

27 October 2020

Telecommunications Industry Ombudsman

By email: PublicConsultation@tio.com.au

Dear Telecommunications Industry Ombudsman,

RE: Supplementary Submission to Consultation – Modernising the Telecommunications Industry Ombudsman Terms of Reference

We write to provide a supplementary submission to our 11 September 2020 submission to the above consultation (the '**Review**'). This supplementary submission provides commentary in relation to the proposed Part 4 of the Draft Telecommunications Industry Ombudsman Terms of Reference: July 2020 ('**Draft TOR**'). In particular, we provide our views in relation the Telecommunication Industry Ombudsman ('**TIO**') systemic issues and policy contribution roles.

Westjustice, Consumer Action Legal Centre ('**Consumer Action**'), Financial Rights Legal Service ('**FRLS**'), and Financial Counselling Australia ('**FCA**') provide legal casework and financial counselling services to consumers, particularly those experiencing disadvantage, in their disputes with telecommunications providers. A description of our services is provided in Appendix A to this submission.

Systemic issues and policy contribution work are core functions of all industry ombudsmen schemes, including the TIO.¹ Not only are these roles comfortably within the scope of the TIO's mandate, they are essential to the overall effectiveness and efficiency of the telecommunications sector, and contribute to the reduction of future complaints. Part 1 of this Supplementary

¹ You can read Consumer Action's other submissions on the systemic issues function of ombudsman schemes on our website, including: <https://consumeraction.org.au/wp-content/uploads/2019/09/190912-SUB-CALC-EWOV-issues-paper.pdf> and <https://consumeraction.org.au/wp-content/uploads/sites/13/2019/03/190301-Submission-Disputes-with-FSPs-within-justice-system.pdf>.

Submission provides our general comments on the importance of these roles, and the relationship of these roles to the TIO's mandate and The Treasury's Benchmarks for Industry-Based Customer Dispute Resolution ('**Benchmarks**')².

Part 2 of this supplementary submission sets out how the systemic issues and policy contribution sections of the Draft TOR improve the TIO's capacity to meet the Benchmarks. The Draft TOR should be favoured over the Current TOR, and adopted.

1. General Comments on the 'role' of the TIO

a) The importance of the TIO's systemic issues role

The TIO's role in investigating, reporting on, and resolving systemic issues is a valuable aspect of the organisation's place in the effective provision of essential telecommunications services. The TIO's recent systemic issues papers have provided valuable, data-driven insights to consumers, industry, regulators, and policy makers. The TIO's comprehensive complaint handling jurisdiction renders it is uniquely positioned to identify recurring and related problems in the telecommunications industry. For example, the TIO's systemic issues paper on the impact of COVID19 on phone and internet complaints (released in July 2020) demonstrated the way in which the TIO was able to quickly gather and interpret its complaints data to provide evidence-based analysis of emerging systemic issues in a dynamic environment.

Investigating, reporting on and resolving systemic issues is a core function of industry ombudsman schemes. In a review its 2017 Final Report of the "Review of the financial system external dispute resolution and complaints framework" ('**Ramsay Review**'), the independent expert review panel identified that:

Where there is a general problem in an industry affecting multiple consumers and a number of similar complaints are received about a particular issue, ombudsman schemes have the capacity to instigate and conduct investigations to identify systemic issues. Once these issues have been identified and investigated, ombudsman services can alert the relevant stakeholders and regulators and assist in their resolution. This approach is more cost-effective than litigation and has the potential to provide positive outcomes for consumers by promoting good industry practice.³

Moreover, as the Cameron Ralph Khoury 2017 TIO Independent Review Report opined:

² See [Government Benchmarks for Industry-Based Customer Dispute Resolution](#), 2015.

³ Ramsay, Ian, Alan Kirkland and Julie Abramson, Final Report, "Review of the financial system external dispute resolution and complaints framework", 2017, 2.20 on p 31, available at: https://treasury.gov.au/sites/default/files/2019-03/R2016-002_EDR-Review-Final-report.pdf

The unique co-regulatory model for the telecommunications industry means that more is required from the TIO in order to fully play its part in identifying, escalating, resolving and providing transparency about systemic issues.⁴

The TIO has committed to complying with the Benchmarks noted above, as publicised on its website.⁵ The systemic issues function of industry ombudsman schemes is core to the 'accountability' and 'effectiveness' benchmarks, as set out below:

Accountability

Underlying principle

The office publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating organisations, policy agencies and regulators.

Purpose

To ensure public confidence in the office and allow assessment and improvement of its performance and that of participating organisations.

Effectiveness

Underlying principle

The office is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance.

Purpose

To promote community confidence in the office and ensure that the office fulfils its role.

We support the public reporting of systemic issues by ombudsman schemes, including the TIO.

The reporting of trends by the TIO, as an independent body, can transparently inform industry, consumers and other stakeholders about areas for improvement and lead to better consumer outcomes, and more effective and fair practices.

Furthermore, the TIO's systemic issues investigations and reports and its policy role directly contribute to the complaint-handling purpose of TIO by reducing future complaints. If causes of complaints are addressed at a systemic level, as identified by the TIO, there will be fewer complaints in future related to those causes. The systemic issues and policy focus are integral to the efficient resolution of complaints.

We consider that public accountability for telco providers improves the overall competitiveness of the marketplace by encouraging traders to improve their practices and empowers consumers to make informed decisions about where to buy goods and services. The ability to name telco

⁴ Cameron Ralph Khoury, 'TIO Independent Review Report', 2017, p 66, available via: <https://www.tio.com.au/reports-updates/independent-review>

⁵ 'Our service is free and complies with the Government Benchmarks for Industry-Based Customer Dispute Resolution' - <https://www.tio.com.au/about-us>

providers improves this transparency, highlighting where traders have done the right thing, as well as traders who have not.

Further, public accountability provides incentive for regulators to take enforcement action against problematic players in the market where there are clearly systemic issues. In addition to transparent, public reports on systemic issues and investigations, the TIO should also share information about these and work closely with ACMA to assist with enforcement, and promote better consumer outcomes.

b) Policy contribution role

We consider the TIO's policy contribution role to be an essential function. The ombudsman is uniquely placed to as a specialist ombudsman service to swiftly identify shortcomings in telecommunications policy and regulation where they lead to unfair, inconsistent, or counterintuitive results. The TIO is also well placed to demonstrate where existing industry practices, policies or regulation is leading to good consumer outcomes. The TIO policy role helps to ensure telecommunications policy is based on real and tangible data and experiences. It would be illogical and inefficient for an independent service with rich complaints data to not be able to analyse or make comment stemming from its insights through that evidence base.

c) The Benchmarks and the TIO mandate

The Benchmarks provide a best practice standard for industry-based customer dispute resolution. They are endorsed by the Treasury, and are the framework against which the TIO is reviewed in its independent review process.

Meeting the Benchmarks is a fundamental part of the TIO's mandate.

The Cameron Ralph Khoury 2017 TIO Independent Review Report described:

*The TIO's authorising environment is complex with legislation, industry codes, and the TIO's Constitution and Terms of Reference all playing a part in defining the TIO's mandate.*⁶

While the Current TOR already prescribe that the TIO 'considers' the Benchmarks in the context of its service delivery (Current TOR cl 1.6), the Draft TOR clarify the commitment to meet the Benchmarks in Draft TOR cl 1.8, aligning the Draft TOR with the TIO's position as publicised on its website.⁷

Moreover (and in any event), the TIO's systemic issues and policy contribution roles were comprehensively considered in 2012, by the then Department of Broadband, Communications and the Digital Economy's 'Reform of the TIO' report.⁸ The Reform of the TIO report argued that while

⁶ Cameron Ralph Khoury, 'TIO Independent Review Report', 2017, p 14, available via: <https://www.tio.com.au/reports-updates/independent-review>

⁷ 'Our service is free and complies with the Government Benchmarks for Industry-Based Customer Dispute Resolution' - <https://www.tio.com.au/about-us>

⁸ Department of Broadband, Communications and the Digital Economy, 'Reform of the Telecommunications Industry Ombudsman', 2012, p 14, available at:

the authorising legislation provided for the TIO to complete systemic issues work, it would be appropriate for this to be made more explicit in the legislation (at that time, s 128(4) of the Telecommunication Consumer Protections and Service Standards Act 1999 required certain *minimum* work that the TIO must do, but did not limit *possible* work).

The Reform of the TIO report did note the reference in the then TIO constitution⁹ to the Benchmarks¹⁰, however writers felt that there was a perception of uncertainty about the status of the Benchmarks arising from the lack of reference to them in the authorising legislation. To remedy this perceived shortcoming, the Reform of the TIO report recommended legislative amendments to the TCPSS Act, to provide for ministerial determination require the TIO to comply with external standards or benchmarks if necessary.

An amendment based on this recommendation was enacted in 2014, via the *Telecommunications Legislative Amendment (Consumer Protection) Act 2014*, and the legislation now not only provides that the Minister can make a such a determination (s 128(8) and (9)), but requires the Minister to have regard to the six Benchmark principles when making any determination (s 128(10)).

The explicit reference to the TIO's systemic issues and policy contribution roles in the Draft TOR clearly aligns with the TIO's authorising environment. It is clear these roles are authorised and are critical functions of the TIO.

2. Commentary on specific clauses in the Draft TOR

As indicated in our 11 September submission, we strongly support the TIO's proposal to give clarity to its industry improvement role (comprising its systemic issues and policy contribution roles) as a standalone 'Part' in the Draft TOR.

The following comments address specific clauses in the Draft TOR Part 4, and are in addition to comments we already provided in our 11 September submission:

Draft TOR 4.2

We strongly support the drafting of this clause, which modifies the guidance attached to Current TOR 5.1 by removing the requirement that a systemic issue must, by definition, affect or possibly affect a 'significant' number of consumers.

Though 'significantly' is not defined in the Current TOR, we are concerned that an inference may be drawn about a minimum number of consumers that must to be affected or potentially affected by an issue before it can be investigated as 'systemic'. In our view, this is inappropriate. As advocates who work with socially and economically marginalised consumer groups, we are acutely aware of cases where certain elements of industry practice or marketplace design significantly disadvantage, exclude, or harm a vulnerable minority.

⁹ This part of the Constitution later formed part of the separate TIO Terms of Reference document

¹⁰ At that time, these were best practice principles formally adopted by the peak body for ombudsman services in Australia and New Zealand, the Australian and New Zealand Ombudsman Association (ANZOA)

The ACCC investigation into Telstra's selling practices to members of Aboriginal communities (in particular, in central and northern Australia) provides a valuable example of an investigation of a specific issue.¹¹

Moreover, as COVID19 lockdowns continue in Victoria, the digital divide has been brought into sharp focus. While the majority of consumers are increasingly tech-literate and have improved access to fast internet for the online delivery of services, a small and vulnerable group of consumers is increasingly excluded from social and economic participation. We are particularly concerned about emerging issues in telecommunications arising for this group, foreshadowed in the TIO's COVID19 Systemic Issues Paper by the distress of consumers who were unable to make phone-contact to their provider to raise issues.

It is fundamental to consumer protection that any examination of a policy and market considers how arrangements affect the most vulnerable - not just the 'average' consumer, or the 'majority' of consumers. This approach must be reflected in the TIO's systemic issues work. Removing the threshold requirement for matters to affect a 'significant' number of consumers an appropriate and positive step in this direction.

Draft TOR 4.2(b)

The TIO has an important role in determining apparent non-compliance with law or regulation. We would support amendment to the draft clause such that it reads:

(b) apparent repeated non-compliance by a member with the law, regulatory requirements or good industry practice;

We strongly support the inclusion of a repeated failure to engage in good industry practice as an example of a systemic issue. The TIO is not a court or tribunal. Complaints are not limited to complaints about breaches of law, nor to those that could properly be brought in a court or tribunal. Industry ombudsman schemes routinely consider good industry practice in the determination of complaints, and, in certain circumstances, it is a failure to comply with good industry practice that forms the basis of the complaint. Accordingly, it is entirely appropriate that an ombudsman to take good industry practice into account when considering its complaints data and other data for identification of systemic issues.

Draft TOR 4.3

We strongly support the drafting of this clause, which clarifies that the TIO can investigate a systemic issue with or without a complaint. This is consistent with the Australian and New Zealand Ombudsman Association (ANZOA) policy statement on the Essential Criteria of an Industry Ombudsman Scheme, which specifically requires that the powers of an Ombudsman should include:

¹¹ See <https://www.abc.net.au/news/2019-06-25/telstra-hits-vulnerable-australians-with-extra-data-charges/11173362>.

In addition to investigating individual complaints, the Ombudsman must have the right to deal with systemic issues or commence an own motion investigation.¹²

It is also essential that TIO investigate all apparent claims on the information available, whether or not specifically identified in a complaint. This will ensure fair outcomes and assist in the identification of systemic issues.

Draft TOR 4.5

Please see our 11 September submission on this point.

Draft TOR 4.6

We strongly support the TIO clarifying its strengthened role in handling systemic issues. As the independent dispute resolution body, it is appropriate for an Ombudsman to ensure members take steps to identify and appropriately remedy all parties impacted within appropriate timeframes. This is a core part of resolving disputes effectively and efficiently.¹³ Furthermore, it is appropriate for an Ombudsman to ensure action is taken to prevent an identified systemic issue from recurring, which will also reduce complaints.

Draft TOR 4.7 (and 4.10)

We strongly support the reporting of member names as argued on pages 3 and 4 of this submission, and as undertaken by other EDR schemes.¹⁴ This provides transparency and increases accountability across industry providers.

Draft TOR 4.9

There is significant public interest in the TIO identifying, investigating and resolving systemic issues, and reporting publicly on that work. This should not be a process of horse trading with industry, and seeking to come to an agreement behind closed doors. The proposed wording of clause 4.9 is therefore appropriate. We support further clarity in the Draft TOR about the TIO's expectations about member responses to recommendations about systemic issues. Members should be required to respond and act on the TIO's recommendations.

Draft TOR 4.11

We strongly support the TIO's continued policy contribution role, as addressed in our Part 1 response above. As an independent EDR body, the TIO holds an evidence base ripe for analysis for better, fairer policy development. Any moves to reduce its ability to effectively and efficiently feed into policy debates will be detrimental to its members, consumers, regulators and governments.

¹² Available at: http://www.anzoo.com.au/assets/anzoo-policy-statement_ombudsman_essential-criteria.pdf

¹³ The quotes on page 2 of this submission (from the Ramsay Review and the 2017 TIO Review reports) support this.

¹⁴ E.g. <https://www.afca.org.au/news/latest-news/afca-updates-rules-name-financial-firms>.

Contact details

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Yours Sincerely,



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APPENDIX A – About the Contributors

WEstjustice (Western Community Legal Centre)

WEstjustice provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine, and outreach across the West. Our services include: legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform, and advocacy.

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took over 22,000 calls for advice or assistance during the 2019/2020 financial year.

Financial Counselling Australia

Financial Counselling Australia is the peak body for financial counsellors in Australia. We support financial counsellors and provide a voice on national issues. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.