



**CONSUMERS
FEDERATION
OF AUSTRALIA**

Developing and promoting
the consumer interest

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1 July 2019

Ms Gayle Neville-Hill
Company Secretary
Telecommunications Industry Ombudsman (TIO)
PO Box 276
Collins Street West
Melbourne VIC 8007

Dear Ms Neville-Hill

Options Paper: Possible Amendments to Constitution Arising from the Telecommunications Consumer Safeguards Review

Thank you for the opportunity to comment on the above Options Paper.

Consumer Action Law Centre and Financial Counselling Australia have had the opportunity to review this submission and endorse its comments.

In opening we note our disappointment that the Australian Government chose to commence the Telecommunications Consumer Safeguards Review (the Review) with an examination of complaints handling processes rather than exploring first the market conditions that give rise to complaints in the first place.

We consider reviewing issues such as reliability of services, fairness, and the effectiveness of consumer choice are likely to provide much greater opportunities for improving consumer experiences and reducing complaints. These matters are being considered in the subsequent parts of the Review and, in this sense, the Review has been conducted the wrong way around. We acknowledge that this was a decision of Government, and not the TIO.

About Consumers' Federation of Australia

The Consumers' Federation of Australia (CFA) is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations. Our organisational members and their members represent or provide services to millions of Australian consumers.

CFA's member organisations include membership-based organisations, organisations that provide information, advice, counselling or assistance to consumers, and organisations that identify regulations or market features that harm consumer interests and propose solutions.

A list of CFA's organisational members is available at:
<http://consumersfederation.org.au/members/cfa-organisational-members/>.

Independence of Directors

Should all of TIO Limited's directors be independent of any current employment or engagement by Members?

CFA's view is that the stakeholder model of governance of external dispute resolution (EDR) schemes is one of their core strengths, and that the review failed to place sufficient weight the benefits the stakeholder perspective brings to the quality of governance.

While there are potentially some issues with the board including 'industry' directors who are employed by members of the scheme, these can be managed and in any event are far outweighed by the benefits they bring provided they do not make up a majority of directors.

There should not be any concern about the governance model in relation to the resolution of individual disputes. Present arrangements mean that the Ombudsman reviews complaints with no input from the Board and we are satisfied that there is no effective conflict of interest in handling of disputes.

From time-to-time, the board will consider matters that affect the interests of members more broadly, for example, in setting fees, or in developing policies that increase consumer awareness of the TIO and hence the likely number of complaints. Experience to date suggest that those concerns are for the most part managed adequately through conflict of interest rules and the fact that the industry directors make up only three of nine directors at present. While we do believe that the TIO could do a much better job in increasing consumers awareness and being accessible to consumers, we do not think that the fact that industry directors have associations with members is the reason for the pace of improvement being slower than we would like.

The success of EDR schemes relies on a reasonable level of 'buy-in' from industry participants. While this can still be achieved with industry directors which are not employed by members, it is perhaps more easily achieved where members know that people with up-to-date industry expertise are part of the Board discussions. Further, advice from consumer directors across EDR schemes tells us that the quality of decision making on issues such as the scheme's relationship with members and forecasting trends in complaints is significantly improved where directors include people with access to detailed current operational experience.

The Options Paper suggests that there is a risk that the members who employ directors will take the view that those directors should act in the interests of their employers rather than complying with their legal obligation to act in the interests of the company. This seems extremely unlikely at least in the case of listed company members with professional management.

We strongly disagree with the view in the Options Paper that suggests that if there were to a ban on current industry associations then it should extend for a number of years. This would seem to be the worst of both worlds. If the TIO was to require independent directors, then having directors with recent experience would more than outweigh the risk of any conflict due to their recent association with a member.

Finally, we note that the TIO consumer directors report that in the six years since unitary governance of the TIO there has been no instance as far as we know where any consumer director of the scheme has felt at all concerned that industry directors were affected by any conflict of interest and conversely there have been numerous times where industry expertise has enhanced the quality of decision making.

Our conclusion is that while we understand that at a superficial level there may be some concern with directors having some association with industry, we think this concern is largely misguided in light of the key advantages offered by the stakeholder model.

On this point we note that a pure form of the stakeholder model has not been applied to the TIO in that there are two 'independent' director positions. This decision was made despite strong advocacy for that model by consumer organisations.

We also note that, more recently after extensive consultation with a wide range of stakeholders, the Australian Financial Complaints Authority (AFCA) has been constituted with a pure stakeholder model, that is all directors other than the chair are chosen based on their expertise in relation to either consumer interests or industry operations and interests. If there are any changes to TIO governance, we consider that consideration should be given to moving back to a pure stakeholder model.

Right for largest and second largest members to nominate directors

Should the right for the largest and second largest Members to each fill a Director role be removed?

We share the concern that, now there are only 3 industry directors, having two from the largest two members is not the best arrangement—it does not give the board access to the broadest possible range of skills and experience nor does it adequately represent the rest of the industry.

However, we do think that there should be one director position reserved for a person who has strong current or recent expertise in the business of large telecommunications companies and then two appointed with expertise across the industry generally including an expectation that between them they have knowledge of the interests and businesses of smaller and medium members. This would contribute to ensuring there is a diverse industry experience among directors.

We strongly oppose an approach that involves members voting for industry director candidates. This would undermine the need for directors to be independent as their reappointment would depend on how well they delivered for voting members and not their acting in the interests of the company. This model would also work exacerbate the concern raised by the discussion earlier in the Options Paper that industry directors are not independent. We also consider this would have negative effects on the collective responsibility of the board.

Given directors are appointed in different years, we do not think that the first option as presented in the Options Paper will achieve the outcome sought. A better solution would for one position to be filled by the board appointing one of the nominees from members over a certain size, and for the other two positions to advertise widely for persons with relevant industry experience and expertise. The size threshold would be designed to include at least the largest 4 members and the companies that account for at least 60 percent of the industry by revenue or subscribers.

External advertising and composition

Should the TIO constitution require all vacant director positions be externally advertised?

We support being less prescriptive in relation to the advertising required for recruitment of vacant directors. It makes sense of the approach to advertising to be made by the board in line with usual corporate governance standards and the approach of other EDR schemes.

Should the composition of the nominations committee, which recommends to the board individuals for appointment to board positions, be altered?

We do not support the involvement of the Australian Communications & Media Authority (ACMA) in the nominations process nor the involvement of a peak group representing the telecommunications industry.

We do see merit in the nominations committee including external people appointed by the board who have specific expertise, however we also think that board itself often knows best who will complement the skills of existing directors and bring perspectives that may not be adequately represented.

The best solution is probably to require that the board:

- consult with industry and consumer bodies about the skills required of directors and the recruitment process at least every two years; and
- have power to appoint a nominations committee made up of the chair and a balanced representation of external consumer and industry interests.

We support the requirement that currently applies to independent directors that recruitment should be done in a transparent and accountable way. We recommend that this should be extended to all positions.

Other matters

We think this is an opportunity to provide brief feedback on the other issues discussed in the Review's final report on redress and complaints handling (and noted in the Options Paper):

- We have not in the past felt that the TIO is insufficiently transparent about how changes to the scheme or the TOR are made;
- We do not see a need for ACMA to have observer status at board meetings and would oppose such a move;
- We do not see a need for the TIO to change its ownership structure;
- We strongly support the recommendation that TIO enhance its engagement with stakeholders;
- We do not see a need at this time for ACMA to have regulatory oversight of the TIO. Should this be considered further, further analysis of the benefits and risks of such approach should be undertaken. We oppose the Government or the Minister having any greater say in changes to the scheme or the terms of reference than at present (i.e. being consulted like any other stakeholder).

I would be happy to discuss this with you further. I can be contacted via chair@consumersfederation.org.au or my mobile number 0415 223 211.

Yours sincerely,

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive style with a large, prominent 'G' and 'B'.

Gerard Brody
Chair
Consumers' Federation of Australia