

23 December 2020



Dear Judi, Michael, and TIO Board members,

**RE: Further consultation on Terms of Reference Review**

First, a note of thanks to Michael and Judi for taking to the time to meet with the Comms Alliance ICAG recently and to work through the TIO's evolving thoughts on proposed ToR changes. This was much appreciated by CA members and management.

Thank you, also, for giving Communications Alliance and its members the opportunity to provide further input on the revision of the TIO's Terms of Reference (ToR).

Many of our positions have not changed markedly from those expressed in our initial submission to the review. While we respect the TIO and Board's constructive approach to finding workable compromises against the backdrop of diverse stakeholder views, we believe that these matters should be considered in light of practical and implementation ramifications, existing legislation and best practice as set out in the Government's [Benchmarks for Industry-based Customer Dispute Resolution](#).

Our key concerns relate to the proposed expansion of the TIO's remit to devices and equipment and the changes to the financial compensation limit and addition of compensation for non-financial losses. On the device issue, although we understand there has been some narrowing of the position from the original proposal, it is still, in our members' view, not narrow enough to avoid the potential for unwanted and unwarranted consequences – including confusion for consumers, impact on TIO and industry resources and a potential chilling effect on the market.

On joining multiple members to a complaint, not all CA members agree on principle that this change is necessary, and all members so far consulted agree that it would be more appropriate to work through the details and guidance on implementation of joining multiple members to a complaint, before making that change to the ToR.

Finally, while we do appreciate the additional opportunity to comment, members do have concerns that the timeframe of this second round of consultation (approximately one week, during the lead up to Christmas) has, unfortunately, not given them sufficient time to consider or prepare more detailed feedback. Additionally, we recommend that once the Board has decided on some of these principles, it undertake further consultation on the precise language prior to a final vote, as the drafting can make a significant difference to the end result.

We have addressed each of the topics raised in the presentation on 14 December in the following pages, and would be happy to answer any questions or to have further discussions.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Stanton'.

John Stanton  
**Chief Executive Officer**

## COMMENTS ON SPECIFIC PROPOSALS

### DEVICES AND EQUIPMENT

We appreciate that the TIO has proposed the added clarity that this expansion would only apply to devices sold by a member to access a telecommunications service provided by that member. However, there are still numerous challenges raised by this proposal.

The issues raised in our submission regarding the appropriateness of this expansion still stand – we do not view that this is in line with the TIO's legislative remit, or its role to address unique issues in carriage services (as opposed to the broader consumer protection framework that covers most other goods and services in the economy). Where a product or service does not involve the supply of a carriage service (or the statutory land access powers for the purpose of installing or maintaining a carriage service), that rationale – for a unique ombudsman for this space – no longer exists. This expansion is also not aligned with the Government's Benchmarks, as the relevant industry/service area for the TIO is carriage services.

Additionally, there are well established mechanisms for enforcements of consumer rights and protections already in place. The ACCC already provides guidance on mobile device protections under the ACL, clearly establishing that these fall under their jurisdiction, and thus that of state consumer protection bodies.<sup>1</sup> Continuing to manage such issues under the current regime also provides clarity for consumers, who can follow the same process for issues with their device, regardless of the place of purchase of the device (i.e. via a telco retail outlet or another retailer such as Harvey Norman, JB HiFi or an Apple or Samsung store).

Ultimately, if a consumer's complaint is only about the device and not about the connection, it is not relevant to the carriage service (e.g. a speaker not working), and thus should be handled via the same methods as all other complaints regarding a purchase in the economy.

We have focused our input below on the practical consequences and challenges of such a change.

#### Lack of clarity

Complaints about a device that is used for the primary purpose of accessing the carriage service supplied by the same organisation is extremely different from devices which make use of the carriage service, but are not the primary means for accessing it.

There are multiple factors in how a device connects to the internet (internal cabling, internal Wi-Fi, Bluetooth, etc) that could impact it that the RSP has no oversight over or knowledge of – and thus no ability to help resolve. It is not appropriate for the TIO to expand to this space, as it is not directly related to the provision of a carriage service, and resolving the question of how a device is being connected (and thus if it falls within the proposed jurisdiction) would add additional unnecessary complexity and time to a complaint resolution process. These issues are already handled by existing consumer protection processes that any consumer can access.

We raise a number of other 'grey area' circumstances in the below section on consumer confusion, but in total, the concern is that the current proposal is so confusing it will be nearly impossible to implement.

#### Chilling effect on competition with non-CSPs

Expanding the remit to devices or other non-carriage service offerings will create an unfair market. TIO members should be able to compete in the supply of these devices and services on the same grounds as companies who are not members of the TIO.

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<sup>1</sup> Guidance on the consumer guarantee as to acceptable quality and 'durability', Australian Consumer Law, pgs 3, 11 [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)

However, this change would mean that members of the TIO are subject to complaint handling by the TIO in addition to being subject to the ACCC and state-based consumer bodies when they sell equipment or devices related or unrelated to telecommunications carriage services. It also means that members of the TIO would be subject to additional and potentially different complaint handling and expectations than other companies who sell these devices. Some members have reported that this may factor into commercial decisions on the range of devices to offer to their customers.

It also creates an imbalance in consumer protections, resulting in two different consumer protection spaces depending on where a consumer purchases their device. For example, if one consumer purchases a phone at JB Hi-fi and another purchases it from an RSP, they should both have the same rights via the ACL and access to their state consumer protection agency, instead of having different access to dispute resolution assistance depending on where they choose to purchase their device.

Finally, it may factor into consumer decisions about changing RSPs, if they are aware that it would impact their ability to access TIO assistance for their previously purchased device(s). The consumer benefits of easily being able to change RSPs have been acknowledged by all parties, and are a key focus of regulation in telecommunications. Any additional barriers to transfers would be an extremely negative consequence of this proposed change.

### Impact on TIO resources

Over time, almost everything will become a connected device. If the TIO proposes to expand to all connected devices, despite there already being existing channels to manage such complaints, its remit – and thus workload – will continually expand and require significant additional resources, while unnecessarily duplicating to an increasing extent the established roles of the state and territory consumer protections tribunals (as there will be very few products sold that are not connected via a carriage service).

A recent study forecasted that the “average number of connected devices is set to increase from 18.9 in 2019 to 35.6 by 2024” – and half of these devices will be connected home devices.<sup>2</sup> As the telecommunications market evolves, more and more RSPs are expanding their market offerings to include various technologies (from headphones to fridges). If consumers are able to come to the TIO about every complaint with a connected device, it will require a significant increase in TIO capacity and likely an overhaul of the organisation as a whole.

Additionally, the variation in these devices means that additional and more varied training will need to be added for TIO staff, as they will need to be aware of and familiar with a wide and ever changing array of devices.

These numbers also only take into account the home market, and do not account for the increasing number of IoT devices that are and will be used by small businesses.

### Confusion for consumers

Finally, while we understand that the TIO is interested in helping a consumer resolve their complaints and does not want to have to send consumers to another body where needed, many of these concerns should instead be addressed through referral mechanisms and arrangements with Fair Trading bodies and the ACCC.

We view that these changes will instead create confusion for many consumers.

There are a range of possible confusing situations that will arise:

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<sup>2</sup> [IoT@Home gathers pace with home-bound Australians — Telsyte](#)

- If a consumer purchases a device from their RSP that could be connected to the carriage service, but doesn't end up connecting it in that way (e.g. – a smart fridge from their mobile RSP that could be connected to a mobile network – 4G/5G, but the consumer ends up connecting it to their home broadband via wifi, which is provided by a different RSP), they may assume that they would be able to go to the TIO about it under these rules but in fact, as they aren't using it to connect to the carriage service, they would not be able to.
- If a consumer purchases a device from RSP X, starts the complaint, then switches their service to RSP Y during the complaint resolution, is the complaint withdrawn?
- If a consumer purchases a connectable device, but never ends up connecting it (this will be true with many smart home devices), it would fall outside of this jurisdiction.
- If a consumer purchases a device from their telco (for use with their carriage service) at one point and subsequently purchases another device from a non-telco retailer (or vice versa), they will be subject to different complaint and consumer protection regimes, which will also cause confusion.

Ultimately there are an increasing range of devices, and this expansion would continually raise new and more confusing circumstances. Clarifying to consumers that the TIO is only able to help with connections to a mobile or broadband network is quite straightforward and navigable for consumers.

## Solution

If, despite the above concerns, the Board chooses to move ahead with this expansion, we strongly recommend that the expansion be further narrowed (from this most recent proposal) to complaints specifically about accessing the carriage service with that device.

## FINANCIAL COMPENSATION

### Compensation Limits

While we understand that the Board is attempting to find a 'middle ground' on this point, we do not see that as an appropriate approach to such a significant matter.

When examining what the appropriate limit would be, there are two key factors – the first, the ability of the TIO to make appropriate decisions on complaints within its remit,<sup>3</sup> and the second, established precedent with similar bodies.

On the first point, we are not aware of any evidence of the need to make this change. The median value of financial outcomes awarded by the TIO according to its latest annual report is \$427.<sup>4</sup> Considering that the small business limit in the TCP Code and related ACMA rules 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.

On the second point, as raised in our previous submission, the TIO already has higher limits than almost every other utility ombudsman in Australia, and state tribunals and small claims courts have limits far below \$100,000 – ranging between \$25,000 and \$50,000.<sup>5</sup> This is an appropriate range, as due to limited oversight, the TIO not being bound by letter of the law or rules of evidence and lack

<sup>3</sup> 6.2 of the [Government's Benchmark Key Practices](#) 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."

<sup>4</sup> TIO 2019-20 Annual Report. p.38. [TIO AR2019-20 High-Res.pdf](#)

<sup>5</sup> [Communications-Alliance-Submission-to-TIO-Terms-of-Reference-Review-September-2020.pdf \(commsalliance.com.au\)](#), p 8.

of published precedents, the TIO should not be able to make determinations that reach into levels of courts.

Increasing the TIO's compensation limit to \$100,000 would be contrary to established good practice for dispute resolution schemes and tribunals.

### Non-financial loss

Our view that the TIO should not be able to award compensation for non-financial loss remains. These issues are complex and would appropriately require provision of evidence by the customer that the TIO does not typically request, creating an unnecessary burden of proof which is challenging for all parties and better left to the courts or bodies with enhanced quasi-judicial capabilities.

We do appreciate the proposal to place a limit of \$1,500 on non-financial loss, and the position that this would not be used as a standard resolution request. However, if this is to be implemented, we strongly recommend further consultation on specific guidelines – to be finalised by the Board – prior to adding this to the Terms of Reference. It would be inappropriate, for example, for TIO staff to proactively ask every customer if they have experienced non-financial loss, as this would lead to a huge financial impost on the industry.

Our viewpoints on those potential guidelines remain as in our prior submission, including that there must be specificity on the limited circumstances in which it would be appropriate, clarity that it is not for punitive damages, transparency through written documentation, consideration of the cause of any non-financial loss, flexibility on the form of compensation payment, and a review by the Ombudsman or Deputy Ombudsman before any such decision is finalised.<sup>6</sup>

## DEFINITION OF SMALL BUSINESS

While we appreciate that the Board has examined the many different definitions of small business used across the economy during this process, we continue to underline the existence of one established definition used in telecommunications consumer protection, by both the ACMA and the TCP Code, that is based on the definition used in the Australian Consumer Law's (ACL) Consumer Protection section.

Due to this established and shared definition, we have continually been unclear on the reason behind the TIO not adopting that definition. Following further discussions with the TIO, we understand that the driving reason behind the interest in using the definition of small business from the ACL's Unfair Contract Terms section is because there is a sentiment that the definition of small business used elsewhere in telco does not provide the TIO enough jurisdiction to handle broader complaints from small businesses, including on topics such as unfair terms in contracts.

Members were not able to fully consider this in the past week, so we may be able to provide additional input in the new year prior to the February board meeting.

Some members did raise potential concerns about the possibility of the TIO becoming involved in commercial disputes that should more appropriately be handled by courts or tribunals. If the intention of this change is to broaden the TIO's jurisdiction, we consider this would require further consultation, as this has not previously been discussed.

If that is not the intention of the proposed change, then we would query why it would be appropriate for the TIO to be the only actor in the telecommunications consumer protection space to use a different definition. Ultimately, alignment across consumer protection instruments and functions streamlines operations and clarifies operations for all parties – the TIO included, as the expectations and rules – and thus what is fair and reasonable for providers to do – would be

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<sup>6</sup> Ibid, p. 9

different for any small businesses that fall outside of the established definition. This would add complexity and potentially require additional staff training for the TIO.

## JOINING MEMBERS TO A COMPLAINT

While not all Comms Alliance members agree on principle that this change is necessary – noting the TIO's existing ability to direct members of the scheme to comply or provide information regardless of if they are 'assigned' to a complaint – all members, regardless of principle position, have strong concerns about the details that must be worked out prior to implementation.

The assignment of complaints can have significant commercial impact on providers due to both fees and published complaints data. This would be substantial, and the consequences of that change should be thoroughly considered before a decision is reached, including the impact to the TIO's current complaint reclassification process. However, the exact consequences are not identifiable at this point without further discussion of the operational details or a clear need for the change at this time.

We do note and appreciate the Board's agreement that this change would not be implemented until the guidance is developed. However, it would be more appropriate for that if a clear rationale for the change is established and this rationale forms the basis of the guidance to be worked through and approved by the Board before the Board approves adding this to the Terms of Reference.

## OTHER MATTERS

We appreciate the consideration from the Board and TIO on the matters of the TIO's industry improvement role and reporting and the roles of the Ombudsman and Board, and do not have any further comment on those topics.

We also note the other changes being considered based on feedback, and do not have any specific concerns or input about those issues.