



Telecommunications
Industry
Ombudsman

Submission to the
ACCC's Digital
Platform Services
Inquiry Discussion
Paper:

**Updating competition
and consumer law for
digital platform
services**

April 2022

Introduction

We welcome the opportunity to comment on this stage of the ACCC's Discussion Paper on updating competition and consumer law for digital platform services (**Discussion Paper**).

The Telecommunications Industry Ombudsman (TIO) is well-positioned to provide insights on the Discussion Paper. As an external dispute resolution (EDR) scheme, we are part of the regulatory ecosystem for the telecommunications (**telco**) sector. In addition to handling telco complaints from consumers and small businesses, we also investigate and refer systemic issues we see in our complaints.

We support the ACCC implementing new regulatory tools and measures to address harms and complaints identified by the ACCC throughout the course of the Digital Platform Services Inquiry. It is important for a new regulatory framework to guide digital platforms to deliver services fairly, and to support digital platform users to understand their options when things go wrong.

We agree with the Discussion Paper's assessment of the need for both effective internal dispute resolution processes and an independent Digital Platform Services Ombudsman (DPO) scheme.¹ A new regulatory framework will play an important role in empowering both digital platforms and their users to resolve complaints. This framework should enable fair and efficient direct resolution of complaints between users and digital platforms, and allow for the escalation of unresolved complaints to a DPO scheme. For a new regulatory framework to achieve this, the framework could include:

- legislated requirements for DPO scheme membership to ensure that all digital platforms are members of the DPO scheme
- clear minimum requirements and obligations that are specific to digital platform services to assist the DPO to consider what a fair and reasonable complaint outcome looks like
- a clear pathway between the DPO scheme and the regulator to enable the scheme to refer non-compliance with membership obligations and Ombudsman decisions, and unresolved systemic issues for regulatory action.

This submission highlights aspects of the regulatory framework for the telco sector which could be used as a model for the digital platforms framework, as well as aspects of the framework that could best assist a DPO scheme to resolve disputes between digital platforms and their users.

We look forward to the outcome of this consultation in the ACCC's *Digital Platform Services Inquiry Interim Report No. 5*.

¹ ACCC, *Digital Platform Services Inquiry – Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services* (February 2022) page 100, section 8.4.2

1. Mandatory membership of the DPO scheme should be set in legislation

The Discussion Paper considers that some regulatory measures may apply to all digital platforms, and other measures may be appropriate to apply only to specific digital platforms. While we support this approach, we encourage the ACCC to consider criteria that are sufficiently clear to allow for efficient and effective management of a new regulatory framework, and a DPO scheme.

The new framework should clearly articulate which digital platforms are captured by regulatory measures. Alongside these specific regulatory measures, the new framework should also include legislation which mandates that all eligible digital service providers must join the DPO scheme.

For an example from the telco sector, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* sets out the eligibility requirements for mandatory membership of the TIO scheme. The TIO handles complaints about products and services supplied by telcos. Legislative requirements for TIO scheme membership align with this, by defining eligibility with reference to the services that a telco provides.

We find this approach beneficial because it does not rely on commercial characteristics that may frequently change, such as the number of customers per month or annual income of the member.

Legislative requirement for TIO scheme membership

As set out in Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, telecommunications carriers and eligible carriage service providers must join the TIO scheme unless they are granted an exemption.

What are carriers and carriage service providers?

Both carriers and carriage service providers are defined under the *Telecommunications Act 1997*. Carriers are readily identifiable and aware of the need to join the TIO scheme as they are licensed by the regulator, the ACMA. Carriage service providers do not require a license. Carriage service providers use carrier networks to provide telecommunications services.

What are the requirements for mandatory scheme membership?

Only 'eligible' carriage service providers are required to join the TIO scheme. Eligible carriage service providers are defined by the type of services they provide, and must join the TIO scheme if they supply any of the following:

- A standard telephone service to any customers who are residential or small business customers
- A mobile service
- A carriage service that enables end-users to access the internet
- One of the above services (as an intermediary who supplies to another intermediary or carriage service provider).

In addition, the ACMA can also specify a class of carriage service provider that it has determined must join the TIO scheme.

While defining mandatory membership eligibility based on service type works well for the telco sector, we recognise that a one-size-fits-all approach may not always capture and exclude the right digital platforms. As the ACCC has noted, digital platforms and their connection with users can vary based on a digital platform's size, products and services, or market or gatekeeper status of a digital platform. To ensure that dispute resolution broadly captures the right digital platforms, legislative requirements for DPO scheme membership could also include a built-in mechanisms that allows the regulator to apply flexibility when needed.

In the telco sector, the ACMA can exempt entities from the requirement to join the TIO scheme on a case-by-case basis. The DPO scheme's regulator could benefit from a similar mechanism.

Process for exempting entities from the requirement to join the TIO scheme

Any carrier or carriage service provider can apply for an exemption to the ACMA.² Exemption requests must include:

- how residential customers or small businesses are dealt with when supplying carriage services
- the number of those customers serviced
- a description of the services supplied
- examples of potential TIO complaints
- details on how complaints are handled.

When considering an exemption request, the ACMA considers the extent to which residential and small business customers are dealt with, and the potential for complaints under the TIO scheme about services provided.

The ACMA can consider any other matters, and will consult with the TIO before deciding whether to grant an exemption. The ACMA can revoke an exemption at any time.

The ACMA publishes exemptions it has granted on its website.

² <https://www.acma.gov.au/tio-scheme-requirements-and-exemptions>

2. Regulation should set clear minimum requirements and obligations

A new regulatory framework should include legislation and other instruments which set out clear minimum requirements and obligations for digital platforms. When setting these minimum requirements and obligations, the ACCC may benefit from considering what the balance between self-regulation and direct regulation should look like in the digital platform services sector.

As well as addressing consumer harms identified by the ACCC, these clear minimum requirements and obligations could assist digital platforms and their users to resolve problems. A DPO scheme would be assisted by these instruments when considering what a fair and reasonable complaint resolution may be.

2.1. Market-specific requirements and obligations would complement Australian Consumer Law (ACL) protections

In the complaint resolution context, we are of the view the current ACL protections would be complemented by market-specific obligations on digital platforms. We find this approach effective in the telco sector, as we rely on both ACL protections and telco-specific obligations to help us resolve complaints.

An example of a telco-specific obligation that is not addressed by ACL protections is the Critical Information Summary (CIS). A CIS forms a key part of a contract between a consumer and their provider and ensures essential information about a service is provided up front so the consumer can make informed choices.

It will be important for any market-specific obligations on digital platforms to remain consistent with ACL protections. To achieve this, market-specific obligations should clarify rights and obligations specific to aspects of digital platform services which broader protections like the ACL are unable to target effectively.

2.2. Direct regulation and self-regulation can work together to support better consumer outcomes

The ACCC may also wish to consider the telco sector as analogous when determining the right balance of regulatory tools. As stated in our 2019 submission to the Digital Platforms Inquiry,³ in many ways digital platforms are converging with communications services like telco. Digital platform services also share characteristics with telco, such as supply chain complexity and rapid innovation rates.

The current telco regulatory framework is supported by both self-regulation and direct regulation. In our experience, there is a place for both types of regulation in a well-functioning market.

We have found industry self-regulation helps the TIO resolve complaints where the complaint subject matter involves technical standards and other areas where cooperation between industry players and supply chain members is required. For example, the Reducing Scam Calls Code⁴ requires telcos to monitor, trace, and block scam phone calls. While it contains no obligations on

³ https://www.tio.com.au/sites/default/files/2019-10/TIO%20Submission%20to%20Treasury%20-%20DPI%20FINAL%2012%20Sept%202019_0.pdf

⁴ Which, as noted by the ACCC, is currently under consultation regarding the inclusion of SMS

telcos to act or not act a particular way towards consumers, industry efforts in this space may have reduced the complaints we see about scam calls.

The self-regulation of technical issues works well when coupled with the direct regulation of essential consumer protections. To reduce consumer harm, legislation and standards can contain minimum obligations for how providers must act towards consumers.

For example, the ACCC has noted digital platform users face accessibility challenges when attempting to contact or raise complaints with digital platforms. In the telco space, essential consumer protections around accessibility are set out in the ACMA's Complaint Handling Standard.⁵ When we see accessibility complaints rising (such as in the early days of the COVID-19 pandemic), we guide providers to the Complaint Handling Standard to ensure those minimum standard continue to be met.

3. A new regulatory framework should include a clear pathway between the DPO scheme and the regulator

Industry-based EDR schemes conduct critical work in the systemic issues space and require a clear escalation pathway to share insights with the regulator. By sharing information and referring systemic issues, an EDR scheme can help the regulator respond effectively to breaches of legislation or industry codes.

In the case of the telco sector, the TIO's systemic issues work⁶ involves directly notifying telcos about systemic issues and then assessing their responses. This can lead to:

- the publication of systemic reports containing recommendations for the industry
- individual telcos agreeing to make improvements,⁷ or
- individual telcos being unable or unwilling to resolve issues, which are then referred to regulators for further action.⁸

The adoption of this approach for digital platforms may lead to better outcomes for digital platforms and their users.

⁵ Telecommunications (Consumer Complaints Handling) Industry Standard 2018

⁶ As set out in our Terms of Reference and supported by memoranda of understanding with its regulators

⁷ For example, in 2020-21, we closed 30 systemic investigations where members agreed to make improvements: https://www.tio.com.au/sites/default/files/2021-09/TIO_AR_Accessible_LR.pdf, page 65

⁸ For example, in 2020-21, we referred two systemic issues to regulators and regulators took action on four systemic issues we had previously referred: https://www.tio.com.au/sites/default/files/2021-09/TIO_AR_Accessible_LR.pdf, page 65