian Consumer Law (ACL) as the principal consumer protection law in Australia”..

We consider the better point of alignment is with the ACL, to avoid the TIO's remit in respect of small businesses being at odds with approaches taken across the whole economy. Consequently, we support the TIO's proposal to link the definition of small business in its Terms of Reference to the definition in the ACL.

Where appropriate, we invite the TIO to take account of definitions of small business in other regulatory requirements that are relevant to its handling of specific complaints, where these vary from the ACL definition.

⁴ Section 5, *Telecommunications (Consumer Complaints Handling) Industry Standard 2018*.

⁵ Section 5, *Telecommunications (NBN Consumer Information) Industry Standard 2018*.

⁶ Section 5, *Telecommunications (NBN Continuity of Service) Industry Standard) 2018*.

⁷ Section 5, *Telecommunications Service Provider (NBN Service Migration) Determination 2018*.

⁸ Note: The definitions of consumer in these instruments is currently under review, and it has been proposed that they are aligned with that in the Telecommunications Consumer Protection Code.

Increase in compensation limit

The TIO asks:

Is \$100,000 an appropriate financial limit for TIO decisions? If not, what would be the more appropriate financial limit for TIO decisions and why?

Currently, clause 3.11 of the TIO's Terms of Reference allows the TIO to decide the resolution of a complaint by making a decision of up to \$50,000. The TIO can also recommend the resolution of a complaint by recommending compensation of up to \$100,000 under clause 3.16.

We understand that the TIO is seeking to align the financial limits of the power to make a decision with the power to make a recommendation. The TIO's proposal is intended to ensure it has sufficient power to make monetary awards consistent with the nature, extent and value of customer transaction. We consider the decision to increase monetary limits is a matter for the TIO as the provider of an independent external dispute resolution service.

We do note that, if there were a significant numbers of determinations being made for amounts close to \$50,000, or an increasing number of recommendations were being made for amounts between \$50,000 and \$100,000, these would be examples of indicators in favour of an increase to the financial limit.

Awarding compensation for non-financial loss

The TIO asks:

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

The 2017 Independent Review of the TIO recommended that the TIO should, in exceptional circumstances, be able to award modest compensation of up to \$1,000 for non-financial loss or indirect loss.⁹

Currently, the only circumstances in which the TIO can consider a compensation claim by a consumer for non-financial loss is in relation to embarrassment or humiliation caused by a privacy breach under the *Privacy Act 1988*.

However, the power to award compensation for non-financial loss has been recognised by ombudsman and related schemes both in Australia and overseas as an appropriate resolution of certain types of disputes. These schemes include:

- > Australian Financial Complaints Authority¹⁰ — may award compensation if an unusual degree of distress or inconvenience has been incurred. Capped at \$5,000.
- > Energy and Water Ombudsman NSW¹¹ — considers compensation for goodwill payment, where there has been:
 - > significant inconvenience incurred;
 - > significant frustration or upset as a result of repeated attempts to resolve the complaint; or
 - > incorrect advice which caused the consumer to take unnecessary action or pay unnecessary costs.
- > Commission for Complaints for Telecom-Television Services of Canada (CCTS)¹² — may award an amount to compensate which is capped at \$CA5,000 for:
 - > any loss, damage or inconvenience directly incurred from complaint circumstances
 - > the failure of the provider to inform the consumer of the CCTS
 - > the failure of the provider to comply with CCTS requirements about unpaid charges in dispute
- > Communications & Internet Service Adjudication Scheme of the United Kingdom¹³ — may provide an award or remedy for an amount not greater than

¹⁰ A.16.4, Australian Financial Complaint Authority Operational Guidelines to the Rules April 2020, accessed 11 August 2020 < <https://www.afca.org.au/media/739/download>>.

¹¹ Section 11.2, Energy and Water Ombudsman NSW, Charter (November 2016).

¹² Section 14.2, Commission for Complaints for Telecom-Television Services, Procedural Code (amended and restated effective 1 September 2017).

¹³ Section 10.6(b)(ii), Ombudsman Services, Terms of Reference (post October 2015).

reasonably appropriate to provide redress relating to loss and inconvenience suffered due to acts or omissions. Capped at £10,000 for any award.

A common element of each of the above listed schemes is that a complainant may be awarded compensation for non-financial loss where the conduct of a party has aggravated the handling of a complaint. We consider that it is likely such circumstances exist in a proportion of complaints that are handled by the TIO.

Consequently, we support the TIO being able to award compensation for non-financial loss. We consider it would be appropriate for the TIO to carefully assess the issues potentially raised in awarding such compensation, including on:

- > how it determines whether it is appropriate to award compensation for non-financial loss
- > the amount of compensation in individual cases and the maximum amount of compensation that can be awarded.

Complaints relating to devices and equipment

The TIO asks:

Are there any other things the TIO should consider when updating our remit for complaints? Are there any particular devices and equipment that should be explicitly excluded from or included on the TIO remit? If yes, what are these and why?

The TIO is established under a regulatory framework that has a focus on telecommunication services. The codes and regulatory instruments that provide telecommunications consumers with safeguards, and which the TIO regularly refers to in handling complaints about equipment or devices that are provided or supplied by its members, focus only on devices and equipment relevant to accessing a telecommunication service. For example, the Telecommunications Consumer Protections Code defines ‘telecommunications goods’ as:¹⁴

*any goods supplied by a Supplier for **use in connection with the supply of a Telecommunications Service**, whether or not the goods are supplied in conjunction with, or separately from, a Telecommunications Service (emphasis added).*

We consider the TIO’s current Terms of Reference reflects this approach:

- > Clause 2.7(b) of the TIO’s current Terms of Reference allows the TIO to handle consumer complaints about “faults with, or failure to supply, handsets, modems, routers and other types of equipment that a consumer **uses to access a telecommunications service**” (emphasis added)
- > Clause 2.10(e) states the TIO does not handle complaints about customer equipment that is not for the purpose of accessing the service.

Consequently, if the TIO were to expand its remit to include complaints about devices and equipment not relevant to accessing a telecommunications service, consideration will need to be given to the regulatory framework under which these complaints would be accepted and actioned (including, if necessary, the available and appropriate escalation points).

¹⁴ Communications Alliance, *Industry Code C628:2019 Telecommunications Consumer Protections Code*, accessed 11 August 2020 < https://www.commsalliance.com.au/__data/assets/pdf_file/0011/64784/TCP-C628_2019.pdf>.

Joining more than one member to a single complaint

The TIO asks:

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

We support the TIO being able to join more than one of its members to a single complaint. The TIO's proposal to have the power to join more than one member to a single complaint will promote complaints being resolved more efficiently and effectively for consumers.

The supply chain in the telecommunications industry is complex. It is possible for a third party—who the consumer may not have knowledge of and is unlikely to have any contractual relationship with—to potentially be responsible for a problem that a consumer is experiencing.

If the root cause of a consumer or small business problem lies, in whole or in part, higher in the supply chain than the provider with the consumer contract, such as with an infrastructure or wholesale provider, we agree the TIO should be able to join such a provider to a complaint. Doing so would be in the interests of effective resolution of complaints and provide accountability of complaint drivers to the consumer.