

**COMMUNICATIONS
ALLIANCE LTD**



TIO Terms of Reference Modernisation: Guidance
COMMUNICATIONS ALLIANCE SUBMISSION
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About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

The most influential association in Australian communications, co-operatively initiating programs that promote sustainable industry development, innovation and growth, while generating positive outcomes for customers and society. To create a co-operative stakeholder environment that allows the industry to take the lead on initiatives which grow the Australian communications industry, enhance the connectivity of all Australians and foster the highest standards of business behaviour. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

INTRODUCTION

Communications Alliance welcomes the opportunity to provide this submission in response to the Telecommunications Industry Ombudsman's (TIO) proposed guidance on compensation for non-financial loss and systemic issues.

Industry appreciates the work by the TIO and its Board on the revised Terms of Reference over the past year, in addition to the decision to consult on the development of this guidance.

We understand that consultation is intended as only one step in the process of developing the guidance. Due to the short timeframes provided for this consultation, we have provided initial thoughts to inform the TIO's forward work program. We prioritised consideration of non-financial loss, as that was what the TIO identified as most time-sensitive, and have only provided initial reactions on the systemic guidance.

COMPENSATION FOR NON-FINANCIAL LOSS

We appreciate that the TIO has acknowledged the importance of developing guidance on this issue. However, we are concerned about the limited scope of the guidance, in that it does not address the important question of the process of how the TIO decides if it will award non-financial loss and the amount of any such award, or any processes for review.

While these matters are not necessarily appropriate for this type of guidance – which appears to be information for consumers – those procedural questions are vital in ensuring that this change does not have outside commercial impacts on providers and the industry as a whole, and in ensuring that it is applied in an equitable and appropriate manner. Guidance, or process documents, on these matters should be developed and transparent.

Process

There are a number of questions of process that need to be addressed. The highest priority ones we have identified are as follows:

- When in the complaints handling process will compensation for non-financial loss be considered – at what level of escalation? In connection with this, if non-financial loss is only considered at higher levels of escalation, how would the TIO prevent consumers from refusing to accept an outcome of a complaint in the hope of escalating to a level where they may be able to receive compensation?
- What level of seniority needs to be involved in a decision to award compensation? The exceptional nature of non-financial loss decisions means that they should automatically require a senior officer, potentially an Assistant Ombudsman, involved in the decision. We consider this particularly important due to ongoing industry concerns about the lack of consistency in TIO decisions. Alternatively, or in addition, there needs to be a review process (beyond the typical reclassification process) to enable providers to discuss such claims with senior staff before industry is expected to pay such claims.
- How will non-financial loss be handled in a matter where there are multiple members on the complaint? We understand this likely won't be addressed until there is further progress on the joinder power and guidance, but this needs to be taken into consideration.

Other matters

- There should be a periodic report to the Board on the decisions taken and objections raised by members, so the Board is able to fully consider the impacts of this decision on the Terms of Reference, in particular during the first couple of years of its implementation.
- While we understand the value of the TIO raising awareness of its services to consumers, it is important that the TIO does not advertise based on the possibility of receiving compensation. Doing so would risk mitigating the impartiality of the TIO and could create a perverse incentive for consumers to refuse to work with their provider and instead approach the TIO.

Comments on the draft guidance

The above points may not be directly relevant for the type of draft guidance the TIO has developed to this point, so we have also provided comments on the draft guidance itself.

Our main concern is that the guidance does not strongly emphasise that compensation for non-financial loss is only intended for exceptional circumstances. While the guidance does state that the TIO “will only consider claims...where an unusual amount of...inconvenience...has occurred,” we feel that it should be more clearly set out for both consumers and staff. There should be clarity that Dispute Resolution Officers will not consider if compensation should be awarded on every case, but only in unusual circumstances.

Claims that can be considered

- We understand that the reference to consequential changes to the existing guidance on privacy complaints is intended to only ensure the guidance is consistent with this new guidance, and that there is no intent to change the practice for privacy complaints. However, we are concerned by the comment that “there will be consequential changes,” and would like to understand exactly what those proposed changes will be.
- The TIO should not be able to recommend or decide that a provider will pay compensation if a consumer does not request that, although we do note that it would be appropriate for the TIO to inform a consumer that they are able to make such a request.

The amount that can be rewarded

- We object to the proposal to allow for multiple ‘events’ in a single complaint to receive compensation for non-financial loss. This appears to be against the principle of the Terms of Reference, and was not something canvassed or ever identified in the consultation on the Terms of Reference.

What we take into account

- We recommend “Any other payments made” be revised to “any other compensation made,” as it is possible a provider may have taken goodwill steps other than a payment, such as a free device (e.g. – in a situation where there is no broadband connection, a provider may have loaned or gifted a hotspot device), increased data allowances or a credit. Consideration of other forms of compensation will depend on the member’s relationship with the consumer and what forms of compensation that are available to be provided.
- We recommend the TIO also consider what steps the member has made to mitigate the impact of the harm to the consumer.

SYSTEMIC ISSUE GUIDELINES

We do have some broader feedback on the TIO's current approach to potential systemic issues, including the risk for overlap with existing regulators and the increasing burden on providers. Industry also has ongoing concerns about the TIO's ability to initiate systemic issue investigations where they have not received complaints as set out in the Terms of Reference.

However, we have kept the response to this consultation focused on the proposed changes to the [existing Systemic Issue Guidelines](#) and will engage separately with the TIO on other matters.

The addition of timeframes is concerning. We will highlight each of these in our comments below, but overall, we understand that the addition of the timeframes in this guidance is intended to set out what is current practice for the TIO. However, we consider that this should be further discussed as part of a broader consideration of the burden that systemic investigations are placing on providers before being set out in writing.

As noted in the introduction, this feedback is only our initial reactions to the matters raised, to flag for the TIO where further discussion needs to take place. Some members may still be considering the draft guidance.

3.1 Identification

- Role of another body: The decision on whether the TIO should investigate a specific topic should also take into consideration if another body (in particular, a regulator) is already handling that issue. Duplicative actions create unnecessary burden on providers and pull attention from the focus on customers. Additionally, if a regulator is taking action on or investigating a particular matter, there is no consumer benefit to the TIO also getting involved.

While the TIO's existing information on the matter could be helpful, that should be provided via the relationship with the regulator, and there should not be any information gathering requiring further action from providers.

- Raising awareness: If the TIO decides not to handle a possible systemic issue, it is not appropriate to 'raise awareness' about that matter beyond the normal matter of complaints reporting or policy submission insights based on complaints data. If the TIO has not 'handled' an issue, it would not have specific insights from an investigation and likely would not have sufficient information to report on the whole picture of that matter. Additionally, the implication of any action by the TIO is that industry is not acting appropriately, which may not be the case, particularly if the TIO has decided not to handle a possible systemic.

3.2 Investigation

3.2.2 Requesting information from members

As noted previously, timeframes require further discussion. On the whole, 20 business days may not be reasonable depending on the information required. Our understanding is that at times, the TIO requests information on complaints over a year old, or detailed information that is not readily accessible.

The compilation of such information often takes up resources that would otherwise be dedicated to resolving consumer complaints. Additionally, the provision of information needs to be reviewed by senior managers and legal teams. This is an extensive process, and may

be taking place in parallel with information requests from the ACMA or scheduled record-keeping rules, which means those internal resources are already at full capacity.

3.2.3 Taking further steps in a systemic investigation

If the TIO chooses not to take further steps, it should notify the member that the matter is closed. This commitment should be true regardless of the level to which the systemic progresses (decision not to proceed, agreed resolution, or recommendations).

3.3 Working with members to address concerns about a systemic issue

3.3.1 Working Towards Resolution

- Escalation: Systemic investigations should only be initiated where the matter is serious, and should not be used widely and regularly, considering the burden placed on providers. When providers receive a systemic investigation, there are significant and senior resources dedicated to internally investigating and considering the problem. Additionally, members have found that the ability to meet with senior staff to discuss investigations, generally proves helpful. In light of this, working towards resolution of a systemic issue should always involve at least an Assistant Ombudsman.

If that proposed change is not adopted, we do appreciate the inclusion of a clear escalation method as an option.

- Timeframes for agreed actions: One to three months is not reasonable, depending on the agreed actions. For example, training or major operational changes would typically take 6 months to one year, and the TIO often does not have visibility over changes providers are already obligated to make due to other regulatory obligations. Changes that require system development may take longer. It is appropriate for the TIO to assist in industry improvement, but there needs to be an acknowledgement that the TIO is not a regulator.

3.3.2 Making systemic issue recommendations

Members may be able to provide initial feedback on a recommendation within 20 days, but it is not reasonable for them to provide certainty or details of how the recommendation would be implemented in that timeframe.

Depending on the recommendation, legal, budgeting, IT and training resources could all need to be consulted on the matter, and if it is connected to a commercial relationship (e.g., wholesaler and RSP, or third-party vendor) there would be external meetings required. As with other proposed timeframes, this requires further consideration.

4. Public Reporting

- Impact of public reporting: The TIO needs to consider the impact its public reporting has. While the TIO may choose to put out a report on a systemic investigation that finds general good behaviour by industry, while still providing opportunities for growth, these systemic reports are received and discussed in the public arena as examples of where industry is behaving poorly or otherwise indictments of industry. This can have commercial and regulatory ramifications.
- Benefits of work: The TIO should add additional focus of the benefits of their work into public reporting of systemics, and this should be in this section of the guidance. That would be that public reporting will set out the positive changes that have been made as a result of the TIO's work.
- Reporting on all investigations: Additionally, the guidance should set out that the TIO will also report on instances (or at least the number of times), perhaps in their Annual Report, where they took investigative steps but did not find a systemic issue. This would increase transparency and rigour around the issues that are decided to be

investigated upon. There is also a broader benefit to members and consumers for the TIO to also report on what is working in industry practice through the course of its investigations.

5. Publication of systemic issue recommendations

- Closure of systemic: There should be a requirement for the systemic issue investigation to be closed and finalised before a report is published. While it would be preferable for this requirement to be in place for all systemic reports, it is vital for those that directly name a member. TIO reports have reputational impact on industry as a whole, and will certainly have commercial consequences on named members. If a report is published while there is still an ongoing investigation or matters being considered those negative impacts will come to pass regardless of the final outcome of that investigation,
- Recency of information: Information published should also be recent. Some prior reports have included out-of-date information, which while potentially helpful for setting context, could mislead consumers on current practices, and in doing so have negative consequences on a provider who has already made changes. This is particularly true for reports which name a provider, but would be best practice for all reports as it would ensure consumers are provided with the most relevant information.
- Notification: While we appreciate the establishment of notification timeframes in the Guidelines, there should not only be 5 days business notice, but that notice should include an advance (embargoed) copy of the publication to give the member the appropriate opportunity to check for accuracy.
- Joining multiple members: The TIO should consider the impact of joining multiple members to a complaint on naming members in a systemic recommendation – for example, would a published systemic recommendation name members who may have been joined to the complaints but were not necessarily at fault or otherwise part of the systemic?. We will address this more in our response to the survey.

6. Working with regulators

The current systemic issue guidelines include a statement that “we will notify the provider when we formally refer the systemic issue to a regulator” (5.2) – this should not be removed. Additionally, before the ombudsman refers a matter to a regulator, members should also have a right to reply.



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