

25 October 2021

By email: PublicConsultation@tio.com.au

Vicky Finn
Strategy and Regulatory Affairs Lead
Telecommunications Industry Ombudsman

Dear Vicky

Draft Guidance: Compensation for Non-Financial Loss and Systemic Issues

We welcome the opportunity to comment on the development of draft guidance to support the implementation of the new Telecommunications Industry Ombudsman (TIO) new Terms of Reference (TOR) by 1 January 2022.

Thank you for allowing us additional time to make this response. We note that only one week was provided for feedback. For future consultations, we would suggest that stakeholders be given at least one month to respond to consultations of this type. This would enable effective consultation within organisations.

Compensation for non-financial loss

1. We recognise that the compensation limits in the draft guidance reflects the limits set out in the TOR (and thus may not be in the scope of consultation), however we wish to reiterate our view that we consider the \$1,500 non-financial compensation loss for complaints other than those about privacy is set too low. We note that other redress schemes have a compensation limit that is substantially higher. For example, AFCA is able to make an award for non-financial loss up to a limit of \$5,000. Furthermore, AFCA has proposed in its submission to the 2021 Independent Review of AFCA that its non-financial loss compensation limit is increased. We ask the TIO board to reconsider this issue in light of meeting best practice.
2. We recognise and support the statement in the draft guidance that the amount of the compensation awarded will be proportionate to the extent of the harm suffered, however we reject the need for the statement 'it is likely that most awards for compensation for non-financial loss will be modest'. This appears unnecessary given the total limit is already far below that of comparable redress schemes.
3. We welcome the statement in the draft guidance that multiple awards for non-financial loss can be made in the context of a single complaint. It may be helpful to add an illustrative case study in this regard. We point to case study 1 in the AFCA non-financial loss claims approach regarding debt collection, and suggest a similar case study could be added to the TIO guidance.

4. We consider that it would be helpful for the guidance to state that 'unusual amount of physical inconvenience, time to resolve the complaint, or interference with expectation of enjoyment of peace of mind has occurred' includes 'humiliation and distress' as expressed in section 46 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic). That provision provides a remedy of damages of up to \$10,000 for humiliation and distress due to course of prohibited debt collection conduct. To aid development of clear jurisprudence about non-financial loss in the context of debt collection, we consider there would be substantial benefit in incorporating this concept.
5. We consider that it would be helpful for the guidance to state whether complaints which raise discrimination fall within the 'any other complaint' category of non-financial loss. As the TIO knows, there have been practices of miss-selling by telcos in remote First Nations communities which may also raise discrimination concerns. We have also seen inappropriate requirements placed on customers with disabilities to resolve disputes or cancel contracts which may amount to indirect discrimination.
6. We think it would be more effective, where TIO is already investigating a matter, to be empowered to resolve all aspects of a complaint, including claims of discrimination, and be able to make awards of compensation for non-financial loss in this regard. We note that clause 2.9 of the TOR says that TIO will not handle complaints where it is more appropriately dealt with by another forum. While discrimination complaints generally are more appropriately dealt with by State or Federal Anti-Discrimination Commissions, in the context of an already existing TIO complaint, we think it is appropriate for the TIO to consider the whole complaint, including any claim of discrimination, rather than artificially separate aspects of a member's conduct out.
7. The draft guidance states that TIO expects complainants to be 'reasonably robust'. This can be compared with the AFCA approach which states that complaints should be 'moderately robust'. Unless there is a reason for this difference, we consider that there would be merit in aligning with AFCA, at least to allow a general community understanding of expectations to develop when they deal with EDR schemes.
8. The draft guidance states that the TIO may consider compensation in the form of an account credit to be appropriate. We do not consider it will always be appropriate, and we think consideration should be given to the consumer's preference for the form of compensation, i.e. whether it is a credit on the bill or whether the amount should be paid by the provider. We point to other rules for essential services which state that over-charging, for example, should be repaid in the form reasonably directed by the customer (see clause 31(2) of the Energy Retail Code, Vic).
9. The draft guidance states that the TIO will consider the impact of the conduct, including 'extenuating circumstances that you made the provider aware of'. We compare this with the AFCA approach which says that AFCA will consider 'all of the complainant's circumstances when assessing the impact of the financial firm's conduct'. This is not limited to circumstances that the complainant made the provider aware of and, for example, states that it recognises that the impact can be greater where the complainant is also in financial difficulty. We consider the AFCA approach to be more in line with a modern understanding of vulnerability, which recognises that there are an array of barriers to making a provider aware of personal circumstances. Telco providers operate as an essential service and should be prepared to provide services to all customers, including those experiencing vulnerability. Furthermore, limiting the circumstances to only those that the provider was aware of may have the unfortunate effect of providers reducing their questions to potential customers as part of their responsible sales procedures, so they are less likely to 'be made aware of' such 'extenuating circumstances'. In that context, we do not think that it is unreasonable that awards of



non-financial loss be made considering the full impact on the customer, not just those impacts that the customer has made the provider aware of.

10. We also recommend the implementation of non-financial loss jurisdiction in full on the date of commencement of the TOR, including for unresolved complaints that have were initiated before this date, for consistency in complaint resolution.

Systemic issues

11. We support the statement in the draft guidance that says: “We may identify a systemic issue from seeing an increase or change in complaint patterns, multiple complaints about the same issue, or disproportional impact on consumers experiencing vulnerability”. We would encourage this to be amended to add complaints that have a “potential disproportionate impact on consumers experiencing vulnerability”. This would encourage a preventative approach to the systemic issues function. In the TIO’s recent systemic report, ‘Helping telco consumers sign up to the right phone and internet products’, the TIO noted that it received fewer than 100 complaints about a specific mis-selling problem, but the investigation found that it affected more than 10,000 consumers. The guidance should recognise that a small number of complaints can raise a systemic issue.
12. The draft guidance outlines public reporting of systemic issues and recommendations, which we consider to be vitally important. These reports have a broader impact on the marketplace, beyond a particular telco that has been investigated and, for that reason, should be publicised. We consider that the TIO should consider the use of reputational incentives, including through naming providers in its systemic issues reports or in a complaints ‘datacube’, similar to that published by AFCA.¹ We welcome this inclusion. In considering whether to publish a systemic issue recommendation, we consider that the Ombudsman should additionally consider:
 - whether the systemic issue had a disproportionate impact on a vulnerable class of consumers;
 - whether the telco breached the Complaints Handling Standard in its handling of the systemic issue; and
 - whether the systemic issue involved breaches of the Telecommunications Industry Code or other consumer protection law.
13. Similarly, the above factors should be considered in making a systemic issue referral to a regulator.
14. We welcome the statement in the draft guidance that where the TIO does not investigate a possible systemic issue, it may still refer it to a more appropriate team or body. We encourage TIO to report on this activity in its annual report, so there is awareness about the types of issues that are referred in this way.
15. We strongly urge the TIO to consider how customers (including a class of customers) are to be remediated in the event of a systemic issue being identified. The focus appears to be on working towards an agreed resolution and make recommendations for improvement, but it is not clear that this includes identifying all customers affected by a systemic issue and ensuring that they are provided with redress. A key role of a power to investigate and address systemic issues is to ensure affected customers are remediated, not just those who made a complaint. We note that including this in its guidance for systemic issues would bring the

¹ <https://data.afca.org.au/>

TIO in line with EDR services such as AFCA, where there it is made clear that the objectives sought from a participating firm include “remedying loss or disadvantage suffered by consumers or Small Businesses (whether or not they have complained about the specific issue)”.² AFCA’s Guidelines to their systemic issue resolution also detail how to identify and communicate to a class of affected clients for reimbursement (advertisements in newspapers, toll-free numbers to take calls relating to the systemic issue’s resolution).

Please contact us on 03 9670 5088 or at brigitte@consumeraction.org.au if you would like to discuss this submission further.

Yours Sincerely,

Gerard Brody | CEO

CONSUMER ACTION LAW CENTRE

Melissa Hardham | CEO

WESTJUSTICE

² Australian Financial Complaints Authority (AFCA) Complaint Resolution Scheme Rules, A17.4

