

Constitution of
Telecommunications
Industry Ombudsman
Limited
ACN 057 634 787

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1 Name of Company

The name of the company is Telecommunications Industry Ombudsman Limited (**TIO Limited**).

2 Interpretation

2.1 Definitions

In this Constitution:

ACMA means the Australian Communications and Media Authority.

Act means the *Telecommunications Act 1997* (Cth).

Acting Ombudsman means the Acting Telecommunications Industry Ombudsman appointed pursuant to **clause 15.2(a)**.

Budget means the budget for TIO Limited for each Year approved or amended by the Board in accordance with this Constitution.

Carriage Service has the same meaning as under the Act.

Carriage Service Intermediary has the same meaning as under the Act.

Carriage Service Provider has the same meaning as under the Act.

Carriage Service Provider Member has the meaning ascribed in **clause 6.2**.

Carrier means the holder of a Carrier Licence under the Act.

Carrier Licence has the same meaning as under the Act.

Carrier Member has the meaning ascribed in **clause 6.2**.

Community and Consumer Groups has the meaning ascribed in **clause 12.3(a)**.

Corporate Representative means a person authorised to act as the representative of a corporation pursuant to section 250D of the Corporations Act.

Corporations Act means the *Corporations Act 2001* (Cth).

Deputy Ombudsman means the Deputy Telecommunications Industry Ombudsman appointed pursuant to **clause 15.3(a)**.

Director means any director of TIO Limited for the time being and includes an alternate Director.

Director With Consumer Experience means a Director appointed in accordance with clause **12.3**. For the avoidance of doubt, the plural for this term is **Directors With Consumer Experience**.

Director With Industry Experience means a Director appointed in accordance with clause **12.4**. For the avoidance of doubt, the plural for this term is **Directors With Industry Experience**.

Directors or the **Board** means the whole or any number of Directors assembled at a meeting of Directors not being less than a quorum.

Eligible Carriage Service Provider has the same meaning as under the TCPSS Act.

Independent Chair means the person appointed to that role under **clause 12.6**.

Independent Directors means directors appointed in accordance with **clause 12.5**.

Member means any person for the time being admitted to membership of TIO Limited in accordance with this Constitution.

Month means calendar month.

Nominations Committee means the committee described in **clause 12.2**.

Ombudsman means the Telecommunications Industry Ombudsman appointed pursuant to **clause 15.1**.

Operating Costs has the meaning ascribed in **clause 7.1(d)**.

Other Member has the meaning ascribed in **clause 6.2**.

Related Company has the same meaning as “related body corporate” under the Corporations Act.

Scheme means the Telecommunications Industry Ombudsman scheme.

Seal means the common seal of TIO Limited.

Secretary means any person appointed to perform the duties of secretary of TIO Limited and includes any person appointed to perform the duties of a secretary of TIO Limited temporarily.

Special Resolution of the Board means a resolution of the Board with a majority of at least 75% of such Directors as, being entitled to do so, vote in person (or by their alternate) at the meeting that considers the resolution.

Terms of Reference means the Telecommunications Industry Ombudsman Scheme Terms of Reference referred to in **clause 17.1**.

TCPSS Act means the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

Volume Related Costs has the meaning ascribed in **clause 7.1(c)**.

Year means a period of 12 consecutive months.

2.2 Construction

Unless expressed to the contrary in this Constitution:

- (a) Words importing:
 - (i) the singular include the plural and vice versa;
 - (ii) any gender include the other genders; and

- (iii) persons include companies, corporations, public bodies and any other bodies corporate.
- (b) References to “in writing” and “written” include typing, printing, lithography and any other mode of representing or reproducing words or figures in a visible form, including words or figures displayed on an electronic screen.
- (c) A reference to a statute, ordinance, code or other law includes regulations and other statutory instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
- (d) Terms defined in the Corporations Act have the same meaning when used in this Constitution.
- (e) This Constitution displaces the replaceable rules set out in the Corporations Act and accordingly, none of the replaceable rules set out in the Corporations Act apply.

3 Objects

The objects of TIO Limited are to operate the Scheme and to appoint an Ombudsman with power on behalf of TIO Limited:

- (a) to receive, investigate, make decisions relating to, give directions relating to and facilitate the resolution of:
 - (i) complaints as to the provision or supply of (or the failure to provide or supply) a Carriage Service by a Member, other than complaints in relation to the general telecommunications policy or commercial practices of such a Member;
 - (ii) complaints from owners or occupiers of land in respect of which a holder of a Carrier Licence under the Act has exercised its statutory powers as a Carrier, where the Carrier is a Member, other than complaints in relation to the policy or commercial decision of a Carrier to exercise its statutory rights as a Carrier in relation to that particular land; and
 - (iii) such other complaints as may by agreement with the complainant be referred to the Ombudsman by a Member; and
- (b) to exercise such jurisdiction, powers and functions as may be conferred by or under any legislation or instrument.

4 Powers

TIO Limited has all of the powers of a natural person, as set out in section 124 of the Corporations Act.

5 Income and Property of TIO Limited

- (a) The whole of the income and property of TIO Limited shall be applied solely towards the promotion of the objects of TIO Limited as set out in this Constitution and no part shall be paid or transferred directly or indirectly to Members by way of dividend, bonus or otherwise provided that nothing in this Constitution shall prevent the payment in good faith of remuneration to any officers or employees of TIO Limited or to any Member in return for any goods supplied or services actually rendered in the ordinary and usual course of business or prevent the payment of interest at prevailing market rates on money borrowed from any Member or reasonable and proper rent for premises let by any Member to TIO Limited.
- (b) True accounts shall be kept of all moneys received and expended by TIO Limited, the matters in respect of which such moneys are received and expended, and of the property, credits and liabilities of TIO Limited. Subject to any reasonable restrictions as to the time and manner of inspecting the same imposed in accordance with this Constitution and the Corporations Act, the accounts shall be open for inspection by the Members. At least once in every year, the accounts of TIO Limited shall be examined by a properly qualified auditor or auditors who shall report to the Members in accordance with the provisions of the Corporations Act.

6 Membership

6.1 Eligibility for Membership

A person shall be eligible to be a Member only if the person:

- (a) is:
 - (i) a Carrier;
 - (ii) a Carriage Service Provider or a Carriage Service Intermediary; or
 - (iii) otherwise considered by the Board to be appropriate for membership;
- (b) completes an application for membership in the form prescribed by the Board at the time the application is made and submits the application to the Secretary; and
- (c) if required by the Board, provides a guarantee by a related company or another person of the prospective Member's obligations as a Member, in a form specified by the Board.

6.2 Classes of Member

Members of TIO Limited shall be divided into classes designated as "Carrier Members", "Carriage Service Provider Members" and "Other Members". Membership of a particular class will be determined as follows:

- (a) for each applicant who holds a Carrier Licence in force under the Act, membership shall be as a **Carrier Member**;
- (b) for each applicant who is a Carriage Service Provider or Carriage Service Intermediary and does not hold a Carrier Licence in force under the Act, membership shall be as a **Carriage Service Provider Member**; and
- (c) for each applicant who does not fall within **clause 6.2(a)** or **(b)**, membership shall be as an **Other Member**.

6.3 Acceptance of Applications

- (a) Where an applicant for membership of TIO Limited is required by the TCPSS Act or another law to participate in a Telecommunications Industry Ombudsman scheme, the application for membership shall be accepted by TIO Limited if:
 - (i) the application is in the form the Board prescribes (if any); and
 - (ii) any fees determined by the Ombudsman under **clause 7.1(a)** are paid.
- (b) In relation to any other application for membership, the Board shall consider whether to accept or reject the application. The Board may accept or reject any such application at its discretion.
- (c) Any decision by the Board to accept an application under **clause 6.3(b)** must be passed by Special Resolution of the Board.

6.4 Transferability

The rights and privileges of a Member shall not be transferable.

6.5 Aggregation of Membership

If:

- (a) a Member acquires 50% or more of another Member (or is otherwise in the Board's reasonable opinion deemed to control that other Member), the acquired Member and the acquiring Member shall for the purposes of quorum and voting requirements under this Constitution be deemed to be one Member only and the class of membership shall be the same as that of the acquiring Member; and
- (b) a non-Member acquires 50% or more of two or more Members (or is otherwise in the Board's reasonable opinion deemed to control those Members), the acquired Members shall for the purposes of quorum and voting requirements under this Constitution be deemed to be one Member only, and the class of membership shall be the same as that of the acquired Member with the longest continuous membership of TIO Limited.

7 Annual Volume Related and Operating Costs

7.1 Volume Related and Operating Costs

- (a) Each Member agrees to pay such annual Volume Related Costs and Operating Costs as are determined by the Ombudsman as being applicable to the Member (with payment to be made at such intervals as determined by the Board).
- (b) The annual Volume Related Costs and Operating Costs shall be based on the amount required to fund the Budget for the relevant year.
- (c) Volume Related Costs applicable to a Member are:
 - (i) those costs which directly relate to the number and relative cost of complaints registered by the Ombudsman against the Member in each billing period; and
 - (ii) any additional costs relating to legal, technical or accounting advice incurred by the Ombudsman in investigating a complaint against the Member.
- (d) Operating Costs applicable to a Member are those overhead costs which:
 - (i) are based on the Member's percentage share of Volume Related Costs (in accordance with a formula unanimously approved by the Board from time to time) billed in the relevant billing period; and
 - (ii) do not include any part of the costs in **clause 7.1(c)(ii)**.
- (e) For the purposes of **clause 7.1(b)** the Ombudsman shall, as determined by the Board, either:
 - (i) estimate a Member's Volume Related Costs and Operating Costs in arrears at the expiration of the first full billing period occurring after the Member joins the Scheme and thereafter in advance for each billing period; or
 - (ii) calculate a Member's Volume Related Costs and Operating Costs in arrears for each billing period.

The Board may, if it so determines, require the Ombudsman to apply **clause 7.1(e)(i)** for one or more Members or classes of Member and require the Ombudsman to apply **clause 7.1(e)(ii)** for all other Members, and may require the Ombudsman to apply billing periods of different duration to one or more Members or classes of Member under **clauses 7.1(e)(i) and 7.1(e)(ii)**.

- (f) All Volume Related Costs and Operating Costs shall be due and payable 30 days after the date on which the Member is notified of the amount to be paid.

7.2 Adjustments

- (a) Where the estimates model described in **clause 7.1(e)(i)** is used, the Ombudsman shall, at the end of each billing period, reconcile the estimated charges for each Member against the Volume Related Costs and Operating Costs applicable to that Member under **clause 7.1(c)** and **7.1(d)** based on actual data.
- (b) If as a result of the Ombudsman's determination in **clause 7.2(a)**:
 - (i) a Member has paid a greater share of the Volume Related Costs and Operating Costs than it should have, the amount of the excess shall be credited against the Volume Related Costs and Operating Costs to be paid by that Member in the forthcoming billing period; or
 - (ii) a Member has paid a lesser share of the Volume Related Costs and Operating Costs than it should have, the amount of the shortfall shall (if not already paid) be added to the Volume Related Costs and Operating Costs to be paid by that Member in the next billing period.

8 Cessation of Membership

- (a) Any Member may withdraw from TIO Limited by giving to the Secretary not less than three months' notice to that effect and its membership shall cease on expiry of such notice.
- (b) If any Member (**Defaulting Member**) neglects or wilfully refuses to comply with the provisions of this Constitution, the Terms of Reference or any rules of TIO Limited the Directors may recommend the expulsion of the Defaulting Member from TIO Limited. Any recommendation to expel a Defaulting Member must be passed by a Special Resolution of the Board. The Directors must, within 21 days of the Special Resolution of the Board being passed, convene a meeting of Members and the recommendation must be put before the Members to determine whether or not to adopt the Directors' recommendation and expel the Defaulting Member.
- (c) Any person who ceases to be a Member of TIO Limited shall forfeit all and any rights and privileges of membership as at the date of cessation of membership and shall have no further rights against or claim upon TIO Limited or the property or funds of TIO Limited, except rights or claim as a creditor (if any), and any right or claim arising from actions or omissions during the period of membership.
- (d) Any person who ceases to be a Member shall:
 - (i) continue to abide by the provisions of this Constitution and the Terms of Reference so far as they are applicable to the particular complaints which are being investigated by TIO Limited at the time the person ceases membership (including for example complying

with any decision made by the Ombudsman or the Ombudsman's delegate in respect of such a complaint); and

- (ii) without limiting **clause 8(d)(i)**, continue to abide by the provisions of this Constitution in relation to the payment of Volume Related Costs and Operating Costs and any other such levies as may fall due.

9 Additional Funding

9.1 Special Levies

The Board may at any time and from time to time obtain money for the purposes of TIO Limited in addition to the annual Volume Related Costs and Operating Costs by raising a special levy from the Members or a particular class of Member. Any decision by the Board to raise a special levy must be passed by a Special Resolution of the Board. Special levies shall be funded by the Members on the basis of each Member's percentage share of Volume Related Costs (in accordance with a formula approved unanimously by the Board from time to time) billed in the relevant billing period.

9.2 Capital Expenditure

- (a) The Board may at any time and from time to time obtain money for the purpose of on-going capital expenditure in addition to the annual Volume Related Costs and Operating Costs. Any decision by the Board to obtain money pursuant to this **clause 9.2(a)** must be passed by a Special Resolution of the Board. This expenditure shall be funded by the Members on the same basis as special levies.
- (b) As and when further applicants become Members of TIO Limited they shall contribute towards capital expenditure as determined by the Board.

9.3 Loans

The Board may raise loan funds from Members or third parties for particular purposes. Any decision by the Board to raise loan funds must be passed by a Special Resolution of the Board.

9.4 Funding

- (a) The Board shall set global funding limits for TIO Limited within which the budgets for TIO Limited shall be finalised.
- (b) Before:
 - (i) the budgets of TIO Limited are implemented; or
 - (ii) any additional expenditure to that set out in a budget approved by the Board is incurred,the prior approval of the Board must be obtained.
- (c) In setting global funding limits and approving budgets or any additional expenditure to that set out in an approved budget the Board shall require the Ombudsman to:

- (i) prepare the budget and business plans for TIO Limited in each successive Year; and
 - (ii) submit each such budget and business plan (and any proposal for additional expenditure beyond an approved budget) to the Board for its consideration.
- (d) In setting global funding limits or approving budgets and additional expenditure as set out in **clauses 9.4(a) and (b)** the Board will use its best endeavours to ensure that the level of funding is such that the Ombudsman is able to carry out his or her functions under the Terms of Reference.

10 General Meetings

- (a) TIO Limited will hold an annual general meeting (**AGM**) if required by, and in accordance with, the provisions of the Corporations Act. All meetings of Members (including the AGM) will be called General Meetings.
- (b) General Meetings may be convened by the Board whenever it thinks fit or by requisition as provided by the Corporations Act.
- (c) Except as otherwise required by law, the Board must not put to a General Meeting a proposal to amend this Constitution unless the Board resolves by Special Resolution of the Board to put that proposal to the General Meeting.
- (d) Subject to the provisions of the Corporations Act relating to special resolutions and consent to short notice, at least 21 days' notice (exclusive of the day on which the notice is served or received or deemed to be served or received and exclusive of the day for which notice is given) specifying the place, the day and the time of meeting and, in the case of special business, the general nature of that business, shall be given to persons entitled to receive such notices from TIO Limited.
- (e) For the purposes of **clause 10(d)**, all business that is transacted at a General Meeting (with the exception of the consideration of the accounts, financial statements and the reports of the Board and auditors at an AGM) shall be special business.
- (f) Omission to give notice of a General Meeting by TIO Limited to, or the non-receipt of notice of a meeting by, any Member shall not invalidate proceedings at a General Meeting.
- (g) Subject to this Constitution and the Corporations Act, the Board may change the place (or places) of, postpone or cancel a General Meeting unless the General Meeting has been convened pursuant to a request by Members in which case the Board must not postpone or cancel the general meeting without the consent of the requesting Members.

11 Proceedings at General Meetings

11.1 Quorum

- (a) No business shall be transacted at a General Meeting unless a quorum of Members is present at the time when the meeting proceeds to business. Save as otherwise provided in this Constitution, five Members shall constitute a quorum at any General Meeting. For the purpose of this **clause 11.1(a)**, persons attending as a proxy or Corporate Representative shall be counted as Members.
- (b) If within 30 minutes of the time appointed for a General Meeting, a quorum is not present, the meeting shall, if convened upon the requisition of Members, be dissolved or, in any other case, stand adjourned to the same day in the next week at the same time and place, or to such other day and at such other time and place as the Independent Chair may determine (being a day which is not more than 30 days after the originally scheduled date).

11.2 Adjourned Meetings

If a quorum of five Members is not present within 30 minutes after the time appointed for the commencement of the adjourned meeting (and notice of the meeting having been properly given in accordance with this Constitution) then the quorum shall be any Member.

11.3 Chair

- (a) The Independent Chair shall preside as Chair at General Meetings of TIO Limited. If the Independent Chair is not present within 30 minutes of the time appointed for holding a General Meeting or if the Independent Chair is unable or unwilling to act, then the Members present shall elect an Independent Director who is present or one of the Members who is present to be Chair of the General Meeting.
- (b) The Chair of any General Meeting may, with the consent of the majority of those Members present at the General Meeting (being a Meeting at which a quorum is present) adjourn the General Meeting. No business shall be transacted at any adjourned General Meeting other than the business left unfinished at the General Meeting from which the adjournment took place. Except as otherwise provided by this Constitution, it shall not be necessary to give any notice of an adjournment or the business to be transacted at an adjourned General Meeting.

11.4 Special Resolutions

- (a) In addition to the requirements of the Corporations Act regarding the passing of special resolutions, a special resolution may only be passed if five Members, including at least one Carrier Member and at least one Carriage Service Provider Member, vote in favour of the special resolution.

- (b) For the purposes of **clause 11.4(a)**, notwithstanding anything contained in this Constitution, any two or more Members who are Related Companies will count as one Member and if any of those Members is a Carrier Member, those Members will count as a Carrier Member, otherwise those Members will count as a Carriage Service Provider Member.

11.5 Voting

- (a) For the avoidance of doubt, in this **clause 11.5** references to a Member or Members will be read subject to the “aggregation of membership” provisions set out in **clause 6.5**.
- (b) At any General Meeting, a resolution put to the vote of the meeting shall be decided on a show of hands (each Member present in person or by Corporate Representative having one vote) unless a poll is demanded before or on the declaration of the result of the show of hands by any Member present in person, by proxy or by Corporate Representative and who is entitled to vote.

Unless a poll is so demanded, a declaration by the Chair of the General Meeting that a resolution has been carried, carried unanimously, carried by a particular majority or lost on a show of hands and an entry to that effect in the book containing the minutes of the proceedings of TIO Limited shall be conclusive evidence of the fact of the resolution having been so carried, carried unanimously, carried by a particular majority or lost. The demand for a poll may be withdrawn.

- (c) If a poll is duly demanded, it shall be taken either at once or after an interval or adjournment and in such manner as the Chair of the General Meeting directs. On a poll each Member will have one vote per whole dollar of its annual Operating Costs contribution in the immediately preceding financial year of TIO Limited (as may have been adjusted under **clauses 7.2(a)** and **7.2(b)**), except that:
 - (i) if the Member has made an annual Operating Costs contribution only in respect of part of the relevant financial year because it was only a Member during that part, the Member will have one vote per whole dollar of the pro-rata amount of Operating Costs the Member would have contributed for the whole financial year had it been a Member for the whole financial year, based on the contribution the Member actually paid;
 - (ii) if the Member did not make an annual Operating Costs contribution in the relevant financial year because it was not a Member during any part of that financial year, the Member will have one vote; and
 - (iii) every Member will in any case have a minimum of one vote.
- (d) In the case of an equality of votes on a show of hands or on a poll, the Chair of the General Meeting at which the show of hands takes place or

at which the poll is demanded shall not be entitled to a second or casting vote and the motion shall be lost.

- (e) A Member may vote in person, by proxy, by attorney or by Corporate Representative. On a show of hands, every Member shall have one vote but in order to pass validly an ordinary resolution at least one Member who is a Carrier Member must vote in favour of that resolution.
- (f) Subject to **clause 11.6(d)**, a Member whose estate is liable to be dealt with in any way under the law relating to mental health shall not be entitled to vote, either on a show of hands or on a poll.

11.6 Proxies and Other Authorities

- (a) The instrument appointing a proxy shall be in writing and signed by the appointor or his or her duly authorised attorney or, if the appointor is a corporation, either under seal or under the hand of an officer or duly authorised attorney of the corporation. The instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll. A Member shall be entitled to instruct his or her proxy to vote in favour of or against any proposed resolution. Unless otherwise instructed, a proxy may vote as he or she thinks fit.
- (b) The instrument appointing a proxy may be in any common or usual form acceptable to the Directors.
- (c) The instrument appointing a proxy for a Member and a copy of the power of attorney or other authority under which it is signed or notarially certified (if any) shall be deposited at the registered office of TIO Limited (or at such other place within the State as is specified for that purpose in the notice convening the General Meeting) not less than 48 hours before the General Meeting or adjourned General Meeting at which the person named in the instrument proposes to vote, or, in the case of a poll, not less than 24 hours before the time appointed for the taking of the poll. In default of the foregoing requirements, the instrument of proxy shall at the discretion of the Chair of the General Meeting be invalid.
- (d) A vote given in accordance with the terms of an instrument of proxy or attorney shall be valid notwithstanding:
 - (i) the previous death or unsoundness of mind of the principal;
 - (ii) revocation of the instrument; or
 - (iii) revocation of the authority under which the instrument was executed,unless an indication in writing of such death, unsoundness of mind or revocation has been received at the registered office of TIO Limited before the commencement of the General Meeting at which the instrument is used.
- (e) Any corporation or other body corporate which is a Member may authorise such person as it thinks fit to act as its Corporate

Representative at any General Meeting of TIO Limited. The person so authorised shall be entitled to exercise the same powers on behalf of the appointor as the appointor could exercise if it were a human Member in accordance with his or her authority until his or her authority is revoked by the corporation or other body corporate.

- (f) TIO Limited is not responsible for ensuring that:
 - (i) any directions provided in an instrument appointing a proxy or the way in which a proxy is to vote on a particular resolution are complied with, and accordingly is not liable if those directions are not complied with; or
 - (ii) the terms of appointment of a corporate representative are complied with, and accordingly is not liable if those terms are not complied with.

12 Directors and Management of TIO Limited

12.1 The Board

Subject to the Corporations Act and to this Constitution, TIO Limited and the business, affairs and property of TIO Limited will be managed by a Board of Directors consisting of:

- (a) three Directors With Consumer Experience;
- (b) three Directors With Industry Experience;
- (c) two Independent Directors; and
- (d) the Independent Chair.

12.2 Nominations Committee and Appointment of Directors

- (a) The Board may, in accordance with this **clause 12.2**, appoint a person to fill any vacant Board position.
- (b) Any decision by the Board to appoint a person to act as a Director must be passed by a Special Resolution of the Board.
- (c) Except in the circumstances described in **clause 12.2(e) and (m)**, the Board must only appoint a person to act as a Director if that person has been recommended by the Nominations Committee.
- (d) When the Board receives a recommendation from the Nominations Committee the Board may accept or reject that recommendation in its discretion. If the Board rejects the recommendation the Board will instruct the Nominations Committee to identify and recommend another person to be appointed to fill that Board position, in accordance with this **clause 12.2**.
- (e) Notwithstanding anything in this **clause 12.2** but subject to the requirement that any decision by the Board to appoint a person to the role of Independent Chair must be passed by a Special Resolution of the

Board, the Board will in all cases determine the best way to appoint a person to the role of the Independent Chair (and a person may be appointed to the role of the Independent Chair in that way). Without limiting the Board's ability to determine the best way to make the appointment, the Board may decide (but is not required) to ask the Nominations Committee to identify and recommend to the Board a person to act as the Independent Chair. However, the Board does not require a recommendation from the Nominations Committee in order to appoint a person to act as the Independent Chair.

- (f) The Nominations Committee will identify and recommend to the Board persons to act as Directors. The Board will instruct the Nominations Committee to fulfil this role in a timely way, as and when any vacancies on the Board arise or are anticipated.
- (g) The Nominations Committee will comprise the Independent Chair (who will chair the Nominations Committee) and the following people appointed to the Nominations Committee by the Board:
 - (i) one Director With Consumer Experience;
 - (ii) one Director With Industry Experience;
 - (iii) one person nominated by a peak group representing users of telecommunications services or public interest issues relevant to telecommunications services; and
 - (iv) one person nominated by a peak group representing the telecommunications industry.
- (h) If the Nominations Committee is considering a Board position for which a member of the Nominations Committee is or may be a candidate for appointment or re-appointment, then the Board will select a different Director to replace that member of the Nominations Committee in relation to any consideration by the Nominations Committee of that Board position. If the Independent Chair is replaced on the Nominations Committee in this way, the Board will select an Independent Director to replace the Independent Chair and that person will act in the role of the Independent Chair for the purposes of the Nominations Committee considering that Board position.
- (i) The Board may appoint or remove the members of the Nominations Committee, other than the Independent Chair (subject to clause **12.2(h)**), as the Board considers appropriate from time to time.
- (j) The Board will provide the Nominations Committee with terms of reference, a duty statement, selection criteria to be applied by the Nominations Committee and any other instructions the Board may wish to give, all of which must be consistent with the terms of this Constitution and must be complied with by the Nominations Committee. The Board may require a person, as a condition of his or her appointment to the Nominations Committee, to execute any document the Board requires by

way of an enforceable undertaking to fulfil the roles and responsibilities of a member of the Nominations Committee.

- (k) Where a vacant Board position is one reserved for either the Largest Member or the Second Largest Member (as specified in **clause 12.4**), the Board will require the Nominations Committee to advise the nominating Member as soon as possible of the vacancy and require the Member to nominate at least two nominees for consideration by the Nominations Committee.
- (l) The Nominations Committee's recommendation of a candidate to fill a vacant Board position must be unanimous except where a unanimous recommendation cannot be reached after thirty days of deliberation in which case the two Independent Directors will temporarily sit on the Nominations Committee for the purpose of reaching a recommendation supported by at least five out of the seven members of that extended Nominations Committee. If a recommendation still cannot be reached after a further thirty days of deliberation then **clause 12.2(m)** will apply.
- (m) If the process in **clause 12.2** does not result in the Nominations Committee making a recommendation, or for any reason cannot be followed (including where the Nominations Committee cannot be constituted in accordance with either **clause 12.2(g)** or **12.2(h)**, or where the position of one or more of the Independent Directors is vacant at the relevant time so that **clause 12.2(l)** cannot be implemented) then the Board will determine the best way to proceed in order to appoint a person to the vacant Board position (and a person may be appointed to the vacant Board position in that way). Without limiting the Board's ability to determine the best way to proceed, the Board may decide to itself take over the role of the Nominations Committee in order to fill the relevant Board position with any such appointment to the Board to be by Special Resolution of the Board (the Independent Chair, if participating in the relevant Board proceedings, being entitled to exercise a casting vote if required).

12.3 Directors With Consumer Experience

- (a) Directors With Consumer Experience will be appointed from the following groups and agencies (**Community and Consumer Groups**):
 - (i) community or consumer groups representing users of telecommunications services, including individual users and small business users; and
 - (ii) community or consumer groups or agencies representing public interest issues relevant to telecommunications services.
- (b) In nominating Directors With Consumer Experience for appointment by the Board, the Nominations Committee and the Board will observe the following principles:

- (i) All appointments will be based on merit, based on criteria including the candidates':
 - (A) expertise in corporate governance;
 - (B) ability to provide effective input on policy and jurisdiction issues for TIO Ltd;
 - (C) ability to uphold the independence of the Ombudsman;
 - (D) expertise in consumer affairs;
 - (E) links to relevant Community and Consumer Groups;
 - (F) capacity and willingness to consult with relevant Community and Consumer Groups; and
 - (G) knowledge of, or ability to acquire knowledge of, telecommunications issues.
- (ii) Directors With Consumer Experience must in the opinion of the Board be independent of the telecommunications industry and government.
- (iii) The Nominations Committee will invite Community and Consumer Groups to make nominations for vacant Director With Consumer Experience positions (however successful candidates do not necessarily have to come from the Community and Consumer Groups invited by the Nominations Committee to make nominations).
- (iv) A wide range of candidates will be considered, and the position will be advertised, as a minimum, in a major national newspaper.
- (v) The nomination and appointment process followed by the Nominations Committee and the Board must be transparent, accountable and cost effective.
- (vi) The nomination and appointment process followed by the Nominations Committee and the Board must be documented and records kept of how decisions have been made.

12.4 Directors With Industry Experience

- (a) The following Directors With Industry Experience will be appointed:
 - (i) a person from among candidates nominated by the Largest Member in accordance with **clause 12.2(k)**;
 - (ii) a person from among candidates nominated by the Second Largest Member in accordance with **clause 12.2(k)**; and
 - (iii) a person identified and recommended by the Nominations Committee (subject to **clause 12.2(m)**) from amongst other telecommunications industry participants.

- (b) For the purposes of this **clause 12.4**, “**Largest Member**” and “**Second Largest Member**” mean the Members that respectively have the highest and second highest total number of retail end-user customers in the Australian telecommunications services market based on the most recent information available to the Board as at the date at which the need to appoint an Director With Industry Experience arises (as determined, in the event of any doubt, by the Board following consultation with the ACMA). For the avoidance of doubt, a person nominated by the Largest Member or the Second Largest Member need not be an employee of the relevant nominating Member.
- (c) A Director With Industry Experience appointed pursuant to **clauses 12.4(a)(i) or 12.4(a)(ii)** will not lose office simply due to the fact that the Member that nominated him or her ceases to be the Largest Member or Second Largest Member (as applicable) during the term of that Director With Industry Experience.
- (d) A Member that nominated a Director With Industry Experience pursuant to **clauses 12.4(a)(i) or 12.4(a)(ii)** may at any time during the term of that Director With Industry Experience give notice to the Board that that Director With Industry Experience will be removed as a director, effective as at the end of the next meeting of the Board following the receipt of that notice. Such removal will take effect at the end of the next meeting of the Board. The position will then be filled in accordance with this Constitution.
- (e) In nominating Directors With Industry Experience for appointment by the Board, the Nominations Committee and the Board will observe the following principles:
 - (i) All appointments will be based on merit, based on criteria including the candidates’:
 - (A) expertise in corporate governance;
 - (B) ability to provide effective input on policy and jurisdiction issues for TIO Ltd;
 - (C) ability to uphold the independence of the Ombudsman;
 - (D) expertise in the telecommunications industry; and
 - (E) capacity and willingness to consult with Members.
 - (ii) The Nominations Committee will invite Members (other than the Largest Member and the Second Largest Member) to make nominations for the Director With Industry Experience position referred to in **clause 12.4(a)(iii)** (however the successful candidate does not necessarily have to come from the Members invited by the Nominations Committee to make nominations).
 - (iii) A wide range of candidates will be considered for the Director With Industry Experience position referred to in **clause 12.4(a)(iii)**, and

the position will be advertised, as a minimum, in a major national newspaper.

- (iv) The nomination and appointment process followed by the Nominations Committee and the Board must be transparent, accountable and cost effective.
- (v) The nomination and appointment process followed by the Nominations Committee and the Board must be documented and records kept of how decisions have been made.

12.5 Independent Directors

Two Independent Directors will be appointed in accordance with the following principles:

- (a) All appointments will be based on merit, based on criteria including the candidates':
 - (i) expertise in corporate governance;
 - (ii) ability to provide effective input on policy and jurisdiction issues for TIO Ltd;
 - (iii) ability to uphold the independence of the Ombudsman;
 - (iv) knowledge of, or ability to acquire knowledge of, telecommunications issues; and
 - (v) knowledge of, or ability to acquire knowledge of, dispute resolution issues.
- (b) Independent Directors must be independent of Community and Consumer Groups, the telecommunications industry, government and other organisations and bodies such that they are not likely to have any substantive conflict of interest in fulfilling their roles as directors of TIO Limited.
- (c) The nomination and appointment process must be transparent, accountable and cost effective.
- (d) The nomination and appointment process must be documented and records kept of how decisions have been made.
- (e) One of the Independent Directors must have not for profit governance experience. The other Independent Director must have commercial governance experience.

12.6 Independent Chair

An Independent Chair will be appointed in accordance with the following principles:

- (a) Any appointment will be based on merit, based on criteria including the candidates':
 - (i) expertise in corporate governance;

- (ii) ability to provide effective input on policy and jurisdiction issues for TIO Ltd;
 - (iii) ability to uphold the independence of the Ombudsman;
 - (iv) knowledge of, or ability to acquire knowledge of, telecommunications issues; and
 - (v) ability to command the respect of stakeholders and the Board.
- (b) The Independent Chair must be independent of Community and Consumer Groups, the telecommunications industry, government and other organisations and bodies such that he or she is not likely to have any substantive conflict of interest in fulfilling his or her role as a director of TIO Limited.
 - (c) Before appointing the Independent Chair, the Board must inform the Federal ministers responsible for consumer affairs policy and communications policy about the proposed appointment and consider any comments they make.
 - (d) The nomination and appointment process must be transparent, accountable and cost effective.
 - (e) The nomination and appointment process must be documented and records kept of how decisions have been made.

12.7 Condition of Appointment of Directors

The appointment of each Director is subject to the appointee executing a deed poll in a form acceptable to the Board by the date required by the Board in which the appointee agrees to be bound by the Terms of Reference and any other document the Board specifies. If this condition is not met by that date, the position of the relevant Director will be vacated from that date.

12.8 Vacation of Office

- (a) The office of a Director shall become vacant:
 - (i) if the Director becomes bankrupt or makes any arrangement or composition with his or her creditors generally;
 - (ii) if the Director becomes prohibited from holding the office of a director of a company under the Corporations Act;
 - (iii) if the Director becomes of unsound mind or a person whose estate is liable to be dealt with in any way under the law relating to mental health;
 - (iv) if the Director resigns his or her office by notice in writing to TIO Limited;
 - (v) unless otherwise determined by the Board – if the Director is absent from meetings of the Board for more than 6 months without permission of the Board;

- (vi) unless otherwise determined by the Board – if the Director holds any office of profit under TIO Limited or receives any payment from TIO Limited other than remuneration properly payable in accordance with this Constitution;
 - (vii) if the Director is a Director With Industry Experience appointed by a Member pursuant to **clause 12.4(a)(i)** or **12.4(a)(ii)** and:
 - (A) is removed in accordance with **clause 12.4(d)**; or
 - (B) the Member that nominated him or her ceases to be a Member;
 - (viii) unless otherwise determined by the Board – if the Director is a Director With Consumer Experience and has ceased:
 - (A) to have suitable links to relevant Community and Consumer Groups; or
 - (B) to be independent of the telecommunications industry and government; or
 - (ix) unless otherwise determined by the Board – if the Director is an Independent Director or the Independent Chair and has ceased to be independent within the requirements of **clause 12.5(b)** or **12.6(b)** (as applicable).
- (b) Upon the office of a Director becoming vacant under **clause 12.8(a)(i)-(vi)** the person who vacated office is disqualified from acting as a Director for a period of two years from the vacation of office.

12.9 Remuneration

- (a) The Board may make provision for a Director to be paid an honorarium from the funds of TIO Limited, on such terms as the Board considers reasonable, subject to the following:
 - (i) any decision to pay an honorarium to a Director must be passed by a Special Resolution of the Board; and
 - (ii) any honorarium which is to be paid to an Independent Director or the Independent Chair must be commensurate with the fees usually paid to a non-executive director of a public company of comparable size; and
 - (iii) the honorarium may include additional amounts for participation in any committee established by the Board.
- (b) If a Director performs duties which, in the opinion of the Board, are outside the scope of the ordinary duties of the Director, he or she may be paid a special honorarium. The payment of a special honorarium shall be on such terms as considered reasonable by the Board and must be passed by a Special Resolution of the Board.
- (c) Each Director will be reimbursed all reasonable travelling, accommodation and other expenses incurred by the Director in attending

General Meetings, meetings of the Board and committees of the Board or while otherwise engaged in undertaking the activities of TIO Limited, promptly upon production of appropriate receipts or other records accurately recording those expenses.

- (d) The honorarium of any Director may be varied or terminated by Special Resolution of the Board.
- (e) The vote of the Director to whom an honorarium is to be paid is not to be counted in determining whether a Special Resolution of the Board in favour of that payment has been passed, and that Director will not be counted towards a quorum in relation to that part of a Board meeting during which such Special Resolution of the Board is considered.

12.10 Term of Office

- (a) Each Director will be appointed for a term of 3 years. For the avoidance of doubt, if a current Director is appointed to fill a different position on the Board, e.g. an Independent Director is appointed to be the Independent Chair, their appointment to that different position will be for a term of 3 years from their appointment to that position.
- (b) At the end of the term of office of a Director the procedures specified in this Constitution will be followed to fill that position. Subject to any express restriction in this Constitution or at law, the person whose term as a Director is coming or has come to an end may (if he or she is willing) be considered for that position in the course of those procedures.

12.11 Removal of Directors

Subject to this Constitution and the provisions of the Corporations Act, a resolution, request or notice of any or all of the Directors is void to the extent that it purports to remove a Director from their office or requires a Director to vacate their office, unless it is determined at a General Meeting on due notice to remove that Director from office.

13 Powers and Duties of the Board

- (a) The Board may exercise all the powers and do all the acts and things as may be exercised or done by TIO Limited that are not required to be exercised by TIO Limited in General Meeting, subject to this Constitution, the Terms of Reference, the provisions of the Corporations Act and to such regulations as are not inconsistent with this Constitution or provisions of the law as may be prescribed by the Board or TIO Limited in General Meeting.
- (b) Any rule, regulation or by-law made by the Board must be circulated among Members within one month of its coming into being.
- (c) The Board may exercise all of TIO Limited's borrowing powers.
- (d) All cheques, promissory notes, drafts, bills of exchange and other negotiable instruments drawn on bank accounts maintained by TIO

Limited and all receipts for money paid to TIO Limited shall be signed, drawn, accepted, endorsed or otherwise executed, as the case may be, in the manner determined by the Board from time to time.

- (e) The Board shall cause minutes to be made of:
 - (i) all appointments of officers of TIO Limited;
 - (ii) the names of Directors present at all General Meetings and meetings of the Board; and
 - (iii) all resolutions and proceedings at General Meetings and meetings of the Board.

Upon confirmation of any minutes made, the Chair of the meeting at which the proceedings are held or the Chair of the next succeeding meeting must sign the minutes.

- (f) The Board shall, at least once every 6 months, convene a discussion forum for the purposes of small Member engagement with TIO Limited. The Board will determine the scope, nature and agenda of such discussion forums as it considers appropriate.

14 Proceedings of the Directors

14.1 Convening of meetings

- (a) The Board may meet together for the despatch of business, adjourn and otherwise regulate its meetings as it thinks fit. A Director may at any time and the Secretary shall on the requisition of a Director summon a meeting of the Board.
- (b) Reasonable notice of each Board or committee meeting (including the Nominations Committee) must be given to the Directors and each alternate entitled to receive notice (if any) or, in the case of each committee meeting, each member of the committee.
- (c) Each notice must state:
 - (i) the date, time and place (or places) of the Board or committee meeting;
 - (ii) the general nature of the business to be conducted at the Board or committee meeting; and
 - (iii) any proposed resolutions.
- (d) No resolution passed at or proceedings at any Board or committee meeting will be invalid because of any unintentional omission or error in giving or not giving notice of:
 - (i) that Board or committee meeting;
 - (ii) any change of place (or places) of that Board or committee meeting;

- (iii) postponement of that Board or committee meeting; or
- (iv) resumption of that adjourned Board or committee meeting.

14.2 Voting

Except as otherwise specified in this Constitution, questions arising at any meeting of the Board shall be decided by a majority of votes and a determination by a majority of the Board shall be deemed a determination of the Board.

14.3 Quorum

- (a) Subject to this Constitution, the number of Directors necessary to constitute a quorum for a Board meeting shall be equal to:
 - (i) if the number of Directors holding office at the time of the relevant Board meeting is an even number: half of the number of Directors holding office at the time of the relevant Board meeting plus one; or
 - (ii) if the number of Directors holding office at the time of the relevant Board meeting is an odd number: half of the number of Directors holding office at the time of the relevant Board meeting, rounded up to the nearest whole number.
- (b) Notwithstanding **clause 14.3(a)** but subject to **clause 14.3(d)**:
 - (i) the quorum for a Board meeting shall in no event be fewer than five Directors; and
 - (ii) the quorum must include at least two Directors With Consumer Experience, two Directors With Industry Experience and either:
 - (A) one Independent Director; or
 - (B) the Independent Chair.
- (c) If within 30 minutes of the time appointed for a Board meeting, a quorum is not present, then:
 - (i) the Directors present 30 minutes after the time appointed for the meeting may, by unanimous decision, elect to adjourn the meeting to a specific time and place later that day; or
 - (ii) if no unanimous decision is made under **clause 14.3(c)(i)**, the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other day and at such other time and place as the Independent Chair may determine (being a day which is not more than 30 days after the originally scheduled date).
- (d) If a quorum is not present within 30 minutes after the time appointed for the commencement of the adjourned Board meeting (and notice of the meeting having been properly given) then the quorum shall be three, including:

- (i) one Independent Director; or
 - (ii) the Independent Chair.
- (e) The Directors may act notwithstanding any vacancy in the Board, but if and so long as their number is reduced below the number fixed by or pursuant to this Constitution as a quorum of the Board, the Directors may only act for the purpose of calling a General Meeting and seeking such amendments to this Constitution as would be desirable in the circumstances to enable sufficient Directors to be appointed to constitute a quorum, or to amend **clause 14.3(a)**.

14.4 Chair

- (a) The Independent Chair shall act as Chair of meetings of the Board.
- (b) If the Independent Chair is not present within 10 minutes after the time appointed for holding a meeting of the Board, then the Directors present shall appoint an Independent Director (or in their absence, any other Director) who is in attendance to act as Chair by ordinary resolution.
- (c) Except where expressly stated in this Constitution, the Chair of any meeting of the Board shall not have a casting vote at that meeting.

14.5 Committees

- (a) The Board may delegate any of its powers and/or functions (except power conferred and duties imposed on the Directors by law which are incapable of delegation and except any power to make a decision on behalf of the Board) to one or more committees consisting of such persons as the Board thinks fit. Any committee formed for this purpose:
 - (i) must conform to any regulation that may be imposed by the Board; and
 - (ii) will have power to co-opt any person or persons provided that any person so co-opted shall not have a vote on such committee unless so authorised by the Board.
- (b) A committee may meet for the despatch of business, adjourn and otherwise regulate its meetings as it thinks fit. Questions arising at any meeting will be determined by a majority of votes of the committee members present and, in the event of an equality of votes, the Chair of the committee will not have a second or casting vote, and the motion will be lost.
- (c) Without limitation, the Board may establish the following committees at its discretion:
 - (i) a remuneration committee;
 - (ii) a finance or budget committee; and
 - (iii) an audit and risk committee.

14.6 Validity of acts

All acts done by the Board, by a committee, or by any person acting as a Director or committee member shall be valid, notwithstanding that it is subsequently discovered that:

- (a) there was some defect in the appointment of any Board or committee member or person so acting; or
- (b) a Board or committee member or any person so acting was disqualified, as if every such person had been duly appointed and was qualified to hold their purported office.

14.7 Resolutions in Writing

A resolution in writing signed by all the Directors for the time being entitled to receive notice of meetings of the Board shall be valid and effectual as if it had been passed at a duly convened meeting of the Board. Any such resolution may consist of several identical documents each signed by one or more Directors.

14.8 Meetings by Electronic Means

- (a) If –
 - (i) the Directors confer by radio, telephone, closed circuit television or other electronic means of audio or audio-visual communications;
 - (ii) all the Directors who for the time being are entitled to receive notice of a meeting of the Directors receive notice of the conference and have access to the means by which the conference is to take place; and
 - (iii) each of the Directors taking part in the conference is able to hear each of the other Directors taking part in the conference;

then all the provisions of this Constitution relating to meetings of the Board shall apply to the conference as if such conference were a meeting of the Board and as if the Directors taking part in the conference were physically present together at a meeting, and any resolution passed by such conference shall be deemed to have been passed at a meeting of the Board held on the day on which and at the time at which the conference was held.

- (b) The fact that a Director is taking part in the conference must be made known to all the other Directors taking part, and no Director may disconnect or cease to have access to his or her means of communication or otherwise cease to take part in the conference unless he or she makes known to all other Directors taking part that he or she is ceasing to take part in the conference. Until a Director makes it known that he or she is ceasing to take part in the conference he or she shall be deemed to continue to be present and to continue to form part of the quorum.

14.9 Declarations of Interest

A Director must not be counted in any quorum considering any contract or proposed contract with TIO Limited in which he or she has an interest nor vote in respect of any such contract or proposed contract unless the Director discloses the existence and nature of that interest to the Board prior to voting and if he or she does so vote without making disclosure, his or her vote will not be counted. Such Director may attest the affixation of the seal to such a contract.

14.10 Alternate Directors

- (a) With the approval of the Board (including approval of the person to be appointed), any Director may appoint:
 - (i) any person or another Director to be an alternate or substitute Director in his or her place during such period as he or she thinks fit; and
 - (ii) a second person or Director to be an alternate or substitute Director to replace the first appointed alternate or substitute Director if he or she is unable or unwilling to act.

Any alternate or substitute Director is entitled to notice of meetings of Directors, to attend and vote at such meetings and to exercise all the powers of the appointor in his or her place. An alternate or substitute Director will ipso facto vacate office if the appointor vacates or is removed from office. Any appointment or removal under this **clause 14.10(a)** will be effected by notice in writing signed by the appointor and delivered to the registered office of TIO Limited.

- (b) An alternate Director who is also a Director in his or her own right shall be entitled to vote in his or her own capacity as Director and again for each alternate directorship held.

14.11 Proxies

A Director may vote at a Board meeting in person or in the case of a particular resolution the wording of which has been sighted by that Director, by proxy given to another Director. If a Director votes by proxy, the Director must specify the way the proxy is to vote on that specific resolution. The proxy must vote accordingly. The proxy retains any vote of his or her own, to which he or she is entitled as a Director.

15 Ombudsman, Acting Ombudsman and Deputy Ombudsman

15.1 Ombudsman

- (a) The Board has the power to appoint a person as the Ombudsman and terminate any such appointment. Any decision by the Board to terminate the appointment of the Ombudsman must be passed by a Special Resolution of the Board.

- (b) The Ombudsman has the powers conferred on the Ombudsman in this Constitution and the Terms of Reference.

15.2 Acting Ombudsman

- (a) A person may be appointed as Acting Ombudsman, which appointment will last only until either a new Ombudsman is appointed or the existing Ombudsman is able to resume his or her duties (as the case may be), if:
 - (i) the appointment of the Ombudsman has terminated or expired;
 - (ii) the Ombudsman is rendered physically or mentally incapable of carrying out his or her duties; or
 - (iii) the Ombudsman is or is to be absent and unable to perform his or her duties for an extended period.
- (b) The Acting Ombudsman will be appointed in the same manner as the Ombudsman, and the appointment of the Acting Ombudsman can only be terminated in the same manner as the appointment of the Ombudsman may be terminated, all as specified in **clause 15.1**.
- (c) The Acting Ombudsman will during his or her appointment have all the rights, powers and obligations of the Ombudsman.

15.3 Deputy Ombudsman

- (a) In consultation with the Board, the Ombudsman has the power to appoint a person as the Deputy Ombudsman and terminate any such appointment.
- (b) To the extent permitted by the Terms of Reference, the Ombudsman may delegate rights, powers and obligations to the Deputy Ombudsman.

15.4 Terms of Appointment

- (a) The terms of appointment of the Ombudsman, the Acting Ombudsman and the Deputy Ombudsman shall include undertakings by those persons to:
 - (i) be bound by the provisions of the Terms of Reference; and
 - (ii) promptly make a written declaration to the Independent Chair (or if there is no Independent Chair, to the Board generally) of any actual or potential conflict of interest which may arise between their duties as officers of TIO Limited and their personal interests by reason of their having a direct financial interest in a Member or in a business operated by a complainant under the Scheme, after becoming aware of the conflict or potential conflict. Without limitation, the Ombudsman, Acting Ombudsman or Deputy Ombudsman is deemed to have a potential conflict of interest if he or she holds any share in any Member or complainant. The holding of a share or other financial interest in a Member by a family member of the Ombudsman, Acting Ombudsman or Deputy

Ombudsman is deemed not to constitute an actual or potential conflict of interest.

- (b) The Ombudsman, the Acting Ombudsman and the Deputy Ombudsman must not be associated with any Member of TIO Limited.

16 Secretary

- (a) The Secretary shall be appointed by the Board for such term and upon such terms and conditions as the Board thinks fit. The Secretary may be removed by the Board.
- (b) If the Secretary is also a Director of TIO Limited, he or she shall not be entitled to receive any remuneration except as provided by this Constitution.

17 Terms of Reference

17.1 TIO Limited to Operate in Accordance with Terms of Reference

TIO Limited will operate in accordance with and observe the roles, functions, powers and obligations set out in the Terms of Reference that forms **Annexure A** to this Constitution as that document may be modified or amended from time to time in accordance with its terms.

17.2 Agreement to be Bound by Terms of Reference

In becoming a Member each Member agrees:

- (a) to be bound by and observe the terms of the Terms of Reference;
- (b) that any amendments to the Terms of Reference will be made in accordance with the terms of the Terms of Reference at the time being in force.

17.3 Terms of Reference replaces TIO Constitution

For the avoidance of doubt, the Terms of Reference replaces the document entitled "Telecommunications Industry Ombudsman Constitution" that was in effect immediately prior to the adoption of this Constitution.

18 Seal

The Board shall provide for the safe custody of the seal which shall only be used by the authority of the Board or a committee of Directors authorised by the Board in that behalf. Every instrument to which the seal is affixed shall be signed by a Director and shall be countersigned by the Secretary, a second Director or some other person appointed by the Board for that purpose.

19 Accounts

- (a) The Board shall cause proper accounts and other records to be kept and shall distribute copies of financial statements and related documents as required by law.
- (b) Subject to the Corporations Act, the Board shall determine the times and places at which, and the conditions and regulations upon which, the accounting and other records of TIO Limited shall be open for inspection by the Members in accordance with **clause 5(b)**.
- (c) The financial years of TIO Limited are from 1 July in each year to the following 30 June.

20 Audit

A properly qualified auditor or auditors shall be appointed and its or their duties regulated in accordance with the Corporations Act. Each report of the auditor or auditors shall be submitted to the Members as required by law.

21 Notices

- (a) Any notice required by law or by or under this Constitution to be duly given to any Member may be given by sending it by post to, or leaving it at, the Member's address in the register of Members or by emailing it to the Member's email address for notices listed in the register of Members (if any).
- (b) For the purposes of determining the time at which a notice is received:
 - (i) where a notice is sent by post from within Australia, it is taken to have been received 2 days after the date of posting;
 - (ii) where a notice is served on a Member personally or left at the Member's registered address, it is taken to have been received when delivered; and
 - (iii) where the notice is sent by email, it is taken to have been received when the email is sent (unless the sender receives a delivery failure notification indicating that the email has not been delivered to the addressee).
- (c) Notice of every General Meeting shall be given in any manner authorised by this Constitution to:
 - (i) every Member except those Members who have not supplied an address to TIO Limited for the giving of notices; and
 - (ii) the auditor or auditors for the time being of TIO Limited, if required by law.
- (d) No other person shall be entitled to receive notice of General Meetings.

22 Review of Scheme

22.1 Periodic review

The Board must commission reviews of the Scheme and develop proposals for the continued operation or termination of the Scheme as required by legislation or when the Board otherwise considers it necessary or desirable. Such reviews must allow sufficient time for consultation with Members and Community and Consumer Groups.

22.2 Recommendations by Ombudsman

The Board must consider any recommendation made at any time by the Ombudsman about amendments to the Scheme the Ombudsman considers necessary or desirable.

23 Winding Up

23.1 Agreement to wind up

If and only if the TCPSS Act no longer requires that Carriers and Eligible Carriage Service Providers enter into a Telecommunications Industry Ombudsman scheme the Members may, by agreement, wind up TIO Limited or transfer it to those Members which choose to continue the Scheme.

23.2 Liability of Members Limited

- (a) The liability of the Members is limited.
- (b) Every Member undertakes that in the event that TIO Limited is wound up during the currency of the Member's membership or within one year of the Member ceasing membership, it will contribute to the property of TIO Limited for:
 - (i) payment of the debts and liabilities of TIO Limited incurred before it ceased to be a Member;
 - (ii) the costs, charges and expenses of winding up; and
 - (iii) an adjustment of the rights of the contributories among themselves,such amount as may be required, provided such amount shall not exceed one hundred dollars (\$100).
- (c) If upon the winding-up or dissolution of TIO Limited in accordance with the Corporations Act and after satisfaction of all its debts and liabilities, there remains any property whatsoever, the same shall be paid to or distributed to a society, association or club which is not carried on for the purposes of profit or gain to individual members and is established for community services purposes.

24 Indemnity and Insurance

- (a) To the extent permitted by the Corporations Act, TIO Limited will, in the case of an action, claim or proceeding brought against an officer and may, at its election, in the case of an action, claim or proceeding initiated by an officer, indemnify each officer and each person who has been an officer of TIO Limited out of the assets of TIO Limited against any liability, loss, damage, cost, charge or expense incurred or to be incurred by the officer in or arising out of the conduct of any activity of TIO Limited or the proper performance by the officer of his or her duties.
- (b) TIO Limited may enter into an agreement containing an indemnity in favour of any officer on such terms as the Board may determine.
- (c) To the extent permitted by the Corporations Act, TIO Limited may pay any premium in respect of a contract of insurance between an insurer and an officer or any person who has been an officer of TIO Limited in respect of any liability suffered or incurred by the officer in or arising out of the conduct of any activity of TIO Limited or the proper performance by the officer of his or her duties.

25 Transitional

- (a) This **clause 25** has effect notwithstanding any other clause of this Constitution and prevails over the other clauses to the extent of any inconsistency.
- (b) Immediately upon this Constitution coming into effect the Board will consist of:
 - (i) four Directors With Consumer Experience;
 - (ii) four Directors With Industry Experience;
 - (iii) two Independent Directors; and
 - (iv) the Independent Chair.
- (c) The persons named in the **Transitional Schedule** to this Constitution are appointed to the Board, in the positions and for the terms specified in the **Transitional Schedule**, immediately upon this Constitution coming into effect. Those persons will be taken to have been properly appointed in accordance with this Constitution. The terms of this Constitution relating to vacation of office will apply in relation to those persons and those appointments.
- (d) The persons specified in the **Transitional Schedule** as being nominated by the Largest Member and Second Largest Member will be deemed to have been nominated by those Members and appointed in accordance with this Constitution.
- (e) The Director With Consumer Experience role numbered 8 in the **Transitional Schedule** and the Director With Industry Experience role

numbered 4 in the **Transitional Schedule** will cease to exist after three years from this Constitution coming into effect.

- (f) Except as expressly stated in this **clause 25**, the terms of this Constitution apply to the persons and appointments listed in the **Transitional Schedule**.

Transitional Schedule

The persons named below are appointed to the Board, in the positions and for the terms specified below, immediately upon this Constitution coming into effect (see **clause 25**).

No.	Name	Type of Appointment	Term
1	Michael John Elsegood	Director With Industry Experience nominated by the Second Largest Member	12 months
2	Jules Patricia Scarlett	Director With Industry Experience nominated by the Largest Member	24 months
3	Iain Arthur Falshaw	Director With Industry Experience	36 months
4	Bradley James Kitschke	Director With Industry Experience	36 months
5	Christopher Phillip Dodds	Director With Consumer Experience	12 months
6	Paul James Harrison	Director With Consumer Experience	24 months
7	Catriona Elizabeth Lowe	Director With Consumer Experience	36 months
8	Teresa Margaret Corbin	Director With Consumer Experience	36 months
9	Jane Margaret Harvey	Independent Director with commercial governance experience	24 months
10	Philippa Judith Smith	Independent Director with not-for-profit governance experience	36 months
11	Patricia Mary Faulkner	Independent Chair	48 months

Annexure A

Telecommunications Industry Ombudsman Scheme Terms of Reference

TELECOMMUNICATIONS INDUSTRY OMBUDSMAN

TERMS OF REFERENCE

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TELECOMMUNICATIONS INDUSTRY OMBUDSMAN TERMS OF REFERENCE

A: INTRODUCTION

1 THE TIO SCHEME

- 1.1 The Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth) (“the Act”) contains the following requirements, (these requirements were previously stated in the Telecommunications Act 1997 (Cth)):
- (a) Each carrier and each eligible carriage service provider must, in association with other carriers and other eligible carriage service providers, enter into a scheme providing for a Telecommunications Industry Ombudsman.
 - (b) The scheme is to be known as the *Telecommunications Industry Ombudsman scheme*.
 - (c) The scheme must provide for the Telecommunications Industry Ombudsman to:
 - (i) investigate; and
 - (ii) make determinations relating to; and
 - (iii) give directions relating to;complaints about carriage services by end-users of those services.
- 1.2
- (a) The Act also provides for the Ombudsman (with his or her consent) to issue an evidentiary certificate stating that a carriage service provider has contravened a “Customer Service Guarantee” performance standard and setting out particulars of the contravention.
 - (b) In addition, the Telecommunications Act 1997 provides that the Ombudsman (with his or her consent) may have functions and powers conferred on him or her by industry codes and industry standards.
- 1.3 The Telecommunications Industry Ombudsman scheme (the “TIO scheme”) has been established by means of a company limited by guarantee, the **Telecommunications Industry Ombudsman Limited** (“TIO Limited”). The Constitution of the company establishes:
- a Board of Directors, composed of equal numbers of directors with industry experience and directors with consumer experience, together with two independent directors and an independent chair, and vested with responsibility for managing the business, affairs and property of TIO Limited in accordance with the Constitution and these Terms of Reference; and
 - an Ombudsman with the functions set out in these Terms of Reference, which include:
 - receiving, investigating and facilitating the resolution of complaints;
 - managing the TIO scheme’s day to day operations; and

- exercising such other powers and functions as may be conferred by statute or delegated by the Board.

An Acting Telecommunications Industry Ombudsman (“Acting Ombudsman”) and a Deputy Telecommunications Industry Ombudsman (“Deputy Ombudsman”) are also provided for.

2 MEMBERS

- 2.1 All carriers and eligible carriage service providers, are required to be members of the TIO scheme.
- 2.2 Membership of the TIO scheme is open to all carriers and carriage service providers and any other entity otherwise considered appropriate by the Board (subject to the Constitution of TIO Limited).
- 2.3 An entity becomes a member of the TIO scheme by becoming a member of TIO Limited in accordance with the Constitution of TIO Limited.
- 2.4 The Ombudsman shall (as required by the Act) maintain a Register of the names of the members of the TIO scheme and ensure that the Register is open for inspection, at all reasonable times, by members of the public. In allowing a person to inspect the Register, the Ombudsman shall first provide to the person a statement of the limitations imposed by the Corporations Act 2001 (Cth) on the use to which the information contained in the Register may be put.

2A PRINCIPLES

- 2A.1 The TIO scheme is committed to the Principles of Accessibility, Independence, Fairness, Accountability, Efficiency and Effectiveness as set out in the Benchmarks for Industry Based Customer Dispute Resolution Schemes (Department of Industry Science and Tourism, August 1997).
- 2A.2 In exercising the Ombudsman’s functions and jurisdiction and in developing procedures for the resolution of complaints, the Ombudsman shall have regard to the benchmarks as well as to the law, good industry practice and what is fair and reasonable in all the circumstances.

B: TELECOMMUNICATIONS INDUSTRY OMBUDSMAN

3 FUNCTIONS OF THE OMBUDSMAN

- 3.1 The functions of the Ombudsman are:
 - (a) to investigate, make determinations relating to, and give directions relating to, complaints about a. carriage services; and b. billing by members for the supply of content services provided by means of a carriage service by end-users of those services.
 - (b) to exercise any functions conferred on the Ombudsman by an industry code or

industry standard in relation to any member of TIO Limited including in the case of an industry code where the member has undertaken to comply with it or, if the code has been registered by the Australian Communications and Media Authority, has been directed by the Australian Communications and Media Authority to comply with the Code; and

- (c) to exercise any other functions conferred on the Ombudsman under any legislation, including for example the power to issue a written certificate stating that a specified carriage service provider has contravened a “Customer Service Guarantee” standard set by the Australian Communications and Media Authority and setting out particulars of the contravention, or the power to approve guidelines for the interception of telecommunications by a carrier;
- (d) to investigate, make determinations relating to, and give directions relating to, complaints by owners or occupiers of land:
 - (i) in respect of which a carrier has exercised its statutory powers, other than complaints in relation to the policy or commercial decision of a carrier to exercise its statutory rights in relation to that particular land; or
 - (ii) arising from the use of the land by a carrier, under a contract between that carrier and the owner or occupier of that land.

3.1A By way of example, the Ombudsman’s functions include to receive, to investigate and to facilitate the resolution of:

- (a) complaints about billing, or the manner of charging, for the supply of carriage services;
- (b) complaints as to the provision or supply of (or the failure to provide or supply) carriage services by a member, other than complaints in relation to the general telecommunications policy or commercial practices of a member;
- (c) such other complaints as may, by agreement with the complainant, be referred to the Ombudsman by a member.

3.2 (a) Complaints may be made to the Ombudsman by end-users of carriage services and by persons directly affected by the provision or supply of (or the failure to provide or supply) such services by TIO scheme members.

(b) Complaints may not be made by an intermediate user of a carriage service except where the complaint relates to a carriage service provided or supplied for the complainant’s own use.

(c) Complaints may be made to the Ombudsman on behalf of a complainant by an authorised representative of the complainant.

(d) The focus of the TIO scheme is on individual complaints which may be oral or in writing.

(e) A complaint must have arisen from events which became known to the complainant less than two (2) years prior to the complaint. However, the Ombudsman has a discretion in relation to a complaint which has arisen from events which became known to the complainant between two (2) and six (6) years prior to the complaint.

3.3 The Ombudsman may investigate, make determinations relating to and give directions relating to a complaint about all or any part of a "bundle" of products and services that includes carriage services and equipment, where one or more elements of that bundle are provided by a non- member and another one or more elements are provided by a member.

Notwithstanding paragraph 4.3(a), under this paragraph 3.3 the Ombudsman may handle complaints involving customer premises equipment where matters relating to the equipment (e.g. a defect in or failure to supply the equipment) affect the supply of carriage services. The complaint will be handled as a complaint against the member and the member may be deemed by the Ombudsman, where the Ombudsman considers it fair and reasonable to do so, to be responsible not only for its own acts and omissions but also for any relevant acts or omissions of the non-member related to the provision of the bundle or any element of the bundle.

In considering whether the member ought be responsible for the acts or omissions of the non- member, the Ombudsman must take into account matters including the following (where known by the Ombudsman):

- (a) whether the non-member is a related entity of the member within the meaning of the Corporations Act 2001 (Cth);
- (b) whether the non-member has a contract, arrangement or understanding with the member which the Ombudsman considers relevant to the subject matter of the complaint;
- (c) whether the member was aware, or ought reasonably have been aware, that its carriage services were being promoted as part of a bundle, either generally or in the specific circumstances of the complaint;
- (d) the extent to which the bundle including carriage services was marketed or described (either before, during or after any part of it was supplied) as relating to the carriage services; and
- (e) whether, in the Ombudsman's opinion, the member has complied with paragraph 5.1(c) and otherwise provided all requested information relevant to the complaint.

4 JURISDICTION OF THE OMBUDSMAN

4.1 For further guidance, the functions of the Ombudsman include, but are not limited to, investigating and facilitating the resolution of complaints as to the following:

- the standard telephone service;
- the provision of access to the Internet or another public electronic communications network (including complaints relating to billing for such a service);
- public mobile telecommunications services;
- operator services;

- directory assistance;
- fault reporting and repair and maintenance services;
- printed and electronic white pages;
- billing not in accordance with a tariff or terms and conditions which are, under Part 23 of the Telecommunications Act 1997, applicable;
- failure to supply a good or service in accordance with a tariff or terms and conditions which are, under Part 23 of the Telecommunications Act 1997, applicable;
- any:
 - (i) interference with the privacy of an individual in terms of non-compliance with (as applicable) the Information Privacy Principles, the National Privacy Principles, the Australian Privacy Principles or any approved privacy code binding on the relevant member, under the **Privacy Act** 1988 (Cth); or
 - (ii) breach of any industry specific privacy standards which may apply from time to time;
- an end-user, or an intended end-user, of a carriage service being unable to access that carriage service as a result of a failure to supply or a defect in any mobile phone handset, or other equipment designed to facilitate access to a carriage service, where that handset or other equipment is, or is to be, supplied by a member who supplies or has agreed to supply the carriage service, a related entity of such a member, or an entity which has a contractual relationship with such a member or with a related entity of such a member under which that other entity solicits, or received applications for, persons to become end-users of the carriage service; and
- the recovery of debts owed or allegedly owed by customers whether by members, their agents or factors.

4.2 Also for guidance, the functions of the Ombudsman in relation to complaints from owners or occupiers of land include, but are not limited to, investigating and facilitating the resolution of complaints as to the following:

- failure by a carrier to give notice of its intention to exercise its statutory rights;
- failure to take all reasonable steps to cause as little detriment, inconvenience and damage as reasonably practicable, in accordance with any applicable statutory or contractual requirement; and
- inadequate compensation where compensation is required by any applicable statute or contract to be paid.

4.3 The functions of the Ombudsman do not extend to complaints relating to:

- (a) the provision or supply of customer premises equipment, other than the non-switching handset that terminates the standard telephone service and auxiliary goods supplied under a tariff or in accordance with terms and conditions applicable under Part 23 of the Telecommunications Act 1997;

- (b) cabling beyond the network termination point, other than cabling from the network termination point to the first telephone and, in the case of residential carriage services, cabling to other extensions of that service within the residential premises;
- (c) business directories, including but not limited to "Yellow Pages";
- (d) commercial activities which do not include the provision of carriage services;
- (e) the setting of tariffs;
- (f) the 000 emergency service;
- (g) Universal Service Obligation policy matters;
- (h) matters of telecommunications policy;
- (i) matters which may involve anti-competitive behaviour or restrictive practices potentially in breach of the **Competition and Consumer Act 2010 (Cth)**;
- (j) matters which are specifically under consideration by the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or any court or tribunal, or which have been considered by any of those bodies previously;
- (k) the content of a content service (as defined in the Telecommunications Act 1997); and
- (l) an alleged breach of an industry code or industry standard by a member of TIO Limited, where the complaint is made by a member of TIO Limited or another industry participant.

5 PROCEDURES OF THE OMBUDSMAN

5.1 The Ombudsman, in handling complaints, must pursue the objective of "fair, just, economical, informal and expeditious" resolution. In accordance with clause 7(b), the Ombudsman is responsible for developing procedures which best achieve this objective. However, these procedures must include the following:

- (a) The Ombudsman on receiving a complaint, will verify with the complainant whether the complainant has given the member concerned an opportunity to consider the complaint;
- (b) The Ombudsman may investigate the complaint in detail only after the Ombudsman has verified with the complainant that the complainant has given the member concerned an opportunity to consider the complaint, and after the member has been notified that the Ombudsman intends to investigate the complaint in detail;
- (c) Within the time reasonably specified by the Ombudsman (which shall be no more than twenty-eight (28) days after receiving notification that the Ombudsman intends investigating a complainant in detail), the member concerned shall (except to the extent the Ombudsman may defer or waive this

requirement upon the member informing the Ombudsman that it has not in fact had an opportunity to consider the complaint because the complainant had not raised the complaint with the member) provide to the Ombudsman all information and documentation relevant to the complaint other than the confidential information of a third party, who despite the reasonable efforts of the member, has refused to consent to disclosure of that information to the Ombudsman;

- (d) With respect to all information concerning or relating to a complaint, the Ombudsman must act in accordance with the **Privacy Act 1988**; and
- (e) In complying with any subpoena, the Ombudsman must notify the person who has provided the information which is the subject of the subpoena so that the person concerned is afforded the opportunity to appear in court to oppose production of the documents or the giving of evidence, as appropriate.

5A SYSTEMIC PROBLEM INVESTIGATIONS

5A.1 ‘Systemic Problem’ means a problem with or the failure of a system, process or practice of a member that causes detriment (that is not trivial) to a significant number or a class of end-users of a carriage service and which arises from a complaint that is within the jurisdiction of the Ombudsman by virtue of another provision of these Terms of Reference.

5A.2 In deciding whether to investigate a potential Systemic Problem the Ombudsman shall have regard to whether such an investigation would be ‘practical, fair, efficient and effective’. In accordance with clause 7(b), the Ombudsman is responsible for developing procedures which achieve those objectives. Such procedures must include the following:

- (a) The Ombudsman may not commence an investigation of a potential Systemic Problem more than twelve (12) months after receipt of the complaint out of which the potential Systemic Problem arises.
- (b) Where the Ombudsman is of the opinion that a complaint may raise a Systemic Problem, the Ombudsman shall:
 - (i) notify the relevant member of the complaint and of the Ombudsman’s opinion;
 - (ii) describe the nature of the potential Systemic Problem; and
 - (iii) invite the member to make submissions as to whether the complaint raises a Systemic Problem.
- (c) A member may only make a submission in accordance with sub-clause (b) (iii), within twenty-eight (28) days of the date of receipt of the notice by the member.
- (d) The Ombudsman may decide, having regard to any submission from the member in accordance with sub-clause (c), or, in the absence of any such submission, to:
 - (i) investigate the complaint as raising a potential Systemic Problem; or

- (ii) continue to investigate the complaint in accordance with clause 5.1 (as a complaint not raising a Systemic Problem); or
 - (iii) take no further action in relation to the complaint.
- (e) Where the Ombudsman decides to investigate a complaint as a potential Systemic Problem, the Ombudsman shall notify the member of that decision and of the reasons for that decision. The Ombudsman may then investigate the complaint as a potential Systemic Problem.
- (f) After receiving a notification under sub-clause (e), the member shall provide to the Ombudsman any additional information and documentation relevant to the investigation and resolution of the potential Systemic Problem, other than the confidential information of a third party who, despite the reasonable efforts of the member, has refused consent to disclosure of that information to the Ombudsman. These documents and this information must be provided within the timeframe reasonably specified by the Ombudsman.

5A.3 If the Ombudsman is investigating a complaint as a potential Systemic Problem, or attempting to resolve a complaint which the Ombudsman has concluded raises a Systemic Problem, the Ombudsman may defer the investigation of any other complaint (a “**deferred complaint**”) which relates to the same actual or potential Systemic Problem where the TIO:

- (i) has notified the member of the complaint, and
- (ii) notifies the complainant and the member of the deferral.

5A.4 (a) Where after completion of an investigation of a potential Systemic Problem, the Ombudsman concludes that a Systemic Problem exists, the Ombudsman shall notify the relevant member of:

- (i) that conclusion and of the reasons for that conclusion; and
- (ii) a recommended resolution of the Systemic Problem.

(b) Where after the completion of an investigation of a potential Systemic Problem the Ombudsman concludes that a Systemic Problem does not exist, the Ombudsman shall inform the relevant member of that conclusion and of the reasons for that conclusion.

(c) Where a member receives a notification under sub-clause (a), the member shall consult with the Ombudsman about the Ombudsman’s conclusion and recommended resolution.

(d) Where the Ombudsman and the member agree on a resolution, the member shall implement that resolution in the manner, and within the period, agreed.

- (e) Any recommended resolution under sub-clause (a) or resolution under sub-clause (d) may be applicable to:
 - (i) the complaint which has been investigated;
 - (ii) a complaint deferred under clause 5A.3; and/or
 - (iii) other customers;and may involve the same or different actions or outcomes for different complainants or customers.
- (f) Where:
 - (i) a resolution is not agreed; or
 - (ii) a member fails to implement a resolution agreed under sub-clause (d); or
 - (iii) the Ombudsman concludes that a Systemic Problem does not exist;the Ombudsman shall resolve the complaint giving rise to the potential Systemic Problem and any complaints deferred under clause 5A.3, in accordance with clauses 5.1 and 6.1.

5A.5 Where a resolution is not agreed or a member fails to implement a resolution agreed under subclause 4(d), the Ombudsman may refer the matter to the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or such other statutory authority or industry body as the Ombudsman considers appropriate. Where the Ombudsman refers a matter under this sub-clause the Ombudsman must notify the member.

5A.6 Clause 5.1 applies in relation to a complaint even if the complaint involves an actual or potential Systemic Problem.

6 POWERS OF THE OMBUDSMAN

6.1 Binding Decisions

After completion of an investigation and in the absence of a conciliated settlement of a complaint, the Ombudsman shall resolve a complaint:

- (a)
 - (i) by making a determination that the member the subject of investigation pay compensation to a complainant,
 - (ii) by directing a member to provide a carriage service,
 - (iii) by directing a member not impose or amend a charge in relation to a service,
 - (iv) by directing a member to provide specified operator services,
 - (v) by directing a member to include or omit an entry in any electronic or printed directory,

- (vi) by directing a member to supply goods or services the subject of the complaint or undertake any necessary corrective or other work to resolve the complaint,
- (vii) by directing a member to make an appropriate correction, deletion or addition to a record,
- (viii) by directing a member to attach to a record a statement provided by the complainant of a correction, deletion or addition sought by the complainant, and/or
- (ix) by directing a member to do, not to do, or to cease doing, an act,

provided that the total of such determinations or directions, and any interim directions under paragraph 6.1A, in relation to an individual complaint are not to exceed in value \$50,000; or

- (b) by dismissing the complaint.

All decisions by the Ombudsman under paragraph 6.1 shall be automatically binding upon members. However, the complainant may elect whether or not to accept the decision of the Ombudsman within twenty one (21) days of the Ombudsman's decision. If the complainant accepts the decision of the Ombudsman, the complainant shall fully release the member from all claims, actions etc in relation to the complaint. In the event that the complainant does not accept the decision of the Ombudsman, the complainant may pursue his or her remedies in any other forum the complainant may choose and the member is then fully released from the Ombudsman's decision.

6.1A Interim Directions - Credit Management

- (a) At any time prior to the resolution of a complaint, where the Ombudsman has requested a member to suspend credit management activity and the member has continued such activity, the Ombudsman may make interim directions directing the member to do, not to do, or to cease doing, any act that relates to credit management. For example, such interim directions might include directing a member:
 - (i) to restore the supply of a service that has been disconnected or suspended for credit management reasons;
 - (ii) to remove any default listing the member has taken steps to record; or
 - (iii) to otherwise cease pursuing (or not to pursue) its usual credit management processes.
- (b) All interim directions under this paragraph 6.1A shall be automatically binding on members:
 - (i) until the end of the period specified by the Ombudsman in the interim directions;

- (ii) until the interim directions are withdrawn or varied by the Ombudsman or the Ombudsman formally closes the complaint (for example when a complaint is settled by conciliation, withdrawn by the complainant, or resolved by the Ombudsman under paragraph 6.1); or
 - (iii) until 90 days following the date the Ombudsman makes the interim directions, whichever occurs sooner.
- (c) Before making any interim direction, the Ombudsman must consider the appropriateness of the interim direction given that any final resolution of the complaint may or may not favour the complainant.
- (d) If the Ombudsman considers it appropriate, with effect from the time interim directions cease to bind a member (e.g. because 90 days has elapsed since the making of the interim directions), the Ombudsman may issue further interim directions to the relevant member under paragraph 6.1A(a) in the same or different terms.

6.2 Recommendations

After completion of an investigation and the unsuccessful conciliation of a complaint, the Ombudsman may also make recommendations to a member in relation to any or all of those matters identified in paragraph 6.1 up to the total value of \$100,000 and a member shall be obliged to consider whether or not to give effect to any such recommendation provided that a decision not to give effect to any such recommendation shall not be the subject of further complaint to the Ombudsman from a complainant.

6.3 Reasons

The Ombudsman shall provide only such written reasons as give effect to any decision or recommendation under paragraph 6.1, interim direction under paragraph 6.1A, or recommendation under paragraph 6.2.

6.4 Arbitration

Where a complaint involves a total amount in excess of \$100,000, if the complainant and the member agree, the Ombudsman may, if he or she so agrees, exercise arbitration powers in respect of the complaint.

6.5 Evidentiary Certificates - Customer Service Guarantee

At any time during or following the investigation of a complaint, and notwithstanding anything else contained in these Terms of Reference, the Ombudsman may in his or her discretion (and if empowered to do so under the Act) issue a written certificate stating that a specified carriage service provider (as the term “carriage service provider” is defined in the Telecommunications Act 1997) has contravened a “Customer Service Guarantee” standard set by the Australian Communications and Media Authority and setting out particulars of the contravention.

6.6 Discretion not to Investigate

The Ombudsman has the discretionary power to decline to investigate a complaint or to decline to investigate a complaint further if in the opinion of the Ombudsman:

- (a) the complaint is frivolous or vexatious or was not made in good faith;
- (b) the complainant does not have a sufficient interest in the subject matter of the complaint;
- (c) an investigation, or further investigation, is not warranted; or
- (d) the complainant has refused to pay any or all undisputed charges, or such amount of charges as, in the opinion of the Ombudsman, is reasonable.

The Ombudsman may also decline to investigate a complaint, or decline to investigate a complaint further, where, under paragraph 6.7(b) for example, the complaint is more conveniently or effectively dealt with by the Australian Communications and Media Authority, the Australian Competition and Consumer Commission, the courts or any other body.

6.7 Referral of Complaints

- (a) At any time before a binding decision (other than any interim direction) is made by the Ombudsman, a member may notify the Ombudsman:
 - (i) that the member considers that a complaint has given rise to:
 - an issue of importance to the member's business, or
 - an issue involving an important or novel point of policy or law; and
 - (ii) that within ninety (90) days the participant or the complainant:
 - will be seeking advice from the Australian Communications and Media Authority, the Australian Competition and Consumer Commission, or another person or body, or
 - will be instituting legal proceedings; and
 - (iii) that, in the case of legal proceedings instituted by a member, the member will:
 - pay the complainant's costs and disbursements (to be taxed, if not agreed, on a solicitor and own client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the member (except by way of respondent's notice, cross appeal or other similar procedure), and
 - make interim payments on account of such costs if and to the extent that it appears reasonable to the member to do so; and
 - (iv) that the member will not take the action on which the complaint is founded pending resolution of the wider issue.

On receipt of such notice, the Ombudsman shall not proceed with the complaint unless:

- (i) the Ombudsman forms the opinion that any delay would jeopardise

a fair resolution of the complaint or would cause unreasonable hardship to the complainant; or

- (ii) the member, or the complainant, fails to seek advice from the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or another person or body or to institute legal proceedings within the time specified in the notice.

(b) Where, at any time after receipt of a complaint, the Ombudsman:

- (i) forms the opinion that the complaint could have been made by the complainant to the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or another body; and
- (ii) forms the opinion that the complaint could be more conveniently or effectively dealt with by the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or such other body; and
- (iii) obtains the consent of the complainant to refer the complaint to the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or such other body;

the Ombudsman may decide not to investigate the complaint, or not to investigate the complaint further, as the case may be.

If the Ombudsman so decides, the Ombudsman must:

- (i) refer the complaint to the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or such other body as appropriate;
- (ii) give written notice to the complainant and the member stating that the complaint has been so referred; and
- (iii) give to the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or such other body all information or documents that relate to the complaint and that are in the Ombudsman's possession or under the Ombudsman's control.

6.8 Restriction on Members Commencing Proceedings

Subject to paragraph 6.7(a), between the time when a member is notified of a complaint to the Ombudsman and the time when that complaint is settled, withdrawn or resolved or otherwise ceases being handled by the Ombudsman, the member complained against must not commence proceedings in any court, tribunal or alternative dispute resolution forum in relation to the subject matter of the complaint. However, the following exceptions apply:

- (a) If the Ombudsman does not handle the complaint within a reasonable period of time, the member may give written notice to the Ombudsman that if the complaint is not settled, withdrawn or resolved (or the Ombudsman does not otherwise cease handling it) within 60 days of the date the Ombudsman received the notice, the member intends to commence such proceedings. If the complaint is not settled, withdrawn or resolved (or the Ombudsman does not otherwise cease handling it)

within that period, the member may commence such proceedings and must promptly notify the Ombudsman of the commencement of the proceedings.

- (b) The member may commence such proceedings (including, interlocutory proceedings) where necessary in order to prevent any ongoing, or imminent and significant risk of, physical injury to persons or damage to or interference with equipment or infrastructure.
- (c) The member may commence court proceedings in which the principal issue is whether the Ombudsman has jurisdiction to handle the complaint or the interpretation of these Terms of Reference.

This paragraph 6.8 does not prevent the member reporting a matter to any public agency responsible for the conduct of criminal investigations, enquiries or prosecutions (e.g. a police force) or becoming involved in criminal investigations, enquiries or prosecutions instigated by such an agency.

6.9 Ombudsman to Have Regard to Laws

In exercising the powers of determination, direction (including interim direction) or recommendation under paragraphs 6.1, 6.1A or 6.2, the Ombudsman shall not make a determination, direction or recommendation which, when given effect, would involve a member contravening any law of the Commonwealth or of a State or Territory.

C: MANAGING THE TIO SCHEME

7 THE OMBUDSMAN'S RESPONSIBILITIES

The Ombudsman is responsible for:

- (a) receiving, investigating and facilitating the resolution of complaints;
- (b) making policies and procedures for:
 - (i) handling complaints and Systemic Problems – this responsibility is delegated by the Board to the Ombudsman by these Terms of Reference; and
 - (ii) other matters, to the extent the Board delegates this responsibility to the Ombudsman by resolution of the Board,
subject to the following requirements:
 - (iii) before making a policy or procedure the Ombudsman must discuss it with the Board and consider any comments the Board makes; and
 - (iv) any policy or procedure must be consistent with the Constitution, these Terms of Reference and any goals and overall strategy set by the Board for TIO Limited and the TIO scheme;
- (c) managing the TIO scheme's day-to-day operations, including by:

- (i) liaising and working with industry bodies, regulators and other government authorities;
- (ii) appointing and terminating the appointment of staff;
- (iii) in consultation with the Board, appointing and terminating the appointment of a Deputy Ombudsman (but not an Acting Ombudsman);
- (iv) making sure the TIO scheme has an up-to-date list of members available to the public in accordance with clause 2.4;
- (v) keeping data about the complaints handled and requests for information received by the TIO scheme;
- (vi) giving confidential reports to members and the Board as the Ombudsman thinks appropriate;
- (vii) reporting to a member where, in the Ombudsman's opinion, the general telecommunications policy or commercial practices of a member:
 - (A) have contributed to a complaint;
 - (B) have been identified as the source of a number of similar complaints;
 - (C) have impeded the investigation or handling of a particular complaint; or
 - (D) operate in such a manner that the Ombudsman considers that the policy or practice should be referred to the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or another body; and
- (viii) publishing the Ombudsman's determinations, directions (including interim directions) and recommendations provided that the anonymity of the complainant and the TIO Limited member is preserved;
- (d) managing the TIO scheme's finances (subject to the Board's oversight), including by:
 - (i) controlling (subject to the Board's oversight) and monitoring the TIO scheme's finances;
 - (ii) giving the Board regular reports about the TIO scheme's finances; and
 - (iii) ensuring that spending is efficient and kept within the approved budget; and
- (e) managing the overall performance of the TIO scheme, including by:
 - (i) meeting any goals set by the Board;
 - (ii) in consultation with the Board, preparing TIO Limited's annual report;

- (iii) attending meetings of the Board and Board committees when invited by the Board or the committee (but the Ombudsman cannot vote in these meetings);
- (iv) in consultation with the Board, promoting the TIO scheme;
- (v) making general statements in public about the TIO scheme; and
- (vi) making recommendations to the Board about reviews of the TIO scheme.

8 THE OMBUDSMAN CAN DELEGATE RESPONSIBILITIES

Only the Ombudsman (or the Deputy Ombudsman, if delegated by the Ombudsman) can do the following things:

- (a) make binding decisions under paragraph 6.1 or interim directions under paragraph 6.1A;
- (b) make a recommendation under paragraph 6.2; and
- (c) arbitrate a complaint.

The Ombudsman can delegate any other responsibility to any TIO Limited staff. This includes any responsibility under a law, an industry code or an industry standard unless the law, industry code or industry standard prevents delegation of the responsibility.

9 THE BOARD'S RESPONSIBILITIES

The Board is responsible for:

- (a) managing the business, affairs and property of TIO Limited;
- (b) monitoring the overall performance and results of TIO Limited and the TIO scheme;
- (c) setting goals and the overall strategy for TIO Limited and the TIO scheme;
- (d) managing TIO Limited's finances, including by;
 - (i) overseeing the Ombudsman's management of spending;
 - (ii) overseeing TIO Limited's capital management, funding and cashflows, including ensuring sufficient funding for the TIO scheme; and
 - (iii) setting financial delegations;
- (e) overseeing TIO Limited's systems for risk management, auditing and legal compliance;
- (f) appointing and terminating the appointment of the Ombudsman;
- (g) appointing and terminating the appointment of any Acting Ombudsman;

- (h) making policies and procedures for TIO Limited and the TIO scheme, subject to any delegation of this responsibility to the Ombudsman under clause 7(b);
- (i) providing advice to the Ombudsman; and
- (j) maintaining the Ombudsman's independence.

10 CHANGING THESE TERMS OF REFERENCE

- 10.1 Every 12 months the Ombudsman will consider whether the financial limits on the Ombudsman's powers should be changed.
- 10.2 The Ombudsman can suggest a change to these Terms of Reference to the Board at any time. The Board can also make its own suggestion for a change to these Terms of Reference at any time. The Ombudsman and the Board will discuss any suggested change.
- 10.3 The Board will decide whether to make the suggested change. Before making the change, the Board must inform the Federal government ministers in charge of communications and consumer affairs policy about the proposed change and consider any comments they make. Any decision by the Board to change these Terms of Reference can only be made by special resolution of the Board. A special resolution of the Board means a resolution of the Board with a majority of at least 75% of such directors as, being entitled to do so, vote in person (or by their alternate) at the meeting that considers the resolution.