

30 August 2024

Cynthia Gebert
Telecommunications Industry Ombudsman (TIO)
PO Box 276
Collins Street West, VIC

By email: PublicConsultation@tio.com.au

Dear Ms Gebert

Proposed changes to the TIO Terms of Reference 2024

Thank you for the opportunity to comment on the proposed changes to the TIO's Terms of Reference, as outlined in the August 2024 Discussion Paper. We understand that the proposed amendments are intended to respond to recent legislative change, implement recommendations from the 2022 Independent Review, and correct minor drafting issues.

nbn is generally supportive of the proposed amendments to the Terms of Reference. However, we have outlined below some suggested modifications to the drafting, that we believe improve the clarity and consistency of the Terms of Reference and will assist consumers to better understand the TIO's role.

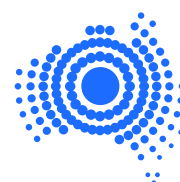
1. Clarification of the TIO powers to handle SIP complaints

As noted in the TIO's Discussion Paper, on 16 May 2024 the *Telecommunications (Consumer Protection and Service Standards) Act 1999 (TCPSS Act)* was amended as part of the *Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Act 2024*, which included inserting a new subsection 128(5A) and (5B) in the TCPSS Act to provide a specific power for the TIO to handle statutory infrastructure provider (**SIP**) complaints. The draft Amended Terms of Reference seeks to reflect this statutory change in the following ways:

- Amendment to clause 2.2(b) as set out in the mark-up below:

We can handle complaints from consumers, including about:

...(b) a problem with telecommunications equipment supplied by a member, or with a member's network infrastructure, that affects the consumer's access to a telecommunications service supplied or offered by a member (including but not limited to a SIP complaint);



- Amendment to clause 2.38(l) as set out in the mark-up below:

A decision may require a member to do or not do, or cease doing an act, including:

(a) ...

(l) connection of a property to a qualifying telecommunications network

- Insertion of the following new definition:

***SIP Complaint:** A complaint about connection of a property to a qualifying telecommunications network by a member who is a statutory infrastructure provider so that a carriage service provider can provide qualifying carriage services*

We set out below a number of recommendations that we consider would provide greater clarification of the TIO jurisdiction and powers to handle SIP complaints following new subsection 128(5A) in the TCPSS Act:

- Firstly, **nbn** recommends that the Terms of Reference use the term “premises” in relation to SIP complaints, rather than “property”. “Premises” is the term used throughout the underlying legislation (Part 19 of the Telecommunications Act 1997) and associated instruments, including in the drafting of the connection obligation in section 360P (and the supply obligation in section 360Q). This is reflected in the drafting of new subsection 128(5A) of the TCPSS Act as well. While not expressly defined in the legislation, “premises” is an important term within the context of the SIP regime describing the requirements with which SIPs must comply. It would be preferable for the TIO Terms of Reference to use language consistent with the statutory framework, to avoid any misunderstanding in relation to the connection entitlements of properties that are not premises.
- Secondly, in relation to decisions by the TIO to require the connection of a premises to a qualifying network, we recommend that the drafting of the Terms of Reference should appropriately recognise that this remedy would be confined to circumstances where such a connection is required under the relevant statutory regime. Detailed legislative and regulatory requirements govern when a SIP is required to connect a premises, when it may refuse a connection, and its ability to determine which technology type to connect a premises to. We note that:
 - There are a range of circumstances in which the obligation to connect a premises to a qualifying network does not arise, including where the end-user’s premises is not situated in the provider’s service area.
 - The *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2024* sets out further circumstances in which the connection and supply obligations do not apply as determined by the Minister.
 - In relation to the technology type used to connect a premises, SIPs are required to connect premises to a fixed-line network unless that is “not reasonable”, in which case the premises must be connected to a fixed wireless or satellite network.



- Thirdly, in relation to the definition of SIP Complaint, the proposed drafting could be amended to better take into account that not every dealing between a customer and a qualifying network provider is necessarily an act in their capacity as a SIP. For example, the relevant dealing may relate to a premises that is not within that SIP's service area, or a connection to an enterprise network to provide a service over and above that which would satisfy the SIP obligations.

2. Signposting of complaints to the TIO

We note that in response to Recommendation 2 from the Independent Review, the draft Amended Terms of Reference includes a new clause 6.2 which specifies that *“members must take reasonable steps to inform consumers and occupiers about the availability of the member’s complaint handling service and TIO’s free, external dispute resolution service for complaints.”*

nbn supports the importance of members flagging the TIO as an escalation pathway as a vital component of the effectiveness of the Ombudsman scheme. There are well established requirements under the Telecommunications Consumer Protection Code (**TCP Code**) and in the Telecommunications (Consumer Complaints Handling) Industry Standard (**Complaint Handling Standard**) about notifying customers of external dispute resolution processes and escalation pathways. **nbn**'s complaint handling process reflects those requirements, as does our guidance to consumers on our website.

It is not clear whether the proposed requirement in clause 6.2 is seeking to expand the obligation of members to signpost external dispute resolution beyond what is required in those instruments. To the extent it is intended to be a different/incremental obligation, we recommend further consultation and guidance to members should take place before any amended Terms of Reference are implemented, to ensure there is a common understanding and agreement in relation to the scope of the obligation. This would be consistent with the recommendation from the Independent Review for the TIO to work with members to agree a common approach.

To the extent such a clause is included, we would recommend clarifying in the drafting that compliance with the Complaints Handling Standard is adequate to meet the obligation (unless members agree to the implementation of additional measures).

Further, the Minister has recently issued a direction to the ACMA to review and amend the existing Complaints Handling Standard to ensure complaint processes are effective for consumers in the context of network outages. One of the objectives specified in that direction is to ensure that consumers are provided with clear and sufficient information at appropriate times in relation to avenues for external dispute resolution. We understand that the ACMA will be consulting on changes to the standard later in the year, with amendments to the Standard to be finalised by April next year.

Given the above, we query whether the new clause 6.2 is necessary for inclusion in the Terms of Reference and whether it may create ambiguity, if interpreted differently to any amendment the ACMA may make to the Complaints Handling Standard.



3. Land Access Complaints

The TIO has included a number of proposed amendments to the Terms of Reference in response to recommendation 17 of the Independent Review, including a new clause 2.38(m), which specifies that the TIO may require a member to “remove non-compliant infrastructure from an occupiers land”. We acknowledge that removal of non-compliant infrastructure may be an appropriate direction for the TIO to make in some circumstances. However, we recommend some adjustments to the proposed drafting to address the following:

- A direction to remove infrastructure could have very significant consequences, given the infrastructure may be part of an active carrier network and required to provide services to the occupier and/or to other consumers. In such circumstances a direction to remove the relevant infrastructure should not be made lightly and without providing the member with the option and opportunity to rectify the defect or replace the relevant item (unless there is some form of imminent danger).
- The term ‘non-compliant’ is not defined in the Terms of Reference and could potentially be interpreted in a very broad manner, to capture deviations from standards or guidelines that are voluntary, minor non-conformities of no consequence or procedural matters. It would be unfair to members and inconsistent with the intent of the carrier land access regime for the TIO to have power to direct that infrastructure be removed on the basis that it was non-compliant with a requirement or standard that was discretionary or optional, or where an order for removal would be disproportionate to any real harm flowing from the relevant ‘non-compliance’. For this reason, we would recommend that any direction to remove infrastructure be limited to a breach of mandatory legal requirements.
- It is not clear on the current drafting that an order to remove ‘non-compliant’ infrastructure would be limited to circumstances where the member is the owner of the infrastructure and therefore in a position to comply with the direction.

In addition to the above, **nbn** does not recommend the extension of clause 2.3(c) to infrastructure that is “proposed to be put” on an occupier’s land, on the basis that this is appropriately covered under land access in Part 3 of the Terms of Reference.

Suggested drafting to address the above matters is attached in Annexure A.

I trust these suggestions are helpful and look forward to further meaningful engagement on this matter.

Yours sincerely

Sarah Alderson
General Manager, Regulatory Affairs



Annexure A – Suggested drafting changes

- **Amendment to clause 2.38(l)** – connection of a ~~property premises~~ to a qualifying telecommunications network, having regard to the member’s obligations under Part 19 of the Telecommunications Act 1997 and associated instruments.
- **Amendment to definition of SIP complaint – SIP Complaint:** A complaint about connection of a ~~property premises~~ to a qualifying telecommunications network by a member ~~who is a~~ in their capacity as the statutory infrastructure provider for the premises so that a carriage service provider can provide qualifying carriage services.
- **Amendment to clause 6.2** (if included): members must take reasonable steps to inform consumers and occupiers about the availability of the member’s complaint handling service and TIO’s free, external dispute resolution service for complaints, in accordance with the Complaints Handling Standard.
- **Amendment to clause 2.3(c):** (c) unsafe or non-compliant carrier infrastructure on the occupier’s land ~~(or proposed to be put on the occupier’s land)~~, and
- **Amendment to clause 2.3(d):** non-compliance by a member with laws relating to land access activities that apply to carriers, or the terms of a land access agreement with an occupier. Objections to land access activities proposed by a member are considered separately in Part 3 of these Terms of Reference.
- **Amendment to clause 2.38(m):** rectify, replace or remove carrier infrastructure owned or operated by the member on ~~from~~ an occupier’s land, where the carrier infrastructure is unsafe or in breach of a mandatory legal requirements.

