



**Queen Margaret University**  
CONSUMER DISPUTE RESOLUTION  
CENTRE

**Five-year Independent Review of  
the Telecommunications Industry Ombudsman**

**Submitted by Dr. Gavin McBurnie and Jane Williams**

**Consumer Dispute Resolution Centre  
Queen Margaret University**

**24 August 2022**

This page is intentionally left blank

## EXECUTIVE SUMMARY

This executive summary outlines the main findings of the five-year independent review into the Telecommunications Industry Ombudsman (TIO). The principal matters for enquiry and report set by the TIO were to:

Assess the TIO's compliance with the Australian Government's Benchmarks for Industry-based Customer Dispute Resolution and should further include the effectiveness of the Scheme's:

- Complaint handling and dispute resolution operations
- Systemic issues identification
- Complaint data and reporting
- Member and consumer stakeholder engagement and outreach activities
- Government and regulator engagement
- Modernised Terms of Reference
- Governance and authorising environment.

The TIO was clear in its Request for Proposals that a review of its complaint handling technology and funding structure were both out of the scope of this review.

### Compliance with the Industry Benchmarks

#### *Accessibility*

The review focused on two areas, those of awareness of the TIO and the TIO's approach to working with vulnerable and disadvantaged complainants. The review team noted that there were generally high levels of awareness of the TIO among the general public but, that, in common with other similar schemes, awareness of the TIO may be lower among disadvantaged and vulnerable groups. The TIO does not collect socio-demographic information about its service-users which would be helpful to the TIO to target awareness raising activities.

The TIO provides high quality training to staff on issues relating to diversity and vulnerability. However, concerns were raised by consumer groups about the ability of TIO casework staff to identify and work with vulnerable and disadvantaged complainants. The review team suggests that there is some additional work that the TIO could undertake in this area to ensure that the particular needs of disadvantaged and vulnerable complainants are fully considered.

### *Efficiency*

The TIO, in common with most industry ombudsman schemes in Australia, refers complaints back to a member to provide the member with a second opportunity to resolve the complaint. However, the review team are of the view that such an approach disadvantages complainants through creating barriers and the likelihood of complaint fatigue, and could undermine long-term trust and confidence in the TIO. The review team were concerned that during case management the emphasis of caseworkers is on procedural fairness and not, necessarily, distributive fairness. Revision of the way that casework is conducted is likely to lead to quicker resolutions and improved confidence from members and complainants in the outcomes.

### *Fairness*

As TIO casework staff make no formal assessment of what may be a fair and reasonable outcome until the decision stage it is not impossible that in some conciliated cases the outcome may not always be fair and reasonable. In the conciliation stage of the complaint handling process the focus of TIO casework staff is on procedural fairness and the review team consider that there are strong levels of procedural fairness exhibited in casework. The TIO should be congratulated on its fairness project but the review team would caution that this work is not so simplified that the purported outcome begins to lose meaning.

### *Effectiveness*

Members generally recognised the importance of systemic investigations and accepted that TIO systemic investigations helped improve the overall telecommunications system. Concern was raised by members at the number of systemic investigations conducted by the TIO. The review team did not share that

concern, and would suggest that the number of systemic investigations is not out of line with other industry ombudsman schemes. However, the TIO does commence a significantly larger number of potential systemic investigations that are closed following feedback from the member involved. Members informed the review team that each of these closed potential systemic investigations creates significant work for them which subsequently turns out to have been of little value. The review team suggests that the TIO should consider how to increase the conversion rate of potential to completed investigations.

The TIO has a role in adjudicating on specific objections relating to the construction and maintenance of low impact telecommunication facilities. It was clear from the review that there may be occasions when carriers behave inappropriately towards land owners or occupiers and yet this is not necessarily covered by the Land Access objections policy. The TIO should be able to consider complaints about carriers' behaviour in such circumstances. The review team would note that the refer-back process is inappropriate for such complaints given the timescales involved in making and resolving land access objections.

### *Accountability*

Members, consumer groups representatives and regulator representatives spoke positively of their relationships with the TIO and of the work that the TIO undertakes to engage with them. There was some concern raised by both members and consumer groups representatives about the limited nature of the data that is published by the TIO and the review team would agree that the TIO could do more in this area. The TIO could also share more information with regulators without the need for the regulators to make formal legal requests for the information.

### *Independence*

The TIO's foundational legislation, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* is now outdated and no longer reflects the roles and responsibilities of modern industry ombudsman. While not in the gift of the TIO to change the legislation, it should seek the support of other parties in the regulatory network to have this aspect of the legislation updated. In a similar fashion, the TIO's

Constitution and Charter could equally benefit from being updated to reflect modern industry ombudsmanry.

The TIO has recently consulted over which equipment, sold or provided by its members, it should have jurisdiction. The current position which allows the TIO to have very limited jurisdiction over such equipment is seen by the review team to be, at best, a holding position and one which will become redundant as the nature of the technology and telecommunications market develops. The review team suggest that the TIO adopts a similar position to that adopted by the Commerce Commission of New Zealand, which is that any equipment sold or provided to consumers by their service provider should be within the jurisdiction of the ombudsman.

All industry ombudsman need to balance a tension between its members upon which it is dependent for resources and maintaining the confidence of consumers and complainants. Maintaining this balance can be very difficult for an industry ombudsman but is essential if it is to maintain its legitimacy. The review team found evidence that in a number of areas it appears that the TIO tends to favour the interests of members over those of consumers and should take steps to reset this balance.

## RECOMMENDATIONS

### **Recommendation 1:**

The TIO should collect the socio-demographic data of its service users and use this data to inform its communications and engagement strategy.

### **Recommendation 2:**

The TIO should work with Members to agree a common approach by which members signpost complainants to the TIO and this should be reflected in the TIO's Constitution or Terms of Reference.

### **Recommendation 3:**

The TIO should develop and implement a vulnerability strategy which ensures that it can identify, and meet the needs of, vulnerable and disadvantaged complainants.

### **Recommendation 4:**

The TIO should remove the refer-back step from its complaint handling model moving straight to case management upon the acceptance by the TIO of a complaint against a Member.

### **Recommendation 5:**

TIO casework staff should collect more, and more relevant, information at the commencement of case management such that the caseworker is able to have a broad understanding of the merits of the complaint and, from this, undertake a more active role in achieving an agreed settlement.

### **Recommendation 6:**

The TIO should remove the fast-track process from its case management process.

**Recommendation 7:**

If a decision is required to be made then there should only be a two-stage-process (such as, the preliminary view and the decision). Both the Member and the complainant should be able to challenge a preliminary view.

**Recommendation 8:**

The TIO should focus on reducing the length of time it takes to close cases.

**If the TIO chooses not to remove the refer-back stage from its complaint handling process then the following recommendations (9-13) are also proposed.**

**Recommendation 9:**

At refer-back, the TIO should develop a triage system so that no complaint relating to a vulnerable or disadvantaged complainant is referred back to a member. It should also determine which other groups of complaints are not suitable for refer-back to members.

**Recommendation 10:**

The TIO should collect better information at refer-back.

**Recommendation 11:**

There should be the automatic follow up of all complaints referred back a member such as is undertaken by the AFCA.

**Recommendation 12:**

The TIO should remove reclassifications from all complaints except where the complaint is about the wrong member or is found to be out of jurisdiction.

**Recommendation 13:**

The TIO should ensure that it covers the cost of the refer-back process.



**Recommendation 14:**

During the conciliation stage of dispute resolution, caseworkers should seek to ensure that the agreed outcome is broadly fair and reasonable.

**Recommendation 15:**

The TIO should consider increasing its systemic investigation resource with a view to increasing the number of systemic investigations that it conducts each year to ensure that all justified systemic investigations are undertaken.

**Recommendation 16:**

The TIO should review how it undertakes systemic investigations with the intention of reducing the time taken to complete a systemic investigation.

**Recommendation 17:**

The TIO should amend its Terms of Reference to make clear that it can investigate complaints about a carrier's behaviour when a carrier wishes to access land under an agreement, or under the carrier's statutory powers to inspect land, maintain facilities, or install low impact facilities.

**Recommendation 18:**

The TIO should not use the refer-back process with complaints about Land Access.

**Recommendation 19:**

The TIO should ensure that the price charged for Land Access objections covers the cost of their adjudication.

**Recommendation 20:**

The TIO should expand its resource with which it is able to conduct community outreach.

**Recommendation 21:**

The TIO should review the publication of its data to address the concerns raised in this review, including increased publication about the performance of the TIO.

**Recommendation 22:**

Taking account of the importance of TIO's information to a well-functioning regulatory network, the TIO should agree with the ACCC and the ACMA what information the TIO shall provide routinely to them.

**Recommendation 23:**

The TIO should review the construct and membership of its Board.

**Recommendation 24:**

The TIO should, at least, remove the word Industry in its public facing material and also consider a more consumer friendly name.

**Recommendation 25:**

The Board and the Ombudsman should review how it manages the tension between Members and consumers to ensure that a fairer balance between the competing interests is struck.

**Recommendation 26:**

The TIO should amend its policy on complaints about equipment to bring it in line with the opposition adopted by the New Zealand Commerce Commission so that the TIO can consider complaint a about all and any equipment sold or provided by Members.

## Contents

EXECUTIVE SUMMARY .....	i
RECOMMENDATIONS .....	v
LIST OF FIGURES AND TABLES .....	3
LIST OF ACRONYMS AND INITIALISMS.....	4
CHAPTER 1. INTRODUCTION.....	5
1.1.The scope of the review.....	5
1.2 Methodology .....	6
1.3 Structure of the report.....	7
CHAPTER 2. BACKGROUND AND CONTEXT .....	9
2.1 The telecommunications industry in Australia.....	9
2.2 The telecommunications industry is undergoing rapid and radical changes ...	10
2.3 The Telecommunications Industry Ombudsman.....	11
2.4 Industry Ombudsman .....	16
2.5 Industry ombudsman and their boundaries.....	19
CHAPTER 3. BENCHMARKING THE SCHEME .....	21
CHAPTER 4. ACCESSIBILITY .....	25
4.1 Awareness.....	25
4.2 Working with vulnerable and disadvantaged individuals.....	31
CHAPTER 5. EFFICIENCY .....	35
5.1 The TIO complaint handling service model.....	36
5.2 The TIO refer-back process.....	39
5.3 Results from fieldwork .....	47
5.4 Handling of escalated cases .....	54
5.5 Reaching a decision .....	60

5.6 Timeliness of case management .....	61
5.7 The cost of TIO complaint handling .....	62
CHAPTER 6. FAIRNESS .....	65
CHAPTER 7. EFFECTIVENESS .....	68
7.1 Systemic Investigations .....	68
Identification of issues for systemic investigation .....	69
Timeliness of TIO's systemic investigations .....	73
7.2 Land Access .....	75
CHAPTER 8. ACCOUNTABILITY .....	78
8.1 Data collection and publication .....	78
8.2 Engagement with, and accountability towards the public.....	80
8.3 Engagement with, and accountability towards Members .....	81
8.4 Engagement with, and accountability to, members of the telecommunications regulatory network .....	82
CHAPTER 9. INDEPENDENCE .....	86
9.1 Legislative background to the TIO .....	86
9.2 The TIO Board .....	87
9.3 Constitution and Charter .....	90
9.4 Terms of Reference .....	92
A\$100,000 Limit .....	92
Financial redress for non-financial loss .....	93
Equipment .....	94
Additional issues .....	98
9.5 Balancing industry and consumer groups .....	100
APPENDICES .....	102
Appendix One: Biographies of the review team .....	102
Appendix Two: Organisations that made submissions to the consultation .....	103
Appendix Three: Participants in interviews .....	104
Appendix 4: Reference List.....	105

## LIST OF FIGURES AND TABLES

### Table of Figures

Figure 1: Overview of the TIO complaint handling process (TIO 2021, p.42).....	13
Figure 2: Complaints received by the TIO by service type and quarter from 2018-19 to 2020-21 (TIO 2021, p.44).....	14
Figure 3: Number of escalated complaints 2018-19 to 2020-21 (TIO 2021, p.45)....	15
Figure 4: Stages of TIO complaint handling .....	35
Figure 5: TIO's complaint case management .....	36
Figure 6: Make a complaint (TIO undated).....	47
Figure 7: Before you begin (TIO undated a).....	48
Figure 8: Complaint form (TIO undated b).....	48
Figure 9: Monthly TIO reclassification rate .....	52
Figure 10: Days to close for systemic investigations closed in 2020-22.....	73

### List of Tables

Table 1: Top ten complaint issues 2020-21 (TIO 2021, p.46) .....	15
Table 2: Location of additional review areas to individual benchmarks .....	22
Table 3: UK examples of signposting to ADR schemes (Williams and O'Neill 2021, p.57).....	30
Table 4: % of complaints referred back to a member for resolution .....	40
Table 5: Comparison of satisfaction with refer-backs and investigations in the PTOV (McBurnie and Williams 2019) .....	43
Table 6: Comparison of director arrangements in consumer ombudsman .....	88

## LIST OF ACRONYMS AND INITIALISMS

ACCAN:	Australian Communications Consumer Action Network
ACCC:	Australian Competition and Consumer Commission
ACMA:	Australian Communications and Media Authority
ADR:	Alternative Dispute Resolution
AEMC:	Australian Energy Market Commission
AFCA:	Australian Financial Complaints Authority
DRO:	Dispute Resolution Officer
EDR:	External Dispute Resolution
ERO:	Early Resolution Officer
EWON:	Energy & Water Ombudsman NSW
EWOV:	Energy and Water Ombudsman Victoria
GDP:	Gross Domestic Product
IDR:	Internal Dispute Resolution
OFT:	Offices of Fair Trading
PTO:	Public Transport Ombudsman
PTOV:	Public Transport Ombudsman Victoria
TIO:	Telecommunications Industry Ombudsman

## CHAPTER 1. INTRODUCTION

### 1.1. The scope of the review

Paragraph 22.1 of the Constitution of the Telecommunications Industry Ombudsman (TIO) requires that the TIO must commission independent reviews of the Scheme as required by legislation or when the Board considers it appropriate. This report details the findings of the five-year independent review of the Telecommunications Industry Ombudsman, undertaken by the Consumer Dispute Resolution team at Queen Margaret University, Edinburgh.

The principal matters for enquiry and report set by the TIO were to:

Assess the TIO's compliance with the Australian Government's Benchmarks for Industry-based Customer Dispute Resolution and should further include the effectiveness of the Scheme's

- Complaint handling and dispute resolution operations
- Systemic issues identification
- Complaint data and reporting
- Member and consumer stakeholder engagement and outreach activities
- Government and regulator engagement
- Modernised Terms of Reference
- Governance and authorising environment.

The TIO was clear in its Request for Proposals that a review of its complaint handling technology and funding structure were both out of the scope of this review.

#### *The Review Team*

This review was undertaken by Dr Gavin McBurnie and Jane Williams from the Consumer Dispute Resolution team at Queen Margaret University. Short biographies of the members of the review team are attached as Appendix One.

## 1.2 Methodology

The following two-phase approach to data collection was adopted:

**Phase 1:** Desk top research was undertaken by the review team. Included in this phase was a review of documents, either supplied to the review team by the TIO or obtained from the TIO's website. These documents included the following material relating to the function and governance of the TIO

- TIO's Terms of Reference and Constitution
- Annual reports
- Statistical returns
- Scheme and governance documents
- Member and consumer feedback surveys
- Approach to systemic investigations
- Staff engagement
- Service model and associated policies and guidance
- Policy documents
- Procedure documents
- Guidance documents
- Published decisions or reports
- Strategy and Business planning documentation
- Training material.

Other documents relating to good complaint handling, modern ombudsmanry, the private sector ombudsman model and the role of the ombudsman in the regulatory network were also collected, as was the collection of relevant published data, policies and procedures from broadly comparator industry ombudsman schemes.

A public consultation was undertaken between 21 March 2022 and 21 May 2022 inviting submissions from members, industry associations, consumer groups, regulators and the general public. Ten written submissions were subsequently received. The submission from the ACCAN was made on behalf of multiple organisations. Details of the submissions received is contained within Appendix Two.

**Phase 2:** One member of the review team conducted fieldwork in Melbourne. The fieldwork consisted of 39 interviews, including interviews with five representatives from consumer organisations, 12 TIO members or industry associations, two regulators involved in the regulation of the telecommunications industry, the Department of Infrastructure, Transport, Regional Development and



Communications, 13 staff and four Board Members from the TIO itself. The organisations with whom those interviews were held are listed in Appendix Three. These interviews were either undertaken face-to-face or by Microsoft Teams. Two additional telephone interviews were held with individual complainants about their experience of interacting with the TIO.

In addition to the interviews, the review team member also reviewed a total of 45 TIO casefiles, including files from the referral stage, cases at case management and complaints made by complainants against the TIO.

The reviewers are confident that all relevant information necessary for this review was collected and considered.

### *Acknowledgements*

The review team wishes to thank

- The TIO for making the necessary local arrangements for the field visit. Particular thanks go to Vicky Finn, James Patterson and Karen Pircher,
- The staff from the TIO for their time in answering questions and providing information, and,
- The many individuals from consumer groups, member organisations and other stakeholders who generously gave up their time to speak to the review team.

Their input is greatly appreciated and ensured the review team was able to come to a holistic view on the performance of the TIO.

## 1.3 Structure of the report

This report comprises three sections. This first section (Chapter 1: Introduction) provides information about the scope of the review and the methodology used in the conduct of the review. Section two (Chapter 2) provides background and context for the report. It covers the changing telecommunications (telecom) market, the private sector ombudsman and provides important background information about the TIO. The third section (Chapters 3-9) of the report reviews the performance of the TIO against the six Key Benchmarks for Industry-based Consumer Dispute Resolutions

Schemes (The Treasury 2015) as well as the specific questions identified by the TIO in its Request for Proposal.

In this report, the term ombudsman is used as both the singular and plural form of the term ombudsman.

## CHAPTER 2. BACKGROUND AND CONTEXT

### 2.1 The telecommunications industry in Australia

The telecommunications industry in Australia is valued at over A\$35 billion and in 2020 added A\$22.3 billion to Australia's GDP. The industry employs over 178,500 persons. The costs of telecommunications make up a significant element of household spending, but these costs are not evenly spread across all income groups with people in the lowest-earning 20% spending 6.2% of their income on telecommunications, while people in the highest-earning 20% spend only 2.2% of their income on telecommunications (Moskovska 2021).

Although there are a very large number of companies operating within the telecom market, this market is dominated by three businesses, Telstra, Optus and Vodafone TPG. For example, in 2021 these three companies accounted for over 90% of the market share of mobile telephone services in Australia and, since 2010, in no year has their combined market share for mobile telephone services been less than 81% of the total market (Statista 2022).

Use of telecom equipment is increasingly seen as an essential service, necessary for individuals to live full lives. Much of people's lives has moved online with mobile phones and internet increasingly essential mediums for work, entertainment, social interaction and interacting with the government: the Australian government is increasing the digitalisation of its services, thus requiring citizens to increase their online presence.

In research published by ACMA (2020, pp.36-39), it was found that while the majority of Australians appear satisfied with their mobile phone services (85%), mobile broadband services (74%), and the reliability of their telecommunication services (around 75%), these figures hide the fact that 13% of Australians had made at least one complaint with their telecom provider in the previous six months. Of those who complained to their telecom provider 30% of them were either dissatisfied or very dissatisfied with the handling of their complaint. In 34% of complaints the provider was unable to resolve the complaint in under three weeks.

## 2.2 The telecommunications industry is undergoing rapid and radical changes

The telecommunications industry is continuing to change rapidly with increases in the power and efficiency of the technology and also in the spheres of life in which it increasingly plays a role. New 'smart' products are frequently being introduced with ever increasing reach into the functions and areas of daily living.

Some Australian telecom companies are increasing their retail offering, selling a wider range of products that can be linked to their main telecommunications infrastructure. This trend is likely to continue with the development of the 'internet of things' where there is expected to be an 'explosion of connected devices' leading to 'trillions of new connected devices' (Howey 2022). It can be expected that telecom companies will increasingly enter the market to sell 'smart equipment'. It was reported to the review team that some telecom companies now state that they are in the technology business and not the telecom business which, if accurate, indicates a potential reorienting of parts of the industry.

These new developments in the market, are often not subject to the same requirements or regulation as traditional telecom services and consumer protections are likely to be less developed. Speaking of the similarly rapid changes in the energy sector, the Chair of the AEMC, John Pierce (2019), stated,

'We have recommended jurisdictional action to improve consumer protection for some years and this job is fast becoming absolutely essential, ... These market shifts are happening so rapidly that consumer protections that fully take into account all the issues associated with this new technology are yet to be devised or available.'

A similar picture is increasingly existing within the rapidly changing telecom market.

There is also increasing convergence within the telecommunications market: telecom companies are beginning to enter the energy market and energy companies are entering the telecom market. The Commonwealth Bank of Australia has entered the telecom market through provision of broadband to its banking app customers (Commonwealth Bank 2022) while, for example, the supermarket Coles has started selling mobile phone and data plans (Coles 2022).

Covid-19 has had a major impact on the use of telecommunications. During lockdowns there was a large increase in home-working and it is clear that the return to 'normal' office working is unlikely, with some form of hybrid working being a key feature in many future workplace scenarios. During lockdowns people also increased their online presence for personal reasons whether shopping, for entertainment or other reason. While there might be some return to previous behaviours it is likely that one consequence of the covid pandemic will be a permanent increase in the use by individuals of technology.

An important need for telecommunication companies in this rapidly changing environment is to maintain their social license to operate, which refers to 'the level of acceptance or approval by local communities and stakeholders of organisations and their operations' (Learning for Sustainability 2019). Adverse media coverage affecting the industry, such as the telecom mis-selling scandals (Ferryhough 2019) negatively impacts companies' social license to operate and the loss of a social license to operate is possible. For example, in the United Kingdom's energy market, the risk to energy companies of the loss of their social license to operate is very real with opinion polls consistently showing majority public support of renationalisation (Chaplain 2021).

## 2.3 The Telecommunications Industry Ombudsman

Upon its establishment in 1993, the TIO was an international first: the first national industry ombudsman (Stuhmcke 2002). Over time, the jurisdiction of the TIO has grown to match the increasingly competitive Australian telecom market, such that by 2002 the TIO was seen to be a 'cornerstone in the [telecommunications] regulatory process' (Stuhmcke 2002, p.70).

The TIO states that its 'purpose is to provide fair, independent, and accessible dispute resolution services and improve outcomes for consumers and members' (TIO 2021). This purpose is further articulated with five strategic goals:

- Work with our members to reduce complaints and improve practices,

- Leverage the power of our people to strengthen our capability and performance,
- Create a great consumer and member experience,
- Expand services with innovative solutions and technology, and,
- Use data and insights to influence policy and shape public debate. (TIO 2021)

Figure 1 below provides an over view of the TIO's complaint handling process. Once a complaint returns from a TIO member as unresolved and is accepted by the TIO for action it is termed as an escalated complaint. In 2020-21, the TIO made 120,035 referrals back to members, 2,812 fast-track referrals (where complaints are referred back to the member for a second time)<sup>1</sup>, considered 13,859 escalated complaints (complaints accepted by the TIO for resolution) and 26 land access complaints (TIO 2021a).

---

<sup>1</sup> The figure for fast-track referrals used in this report is the figures published in the TIO's published Financial Report. The review team has since been informed by TIO staff that this figure relates not only to fast-track referrals but also includes other cases, such as the remittance of batched unresolved complaints to Members. The review team was informed that the correct number for fast-track referrals was 1,956 notifications resulting in 1,568 closures.

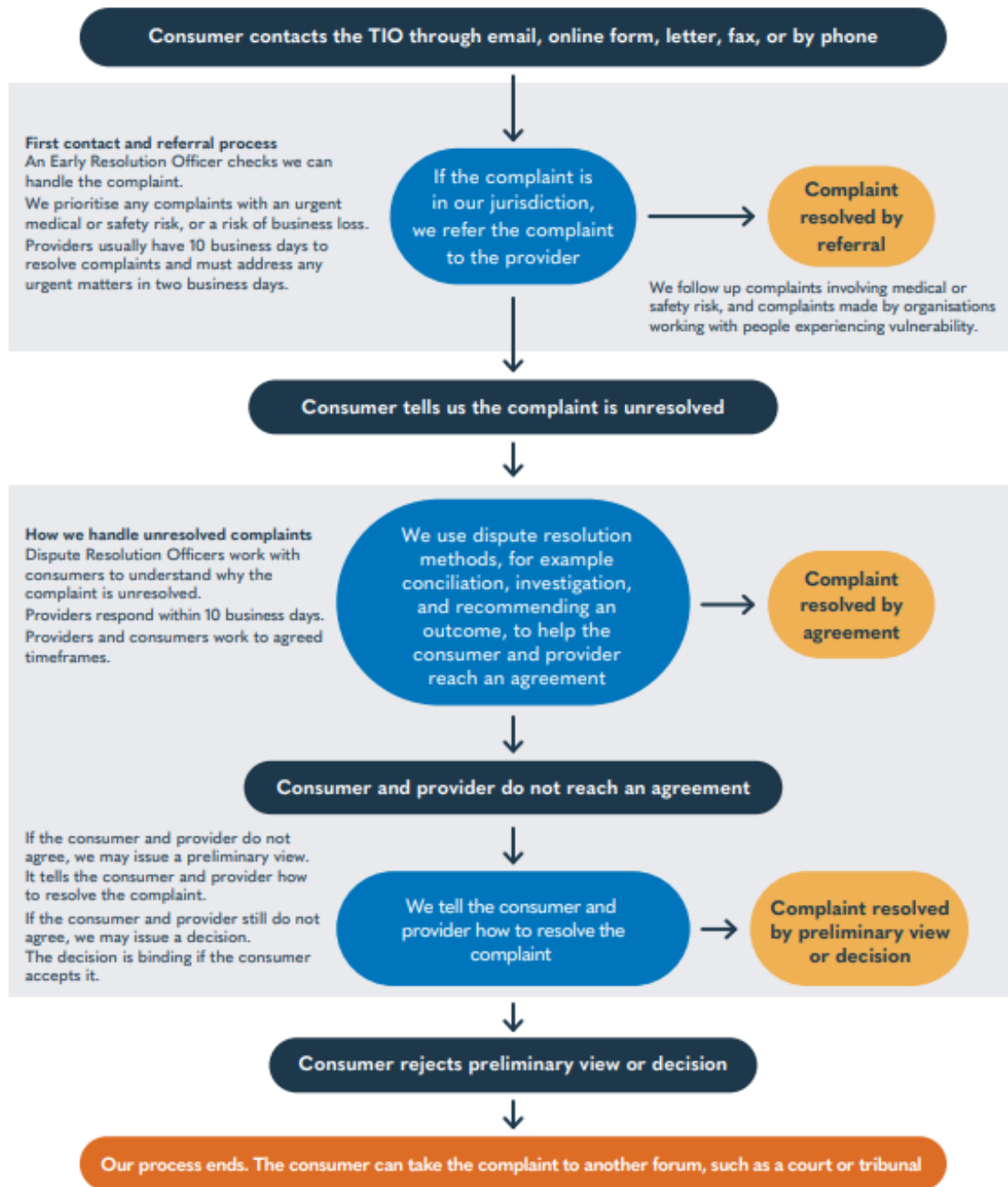


Figure 1: Overview of the TIO complaint handling process (TIO 2021, p.42)

Figure 2 below provides information on the number of complaints received by the TIO by service type and quarter from 2018-19 to 2020-2021:

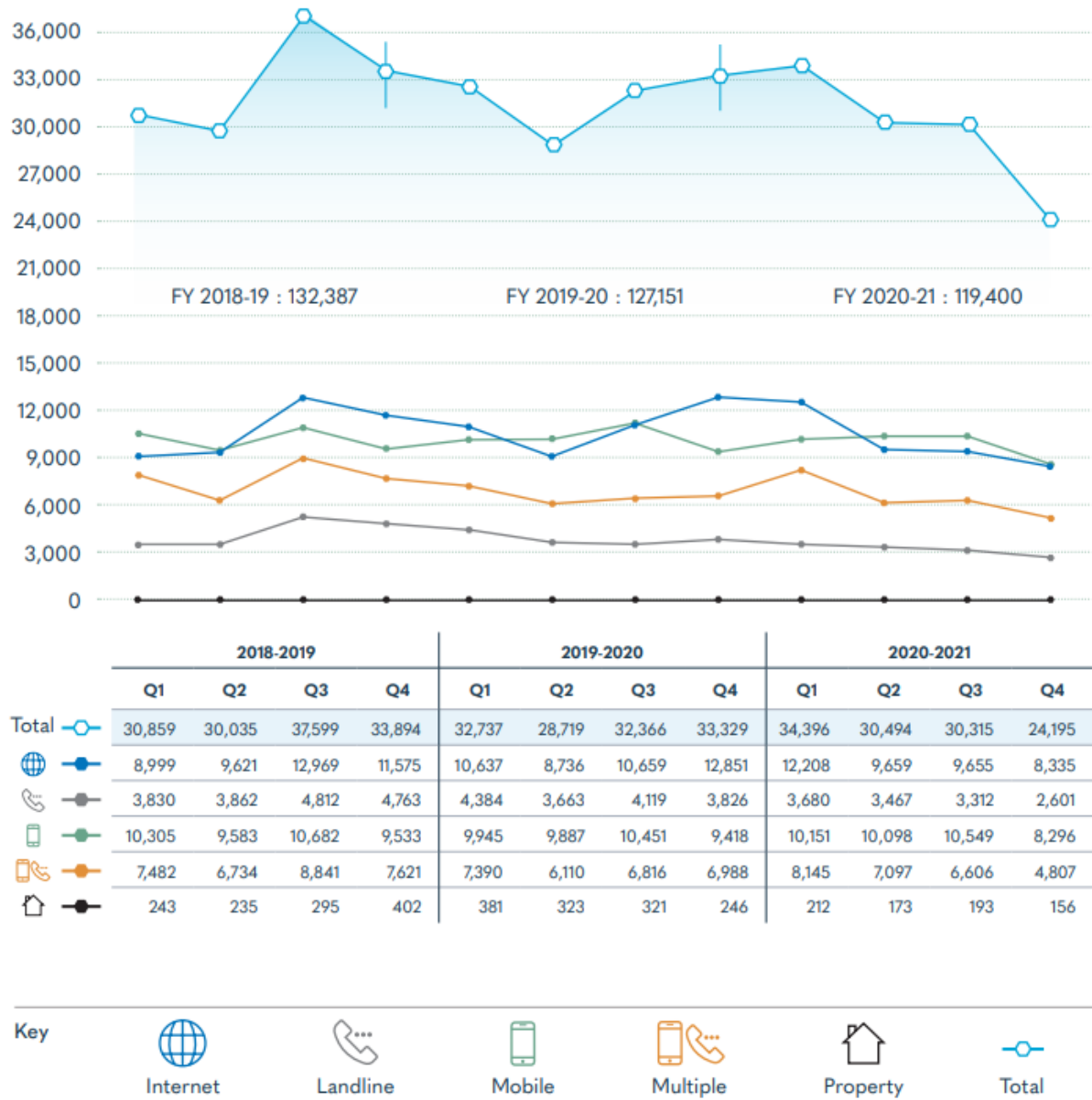


Figure 2: Complaints received by the TIO by service type and quarter from 2018-19 to 2020-21 (TIO 2021, p.44)

These complaints received by the TIO translate into the following numbers of escalated complaints, Figure 3 below:



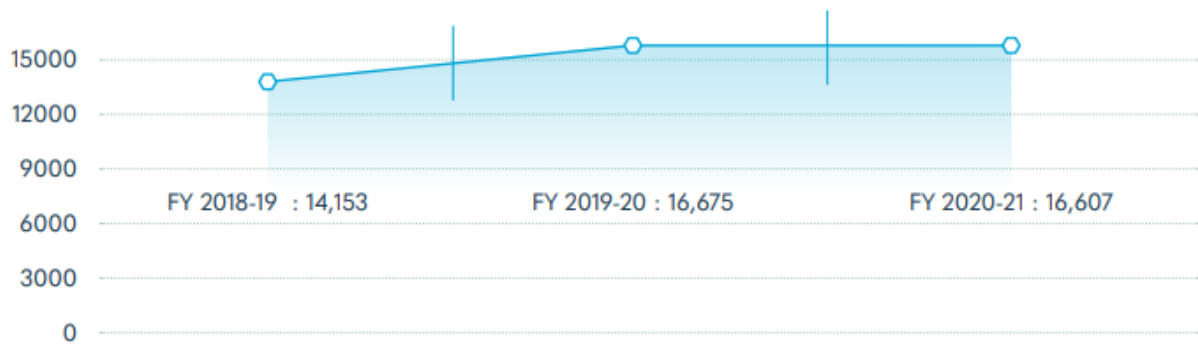


Figure 3: Number of escalated complaints 2018-19 to 2020-21 (TIO 2021, p.45)

The top ten issues contained within the complaints received by the TIO are detailed in Table 1 below:

Complaint Issue	2019-20	2020-21	2020-21 % of total	Change from 2019-20
No or delayed action by provider	41,669	46,533	39.0%	11.7%
Service and equipment fees	42,152	39,584	33.2%	-6.1%
No phone or internet service	17,501	15,593	13.1%	-10.9%
Delay establishing a service	17,347	14,170	11.9%	-18.3%
Intermittent service or drop outs	11,789	10,913	9.1%	-7.4%
Resolution agreed but not met	13,259	10,275	8.6%	-22.5%
Provider uncontactable	4,672	8,800	7.4%	88.4%
Failure to cancel a service*	6,753	8,775	7.3%	29.9%
Slow data speed	8,721	7,122	6.0%	-18.3%
Service problem with add-on feature eg email, call waiting, alarm etc failure	2,079	4,344	3.6%	108.9%

Table 1: Top ten complaint issues 2020-21 (TIO 2021, p.46)

The TIO has over 1,500 members (TIO 2021). In 2021, complaints about ten TIO members accounted for approximately 93% of all complaints received by the TIO while the TIO received complaints about only approximately 25% of its membership (TIO 2021). Over 86% of complaints received by the TIO are about its three largest members (TIO 2021, p. 54). Approximately 75% of escalated complaints received by the TIO are residential complaints while the remainder of the escalated complaints are complaints brought by small businesses (TIO 2021).

The TIO was held to be a predominantly reactive complaint-handling body, funded by industry but established under government regulation. In this privatised telecommunications industry, the TIO became the only means for a consumer to resolve a complaint other than by using private law (Stuhmcke 2002). One feature of the Australian regulatory system is its preference for avoiding 'adversarial encounters with industry' which are undertaken only as an action of last resort (Stuhmcke 2002). This approach, utilised also by the TIO, is predicated on the basis that businesses within their jurisdiction are seen, in the main, as socially responsible and eager to be seen as law-abiding (Stuhmcke 2002, p.74). Stuhmcke (2002) goes on to argue that this conciliatory approach is 'quintessentially' that of an ombudsman, which should pursue all possible non-litigious avenues as a requirement of its neutrality. This conciliatory approach is reflected in the TIO's complaint handling figures: in 2020-21 the TIO received over 16,000 unresolved complaints for consideration and, from that number, made only 378 preliminary views and 11 decisions (TIO 2021).

## 2.4 Industry Ombudsman

Speaking in the context of the European energy market, the Mediterranean Energy Regulators (2018, p.5) argue that consumer protection is seen as a core responsibility of an ombudsman. It contends that customers in the energy market are likely to be disadvantaged towards service providers due to an inequality in their knowledge and resources. Accordingly, 'The availability to household customers of effective means to address their complaints and to have access to efficient, effective and inexpensive means of dispute resolution is a vital and incontrovertible characteristic of a functioning energy market' (Mediterranean Energy Regulators 2018, p.5). Where complainants do not have access to 'efficient, effective and inexpensive means of dispute resolution', exacerbated by a low awareness among consumers of their rights, this should be seen as indicative of a malfunctioning market and of a significant imbalance between the rights and obligations of consumers and service providers (Mediterranean Energy Regulators 2018, p.5). The

review team suggest that this position applies equally to the Australian telecom market.

The former Commonwealth Ombudsman Colin Neave (2014) said of public sector ombudsman:

‘There are some people, both in the government and the community, who think that all the Ombudsman does is to handle complaints, ... This is a very narrow view and falls dramatically short. In fact, it is a very old-fashioned notion.

In reality we are leaders in building better public administration. We have a critical place between government and the public, and we are a safety net for members of the community. ... We promote good governance, accountability and transparency through oversight of government administration and service delivery.’

Neave (2014) continued that they achieve this through the consideration of individual complaints, systemic investigations, the feedback of data to organisations and other relevant agencies, and their presence acting as an incentive to organisations to improve the services that they provide to their customers.

While Neave was speaking about the public sector ombudsman and public administration, one can easily see how this applies equally to industry ombudsman. Replace ‘government’ with ‘industry’ and ‘public administration’ with ‘industry practices’ in the above quote and it remains true and equally applicable. A modern industry ombudsman is not simply an individual complaint resolver, it has broader responsibilities which help it in its role to support the maintenance of an effective telecom market.

As with changes in the telecommunications industry, there have been changes in ombudsmanry and it would be an error to believe that the only function of a modern industry ombudsman such as the TIO is to primarily resolve complaints. Over time the functions of consumer ombudsman have increased to include consumer advice (providing information to consumers), dispute resolution, the aggregation of data from each contact to provide an understanding of ‘trading conditions, infringements, traders and trends’, the publication of aggregated data as feedback to members, and ‘information to consumers, competitions, regulators and investors, to support the maintenance of a level and fair market place’, and improving market behaviour

through mechanisms such as publication of information or referrals to regulators (Hodges 2018, p.57).

This modern role becomes a number of functions that a modern ombudsman service delivers:

- To provide independent resolution of disputes arising from contracts and transactions between consumers and private businesses
- To provide a strict alternative to the use of the courts and, additionally, to provide an equitable jurisdiction to provide additional consumer protection
- To provide advice and assistance to consumers in relation to their disputes, reducing the need for representation
- To equalise the balance of power between parties and identify, and provide special assistance to, the most vulnerable consumers to facilitate their access to redress
- To help consumers whose complaints are not valid understand why that is the case and help them move on from their dispute
- To raise standards amongst bodies subject to investigation by feeding back lessons that arise in decisions
- To enhance consumer confidence and trust in the sectors subject to investigation (Gill and Hirst 2016, p.3)

To this list can be added the role of 'expectations management' which involves caseworkers 'reshaping consumers' perceptions of their disputes in such a way that they feel able to move on' (Gill and Hirst 2016, p.21). This is deemed necessary when there is a gap between the caseworker's professional analysis and the consumer's expectations (Gilad 2008). To be able to deliver this role, caseworkers require additional skills to those historically thought necessary: caseworkers were seen to require investigative and analytic skills, but Gilad (2008) suggests that, to be effective, caseworkers also require sensitivity to complainants' emotions and communication skills to manage these emotional sensitivities. Gilad (2008, p.249) argues that,

'What is at stake for complainants is not just financial or physical loss, but recuperation for their identity as responsible and worthy citizens. Complainants want to be heard, understood, taken seriously, offered satisfactory explanation, and responded to with respect.'

Increasingly, ombudsmen are viewed as experts in the complaints system and, as such, are able to assist the improvement of the complaint system at all levels. For example, in a review by Lucerna (2015) of a UK industry-based ombudsman, Ombudsman Services: Energy, Lucerna stated that Ombudsman Services: Energy

had three roles: individual complaint handling, improving complaint handling by energy firms, and, identifying systemic industry wide issues. Lucerna (2015, p.43) encouraged Ombudsman Services: Energy to undertake greater activity in helping energy firms improve their complaint handling claiming that by doing so this “has the potential to drive significant benefits for all consumers – those who complain, those who complain initially but do not pursue their claim to the ombudsman, and those who never complain”. The review team support this view and would suggest that industry ombudsman are at the apex of the complaints system over the industry(ies) for which it has jurisdiction. This is due in part to their position as final decision-maker but also includes their ability to oversee the whole complaints system, their expertise in complaint handling, and their ability to learn from other complaint systems.

## 2.5 Industry ombudsman and their boundaries.

Industry ombudsman have a wide range of stakeholders including members, complainants, other regulators and government, and other ombudsman schemes. To maintain their legitimacy, and even survival, industry ombudsman need to be clear about how they interpret and explain their roles to these multiple stakeholder groups, each of which will have different expectations or demands. To do this successfully, industry ombudsman need to manage their boundaries, or domains, with each of these differing groups of stakeholders (Gilad 2008). Gilad (2008) identifies four key sets of domains that an industry ombudsman must successfully manage if it is to retain its legitimacy. These four domains relate to members, complainants, other bodies in the regulatory sphere, and, lastly other ombudsman.

Industry ombudsman are reliant upon their members for their resources. Gilad (2008) identified that where such circumstances exist, there is a risk that the ombudsman can be subject to regulatory capture which may result in more lenient regulation or the ombudsman adopting a pro-industry stance. Counterbalancing this risk are the expectations of citizen-consumers. Should industry ombudsman ignore the expectations of citizen-consumers then they risk adverse political and media scrutiny. As such, industry ombudsman require both their members resources and

support as well as the confidence of the public, resulting in a tension between both sets of stakeholders. Industry ombudsman need to secure a legitimate compromise between both those competing sets of stakeholders.

In addition to maintaining this legitimate compromise, industry ombudsman face potential competition from other regulators and agencies within their institutional area. This competition results in an attempt by industry ombudsman and regulators to secure exclusivity for their roles and responsibilities. This is of interest to the TIO for, as well as needing to maintain effective boundaries and relationships with other bodies such as the ACCAN, ACMA and the Comms Alliance, with the increasing convergence that is happening within the telecoms industry there is the potential for new competitors for its roles and responsibilities to arise, such as from energy and water ombudsman.

The last remaining boundary for industry ombudsman to manage is with its peer organisations – such as other industry ombudsman or public sector ombudsman. Legitimacy securing organisations will be influenced by the normative expectations of their peers and will thus draw upon the accepted beliefs and ideas within their own networks and professional groups. This can create a tension between what an industry ombudsman needs to do to manage its own area of responsibility and the expectations or even requirements of its professional networks (Gilad 2008).

An industry ombudsman needs to take the time and effort to manage each of these boundaries. Should any of these boundaries fail then the legitimacy and survival of the industry ombudsman is placed at risk.

## CHAPTER 3. BENCHMARKING THE SCHEME

### 3.1 Background

In writing this section, the review team is aware of the detail contained within the Key Practices for Industry-based Consumer Dispute Resolution (The Treasury 2017a). The focus of the section is however on the key issues identified by those who responded to the public consultation, took part in the interviews with the review team, or by the review team itself as a result of its fieldwork.

Many contributors to this review, either through the public consultation or in the interviews, stated that they saw the TIO as an important player in the resolution of complaints and within the telecommunications industry regulatory system. That does not mean that they were without criticism of all that the TIO does or how the TIO undertakes some of its functions – as will be seen, in some areas, contributors suggested that there was room for improvement. Rather, the view was that, holistically, contributors recognised the importance of the work that the TIO undertook and the benefits that were achieved. Comments such as, the TIO does ‘great work’, the TIO is ‘an important, effective EDR scheme’, ‘we’re glad that the TIO exists,’ the ‘TIO is a critical part of the consumer protection framework’, and ‘we emphasise our general support of the TIO and for the TIO’s stated goal and purpose, were made in support of the TIO’.

Where individual elements within each key practice are not mentioned in this section, this does not mean that they were ignored by the review team but, rather, that the review team had no concerns that merited inclusion in the report. This allows the TIO and readers to focus on the key concerns raised through the fieldwork. While this will result in a slightly ‘lopsided’ report, it should not be read as meaning that the TIO is a failing organisation with no examples of good practice.

The review team was tasked by the Board of the TIO to assess the compliance by the TIO scheme with the Australian Government’s *Benchmarks for Industry-based Customer Dispute Resolution* (which include accessibility, independence, fairness, accountability, efficiency and effectiveness), and should further include the effectiveness of the Scheme’s:

- Complaint handling and dispute resolution operations
- Systemic issues identification
- Complaint data and reporting
- Member and consumer stakeholder engagement and outreach activities
- Government and regulator engagement
- Modernised Terms of Reference
- Governance and authorising environment

In compiling this report these additional areas are included within the section for the relevant benchmark: see Table 2 below:

Issue	Benchmark
Complaint handling and dispute resolution operations	Efficiency
Systemic issues identification	Effectiveness
Member and consumer stakeholder engagement and outreach activities	Accountability
Complaint data and reporting	Accountability
Government and regulator engagement	Accountability
Modernised Terms of Reference	Independence
Governance and authorising environment	Independence

Table 2: Location of additional review areas to individual benchmarks

One issue that arose several times within the review but was not within the scope of this review is the issue of the convergence of the market and the implication that this raises for the TIO's boundaries with other ombudsman such as energy and water ombudsman. It was noted in the Introduction that one change that is occurring within the telecommunications industry is for telecom companies to enter the energy market or for energy companies to enter the telecom market. One consequence is that people may receive aggregated services and bills. When a dispute occurs confusion may arise about which is the appropriate ombudsman service for a consumer to approach leading to consumers approaching the wrong ombudsman



causing them frustration or, in the worst case, an attempt by consumers at forum shopping. This is not considered by the review team to be an immediate problem for the TIO but will need careful consideration by its board of the new types of relationships that will need to be established with other ombudsman schemes over the coming years.

### 3.2 Effective complaint handling

There appears to be a general consensus that effective complaint handling brings benefits to companies, including:

- Increased customer trust, confidence and satisfaction,
- Increased loyalty,
- Helping organisations to understand and manage consumer expectations,
- Early warning of possible problems; • reduction of repeat complaints,
- Increased employee satisfaction and engagement,
- Enhanced reputation, and,
- A reduction on costs of dealing with complaints (Williams et al. 2018)

In an inquiry report on access to justice arrangements in Australia, Ernst and Young are cited as claiming that an unresolved complaint costs a business around A\$720 (Productivity Commission 2014, p.337). Effective complaint handling is seen to reduce these complaint costs.

There are a number of factors that have been identified as underpinning an effective complaint handling service which should:

- Be customer focused
- Be free, simple and easy to use (with as few barriers as possible)
- Be clearly communicated, and understood by all involved
- Be responsive, timely and flexible
- Be objective, impartial and fair
- Be proportionate and consistent
- Be open and accountable
- Put things right so far as possible
- Seek early resolution
- Deliver continuous improvement (Williams et al. 2018)

It is against this conceptual framework that the review team assesses the TIO's performance against the industry benchmarks.

## CHAPTER 4. ACCESSIBILITY

The focus of the report in this section is public awareness of the TIO and the TIO's work with vulnerable and disadvantaged individuals.

### 4.1 Awareness

For an ombudsman scheme to be effective to all consumers, irrespective of their background or needs, then consumers need to be aware of the ombudsman's existence and believe that its services are easy and simple to use. This requires additional understanding from those working in ombudsman offices towards those from a disadvantaged or minority background or who are otherwise vulnerable (Beqiraj et al. 2018, p.16, Brennan et al. 2017). Ombudsman offices need to be aware of any particular additional needs of whatever type, exhibited by service users, at every stage of the complaints process (Beqiraj et al. 2018, p.16).

Australian ombudsman schemes generally suffer from low awareness (Productivity Commission 2014). In its previous reviews of Australian and New Zealand industry ombudsman schemes, Queen Margaret University found variable levels of public awareness of the ombudsman schemes under review. The levels of public awareness of Utilities Disputes Limited were 6% for unprompted awareness and around 18% for prompted awareness of the scheme (McBurnie and Gill 2017, p. 17). For the Public Transport Ombudsman, Victoria the figures were unprompted awareness, around 10% and prompted awareness, around 50% (McBurnie and Williams 2019, p.28). Finally, for the Energy and Water Ombudsman New South Wales (EWON), the comparable figures were 10% for unprompted awareness of EWON and 30% for prompted awareness (McBurnie and Williams 2019, p. 28).

An independent Kantar survey conducted on behalf of the TIO in 2021 found that the TIO's unprompted awareness figure was 34% with its prompted awareness at 75%. The TIO secured even higher figures of awareness among small businesses with the awareness figures at 51% and 86% respectively. These figures are, in general, (accepting methodological differences) consistent with those included in the ACCAN

submission to this review which found that 62% of respondents to a survey had some level of awareness of the TIO.

During the interviews undertaken as part of the fieldwork for this review, there was a difference of opinions from interviewees about the level of public awareness of the TIO. Participants from TIO member organisations informed the review team that consumers who contacted their customer services team frequently mentioned the TIO and were, generally, of the opinion that there was reasonably good public awareness of the TIO. Consumer groups, though, reported greater concerns about the level of public awareness of the TIO feeling that it needed to be boosted.

This difference in view is likely to reflect different populations. The views of TIO members will have been shaped by the generality of their complainants and people using their customer services. The consumer groups, however, tend to work with more disadvantaged and vulnerable groups in the community. Indeed, one consumer group specifically mentioned that there was low awareness of the TIO among Culturally and Linguistically Diverse (CALD) populations while another consumer group representative informed the review team that their clients, who would tend to be financially vulnerable, also had low levels of awareness. This finding is unsurprising as other research indicates that vulnerable and disadvantaged groups are less likely to be aware of, and use, third-party dispute resolution schemes (see Hubeau 2019, Productivity Commission 2014, Hertogh 2013). Thus, while overall levels of awareness of the TIO scheme appear relatively high, it is likely that there are some population groups in which the level of public awareness is much lower.

An effective complaints process should be designed in such a way as to meet the needs of complainants. In order to do this the complaint system needs to identify who are its users and potential users and ask them what it is that they expect from the complaint system. Hubeau (2019, p.270) cites research which demonstrates that the perception by ombudsman staff of its service users does not match the profile of actual service users. Collecting socio-demographic data on users is important for industry ombudsman as it allows them to, both, ensure that service users are representative of those who need its services and to speak authoritatively on issues affecting under-represented and disadvantaged groups. In addition, where the data

indicates that service users are not representative of those who needs its services, it allows industry ombudsman to undertake more targeted awareness raising activities.

Hubeau (2019), therefore, highlights the need for ombudsman schemes to collect socio-demographic data on its service users. DJS research (2016) found that, in the UK, very few Alternative Dispute Resolution (ADR) schemes gathered socio-demographic information about complainants, nor asked them (or other potential complainants) what services they needed from the ADR scheme and how these might best be provided. It is the experience of the review team that in Australia and New Zealand, ADR schemes also do not systematically collect socio-demographic data on their users. While the TIO's Kantar survey did collect some data involving socio-demographic factors, this information was obtained for a general awareness survey and is not necessarily indicative of all users. The TIO does not systematically collect socio-demographic data about its users. Therefore, it cannot be certain that there are not gaps among its service users or that some user groups are under-represented.

The review team recognises that this can be a sensitive area of questioning for vulnerable and disadvantaged groups who may wish to submit a complaint, as it may raise concerns that, if they provide the 'wrong' answer, their complaint will not be considered appropriately. It is, nonetheless, important that the TIO consider how best it should collect this information. This would allow it to conduct targeted awareness raising campaigns on those groups under-represented among its service-users.

To help resolve any lack of awareness among vulnerable and disadvantaged populations, there was a call from consumer groups for the TIO to conduct more targeted, outreach activities. A repeated view was that these targeted outreach activities should be focused on rural, remote areas where individuals often become aware of the TIO through financial counsellors or community legal centres. Another priority area for increased targeted outreach activity would be with First Nation populations and other vulnerable or disadvantaged groups. An increased use of social and other media was suggested as means by which the TIO could deliver targeted outreach messaging. There was also a suggestion that the TIO could partner with other organisations to facilitate its outreach activity.

The TIO does undertake a range of activities to promote awareness of its schemes including a limited number of media releases, blogs on its website, Facebook, YouTube and LinkedIn, all of which are noticeable for their use by older members of the public (Hubeau 2019) and which may contribute to the finding in the Kantar report that there were higher levels of awareness of the TIO among older populations. Hubeau (2019, pp. 274-275) discusses the trend by ombudsman to increase their use of social media to promote both their existence and their activities. There are forms of social media such as podcasts, Twitter and TikTok currently not used by the TIO but which may be useful for it to broaden its reach. For young adults TikTok and Instagram are becoming increasingly important as means of obtaining news and information (Eddy 2022).

Newspapers and trade journals do report on outputs from the TIO such as its quarterly complaints' report. One issue for the TIO is to produce material that is not only likely to be of interest to the media but is also produced in a format which enables a media outlet to use it with ease. One ombudsman office, known to the review team, when publishing a report will produce an associated media pack which enables journalists to report the story with minimal effort.

The TIO's previous independent review cited the TIO's 2015-16 Annual Report as reporting that the TIO had undertaken 43 outreach activities in that year but that this figure had dropped to 10 the following financial year (Cameron, Ralph and Khoury 2017). The TIO makes great effort to engage with members of the community and community groups but covid has required some change in how it conducts these activities. In 2019-20, pre-covid, the TIO undertook 17 in-person events with community groups or at community group conferences. The TIO would also attend Bring Your Bills days. In the 2021-22 financial year, the TIO undertook 34 events reaching over 100 community organisations. In 2022-2023, with the easing of covid restrictions, the TIO plans to conduct some 16-25 in-person events with community groups. Following the recent series of natural disasters which has befallen Australia, the TIO has started working in partnership with other agencies. This complements the TIO's joint work with other ombudsman schemes.

As a result of the covid pandemic, some of the TIO's engagement activity with community groups moved online. The TIO commenced a series of webinars aimed at community groups and typically runs several webinars each month. These webinars were originally generalist in nature but the TIO is now starting to receive requests from community groups for more bespoke webinars of material particularly relevant to them. The TIO produces a monthly eNewsletter for community groups.

At the time of the interviews, the review team was informed that the TIO was undertaking the development of a revised communications and engagement strategy. Elements under consideration for inclusion within the strategy did involve an increased use of social media and working with other organisations, particularly those organisations that had strong relationships with diverse populations. It is correct that the TIO should focus its awareness raising activities on those more disadvantaged and vulnerable populations. There was a clear call from consumer group representatives for the TIO to undertake more in-person events in rural, remote areas and with First Nation populations and the TIO should respond to these calls.

In some jurisdictions, signposting to ADR has emerged as an important issue in relation to transparency and raising awareness (Williams and O'Neill 2021). Good signposting can enable people to be aware of the TIO when they have a need to use the TIO. Effective signposting can also play an important role in ensuring that the complaints that reach ADR are not premature and are within jurisdiction. In the UK, regulators often include specific requirements relating to signposting (Williams and O'Neill 2021).

There are three possible points at which signposting can take place: as part of the published complaint procedure before any complaint is made, at the time the complaint is submitted, and, finally, at the point the complaint is concluded or remains unresolved. The requirements by UK regulators are shown below in Table 3:

	ORR	Ofgem	Ofcom	FCA	Legal Services	Ofwat/CCW
As part of published complaint procedure	No <sup>153</sup>	Yes	Yes	Yes	Yes	No <sup>154</sup>
At time of complaint	No	No	No	No	No	No
At eight weeks or final decision reached (whichever is the <u>earlier</u> )	Yes	Yes	Yes	Yes	Yes	Yes

Table 3: UK examples of signposting to ADR schemes (Williams and O'Neill 2021, p.57)

As shown in Table 3, all regulators require information regarding the ADR scheme to be included within the published complaint handling information. In some schemes, the information must also be included in bills or at the point of entering a contract (legal services for example). Service providers must also signpost complainants to the relevant ADR scheme at the conclusion of the complaints process. The Key Practices for Industry-based Consumer Dispute Resolution does state that members should inform complainants about the TIO when responding to the complaint (The Treasury 2017a, pp7-8) and the *Telecommunications (Consumer Complaints handling) Industry Standard 2018* also makes clear that members should provide information regarding the TIO.

Unlike other industry ombudsman schemes, in neither its Constitution nor its Terms of Reference does the TIO require members to include information about the TIO in its provision of information to complainants, presumably relying on the Industry Standard to encourage members to comply. This compares with the constitution of EWON which makes clear that member organisations must operate and publicise an effective complaints process, including the provision of information about EWON (EWON 2020, para 5.1).

The TIO should work with its members to agree a common approach to promoting an effective complaints system for telecom complaints and amend its Constitution or Terms of Reference to require members to operate and publicise an effective complaints process, including the provision of information about the TIO. It should,



further, amend its Terms of Reference to include its ability to consider the complaint handling of members when resolving complaints brought to it by complainants and to award non-financial compensation for egregiously poor complaint handling that is non-compliant with the *Telecommunications (Consumer Complaints handling) Industry Standard 2018* (see Benchmark: Independence)

## 4.2 Working with vulnerable and disadvantaged individuals

Consumer group representatives raised particular concerns about the TIO's handling of complaints from vulnerable and disadvantaged individuals. One consumer group stated that CALD communities had low levels of trust in the TIO while another consumer group representative informed the TIO that some consumer advocates actively avoided going to the TIO with complaints preferring, instead, to use the Members' own internal dispute resolution teams for complex complaints, as they claimed these teams had a better and fairer understanding of consumer vulnerability. There was a view from several consumer groups that TIO staff did not always recognise a vulnerable or disadvantaged complainant and suggested that TIO staff undergo specific training in working with vulnerable and disadvantaged complainants. It was also suggested that there should also be specialist staff or teams within the TIO to deal with complaints from vulnerable and disadvantaged complainants and complaints from vulnerable and disadvantaged complainants should also be prioritised for early resolution.

There are many definitions of vulnerability but the UK Competitions and Markets Authority (2019) defines consumer vulnerability as 'any situation in which an individual may be unable to engage effectively in a market and, as a result, is at a particularly high risk of getting a poor deal'. In research for the Australian Energy Regulator, O'Neill (2020, p.5) found that one in five national helpline users were experiencing mental health problems, one in five people in Australia speak a language other than English at home, one in six Australian women have experienced physical or sexual violence, one in five Australians have a disability, 44% of Australians have low levels of literacy, and two in three Australians experience some

level of financial stress. These figures highlight that a large proportion of Australians are disadvantaged and may be vulnerable at any particular point in time.

But these categories, described by O'Neill above, simply describe people who are disadvantaged and, as a result, can be vulnerable in specific situations. But disadvantage is not necessarily the same as vulnerability. Vulnerability is often about the situation which an individual faces at any particular time and not about the individual. For example, in relation to legal services, a very specialist, technically complex area, people with no or minimal disadvantages may, nonetheless, still be vulnerable. The rapid change in technology may create vulnerability in an otherwise non-disadvantaged individual. Therefore, there is a need for the TIO to consider both vulnerability arising from disadvantage and situational vulnerability (see Brennan et al. 2017).

It is essential that ombudsman encourage consumers to submit complaints should they have a legitimate grievance. Ombudsman need to appreciate that some individuals or groups will find submitting a complaint challenging. Such groups might include the young or elderly, people with a disability, people with a mental illness, people from a CALD background or are isolated for whatever reason. Complaint systems need to be aware of the additional challenges vulnerable and disadvantaged groups face and develop systems which can quickly identify such people and, are then able to provide a service which makes reasonable adjustments to meet their needs. Potential tools to mitigate the challenges facing vulnerable and disadvantaged people include, but are not limited to, organisations undertaking vulnerability impact assessments, focusing on good inclusive product or service design, the identification of, and provision of support to, customers in vulnerable circumstances, the proactive identification of vulnerable and disadvantaged customers, and the provision of accessible, flexible, tailored services (O'Neill 2020).

It is good practice to ensure that complaints can be submitted and considered in a manner that meets the needs of complainants and may include:

- Complainants can contact the ombudsman through as many different channels as possible such as over the phone, in person, in writing by letter, email, fax or online form or web-chats

- Complaint literature is provided in plain language, and other relevant commonly used languages and other accessible formats
- Translation services are readily available
- Support to people making a complaint is available either by the organisation itself or the complainant is supported by an advocate. (Vivian, O'Neill and McBurnie 2018, p.22).

Together, this means making easily available information about the complaints system in a wide range of formats, including but not limited to, large print, braille or audio format, Auslan, videos, information sheets in a range of languages suitable for the population covered, Makaton or diagrammatic form. In addition to providing information in a range of formats, the complaint system should allow access to it via a range of means, for example, in person, by phone, in writing, email, online forms, and letters. Once an individual has accessed a complaints system staff need to be able to identify those who have additional needs and to be able to work with them to establish how best they may be served.

The TIO does provide specific training to staff in the area of vulnerable complainants. All Dispute Resolution Officers (DROs) would, as part of its General Certificate in Dispute Resolution (Industry) course, undertake a module entitled 'Diversity' in which the DRO is trained in identifying the diverse groups and cohorts that contact the TIO, identify factors that may limit their access to the TIO, and provide the DRO with inclusive strategies to enable dispute resolution for all parties, and understand the Dispute Resolution Officer's role in managing disputes where vulnerability is established (TIO 2018). In addition, all casework staff are required to undertake an online training module on vulnerable consumers provided by Frameshift. This training is of very high quality but may not be, in itself, sufficient for the TIO to discharge all its responsibilities to vulnerable and disadvantaged complainants. For example, in its submission, ACCAN suggested that the TIO,

'should continue to improve staff awareness and understanding of vulnerability, as well as improving quality systems and processes to ensure that vulnerability is identified, and barriers faced by people experiencing vulnerability are removed. It could do this by developing a comprehensive Vulnerability Strategy, which meets or exceeds the recently completed international standard on inclusive service delivery.'

**Recommendation 1:**

The TIO should collect the socio-demographic data of its service users and use this data to inform its communications and engagement strategy.

**Recommendation 2:**

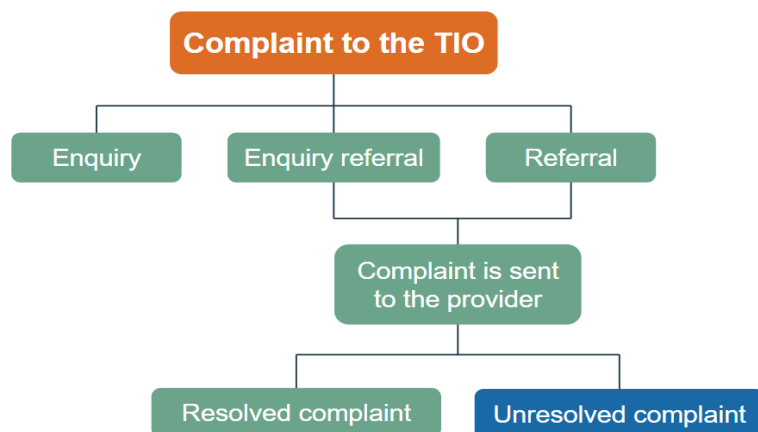
The TIO should work with Members to agree a common approach by which members signpost complainants to the TIO and this should be reflected in the TIO's Constitution or Terms of Reference.

**Recommendation 3:**

The TIO should develop and implement a vulnerability strategy which ensures that it can identify, and meet the needs of, vulnerable complainants.

## CHAPTER 5. EFFICIENCY

The section within the Key Practices for Industry-based Customer Dispute Resolution for efficiency includes five areas for consideration: appropriate process or forum, the timeliness of complaint handling, the tracking of complaints, monitoring the office's performance and the professionalism of ombudsman staff. These all relate, in some way, to the service model used by the ombudsman office and its oversight. In this section the service model used by the TIO in the handling complaints received by it is firstly described. Following this description, the service model is reviewed taking into account the contributions submitted as part of the fieldwork. Figures 4 and 5 below details the complaint handling service model in use by the TIO. Figure 4 provides an overview of the whole service model while Figure 5 provides detail on the handling by the TIO of complaints unresolved after they have been referred back to the Member to attempt resolution.



*Figure 4: Stages of TIO complaint handling*

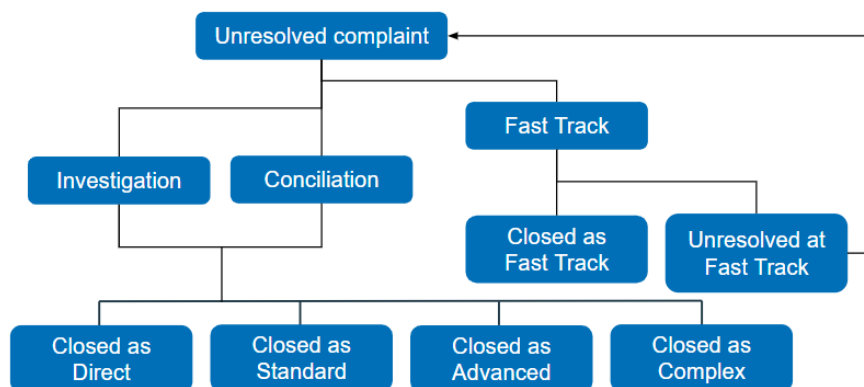


Figure 5: TIO's complaint case management

## 5.1 The TIO complaint handling service model

The stages where the TIO plays an active role in the management of the complaint are the referral and case management stages, the latter of which includes investigation, conciliation and fast-track.

### 1. Initial contact<sup>2</sup>

An individual will approach the TIO with a complaint. In relation to its complaint handling functions, at this first contact the TIO will collect the following information:

- The name and contact details of the complainant
- If the complainant is being represented by another person, the representative's name and contact details
- The name of the Member subject to the complaint
- An identifier for the service that the complaint is about (such as an account number, phone number, service address)
- Details of the complaint
- Details of when the complainant complained to the Member and the Member's response

<sup>2</sup> At this stage, the TIO will also handle general queries and other enquiries that it receives.

- If possible, the Member's reference for the complaint
- What outcome the complainant wants.

If, at this stage the complainant has not yet submitted their complaint to the Member, the TIO may refer it to the member, on their behalf. This is called an Enquiry Referral and the complaint closed at this stage.

## 2. Referral

If the Member has had an opportunity to consider the complaint, the TIO will, typically, at this stage, nonetheless refer the complaint back to the Member for further consideration. The Member would, in most cases, have 10 business days to try and resolve the complaint.

## 3. Complaints not resolved by referral back to a Member

Should the complainant return following a referral back to a Member, the TIO will consider whether to continue to handle the complaint while not, at that time, making any assessment of the merits of the complaint. Reasons for deciding not to continue with a complaint include

- the complainant cannot be contacted or is not participating in the resolution process
- the complaint falls outside the jurisdiction of the Telecommunications Industry Ombudsman
- there is another body or forum that we consider is more appropriate to deal with the complaint
- the complainant refuses to pay undisputed charges
- the complaint is not made in good faith
- the complainant is acting unreasonably.

Assuming that the decision from the TIO is to continue the complaint it will move to either the fast-track process or to case management.

## 4. Fast-track

The TIO states that the fast-track process is appropriate for relatively simple, low-value cases that involve one issue and where the member has previously agreed to

participate in this process. In this process, the TIO refers the complaint back to the Member yet again and asks the Member to attempt to resolve the complaint within ten days. This option is only used with Members which have previously arranged with the TIO to accept fast-track referrals and requires the agreement of both parties to proceed.

## 5. Case management

If the TIO believes that the fast-track process is not a suitable approach to try and resolve the complaint, or the fast-track complaint has failed to resolve the complaint, the complaint will, typically, be sent for case management. Under case management the TIO's caseworker will ask the parties to explain their positions and to provide the TIO with information relevant to the complaint. The TIO will then determine what is the most appropriate process to try and resolve the complaint which generally falls into one of two approaches, conciliation or investigation.

During conciliation the caseworker will obtain further information and try to broker a resolution between the two parties. This may involve the caseworker requesting additional information from both or either party and can be an iterative process. In an attempt to conciliate a complaint, a caseworker may provide their view on a potential resolution to both parties, firstly, informally, as their current view and, should this not resolve the complaint, then, formally, as a recommended outcome. Where the current view is accepted, the complaint will be closed as conciliated while if closed after a recommended outcome, the complaint is closed as a recommended outcome. The caseworker may provide both parties with their opinion on what may be the formal decision if the complaint reached the adjudication stage of the process. However, until the recommended stage is reached, there is no attempt by the caseworker to formally establish what may be a fair and reasonable outcome to the complaint although at the current view stage of the process the caseworker may offer an informal view on what may be a fair and reasonable outcome.

The alternative to conciliation is an investigation. In an investigation the caseworker will inform both parties what information they need to investigate the complaint and using this information to conciliate a complaint, provide their current view on the complaint, or, if these both fail, recommend an outcome to the parties. If the



recommended outcome is not accepted by one or either party the complaint will be referred to another more senior caseworker called a Decision Maker for a formal decision.

## 6. Reaching a decision

Upon receipt of the complaint, the Decision Maker will consider the information collected by the original caseworker and, if necessary, obtain further information from both or either party. The Decision maker is able to stop the complaint at this point if they feel that it is appropriate or, more likely, will proceed to issue their preliminary view on the matter. If the complainant rejects the Decision Maker's preliminary view of the complaint the complaint will be closed. If, however, the Member rejects the preliminary view of the Decision Maker, the Decision Maker will then proceed to make a Decision. Before issuing a decision, the Decision Maker may decide to investigate the complaint further. If the consumer rejects the decision the complaint will be closed. However, a decision is binding upon a member.

A complaint can be closed at conciliation or investigation as direct, standard, advanced or complex dependent upon the degree of TIO input into the resolution of the complaint. The degree of TIO input is then used to calculate the case fee for a complaint with the fee increasing relative to the increased degree of input from the TIO. The detail provided in this section is available on the TIO website (TIO 2022).

Following this description of the TIO complaint handling service model, the review will consider in detail each of those stages in which the TIO plays an active role.

## 5.2 The TIO refer-back process

An important element of the TIO service model is for the TIO to refer a case back to a Member for further consideration (hereafter, a refer-back). In this part of the review, the appropriateness of the refer-back to a Member is considered. The review team acknowledge that the refer-back process is common in Australian ADR, and has been for a long time, although the proportion of complaints resolved by refer-

back varies widely between schemes. In Table 4 below, the % of cases closed by refer-back for the TIO and three comparator Australian ombudsman is provided<sup>3</sup>:

	TIO	EWON	AFCA	EWOV
2020-21	86%	39%	50%	63%
2019-20	87%	41%	46%	66%
2018-19	89%	39%	42%	61%

Table 4: % of complaints referred back to a member for resolution

In its submission to the Consumer Safeguards Review Part A, the TIO outlined the reasons why it believed that refer-backs were an ‘essential element of an efficient and effective EDR scheme’ (TIO 2018a, p.19), asserting that a high resolution rate for referred complaints is seen ‘as an indication of the effectiveness of the EDR scheme and the skill of its frontline staff’ (TIO 2018a, p.20). In supporting this position, the TIO, in its submission, listed a number of arguments to support its position:

- Refer-backs repair the communication breakdown between complainant and member,
- Provides an unbiased perspective on complaints,
- Supports vulnerable complainants
- Ensures consumers do not fall through the cracks,
- Helps identify systemic issues,
- Reduces barriers for complainants seeking to raise a complaint,
- Prevents consumer fatigue,
- Provides an independent insight into IDR outcomes
- If the refer-back element was removed greater TIO resources would be required including the recruitment of additional staff
- Removing the refer-back element would mean that the TIO would be unable to collect the same data

In the 2017 Independent Review of the TIO, the refer-back element was endorsed as ‘the fact that the complaint has been made to the TIO does frequently change the

---

<sup>3</sup> Information obtained from Annual Reports available on each ombudsman’s websites

dynamic with the telecommunications provider, ... for this reason we think it is appropriate' (Cameron, Ralph and Khoury 2017, pp.41-42). Within the TIO's submission to the Consumer Safeguard Review Part A, the TIO does provide anecdotal evidence in the form of a small number of people's stories which do appear to indicate that, once a Member is aware of the TIO's knowledge of a complaint against it, the Member is usually able to speedily resolve the complaint (TIO 2018a).

In its review of the TIO in 2017, Cameron Ralph and Khoury also recommended that the TIO conduct a periodic survey of complainants whose complaint is referred back to the Member by TIO and does not, subsequently, return to the TIO in order that it can reassure itself that those complainants are having their complaints resolved satisfactorily. The TIO did conduct one such survey and reported the headline findings in its Consumer Safeguards Review Part A submission (TIO 2018a):

- 91% of respondents reported that the Member had contacted them following the refer-back
- 81% of the respondents had had their complaint resolved following refer-back<sup>4</sup>
- 70% of respondents felt frustrated dealing with their provider
- 57% of respondents felt angry dealing with their provider
- 51% of respondents felt stressed with dealing with their provider, and,
- 47% of respondents felt powerless dealing with their provider (TIO 2018).

There is, however, a fundamental question as to the appropriateness of the refer-back process. In the year of the periodic survey of complainants, 2018-19, the TIO received a total of 132,387 complaints of which 14,153 were subsequently escalated to case management (TIO 2019, p.10). That suggests that a net 118,314 complaints (or 89% of total complaints received by the TIO) were resolved by Members.

However, assuming that the TIO survey (above) is correct, this means that in 9% of cases referred back to members (or for 11,915 persons) the Member did not contact the complainant and for 19% of complainants (or 22,479 persons) the Member did not resolve the complaint. And, that is without taking into account the negative psychological consequences experienced by the complainant following the refer-back and detailed above.

---

<sup>4</sup> The TIO submission to the Consumer Safeguards Review Part A did not make clear whether the 81% figure referred to all refer-backs or just those refer-backs to which the Member responded.

The more positive way of viewing these numbers is that in 2018-19, in 95,825 cases the Member did resolve the case and, in the greater majority of cases within ten business days. The *Telecommunications (Consumer Complaints Handling) Industry Standard 2018* at para.13(1)(a) states 'A carriage service provider must use its best efforts to resolve a complaint on first contact'. And yet. ... In 95,825 cases, where the involvement of the TIO has changed the dynamic with the telecommunications provider, by virtue of referring a complaint back to the Member, complaints which had previously been at deadlock were now able to be resolved in a matter of days. This strongly suggests that the carriage service provider had not made their best efforts to resolve the complaint at first contact and are, in fact, in breach of the Industry Standard.

There is some evidence to support the review team taking this view from Member representatives who informed the review team that in the handling of complaints, their complaint teams had set delegation limits within which they must operate and that if an unresolved complaint is returned to the Member, it will be considered by a second team with increased delegation limits. The review team was informed that this was common telecommunication industry practice and through its experience of conducting reviews of ADR schemes in Australia and other countries is aware that such an industry practice would not be confined to the telecommunications industry in Australia. Nevertheless, the Industry Standard makes it clear that TIO Members must use their best efforts to resolve complaints at first contact. Best efforts would mean that there should be no artificial, internal barrier to resolution set by a Member.

The TIO survey on complainants who did not return to the TIO following a refer-back presents a very disappointing set of emotions experienced by complainants. But complainants tend to be unhappy with the refer-back process in itself. Table 5 below shows the drop in satisfaction with the Public Transport Ombudsman Victoria (PTOV) as a result of its refer-back process<sup>5</sup> (refer-backs are called RFIE in the PTOV). In a review of its complaint process the PTOV has subsequently removed the refer-back (RFIE) step from its complaint handling model.

---

<sup>5</sup> In the PTOV refer-backs are called RFIE while case management is referred to as Investigation

% agreeing with the statement	RFIE	Investigation
I feel that my complaint was taken seriously	64	88
The PTO took my personal experiences and circumstances into account	62	80
The PTO was knowledgeable about public transport issues relevant to my complaint	65	83
The PTO had skills that encouraged a fair hearing and efficient progress of the matter	65	90
How satisfied were you with your interaction(s) with the PTO	64	90

Table 5: Comparison of satisfaction with refer-backs and investigations in the PTOV (McBurnie and Williams 2019)

Such a drop in customer satisfaction with a scheme is likely to have a negative long-term effect on trust and confidence in the ADR scheme. As a result of its fieldwork, the review team is aware that Members are happy with the refer-back scheme but consumer representatives are less happy. While there was some recognition that refer-backs did appear to change the dynamic and encourage the Member to resolve the complaint there was also concern that the refer-back process may confuse the complainant as to what is happening and who is responsible for the resolution of their complaint, and may create barriers in the resolution process thus increasing complaint fatigue.

As noted above, the TIO put forward a number of arguments to support the retention of refer-backs as part of its response to the Consumer Safeguards Review Part A. These arguments are considered below:

- 1) Refer-backs repair the communication breakdown between complainant and member. Refer-backs do provide the Member with the opportunity to try and repair its relationship with the complainant although the views of complainants in both the TIO and PTOV surveys suggest that the damage to the relationship is more longstanding. A more satisfactory first-instance approach

to complaint handling would, however, be an even better approach to restoring this relationship.

- 2) Refer-backs provide an unbiased perspective on complaints. The review team did not sit in on any calls between complainants and EROs and thus are unable to provide a full view on this matter. However, as the notes recorded in the complaint file are sparse, the question of how fully the case was discussed with the complainant is open to question. In addition, at this stage the ERO only has the complainant's position so is inevitably limited on how much perspective on the complaint that they can provide.
- 3) Refer-backs support vulnerable complainants. In reality many, if not most, vulnerable complainants, unless they have access to support from family, friend or consumer group, will not be supported while the case is being reconsidered by the Member. As noted earlier in the report, vulnerable and disadvantaged consumers may need the additional support that an ADR body is able to provide. This was the view of consumer group representatives who expressed concern at vulnerable and disadvantaged complainants being sent back to Members who may not have handled their complaint appropriately in the first place. Refer-backs are inappropriate for vulnerable and disadvantaged complainants.
- 4) Refer-backs ensure that consumers do not fall through the cracks. As the TIO's subsequent survey indicates this statement is inaccurate. 9% of complainants do not receive a call back from Members following a refer-back. Other complainants, who are contacted by the member but whose complaint is unresolved may not return to the TIO and are simply left dissatisfied with the process. For ACCAN, the reasons why complainants may not return to the TIO could be due to confusion, complaint fatigue or disengagement from the process. One consumer group representative informed the review team that some complainants were confused about the status of their complaint arising from a refer-back. Rather than understanding that the complaint had been refer backed to the provider for a further attempt at resolution they believed that the TIO were considering the complaint. Should the Member

subsequently not resolve the case at refer-back, the complainant may, mistakenly, believe that it was the TIO that had not resolved the complaint.

- 5) Refer-backs help identify systemic issues. This view is predicated on the basis that EROs are able to collect accurate data about the complaint. Complainants are able to submit a complaint either by completing the TIO's online complaints form or by telephone to an Early Resolution Officer (ERO). During the review of cases by the review team, what was noticeable was the very limited information that was recorded in the complaint file particularly after a telephone submission. The information collected at this stage includes baseline information about the complainant, basic information about the complaint, the Member's response to the complainant when the complainant raised it with the member and the resolution sought by the complainant. The information recorded by EROs is best described as sparing while that submitted by the complainant on the complaint form is not much more extensive. It is this sparse information that is sent to the Member. The Comms Alliance and Members informed the review team that, in their opinion, the information obtained at this stage, being only from complainants, is not always accurate, leading to the incorrect tagging of cases by EROs. Incorrect coding could lead to the misidentification of systemic issues. As the TIO collects very little data at first-instance and do not collect any information from the Member at this time, it is arguable whether the TIO will have a sufficient dataset upon which it can reliably identify systemic issues.
- 6) Refer-backs reduce barriers for complainants seeking to raise a complaint. The use of the refer-back process in, and of itself, creates an unnecessary step in the complaints process reducing accessibility. An effective complaints system has an effective inhouse complaints system followed by a quick, external independent process leading to a final outcome (SPSO 2011, p.11). Consumer groups believed that the refer-back process created unnecessary additional steps in the process increasing burdens on complainants. There should be as few steps as possible in the complaint handling system.

- 7) Refer-backs prevent consumer fatigue. The additional step in the complaints process inevitably is likely to increase consumer fatigue. Referral fatigue where the user is passed from one person to another can operate as a barrier to effective participation in ADR and, where the ADR scheme's participation is viewed as tokenistic (Williams et al, 2020).
- 8) Refer-backs provide an independent insight into IDR outcomes. It is unclear to what this claim specifically refers. There is no contact between the ERO and Member other than for the ERO to provide the Member with brief details of the complaint.
- 9) If the refer-back element was removed greater TIO resources would be required including the recruitment of additional staff. It could be suggested that stopping refer-backs would result in the TIO being overwhelmed with complaints to case manage but the review team are unconvinced by this argument. One would reasonably expect Members to increase their investment in internal dispute resolution (IDR), thus enhancing their compliance with the *Telecommunications (Consumer Complaints Handling) Industry Standard 2018* and reducing the overall number of complaints received by the TIO. Nonetheless, despite improved IDR, it remains likely that the number of complaints submitted to the TIO for case management would increase but it is unlikely that the numbers will approach anywhere near the current number of refer-backs. To a significant degree, the number of complaints received by the TIO lies in the hands of the Members.
- 10) Removing the refer-back element would mean that the TIO would be unable to collect the same data. Assuming that Members do amend their IDR processes to mitigate the loss of refer-backs there will inevitably also be a change in the data available. However, ACMA will be able to collect the revised data so it is not lost to the regulatory network.

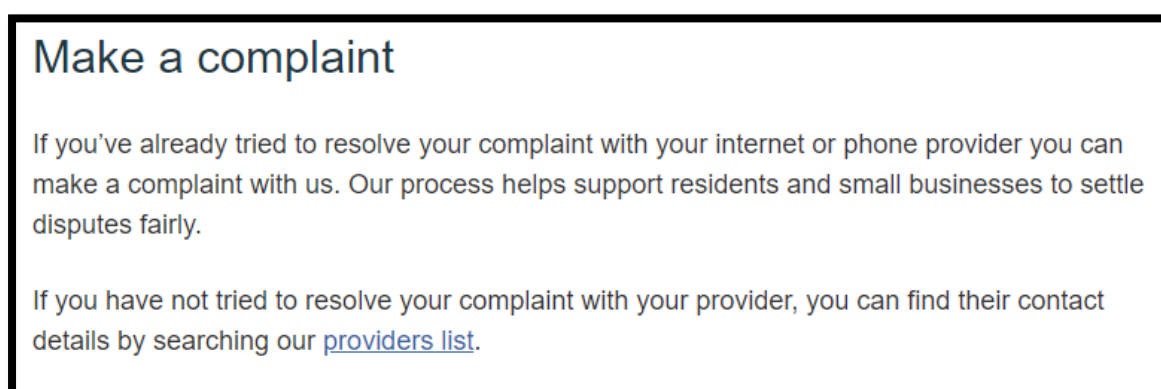
In summary, the refer-back process disadvantages the complainant through creating barriers and the likelihood of complaint fatigue, and could undermine long-term trust and confidence in the TIO. Its prevalence and historicity are not arguments for its



continuation. The current system of refer-backs does not act as an incentive for Members to improve their own internal dispute resolution processes. The issue is about Members improving their IDR and the TIO resolving complaints where Members have genuinely been unable to resolve the complaint internally. That is the TIO's true role and where it adds value in the system.

### 5.3 Results from fieldwork

Irrespective of one's views on the appropriateness of the refer-back process, the process itself was subject to much comment during the fieldwork. Concern was raised by the Comms Alliance and individual Members that the TIO website was insufficiently clear about the requirement for complainants to attempt to resolve the complaint with their provider before approaching the TIO. The Comms Alliance raised criticism about a specific element of the TIO website, stating that it was insufficiently clear about the need for a complainant to try to resolve the complaint with the provider:



*Figure 6: Make a complaint (TIO undated)*

But this is rather selective evidence from the Comms Alliance. The TIO website also has the following messages about the need to first approach a provider about a complaint:

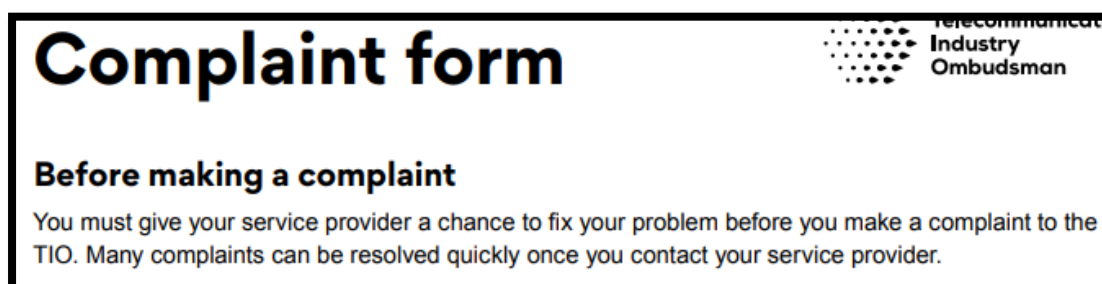
## Before you begin

### First try to resolve the complaint yourself

Before contacting us, you must try to resolve the complaint with the telco first. We can't begin to resolve your complaint until you've tried to resolve it on your own.

*Figure 7: Before you begin (TIO undated a)*

Or, in the complaint form:

The image shows the header section of a 'Complaint form' from the Telecommunications Industry Ombudsman. The title 'Complaint form' is in large, bold, black font. To the right is the TIO logo, which consists of a circular pattern of dots and the text 'Telecommunications Industry Ombudsman'. Below the title, the section 'Before making a complaint' is highlighted in bold. The text below states: 'You must give your service provider a chance to fix your problem before you make a complaint to the TIO. Many complaints can be resolved quickly once you contact your service provider.'

*Figure 8: Complaint form (TIO undated b)*

While the first figure (6) might be less than imperative, the other figures (7 and 8) make it clear that a complainant must first approach their provider with their complaint. People who phone the TIO to submit their complaint are also informed of the need, firstly, to complain to their provider.

There was a lot of criticism from Members about the TIO accepting complaints which had not previously been submitted to the Member, thus, leading to Members needing to contact the TIO to have the complaint reclassified. Reclassifications are considered below but Members suggested that this problem could be mitigated if the TIO required complainants to provide the Member's unique complaint reference number as evidence that they had, indeed, attempted to resolve the complaint with their provider. Several Member participants expressed unhappiness that, in their perception, at the referral stage, the TIO took the complainant's word in good faith and did not require the complainant to provide evidence to support their claim that had already approached the provider. The Comms Alliance did acknowledge that

there would be a risk that requiring complainants to provide the reference number could act as a barrier to complaining.

The review team are of the view that requiring a complainant to provide a reference number would be an unreasonable barrier to making a legitimate complaint. The unique reference number is the Member's number and it is unlikely that the complainant will identify with the number. The review team did look at 45 case files and, although this is a small sample of the TIO's overall casework, in each and every case, there was evidence that the complainant had raised the complaint with the Member and that it was unresolved.

This issue may be, in part, due to different interpretations of what is an attempt to resolve a complaint. The Members' position appears to be that a complaint has only been through their complaint resolution process if the complaint has a unique complaint reference number. However, complainants are not likely to necessarily share that interpretation. They may go to a store and raise their grievance there. The staff member, for a variety of reasons may not record the complaint as a formal complaint. To the complainant they have tried to resolve the complaint but to the Member they have not yet done so. ACCAN make such a point in its submission – 'it is common for consumers to contact their telco about a persistent issue that should be treated as a formal complaint, but isn't classified as such'. A staff member needs to recognise a complaint as a complaint but may not always do so.

There are over 20 million smart phone users in Australia (Granwal 2022). According to ACMA (2020, pp.36-39), 13% of telecom users had made at least one complaint to their telecom provider in the previous six months. That would suggest 2.5 million complaints. But telecom providers only report slightly over 1.3 million complaints a year to AMCA (AMCA 2022a). There is no suggestion that the telecom provider is submitting inaccurate information to ACMA. Rather it is suggested that what a Member may recognise as a complaint and the action that a consumer believes that they have taken may not always correspond. For that reason, the review team does not support the proposal that a reference number should be required by the TIO as evidence that the complainant has previously approached their provider.

A second issue was raised by both Member and consumer group participants to the fieldwork and that is that insufficient information is collected by EROs at the referral stage. The Comms Alliance stated that the TIO does not take detailed notes at the referral stage while other member participants were concerned about the quality of information passed to them from the TIO at the referral stage lacked and that this could cause the Member problems with effectively responding to the referral. A consumer group participant whose organisation supports vulnerable and disadvantaged complainants was concerned about the 'really limited information' collected by the TIO at the referral stage of the process.

The review team suggest that, at this stage, the TIO has no real alternative other than to take the complainant's comments in good faith. There was recognition from a TIO staff member that the information collected, particularly with regard to oral complaints was 'skimpy' and that more information about the complaint could be collected and described with a better narrative. However, this person, like several other TIO staff members, stressed the importance of balancing data collection at the referral stage with efficiency – taking more information increases the duration of contact with the complainant and, thus, costs. And they are correct. There is a balance to be made but the review team, in common with Members and consumer groups, is not convinced that the correct balance is currently being reached.

A final issue was raised by both Members and consumer groups concerning the follow up of refer-backs although, oddly, both their interpretations of the current situation were incorrect. What currently happens is that where a complainant has been identified as vulnerable the TIO will follow up the refer-back with them two days post refer-back, making up to three calls to confirm that the issue has been resolved. These are the only complainants for which there is TIO follow up. ACCAN and consumer groups suggest that there is no routine follow up by the TIO to any complainant while the Comms Alliance suggest that the TIO follows up every refer-back. The Comms Alliance goes as far as to suggest that when the TIO follows up a refer-back and is informed by the complainant that the case is unresolved the case is automatically escalated to case management. It argues that this is 'unreasonable, as it provides no opportunity for independent assessment of the consumer's report that their case has not been resolved'. Putting aside for the moment that the Comms

Alliance is incorrect in its assertion that the TIO follows up all complaints at 14 days post-referral, the review team does not fully understand the logic of this point. If a consumer states that the complaint remains unresolved post refer-back the complaint would remain unresolved irrespective of whether or not the member believed that they had resolved the complaint.

ACCAN highlighted the approach used by AFCA, which requires its members to confirm with AFCA that the refer-back has been resolved. When an AFCA member provides such confirmation, AFCA will automatically contact the complainant to seek their confirmation that the complaint has been resolved. Where a complaint is not resolved within the set timescale the complaint is automatically escalated to case management.

The review team is of the opinion that, by simply referring the case to the Member and then not ensuring that the complaint has been resolved, the TIO may not be fully discharging its responsibility towards the complainant. The TIO is aware that in roughly 9% of cases the member does not make contact with the complainant and in 19% of cases the Member is unable to resolve the case. While many of those complainants are likely to return to the TIO not all do so. The TIO has a responsibility to these consumers and it should ensure that they are not lost to follow up. Accordingly, the review team believes that the TIO should ensure that each refer-back is followed up. The simplest method may be to replicate the approach utilised by AFCA.

Complaints that are referred back to Members incur a specific charge to each Member of A\$29 for each refer-back. The review team acknowledge that the TIO's funding model is outwith the scope of this review but does feel that it is able to record that a fee of A\$29 does not cover the TIO's costs of referring a case back to a Member.

An issue that has been raised many times over the years by Members has been the issue of reclassifications of refer-backs. Reclassifications arise when Members inform the TIO that they have wrongly received a refer-back when, they argue, Members have not had an opportunity to consider the complaint (in which case it should be classed as an enquiry referral for which no case fee is associated), the

refer-back relates to cases that the Member has already resolved, cases that are out of the TIO's jurisdiction (and should have been treated as enquiry for which there is no associated case fee) or the case has been allocated to the wrong member (Comms Alliance 2022, p.8).

The Comms Alliance states that reclassification rates have remained high over a number of years, claiming 'members report agreed complaint reclassification rates of around 8-9 percent, or even higher, over the last 5 or so years' (Comms Alliance 2022, p.8). Unfortunately, this sentence as constructed may accidentally mislead readers. While it is correct to say that some Members, in some calendar quarters, may have high reclassification rates for that period, and one Member did provide the detail behind the 8-9 percent figure quoted by the Comms Alliance, it would be incorrect to assert that the overall percentage of reclassifications for all Members considered by the TIO has been anywhere near that level. Figure 9 provides details on the TIO's monthly reclassification rate since July 2018.

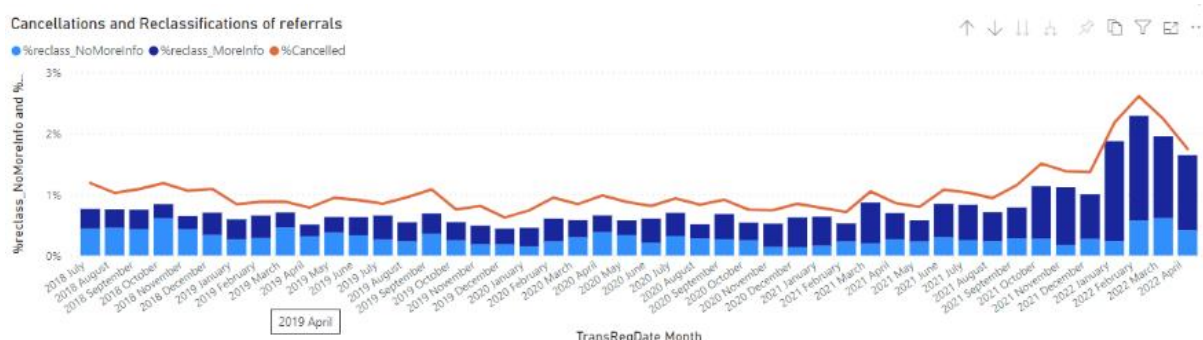


Figure 9: Monthly TIO reclassification rate

Examining Figure 9, two points emerge: firstly, the average reclassification rate has been somewhere between 1-2%. There has been a noticeable increase in the early part of 2022 which, the review team was informed, is due to a large TIO Member amending the way it treated reclassifications to bring it into line with other TIO Members. It is possible that this increase represents a temporary increase as this change in approach by the Member plays out. The second point of interest is that a large proportion of reclassifications accepted by the TIO occur after the submission of further information from either the member or complainant.

The review team was informed by staff from the TIO that approximately 55% of reclassification challenges submitted by Members are subsequently changed. TIO staff provided their explanations as to why reclassifications arise: the complexity of service provision can lead to unintended errors by customers and that if people submit their complaints online before a weekend or bank holiday, the Member may have resolved the complaint before the TIO's office has reopened. According to TIO staff, 10% of reclassifications are due to complaints being out of the TIO's jurisdiction.

This picture reinforces the view, discussed above, that the TIO should collect additional information at the referral stage in order for it to be able to minimise these misclassifications. Once this additional information is collected the question arises as to whether or not the TIO should continue with reclassifications. There is a certainly a case for case reclassification if the complaint is about the wrong Member or is out of the TIO's jurisdiction but for cases related to whether or not the complainant had previously submitted their complaint to their provider it is hard to see any real benefit. Roughly 50% of cases are reclassified but after the submission of further information. That is less than 1% of all complaints, and this includes reclassifications when the complaint is about the wrong Member or is out of jurisdiction. Assuming that the TIO is now collecting this additional information then there is no significant benefit to be gained. There is a cost to Members in arguing for a reclassification. The TIO also incurs costs by considering this reclassification request

One final comment on reclassifications: some Members are unhappy that in its quarterly complaints report, the TIO publishes what are in effect provisional figures. These are the figures published by the TIO on complaints received but where the reclassification process has not been completed. Members claim that in some quarters this leads to the publication of inaccurate figures. The review team has some sympathy with the position of Members that the TIO should not publish inaccurate information particularly if, as has been claimed by Members, the publication of what transpired to be inaccurate information has resulted in negative media coverage. The review team believes that this should also be of concern to the TIO. Collecting better information at the initial referral stage should lead to a significant reduction in reclassification requests from Members especially if limited to

requests about jurisdiction or wrong member but it would also be helpful if the TIO shortened the periods for which a Member could submit a reclassification request and the time that the TIO has to consider such a request. It is more important for the TIO to publish accurate information rather than quick information.

#### 5.4 Handling of escalated cases

Earlier in the report the formal complaint handling model was described. The options available to case managers with escalated cases are fast-track referral, conciliation or investigation.

##### **Fast-track process**

The TIO states that the fast-track process 'is appropriate for relatively simple, low-value cases that involve one issue ... where the Member has previously arranged with us to accept fast track referrals' (TIO 2022). It is intended that the Member resolve a fast-track referral in ten business days. The review team was informed by TIO staff that refer-backs are successful in 90% of cases, turnaround of complaints was quicker, and Members were charged less. In 2020-21, 2,812 complaints were resolved at fast-track, or approximately one in six of all complaints escalated by the TIO (TIO 2021a).

From a complainant's perspective, by the end of fast-track, a complainant has approached their provider with a complaint that was subsequently unresolved by the provider. The complainant, therefore, complains to the TIO which almost certainly refers the complaint back to their provider to give it a second chance to resolve the complaint. Should that second attempt to resolve a complaint not succeed then, if the complaint is deemed appropriate for fast-track referral, the complaint is sent, yet again, back to the Member to provide it with a third chance to resolve the complaint for reasons which are detailed above and are predominantly in the interests of the Member and the TIO but not the complainant as this approach contradicts the principles of good complaint handling. Good complaint handling indicates that there should be as few hand-overs as possible in any complaints process. An increase in hand-offs is associated with complaint fatigue and complainants withdrawing from



the complaints process and will result in decreased trust and confidence in the TIO. The TIO should discontinue the fast-track process as it is not in the interests of complainants.

### **Case management**

For the one in ten complaints that are not resolved at fast track, and for all other complaints that have returned to the TIO for escalation, the complaint will enter the TIO's case management process. According to TIO staff, the vast majority of complaints are resolved through conciliation. Complaints involving issues such as credit defaults or other financial issues are more likely to be investigated as they are viewed to be less suitable for conciliation. However, whether a complaint is investigated or conciliated is at the discretion of the caseworker.

In the TIO, once a decision to conciliate a case has been made, a Dispute Resolution Officer (DRO) will contact both the complainant and Member asking for information about the complaint. According to TIO staff, this is the first point in the process where the TIO obtains both sides of the complaint. Both ACCAN and the Comms Alliance report that complaints are not necessarily well framed by the complainant – the complainant may fail to appreciate or understand the issues that lie at the heart of the complaint, particularly if the complainant is vulnerable. To remedy this requires the DRO to work with the complainant to fully delineate the issues contained within the complaint, the actions that have been taken by the complainant to date and the resolution sought. It would be good practice for the DRO to put this in writing and ask the complainant to confirm that the DRO has accurately captured the complaint. As the NSW Ombudsman (NSW Ombudsman 2004, p.6) says, minor changes to complaints at this stage can have more profound consequences to the conduct and conclusion of the complaint resolution. The Scottish Public Services Ombudsman (2020) more recently emphasised the importance, at the outset, of agreeing with the complainant the points of complaint and outcomes sought.

A review of a small sample of case notes by the review team indicates that, at the outset of conciliation, this request for information is typically a generic request for information. At this stage of the process, the DRO has not set out the specific

questions that need to be answered nor identified the information that they will need in order to answer these questions. The Comms Alliance stated that Members were of the view that the complaints sent to them were often of poor quality which contained insufficient information to enable the Member to respond efficiently.

There then follows an iterative process, which, at the outset is of uncertain duration, where the DRO will try to set a framework for discussion and conciliated settlement but which can alter as additional information is brought by either party to the attention of the DRO. TIO staff said that, at this stage of the process, the focus is on procedural fairness and not the fairness nor reasonableness of the outcome. It is only later when a DRO sets out their more formal view, in either a 'current view' or 'recommended outcome', that the fair and reasonableness test is applied to the complaint.

One Member informed the review team that, in their opinion, the TIO should take a stronger role in conciliation, collect more information and consider the broad merits of the case at an early stage. They were concerned that an insufficient analysis was undertaken by caseworkers at an early stage of complaint resolution. To paraphrase what the review team was told, 'first contact resolution does not mean immediate resolution', the point being that the caseworker needs to put themselves in a position to help conciliate a complaint and that this does not typically occur. There was a view expressed by a Member that 'a case manager [should be] more than a facilitator of communications'. Their job is to play an active role in bringing about an agreed settlement.

In relation to securing an agreed settlement, both Members and consumer groups were critical of the TIO. For example, nbn was unhappy that

'during conciliation, nbn has observed that TIO officers withhold guidance on their initial thinking about the complaint resolution question until an outcome is close to being required. Earlier guidance on what the TIO considers to be a fair and reasonable outcome and key evidence it wishes to consider would assist consumers and members in resolving matters earlier.'

In reaching a fair settlement, ACCAN was concerned that it was

'important that the TIO does not view fairness as an equal-footed compromise between the interests of consumers and TIO members. ... the TIO should

always consider whether the consumer has been treated fairly in accordance with good industry practice and all applicable rules and guidance.

The Comms Alliance claimed that case managers often want the case resolved without the need for the case manager to go through the lengthy process of writing up a written recommendation, thus increasing pressure for 'pity credits', by which it is meant Members offering a financial settlement to close the case rather than because they believe that it is a fair settlement. ACCAN raised a similar concern that there was pressure on complainants to resolve the complaint at an early stage of the conciliation process meaning that proper analysis of the issues within the complaint was not undertaken with one consumer group representative claiming that consumers often feel pressured to reach a settlement, split down the middle of the competing positions, without their complaint being properly understood, or worse, there being pressure from case managers on complainants to withdraw their complaint.

This light touch approach by case managers towards conciliation raises a concern about the ability of vulnerable people to meaningfully engage with the process, for example, because English is their second language or the psychological stress of pursuing a complaint.

The Comms Alliance and Members expressed concern that during the conciliation and investigation stages Members would be asked to provide significant amounts of evidence to support their case while consumers had no similar expectations placed upon them. Members also suggested that the complainant may reject the position of the Member, without any supporting evidence to justify their disagreement, and yet the case manager would side with the complainant. It appears somewhat inevitable that Members will be asked to provide more information than complainants, as it is reasonable to assume that Members will keep accurate, contemporaneous records of their interactions with customers. The issue, though, is not the collection of evidence but the weight that is placed upon it by case managers. For a caseworker to reach a decision they need to assess the credibility, reliability and weight of the evidence in their possession. To disregard a Member's evidence the caseworker would need to provide an explanation as to why they preferred the complainant's view and the evidence in their possession that supports this preference.

Members were concerned at a perceived inconsistency in decisions reached during the conciliation process, perhaps best articulated by Vodafone TPG: 'The outcomes of conciliation seem to depend upon the TIO staff members involved, leading to inconsistent outcomes' requesting that the TIO utilise a fairer, less subjective approach to conciliation. Although many complaints will be broadly similar, they are likely to be specifically dissimilar, and making a decision that is fair and reasonable in all the circumstances may lead to apparent inconsistencies in decision-making because of this dissimilarity. That is why Members' calls for precedents is misplaced here – ombudsmen are not courts of law and, by the nature of their dispute resolution processes and the fair and reasonableness test, do not set precedents.

Genn (2010) raised a question about mediation: whether mediation was about just settlement or just about settlement. The same question can be asked here concerning the TIO's conciliation process. Is the objective of the TIO's conciliation process just about reaching a settlement or about reaching a just settlement? As there is no specific attempt to identify a fair and reasonable settlement at this stage of the process it appears to be the former position. As Hodges (2018, p.66) puts it 'the risk is that settlement will in practice be forced on parties – especially weaker parties such as individual consumers – irrespective of the merits of their case'.

In two cases out of the 45 reviewed by the review team, the complainant made clear to the caseworker that they were accepting a settlement because complaint fatigue had set in, for example, 'I want to get on with my life'. No doubt these cases were closed as successful conciliations but, from the complainants' perspective, it appears that it was easier to accept the Member's proposal rather than continue with their complaint. Hodges (2018) makes clear that justice is not the only criterion by which complainants will view their complaint and people will apply other factors such as the effort of continuing the complaint against a likely future benefit. That is what the TIO complainants did in fact do, but even when doing so, they expressed a view that the outcome was unfair to them.

In summary, during conciliation, the DRO does not, at the outset, set out the specific questions that need to be addressed and, from this, identify that information that they

will need to obtain from either party. As a result, the DRO will not be able to make an initial assessment of the merits of the case nor what may be a fair and reasonable outcome to the complaint. Instead, an iterative process, of uncertain duration, can emerge as either party provides additional information until an agreement is reached. As no specific attempt is made by the caseworker at this point of the process to assess what would be broadly fair and reasonable, parties on either side of the dispute may feel that this final agreement is forced upon them rather than being what they consider to be reasonable. This is likely to contribute to complaints of inconsistency from Members.

The TIO may wish to revise the first stage of the case management process: caseworkers should check their understanding of the complaint with the complainant; identify the specific issues that need to be addressed, what information will need to be gathered to address the issue(s), and come to an assessment of the broad merits of the complaint and outcome. Undertaking this early in the complaint process will aid the conciliation process and address the concerns raised by both Members and consumer group representatives detailed above. It is recognised that undertaking this work will increase the average length of time taken to undertake this early stage of the complaint process but taking better and more accurate information at the start has a number of benefits:

- Provides the DRO with a clearer understanding of the issues at the centre of the grievance and a broad understanding of the merits
- This enables the DRO to more actively control the negotiation/conciliation phase of the complaint resolution
- This could lead to quicker overall closures
- Will improve complainant (and Member) satisfaction with the overall fairness of the process (see next section of the report on Fairness).

There is recognition by the review team that the costing of complaint handling may also have to be revisited: as one participant to the fieldwork said 'there are wheels within wheels'. Members informed the review team that they recognised that, if the TIO should change its service model to one similar to that described above, there would likely be an increase in case fees at the early stage of the TIO's case handling. Nonetheless, they were supportive of the proposal as a slimmed down process would decrease time and effort to respond to information requests from the

TIO, would benefit complainants which was in their interest as they wanted to retain customers, and the overall cost per case may reduce.

## 5.5 Reaching a decision

Where agreement cannot be reached, the DRO will, for the first time, set out their considered view in what is referred to as a current view. If either party does not accept this current view the DRO will then issue their recommended outcome. If either party rejects the recommended outcome the case will be passed to an Adjudicator who will look at the case afresh and issue their preliminary view. If the complainant does not accept this preliminary view the case is closed by the TIO. If the Member does not accept the preliminary view, they may inform the Adjudicator of this together with their reasons why, who will consider the case again before issuing their decision. In effect, there is a differential approach adopted by the TIO, one which favours Members over complainants. According to TIO staff, the reason for providing a Member, as opposed to the complainant, an extra opportunity for review, is that for the Member, the decision is binding and the TIO can approach a regulator for enforcement of the decision.

But this approach is problematic: this differentiation in approach towards the two parties in the complaint is manifestly unfair in terms of procedural fairness. In addition, an ombudsman should, in the greater majority of cases, not normally be happy with the idea that an unhappy complainant has the ability to take their grievance to a court or tribunal as this actively undermines the fundamental purpose of an ombudsman which is to be the alternative to a court or tribunal. Further, this attitude ignores the problems that most individuals have in taking grievances to courts or tribunals and the imbalance in power, finances and information between the parties which is the principal reason for the establishment of industry ombudsman schemes.

Members suggested that they were happier with the outcomes of final decisions, stating that they were more likely to be fair and reasonable and with higher levels of

consistency. Part of the reason for this may be due to the fact that, compared with complainants, Members have an additional opportunity to challenge a decision.

In some cases, a complaint may have been thought of as conciliated and the case closed, but, subsequently, the same problem recurs, or in some situations, the resolution has not resolved the problem at the centre of the complaint. If a complainant wishes to bring this issue back to the TIO then they have to submit this as a new complaint and start the process again. It is claimed by ACCAN that on some occasions the complaint is not even accepted by the TIO. Consumer groups want the TIO to have a system whereby complaints where an agreed resolution has fallen through for whatever reason can be reopened and fast tracked through the TIO's complaint system rather than having to start again with the refer-back process. They did suggest that this might be time-limited to, perhaps, six months to ensure that it is not an open commitment.

Two other issues relating to the timeliness and cost of the TIO's complaint handling were expressed by a majority of all members.

## 5.6 Timeliness of case management

There was widespread concern raised by Members about the length of time taken by the TIO to resolve complaints particularly at conciliation which the Comms Alliance believes is due to issues around the TIO's efficiency and its priorities. For TIO adjudications, the Comms Alliance states that decisions can take months to produce. In these situations, as Optus stated, 'it is unhelpful to consumers to have to wait so long for their complaint to be addressed'. Another Member informed the review team that the TIO 'is not resolution focused' the consequence of which is that cases take too long to close. Part of the problem, raised by Members, appears to be delays within the TIO to start the conciliation and adjudication processes.

The TIO has set itself two performance standards on timeliness: that 75% of complaints should be closed within 60 days and 90% of cases should be closed

within 120 days. Looking at the TIO performance figures for July 2021 to April 2022, the most recent figures available to the review team at the time of the review, for complaints undergoing active case management, the TIO hit the 75% and 90% targets only six times in the ten months. However, there are delays while cases await allocation for active case management and if one adds in these delays then the TIO failed to hit either of its targets at any time in that ten-month period.

Revising the first stage of case management as described above may, in itself, lead to quicker resolutions but, in any event, needs to focus on reducing the length of time that caseworkers take to close cases. The individual performance targets for each caseworker may need to be revised.

A second, common, concern raised by Members is the response by TIO caseworkers to Members. Many Members stated that caseworkers may request information from them regarding a complaint but that the Member then has to wait weeks if not months for the caseworkers to respond to them following the submission of that information. Should a Member contact the caseworker to ask for an update then they may have to wait for some time for a response, with some Members claiming that caseworker did not always respond at all.

## 5.7 The cost of TIO complaint handling

Several Members raised the issue of costs making the point that TIO complaint numbers have dropped but that its costs have increased. Taken together, the Comms Alliance states that the cost per case has increased particularly over the last three years. Such views from industry are in common with the review team's findings in its other reviews of industry ombudsman and are in keeping with Gilad's domain and barriers, discussed earlier, where an industry attempts to constrain the actions and costs of its industry body. The review team are not convinced by the Comms Alliance position. As was discussed earlier in the report, a modern ombudsman is much more than a dispute resolution body. Therefore, the use of cost per case as a measure of 'efficiency' is inappropriate as modern ombudsman undertake, and should undertake, more than dispute resolution. In this case, for example, the TIO



has significantly expanded its systemic investigation activity as a response to the last independent five-year review.

The Comms Alliance proposes that:

‘TIO members should be able to independently assess and verify that the conciliation charge aligns with the complexity and time spent on the case. We further suggest that TIO members are provided mechanisms to provide feedback on the TIO’s performance and conduct, with oversight provided by an independent resource or body.’

The review team questions the appropriateness of the Comms Alliance to make these proposals. These actions are part of the functions of the Board of the TIO. The Board is independent of the operations of the TIO’s dispute resolution activity but does have responsibility for the performance, conduct and costs of the operational side of the business. Industry has three Members on the Board and one of the responsibilities of such board members would be to provide feedback to, and raise concerns with, the Board of any issues they have in these three areas. To grant further privileges to Members would undermine the independence of the TIO and make it susceptible to further industry capture.

**Recommendation 4:**

The TIO should remove the refer-back step from its complaint handling model moving straight to case management upon the acceptance by the TIO of a complaint against a Member.

**Recommendations 5:**

TIO casework staff should collect more, and more relevant, information at the commencement of case management such that the caseworker is able to have a broad understanding of the merits of the complaint and, from this, undertake a more active role in achieving an agreed settlement.

**Recommendation 6:**

The TIO should remove the fast-track process from its complaint handling model.

**Recommendation 7:**

If a decision is required to be made then there should only be a two-stage-process (such as, the preliminary view and the decision). Both the Member and the complainant should be able to challenge a preliminary view.

**Recommendation 8:**

The TIO should focus on reducing the length of time it takes to close cases.

**If the TIO chooses not to remove the refer-back stage from its complaint handling process then the following recommendations are also proposed.**

**Recommendation 9:**

At refer-back, the TIO should develop a triage system so that no complaint relating to a vulnerable or disadvantaged complainant is referred back to a member. It should also determine which other groups of complaints are not suitable for refer-back to members.

**Recommendation 10:**

The TIO should collect better information at refer-back.

**Recommendation 11:**

There should be the automatic follow up of all complaints referred back a member such as is undertaken by the AFCA.

**Recommendation 12:**

The TIO should remove reclassifications from all complaints except where the complaint is about the wrong member or is found to be out of jurisdiction.

**Recommendation 13:**

The TIO should ensure that it covers the cost of the refer-back process.

## CHAPTER 6. FAIRNESS

While substantive outcomes (distributive fairness) appear to be of greater importance in ombudsman schemes than in other dispute resolution contexts (Creutzfeldt 2014, 2016) it is still the case that, the negative feelings that an adverse outcome produces can be mitigated if the ombudsman's office has delivered high levels of procedural fairness (is the process used in resolving the complaint fair?) during the complaint resolution process. This next section looks at the TIO's performance against both of these areas of fairness.

Distributive fairness, which relates to the outcome of the dispute, is concerned with two things. Firstly, was the correct decision reached? And, secondly, was the final remedy appropriate? Most industry ombudsman schemes attempt to secure the appropriate resolution to a complaint based upon what would be fair and reasonable in all the circumstances, taking into consideration relevant laws, industry codes and regulations. This approach is underpinned by the fact that in western society there is the increasing importance of fairness as a basic element of the social contract (Hodges 2018, pp.64-65).

One of the strengths of industry-based ombudsman schemes is that they are able to go 'beyond the law' and look at an issue in a more holistic manner. Wheeler (2014, p.12) suggests that the objective of the fair and reasonable test is aspirational, 'directing consideration towards approaches or outcomes that are perceived to be morally right and in accordance with accepted standards of conduct'. Thus, it is more than whether or not a body acted in technical accordance with the law, regulations or industry code. A body may act in keeping with relevant laws but still be found by an ombudsman not to have acted fairly and reasonably (Allen and Overy 2017). Wheeler concludes that the answer to the question on whether an organisation's 'conduct was fair and/or reasonable will depend almost entirely on the circumstances in which the question arises and the role and/or interests of the person making the assessment' (Wheeler 2014, p.12).

It was discussed earlier under the section on efficiency, that TIO caseworkers during the conciliation stage do not make any formal assessment of what is fair and

reasonable but that the formal assessment of what may be a fair and reasonable outcome occurs later in the process when TIO caseworkers make more formal decisions. Therefore, there is a chance that resolutions delivered through conciliation may not always be fair and reasonable but rather what the Member and complainant are prepared to offer and accept. This is a weakness in the TIO complaint handling process. It is the responsibility of an ombudsman to attempt to secure fair and reasonable outcomes and yet, during conciliation, the TIO may not always attempt to achieve this. It is worth noting that when caseworkers issued more formal assessments and decisions along with their explanations there was greater acceptance by Members and consumer group representatives of both these decisions and their fairness and reasonableness.

Procedural fairness includes:

- People need to know if a complaint has been made against them
- People have a need to understand what the case is against them
- Both parties need to be able to make their case and be given reasonable time to do so
- The decision should be made solely on the basis of the material available
- This decision needs to take account of the evidence and answers the complaint

By and large the review team did not identify any significant concerns with the TIO's approach to procedural fairness. There was some concern raised by Members that they were given timescales to reply to the TIO that were very short and this caused the Members some problems in replying appropriately. Further, some Members claimed that the TIO ignored the evidence that they had submitted and supported the view of the complainant without sufficient justification. This may, indeed, possibly happen on occasions but the review team saw no evidence of this in its case review. It does not appear, therefore, to be a systemic issue.

In an attempt to assess how fair the TIO is during its complaint resolution activities, the TIO is piloting a 'fairness framework by which it can assess the customer satisfaction and both Members and complainants and their beliefs that the TIO operated fairly. This work is supported by both Members and consumer groups. The TIO deserves much praise for attempting to deliver this objective as it is a complex area to tackle due to the fact that both of the components of fairness, discussed above, are, in themselves, multi-dimensional in order that they capture the richness

of that component. The review team does suggest, however, that the TIO needs to be careful that, in an attempt to reduce the complexity inherent in any attempt to assess fairness in dispute resolution, the end-product ceases to provide meaningful information to the TIO. The TIO should also remember that complainant satisfaction can very often be driven by whether or not an outcome of their complaint was in an individual's favour or not.

**Recommendation 14:**

During the conciliation stage of dispute resolution, caseworkers should seek to ensure that the agreed outcome is broadly fair and reasonable.

## CHAPTER 7. EFFECTIVENESS

This chapter considers the TIO's ability to consider issues relating, firstly, to its ability to consider systemic problems within the industry, and, secondly, its ability to consider the vast majority of complaints concerning the telecommunications industry. The chapter also considers the TIO's powers in relation to make appropriate financial redress for any failing identified during its complaint resolution process and concludes by briefly considering the TIO's particular role in land access complaints.

### 7.1 Systemic Investigations

The previous five-year independent review recommended that there should be 'a significant expansion of the TIO's systemic investigation capacity, [and] a greater readiness to refer unresolved systemic issues to the relevant regulator' (Cameron, Ralph and Khoury 2017, p.7). Both Members and consumer group representatives acknowledged the importance of the TIO's systemic investigation work and agreed that it should continue. For consumer groups the ability for the TIO to conduct systemic investigations is both an important and integral part of the TIO's responsibilities and that the Board needs to ensure itself that systemic investigations are funded properly. Consumer group representatives stated that systemic investigations provided broad insight and transparency into industry practice which, by providing a factual basis of industry practice, helps them in their consumer advocacy role, helps hold the industry to account, and, by doing so, helps promote confidence and trust in both the industry and the TIO.

Members also recognised the importance of the TIO's systemic investigations, acknowledging that they can bring about change to the benefit of customers, that when systemic investigations go well they can be 'very powerful' and really help a company to fix a problem, that they keep 'telcos honest', that a Member has 'benefitted from effective systemic investigations in the past to drive change internally and deliver improvements for consumers', and, as the Comms Alliance stated, 'systemic investigations can lead to improved industry practice and lasting,

beneficial change'. Members, nonetheless, raised a number of concerns which are discussed below.

### Identification of issues for systemic investigation

In its revised Terms of Reference, the TIO (2022, para.4.2) states that:

'A systemic issue is one that has or is likely to have a negative effect on a number of consumers or a particular type of consumer, including about:

- (a) members' systems, policies, processes, or practices
- (b) repeated conduct by a member that indicates potential non-compliance with the law, regulatory requirements, or good industry practice, and
- (c) widespread issues driving complaints, which may arise from general industry practices, gaps in consumer awareness, or the broader regulatory and telecommunications operating landscape'

The TIO has provided additional guidance on its approach in identifying potential systemic investigations which states that the TIO will identify:

'possible systemic issues through a range of methods, including through:

- handling complaints
  - analysing complaint trends, or
  - receiving other information that may suggest a systemic issue, including information from members, consumer groups, the media or regulators.'
- (TIO 2022c, para.3.1)

In this revision to its Terms of Reference, the TIO is suggesting that a systemic issue in which it might be interested need only be 'likely to have a negative effect' and that the TIO can identify potential systemic issues on the receipt of information from members, consumers groups, the media or regulators without receiving complaints specifically about the issue. These revisions are significant as, firstly, a negative effect may not yet have arisen but need only be likely to arise and, secondly, it significantly broadens the range of information that the TIO will take into account when considering whether or not to commence a systemic investigation.

The Comms Alliance in its submission indicated that it was unhappy with these revisions, arguing that the revisions were not in keeping with the relevant Key Industry Benchmark which states, in an explanatory footnote, that 'Systemic problems can refer to issues or trends arising either out of many complaints about one participating organisation or out of many complaints (which are essentially similar) about more than one participating organisation' (The Treasury 2017, p.17).

The review team would make two points regarding this position. Firstly, this is an explanatory note that only states that 'systemic problems **can** refer to issues or trends arising ... out of many complaints' and not that they can **only** be identified from the TIO receiving many complaints (Authors' emphasis). The second point is that these are Benchmarks and not absolute standards. This does leave room for industry ombudsman to go further where it is in the interests of the scheme, consumers and members.

Nonetheless, this revised approach to the identification of potential systemic investigations has led to significant unhappiness from Members. This unhappiness from both the Comms Alliance and Members, and the reasons for this, can be summarised as follows:

- 1) Members were unhappy that the revised guidance allows the TIO to commence systemic investigations when it had received only small numbers of complaints, or even no complaints at all, about the issue for investigation. Members suggested that the TIO should only undertake systemic investigations on issues that had been evidenced by the TIO receiving a significant number of complaints and where the TIO could evidence this significant number of complaints by demonstrating a trend in complaints. It was also suggested by Members that the TIO should be able to evidence a negative impact for consumers arising from the complaints.

But just as Neave (2014) said that it is old fashioned to think of ombudsman simply as grievance handlers, it is also old-fashioned to think that, in modern ombudsmanry, systemic investigations are only commenced after the receipt of multiple complaints. Increasingly, within modern ombudsmanry, systemic investigations are commenced on small numbers of investigations or even on



an ombudsman's own initiative. (See the work of the Ontario Ombudsman, the NSW Ombudsman, the Commonwealth Ombudsman, the Northern Ireland Public Services Ombudsman and the Public Services Ombudsman for Wales) This change brings the TIO into line with modern ombudsmanry.

- 2) The Comms Alliance stated that its members reported that systemic investigations focus on internal processes and procedures instead of focusing on outcomes which it described as impacts on consumers. It was unhappy at what it saw the TIO focusing on Members' commercial or operational decisions. The justification for a systemic investigation is to examine the whole system in which there is reason to believe that there is a problem adversely affecting consumers. Restricting the TIO to only consider outcomes and not what led to these outcomes would seriously undermine the systemic investigation process.
- 3) It was suggested by the Comms Alliance that the TIO should limit the number of systemic investigations that it conducts annually as the increasing number of systemic investigations undertaken by the TIO is placing an undue and unnecessary burden on Members 'to feed the beast' as one Member put it. Members were in agreement that, as the Comms Alliance stated, 'the "conversion rate" of information requests to meaningful identification and action targeting systemic issues is low, we believe, reached unsustainable and unreasonable levels' (sic). Members and the Comms Alliance were concerned that the notification to a Member of a systemic issue was a fishing expedition rather than the identification of a clear systemic problem by the TIO.

Potential systemic investigations are identified by the TIO from a number of sources such as EROs, DROs or regulators. Issues that arise are considered at meetings of the systemic investigations team where any additional work is identified so that the team can have an understanding of the scale and potential impact of the issue. The review team was shown examples of the outputs of such assessments and, in each case, there were very justifiable reasons for the TIO to consider a systemic investigation.

Figures provided by the TIO to the review team indicate that the TIO conducts around 30 systemic investigations each year - conducting 29 systemic investigations in both 2020-21 and 2021-22. In itself, given the size of the Australian telecommunications industry, an average of around 30 systemic investigations a year does not sound unreasonable. For example, EWON in its 2018 Annual Report stated that it had conducted 19 systemic investigations (McBurnie and Williams 2019), in 2020-2021 EWOV conducted 26 systemic investigations (EWOV 2021) and AFCA stated that it had conducted 218 systemic investigations in 2019-20 (AFCA 2020). Indeed the number of systemic investigations conducted by the TIO into the very large Australian telecommunications industry suggest that the Comms Alliance's concerns that the numbers are unsustainable and unreasonable to be misplaced.

The review team does not support limiting the number of systemic investigations that the TIO commences in any one year, as suggested by the Comms Alliance. Indeed, the review team has no concern with the actual number of systemic investigations undertaken by the TIO each year and would perhaps suggest that given the number of systemic investigations conducted by comparator organisations, the number of systemic investigations conducted by the TIO is relatively low. Each year, the TIO identifies a much larger number of potential systemic investigations but chooses to investigate only a minority of the issues identified. The TIO may wish to consider expanding its systemic investigation resource with a view to conducting a larger number of systemic investigation where these appear justified. If the TIO has reasonable grounds to consider that there is a systemic problem adversely affecting consumers then it should be able to investigate that potential problem, as failure to do so could adversely impact consumers.

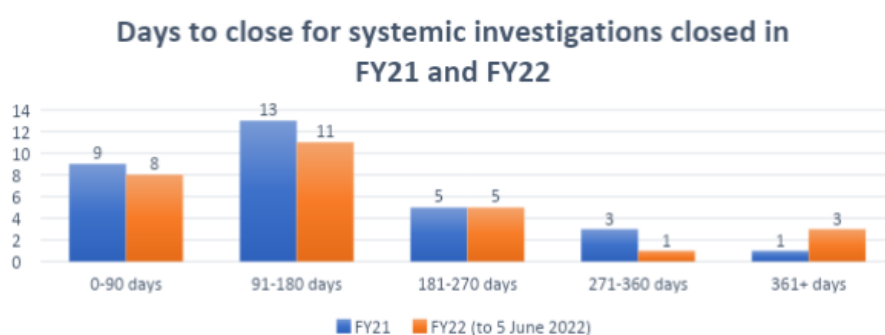
- 4) Many Members were strongly of the view that, in its systemic investigation activities, the TIO is moving too far into space that is more properly the responsibility of regulators. Examples were cited of the TIO undertaking systemic investigations into issues that a regulator was also investigating. The

review team would highlight the differences in focus between regulators and ombudsman.

The focus of regulators is, has the body breached any of the regulations that allow it to operate in that industry sector and, if so, what regulatory action should the regulator take to ensure that the body complies with regulations in future. Ombudsman are more interested in system improvement – how can it work with bodies to ensure that the overall system benefits. Because of this difference in focus, a regulator and ombudsman can, in some circumstances, conduct an investigation into the same problem, but reach different conclusions and recommendations and, yet, both be legitimate.

### Timeliness of TIO's systemic investigations

The final issue that raised concern from Members was that of the timeliness of TIO systemic investigations. Many Members complained that the TIO took too long to complete systemic investigations. The Comms Alliance in its submission claimed that 'the TIO can take many months to review information and provide any feedback or updates on the issues in question'. There are two issues contained within this: the overall length that it takes the TIO to complete its investigations and the timeliness of feedback, or further action, by TIO caseworkers to its request for information from Members. Figure 10 below provides detail on the length of TIO systemic investigations:



*Figure 10: Days to close for systemic investigations closed in 2020-21 and 2021-22*

As can be seen roughly one-third of systemic investigations take under three months while one-third take three to six months and the final one-third over six months to complete. The review team was informed by the TIO that delays in closure can be caused by the complexity of the investigation, provider delay, staff changes within the TIO and delays in implementation by the Member. It is noted that, apart from the need by the TIO, on occasion, to change the investigator, the other factors mentioned are outwith the control of the TIO.

The review team suggests that there are additional reasons which contribute to the length of duration of TIO systemic investigations. The TIO does not have set timescales for closure of systemic investigations. Thus, they take as long as they take and that is not an efficient approach. The approach to systemic investigations within the TIO is for one caseworker to have responsibility for the management of an entire systemic investigation with, perhaps, a little support from colleagues if necessary. This caseworker will probably be managing three to four systemic investigations at any one time. Such an approach may increase the efficiency of the caseworker but could lead to delays in the closure of cases.

As the starting point of a systemic investigation is that a failing has the potential to adversely affect many customers it is important that the TIO concludes its systemic investigations as quickly as possible. The Ontario Ombudsman, when conducting a systemic investigation, would select a bespoke team of about six staff, develop a detailed project plan and have a very tight closure date of around three months (Ontario Ombudsman 2013). This is a very intensive and costly approach and only really applies to major systemic issues. The TIO appears to operate somewhat at the other end of the spectrum, with one caseworker conducting multiple systemic investigations at any one time with no rigorous project plan and no fixed time to closure. The TIO should review its systemic investigation model to determine how it can make the process quicker and more efficient.

As a final point in this section, Members did raise concerns that they may provide the TIO with information as part of the systemic investigation but that there may be a significant delay by the caseworker to follow this up and/or the subsequent responsiveness of caseworkers to Members seeking an update. This is similar in nature to concerns raised by Members about the interaction between caseworker

and Members during individual complaint resolution. The review team is not in a position to assess this issue, but given that this has been reported to it by many Members over different scenarios it is suggested that the TIO's management should look into this issue.

## 7.2 Land Access

By virtue of the *Telecommunications Code of Practice 2021* which details the legal context for the implementation of Schedule 3 of the *Telecommunications Act 1997*, the TIO has responsibility for considering objections from landowners about a carrier's ability to access land under an agreement, or under the carrier's statutory powers to inspect land, maintain facilities, or install low impact facilities. The *Telecommunications Code of Practice 2021* sets out the associated conditions with which carriers must comply. This is a specialist area of activity within the TIO, with many cases requiring expert technical opinion and external legal advice. The TIO is required to adjudicate in these cases but may use the fair and reasonable standard as the basis for its adjudication.

A carrier has to inform a landowner of its intent to access their land or use its statutory powers to inspect land, maintain facilities, or install low impact facilities at least ten days prior to the proposed commencement of the activity. In turn, the landowner has a maximum of five days in which to submit a written objection to the carrier with supporting reasons for the objection – that is a landowner's objection must be received by the carrier at least five days prior to the proposed commencement of the activity.

Once a land owner has notified the carrier that it wishes to object to the proposed activity on their land, the carrier is required to make reasonable efforts to resolve the matter and these efforts must be made in good faith. If a resolution has not been secured then the carrier **must** refer the objection to the TIO (*Telecommunications Code of Practice 2021*, Paras 2.35, 2.35A, 4.36 and 4.36A, review teams' emphasis). However, the review team has heard that the TIO receives complaints from landowners in which they allege that the carrier has refused to refer their

objection to the TIO, despite the Code of Practice requiring the carrier to do so (*Telecommunications Code of Practice 2021*, Paras 2.35 and 4.36). The review team were informed that carriers appeared to use **their** power to make reasonable attempts to resolve the matter as **the** appeal process, informing the landowner that they would not refer the case to the TIO as the objection had no merit or did not meet one of the grounds listed in the Code of Practice, upon which one can object. This is worrying as, if true, it is incompatible with the Code of Practice and denies the landowner an opportunity to object.

This leads to a problem for the TIO. If a carrier behaves in this way, the landowner is effectively prevented from submitting an objection in keeping with the Code of Practice but is only able to submit a complaint to the TIO about the carrier's handling of their intended objection. This situation is exacerbated by the TIO's own, internal, processes which would, ordinarily, refer this complaint back to the carrier for an attempt at resolution. While this refer-back process is ongoing, the time frames within the Code of Practice are also running. As a result, the legally based time scale in which to make an objection may expire before the refer-back process is complete. The review team has raised concerns with the refer-back process in the handling of complaints earlier in this review but to use the refer-back process in Land Access complaints appears even more troubling. The TIO should not refer-back any Land Access complaints. The TIO may also wish to discuss with the ACMA whether breaches by carriers of the Code of Practice should result in regulatory action.

A third issue was raised and that was that the TIO charges a A\$5,000 flat fee to consider a land access objection. The review team was informed that in many cases the actual costs to adjudicate a land access complaint were in excess of A\$5,000. Should this be correct, and the review team can see that the costs could easily exceed A\$5,000, the review team believes that there should be full cost recovery by the TIO for this activity.

**Recommendation 15:**

The TIO should consider increasing its systemic investigation resource with a view to increasing the number of systemic investigations that it conducts each year to ensure that all justified systemic investigations are undertaken.

**Recommendation 16:**

The TIO should review how it undertakes systemic investigations with the intention of reducing the time taken to complete a systemic investigation.

**Recommendation 17:**

The TIO should amend its Terms of Reference to make clear that it can investigate complaints about a carrier's behaviour when a carrier wishes to access land under an agreement, or under the carrier's statutory powers to inspect land, maintain facilities, or install low impact facilities.

**Recommendation 18:**

The TIO should not use the refer-back process with complaints about Land Access.

**Recommendation 19:**

The TIO should ensure that the price charged for Land Access objections covers the cost of their adjudication.

## CHAPTER 8. ACCOUNTABILITY

The TIO has three core accountability relationships. The first is to the public and complainants, the second is to members, while the third is to other stakeholders in the telecommunications regulatory network, which includes the ACCC, the ACMA and the responsible government department. In its scope for this review, the TIO asked the review team to consider specifically the TIO's government and regulator engagement.

During the fieldwork, it became clear that there was a general consensus that the TIO could do more in publishing data and it is this issue that is considered first.

### 8.1 Data collection and publication

Consumer groups were very clear that they would like the TIO to publish more data and at a more granular level, with there being several calls that when publishing data, the associated telecom businesses should be named, claiming that, by doing so, this would increase transparency and the accountability to the public of telecom businesses. It was suggested that the data that is published should provide detail on the number and types of the complaints about each member received by the TIO and, given the particular problems surrounding the provision of telecommunication services in rural, remote areas that that data should also demonstrate the split between urban and rural, remote complaints. The example of AFCA was cited by consumer group representatives as an example of good practice in this area. The data and information contained within AFCA's 'Datacube' (AFCA 2022) is both comprehensive and detailed, providing those interested an ability to interrogate and analyse the data in many different ways. It does appear to be the gold standard for industry ombudsman data reporting.

As mentioned earlier in the report, Members were unhappy that the TIO publishes inaccurate information in its quarterly reports as the TIO publishes data before taking account of potential reclassifications. One Member suggested that the TIO should



not publish data relating to the TIO's activities prior to case management or following a systemic investigation as the data collected prior to these activities is unreliable. Nonetheless, Members, too, were generally supportive of the proposition that the TIO should publish more data as this could help Members improve their performance. This includes increased publication of information about systemic investigations and the outcomes of decisions. However, the Members' overall focus tended to be directed towards the TIO publishing additional information on its own performance, including reclassification rates.

The TIO publishes a quarterly report on complaint numbers (see TIO 2022d for an example of such a report) which provides relatively detailed data on the complaints received by the TIO and with how they are dealt. Similarly, in the TIO's Annual Report (2021), the TIO publishes detailed information and analysis on the complaints that it receives. However, there are gaps in the information that is published by the TIO. The TIO publishes only a small sample of its systemic investigations, for example, three investigation reports in both of the 2020 and 2021 calendar years (TIO 2022e). Similarly, the TIO does not publish all of the preliminary views and decisions that it reaches, although the proportion of decisions published is higher than those of systemic issues and preliminary views (TIO 2021). In addition, the TIO publishes very little information about the outcomes of its complaints, the disposition of complaints received by the TIO and the TIO's performance in its handling of complaints received. In relation to this last point, it is noticeable that information published on the TIO's own performance is very limited (see TIO 2021). It is suggested that the TIO could publish more information related to its own performance and the disposition and outcomes of complaints.

Earlier there was discussion of the need for the TIO to maintain a balance between the interests of both members and consumers and that there can be a tension between these interests which the TIO needs to manage. As a result, the TIO is aware of the need for it to establish strong relationships with both members and consumer groups.

## 8.2 Engagement with, and accountability towards the public

The TIO works hard to discharge its accountability towards the public. On its website the TIO publishes a wide variety of information about its processes, and other helpful information within its guidance documents and factsheets. The TIO issues a quarterly eNewsletter, to which individuals can subscribe, updating them on complaints and other topical issues. The TIO publishes its quarterly complaints report which provides some information on complaints received. Unfortunately, it appears that the majority of the information produced by the TIO, including its Annual Report, is only available in English, despite almost one in four people resident in Australia speaking a language other than English at home.

As noted earlier in the chapter on accessibility, the TIO conducts significant work in its attempts to engage with the community and community groups. To support this engagement activity with community groups the TIO, in 2020, established a Consumer Panel, consisting of 11 members from a diverse range of community groups, which meets at least twice a year, to 'provide us [the TIO] with access to diverse consumer perspectives to inform our work' (TIO undated). Its purpose is to provide the TIO with advice on a range of issues, including:

- The needs and interests of vulnerable, disadvantaged and hard-to-reach consumers
- The needs and interests of small business consumers
- Consumer relationships with telecommunications providers
- Systemic issues, trends and regulatory issues
- Consumer views on the awareness and accessibility of the telecommunications industry ombudsman to consumers
- Community outreach
- Offering feedback on the continuing development and enhancement of complaint handling processes
- Key issues arising in the sector likely to impact on telecommunications complaints and complaint handling. (tio 2019).

Although it has a diverse range of organisations among its 11 members, it is noticeable that the membership is light on groups specifically representing people of colour. Given that one in five people do not speak English at home (O'Neill 2020, p.5), the TIO should reassure itself that its consumer panel is able to accurately reflect the views and concerns of Australia's ethnic minorities.

While generally very supportive of the TIO's outreach programme, there was a general view from consumer groups that the TIO should undertake additional targeted outreach activities aimed at rural, remote areas and with First Nation populations and other vulnerable or disadvantaged groups. In this regard the review teams notes that there is very limited resource available within the TIO with which to conduct community outreach activities. The TIO should consider expanding the resource available with which to conduct community outreach.

### 8.3 Engagement with, and accountability towards Members

The constitution details the nature of the accountability relationship between the TIO and members. The key mechanism is the Annual General Meeting of members. The TIO also undertakes other activities with members. Further information on its work with Members is included in the section on Member and Community Stakeholder Engagement. However, unlike other schemes, the TIO does not conduct membership surveys to ascertain their views on the TIO's performance and other important issues.

For this review, nearly all Members were positive about their overall relationship with the TIO. In engaging with its members, the TIO adopts a multi-modal approach, using a variety of mechanisms led by a dedicated Members' Team which also acts as first point of contact to members about non-casework TIO activities. These activities include the onboarding of new members, which involves making sure that they have accurately applied for membership, that their membership details are accurate and kept updated, and the provision of training videos to new members on issues relevant to their membership.

For all members there are a variety of mechanisms by which the TIO attempts to secure meaningful engagement with members. It provides four to six webinars on complaint handling per year, as well as webinars on systemic investigations. It holds two members forums per year to which all members are invited.<sup>6</sup> Newsletters are

---

<sup>6</sup> It is noted by the review team that covid meant that the TIO was not able to conduct its face-to-face member forums.

issued to members on at least a monthly basis (20 editions in 2020-2021) and have invited members to external events. The TIO website provides a limited amount of publicly available information to its members but there is also a members' portal which provides members with access to a suite of reports, invoicing, events, induction videos, webinars, publications, and information about the TIO's complaint handling process (TIO 2021, p.28).

It was noted earlier in the report, that ten TIO members account for around 93% of complaints received by the TIO. To facilitate discussions with these ten members around issues that arise, such as trends and patterns, the TIO meets fortnightly with representatives from these members. It also holds ad hoc meetings as required with members responsible for fewer complaints.

Members who contributed to this review were, generally very supportive of the engagement between them and the TIO. Although happy with the engagement some members did feel that the TIO could strengthen its engagement further. One proposal raised by several participants was for the TIO to establish a collaborative forum between the TIO members which would allow both parties to work more collaboratively on process issues, the sharing of technical knowledge and expertise as well as broader discussions on consumer protection and best practice complaint handling.

#### 8.4 Engagement with, and accountability to, members of the telecommunications regulatory network

As noted above, the TIO is part of a regulatory system which attempts to ensure that the telecommunications market operates effectively. To do this it needs to work effectively with regulators such as the ACCC, the ACMA and relevant government departments. Both the ACCC and the ACMA, as well as representatives from the responsible government department, spoke positively of their relationships with the TIO. There was clear support for the TIO's position within the regulatory system. In its submission, the ACMA stated that 'ACMA and TIO staff have a long history of

working together to discharge our respective functions. This relationship provides a significant benefit to the Australian community'. To facilitate the relationships that exist between the TIO and the ACCC and the ACMA, there are published Memoranda of Understanding. The implementation of those memoranda is demonstrated through both regular planned meetings between senior members of both the regulators and the TIO and also by more informal meetings on an *ad hoc* basis at an operational level. The ACMA described the meetings as 'working well and strike a good balance between engagement at the various levels across the ACMA and TIO'. The ACCC described its relationship with the TIO as 'generally healthy' while a representative from the responsible government department described the relationship as 'close'.

Despite these clearly positive relationships, there was one issue raised by both the ACCC and the ACMA where both suggested that the TIO could be more open in the sharing of its information. A participant from one regulator suggested that, while recognising the importance of the TIO to the regulatory network, the perceived lack of information sharing on the part of the TIO could potentially leave a gap in the regulatory network.

The ACMA stated that 'TIO complaints statistics and referrals can be an important source of information for the ACMA about emerging issues and harms and a key informant to our compliance, education and regulatory activities'. A representative from the ACCC made similar comments: that the ACCC valued, and need, the information that the TIO is able to provide.

However, a participant from the ACMA also suggested that there was an inconsistency about the information provided by the TIO, stating that while the ACMA received monthly information with named data about the number of complaints and general information about the issues that have arisen within the complaints, the ACMA is unable to receive named data that links the identified issues to any particular provider. It was noted that there was willingness at senior levels of the TIO to provide this information, and a suggestion that the Memoranda of Understanding

would permit the sharing of necessary information, but that more junior members of staff from within the TIO may be delaying its release.

The regulators were keen to stress that they were not suggesting that the TIO collect additional information or change the means by which it currently collects information. Rather, they would like the TIO to be more collegiate in sharing the information that it has in its possession. Currently, both the ACCC and the ACMA may need to use their statutory powers to compel the TIO to produce necessary information, a process described to the review team as ‘cumbersome’ and ‘time consuming and complicated’.

The concerns from regulators about the TIO’s reluctance to share information extends to the sharing of information about systemic investigations, with regulators expressing a view that knowledge of TIO systemic investigations would be beneficial to them in understanding issues currently arising within the telecommunications market and thus help them deliver their regulatory responsibilities.

Regulators put forward a number of potential reasons as to why the TIO is reluctant to share information with them. The TIO’s foundational legislation is the *Telecommunications (Consumer Protection and Services Standards) Act 1999* and it does not provide the TIO with explicit legislative authority to share information although it also does not explicitly place any restriction upon the TIO’s sharing of information. A participant from one regulator also informed the review team that they have been told by TIO staff that the TIO’s Privacy Policy prevented them from sharing information. The final reason put forward by regulator participants on the TIO’s apparent reluctance to share information was that they had been told by TIO staff that routinely supplying regulators with information could adversely affect the TIO’s relationship with members and may compromise its ability to conduct investigations. A member of TIO staff confirmed this last view in a discussion with a member of the review team. The management team of the TIO take a different position on this issue. The management team suggests that should the TIO refer the outputs of its systemic investigations to ACMA, the TIO is not always clear what actions, if any, the ACMA subsequently took against the Member. The TIO management team reiterated its position that the TIO was always ready and willing to discuss with the ACMA how they may work better together and how they can

share information easily but within the confidentiality constraints that apply to both bodies.

**Recommendation 20:**

The TIO should expand its resource with which it is able to conduct community outreach.

**Recommendation 21:**

The TIO should review the publication of its data to address the concerns raised in this review, including increased publication about the performance of the TIO.

**Recommendation 22:**

Taking account of the importance of TIO's information to a well-functioning regulatory network, the TIO should agree with the ACCC and the ACMA what information the TIO shall provide routinely to them.

## CHAPTER 9. INDEPENDENCE

The intention behind this benchmark is that the TIO's decision-making and administration should be independent of Members and that the decision reached by the TIO in relation to complaints are unbiased. The chapter considers whether the TIO's foundational legislation is fit-for-purpose in its ability to support the practise of modern ombudsmanry. The TIO's Constitution, Board Charter, and Terms of Reference. In considering the TIO's Terms of Reference the review team consider particular issues raised during the fieldwork from both Members and community group representatives.

### 9.1 Legislative background to the TIO

The TIO's foundational legislation is located in Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. Paragraph 128(2) states that 'The scheme is to be known as the **Telecommunications Industry Ombudsman scheme**' (original emphasis). In paragraph 128(4) of this Act sets out the responsibilities placed upon the TIO:

The scheme must provide for the Telecommunications Industry Ombudsman to:

- (a) investigate; and
- (b) make determinations relating to; and
- (c) give directions relating to;

complaints about carriage services by end-users of those services.

This legislation is now showing its age. As was discussed earlier, the idea that an ombudsman is solely a grievance handler responsible for the resolution of individual complaints is now considered an old-fashioned model. Modern industry ombudsman play an important role in the regulation of the industry through the conduct of a range



of functions that are built upon this core function, but not restricted to only this function, such as data sharing, systematic investigations, contributions to policy and consultations. By using its unique insight gained from the resolution of complaints the modern industry ombudsman contributes to effective market regulation, the protection of consumers, and the maintenance of trust in the industry. Whilst it is recognised by the review team that it is not in the gift of the TIO to change this legislation, the TIO should approach its co-regulators and the responsible government department to seek support for the updating of the legislation. Doing so would make clear to Members and the public what the government expects of the TIO.

## 9.2 The TIO Board

The issue of board composition is relevant to the independence and, of at least equal importance, the perceived independence of consumer ombudsman, from its funders. The fact that the TIO is funded by the telecommunications industry will, in itself, raise doubts among outsiders about its independence. This is the historical funding model of industry-based ombudsman schemes and reflects their history, as a form of statutory based self-regulation.

The TIO Board is comprised of three members drawn from the telecommunications industry, three members who are representatives drawn from consumer groups, two independent members and an independent chair, comprising a total of nine members. As a result of the Consumer Safeguards Review Part A, changes were made to the selection of Board members, principally removing the right of Telstra and Optus to have an automatic board representative although the review team notes that two of the three current industry members of the Board remain drawn from Telstra and Optus. All director appointments to the TIO are made through the TIO Nominations Committee which, after open advert, recommends potential directors to the TIO Board. Table 6 provides a comparison of the governance arrangements for the TIO with comparator organisations.

Length of appointment	Composition of directors	Number of directors	Organisation
3 years with a potential further 3 years, without a formal application process, if approved by the Board	Independent chair  Three industry members (IDs)	9 members	TIO
Chair – 3- year term with possible further 3 years.	Chair: Appointed by members following proposal from Nominations Committee	Currently 9 members with the potential for 11	EWOV
3 years with possible further 3 years	Chair – appointed by Board	11members Chairperson 5 IDs	EWON
3-year term but possible to serve 3 terms.	Chair – appointed by directors  CDs appointed by Directors – must be able to demonstrate applicable	Up to 11 members Chairperson 5 IDs	AFCA
Chair  Four year term with possible further four years. Members three year appointment with potential further three years.	Chair  Four independent members	5 members Chairperson 4 Ind	UDL

Table 6: Comparison of director arrangements in consumer ombudsman

As well as ensuring the appropriate running of the TIO, all board members have a responsibility to ensure the maintenance of long-term trust and confidence in the TIO among its key stakeholders. Consumer board members are required by the TIO's Constitution (12.10(a)(vii)) to retain links with 'relevant Consumer Groups'. Industry members need only have telecommunications industry experience.

The TIO's Charter for the Board of Directors (para. 2(4)(a)) states that the Board must act 'in the best interests of the TIO as a whole ... irrespective of individual members' personnel, professional, commercial or other interests, loyalties or affiliations'. Being an industry or consumer group member on the Board of an industry ombudsman can place the incumbent in challenging positions. One industry board member who spoke with the review team was very conscious of the need to 'create walls' between their board member role and their industry position and of the need to be very clear about conflict of interests.

Nonetheless, the review team received several reports that on difficult issues, such as the proposed change to the Terms of Reference to provide the TIO with greater jurisdiction over equipment, that both industry and consumer group members adopted 'short-term interests' rather than consider the longer-term interests of the TIO. The review team are unable to confirm this but one way to avoid any potential conflict of interest is to adopt the recommendation contained within the Consumer Safeguards Review Part A which was that industry members, while being able to evidence significant senior telecommunications industry experience, should not be currently employed within the telecommunications industry. A similar position could be taken with consumer group representatives. Independent board members should not previously have held senior positions within either the telecommunications industry or with a consumer group.

The review team understands that this proposal from the Consumer Safeguards Review Part A was put to members who rejected it. There are other options available to the TIO. Firstly, the TIO could follow the model of Utilities Disputes in New Zealand and move to a model where all board members are independent or, secondly, adopting a model of two industry board members, two consumer group members, four independent members and an independent chair. The review team believes that the current model is unsustainable in the longer term given the

changing nature of the telecommunications industry which has the potential to create more problems of the type that arose with the discussions on equipment and financial redress. There is a need for the TIO to review the construct and membership of its Board. In making these points the review team is, in no way, passing judgement on any current or previous board member.

The TIO may also wish to review the diversity of its board. While the review team was only able to speak with a minority of board members, the TIO's Annual Report does provide brief details on all Board Members. An examination of who is currently a Board Member appears to indicate that the current composition of the TIO Board does not reflect the diverse nature of the broader Australian population. As was discussed under the benchmark: Accessibility, the TIO does appear to have problems engaging with, and securing the trust of, some people in vulnerable and disadvantaged communities. These groups may not readily engage with mechanisms such as industry ombudsman (Hertogh 2013) and ensuring appropriate diversity on the TIO board may help create confidence and awareness with these groups.

### 9.3 Constitution and Charter

A review of the TIO's Constitution reveals two points of particular interest to the review team.

Firstly, para.1 of the Constitution states that 'the name of the company is Telecommunications Industry Ombudsman'. The review team recognise that this is in keeping with Para 128(2) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. However, while it is accepted by the review team that this must be the formal legal name of the TIO, used in formal legal settings, it questions whether it should be the name publicly used by the TIO. The word industry in the title suggest that the ombudsman scheme belongs to the telecommunications industry and is not independent of it. The TIO should remove the word Industry from its publicly available material and should speak with the government about removing this clause from the Act. In addition, given the low levels of literacy extant within

Australia (O'Neill 2020) the word telecommunications may also provide a barrier. The TIO may wish to use a more-user friendly name in public such as the Telco Ombudsman.

Secondly, the Objects of the TIO are detailed in para 3 which states 'The objects of TIO Limited are to:

- (a) to receive, investigate, make decisions relating to, give directions relating to and facilitate the resolution of [complaints] ...
- (b) to exercise such jurisdiction, powers and functions as may be conferred by or under any legislation or instrument.

Hodges (2018) suggests that there are five potential roles that can be delivered by industry-based ombudsman:

- 1) Consumer advice
- 2) Individual dispute resolution
- 3) Data analysis: analysing data on complaints received to identify issues and trends
- 4) Data publication: provides feedback to consumers, the industry, regulators and other stakeholders
- 5) Improving market behaviour: This can be achieved through individual complaint investigations, the publication of information or systemic activities.

Thus, the objectives of an industry ombudsman go beyond those detailed in the TIO's Constitution. The review team recognise that the TIO's Objects are in keeping with the role of the TIO detailed in the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. As stated above though, this Act is out of date and no longer represents the functions of an industry ombudsman. The TIO should review its Objects to ensure that they represent modern ombudsmanry. Such a change will not significantly change the activities that the TIO undertakes currently. The change will, however, make clear to Members and the public what they can expect from the TIO.

Para.1 (4) of the TIO's Charter for its Board of Directors states 'The Board is accountable to members of TIO Limited, while at the same time having proper regard for the interests of all stakeholders'. Such a clause clearly creates different classes of Board accountability and this is regrettable. The review team argue that the Board of the TIO is accountable to Members, the public and co-regulators.

## 9.4 Terms of Reference

In the Request for Proposal the TIO asked that the review team should also consider the effectiveness of the TIO's modernised Terms of Reference. These new Terms of Reference came into force on 1 January 2022 following an extensive consultation with Members and the public. On the date of its implementation, the TIO management team was still working on guidance about how some of the revisions in the Terms of reference relating to issues such as non-financial loss or equipment would be implemented in practice.

As part of its fieldwork, the review team consulted with members and consumer groups on the revised Terms of Reference. Three issues were repeatedly raised: the lifting of potential financial compensation to A\$100,000, the ability to award limited financial compensation for non-financial loss, and the TIO's jurisdiction over equipment sold or provided by Members.

### A\$100,000 Limit

The revised Terms of Reference makes clear that the TIO is able to award financial redress to a maximum of A\$100,000 in any one complaint. In the previous Terms of Reference, the maximum limit had been set at A\$50,000. Consumer group representatives were happy with this increase while Members were unhappy with the change.

Optus in its submission made the point that a review of TIO decisions indicated that the average award was around A\$6,000 with the highest award they identified being A\$20,505. They suggested that, as the previous A\$50,000 maximum had not come close to being breached, there was no compelling argument for the TIO to increase the potential maximum limit for financial compensation. This finding, confirmed by the review team, should be reassuring to Members as it indicates that, although there has been the facility for the TIO to award up to A\$50,000 in financial redress, it has not yet approached that limit.

But that does not obviate the potential that the TIO may need to do so in the future. The TIO has to make decisions that are fair and reasonable and, as part of that consideration, what would be a fair and reasonable level of financial redress. The TIO has jurisdiction over complaints made by small businesses and businesses are increasingly using technology to attract customers and manage their business. An egregious failure by a telecom business may lead to a small business suffering significant financial detriment through no fault of its own. In these cases, the potential to award up to A\$100,000 does not appear unreasonable.

### Financial redress for non-financial loss

Consumer groups welcomed the introduction of the ability for the TIO to make awards for non-financial loss although they were disappointed that there is a maximum limit of A\$1,500. They pointed to the example of AFCA which can award redress of up to A\$5,400 for non-financial loss (AFCA 2021, p.41). ACCAN suggested that the limit be unlimited.

Members were unhappy at the introduction of non-financial loss, with one company claiming that this could cost telecom businesses ‘10s of millions of dollars’ per year. One Member, echoing the Comms Alliance, asked how the TIO would be able to measure pain and suffering, a second Member claimed that this new approach was punitive, while a third feared that the ability to award redress for non-financial loss would be used too frequently. Members were also concerned that it may be unclear how the decision to award non-financial compensation and its quantum may be determined in any individual case, that there may be inconsistency in the decisions between different caseworkers and used too frequently.

The Comms Alliance were of the view that compensation for non-financial loss was inappropriate as the issues were complex and that it was difficult to substantiate the claimed losses. Their view was that the issue of non-financial loss would be better left with courts or other quasi-judicial bodies to determine. However, the obstacles for ordinary consumers to take claims to courts are well known and this does not sound like a practical option.

The review team support the introduction of non-financial loss as a potential remedy where appropriate. The review team was informed by the TIO that the TIO was currently piloting a matrix to support caseworkers make such judgments – relevant factors would be the severity and duration of the inconvenience. The review team believes that once this pilot is complete, the TIO should publish the document on its website. In addition, as this is a new initiative, the TIO should undertake a regular annual audit on the use and scale of non-financial loss to assure itself that there is consistency in its use and quantum. The results of this audit should be published by the TIO.

### Equipment

The third issue that arose concerning the change to the TIO's Terms of Reference relates to the degree to which the TIO should be able to consider complaints about equipment sold or provided by telecom businesses. It will be recalled from the discussion in the Introduction about the rapidly changing nature of the telecommunications industry that a significant future change is the development of the 'internet of things' and the potential of 'trillions of devices that may be able to be connected to the internet' (Howey 2022). It is against this background that the TIO considered this amendment to its Terms of Reference.

The revised Terms of Reference issued in 2022 (TIO 2022) clarified the types of complaints that the TIO would be able to consider: 'a problem with telecommunications equipment supplied by a member, or with a member's infrastructure, that affects the consumer's access to a telecommunications service supplied or offered by a member' (TIO 2022, para.2.2(b)). This amendment potentially extends the range of telecom equipment, sold or provided by Members, that could be subject to the jurisdiction of the TIO than provided for in the previous Terms of Reference.

ACCAN, in its submission to this review, stated that 'The TIO should be able to adapt to a changing communications landscape and changing consumer needs. In the current environment, there are some limitations to the effectiveness of the TIO, for example, its device and equipment jurisdiction'. A participant informed the review team that the range of devices that may be potentially covered was increasing rapidly due to changes in technology and the TIO risked being bypassed by these



changes with the danger that the TIO may become irrelevant. Consumer group representatives wanted the TIO to be able to consider as broad a range of equipment sold or provided by Members as possible and would 'welcome a generous interpretation' of the rules. They stated that it is the Members that are making the decision to enter the retail market for such equipment and that Members should have responsibility for the equipment that they sell. A consumer group representative, building on that position, stated that Members have a market advantage by the virtue of their provision of the essential services that underpin the use of this equipment.

There was a difference in opinion among Members. Most Members did not accept that the TIO should have significant jurisdiction over standalone equipment. Those Members, who argued that the TIO should have limited jurisdiction over equipment, suggested that the TIO was attempting a 'land grab', 'being everything to everyone' and that the TIO believed that it should have a very broad remit, able to fill gaps in consumer protection. Members stressed that it would be difficult for the TIO to keep up with the changes in technology and questioned whether the TIO would have the technical expertise to consider all complaints about equipment. Meanwhile, other Members suggested that they might be happy to held accountable for complaints about equipment that they sell.

The issue at heart of this debate between Members and consumer groups is where should the boundary lie. That is, for what equipment sold or provided by Members should the TIO be able to accept complaints. Members want the boundary to be fairly tight while consumer groups want the boundary to be fairly loose.

Many Members suggested that if the TIO assumed the ability to consider complaints about equipment than this may lead to confusion among consumers about which is the correct body to which they should lodge their complaint. Consumers would be faced with different routes to seek resolution dependent upon where they purchased the equipment. Members suggested that consumers already had a range of options about where to lodge a grievance: courts, small claims tribunals, Offices of Fair Trading and ACCAN. The Comms Alliance was concerned about an overlap of jurisdiction between bodies, citing examples of where complaints have taken their complaint to more than one body.

This argument that there are multiple avenues for complainants to use was described as fallacious by one regulator participant. Consumer groups commented that small claims tribunals and courts are often not a suitable forum to resolve these complaints. Offices of Fair Trading (OFT) may not necessarily be a realistic option given their overall role and their lack of expertise in the area of telecommunications. A consumer group representative was sceptical about OFT intervening, saying that they were reluctant to prosecute and usually tried to use moral suasion to secure a resolution. When the review team undertook its review of EWON, it was noticeable that energy providers were not supportive of bringing OFT Trading into complaint resolution because of the processes that they used in complaint resolution and the time that they took to resolve a complaint (McBurnie and Williams 2019). In the Productivity Commission's Access to Justice report (2014, p.314), the ACCC is cited as saying 'we [ACCC] don't resolve individual complaints' which rules out the ACCC as a body to which an individual can take a complaint.

Where consumers take their complaint to more than one body this is called 'forum shopping'. Dunleavy et al. (2010) discuss this issue, pointing out that complaint systems are often fragmented. Complainants become confused about where to go to lodge a valid complaint and, as a result, they may try several routes to receive the justice to which they believe that they are entitled. When they do this, complainants are criticised for forum shopping when the problem lies with the complaints system itself. In reality, there is no straightforward route by which a consumer can bring a complaint about equipment and the TIO may be best placed to consider them. If they did so, then it would be very important for Members to ensure that they effectively signposted the complainant to the TIO to reduce the risk of both confusion and forum shopping.

It is accepted by the review team that this is a complex and rapidly changing area. But there are some general points that can be drawn:

- The telecommunications market is rapidly changing and current telecom organisations are heavily involved in these developments,
- It will be very difficult to separate out new technologies from traditional telecom supplies as they become increasingly integrated,
- The current consumer protection arrangements are insufficient at present to provide all necessary consumer safeguards, and,

- Ombudsman will need to work closely with regulators and the industry to understand future developments and their impact on consumers, including the approach to consumer protection.

At the time of writing this report, the TIO had only recently produced its formal guidance on how it would handle complaints about telecommunications equipment. In summary, equipment is within the TIO's jurisdiction if it is purchased with a telecom service. If no associated telecom service was purchased but the equipment was a handset, mobile phone, tablet, modem or router, then a complaint will be considered by the TIO if the problem affects the consumer's ability to access the telecom service. Smart home devices, smart watches, drones, accessories such as headphones or ear buds, gaming consoles and laptops are specifically listed as items of equipment that the TIO will not expect to consider. The review team was informed by many sources that this list was as much as the telecom industry was prepared to accept and that consumer groups were disappointed by the limited extent of equipment that can be considered.

The review team are concerned at the current position taken by the TIO in relation to these products. The boundary of what is, or is not, within its jurisdiction, does appear to be determined by what the industry was prepared to accept. Given the significant power imbalances that exist between Members and individual consumers this is disappointing.

This current approach by the TIO may be best described as a holding position. As the telecommunications industry and associated technology changes there will be renewed pressure from consumers and consumer groups for the TIO to update its position. It was noted earlier that some Members indicated that they would accept responsibility for equipment that they sold and this appears to be an appropriate position. This is also the recommendation from the New Zealand Commerce Commission in its review of the New Zealand's telecommunications dispute resolution scheme (Commerce Commission 2021, para. 100.1) which states,

'Consumers should have the recourse to their service provider for all parts of the service that they purchase or receive from their service provider. Complaints or disputes regarding any equipment sold or provided to consumers by their service provider should be within the jurisdiction of the TDRS' (the New Zealand equivalent of the TIO).

It is a commercial business decision for Members to increasingly enter the broader retail market and its position as telecommunication service provider does provide it with some leverage and market advantage in this area. It is noted that Telstra are running TV adverts which are solely about their smart equipment offering, such as headphones, speakers and watches, and do not mention its telecom side of the business. In making these points, the review team is in no way criticising telecom companies from increasingly entering this market. There is an obvious synergy with their historical role and businesses always need to be on the lookout for new customers. But, the review team suggests, that as it has entered this arena, then it needs to accept the responsibilities that consequently arise.

If this position is adopted, and the review team suggests that it is the best option, there will be some issues that will need to be clarified, for example, about equipment that is out of warranty, contract or past its 'end of life' so that there is no unlimited responsibility placed upon Members.

### Additional issues

To aid its review of the Terms of Reference, the review team considered the following equivalent documents: the 'Rules' of AFCA (AFCA 2021) and the Charters of EWOV (EWOV 2018), EWON (EWON 2016) and the PTO (PTO 2013) and, as well as these three issues raised by members and consumer groups, the review team would like to make the following observations.

Part 1 of the revised Terms of reference the TIO includes the roles of the TIO as an external dispute resolution scheme and in 'supporting improvements in industry practice and policy'. The review team is supportive of the items listed but suggests that when the next revision of the TIO is due it may wish to include the following issues:

- 1) The provision of advice to the public and complainants: the TIO already performs this important function through its website, publications, enquiries and to a lesser degree, in enquiry referrals and conciliations. This role should be recognised.

- 2) To encourage Members on the development and implementation of effective complaint handling. It was noted earlier in this report, on the section about Industry Ombudsman, that Lucerna had identified a key role for industry ombudsman to help members improve complaint their handling and that, in doing so, this would benefit all consumers. An industry ombudsman's position at the apex of the complaints system, managing complaint that Members have been unable to resolve, enables the industry ombudsman to assist Members in this way. The review team agree that this is a role for industry ombudsman and the TIO should look to develop this role.
- 3) The TIO may also wish to include in Part 6 of its Terms of Reference (Members obligations), an obligation for Members to operate and publicise an effective complaints process, including the provision of information about the TIO. The review team is aware of ACMA's *Telecommunications (Consumer Complaints Handling) Industry Standard 2018*, but suggest it would also be helpful to either note the obligation on Members to follow this standard.
- 4) As Members complaint handling is now subject to an Industry Standard, the TIO may wish to consider including within its Terms of Reference an explicit ability for it to accept and consider how Members have handled complaints. Poor complaint handling by Members would seem suitable for the award of compensation for non-financial loss.
- 5) Finally, the review team note that the revised Terms of Reference set out what complaints the TIO will handle and will not handle: that is, what is and is not in its jurisdiction. In other schemes it is noted that it is explicitly a power of the ombudsman to determine what is, and is not, in jurisdiction. When the Terms of Reference are next due for revision, the ombudsman may wish to include a paragraph setting out how the ombudsman will handle jurisdictional disputes.

## 9.5 Balancing industry and consumer groups

Gilad's (2008) work on domains was discussed earlier where it was noted that the TIO faces a challenge where it needs to balance the tension that exist between Members and consumers. The point made was that industry ombudsman require both their members resources and support as well as the confidence of the public, resulting in a tension between both sets of stakeholders. Consequently, industry ombudsman need to secure a legitimate compromise between both those competing sets of stakeholders.

The review team recognise the difficulty inherent for the TIO in maintaining that balance. The review team does however suggest that the TIO does not quite have this tension correctly balanced. Too often it appears that the TIO works in the interest of Members. The following issues raised throughout this report demonstrate this imbalance of interests:

- The refer-back stage,
- Fast-track referral,
- The ability, unavailable to complainants, of Members to contest a preliminary view,
- The outcome of the debate on equipment which restricts the jurisdiction of the TIO to a limited list of equipment,
- The outcome of the consultation on non-financial loss which restricted the ability of the TIO to properly recognise the losses that may be incurred by complainants,
- The alleged unwillingness of the TIO to share information with regulators without a need for 'cumbersome and complex' processes, in order to keep the TIO onside with members,
- The lack of detailed information published about Members, and,
- The paragraph in the Board Charter which says that the Board is accountable to members but must only have regard to other stakeholders.

This imbalance in the tension between Members and consumers indicates that the independence of the TIO has been slightly undermined. The TIO needs to rebalance this tension if it is to maintain trust and confidence from users.

**Recommendation 23:**

The TIO should review the construct and membership of its Board.

**Recommendation 24:**

The TIO should, at least, remove the word Industry in its public facing material and also consider a more consumer friendly name.

**Recommendation 25:**

The Board and the Ombudsman should review how it manages the tension between Members and consumers to ensure that a fairer balance between the competing interests is struck.

**Recommendation 26:**

The TIO should amend its policy on complaints about equipment to bring it in line with the opposition adopted by the New Zealand Commerce Commission so that the TIO can consider complaint a about all and any equipment sold or provided by Members.

## APPENDICES

### Appendix One: Biographies of the review team

**Dr Gavin McBurnie** worked at the Parliamentary and Health Service Ombudsman (PHSO) where, over seven years he held a number of senior director level roles. Gavin was the lead consultant on the five-year review of Utilities Disputes Limited, the Public Transport Ombudsman Victoria, the Energy and Water Ombudsman New South Wales. He acted an independent external adviser to the Welsh Assembly as it considered proposals to develop the role of the Public Services Ombudsman for Wales.

Gavin originally trained as a doctor at Glasgow Medical School before returning to Edinburgh University to study for an MBA. Following this he entered health service management where he held a number of director roles within the NHS in both Scotland and England. Gavin has also studied for an LLM at de Montfort University in Health Care Law and was awarded a PhD by Queen Margaret University on the methods used by health ombudsmen in their 'system improvement' role.

**Jane Williams** Williams is a Senior Lecturer in Dispute Resolution at Queen Margaret University in their Business School. She previously worked in consumer protection and has extensive experience of dealing with complaints and in running short courses for regulators, ombudsman organisations and complaint handlers in the public and private sector. Jane was a consumer representative on the Scottish Civil Justice Council and a member of their Access to Justice Committee. She is currently the Chair of the Scottish Legal Complaints Consumer Panel. Her current research focuses on shifting the culture and design of complaint systems to more participative, reflexive and ethical approaches. She has published on topics such as dispute design, fair decision making in complaints handling, consumer experiences of complaints handling, vulnerable consumers and the impact of being complained about. Jane has completed funded research and consultancy projects for BACS on consumer representation, Citizens Advice, Energy and Water Ombudsman New South Wales, Legal Ombudsman, Office of Rail and Road and the Public Transport Ombudsman Victoria.



## Appendix Two: Organisations that made submissions to the consultation

Australian Communications Consumer Action Network

Australian Communications and Media Authority

Comms Alliance

Internet Association of Australia

Legal Aid NSW

nbn

NewSprout

Optus

Telstra

Vodafone TPG

### Appendix Three: Participants in interviews

Australian Communications Consumer Action Network

Australian Communications and Media Authority

Australian Competition and Consumer Commission

AGL Energy

Australian Mobile Telecommunications Association

Aussie Broadband

Comms Alliance

Consumer Action

Council of Small Business Organisations Australia

Department of Infrastructure, Transport, Regional Development and Communications

Financial Counselling Australia

Foxtel

Mate

Optus

Regional Tech Hub

Summit

Telstra

Vocus

Vodafone

West Justice

## Appendix 4: Reference List

AFCA, 2020, *Annual Review*, <https://www.afca.org.au/about-afca/annual-review/previous-annual-reviews>

AFCA, 2021, *Complaint Resolution Scheme Rules*, [file:///C:/Users/gavin/Downloads/AFCA%20-%20Rules%2013%20January%20\(1\).pdf](file:///C:/Users/gavin/Downloads/AFCA%20-%20Rules%2013%20January%20(1).pdf)

Allen and Overy, 2017, *Judicial review of Financial Ombudsman services – Wednesbury unreasonableness*, <http://www.allenoverly.com/publications/en-gb/Pages/Judicial-review-of-FinancialOmbudsman-decisions-%E2%80%93-Wednesbury-unreasonableness.aspx>

ACMA, 2020, *Telco consumer experience — Australian adults and households: Phone and internet services*, <https://www.acma.gov.au/publications/2020-10/report/telco-consumer-experience-australian-adults-households-and-businesses>

AMCA, 2022a, *Telco complaints-handling performance*, <https://www.acma.gov.au/publications/2021-04/report/telco-complaints-handling-performance>

Begiraj, J., Garahan, S. and Shuttleworth, K., 2018, *Ombudsman Schemes and effective access to justice: A study of international practices and trends*, [https://www.biicl.org/documents/2021\\_access\\_to\\_justice\\_ombudsman\\_report\\_2018\\_full.pdf?showdocument=1%C2%A0](https://www.biicl.org/documents/2021_access_to_justice_ombudsman_report_2018_full.pdf?showdocument=1%C2%A0)

Brennan, C., Sourdin, T., Williams, J., Bursteyner, N. and Gill, C., 2017, Consumer vulnerability and complaint handling: challenges, opportunities and dispute system design. *Int J Consum Stud.* 2017;00:1–9. <https://doi.org/10.1111/ijcs.12377>

Cameron, Ralph, Khoury, 2017, *Telecommunications Industry Ombudsman Independent Review Report*, [https://www.tio.com.au/sites/default/files/2019-05/2017\\_0929-TIO-Report-Final\\_0.pdf](https://www.tio.com.au/sites/default/files/2019-05/2017_0929-TIO-Report-Final_0.pdf)

Chaplain, C., 2021, More than half of the public would support renationalising energy companies, polling reveals, *iNews*, 25 September 2021

Coles, 2022, *ColesMobile*, <https://colesmobile.com.au/>

Commerce Commission, 2021, *2021 Review of the Telecommunications Dispute Resolution Scheme*, [https://comcom.govt.nz/data/assets/pdf\\_file/0020/270083/Report-to-the-New-Zealand-Telecommunications-Forum-on-recommendations-for-improvements-to-the-TDRS-11-November-2021.pdf](https://comcom.govt.nz/data/assets/pdf_file/0020/270083/Report-to-the-New-Zealand-Telecommunications-Forum-on-recommendations-for-improvements-to-the-TDRS-11-November-2021.pdf)

Commonwealth Bank, 2022, *morenbn*, <https://www.commbank.com.au/latest/partnerships/more-telecom.html>

Comms Alliance, 2022, *TIO Independent Five-Year Review COMMUNICATIONS ALLIANCE SUBMISSION*,  
[https://www.commsalliance.com.au/\\_data/assets/pdf\\_file/0008/85238/CA-response-to-TIO-5-year-review-consultation-May-2022.pdf](https://www.commsalliance.com.au/_data/assets/pdf_file/0008/85238/CA-response-to-TIO-5-year-review-consultation-May-2022.pdf)

Competition and Markets Authority, 2019, *Consumer vulnerability: challenges and potential solutions*, <https://www.gov.uk/government/publications/consumer-vulnerability-challenges-and-potential-solutions/consumer-vulnerability-challenges-and-potential-solutions>

Creutzfeldt, N. 2016, *Trusting the middle-man: Impact and legitimacy of ombudsmen in Europe*,  
[https://www.law.ox.ac.uk/sites/files/oxlaw/ombuds\\_project\\_report\\_nc\\_2.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/ombuds_project_report_nc_2.pdf)

DJS research, 2016, *Understanding Consumer Experiences of Complaint Handling*,  
[https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Understanding%20consumer%20experiences%20of%20complaint%20handling\\_DJS%20report%20final\\_June2016%20\(2\)%20\(1\).pdf](https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Understanding%20consumer%20experiences%20of%20complaint%20handling_DJS%20report%20final_June2016%20(2)%20(1).pdf)

Dunleavy, P., Bastow, S., Tinkler, J., Goldchuk, S. and Towers, E., 2010, *Joining up Citizen Redress in UK Central Government* in Adler, M., ed., *Administrative Justice in Context*, Oxford: Hart Publishing

Eddy, K., 2022, *The changing news habits and attitudes of younger audiences*,  
<https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2022/young-audiences-news-media>

EWON, 2016, *Charter*,  
<https://www.ewon.com.au/content/Document/About%20us/EWON-Charter.pdf>

EWON, 2020, *Constitution*,  
<https://www.ewon.com.au/content/Document/About%20us/EWON-Constitution.pdf>

EWOV, 2018, *Charter*, [https://www.ewov.com.au/uploads/main/ewov\\_charter.pdf](https://www.ewov.com.au/uploads/main/ewov_charter.pdf)

EWOV, 2021, *Annual Report*, <https://www.ewov.com.au/flip/annual-report/2021/PDF-Flip/>

Fernyhough, J., 2019, *Telcos slammed for irresponsible selling*, *Financial Review*

Genn, H., 2010, *Judging Civil Justice*, The Hamlyn Lecture, Cambridge

Gilad, S., 2008, *Accountability of Expectations Management: The Role of the Ombudsman in Financial Regulation*, *Law & Policy* Vol.30 No.2

Gilad, S., 2008, *Exchange Without Capture: The UK Financial Ombudsman Service's Struggle For Accepted Domain*, *Public Administration* Vol. 86 No.4

- Gill, C. and Hirst, C., 2016, *Defining Consumer Ombudsman: A Report for Ombudsman Services*, <https://ereseach.qmu.ac.uk/handle/20.500.12289/4556>
- Granwal, L., 2022, *Smartphone users in Australia 2017-2026*, <https://www.statista.com/statistics/467753/forecast-of-smartphone-users-in-australia/#:~:text=In%202017%2C%20the%20number%20of,87%20percent%20in%20the%20country>
- Hertogh M., 2013, Why the Ombudsman Does Not Promote Public Trust in Government: Lessons from the Low Countries, *Journal of Social Welfare and Family Law*, Vol.35 No.2
- Hodges, C., 2018, The private sector ombudsman, in eds. Hertogh, M. and Kirkham, R., *Research Handbook on the Ombudsman*, Edward Elgar Publishing
- Howey, S., 2022, The Future of the Telecommunication Industry, *Talkroute*
- Hubeau, M., 2019, The profile of complainants, in Hertogh, M. and Kirkham, R., eds. *Research Handbook on the Ombudsman*, Cheltenham: Edward Elgar Publishing
- Learning for Sustainability, 2019, *Social license to operate*, <https://learningforsustainability.net/social-license/>
- Lucerna, 2015, *Review of ombudsman services: energy. A report for Ofgem*, [https://www.ofgem.gov.uk/sites/default/files/docs/2015/09/review\\_of\\_ombudsman\\_services\\_energy\\_2.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2015/09/review_of_ombudsman_services_energy_2.pdf)
- McBurnie, G. and Gill, C., 2017, *Independent Review of Utilities Disputes Limited – 2017*, <http://media.utilitiesdisputes.org.nz/media/Independent%20Reviews/2017/Independent%20Review%20of%20Utilities%20Disputes%202017.pdf>
- McBurnie, G. and Williams, J., 2019, *Independent Review of The Public Transport Ombudsman, Victoria*, <https://www.ptovic.com.au/documents/independent-reviews/10-2019-independent-review-of-ptoc-queen-margaret-university-1/file>
- McBurnie, G. and Williams, J., 2019, *Energy and Water Ombudsman NSW Independent five-year review*, [file:///C:/Users/gavin/Downloads/Independent-Review-Final-Report-EWON%20\(2\).pdf](file:///C:/Users/gavin/Downloads/Independent-Review-Final-Report-EWON%20(2).pdf)
- Mediterranean Energy Regulators, 2018, *Complaint handling & dispute settlement procedures available to household customers*, [http://www.medreg-regulators.org/Portals/\\_default/Skeda/Allegati/Skeda4506-320-2018.12.12/Complaint%20handling\\_EN.pdf?IDUNI=ovvzfgzyeas0hh3acfbkxwx221](http://www.medreg-regulators.org/Portals/_default/Skeda/Allegati/Skeda4506-320-2018.12.12/Complaint%20handling_EN.pdf?IDUNI=ovvzfgzyeas0hh3acfbkxwx221)
- Moskovska, A., 2021, 20+ Impressive telecom Industry Statistics for Australia, <https://takeatumble.com.au/insights/telecom-industry-statistics/>

Neave, C., 2014, *Exploring the role of the Commonwealth Ombudsman in relation to Parliament*, Senate Occasional Lecture, 28 November 2014

NSW Ombudsman, 2004, *An Investigation Manual for Complaint Investigators*. New South Wales: NSW O

O'Neill E., 2020, *Exploring regulatory approaches to consumer vulnerability*, [https://www.aer.gov.au/system/files/CPRC%20-%20Exploring%20regulatory%20approaches%20to%20consumer%20vulnerability%20-%20A%20report%20for%20the%20AER%20-%20February%202020\\_0.pdf](https://www.aer.gov.au/system/files/CPRC%20-%20Exploring%20regulatory%20approaches%20to%20consumer%20vulnerability%20-%20A%20report%20for%20the%20AER%20-%20February%202020_0.pdf)

Pierce, J., 2019, *Consumer regulation frameworks to respond to technology change*, <https://www.aemc.gov.au/news-centre/media-releases/aemc-push-majorchanges-consumer-frameworks-respond-rapid-technology>

Productivity Commission, 2014, *Access to Justice Arrangements: Inquiry Report Volume 1*, <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>

PTO, 2013, *Charter*, <https://www.ptovic.com.au/images/documents/Charter%20June%202013.pdf>

SPSO, 2011, *Guidance on A Model Complaints Handling Procedure*, [https://www.spsso.org.uk/sites/spsso/files/communications\\_material/leaflets\\_buj/Guidance-on-a-Model-Complaints-Handling-Procedure.pdf](https://www.spsso.org.uk/sites/spsso/files/communications_material/leaflets_buj/Guidance-on-a-Model-Complaints-Handling-Procedure.pdf)

Scottish Public Services Ombudsman, 2020, *Local Authority Model complaints procedure*, <https://www.spsso.org.uk/sites/spsso/files/csa/LAMCHPPart3.pdf>

Statista, 2022, *Operators' market share of mobile phone services in Australia from financial year 2010 to 2021*, [https://www.statista.com/statistics/488511/australia-mobile-handset-services-market-share/#:~:text=Market%20share%20of%20major%20carriers'%20mobile%20services%20Australia%20FY%202010%2D2021&text=Since%202010%2C%20Telstra%20has%20consistently,years%20between%202014%20and%202016\)](https://www.statista.com/statistics/488511/australia-mobile-handset-services-market-share/#:~:text=Market%20share%20of%20major%20carriers'%20mobile%20services%20Australia%20FY%202010%2D2021&text=Since%202010%2C%20Telstra%20has%20consistently,years%20between%202014%20and%202016))

Stuhmcke, A., 2002, *The rise of the Australian Telecommunications Industry Ombudsman*, *Telecommunications Policy*, Vol.26 pp. 69-85.

The Treasury, 2015, *Benchmarks for Industry-based Customer Dispute Resolution*, [https://treasury.gov.au/sites/default/files/2019-03/benchmarks\\_ind\\_cust\\_dispute\\_reso.pdf](https://treasury.gov.au/sites/default/files/2019-03/benchmarks_ind_cust_dispute_reso.pdf)

The Treasury, 2017a, *Key Practices for Industry-based Consumer Dispute Resolution*, <https://treasury.gov.au/publication/key-practices-for-industry-based-customer-dispute-resolution>

TIO, 2018, *Diversity*, (internal training manual)

TIO, 2018a, *Submission to Consumer Safeguards Review Part A Redress and Complaint Handling*, [https://www.tio.com.au/sites/default/files/2019-05/Consumer-Safeguards-Review-TIO-submission\\_0.PDF](https://www.tio.com.au/sites/default/files/2019-05/Consumer-Safeguards-Review-TIO-submission_0.PDF)

TIO, 2019, *Annual Report 2018-19*, <https://www.tio.com.au/sites/default/files/2019-09/TIO%20Annual%20Report%202018-19.pdf>

TIO, 2019, *Telecommunications Industry Ombudsman Consumer Panel Terms of Reference*, <https://www.tio.com.au/sites/default/files/2019-09/TIO%20Consumer%20Panel%20-%20Terms%20of%20Reference.pdf>

TIO, 2021, *Annual Report*, [https://www.tio.com.au/sites/default/files/2021-09/TIO\\_AR\\_Accessible\\_LR.pdf](https://www.tio.com.au/sites/default/files/2021-09/TIO_AR_Accessible_LR.pdf)

TIO, 2021, *Decisions and preliminary views*, <https://www.tio.com.au/about-us/reports/decisions-and-preliminary-views>

TIO, 2021a, *Financial Report*, <https://www.tio.com.au/sites/default/files/2021-11/Financial%20Report%202021.pdf>

TIO, 2022, *Complaint Handling Procedures*, <https://www.tio.com.au/about-us/policies-and-procedures>

TIO, 2022, *Telecommunications Industry Ombudsman Terms of Reference*, <https://www.tio.com.au/sites/default/files/2021-08/TIO%202021%20Modernised%20Terms%20of%20Reference%20FINAL.pdf>

TIO, 2022c, *Systemic Issue Guidelines*, <https://www.tio.com.au/about-us/policies-and-procedures/systemic-problem-investigation>

TIO, 2022d, *Quarterly report*, [https://www.tio.com.au/sites/default/files/2022-05/TIO%202022%20Q3%20Report\\_Hi%20Res.pdf](https://www.tio.com.au/sites/default/files/2022-05/TIO%202022%20Q3%20Report_Hi%20Res.pdf)

TIO, 2022e, *Systemic Issues*, <https://www.tio.com.au/systemic-issues>

TIO, undated, *Make a complaint*, <https://www.tio.com.au/complaints>

TIO, undated a, *What to expect*, <https://www.tio.com.au/complaints/what-expect>

TIO, undated b, *Complaint Form*

TIO, undated, *Telecommunications Industry Ombudsman Consumer Panel*, <https://www.tio.com.au/about-us/consumer-panel>

Vivian, N., O'Neill, S. and McBurnie, G., 2018, *Review of Post-Company Complaints Handling Processes in the Water Sector in England and Wales*, <https://www.water.org.uk/wp-content/uploads/2019/03/Review-of-post-company-complaints-handling-in-the-water-sector.pdf>

Williams, J., Brennan C. and Vivian N., 2018, *Improving your complaints process for complainants and for you: A brief guide for organisations*,  
<https://www.qmu.ac.uk/media/8d891e5fb80b3d0/complaints-handling-guide-online.pdf>

Williams, J. and O'Neil S. 202). *A review of good practice in complaints handling procedures and guidance*', Project report. Office of Rail and Road.  
<https://www.orr.gov.uk/sites/default/files/2021-08/a-review-of-good-practice-in-complaints-handling-procedures-and-guidance.pdf>

Williams, J., Gill, C., Vivian, N. and Creutzfeldt, N., 2020, Participation as a framework for analysing consumers' experiences of alternative dispute resolution, *Journal of Law and Society* Vol.47 No.2