

A submission by AMTA on behalf of the Mobile Carriers Forum
(Optus, Telstra and TPG Telecom):

Proposed Amendments to the TIO's Terms of Reference

30 August 2024



About AMTA

The Australian Mobile Telecommunications Association (AMTA) is the peak national body representing Australia's mobile telecommunications industry. It aims to promote an environmentally, socially and economically responsible, successful and sustainable mobile telecommunications industry in Australia. Please see www.amta.org.au



Introduction

AMTA welcomes the opportunity to provide this submission to the Telecommunications Industry Ombudsman (TIO) on behalf of the Mobile Carriers Forum (MCF) in response to the invitation to comment on the proposed amendments to the TIO's Terms of Reference (ToR).

In preparing this submission, AMTA has reviewed the Queen Margaret University Consumer Dispute Resolution Centre's Five-Year Independent Review of the Telecommunications Industry Ombudsman 2022 (hereafter referred to as 'QMU Review'), together with the TIO's Response to Recommendations from the Independent review - October 2022' (hereafter referred to as the 'TIO Response').

Whilst AMTA and its members welcome the opportunity to comment on the proposed ToR, we are concerned at the level of detail provided about the changes proposed in the Discussion Paper. The use of broad and general language in the amendments to the ToR have also given rise to several questions that we have outlined in the next section of our submission.

AMTA considers that the TIO's role in land access should be confined to resolving disputes about statutory rights and obligations as is outlined in Schedule 3 of the Telecommunications Act, and the relevant parts of the Telecommunications Code of Practice 2021, rather than any contractual rights and obligations. This is further discussed below.

Also, we note that at present, AMTA's carrier members are fully engaged delivering critical infrastructure that provides mobile and fixed line telecommunications services. Reliable services and resilient networks are necessary to ensure connectivity is accessible when needed. However, the network investment and time required to deliver high quality networks and services, particularly in parts of regional Australia, can be challenging. We are concerned that further erosion of our carrier member's powers, or delays resulting from duplicate complaint handling and investigation processes may make it difficult for carriers to deliver on this objective.

AMTA respectfully requests that the TIO consider responding to the questions posed in this submission and provide a brief additional opportunity for the industry to comment after considering the TIO's responses.

Comment on the proposed amendments to the TIO's ToR

There are three 'Questions for consultation' in the Discussion paper:

1. Do the proposed changes successfully clarify TIO's power to handle SIP connection complaints following the recent legislative changes? If not, what other ToR amendments should be made to achieve this purpose?
2. Do the proposed changes support the TIO implementing recommendations 2, 12 and 17 of the 2022 independent review of the TIO? If not, what other ToR amendments should be made to address these recommendations?
3. Do proposed changes adequately correct drafting issues in the current ToR?

AMTA's focus in this submission is in relation to the second question, and specifically the proposed amendments resulting from the TIO's objective of implementing Recommendation 17 of the QMU Review.

Implementation of Recommendation 17 of the Independent Review

Recommendation 17 of the QMU Review proposes that *'the TIO should amend its Terms of Reference to make clear that it can investigate complaints about a carrier's behaviour when a carrier wishes to access land under an agreement, or under the carrier's statutory powers to inspect land, maintain facilities, or install low impact facilities'*.

The TIO Response notes that it *'accepts this recommendation'* and that *'We will clarify our role in relation (to) handling complaints about a carrier's behaviour when a carrier wishes to access land under an agreement, or under the carrier's statutory powers to inspect land, maintain facilities, or install low impact facilities, as distinct from our statutory function in considering Land Access objections'*.

This has translated into proposed amendments to the TIO ToR with an addition of clause 2.3 (c) and clause 2.3 (d), as follows:

'We can handle complaints from occupiers, including about:

...

(c) unsafe or non-compliant carrier infrastructure on the occupier's land (or proposed to be put on the occupier's land);

(d) non-compliance by a member with laws relating to land access activities, or the terms of land access agreement with an occupier”.

In addition, there are two additional points of interest to AMTA proposed under clause 2.38: ‘A decision may require a member to do or not to do, or cease doing an act, including;

...

(m) remove non-compliant infrastructure from an occupier’s land; and,

(n) comply with laws regarding land access activities or the terms of a land access agreement with an occupier

AMTA notes that 2.3(c) and 2.38(m) are related insofar as they identify the type of complaint and what the TIO may do. Likewise, 2.3(d) and 2.38(n) are related. Therefore, AMTA provides the following general comments in response to these proposed additional clauses within the TIO ToR, as well as specific comments.

General comments on Recommendation 17

General reference in the ‘Discussion Paper: Proposed Terms of Reference’ that the ‘*TIO should amend its Terms of Reference’ to make it clear that it can investigate complaints about a carrier’s behaviour...*’ makes it difficult to understand the TIO’s desired outcome when proposing such an expansion of its role outside its remit set out in the Telecommunications Code of Practice 2021 (the Code).

AMTA’s submits that the Code provides a suitable process as to how landowners and occupiers can protect their rights, and it outlines suitable avenues to raise complaints that address their circumstances. Proposed amendments to the TIO ToR duplicating this process with an examination of ‘behaviour’ (which is undefined) is problematic and unhelpful given that no data, explanation or justification has been provided in the QMU Review or TIO Response.

AMTA encourages the TIO to retain and develop its focus on informing and educating landowners/occupiers of the limited grounds for an objection to a LAAN in the statutory land access process.

Whilst AMTA acknowledges that the TIO needs to be properly resourced and that cost recovery is an important element of this, we submit that an improved initial triage system in the complaints process

could be introduced to help improve consumer awareness of carriers' rights to access land under Schedule 3 of the Telecommunications Act.

AMTA is particularly focussed on ensuring specificity and clarity in the ToR, because it is our members' experience that unintended consequences can occur, despite the TIO having the best of intentions in terms of resolving disputes. For example, the current ToR gives the TIO jurisdiction over complaints about a 'bill or debt claimed by a member against an occupier' (cl 2.3c) and the ability to require a member to 'stop legal proceedings to recover a debt' (cl 2.38c). The TIO has therefore intervened in a dispute between one of our members and a landowner in relation to an overpayment, which we consider should be beyond the scope of the TIO. It is clearly a legal question of contractual interpretation for a court to decide. We have raised similar potential issues of potential overlap of 'jurisdiction' when assessing the current proposed changes to the TIO's ToR.

The QMU Review notes *"By virtue of the [Code], the TIO has responsibility for considering objections from landowners about a carrier's ability to access land under an agreement, or under the carrier's statutory powers to inspect land, maintain facilities, or install low impact facilities"* (section 7.2). This appears to be one of the reasons for the QMU Review making Recommendation 17, and in turn the TIO proposed changes to the ToR. However, AMTA's carrier members consider this is not an accurate interpretation of the Code. The Code does not confer any powers on the TIO over contractual arrangements between carriers and landowners (other than a narrow obligation to try to enter into agreements with public utilities before issuing a LAAN). Accordingly, it would be inappropriate for the ToR to be expanded for the TIO to have jurisdiction over contractual arrangements.

AMTA comment on proposed clauses 2.3(c) and 2.38(m)

Proposed clause 2.3(c) proposes that the TIO can handle complaints from occupiers about *'unsafe or non-compliant carrier infrastructure on the occupier's land (or proposed to be put on the occupier's land)'*, and clause 2.38 (m) proposes that a TIO decision may require a member to *'remove non-compliant infrastructure from an occupier's land'*.

These proposed amendments raise several questions mostly in relation to how 'non-compliant infrastructure' is defined. There is no discussion in the QMU review regarding non-compliant infrastructure, so AMTA questions the basis for 2.3(c) to be included in the TIO ToR. There is also no discussion in the TIO Discussion Paper of the need for the TIO to add 2.38(m) as a potential remedy following investigation.

AMTA questions whether ‘non-compliant’ just refers to a facility that has been established as part of a LAAN process pursuant to Schedule 3 of the Act where there is alleged non-compliance with that process, or does the TIO intend for these clauses to apply to a complaint about any facility that has been established that meets (or purportedly meets) the requirements of the Telecommunications (Low-impact facilities) Determination (LIFD)?

AMTA notes that carriers deploy thousands of mobile and fixed line facilities each year using the LIFD. From time-to-time there are disagreements between carriers, councils and community members over whether a facility meets the requirements of the LIFD and are therefore exempt from State and Territory laws (refer to Division 7, Clause 37 Schedule 3 of the Telecommunications Act 1997¹). These disputes typically centre on matters such as whether a particular State and Territory town planning control is defined as an ‘Area of Environmental Significance in the LIFD or whether the protrusion of antennas meets requirements in the Schedule to the LIFD². AMTA would be concerned if the TIO is contemplating the extension of its role to consider ‘non-compliance’ in such matters. If a carrier intends to rely on these exemptions then the correct jurisdiction for redress are the States and Territories. For example, the Victorian Civil and Administrative Tribunal would consider an application for review if a carrier was to proceed without planning permission, having resolved to rely on the LIFD³.

In addition to town planning, we also note that other questions of ‘non-compliance’ arise from time-to-time such as compliance with engineering standards and the standard that sets limits for human exposure to radiofrequency electromagnetic fields⁴. AMTA submits that there are other regulators that have jurisdiction to assess allegations of non-compliance with these types of matters. For example, determining whether a facility is unsafe from an engineering/structural perspective is a matter for a suitably qualified engineer. So, the TIO’s proposal would be a duplication, and regardless we question whether the TIO has the capability to assess compliance or otherwise for matters such as these.

¹ https://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ta1997214/sch3.html

² <https://www.legislation.gov.au/F2018L00170/latest/text>

³ For example, refer to VCAT case https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2020/672.html?context=1;query=Telecommunications%20Facility%20protrusion;mask_path=au/cases/vic/VCAT#fn2

⁴ <https://www.arpsa.gov.au/regulation-and-licensing/regulatory-publications/radiation-protection-series/codes-and-standards/rpss-1>

Notwithstanding, AMTA is seeking a response from the TIO regarding its definition of 'non-compliant' as it relates to 2.3(c) and 2.38(m) before AMTA can properly assess and provide comprehensive feedback on this proposed addition to the TIO's ToR.

Depending upon the TIO's response to the questions posed above, AMTA submits that the power to direct a carrier to remove non-compliant infrastructure may be beyond the limits of the TIO's jurisdiction and at odds with Part 6 of the Telecommunications (Consumer Protection and Service Standards) Act 1999⁵.

Instead, the TIO could reframe their ToR to examine infrastructure from a health or safety of persons or property lens as that would complement the already existing obligation which requires carriers to regularly inspect facilities under Part 6 of Schedule 1 to the Telecommunications Act 1997⁶.

The TOR should consider a graduated approach whereby the carrier is given an opportunity to rectify/remediate any non-compliant infrastructure that poses a risk to health or safety of persons or property before the TIO considers that any further action is deemed necessary.

AMTA comment on proposed clauses 2.3(d) and 2.38(n)

AMTA does not agree with recommendation 17 to the extent that it seeks to enable the TIO to arbitrate private agreements about land access.

Proposed clause 2.3(d) proposes that the TIO can handle complaints from occupiers about '*non-compliance by a member with laws relating to land access activities, or the terms of a land-access agreement with an occupier*'. The corresponding clause 2.38(n) proposes that a TIO decision may require a member to '*(n) comply with laws regarding land access activities, or the terms of a land access agreement with an occupier*'.

These proposed changes reflect section 7.2 of the QMU Review, which states '*By virtue of the Telecommunications Code of Practice 2021 which details the legal context for the implementation of schedule 3 of the Telecommunications Act 1997, the TIO has responsibility for considering objections from land owners about a carrier's ability to access land under an agreement...*'.

⁵ https://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/tpassa1999620/

⁶ https://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ta1997214/sch1.html

As noted earlier in this submission, we submit that it is outside of the TIO's role in land access to be considering complaints about contractual rights and obligations under an agreement about "land access". The TIO ToR should be confined to resolving disputes about statutory rights and obligations such as those outlined in Schedule 3 of the Telecommunications Act, and the relevant parts of the Telecommunications Code of Practice 2021,

So, AMTA disagrees with the premise that it is the TIO's role to require a member to comply with the terms of a land access agreement with an occupier. Compliance with these commercial agreements between landowners and carriers should not be a matter in the purview of the TIO. Disputes between a carrier and landowner or structure owner are addressed through the dispute resolution mechanisms within the agreement. Carriers conclude agreements with a wide variety of stakeholders for the purpose of deploying a range of network infrastructure. Allowing for the TIO to hear complaints about such agreements introduces potential delays to deployment and may undermine the effectiveness of dispute resolution mechanisms agreed between the parties.

AMTA submits that the Terms of Reference proposed should be amended to clarify the TIO has jurisdiction except where the access dispute is pursuant to an agreement, and only where it's pursuant to a LAAN.

Conclusion

AMTA thanks the TIO for the opportunity to make this submission in response to the release of the draft TIO ToR.

AMTA disagrees with the expansion of the TIO ToR where the TIO's proposed functions duplicate existing processes.

AMTA has posed questions about the definition of important terminology and the scope of the TIO's new functions in the proposed additional provisions in the ToR - for example, the need for clarity on 'non-compliant'.

It follows that AMTA is unable to fully respond without first obtaining clarity, so we respectfully request additional engagement with the TIO before the ToR is finalised.