

Telecommunications Industry Ombudsman Ltd
Proposed amendments to TIO Constitution and Terms of Reference
Explanatory notes

The Board of TIO Ltd has proposed some amendments to the TIO Constitution, to be considered at TIO Ltd's Annual General Meeting on Tuesday 15 December 2020. These will also require some amendments to the TIO Terms of Reference, TIO Board of Directors Charter and the TIO Board Nominations Committee Charter.

The notes in the table below explain the reasons for the proposed amendments. The table is a summary and does not discuss some of the minor amendments that are proposed.

Constitution			
Clause	Summary of amendment	Details of amendment	Reason for amendment
2.1	New and amended definitions.	New definitions of Acting Deputy Ombudsman, Common Appointment Criteria, Legislation and Legislative Instrument added. Minor amendments to other definitions.	A new role of Acting Deputy Ombudsman is provided for (see discussion of clause 15.4 below), but nobody will be appointed to that role in the short term as there is no Deputy Ombudsman at present. The new definition of Common Appointment Criteria helps simplify the drafting in clause 12 (see discussion of clause 12.3 below) and in itself is not a material change. The amendment of the term "Community and Consumer Groups" to "Consumer Groups" relates to the changes in clause 12.4 discussed below. The new definitions of Legislation and Legislative Instrument relate to the new wording added to clause 15.2(c) (see discussion below). The definition of Legislative Instrument would include the Telecommunications Code of Practice. Minor amendments to some other definitions relate to the removal of the ability to appoint alternate directors (see discussion below).
8(d)	Clarification of obligations of former Members to make payments	Minor changes to wording.	This amendment clarifies that when a Member leaves TIO Ltd, they must abide by the Constitution regarding payment of charges to TIO Ltd whether or not the charges have already fallen due at the date the Member leaves. For example, a former Member may have to pay charges for a complaint that was ongoing when the Member left, even if the charges arise after the Member left.
11.5(g)	Clause deleted	This clause can be deleted as it is no longer relevant.	This was a transitional clause, inserted when a previous set of amendments to the Constitution was made. It is redundant now and can be deleted. It relates to the amount of Operational Costs that a Member would in certain circumstances be deemed to have contributed in a financial year, for the purpose of determining how many votes the Member would have on a poll in a General Meeting of Members.

Constitution			
Clause	Summary of amendment	Details of amendment	Reason for amendment
11.6	Amendments to requirements for appointment of a proxy by a Member	A Member can appoint a proxy to attend a General Meeting of TIO Ltd, or to vote at such a meeting, on the Member's behalf. The amendments allow a Member to give a proxy electronically. They also better align clause 11.6 with the legislative requirements for a valid proxy.	These amendments modernise the Constitution by allowing a Member to give a proxy electronically. The amended wording in clause 11.6 closely matches the wording in the relevant legislation. The amendments also provide more details of what information a proxy appointment must contain to be legally valid. Again, the wording closely matches the wording of the legislation. Stating these details in clause 11.6 should assist Members when they appoint proxies.
12.3	Introduction of concept of Common Appointment Criteria for directors	This new clause lists certain criteria that will be considered when appointing any director to the Board of TIO Ltd. Additional criteria are set out in clauses 12.4 to 12.7 inclusive, for different categories of director.	This is not a material change. It simplifies clause 12 by bringing together in one clause the criteria that are the same for appointing each category of director. These were previously spread over the subsequent provisions of clause 12. Minor changes have also been made in clause 12.3 to make the criteria consistent across the different categories of director.
12.4(a)	Removal of reference to community groups	This amendment means that a Director With Consumer Experience must have links to <u>consumer</u> groups – having links to <u>community</u> groups would not be sufficient.	Before this amendment, all Directors With Consumer Experience had to have links to community or consumer groups or agencies. The amendment means that a person must have links to consumer groups or agencies, rather than community groups. This is intended to help ensure that candidates for Director With Consumer Experience positions have links specifically to consumer bodies, rather than potentially only having links to a community group whose focus is not centrally on consumer interests.
12.4(b)	Simplification of drafting	This clause has been simplified by moving the Common Appointment Criteria for directors to clause 12.3 and moving the need for a Director With Consumer Experience to have links to relevant Consumer Groups into clause 12.4(a). Also, several sub-clauses have been moved into clause 12.8 and the Charter of the TIO Board Nominations Committee.	These changes simplify the drafting of the clause. The need for this category of director to have expertise in consumer affairs is retained in this clause. Several sub-clauses of clause 12.4(b) have been moved to: • clause 12.8, because they are common to the nomination and appointment processes for all categories of director; or • the Charter of the TIO Board Nominations Committee because they are procedural in nature.

Constitution			
Clause	Summary of amendment	Details of amendment	Reason for amendment
12.5(b)	Simplification of drafting	This clause has been simplified by moving the Common Appointment Criteria for directors to clause 12.3. Several sub-clauses have been moved into clause 12.8 and the Charter of the TIO Board Nominations Committee.	These changes simplify the drafting of the clause. The need for this category of director to have expertise in the telecommunications industry is retained in this clause. Several sub-clauses of clause 12.5(b) have been moved to: - clause 12.8, because they are common to the nomination and appointment processes for all categories of director; or - the Charter of the TIO Board Nominations Committee because they are procedural in nature.
12.6	Simplification of drafting	This clause has been simplified by moving the Common Appointment Criteria for directors to clause 12.3. Several sub-clauses have been moved into clause 12.8 and the Charter of the TIO Board Nominations Committee.	These changes simplify the drafting of the clause. Two sub-clauses of clause 12.6(b) have been moved to clause 12.8, because they are common to the nomination and appointment processes for all categories of director. Another sub-clause of clause 12.6(b) has been moved to the Charter of the TIO Board Nominations Committee because it is procedural in nature.
12.7	Simplification of drafting	This clause has been simplified by moving the Common Appointment Criteria for directors to clause 12.3. Two sub-clauses have been moved into clause 12.8.	These changes simplify the drafting of the clause. The need for the Independent Chair to have the ability to command the respect of stakeholders and the Board is retained in this clause. Two sub-clauses of clause 12.7 have been moved to clause 12.8, because they are common to the nomination and appointment processes for all categories of director.
12.8	Simplification of drafting	Wording about record keeping and transparency of process in the appointment of directors has been moved to this clause.	This new clause does not introduce any material change. It states requirements relating to record keeping, transparency and cost-effectiveness of process in the appointment of directors. These were previously stated in each of clauses 12.4 to 12.7.
12.11	Change in terminology and deletion of ability to pay special honorarium to directors	The word "honorarium" is replaced by the word "remuneration", for the payments made to directors for their role. The specific ability for TIO Ltd to pay a special honorarium to a director who performs duties outside the ordinary duties of a director is removed.	The change to terminology will not have any material effect on TIO Ltd's ability to pay directors for performing their role as directors, or on the amount they receive. It simply makes the wording more modern and uses plainer English. The amendments align the body of the clause with its heading ("Remuneration") and with the terminology used in the constitutions of certain other industry ombudsman schemes in Australia. Sub-clause 12.11(b), which will be deleted, states that if a director performs duties outside the ordinary duties of a director they may in some circumstances be paid a special honorarium. So far as the current Board is aware, this sub-clause has never been used. The Board does not expect that it is likely to be used in future and recommends its deletion.

Constitution			
Clause	Summary of amendment	Details of amendment	Reason for amendment
12.12	Change to term of appointment of directors	The term of appointment for a director will be changed from a fixed period of 3 years, to a term specified by the Board of up to 3 years.	The change allows the Board flexibility to "stagger" the appointment terms for directors, so that they expire in an ordered spread over a period of time. It also allows flexibility to appoint a director for a shorter term where, for example, an incumbent well-performing director does not wish to serve a further full 3 year term but is willing to serve a further 1 year term to assist to complete a project.
14.7	Changes to provisions for circular resolutions of the Board	The amendments allow a circular resolution of the Board to be passed without the assent of directors who are unavailable to consider it. They also allow for a circular resolution to be passed by electronic means, for example by email.	The changes will allow the Board to pass a circular resolution of the Board with the assent of all directors entitled to vote on the resolution, except any director who has informed the Board of their unavailability to consider it or whom the Independent Chair reasonably deems unavailable to consider it (for example due to serious illness). They also allow the Board to pass a circular resolution by electronic means, for example by email, telephone or video-conference. In that case each relevant director must also affirm the resolution at the next Board meeting they attend, however the validity of the resolution would not be affected by any failure to do so.
14.10 (deleted clause)	Deletion of ability for a director to appoint an alternate director	A director will no longer be able to appoint an alternate or substitute director to act in their place.	While some directors of TIO Ltd in the past have appointed alternate directors, none are appointed currently. The Board considers that it is better governance practice for directors to aim to attend each Board meeting personally. If a director is unable to do so they: • will still receive the Board papers for the meeting and have the opportunity to consider them; • may vote at the Board meeting by proxy given to another director, on any resolution the wording of which they have sighted; and • may communicate their views on key matters to the Independent Chair, who can ensure those views are considered at the meeting.
15.2(c)	Members must treat Acting Ombudsman as having the same powers as the Ombudsman	Members must treat any Acting Ombudsman as having the same functions and powers as the Ombudsman under all legislation, the Constitution and the Terms of Reference.	Under the Telecommunications Code of Practice the Telecommunications Industry Ombudsman can give a carrier a direction about the way the carrier should engage in certain activities related to entering land. Because of the way "Telecommunications Industry Ombudsman" is defined in the Code, arguably only the Ombudsman personally can give such a direction. This amendment aims to help address this issue. Under this amendment, each Member must treat an Acting Ombudsman as having the Ombudsman's powers under legislation (this would include the Code). Therefore if an Acting Ombudsman gave a Carrier Member a direction under the Code about the way the Carrier Member should engage in land entry activities, the Carrier Member would be obliged by the Constitution to comply.

Constitution			
Clause	Summary of amendment	Details of amendment	Reason for amendment
15.4	New role of Acting Deputy Ombudsman introduced	This new clause allows for the appointment of an Acting Deputy Ombudsman.	This clause will allow the Ombudsman, in consultation with the Board, to appoint an Acting Deputy Ombudsman if: - the appointment of the Deputy Ombudsman ends; - the Deputy Ombudsman becomes physically or mentally incapable of carrying out their duties; or - the Deputy Ombudsman is or is to be absent and unable to perform their duties for an extended period. There is no Deputy Ombudsman at present, and the Ombudsman has no current plan to appoint one, so this new clause will not have any practical impact in the short term. However as the potential exists to appoint a Deputy Ombudsman, it makes sense to allow for the appointment of an Acting Deputy Ombudsman.
21(b)(i)	Change of deemed time when a notice is received	A notice will be deemed to be received 5 days after posting, rather than 2 days as was the case before this amendment.	Before the COVID-19 pandemic, Australia Post was citing a target delivery time for regular letters of 2-6 business days after posting. Changing the deemed date for receipt of a notice to 5 days after posting better reflects this timeframe. COVID-19 has further impacted Australia Post's service levels. For example, until 30 June 2021, subject to review, in metropolitan areas Australia Post is permitted to make deliveries every second business day rather than every business day. This further supports extending the deemed delivery time to 5 days after posting.
25(b)	Amendment to transitional provision	The amendments update this transitional provision to ensure the other changes to the Constitution do not have unintended effects.	This clause makes it clear that changes to the requirements for appointing Directors With Industry Experience that were made in a previous update to the Constitution, do not affect the validity of appointment of the current directors holding those positions. The amendments to this clause are not intended to make any material change, but simply preserve the effect of this clause.

Terms of Reference			
Clause	Summary of amendment	Details of amendment	Explanation
7.3(c) and 7.5	Addition of references to Acting Deputy Ombudsman	The amendments provide for the role of Acting Deputy Ombudsman.	As clause 15.4 of the Constitution now provides for the role of Acting Deputy Ombudsman (see discussion above), minor amendments are needed in the Terms of Reference to reflect the responsibilities of this role. There is no Deputy Ombudsman at present, and the Ombudsman has no current plan to appoint one, so these amendments will not have any practical impact in the short term.
7.4	Acting Ombudsman has the same powers as the Ombudsman	Statement that an Acting Ombudsman has the same functions and powers as the Ombudsman.	While the Terms of Reference already referred to the possibility of an Acting Ombudsman being appointed, they did not state that the Acting Ombudsman has the same functions and powers as the Ombudsman. This was implied, but these amendments will make it clear.

Charter – TIO Board of Directors			
Clause	Summary of amendment	Details of amendment	Explanation
3(5)	Board to consider gaps in skill set of the Board when appointing directors	In considering candidates to be appointed to the Board, the Board will consider any gaps in the collective skill-set of the Board.	The Constitution states that Board appointments are to be based on merit and on criteria including the specific criteria stated in the Constitution. The Board also requires the skills to meet its responsibilities as outlined in the Terms of Reference. The amendment to clause 3(5) means that in considering candidates to be appointed to the Board, the Board will also consider any gaps in the collective skill-set of the Board. The Board considers it desirable to apply this "skills matrix" lens to the Board recruitment process.
3(6)	Capacity and willingness to consult with key stakeholders is a criterion for appointing a Director With Industry Experience	The amendment means that the criteria for appointing a Director With Industry Experience include the capacity and willingness to consult with key stakeholders of the TIO scheme (not just with Members as previously required).	The Common Appointment Criteria for directors (see the discussion of clause 12.3 of the Constitution, above) include capacity and willingness to consult with key stakeholders of the TIO scheme. Previously in the Constitution, this criterion (as it related to a Director With Industry Experience) was capacity and willingness to consult with Members. The amendment reflects the minor changes being made to harmonise the Common Appointment Criteria across all of the different categories of director. Since all directors have a legal duty to discharge their duties in the best interests of TIO Ltd as a whole, it is considered that Directors With Industry Experience should have the capacity and willingness to consult with all key stakeholders, not just Members. (Similarly, Directors With Consumer Experience should have the capacity and willingness to consult with all key stakeholders, not just Consumer Groups, and the proposed amendments to the Constitution reflect this.)

Charter – TIO Board Nominations Committee			
Clause	Summary of amendment	Details of amendment	Explanation
2(4)(b)	Board to consider gaps in skill set of the Board when appointing directors	In considering candidates to be appointed to the Board, the Board will consider any gaps in the collective skill-set of the Board.	This is the same as the amendment to clause 3(5) of the TIO Board of Directors Charter, discussed above.
2(4)(c)	Capacity and willingness to consult with key stakeholders is a criterion for appointing a Director With Industry Experience	The amendment means that the criteria for appointing a Director With Industry Experience include the capacity and willingness to consult with key stakeholders of the TIO scheme (not just with Members as previously required).	This is the same as the amendment to clause 3(6) of the TIO Board of Directors Charter, discussed above.
2(4)(d)-(f)	Procedural steps for appointing directors	For Board positions other than the Independent Chair, the Nominations Committee must consider a wide range of candidates and conduct a search process including through a medium or media likely to attract a substantial pool of suitably qualified candidates. For any vacant Director With Consumer Experience position the Committee will invite Consumer Groups (as defined in the TIO Constitution) to make nominations. For any vacant Director With Industry Experience position the Committee will invite Members to make nominations.	These provisions have been moved, with little amendment, from the Constitution. It is appropriate to state them in this Charter rather than the Constitution as they are procedural in nature. A sentence has been added to the end of clause 4(d) to state that if the Board asks the Nominations Committee to identify and recommend to the Board a person to act as the Independent Chair, the Board may instruct the Committee as to whether to consider a wide range of candidates and conduct a search process as for the other Board positions.