

11 September 2020

**Telecommunications Industry Ombudsman**

By email: [PublicConsultation@tio.com.au](mailto:PublicConsultation@tio.com.au)

Dear Telecommunications Industry Ombudsman,

**Consultation – Modernising the Telecommunications Industry Ombudsman Terms of Reference**

Thank you for the opportunity to comment on this timely review of the Telecommunications Industry Ombudsman ('**TIO**') Terms of Reference ('**Review**').

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

In addition to our direct experience assisting consumers in the TIO's dispute resolution service, we have cross-industry experience advocating on behalf of consumers in the External Dispute Resolution ('**EDR**') schemes in the financial services and the Victorian energy and water industries: the Australian Financial Complaints Authority ('**AFCA**') and the Energy and Water Ombudsman of Victoria ('**EWOV**') respectively. We consider this experience provides a helpful comparative perspective, and we reflect on our experience with these schemes, as well as our experience using the TIO scheme, throughout this submission.

This submission:

- a) Responds directly to the TIO's Questions for Consultation; and
- b) In the broad remit for commentary provided by Question 8:
  - i) Provides feedback on a number of specific clauses of the Draft Terms of Reference, which are not otherwise dealt with in our responses Questions 1 – 7 and 9; and
  - ii) Addresses a number of outstanding matters relating to the TIO's processes and jurisdiction.

A summary of our recommendations is provided in Appendix A.

Throughout this submission we refer to the document: 'Draft Telecommunications Industry Ombudsman Terms of Reference: July 2020' as the '**Draft TOR**', and document currently in operation: 'Telecommunications Industry Ombudsman Terms of Reference: As approved by the Board on 12 November 2019' as the '**Current TOR**'.

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### ***General comments in relation to this Review***

We are greatly encouraged by many aspects of the Draft TOR. In particular, we commend the proposal to give prominence to the TIO's industry improvement and information sharing roles by the drafting of these as standalone 'Parts' in the Draft TOR.

We also support the inclusion of the TIO's outreach role as a defining feature of the TIO scheme in Part 1 of the Draft TOR document.<sup>1</sup> Consistent with the Draft TOR, we consider that the outreach role of an industry ombudsman scheme requires both accessibility and promoting awareness. To safeguard accessibility, it is essential for an ombudsman to seek and consider community feedback on procedural user matters, including its Terms of Reference and jurisdiction, its complaint handling process, and its other guidance documents. Consumer advocates look forward to continuing to engage with the TIO in work of this type, including in consumer forums.

Access to telecommunications goods and services has become necessary for financial and social inclusion in Australia. Basic social and other services are now routinely delivered and administered online,<sup>2</sup> and, as a result, the availability of those services is severely restricted if a person is unable to access voice and messaging services, and the internet.

Earlier this year, the bushfire crisis drew focus to the vital role of telecommunications in information sharing as part of the disaster response. Complementary to radio in providing emergency service updates, telecommunications (in particular, apps like 'VicEmergency' and 'Fires Near Me') were widely used as fire tracking resources by people in high risk areas. Online information was particularly valuable to deaf and hard of hearing persons, and English second language communities, who are often practically unable to access radio broadcasts.

Moreover, and pressingly, COVID19 and the associated lockdown response (ongoing in Victoria) have seen an increased reliance on telecommunications, as whole households work, study, follow the news, and socialise online. Connectivity has become vital across the spectrum, from year 12 students trying to complete their final year of high school, to persons now required to access health services via telehealth, and to those living alone and reliant on phone calls or video chats to help relieve feelings of fear and isolation.

The TIO scheme provides an invaluable service to consumers. WEstjustice and Consumer Action staunchly defended the TIO in response to a proposal to replace the scheme with an alternative body contained in the consultation paper of the then Department of Communications and the Arts<sup>3</sup> 'Consumer Safeguards Review: Part A'. We are strong supporters of the scheme, and are want to see it retain its effectiveness and utility as telecommunications goods and services become a part of day-to-day life in unprecedented (and at times, unpredicted) ways.

A truly 'future-proof' TIO scheme will have the coverage and flexibility to respond to emerging issues in consumer complaints as new technology and service needs arise.

We trust that the commentary and feedback we have provided in this submission is constructive and helpful to the TIO and its Board. We encourage the TIO to continue to engage with consumer perspectives, both through proactive consultation with consumer representative organisations such

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<sup>1</sup> Draft TOR 1.g.

<sup>2</sup> E.g. Services Australia (Centrelink) claims, e.g. COVID-19 testing results (<https://www.dhhs.vic.gov.au/getting-your-results-covid-19>).

<sup>3</sup> This ongoing review is within the current purview of the Department of Infrastructure, Transport, Regional Developments, and Communications.

as ourselves and the public, and through its targeted community outreach activities. We would support an increase in consultation opportunities in the future.

**Recommendation 1: The TIO continue and increase its consultation with consumer representative organisations and the public, including on processes and procedures in its jurisdiction.**

### **Definition of Small Business**

**Q1. Is the proposal to link the small business definition to the ACL the most appropriate test to use, or is there a better definition? What else should we consider when deciding whether a small business consumer is eligible to access our scheme?**

We have set out a summary of different small business definitions below, including the proposed definition in the Draft TOR:

Current TIO	<ul style="list-style-type: none"> <li>No more than 20 full time employees</li> <li>Up to \$3m in annual turnover</li> </ul>
Draft TIO	<ul style="list-style-type: none"> <li>The consumer or occupier who operates a small business or not-for profit that has the maximum number of full time employees a small business may have to be eligible for protection against unfair contract terms in the Australian Consumer Law (<b>ACL</b>).</li> </ul>
ACL	<p>Related to unfair terms contracts:</p> <ul style="list-style-type: none"> <li>Employs fewer than 20 persons (including casual employees employed on a regular and systematic basis); and</li> <li>Upfront payable price does not exceed \$300,000 or contract duration more than 12 months does not exceed \$1m<sup>4</sup></li> </ul>
Current Telecommunications Consumer Protection (TCP) Code	<ul style="list-style-type: none"> <li>Does not have genuine and reasonable opportunity to negotiate terms of customer contract; and</li> <li>Annual spend no greater than \$40k<sup>5</sup></li> </ul>
AFCA	Small Business means a Primary Producer or other business that had less than 100 employees at the time of the act or omission by the Financial Firm that gave rise to the complaint.

Of the above, we consider the AFCA definition of a small business as the most appropriate.

**RECOMMENDATION 2: The Terms of Reference define small business as a Primary Producer or other business that had less than 100 employees at the time of the act or omission by the TIO member that gave rise to the complaint.**

We note that we do not support the very limited definition of small business found in the current Telecommunications Consumer Protection (**TCP**) Code. Due to the outrageously low annual spend limit in the TCP Code (\$40,000), the adoption of that definition would result in a significant reduction

<sup>4</sup> *Competition and Consumer Act 2010* (Cth) Schedule 2 s 23(4).

<sup>5</sup> Communications Alliance, TCP Code (Industry Code C628:2019), cl. 2.1, available at [https://www.commsalliance.com.au/data/assets/pdf\\_file/0011/64784/TCP-C628\\_2019.pdf](https://www.commsalliance.com.au/data/assets/pdf_file/0011/64784/TCP-C628_2019.pdf).

in the ability for small businesses to resolve a dispute through this specialist scheme, thereby reducing access to justice for these small businesses.

### ***Increase in compensation limit***

#### **Q2. Is \$100,000 an appropriate financial limit for TIO decisions?**

We support the proposal by the TIO to increase the limit of the compensation it may award to a consumer or occupier from \$50,000 to \$100,000. However, our preferred view is that it should be open to the TIO to award amounts greater than \$100,000 in circumstances where an award of that quantum is fair and reasonable.

We consider that, under the Draft TOR, it would be open for the TIO to determine matters where the quantum of a debt alleged by a member<sup>6</sup> and disputed or complained about by a consumer<sup>7</sup> exceeds \$100,000 where it is fair and reasonable to do so. That is, the \$100,000 operates as a compensation limit rather than a claim limit to access the scheme. We strongly support this discretion.

#### **Q3. If not, what would be the more appropriate financial limit for TIO decisions and why?**

As we understand it, there is no requirement arising from the TIO Constitution to prescribe a financial limit on either available compensation or the claim limit more generally. We suggest that the TIO leaves claim and compensation limits open to ensure flexibility in the dynamically evolving telecommunications environment.

By way of comparison to the TIO's proposed compensation limit, the AFCA can consider consumer claims up to a claim limit of \$1 million, has a compensation limit of up to \$500,000 in most claims of direct financial loss<sup>8</sup> (or unlimited where related to a guarantee over the guarantor's principal place of residence), and can pay compensation up to \$5,000 per claim<sup>9</sup> for indirect financial loss or for non-financial loss.<sup>10</sup> Consumer Action has previously argued for the removal of these indirect financial loss and non-financial loss limits, and to empower AFCA to award fair and reasonable compensation within the general compensation cap.<sup>11</sup>

While financial services disputes presently typically relate to greater sums of money than telecommunications disputes, the significantly greater limits at AFCA (a comparatively newly established forum<sup>12</sup>) point to a precedent for the TIO to raise monetary limits.

Moreover, the telecommunications landscape is arguably changing faster, more dramatically, and less predictably, than the financial services landscape in terms of types and uptake of goods and

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<sup>6</sup> Or, where relevant, a member's agent or other related party, such as a third party provider, related company, dealer, contractor, employee or authorized representative— see Current TOR 2.9, Draft TOR 2.26

<sup>7</sup> Or occupier

<sup>8</sup> See here for exceptions, including business disputes: <https://www.afca.org.au/what-to-expect/outcomes-afca-provides>.

<sup>9</sup> Significantly, multiple claims for non-financial loss may be available per AFCA complaint: "AFCA takes the view that a 'claim' refers to the set of facts that, put together, gives the complainant the right to ask for a remedy. This means a set of separate events that led to the alleged loss. ...Where there is repeated conduct by a financial firm (for example, repeated instances of debt collection activity while the AFCA file is open), each event may cause the complainant additional non-financial loss, and so the amount of compensation for each claim may increase. The \$5,000 compensation cap for non-financial loss claims applies to each claim, so AFCA can award a complainant more than \$5,000 in total in a complaint if he has several claims." (The AFCA Approach to Non-Financial Loss Claims, available via: <https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches>)

<sup>10</sup> AFCA Complaint Resolution Scheme Rules: 25 April 2020 ('AFCA Rules'), D.4.1 p 39, referring to table on AFCA Rules p 40.

<sup>11</sup> For example, see Consumer Action submission to the Senate Legal and Constitutional Affairs Reference Committee Inquiry into resolution of disputes with financial service providers within the justice system, dated 1 March 2019; The expression 'general damages' describes damages awarded for non-economic loss including pain and suffering, loss of amenities and loss of expectation of life. Caps on general damages vary across Australian jurisdictions, but for reference: in Victoria the statutory maximum award for damages for non-economic loss arising from a claim under the *Wrongs Act 1958* (Vic) is \$577,050 (indexed) (*Wrongs Act 1958* (Vic), s 28G).

<sup>12</sup> Established in 2018, replacing the Financial Ombudsman Service, the Credit and Investments Ombudsman, and the Superannuation Complaints Tribunal.

services, as well as the nature and number of industry participants. It is foreseeable that 'typical' complaint subject matter, value, and appropriate resolutions, could likewise rapidly evolve.

The TIO will thus require significant flexibility to meet the benchmark of effectiveness<sup>13</sup> and ensure access to justice for consumers. In our submission, such flexibility is best provided for by wide-ranging resolution options, including uncapped claim value and compensation where fair and reasonable.

Furthermore, where telecommunications assume the role of essential services, and even emergency services (as during the 2019 – 2020 bushfires), we consider it foreseeable that significant non-financial loss claims may arise in circumstances where services unfairly and unreasonably fail or are otherwise defectively provided.

An open jurisdiction on claim and compensation quantum would ensure that the TIO is adequately positioned to consider novel and emerging categories of claims in that may arise in extenuating circumstances.

**Recommendation 3: The TIO be empowered to award amounts greater than \$100,000 in circumstances where an award of that quantum is fair and reasonable.**

#### **Q4. Should we include a financial limit for non-financial loss compensation? If so, what is an appropriate financial limit?**

We strongly support the TIO's proposed assertion of its jurisdiction to award compensation for non-financial loss, bringing it in line with other dispute resolution schemes.<sup>14</sup> Though we understand that the TIO already has this general jurisdiction, there has been considerable confusion due to the contradictory representations in the TIO's publicly available materials on this matter.<sup>15</sup>

Explicit expression of the power enhances transparency and accordingly promotes the 'accessibility' and 'fairness' Benchmarks for Industry-based Customer Dispute Resolution ('**Benchmarks**')<sup>16</sup>. Specifically, clarifying the TIO's jurisdiction by explicit reference to this power will both improve consumer and industry comprehension of the scheme's available remedies,<sup>17</sup> and promote procedural fairness by providing parameters for what consumers may claim in their complaints (and, it follows, what evidence they should provide to the TIO to demonstrate this loss).

Non-financial loss takes many forms. It includes distress and detriment caused by poor conduct, including but not limited to a loss of privacy.

The following are some examples of non-financial losses incurred by our clients in telecommunications matters:

<sup>13</sup> Benchmarks for Industry-based Customer Dispute Resolution, Australian Government: The Treasury (2015), available via: <https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution>

<sup>14</sup> E.g. AFCA compensation for non-financial loss (see AFCA Rules, part D.4). In the energy sector, there are significant payments due for wrongful disconnection, which, in Victoria, are resolved through the Energy and Water Ombudsman of Victoria (see <https://www.esc.vic.gov.au/electricity-and-gas/market-performance-and-reporting/wrongful-disconnection-payments>).

<sup>15</sup> See for example, the TIO Factsheet: Consumer guide to compensation for embarrassment or humiliation, which answers the question "When will we consider a non-financial loss claim?" with the response: "We will **only** consider a claim where a provider has breached a privacy obligation under the Privacy Act 1988" (our emphasis). Factsheet currently available via: <https://www.tio.com.au/factsheets>

<sup>16</sup> Benchmarks for Industry-based Customer Dispute Resolution, Australian Government: The Treasury (2015), available via: <https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution>

<sup>17</sup> See also Key Practices for Industry-based Customer Dispute Resolution ('Key Practices'), Australian Government: The Treasury (2015), available via: <https://treasury.gov.au/publication/key-practices-for-industry-based-customer-dispute-resolution> - See Key Practice 1.13: The jurisdiction of the office is expressed clearly.

a. Losses related to disconnection of a service or a failure to connect a service

Arising from the essential role that telecommunications play in daily life, loss or failure of connection can have serious adverse impacts on consumers. This has been enforced and exacerbated by COVID19 and the associated lockdowns.

Non-financial losses to consumers include loneliness or distress arising from inability to contact friends and family, frustration and time lost from an inability to complete day-to-day tasks (including online transactions), loss related to inability to access to services including Centrelink, NDIS, and telehealth services, the inability to complete and submit school work, and time spent (and distress incurred) trying to rectify or resolve the service problem.

Financially marginalised consumers often suffer the greatest loss, as they are least able to effectively mitigate with alternative services.

**CASE STUDY: JOSIE'S STORY**

Josie\* (name changed) is a 55 year old refugee. She is a single mother to a teenage daughter, as well as legal carer and guardian to two grandchildren aged under 10. Josie came to Australia after spending many years in a refugee camp in Africa. Her knowledge of Australian legal and regulatory systems is low. Her technological literacy is very low. At the time of WEstjustice's assistance to Josie, a family violence intervention order excluded a person from Josie's home.

Josie's telecommunications dispute related to her attempt to transfer from one land-line provider to second land-line provider. Josie did not have a mobile phone prior to attempting to transfer providers. She has low technical literacy and is not proficient with computers. Her landline was her primary mode of communication with service providers, friends, and family.

The details of Josie's dispute are discussed as a case study in response to Q7 of this review.

Relevant to the issue of non-financial loss is that Josie's phone remained disconnected for over **nine weeks** while Josie and WEstjustice waited for a response from the second provider at various stages in the TIO process. The second provider was on notice that Josie's phone was disconnected via Josie's TIO complaint, but no interim or alternative service was provided.

Josie was extremely distressed by this period of disconnection: there was family violence in her home and she was unable to speak friends and relatives. Moreover, she was unable to contact or be contacted by WEstjustice, who were trying to help her resolve the issue.

Josie eventually purchased a cheap mobile phone and prepaid credit to alleviate the situation, but this caused her further distress, as she had difficulty using the phone (she was not accustomed to using a mobile phone at all), and she couldn't afford to purchase sufficient credit. On occasions when she attended WEstjustice seeking an update, Josie was frustrated and tearful.

*Source: WEstjustice*

b. Distress and confusion resulting from debts incurred by mis-sold services

Mis-selling of inappropriate products is an enduring cause of confusion, distress, and hardship, particularly amongst our most vulnerable clients. Unsolicited sale or upgrade scenarios in particular place the consumer at a disadvantage, and very often result in poor outcomes. Non-financial consumer harm, as described in Margaret's and Angie's stories below, is common.

### **CASE STUDY: MARGARET'S STORY**

Margaret\* (name changed) engaged a large service provider for a low to mid-range post-paid service. Margaret's income was low, but she was able to afford the plan.

Margaret has serious and ongoing mental health problems. In about 2017 she was hospitalised in relation to her mental health. Margaret was placed in a secured psychiatric ward. She was not permitted to leave the ward and was heavily medicated with psychiatric drugs. While an inpatient in the secured ward, Margaret was cold-called by her provider and apparently offered an upgrade on her mobile phone plan. Margaret has only a vague memory of this phone call: she remembered being called by her provider, but could not recall the reason why, or the content of the conversation. Her provider asserted billing authority from an upgraded plan from this date.

Sometime after she was released from hospital, Margaret contacted her provider to find out why she was being sent large bills. When Margaret's provider told her that she had agreed to upgrade her plan, Margaret explained to her provider that she had been in a secured psychiatric ward at the time of the telesale, that she had very little memory of her time in that ward as she had been very heavily dosed on psychiatric drugs, that she had no recollection of the telesale and no capacity to pay. Margaret asked if the plan could be cancelled and her provider refused.

Margaret, whose mental health was already fragile, was extremely upset, embarrassed, and agitated by the situation. She contacted WEstjustice for assistance in considerable distress.

*Source: WEstjustice*

### **CASE STUDY: ANGIE'S STORY**

Angie\* (name changed) spoke to the National Debt Helpline and our legal advice line about poor telco conduct affecting her 80-year-old father, Roger\* (name changed), who has Alzheimer's and dementia. Angie told us she has power of attorney for her father. This is what she told us:

Roger is an 80 year old man who is unable to speak in clear sentences due to his Alzheimer's and dementia and is on a Centrelink pension. He is a long-time Telstra customer, so when Angie noticed he also had bills from Optus, she wanted to check why this was happening.

Angie discovered that in 2019, Roger accidentally entered an Optus shop, which was next door in the shopping centre to the Telstra shop that he meant to go into. The salesperson at Optus signed him up to a contract for a phone plan and ported his number across. He continued on his Telstra plan as well, and went back to the correct shop the next week.

Roger received three bills from Optus, which he immediately went into the Optus store and paid. He was very confused and scared by the bills, he didn't understand what they were for.

Angie went to the Optus store in January 2020 to ask them what her father's bills were for, but was told they couldn't deal with her due to privacy. She was forced to drive her elderly and disabled father to the store to get authority, even though it was obvious to anyone he had issues communicating. A young Optus staff member told her that he had signed Roger up to the contract, and admitted Roger had looked 'a bit off' but he also said words to the effect- 'I can't determine if someone has dementia'. Angie said they refused to refund the amounts paid, so she requested they call the Optus head office while they were there to cancel the contract and provide a refund. This process went on for two hours and during this time Roger collapsed in the

store. Optus then promised it had all been fixed- they would cancel the contract and refund Roger the money paid. They also made Angie the third party authority on the account. The next day, Angie received 3 text message notifications saying that the refund requests had been denied because the account was not in credit.

Angie told us that two months later, she went back to the store with recent VCAT Power of Attorney orders in relation to Roger, and was assured again by Optus that the amounts paid by her father would be refunded. However, when Angie reached out to the National Debt Helpline in early July 2020, they had just received a bill and threatening letter for Optus with a termination fee, 6 months after they thought the matter had been resolved. In mid-July 2020, Angie received a letter and telephone call about Roger's account from a debt collection agency engaged on behalf of Optus. They said the debt had increased from \$59 to \$63. She said they were nasty and bullying during the call, and when she explained the situation, they just said words to the effect 'you will have to take that up with Optus'. Angie says that this Optus store is close to other aged care centres and she is worried they are treating other elderly people like this.

*Source: Consumer Action Law Centre*

### c. Privacy breaches

In addition to the privacy breaches associated with credit reporting, serious consumer harm can occur where a member fails to protect the privacy of a consumer in its correspondence or other dealings. This is particularly significant in family violence contexts, as described in Penny's story, on page 9 of our 2018 joint submission to the review of the TCP Code extracted below:<sup>18</sup>

#### **CASE STUDY: PENNY'S STORY**

Penny (name changed) was 18 years old when her boyfriend Matt (name changed) forced her to take out phone plans in his name – one of which was with Telstra. She now believes his end game was to on sell the phones and keep the profit. Penny was living at home paying \$50 per week in board and working casually earning at most \$200 a week. She was also paying around \$280 per month towards other phone contracts at the time.

Penny and Matt went into the Telstra shop together and Matt talked specs with the store manager. Penny instructs that it was clear to all that the phone was for Matt and that he was requiring Penny to pay for it. She instructs that initially Matt tried to get the contract in his name, but Telstra refused the application because of his credit history.

Matt settled on a plan that totalled \$240 per month. Penny asked for insurance on the phone and says she was very particular about her address and her email address. She instructs that she asked the Telstra representative to send any correspondence by email to her email address.

Penny's parents did not approve of her relationship with Matt. They thought he was taking financial advantage of her. When Telstra sent the contract details to Penny's parent's email address (not the one Penny specified), her parents asked her to leave their home. She moved in with Matt. She was later asked to leave Matt's home, at which time she became homeless.

Penny instructs that Matt sold the phone to a pawnbroker two days after purchase without Penny's consent.

Consumer Action assisted Penny to lodge a complaint in the Telecommunications Industry Ombudsman against Telstra. The matter has since resolved.

<sup>18</sup> See the original case study in our submission here: <https://consumeraction.org.au/draft-tcp-code/>.

d. Distress and embarrassment caused by debt collection practices

Consumer harm also occurs through stress caused by poor debt collection practices, including harassment. This is evidenced in Jordan's story, below:

**CASE STUDY: JORDAN'S STORY**

Jordan\* (name changed) is in her 70s and battling terminal cancer, as well as complications from surgery. She also suffers from depression and anxiety and is unable to leave her home without significant effort. Jordan lives in public housing and her sole source of income is from Centrelink. She was a customer of one a telecommunications/internet provider for decades. In early 2017, Jordan contacted her provider to ask about internet plans so that she could be more connected to services and support.

In mid-2017, Jordan made a complaint to the TIO based on unresolved issues with her internet connection and landline. As part of the resolution, the provider offered to give Jordan credit; however, they refused to provide proof of the credit in writing. Soon after, Jordan started receiving overdue notices from the provider. By the time she reached our service, she apparently owed over \$800.

During this time, the provider and/or their collection agencies repeatedly harassed our client, continuing to contact her even after Consumer Action was on the record as her representative, and after we told them that they were breaching Victorian debt collection laws by contacting Jordan directly. The phone provider's harassment caused our client significant distress.

Ultimately, in around December 2018 the provider sold the debt to a debt collection agency.

The matter has now been resolved.

Source: Consumer Action Law Centre

e. Frustration, inconvenience, and loss of time trying to resolve a dispute

ACCAN's 2019 report, *'Please hold: costing telco customer wait times'*<sup>19</sup>, and the soon to be released *'Still Waiting'* report, provide valuable data for the quantification of value for consumer loss in time attempting to resolve disputes.

Furthermore, poor complaint responses and ineffective internal dispute resolution ('IDR') can exacerbate feelings of distress and hopelessness arising from the original subject matter of a complaint. Several of the above case studies describe consumer misery and frustration attempting to self-advocate with providers about their disputes prior to engaging a consumer advocate for assistance. One Westjustice client recently commented to the effect of 'every time I go to the [provider name redacted] shop to try to deal with [the dispute], there is someone else in there crying'.

<sup>19</sup> Available via: <https://accan.org.au/media-centre/hot-issues/1628-please-hold-costing-telco-customer-wait-times>

*f. Indirect financial loss*

As telecommunications services become more and more essential for social participation, as well as work or schooling, we are concerned that people will go without other essentials to pay their phone bills. Our services have assisted clients who have gone without food or who have increased their credit card debt to keep up with their phone bills.

The above examples are not an exhaustive list of the kinds of indirect or non-financial loss that may arise from member misconduct. Our increasing reliance on telecommunications goods and services, and the technological advancements shaping industry, portend the prospect of novel and hard to predict harms. An emerging example is increasing concerns around cybersecurity risks arising in smart devices and technology.<sup>20</sup>

As argued above, we recommend that the quantum of the available award for indirect or non-financial loss claims should remain uncapped, or at least uncapped to the general compensation threshold. This would go toward reducing complexities for consumers in making their claims and would better enable the TIO to award compensation that is fair and reasonable in the circumstances. Given this position, and without knowing what, if any, caps are being considered or proposed, it is hard for us to comment on or propose an alternative figure. The risk in setting a 'low' cap is that it will be too low to incentivise TIO members to act appropriately to mitigate the stress, anxiety and hardship caused by their conduct, or to adequately compensate consumers when such misconduct occurs.

Finally, to improve transparency, accessibility, and procedural fairness, we suggest that the matter of awards for indirect and non-financial loss merits an additional robust consultation with consumer representatives and industry, with the view to producing a guidance note or process document about how such awards will be considered.

**Recommendation 4: The TOR include a clear, transparent remit for awarding compensation for non-financial loss and indirect financial loss.**

**Recommendation 5: the TIO consult on, specify, and publicise, a clear process for considering compensation for indirect financial loss and non-financial loss.**

***Complaints relating to devices and equipment***

**Q5. Are there other things the TIO should consider when updating our remit for complaints?**

In addition to the scheme coverage considerations regarding devices and equipment we discuss in part (a) of our response below, part (b) of our response raises an additional remit question in relation to debt buyers and collectors.

**a) Devices and Equipment**

We support the TIO's proposal to include coverage for complaints about devices and equipment that are offered and supplied by a member. This is an appropriate recognition of the development of the telecommunications industry: a complex market of products and related services – sold and promoted either bundled or individually.

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<sup>20</sup> See for example Sivaraman, V. Gharakheili, H. and Fenandes, C. *Inside job: Security and privacy threats from smart-home IoT devices*, May 2017 – available via: <https://accan.org.au/grants/completed-grants/1442-inside-job>

For years, consumer advocates have assisted clients in disputes where the bulk debt alleged by a member relates to the product or products that were bundled with the relevant telecommunications services at the time of sale. Where mis-selling has occurred in these instances, the conduct relates simultaneously to the product and the service, which are usually combined in a single contract.

We very much welcome jurisdiction for the TIO to deal with complaints relating to devices and equipment sold by members, either combined with services or separately, including those about sales practices and/or mechanical or technological defects. The previous lack of jurisdiction was a significant gap in scheme coverage, resulting in different consumer complaint pathways depending on the person's home state, and considerably limiting access to justice.

For example, while in 2018 New South Wales, NSW Fair Trading introduced jurisdiction to consider and issue a direction in relation to consumer guarantees<sup>21</sup> complaints about goods valued at up to \$3,000, no such jurisdiction exists for Consumer Affairs Victoria ('CAV'). By contrast, CAV is only able to invite parties to participate in a voluntary conciliation, and cannot issue a binding direction – this process is seldom engaged by lawyers or consumer advocates due to its lack of binding resolution powers.

While CAV does have regulatory compliance powers to investigate and prosecute allegations of trader misconduct, these powers are akin to the regulatory powers of regulators such as ASIC or the ACCC, and are typically used to address serious, repeated, and systemic instances of misconduct, rather than individual instances of 'run of the mill' consumer guarantees disputes. We are unaware of any recent<sup>22</sup> CAV court action in relation to a telecommunications product or provider.

Rather, should a Victorian consumer have a complaint about a defective telecommunications device, absent the jurisdiction of the TIO to deal with such a matter, the consumer (if unable to negotiate or conciliate an outcome with the relevant trader including through CAV) must elect to litigate their dispute as a proceeding in either the Victorian Civil and Administrative Tribunal ('VCAT') or the Magistrates' Court of Victoria ('Court'). Both processes require the consumer to pay an initial filing fee. To succeed, the consumer must prove their complaint by presenting evidence to the decision maker about the technical nature of the defect. This typically requires expert evidence in the form of an expert report (paid for by the consumer), and an expert witness willing to attend VCAT or the Court to give evidence (attendance fees are usually payable by the consumer). The consumer usually must also make legal submissions to VCAT or the Court about the application of aspects of the Australian Consumer Law, as well as submissions of fact in the context of the law, such as they 'rejected' the goods within a 'reasonable rejection period' as defined in the legislation.<sup>23</sup>

Not only is this process time consuming,<sup>24</sup> complicated, and prohibitive to financially marginalised consumers, a significant opportunity for industry improvement is missed, as neither VCAT nor the

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<sup>21</sup> See *Competition and Consumer Act 2010, Sch 2: The Australian Consumer Law*, s 51[ff]

<sup>22</sup> Based on review of the published court actions from 1 January 2018 – present (10 September 2020) on the Consumer Affairs Victoria website, via <https://www.consumer.vic.gov.au/latest-news>

<sup>23</sup> For more information about the barriers to accessing justice via courts and tribunals, see: in particular, the Joint Consumer Submission to the Ramsay Review: Issues Paper, p 3, 4, 68-70, available at: <https://consumeraction.org.au/edr-review>; the Consumer Action, Submission to the Victorian Access to Justice Review, 29 February 2016, available at: <https://consumeraction.org.au/access-to-justice-review>; and Cameronralph Navigator, Review of Tenants' and Consumers' Experience of the Victorian and Administrative Tribunal: Residential Tenancies List and Civil Claims List, July 2016, available at: <http://consumeraction.org.au/review-tenants-consumersexperience-victorian-civil-administrative-tribunal/>.

<sup>24</sup> In addition to the considerable time taken to collect sufficient evidence to support a claim, both VCAT and the Magistrates' Court of Victoria have very significant listing delays (time between when the matter is filed and when a date is set for first hearing), which have worsened significantly since the advent of COVID19.

Courts have the systemic issues capacity of an industry ombudsman or regulator to collate and share data about repeated issues or patterns emerging in discrete cases.

It would be preferable for consumers to have an avenue to deal with disputes about telecommunications products and devices via the TIO, which offers:

- an investigatory rather than adversarial approach;
- technological proficiency in decision-makers;
- systemic issues prerogative and capacity; and
- appropriate accessibility for consumers as a fast, free, and user-friendly dispute resolution service.

Finally, we consider that this matter raises a broader scheme coverage question in relation to telecommunications devices and equipment. While we agree that the proposed expansion of jurisdiction is an appropriate response to increased industry marketing of products and devices, we note that the limitation to jurisdiction to consider disputes about devices and equipment sold by members that provide telecommunications services. This risks creation of a somewhat arbitrary distinction for consumers in terms of where they can raise a dispute, between those who purchased a product from a telecommunications retailer (who must be a TIO member), and those who purchased a product from, for example, an electronics store (which typically would not need to be a TIO member). Moreover, this limits the TIO's collection of data about issues relating to devices and equipment to those classes of devices and equipment that are sold by member retailers, risking a skew or misleading trend in data that supposedly speaks 'across industry'.

We support consideration of legislative reform to require manufacturers and retailers of the telecommunications equipment to be scheme members. While it is beyond the power of the TIO to amend legislation, TIO advocacy in relation to this matter would be helpful and pertinent to ensuring the TIO has an appropriate comprehensive jurisdiction.

**Recommendation 6: the TOR include coverage for complaints about devices and equipment that are offered and supplied by a member.**

**Recommendation 7: the TIO give consideration to, and engage in advocacy towards, a legislative requirement for manufacturers and retailers of telecommunications devices and equipment to be TIO scheme members.**

#### **b) Debt Buyers and Collectors**

On scheme coverage more generally, a longstanding concern of consumer advocates is the activity of debt collectors in the telecommunications market, and the lack of an appropriate process for complaints about debt buyer misconduct where it arises in relation to a purchased telecommunications debt.

Vulnerable consumers often do not reach out to advocates or support workers for help until a matter has reached a 'crisis point'. For many, this occurs when aggressive debt collection activity commences following sale of an alleged debt to a debt buyer.

Neither the Current TOR, nor the Draft TOR, provide clear jurisdiction to the TIO to hear complaints about the conduct of a debt collector who has purchased an alleged telecommunications debt.

The Draft TOR 2.26 provides, "When we consider it fair and reasonable to do so, we may hold a member responsible for the acts or omissions of another person, including a third party provider, related company, agent, dealer, contractor, employee or authorised representative". The Current

TOR 2.9 is similarly drafted. The broad reading of these provisions would be such that it empowered the TIO to hold a member responsible for the conduct of a debt buyer who had purchased, and was independently pursuing a debt, however this would only be enlivened where the TIO considered it 'fair and reasonable' to hold a member accountable for those actions.

The TIO has no current or proposed jurisdiction to make a determination binding a debt buyer, unless that debt buyer happens to be a TIO member. And there is no legislative, regulatory, or industry code requirement for purchasers of telecommunications debts to be TIO members.

The TIO's Guidance Note 'Collecting overdue charges'<sup>25</sup> (notably, marked 'under review') describes: *"When a consumer's complaint relates solely to the conduct of a debt buyer and is about events that took place after a debt was sold, we may exercise discretion not to handle the complaint, and instead refer the consumer to the debt buyer's external dispute resolution scheme."* This guidance is properly read in conjunction with provision 6.10.3 of Industry Code C628:2019, the TCP Code, which provides that suppliers can only sell a debt to a debt buyer that is an AFCA member.

With no significant proposed changes to the Draft TOR in relation to debt buyers, and no consultation questions on to this matter, we assume that the practice indicated in the Guidance Note is intended to continue following adoption of the Draft TOR. We consider this practice is inadequate.

It is beyond debate that telecommunications are essential goods and services in Australia. A company profiting from an essential goods and services sector ought to be answerable to, and held accountable to their customers through, that sector's industry ombudsman. Where a debt buyer wishes to purchase and profit from essential services debts, it should be required to be a member of the relevant industry scheme. This is more than 'a matter of principle'. The role of an industry ombudsman involves systemic issues work arising from complaints data. Appropriate systemic issues identification requires that the scheme has coverage of the vast majority of complaints in the relevant industry. In the telecommunications industry, where consumer debt and financial hardship are ongoing issues, and sale of debts to purchasers is a commonplace, an effective ombudsman must be able to consider complaints relating to the conduct of these debt buyers.

We support in principle the TIO's position indicated in the Guidance Note that, *"When, in our view, a provider has sold or assigned a debt to a debt buyer, and some or all of the debt is in dispute, we expect the provider to address the dispute."* However, we note that many vulnerable consumers are often unaware that they may have a claim open to them to dispute debts arising from mis-selling or other unfair practices. We are concerned that there is a risk such matters will be classified as financial hardship matters involving undisputed debts, and the matter may be referred to AFCA prior to or even during the TIO referral process, in circumstances where investigation should have revealed an underlying issue of member misconduct.

Moreover, it is unclear what approach will be taken where a consumer both disputes the alleged debt, and has separate complaints about the conduct of the debt buyer in its collection activities following sale of the debt. We would strongly oppose any suggestion that the consumer ought to run tandem complaints in both the TIO (in relation to the TIO member's conduct) and AFCA (in relation to the debt collector's conduct). Such a process would not only be inefficient, and needlessly confusing and time consuming for the consumer, but may risks resulting in 'double recovery' by the consumer, or other inappropriate or inconsistent outcomes.

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<sup>25</sup> Available via: <https://www.tio.com.au/guidance-notes/collecting-overdue-charges>

AFCA does not have jurisdictional specialisation in relation to debt buyer duties or debt collection practices in any way that exceeds the TIO's prerogative. Most debt collector complaints to AFCA are about breaches of the ASIC/ACCC Debt Collection Guideline, section 50 of the ACL (which prohibits 'undue harassment'), or breaches of relevant industry codes relating to the original debt. The TIO already considers the ASIC/ACCC Debt Collection Guideline and ACL as these apply to its members collecting on alleged debts, and is certainly better placed than AFCA to consider matters relating to, for example, the TCP Code and the ACMA Complaints Handling Standard. Accordingly, we consider that there is no viable argument that AFCA is inherently better placed to deal with telecommunications industry debt buyer matters than the TIO.

In addition to the above, we consider an important legal question arises in context of a 'co-regulated' industry in relation to the law of assignment. The law of assignment is such that, when an assignee accepts assignment of a debt from an assignor, the assignee takes the debt subject to all equities which had matured at the time of the notice of assignment. It follows that we consider that there is at least an arguable case that the law of assignment would require an assignee to comply with the same industry codes and standards as bound the assignor. Relevantly, should this be made out, it would follow that debt buyers would need to comply with the TCP Code (most significantly, the provisions relating to financial hardship), and the ACMA Complaints Handling Standard when collecting telecommunications debts. Should this be the case, then, as argued above, the TIO would clearly be a more appropriate forum than AFCA for these disputes.

We suggest that, as a matter of effectiveness and comprehensive jurisdiction, it would be appropriate for the TIO to transparently and explicitly confirm jurisdiction to deal with debt buyers, either by advocating for legislative or TCP Code reform requiring buyers to be TIO members, or by explicitly stating that the TIO **will** hold a member accountable for actions of buyer, including for non-financial loss arising from debt collection practices engaged in solely by the buyer. The latter of these suggestions would provide an appropriate disincentive to members selling debts to buyers who engage in unfair conduct.

**Recommendation 8: the TIO should ensure it has jurisdiction to consider complaints about purchasers of telecommunications debts.**

**Q6. Are there specific devices or equipment that should be explicitly excluded from or included in the TIO's remit? If yes, what are these and why?**

No comment on this consultation question.

***Introducing joining more than one member to a single complaint***

**Q7. What issues are raised by joining more than one member to a complaint and how can we address these issues?**

We strongly support the proposal to enable the TIO to join more than one member to a complaint. Consumers too often lose out while members 'pass the buck', a practice that affects matters involving multiple retail providers, as well as carrier/provider disputes.

**Case Study: More from Josie's story**

As described earlier in this submission, Josie experienced difficulty transferring her landline service from one provider to a second provider.

Josie chose to switch landline providers after her first provider sent her multiple confusing bills containing information that Josie thought conflicted with what the provider had told her over the phone. She approached a second provider, and requested to port her fixed line phone number to that provider and engage as her landline service.

Josie approached Westjustice in confusion after two months had passed since her request transfer, and her original provider was still billing her, despite the second provider also having commenced billing.

WEstjustice called both Josie's first and second provider seeking an explanation for the double billing. Josie's first provider told WEstjustice that no port-out request had been received. WEstjustice assisted Josie to make a Telecommunications Industry Ombudsman ('TIO') complaint about the second provider's failure to port her line and transfer her account, despite commencing and continuing billing. Sometime shortly after, Josie's first provider disconnected her landline and her phone became unusable.

The TIO's first stage of dispute resolution ('referral stage') required the second provider to contact WEstjustice within a stipulated time frame. No contact was made. WEstjustice contacted the TIO and advised that the stipulated time for reply by the second provider had passed, that Josie's phone was now not working at all, and that no one from either provider had updated Josie or WEstjustice prior to that disconnection. The TIO advised that Josie's matter would be progressed to the 'next stage' in the TIO process, but that no time frame could be provided for when a case manager would be allocated.

WEstjustice also contacted Josie's first provider, which said that the phone had been disconnected automatically by the first provider's system, and that it was likely to be because of a port-out request had now been received, however the representative was unable to confirm this.

As described above, Josie's phone remained disconnected for over nine weeks while WEstjustice attempted to resolve the situation. WEstjustice feels that if there had been a way to force direct communication between the two providers the matter could have been resolved much faster.

*Source: WEstjustice*

We do not support a fault-based model for TIO fee allocation. We consider such a model risks protracting the complaint process by creating a disincentive to reaching practical negotiated or conciliated outcomes. Specifically, we are concerned that fear of an inference of fault may be an impediment to either member proposing or agreeing to a practical resolution.

**Recommendation 9: the TIO should adopt Draft TOR 2.20, enabling the TIO to join members to a single complaint.**

**Recommendation 10: a 'no fault' fee structure should be retained in relation to complaint fees.**

**Q8. Looking at the TOR as a whole, are there other changes we should consider to ensure our scheme continues to meeting community expectations for best practice external dispute resolution in the telecommunications sector?**

We use the broad remit of this question to provide feedback to the TIO on the following matters: (a) jurisdiction to consider a complaint where a legal proceeding has been initiated; (b) short, specific

feedback on drafting and other concerns about specific clauses of the Draft TOR; and (c) comments in relation to the TIO's Complaints Handling Process.

*a. Jurisdiction to consider a complaint where a legal proceeding has been initiated*

We suggest that the TIO expand its jurisdiction to consider complaints in circumstances where a legal proceeding has been initiated. Such a position would align the TIO with the jurisdiction of AFCA and EWOV in relation to such matters.

As described in our response to Q5 above, it is too often the case that the vulnerable consumers do not seek help until a 'crisis point' is reached. Sadly, it is not uncommon for people experiencing disadvantage or vulnerability to only present to a community legal centre having been served a Magistrates' Court Complaint in relation to an alleged debt. These examples include telecommunications debts, where proceedings are usually initiated by a debt buyer, or debt collector acting as the member's agent.

Sometimes these consumers, when providing instructions to a lawyer or financial counsellor, say they were unaware that any alleged debt was owed, or give instructions consistent with likely misconduct by the member at the time the contract was originally entered into.

In Victoria, once served with a Complaint, a consumer has only 21 days in which they can file a Defence to avoid summary judgment being entered against them. However, even where legal assistance is sought and available within time, and a lawyer assesses the consumer may have defences open to them, actually filing a Defence is a high-risk path, as having the matter proceed to a contested hearing attracts significant costs risks (in the range of thousands of dollars) in the event the consumer is ultimately unsuccessful in defending the claim.

Both the Current TOR and Draft TOR would preclude a consumer in such circumstances from bringing a TIO complaint: this is a position we consider unfair.

External dispute resolution forums such as TIO are far more accessible to consumers than the court system. Processes are less formal, and the TIO (like other EDR schemes) is able to consider what is fair and reasonable in all the circumstances and good practice. Moreover, EDR schemes avoid the significant cost risks described above, which create an imbalance of power between consumers and large member and debt buyer companies.

The TIO's lack of jurisdiction to handle a complaint where a party has commenced proceedings in a court or tribunal results in consumers being unable to access this scheme in circumstances as described above, even where there is significant material to suggest that a member has not acted fairly or in line with good industry practice.

In our view, this significantly limits access to justice for consumers, and could result in devastating outcomes for consumers who are denied fair and accessible EDR to challenge alleged debts.

We recommend that the TIO adopt the below approach taken by AFCA in relation to initiated proceedings.

AFCA rule A.7.1:

While AFCA is considering a complaint, the Financial Firm is subject to the following restrictions:
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- a) The Financial Firm must not begin legal proceedings against the Complainant, anyone else joined as a party to the complaint or Other Affected Party about any aspect of the subject matter of the complaint; **and**
- b) The Financial Firm must not seek judgment **or take other action to pursue debt recovery legal proceedings that the Financial Firm began before the Complainant submitted the complaint to AFCA**, other than to the minimum extent necessary to preserve the Financial Firm’s legal rights.

**(our emphasis)**

Finally, we are concerned that the exclusion of jurisdiction set out in 2.6 and 2.38(c) of the Draft TOR may significantly disadvantage consumers who are attempting to settle a family law property matter, or have already settled such a matter. In family contexts, it is not uncommon for one party to have liability for debts for which they received no benefit, including telecommunications debts. This is particularly the case where family violence and economic abuse are involved. Such instances often also raise questions about the appropriateness of initial contracting by the telecommunications provider, and indicate possible liability claims against the TIO member by the alleged debtor.

A family law property order effectively deals with **all** assets and liabilities to a relationship. As such, any debt alleged prior to the settlement is effectively ‘dealt’ with by that legal proceeding. At the same time, it would generally be inappropriate to delay family law property settlements until a telecommunications dispute is resolved through the TIO.

We suggest that the TIO clarify that, where a member service provider is not involved in the property proceeding, the TIO is not excluded from considering a dispute with a provider about a telecommunications debt that existed prior to the property proceeding’s initiation.

**Recommendation 11: The TIO should amend its Terms of Reference to empower it to consider complaints where a legal proceeding has been initiated.**

**Recommendation 12: The TIO should amend its Terms of Reference such that it requires members not to seek judgment on an initiated legal proceeding once a TIO complaint has been lodged by a consumer until the TIO complaint has been resolved.**

**Recommendation 13: The TIO should clarify in its Terms of Reference that it can consider complaints about telecommunications matters where the relevant complaint relates to an alleged debt or claim of a person who is involved in an initiated or finalised family law property proceeding.**

*b. Feedback on specific clauses of the Draft TOR*

We note that our redraft suggestions are underlined to draw attention to these in the below document. We do not propose that the text be underlined in the Terms of Reference document.

Provision no.	Wording in Draft TOR	Our comments and suggestions
Interpretation (Part 8)	<b>Consumer:</b>	We consider part (a) of this definition is inconsistent with the proposal to expand the TIO’s jurisdiction to

<p>Definition of 'Consumer':</p>	<p>A residential, small business, or not-for-profit customer (or former customer) who is or was:</p> <ul style="list-style-type: none"> <li>(a) The account holder or end user of a telecommunications service; or</li> <li>(b) A person or company who a member claims is or was its customer.</li> </ul>	<p>consider complaints about devices and equipment sold by members.</p> <p>Suggested redraft:</p> <p><b>Consumer:</b>  <i>A residential, small business, or not-for-profit customer (or former customer) who is or was:</i></p> <ul style="list-style-type: none"> <li>(a) <i>The account holder or end user of a telecommunications service;</i></li> <li>(b) <i><u>A purchaser or prospective purchaser of a device or equipment sold by a member;</u> or</i></li> <li>(c) <i>A person or company who a member claims is or was its customer.</i></li> </ul> <p>The term 'end user' should also be defined in Part 8.</p>
<p>Interpretation (Part 8)  Definition of 'Credit Management Action':</p>	<p><b>Credit management action:</b>  Action by a member taken as a result of a consumer's or occupier's failure to pay account charges or fees, including:</p> <ul style="list-style-type: none"> <li>(a) Any communication aimed at collecting disputed charges from a consumer;</li> <li>(b) Debiting or attempting to debit an amount from a credit card or bank account;</li> <li>(c) Suspending, restricting or disconnecting a consumer's service</li> <li>(d) Reporting or threatening to report information to a credit bureau; and</li> <li>(e) Threatening or initiating legal proceedings</li> </ul>	<p>We suggest inserting the word 'alleged' prior to 'failure to pay': the alleged 'failure', or liability for the relevant charges, is sometimes disputed by the consumer.</p> <p>We further suggest adding the words 'or threatening to do so' to (c), such that it reads:  <i>"Suspending, restricting or disconnecting a consumer's service, <u>or threatening to do so</u>"</i></p> <p>We further suggest adding:  (f) <i><u>Assigning a right to recover an alleged debt</u></i></p> <p>The term 'disputed charges' should also be defined in Part 8. We would support inclusion of the definition in the Complaints Handling Process, which makes it clear that disputed charges include 'complained about' charges, and accordingly can extend to complaints, for example, about a failure to comply with a financial hardship policy where actual liability is not necessarily disputed:</p> <p><b>Disputed charges:</b>  <i><u>Charges for services where the Consumer has raised a Complaint with the Provider, and the disputed charges have been specified. Consumers are entitled to withhold payment on the disputed charges but are expected to make payment on charges for services that they are using.</u></i></p>
<p>2.2</p>	<p>We can handle complaints from consumers, including about:</p> <ul style="list-style-type: none"> <li>(a) Telecommunications services that a member offers or supplies to the consumer;</li> </ul>	<p>We suggest removing the words 'a problem with' from (b). This phrasing implies that only complaints about devices or equipment will only be considered where those complaints are about defective goods (rather than things like selling practices, privacy breaches etc).</p>

	<p>(b) A problem with equipment or a device sold by a member, whether together with or separately from, a telecommunications service;</p> <p>(c) ... to (j) ...</p>	<p>To match the drafting of (a), we suggest (b) read simply:</p> <p><i><u>(b) Equipment or a device sold by a member, whether together with or separately from, a telecommunications service;</u></i></p> <p>We further suggest adding to this list:</p> <p><i><u>(k) selling practices by a member;</u></i>  <i><u>(l) suspension, restriction or disconnection of a service;</u></i>  <i><u>and</u></i>  <i><u>(m) credit reporting, including the listing of defaults</u></i></p>
2.6	We will not handle a complaint where either party has commenced proceedings in a court or tribunal.	See our detailed comments at 8(a) above.
2.33	A decision may require a member to take a range of actions, including: (a) ... to (j) ...	We support the list of possible remedies, and suggest adding a remedy: <i><u>(k) reconnect a service, including where appropriate reconnection on the same terms for the service as prior to disconnection</u></i>
2.39	We may decide to stop handling a complaint when we consider it reasonable to do so, such as when: (a) A consumer or occupier dies; (b) The member ceases to trade; ...	We consider that the drafting of this clause implies that the TIO <b>will</b> find it fair and reasonable to stop handling a complaint in the circumstances listed. We have the following concerns in relation to that implication: (a) We consider that an estate of a consumer or occupier should be able to continue a claim in the place of an occupier or consumer who has died. This position would be consistent with both court processes and the AFCA process. (b) We are concerned that the drafting of (b) may encourage avoidance behaviors in unscrupulous traders, and leave consumers without redress even if the member still has capacity to pay.
4.5	We may wait until we have finalised a systemic issue investigation before handling any complaints connected to the issue.	We suggest that the TIO clarify in this section that complaints can nonetheless be lodged, and that temporary rulings per 2.28 can be made, while the systemic issues investigation is ongoing.  Should temporary rulings not be available, there is a risk of significant consumer harm where, for example, phones remain disconnected, credit management activity occurs, or an application for summary judgment is initiated (for example, by a debt buyer) while TIO finalising a systemic issues investigation.

6.7	<p>Once we tell a member about a complaint, the member must not take legal action about the complaint in a court, tribunal or alternative dispute resolution forum unless:</p> <p>(a) ... (d) ...</p>	<p>Consistent with our arguments at 8(a) above, we suggest drafting this clause such that it reads:</p> <p><i>Once we tell a member about a complaint, the member must not take legal action about the complaint in a court, tribunal or alternative dispute resolution forum, <u>or seek judgment or take other action to pursue debt recovery legal proceedings that began before the Complainant submitted the complaint to the TIO, unless:</u></i></p> <p>(a) ... (d) ...</p>
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*c. The complaints handling process*

Both the Draft TOR (cl. 2.13 – 2.40) and the Current TOR (ch. 3 and 4) include basic information about complaint handling at the TIO. The Draft TOR includes less detail than its predecessor, instead referencing the separate Complaints Handling Procedure<sup>26</sup> – we support this in principle, so long as the TIO conduct open, public consultations and reviews on complaints handling, as this is truly ‘where the rubber hits the road’ for consumers and TIO members. When looking to other sectors, the AFCA complaints resolution process is transparently reviewed as part of the AFCA Rules.<sup>27</sup>

We are aware the Complaint Handling Procedures were most recently updated in July 2020; however, we are not aware of any recent public consultation on the process. We recommend this occur as soon as possible. In the meantime, we provide the following feedback on significant issues.

**(i) Lack of follow up with consumers**

We have raised previously our concerns that the TIO relies on consumers (barring where the TIO has identified urgent medical or safety concerns) to re-contact the TIO after a referral back to the provider if their dispute has not been satisfactorily resolved, including where the provider has not made contact with them. We are concerned about consumer disengagement where a provider does not satisfactorily resolve a complaint on TIO referral, given that this will typically be the third time the provider has declined to provide a result that the consumer considers suitable.<sup>28</sup> We are further concerned that this will lead to a gap in the TIO’s data between those who have actually been able to resolve their complaint and those who simply do not or are not able to follow-up (again) with the TIO.

The TIO states on its website that ‘almost 90% of complaints are resolved within 10 business days’.<sup>29</sup> However, we know from speaking to clients who are confused about whether their matter is still with the TIO, or who have never heard again from their provider, that this does not account for the percentage of people who make complaints to the TIO but do not proactively re-engage with the TIO again. This can be due to confusion, complaint fatigue, or disengagement for many other valid and understandable reasons.

<sup>26</sup> TIO, “Complaint Handling Procedures” (1 July 2020), available at: <https://www.tio.com.au/about-us/policies-and-procedures>

<sup>27</sup> Australian Financial Complaints Authority (AFCA), “Complaint Resolution Scheme Rules” (25 April 2020) available at <https://www.afca.org.au/about-afca/rules-and-guidelines/rules>; recent consultation on AFCA Rules changes are available here: <https://www.afca.org.au/news/consultation>.

<sup>28</sup> The matter having already been raised as a complaint at first instance with a staff member, progressed to IDR, and escalated to the TIO.

<sup>29</sup> <https://www.tio.com.au/>

In contrast, AFCA requires a financial service provider to provide AFCA with a response to a complaint referred to them by AFCA. This then triggers a generic email from AFCA to the consumer, noting they understand the financial service provider has responded, and notifying the consumer they can contact AFCA if the complaint has not been resolved. If the financial service provider never contacts AFCA within the resolution timeframe, the matter is automatically progressed to AFCA Case Management.

In many cases, the people who will be most disadvantaged by a lack of follow up by the TIO will cross over with the most vulnerable – people who are struggling with telecommunications or other stress-inducing debt, family violence, or homelessness, for example.

David’s story, below, is an example of the disengagement that occurs when the onus is on the consumer to re-contact the TIO.

#### **Case Study: David’s story**

David is in his thirties, and called the National Debt Helpline (NDH) in late 2019 about multiple debts totalling more than \$60,000. David told us he worked in catering and sometimes drove for a ride-share service, but he was struggling with an injured leg, which he thought may reduce his approximate \$1600/fortnight salary. David said he was experiencing mental ill-health, with the overwhelm of his debts adding to this.

David told us that in 2018, he purchased an iPad at JB Hi-fi and JB Hi-fi signed him up to Telstra. He was already in a contract with a different major telco provider. After he received the new sim card, the service was inconsistent; he couldn’t get incoming calls or make outgoing calls - and sometimes had no signal.

David said he returned to JB Hi-fi, and they changed sim cards a few times, but it still was not working. After two or three weeks, David went to different Telstra stalls. David said he was told Telstra needed to investigate the sim card. David said he left them to investigate the sim card for two - three weeks but he continued to have issues. David informed Telstra he wanted to cancel. David said he was advised he would then be required to pay cancellation fees.

David said he went to the TIO, who said they would contact Telstra, and if he does not get a response he should call them back again. David said he went back to Telstra, but still nothing happened, so he cancelled the contract to return to his old provider. David said he then received an invoice for approximately \$500, and, at the time of his call to NDH, a letter stating legal action would be taken against him.

*Source: Consumer Action Law Centre*

We note that the TIO has publicly supported Recommendation 7 of the 2017 Independent Review of the TIO, that “The TIO should undertake a limited exercise of periodic telephone surveying of a randomly selected group of consumers whose complaint does not return to the TIO as a conciliated (Level 2) complaint – to check that they were satisfied that their complaint was reasonably and fairly dealt with by the provider and, if not, why they did not pursue their complaint through the TIO. This data should be collated and analysed with a view to identifying any weaknesses in the process that should be addressed and trends over

time.” The TIO’s December 2017 Response to the Recommendations, states “The Telecommunications Industry Ombudsman will include this as one of the priorities in the 2019 Business Plan.”<sup>30</sup> We ask that, if this research has been conducted, that the resulting data be publicly shared. If the survey has not been conducted as undertaken, we urge the TIO to begin this process.

**(ii) Preliminary Views and Decisions**

The process by which Preliminary Views may be rejected differs for consumers versus providers. If a consumer rejects the Preliminary View, the complaint will simply be closed without binding the provider.<sup>31</sup> If the provider rejects the Preliminary View, there will be a (published) Decision made (which can take into account further information or investigation), binding the provider.<sup>32</sup>

Not only do we consider it unbalanced and unfair to provide an additional level of review to providers and not consumers, we are concerned that published TIO determinations will be unbalanced, as only the provider-requested Decisions are ever published.

**Recommendation 14: Undertake a robust and public consultation on the Complaint Handling Procedures.**

**Recommendation 15: Allow both consumers and providers to proceed to Decisions, with all decisions publicly available.**

*d. TIO directory of members’ Internal Dispute Resolution contact information*

Consumers (and consumer advocates) have reported failings in the Internal Dispute Resolution (‘IDR’) processes of a number of members. Of particular frustration is the wide failure of members to publicise contact details for their IDR departments, instead requiring consumers to complete complicated online forms, or even engage with ‘chatbots’. Moreover, some members fail altogether to provide a telephone number (or in the case of one member, an operative telephone number) for customer service. This is not only aggravating, but constitutes a significant barrier for consumers experiencing vulnerability or disadvantage.

It would be of considerable benefit to consumers and their advocates for the TIO to require of its members, and publish on its website, the telephone and email IDR contact details of its members.

**Recommendation 16: the TIO update its Terms of Reference to the effect that members are required to provide current telephone and email IDR contact details to the TIO.**

**Recommendation 17: the TIO publish on its website a directory of IDR contact details provided by its members.**

**Q9. Are the proposed Terms of Reference easy to follow and understand?**

<sup>30</sup> Available via: <https://www.tio.com.au/reports-updates/independent-review>

<sup>31</sup> TIO, “Complaint Handling Procedures” (1 July 2020) cl. 5.3.1.2, available at: <https://www.tio.com.au/about-us/policies-and-procedures#pt5>.

<sup>32</sup> TIO, “Complaint Handling Procedures” (1 July 2020) cl. 5.3.1.3 and 5.3.2.

Putting aside the specific drafting concerns we have raised in our response to Q8 above, we consider the Draft TOR to be easy to follow, and a vast improvement on the Current TOR in terms of layout and readability.

We do note that the writers of this submission are policy workers, lawyers, and professional advocates. We encourage the TIO to engage directly with vulnerable consumer groups as part its outreach work to assess the accessibility of this document, and to develop appropriate supplementary materials where necessary to enhance consumer comprehension.

**Recommendation 18: the TIO should engage directly with vulnerable consumer groups as part its outreach work to assess the accessibility of its Terms of Reference, and to develop appropriate supplementary materials where necessary to enhance consumer comprehension.**

### Contact details

Please contact Tess Matthews at WEstjustice on 03 9749 7720 or at [tess@westjustice.org.au](mailto:tess@westjustice.org.au) if you have any questions about this submission.

Yours Sincerely,



Melissa Hardham | CEO  
**WESTJUSTICE**



Gerard Brody | CEO  
**CONSUMER ACTION LAW CENTRE**



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**FINANCIAL RIGHTS LEGAL SERVICE**



Fiona Guthrie AM | Chief Executive  
**FINANCIAL COUNSELLING AUSTRALIA**

## APPENDIX A – Summary of Recommendations

**Recommendation 1:** The TIO continue and increase its consultation with consumer representative organisations and the public, including on processes and procedures in its jurisdiction.

**Recommendation 2:** The Terms of Reference define small business as a Primary Producer or other business that had less than 100 employees at the time of the act or omission by the TIO member that gave rise to the complaint.

**Recommendation 3:** The TIO be empowered to award amounts greater than \$100,000 in circumstances where an award of that quantum is fair and reasonable.

**Recommendation 4:** The TOR include a clear, transparent remit for awarding compensation for non-financial loss and indirect financial loss.

**Recommendation 5:** The TIO consult on, specify, and publicise, a clear process for considering compensation for indirect financial loss and non-financial loss.

**Recommendation 6:** The TOR include coverage for complaints about devices and equipment that are offered and supplied by a member.

**Recommendation 7:** The TIO give consideration to, and engage in advocacy towards, a legislative requirement for manufacturers and retailers of telecommunications devices and equipment to be TIO scheme members.

**Recommendation 8:** The TIO should ensure it has jurisdiction to consider complaints about purchasers of telecommunications debts.

**Recommendation 9:** The TIO should adopt Draft TOR 2.20, enabling the TIO to join members to a single complaint.

**Recommendation 10:** A 'no fault' fee structure should be retained in relation to complaint fees.

**Recommendation 11:** The TIO should amend its Terms of Reference to empower it to consider complaints where a legal proceeding has been initiated.

**Recommendation 12:** The TIO should amend its Terms of Reference such that it requires members not to seek judgment on an initiated legal proceeding once a TIO complaint has been lodged by a consumer until the TIO complaint has been resolved.

**Recommendation 13:** The TIO should clarify in its Terms of Reference that it can consider complaints about telecommunications matters where the relevant complaint relates to an alleged debt or claim of a person who is involved in an initiated or finalised family law property proceeding.

**Recommendation 14:** The TIO undertakes a robust and public consultation on the Complaint Handling Procedures.

**Recommendation 15:** The TIO amend its Complaint Handling Process to allow both consumers and providers to proceed to Decisions, with all decisions publicly available.

**Recommendation 16:** The TIO update its Terms of Reference to the effect that members are required to provide current telephone and email IDR contact details to the TIO.

**Recommendation 17:** The TIO publish on its website a directory of IDR contact details provided by its members.

**Recommendation 18:** The TIO should engage directly with vulnerable consumer groups as part its outreach work to assess the accessibility of its Terms of Reference, and to develop appropriate supplementary materials where necessary to enhance consumer comprehension.

## **APPENDIX B – About the Contributors**

### **WEstjustice (Western Community Legal Centre)**

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

### **Consumer Action Law Centre**

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

### **Financial Rights Legal Centre**

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

### **Financial Counselling Australia**

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