

cameron. ralph. khoury

Expert Report

Prepared by *cameron. ralph. khoury* for New Zealand Commerce Commission for the purposes of its Review of the Telecommunications Dispute Resolution Scheme (TDRS)

August 2021

Contents

| | | |
|----|---|----|
| 1. | Introduction | 3 |
| 2. | Background | 6 |
| 3. | Executive summary | 8 |
| 4. | Awareness | 9 |
| 5. | Position Statements and other TDRS guidance | 19 |
| 6. | Systemic issues | 24 |
| 7. | Complaints handling process | 31 |
| 8. | Governance | 49 |
| 9. | Jurisdiction | 58 |

1. Introduction

1. The Telecommunications Dispute Resolution Scheme (TDRS) is New Zealand's main dispute resolution service for consumers who have disputes with their telecommunications service providers about mobile, internet and landline services. It is also the dispute resolution service for disputes relating to the 111 Contact Code and Copper Withdrawal Code. TDRS operations are governed primarily by the New Zealand Telecommunications Forum (TCF) Customer Complaints Code¹ and Terms of Reference (ToR). FairWay Resolution Limited operates the TDRS as Scheme Agent.
2. The Commerce Commission (Commission) is New Zealand's competition and utility regulator. In 2018, its responsibilities were extended to include the review of each telecommunication industry dispute resolution scheme at least once every 3 years². The Commission is required to provide a report of the review to the scheme provider setting out any recommendations for improving the scheme and when they should be implemented.
3. The Telecommunications Act 2001 includes a list of matters that the Commission may, without limitation, consider when undertaking a review. These include:
 - a) The effectiveness of the scheme in resolving complaints by consumers against service providers³
 - b) The adequacy of the scheme rules⁴
 - c) Whether the scheme rules comply with the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness⁵.
4. The Commission released an Issues Paper on 23 April 2021 setting out a non-exhaustive list of matters the Commission proposed to consider in the review. This was informed by written submissions received in response to an open letter by the Commission on 29 October 2020 *Improving Retail Service Quality for Consumers* inviting stakeholders' views about the TDRS.
5. The Commission has appointed cameron. ralph. khoury (CRK), an Australian-based consultancy with particular expertise in external dispute resolution, to assist the Commission with the conduct of the review. CRK were asked to:
 - a) Conduct stakeholder consultation sessions for the Commission
 - b) Provide analysis of review-related information obtained by the Commission
 - c) Prepare an expert report that the Commission may draw upon.

¹ Version endorsed in March 2016 with numbering errors fixed in July 2021

² Telecommunications Act 2001 s246(1)

³ Telecommunications Act 2001 s246(2)(d)

⁴ Telecommunications Act 2001 s246(2)(e)

⁵ Telecommunications Act 2001 s246(2)(f)

6. Our tasks have included:
 - a) Review of 12 written submissions to the Commission in response to the Commission's open letter
 - b) Review of documents and data provided by FairWay Resolution Limited (FairWay) as Scheme Agent, the TDRS Council and the TCF
 - c) Review of 30 closed TDRS cases
 - d) Telephone interview of 15 customers who have recently used the TDRS
 - e) Meetings with stakeholders (TDRS members, internet service provider associations, consumer organisations and Ministry of Business, Innovation and Employment (MBIE) representatives)
 - f) Meeting with the TDRS Council

Structure of report and terminology

7. This report is structured as follows:
 - a) Chapter 2 provides background information about the TDRS and the Commission's review
 - b) Chapter 3 is an executive summary
 - c) Chapters 4 to 9 set out our findings using the structure of the Commission Issues Paper.
8. This report uses the following terms:
 - a) *Adjudicator* is a person whose TDRS role it is to consider requests for adjudication and provide final determinations⁶
 - b) *Complaints Code* is the Customer Complaints Code (current version endorsed in March 2016 with numbering errors fixed in July 2021) developed by the TCF
 - c) *Council* is the advisory body set up under the TDRS Terms of Reference to govern the TDRS
 - d) *EDR* (external dispute resolution) is a generic term for dispute resolution that takes place via an ombudsman scheme or other complaint handling organisation that is external to the organisation that is the subject of the dispute
 - e) An *enquiry* is an early stage complaint raised by a consumer with the TDRS that has been referred by the TDRS to the RSM to provide the RSM with a chance to resolve it. If not resolved, the matter may proceed to the TDRS's formal complaint stage at which point it becomes classified as a complaint

⁶ See definition in Companies Code clause 3

- f) *RSMs* are retail telecommunication services providers who have executed a Deed Poll agreeing to be bound by the terms of the TDRS
- g) *Scheme Agent* is the organisation contracted by the TCF to operate the TDRS (FairWay Resolution Limited is the current contracted organisation)
- h) *Scheme Members* are RSMs and WSMs
- i) *TCF* is the New Zealand Telecommunications Forum Inc
- j) *ToR* are the Terms of Reference that set out how the TDRS operates
- k) *WSMs* are wholesale telecommunication services providers who have executed a Deed Poll agreeing to be bound by the ToR and the Complaints Code

2. Background

Context

9. The TDRS was created in 2007 by the TCF, an industry body with a membership of 21 telecommunications providers.
10. All TCF members must be TDRS members. Non-TCF members may also be members. The TDRS currently comprises 19 RSMs and 5 WSMs.
11. TDRS complaints and enquiries can be about “any goods, services, equipment and facilities that enable or facilitate telecommunication”⁷ and so include voice services (mobile and landline services) and broadband/ internet services. Matters must be initiated by an end user customer⁸, either a residential customer or a small business customer⁹.
12. The number of customers who have accessed the TDRS grew by close to 70% in the five years to June 2020, an average growth of approximately 14% per annum.

Figure 1: Total complaint and enquiry contacts with the TDRS per year



Source: Telecommunications Dispute Resolution Annual Report 1 July 2019 – 30 June 2020

13. In the year to 30 June 2020, 27 complaints were resolved by adjudicator determination (approx 1% of the 2,752 complaints and enquiries resolved or closed by the TDRS that year)¹⁰.
14. More recently there has been a drop in complaints. In the year to 30 June 2021, there were 1,005 complaints and enquiries received¹¹, a drop of 36% from the same period in 2019/2020.

⁷ Complaints Code clause 3 definition of “Telecommunications Services”

⁸ Complaints Code clause 3 definition of “Customer”

⁹ Complaints Code clause 18.1.17 excludes complaints relating to a Corporate Customer. Clause 3 defines this term as a business or other organisation with a) at least 20 full time or equivalent employees, or b) less employees if the Scheme Agent considers that the business or other organisation’s size, structure or nature of business makes it analogous to a business with at least 20 full time or equivalent employees.

¹⁰ Telecommunications Dispute Resolution Annual Report 1 July 2019 – 30 June 2020 p.10

¹¹ Telecommunications Dispute Resolution Biannual Report July – December 2020 p.4.

In its February 2021 report to the TCF, the Council suggested that this could be due to the impacts of the pandemic.

The Review

15. The Commission's Issues Paper sets out the matters it intends to consider in its first review of the TDRS. These are:
 - a) Awareness
 - b) Position statements
 - c) Systemic issues
 - d) Complaints handling process
 - e) Jurisdiction and Membership
 - f) Governance
16. The Issues Paper refers to the NZ Government Centre for Dispute Resolution best practice dispute resolution framework (MBIE Framework)¹². This identifies standards and capabilities required to meet the principles of user-focused and accessible, independent and fair, efficient, effective and accountable. The MBIE Framework recognises that there is a maturity journey for schemes, with stages described as 'developing, advancing, confident and leader'. This report draws upon those standards and capabilities, where relevant, and those maturity descriptors.
17. The Issues Paper also referred to the Australian Government developed *Benchmarks for Industry-based Customer Dispute Resolution Schemes* and the supporting *Key Practices for Industry-based Customer Dispute Resolution*. The Benchmarks are the same as the NZ Telecommunications Act 2001 section 246(2)(f) principles. Accordingly, this report draws upon these documents as descriptions of good practice.
18. In preparing this report for the Commission, we have also drawn upon our experience as reviewers of other EDR schemes located in Australia, New Zealand, Canada, Malaysia and United States of America and in particular as reviewers of the Australian Telecommunications Industry Ombudsman (TIO) and Canadian Commission for Complaints to Telecom-Television Services (CCTS). We recognise that neither the TIO nor the CCTS are completely comparable with the TDRS. They operate in different marketplaces, within different regulatory and consumer protection frameworks and with differing scopes. That said, appropriate comparisons can be drawn and we think that there is much to learn from them.

¹² <https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/best-practice-guidance-on-dispute-resolution/assessing-a-dispute-resolution-scheme>.

3. Executive summary

19. We found that the TDRS has the basic building blocks in place that an EDR scheme needs to meet the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness.
 - a) The TDRS' processes are for the most part clear and well established. A particular strength is the productive approach that Scheme Members seem to take where TDRS refers an enquiry to them for a final chance at resolution. 98% of TDRS enquiries are resolved through this process, often within 10 working days from the customer accessing TDRS. The result is that many customers, who access the TDRS, experience timely and satisfactory complaints resolution.
 - b) Although general awareness of the TDRS is low and TDRS enquiry numbers are below what would be expected, the TCF and TDRS are to be commended for committing this financial year to a program of marketing initiatives to raise its profile in the New Zealand community.
20. There are, however, two major impediments to the progression of the TDRS along the maturity journey for EDR schemes.
21. First, the Complaints Code imposes many limitations. It creates insufficient obligations on Scheme Members to make their customers aware of the TDRS. It contains a long list of exclusions to the complaints that the TDRS is able to consider, including an unnecessarily short time period within which the scheme can be accessed. The Complaints Code unduly restricts accessibility to the TDRS through its deadlock requirements and is overly restrictive of the amount of compensation the TDRS can provide. The Complaints Code also fails to confer sufficient powers on the TDRS to address systemic issues.
22. Secondly, the accountability framework for the Scheme Agent is fragmented and weak, with the TCF controlling the purse strings and the Complaints Code, but not driving continuous improvement and the Council disempowered with advisory only status and voting rules that skew against innovation.
23. A stronger enabling environment and an effective governance framework are the two critical underpinnings that would support the TDRS to address our other findings and position the TDRS to enhance awareness, to build stronger partnerships with consumer organisations, to develop better TDRS guidance material, to advance TDRS complaint resolution processes and to be more proactive and effective in addressing systemic issues.

4. Awareness

Background

24. A universal expectation of EDR services, is that of customer awareness – ie. that customers are made aware that they may have recourse to an independent mediator or arbiter if they are not satisfied with their provider’s response to a complaint. Both MBIE’s best practice guidance and the Australian guidance include raising awareness under the accessibility principle.¹³
25. It is common in the world of EDR for customer awareness to be something of a challenge. Thankfully, in most circumstances in advanced economies, customers obtain products and services without problem, a very small number have cause to complain and, of those, the vast majority have their complaint dealt with satisfactorily by their provider. A very small proportion of customers are not satisfied with the response from their provider and need further assistance. For most customers, a complaint that must go to an EDR scheme is an infrequent occurrence at most.
26. To maintain continuous customer awareness of multiple ombudsman or disputes schemes for the rare times when they are needed is an unrealistic expectation. As a consequence, all EDR schemes rely on three channels for customer awareness – in the following order of importance:
 - a) Advice to the customer from the scheme member
Obligations for the scheme member to inform the customer of the availability of the EDR scheme at appropriate points in the sale or transaction and also in the process of their own internal complaint handling.
 - b) Advice and referral
Ensuring that common points of advice or reference in the community, such as legal firms, government agencies, consumer representatives, community legal aid bodies, welfare agencies, charities and community groups are aware of the EDR scheme and its scope and powers and how to put customers in contact with the scheme.
 - c) Community awareness
The final channel is general awareness in the community. The aim here is to achieve sufficient numbers of people with some awareness of the existence of the scheme to facilitate advice amongst family, friends, social networks. This awareness can be as limited as knowing that there are a range of EDR services in the community and to suggest a search for an appropriate one.

¹³ MBIE Framework Standard 2.1, Australian Key Practices for Industry-based Customer Dispute Resolution para 1.1, 1.2, 1.3 and 1.4

TDRS requirements

27. The Complaints Code places an obligation on RSMs to raise awareness of the TDRS. It states that *“good awareness of the TDRS is recognised as an important part of providing a commitment to the Scheme and its principles”*¹⁴.
28. The ToR obliges the Scheme Agent to undertake promotion of the scheme in accordance with the approved business plan.¹⁵ Likewise the Services Agreement between the TCF and the Scheme Agent makes the Scheme Agent responsible for promotion of the TDRS *“with the aim of improving awareness of the TDRS”*¹⁶.
29. The Council is responsible for monitoring the response to TDRS promotional activities¹⁷. The Services Agreement between TCF and the Scheme Agent obliges the Scheme Agent to account to the Council quarterly on the expenditure of the marketing and promotion budget¹⁸.

Awareness levels

30. Consumer Protection’s New Zealand Consumer Survey 2020¹⁹ found that, as for most New Zealand dispute resolution services, general public awareness of the TDRS has declined rather than increased in recent years. While it is not entirely clear to us what the reasons for this are, it is a concern.

¹⁴ Clause 5.3.

¹⁵ ToR clause 14.3(e)

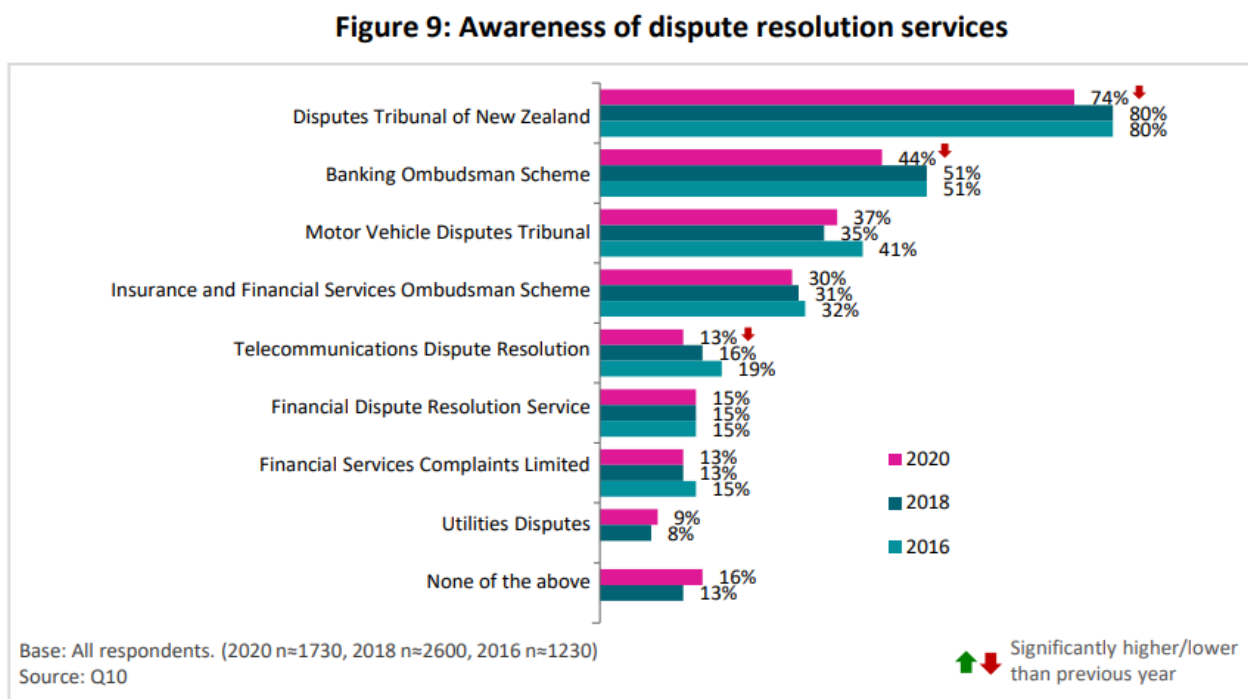
¹⁶ Clause 3.1

¹⁷ TDRS TOR clause 6.1(e)

¹⁸ Clause 5.2

¹⁹ p.18

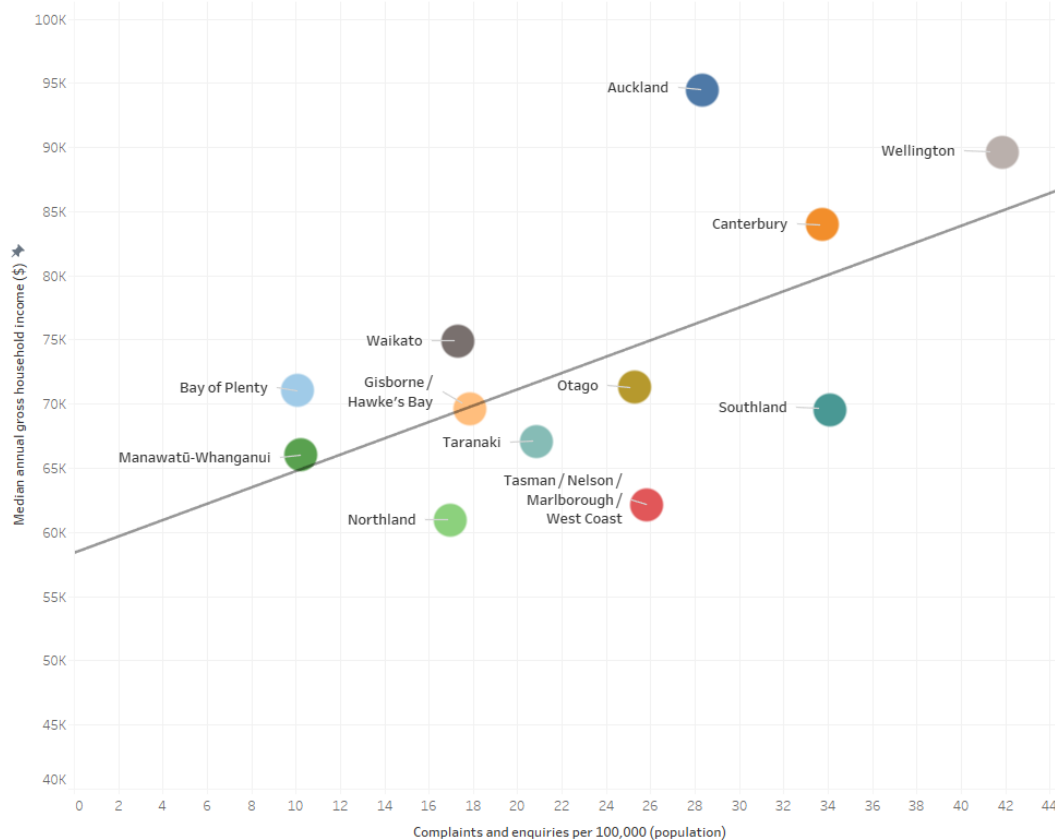
Figure 2: MBIE, Consumer Protection Team, New Zealand Consumer Survey 2020 – awareness of dispute resolution services



31. The survey²⁰ identified the following groups as particularly likely to have low awareness of dispute resolution services:
 - a) Those currently studying (70%)
 - b) Asian New Zealanders (63%)
 - c) Those aged 18 to 36 years (60%)
 - d) Pacific consumers (56%)
 - e) Those who do not speak English as their main language (54%)
32. TDRS collects only limited demographic data. So we could not test whether the demographic groups set out in paragraph 31 are under-represented in the cohort of users of the TDRS.
33. The TDRS does, however, collect users' postcodes and this can be used to see what geographic regions are most accessing the TDRS. As the next figure shows, New Zealand geographical regions with the highest median annual household incomes are much more frequent users of the TDRS (up to 4 times) than the geographical regions with the lowest median annual household incomes.

²⁰ p.18

Figure 3: Enquiries and complaints per 100,000 population by median household income



Source: Commerce Commission analysis of TDRS supplied data for the period April 2020 to January 2021.

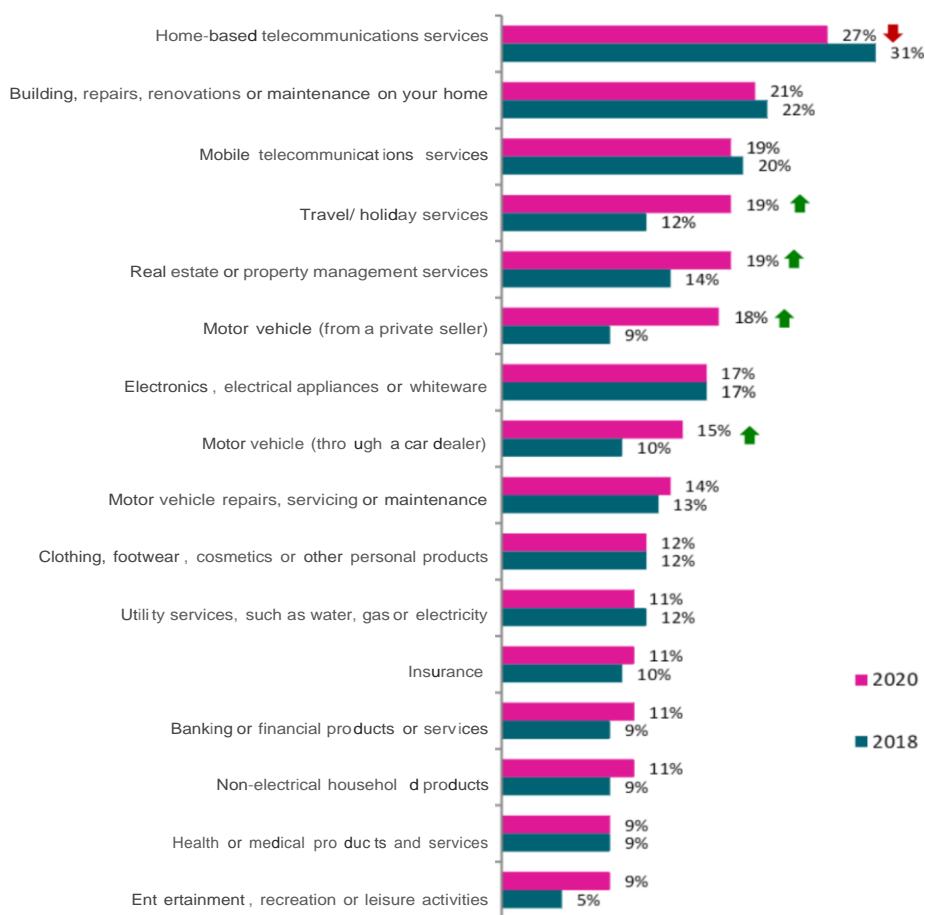
34. The Scheme Agent has also told us of their sense that most TDRS users are older white males. This realisation has driven a desire by the Scheme Agent to better understand the TDRS user population and the under-represented groups. There is much optimism at the Scheme Agent that the new TDRS case management system implemented earlier this year will progressively enable much more sophisticated leverage of TDRS data.
35. All of this - the Consumer Protection Consumer Survey, the Commerce Commission analysis and the Scheme Agents' anecdotal information - suggests the importance of more being done to ensure that all parts of the community are aware of the TDRS so that they can access the TDRS when the need arises.

Lower awareness, but more problems

36. At the same time as finding low awareness of the TDRS, the Consumer Protection - New Zealand Consumer Survey 2020 found that a high level of consumers who had purchased home-based or mobile telecommunication services in the past 2 years reported that they had experienced a problem. Consumer Protection's conclusion was that: "As in 2018, home-based telecommunication services had the highest problem incidence rate, although this has declined

from 2018²¹. Mobile telecommunication services constituted the third highest category and those who had experienced a problem were “more likely than average to say that [their problems] . . . are resolved but not to their satisfaction”.²² (The survey would have displayed consumer problems with telecommunications even more starkly if home-based telecommunications services and mobile telecommunications services had been aggregated in the survey as a single category, rather than as two categories.)

Figure 4: Consumer Protection New Zealand Consumer Survey 2020 – problem incidence by product or service



Base: Those who have purchased in each category. (2020 n 345-1458; 2018 n 2s0-2,2so)
Source: Q12

• • Significantly higher/lower than previous year

37. Utilities Disputes’ written submission to the Commission referred to the 2018 New Zealand Consumer Survey findings about telecommunication consumers’ experience of problems and made a particular point of the apparently low numbers of consumers accessing the TDRS. Their submission stated: “The numbers of complaints that the TDRS actively resolves appear to be on

²¹ MBIE, Consumer Protection Team, New Zealand Consumer Survey 2020 Summary Findings P. 3

²² P.50

the low side. Its Annual Report for 2019/20 shows it closed 98% or 2,752 of enquiries and complaints received often after just a single phone call to TDR. . . The Australian TIO, in its annual report for 2019/20, reports receiving 318,797 contacts of which 127,151 were complaints. These figures equate to 0.05% of NZ's population accessing TDR and 1.27% of Australia's population accessing TIO."

38. While the New Zealand and Australia per capita figures are dramatically different, with Australia's figures some 25 times higher, we have learned over the years that international comparisons must be approached with some caution. We also note that the UK and Canadian EDR schemes for telecommunications report per capita enquiry and complaint numbers that are much closer to the New Zealand experience of around 0.05%.
39. By way of another calibration, we compared the number of matters received per capita in 2019 by Utilities Disputes in New Zealand with the closest equivalent in Australia – the Energy and Water Ombudsman of Victoria (EWOV). In that comparison, our figuring showed Utilities Disputes with around 0.15% of the population accessing their services and EWOV with around 0.47% - a significant but much smaller difference at around 3 times the rate.
40. Stakeholders we interviewed from both consumer organisations and industry all recognised to some extent that awareness of the scheme was likely less than it should be, although they differed in their perspective of the impact of this on access to the scheme.
41. As set out in their written submissions to the Commission, consumer representatives expressed considerable concern. The Scheme Agent and Council members also advised us that they regard awareness as an important issue and that there had recently been agreement to significantly strengthen effort in this area.
42. In our interviews with Scheme Members and industry associations, we asked participants if they had an explanation or a hypothesis for the apparently low rate of enquiries and complaints coming to the TDRS. Interestingly, a number speculated that there may be a New Zealand culture of reluctance to complain, some claimed that it was because of the superior customer service and complaints performance of NZ telcos. All conceded, however, that there was low awareness of the TDRS and that awareness could be improved.

Finding 1.

It is clear that significantly greater consumer awareness of the scheme should be a key objective of any changes to the operation of the TDRS and that this would be supported by most Scheme Members and other stakeholders.

Scheme Members driving consumer awareness

43. Clause 5.3 of the Complaints Code describes how it envisages awareness should be promoted by RSMs: *"Raising awareness may be done in various ways such as via reference on a bill; direct mailouts; or in marketing material. As a minimum, each Scheme Member must include the TDR logo on its website; a link to the TDR website; and an explanation that before TDR can consider a complaint, the customer must have made it to the company first and given the Scheme*

Member a reasonable opportunity to fix it. Details about the scheme must be provided in an easy to find part of the Scheme Member's website...."

44. These expectations are expressed in a very general way, with discretion left to the RSM to make their own judgement about how to apply this requirement. (The Scheme Agent told us that the original provisions in the Code were even less prescriptive and that it had taken some effort to strengthen the provision and to strongly encourage all Scheme Members to have the TDRS telephone number to be included on bills.)
45. For some years, the TDRS had a program that publicly recognised RSMs that set best practice in raising awareness of the scheme. But we understand this program has been abandoned recently, largely over concerns that it was confusing for consumers and generally ineffective.
46. The result is that RSM performance in promoting the TDRS continues to be highly variable, a view confirmed by the Scheme Agent staff. Our checks in June 2021 found that some RSM websites had readily locatable and helpful information about the TDRS, but other RSM websites had only the TDRS name and logo with no explanation of the TDRS's role - and even the TDRS name and logo was hard to locate. We have been told by the Scheme Agent that the same variation applies to the provision of TDRS contact details on bills, with some very clear and others in the 'fine print'.
47. To improve RSM awareness raising, the Scheme Agent has told us, there have been discussions in the last few years about whether RSMs should include a message about the TDRS as part of the inbound telephone call greeting script for customers. Some RSMs have, however, expressed concerns about the practicality of this, including because the TDRS is not the only escalation avenue available to their dissatisfied customers. Despite this, TDRS's creative design expert proposed in September 2020:

"Work with members to encourage them to add a message about TDR on their on-hold messages eg 'If you have a complaint about our services, we do our very best to fix it with you. In nearly every case we can reach an agreement, but If we can't did you know you can go to TDR - Telecommunications Dispute Resolution?"²³

48. In addition to the general awareness obligations applicable to RSMs, the Complaints Code also obliges RSMs to provide information about the TDRS's "existence, procedures and scope" when a complaint reaches deadlock.²⁴ (This is all-the-more Important given that, as some RSMs told us, customer behaviour is changing, with fewer receiving or reading paper bills, reducing the effectiveness of bills as a forum for communication about the TDRS.)
49. Although the Complaints Code sets a deadline of 6 weeks for deadlock of a complaint²⁵, in practice, RSMs frequently take the approach that deadlock has not been reached if they are still communicating with the customer about the customer's problem. As our review of closed TDRS

²³ Telecommunications Dispute Resolution Awareness Campaign Ideas, September 2020, Mark Creative

²⁴ Complaints Code clause 23.4.6.

²⁵ Complaints Code clause 3 defines "Deadlock" as either a) where the customer is not satisfied with the RSM's final response and the customer has received a referral number or b) where more than 6 weeks has passed since the customer has complained to the RSM and no final response has been forthcoming

enquiries and complaints demonstrated (see paragraph 147), the result is that typically a matter that the customer has taken to the TDRS has not been viewed by the RSM as deadlocked – so the RSM has not provided information to the customer about the TDRS’s “existence, procedures and scope” (see paragraph 48). Rather the customer found out about the TDRS through other means, as in a case study provided by Age Concern New Zealand²⁶.

50. Whilst not mandatory under the Complaints Code, some RSMs provide dissatisfied customers with information about the TDRS before deadlock, that is, while the RSM is still working with the customer on a solution to their problem. These RSMs do this by including Information about the TDRS in the email signature footer of their customer service staff. By doing this, knowledge of the availability of the TDRS can inform customer decisions about their problem, for example, whether to accept a RSM-proposed solution or whether to access the TDRS if the RSM fails to progress resolution of their problem in a timely manner.
51. In conclusion, while there are challenges associated with RSM efforts to raise awareness of the TDRS, our experience elsewhere shows that they are not insurmountable. As previously noted, some RSMs already have very good website information about the TDRS and some provide TDRS information in customer service emails. Members of other EDR schemes are subject to much more specific requirements than are TDRS members. In particular, since 1 April 2021, New Zealand electricity retailers and distributors have operated under a detailed set of obligations to raise awareness of Utilities Disputes.²⁷

Finding 2.

The Complaints Code does not establish clear and effective obligations on RSMs to raise their customers’ awareness of the TDRS.

Advice and referral

52. The Scheme Agent advised us that there has been a concerted effort made to build the profile of the TDRS since 2017 and that this has included beginning outreach to different community groups – eg. consumer budget advisers, local community law organisations and others. This began as a Scheme Agent initiative without specific funding.
53. We were told that, as this became an expected part of the TDRS Business Plan, it was accepted by the Council and the TCF that a certain proportion of the budget approved each year was to be spent on outreach/promotion – ie. ‘ring-fenced’ for that purpose. The 2019/20 Business Plan was a turning point with a more comprehensive set of awareness strategies including production of some short promotional videos that could be shared with community groups and other referral points and a planned program of visitation to community groups such as Māori,

²⁶ Age Concern New Zealand submission on industry dispute resolution scheme (9 December 2020), p 4

²⁷ Eg NZ electricity retailers and distributors must include information about Utilities Disputes in the welcome message or as part of responding to a customer query: Electricity Authority, *Raising consumer awareness of regulated dispute resolution service and electricity plan comparison website, Guidelines*, 2 March 2021

Pacific peoples and rural communities at least once a quarter. Some of this activity had to be deferred due to the impact of the COVID-19 pandemic.

54. The 2020/21 Business Plan continued this effort with an amount of \$[]NZD set aside for marketing and promotion. Just before drafting of this Report a further budget of over \$[]NZD has been approved by the TCF for 2021/22 – a substantial boost, much of which will go to the third category of general community awareness.
55. While all of this effort is an admirable shift in commitment and seems to be quite professional, the feedback from some of the community groups, consumer groups and referral agencies that we spoke with suggests that the effort is well overdue. Consumer NZ and Citizens Advice Bureau written submissions to the Commission last year expressed concern about the lack of engagement by the TDRS with them.²⁸
56. Interviewed consumer organisations repeated this concern and contrasted the TDRS unfavourably with other industry EDR schemes which we were told are much more proactive in building consumer organisation awareness and providing them with brochures and fact sheets to distribute through their networks. Consumer organisations commented favourably on the Utility Disputes Limited Community Engagement Officer, dedicated to this work.
57. Consistent with these observations, we found that the TDRS's 2020/21 and 2021/22 Business Plans have not contained specific commitments to engagement with consumer organisations. (This can be contrasted with the quite specific commitments to engage with TDRS scheme members²⁹.) Further the Scheme Agent's last 12 months of reporting to the Council as to stakeholder engagement suggested very limited activity of this type – at most meeting the minimum requirements of the plan. Whilst the coronavirus pandemic has undoubtedly had a disruptive effect³⁰, we think that this is only a partial explanation.
58. We also heard that other EDR schemes in New Zealand provide more in the way of direct support and advice for consumer advocates. Caseworkers can call the schemes directly on

²⁸ Citizens Advice Bureau submission on industry dispute resolution scheme (17 December 2020), p 1; Consumer NZ submission on industry dispute resolution scheme (18 December 2020), p 2-3.

²⁹ The Business Plan commits the Scheme Agent to 6 operations meetings and 4 focus group meetings with scheme members per year and a member with each scheme member trice per year. For other organisations, the commitment is to engage quarterly with the Commerce Commission and with at least one other organisation (ad hoc meetings with dispute investigators group, ad hoc meetings with other EDR organisations, ad hoc meetings with Government Centre for Dispute Resolution, ad hoc meetings with Consumer, ad hoc meetings with Consumer Protection/ MBIE).

³⁰ The TDRS's report to the Council for May 2020 noted: "A number of regional hui were scheduled to take place from the 31st of March through to the 30th of April, across 7 regional towns and the 3 main centres promoting awareness of DRS within our communities. As a result of Covid-19 these have been postponed until late 2020 or early 2021. This is being led by FINCAP and involves Utilities Disputes Limited, Financial Services Complaints Limited, Insurance and Financial Services Ombudsman, Banking Ombudsman Scheme, TDR and Financial Dispute Resolution Service. The primary purpose of the hui is to promote awareness of DRS with a focus on the following:

- providing training for financial mentors, so they can better identify and refer cases to the schemes
- encouraging complaints from people and whanau in hardship or vulnerable circumstances.

As part of Fairways response to Covid-19, information on free support services available through Fairway was sent out to social service Providers across NZ, Safer Credit and Financial Inclusion Credit and Debt Coordination Group, over 2000+ FDRS members and to all TDR Scheme Members. TDR services were included in this information, which has also been passed on to individual and organisations networks."

behalf of their clients and get advice on whether the scheme can deal with a matter or where else to direct them.

Finding 3.

The 2021/22 Business Plan does not make the Scheme Agent accountable for the same level of engagement with consumer organisations as with Scheme Members suggesting that insufficient priority is accorded to Scheme Agent engagement with consumer organisations.

General community awareness

59. As discussed above, this direct promotion to consumers is often given very little attention by EDR schemes. It is generally costly, often there is little inhouse expertise in this type of communication and there is often scepticism from the industry members funding this effort that it will be money well-spent.
60. The current TDRS Marketing Plan is a departure from this tendency, with the bulk of the budget going to branding and direct promotion through advertising and social media communications. Even TV advertising is being considered. We are not experts in marketing, so will not hazard a view on the quality of what is planned. From our experience we have three observations:
 - a) The TDRS will need to coordinate this effort with ‘traditional’ activity of visiting referral points, consumer advice points, industry via Scheme Members and community groups – of providing useful engaging information in many channels, of using the media to spread the word of successful case studies or of current consumer issues.
 - b) The TDRS will need to sustain the effort over some period of time for the consumer awareness to ‘take hold’ and there may not always be budget for this extra effort.
 - c) It will be important to be able to measure outcomes from this effort, not just activity. We have seen many other EDR schemes lose support from industry for awareness raising if it cannot be shown to be making a tangible, measurable difference. We are aware that the TDRS is working on this – in particular thinking about what data it should be collecting in order to be able to measure improvement.

Finding 4.

The TDRS is significantly boosting its resourcing for general awareness initiatives in 2021/2022. However these awareness initiatives will need to be sustained over some years to have a lasting effect.

5. Position Statements and other TDRS guidance

Background

61. To be fair, efficient and accountable, a scheme is expected to develop and publish information about its approach to complaints³¹. This includes guidance as to what the scheme considers scheme members must do to meet their obligations and to be fair to customers.
62. Whilst it is not mandatory for a scheme member to comply with this guidance, scheme members are on notice that if they provide a lesser standard of customer service, the scheme is likely to find against them in a dispute if a customer incurs a compensable loss.
63. In this way, as recognised in the MBIE Framework Standard 7, scheme guidance helps users of the scheme to know what to expect and informs early resolution³².
64. Published scheme guidance also helps scheme staff and adjudicators to achieve consistent outcomes.
65. Our experience is that schemes typically fulfil these expectations by publishing on their website topic-specific guidance documents and by publishing their decisions. Some schemes publish all of their decisions and others a selection of decisions. Publication may be in full or in a summarised case study format.

Topic-specific guidance

66. Part I of the Code contemplates that the Scheme Agent will recommend, and the Council will approve, guidance (referred to as Position Statements) about the approach to recurring types of complaint. The aim is faster and more efficient resolution of common types of complaint.³³ The Code states that the Scheme Agent must take Position Statements into account when evaluating any complaint.³⁴
67. The TDRS has published 19 Position Statements on its website. These deal with topics such as optical network terminal placement, services provided to minors and disconnection or suspension of services.
68. In submissions to the Commission and in our consultations, there were criticisms by consumer organisations that the TDRS's guidance is not sufficiently comprehensive and does not establish

³¹ Australian Key Practices for Industry-based Customer Dispute Resolution para 4.1, 4.2 and 4.5d).

³² MBIE Framework Standard 7.1.1

³³ Code, Section I (Position Statements).

³⁴ Code para 35.2

sufficiently rigorous consumer protection standards.³⁵ For example, it was noted to us that the TDRS does not have guidance about consumers facing vulnerability or a hardship policy.

69. We found that the number of TDRS topic-specific guidance documents compares favourably with that produced by other EDR schemes in New Zealand. Nevertheless there are important gaps.³⁶ In particular, in light of increasing awareness of the difficulties facing vulnerable consumers, we think that the lack of guidance about consumers facing vulnerability is a gap³⁷.
70. Although last year's and this year's TDRS Business Plan and Strategy committed the TDRS to continue to produce Position Statements, in fact, the Scheme Agent told us that the TDRS last published a Position Statement in December 2015.
71. Since then, the Scheme Agent has issued a couple of Recurring Issues webpages and website articles, as a way of publicising its approach to more recently occurring common complaints. In September 2018, the Scheme Agent published a Recurring Issue webpage about customer transfers (in total there are 6 Recurring Issue webpages³⁸). In January 2020, a website article was published about account authorities³⁹. (A Recurring Issue webpage or article can be developed by the Scheme Agent more quickly than a Position Statement because, unlike a Position Statement, Council approval is not required.)
72. To the extent that there may have been a trend in recent years away from Position Statements to other forms of website publication, this seems undesirable given that Position Statements potentially have more impact than other forms of guidance. This is because Position Statements are recognised in the Complaints Code.
73. There is also the problem that the existing suite of TDRS Position Statements have not been updated. In our consultation meeting, Scheme Agent staff accepted that the majority of Position Statements need revisiting.
74. In written submissions⁴⁰ and our consultations with consumer organisation representatives, we heard particular criticism of TDRS Position Statement *Faulty mobile telephones*⁴¹ for its statement that a mobile phone will have an expected life of at least 1 to 2 years. The view was put that the Consumer Guarantees Act would require a longer lifespan. We agree – and noted that our closed case review identified a determination that stated: “it is generally accepted that the lifespan of a mobile phone is 2 – 3 years although with careful use it could operate for much

³⁵ Eg FinCap submission on industry dispute resolution scheme (17 December 2020), p 2.

³⁶ Minutes of Council meeting of 20 August 2020 record that consideration is being given to the development of a position statement on broadcasting versus streaming services. This has not, however, been progressed.

³⁷ Compare Insurance & Financial Services Ombudsman *What is customer vulnerability?* <https://s3.ap-southeast-2.amazonaws.com/ifso-files/docs/e-learning-CV-Module-1-What-is-customer-vulnerability.pdf?mtime=20200116113301&focal=none>, TIO *Urgent complaints from vulnerable and at-risk consumers* <https://www.tio.com.au/contact-us/vulnerable-and-at-risk-consumers>

³⁸ <https://www.tdr.org.nz/about-tdr/recurring-issues>

³⁹ <https://www.tdr.org.nz/news/account-authority>

⁴⁰ Consumer NZ “Submission on industry dispute resolution scheme” (18 December 2020), p 1.

⁴¹ <https://www.tdr.org.nz/cases/common-complaint-services-hardware/faulty-mobile-telephones>

longer”⁴². It is, however, concerning that the TDRS Position Statement does not make this stance clearly visible so as to accurately inform early resolution of these types of disputes.

75. We found other examples of TDRS guidance that establishes a standard that is lower than what we would expect, but which is not necessarily explicable by differences in the New Zealand regulatory framework.
76. For example, TDRS Position Statement *Broadband Internet Speed*⁴³ indicates that the TDRS can only consider complaints about misleading marketing of internet services if the marketing commits to a minimum internet speed. In comparison, the TIO will consider a complaint that marketing is misleading if a scheme member advertises a maximum speed that is never capable of being achieved.⁴⁴
77. We also found that much of TDRS’s guidance, particularly its Recurring Issues, is written using diffuse language, with “recommendations” and views expressed about what the TDRS “would like” Scheme Members to do. Rather than establishing clear standards as to how the TDRS will deal with complaints where Scheme Members do not follow its guidance, the thrust of some of the TDRS guidance is to urge customers to look after themselves. This creates a perception of a lack of ‘teeth’ in some of the TDRS guidance. In contrast, other schemes provide very clear and specific steps that a service provider must take to be considered to have treated the customer fairly.
78. For example, Recurring Issue *Fibre connection delays* refers to increasing complaints about fibre services not being connected by the indicative commencement date. The TDRS states:

*“Our advice to Scheme members is not to give undertakings regarding the connection date if they are unable to ensure that the service will be provided on the stipulated date. They should avoid creating expectations that might not be met. Customers should ask their providers to ensure that the installation goes ahead on the given date. If they cannot get that assurance, they should anticipate the possibility of delays.”*⁴⁵
79. In comparison, the TIO states in its Position Statement *Connection and disconnection of services – in detail*:

*“When a service has not been connected ...by an agreed date, or if there is no agreed date, within a reasonable time in the circumstances, the provider should address the impact of the delay on the consumer. This may involve connecting the service, offering an interim service, waiving service charges, releasing a consumer from contract without exit fees, paying compensation. Remedies under the [Australian Consumer Law](#) may also apply for any failure of a consumer guarantee.”*⁴⁶

⁴² Case T029705

⁴³ Eg Position Statement *Broadband internet speeds* <https://www.tdr.org.nz/cases/common-complaint-services-hardware/broadband-internet-speed> .

⁴⁴ *Slow internet speed* <https://www.tio.com.au/help/problems-your-service/slow-internet-speed>.

⁴⁵ <https://www.tdr.org.nz/cases/recurring-issues/fibre-connection-delays>

⁴⁶ <https://www.tio.com.au/guidance-notes/connection-and-disconnection-of-services>

80. To give another example, TDRS Recurring Issue *Real-time data usage monitoring* refers to complaints by consumers experiencing high excess data charges, despite careful monitoring of their data usage using their RSM's data monitoring tool.

*"TDR recommends that all Scheme Members provide their customers with tools to monitor data usage in real time, as standard. If technical reasons limit the use of such real-time monitoring, the monitoring tools should clearly show the customer that the usage shown may not reflect the actual usage."*⁴⁷

There is no clarity, however, about how the TDRS will handle a complaint where this does not occur and whether it may award compensation to customers.

81. In comparison, the TIO is much clearer that in these types of circumstances compensation may follow:

*"When, in our view, the consumer has received an unexpected high bill or bills because of ... usage meters that gave information that was not provided within 48 hours of usage being incurred or a shorter period if this is technically possible ...outcomes may include the provider waiving some or all of the debt..."*⁴⁸

This gives the TIO guidance more 'teeth' than the TDRS guidance.

Finding 5.

Whilst the TDRS has published a range of topic-specific guidance on its website:

- a) There are gaps in coverage, for example, no guidance about vulnerable customers
- b) In the last 5 years, there has been little new guidance published and existing guidance has not been updated
- c) The published guidance in the last 5 years has been in the form of a Recurring Issue webpage or news articles, rather than via a Complaints Code-recognised Position Statement
- d) The language used in TDRS guidance is often insufficiently clear about what is expected of Scheme Members and how the TDRS will handle complaints where those expectations are not met
- e) Some TDRS guidance falls short of either what may be required under the full reach of consumer protection laws or the standards that TDRS adjudicators actually expect of Scheme Members as shown in their final determinations.

⁴⁷ <https://www.tdr.org.nz/cases/recurring-issues/real-time-data-usage-monitoring>. Similarly TDRS Recurring Issue *Internet data usage* <https://www.tdr.org.nz/cases/recurring-issues/internet-data-usage> uses diffuse language and does not make it clear whether a customer has grounds for compensation if the RSM does not do what "TDR would like to see the Internet Service Providers [doing] .. in making customers more aware of the costs of data usage, how these costs may be incurred, and how to monitor or limit usage".

⁴⁸ <https://www.tio.com.au/guidance-notes/managing-usage-and-expenditure-on-a-service>

Decisions and case studies

82. The TDRS does not publish adjudicator determinations on its website.
83. The 2020/21 and 2021/22 TDRS Business Plan and Strategy committed the TDRS to producing case studies (summaries) for all complaints and most complaint enquiries.
84. The TDRS has over 100 case studies published on its website. Some of these deal with matters ruled by the scheme as outside jurisdiction. Others deal with mediated settlements. Still others are summaries of complaints that proceeded to determination. From our checking, it was apparent, however, that not all cases that proceed to determination are summarised as a case study.
85. In written submissions⁴⁹ and our consultations with consumer organisation representatives, we heard criticism that summarised case studies do not provide the level of transparency that would be achieved by the full publication of determinations. Consumer organisations said that they would be assisted by seeing the detailed discussion of the relevant consumer law elements as applied to the circumstances of the complaint. Some consumer organisations also said that they would like published determinations to name the relevant scheme member.
86. Our comparison of adjudicator determinations and case studies demonstrated that determinations provide much greater insight into the way in which the TDRS decides complaints. In our view, to publish full determinations would enhance the TDRS's efficiency and accountability. But this would be a leading practice initiative that, whilst usual practice for Australian and for some international EDR schemes, is not usual practice for New Zealand schemes.⁵⁰
87. If the TDRS changes its practice and begins publishing determinations on its website, the TDRS would need to do so on an anonymised basis (as currently for case studies). This is because the Complaints Code clause 44.9 provides that final determinations are confidential as between the Scheme Member and the consumer.

Finding 6.

Whilst the TDRS has published a large number of case studies, these do not provide the insight into how it decides complaints that would be achieved by the publication of anonymised determinations in full.

⁴⁹ Consumer NZ "Submission on industry dispute resolution scheme" (18 December 2020), p 1.

⁵⁰ None of Utilities Disputes, Banking Ombudsman Scheme and Insurance & Financial Services Ombudsman Scheme publish determinations. The TIO does, however, publish its decisions: <https://www.tio.com.au/about-us/ombudsman/decisions>

6. Systemic issues

Background

88. The MBIE Framework Resolution/ Prevention Standard 7 recognises the importance of a scheme being able to identify trends, systemic issues and/ or root causes⁵¹.
89. Similarly, the Australian EDR guidance includes as a key practice “mechanisms and procedures for dealing with systemic problems that become apparent from complaints, including by investigating these issues or referring them to relevant participating organisations or to regulators or policy makers”⁵².
90. The Complaints Code specifies that a primary purpose of the Scheme (defined as the Complaints Code and the TDRS) is “to educate the industry about systemic issues arising from disputes and determinations”⁵³. The Complaints Code obliges RSMs “to identify recurring and systemic problems and trends in order to address and eliminate the underlying causes of complaints and improve the quality of customer service”.⁵⁴
91. The Complaints Code does not define a systemic issue. However, the Services Agreement between the TCF and the Scheme Agent specifies: “Systemic issues are issues that relate to process or procedural problems within a Scheme Member’s organisation or affecting more than one Scheme Member. They may affect Customers beyond those who are involved in a Dispute.”⁵⁵
92. The Services Agreement provides that the Scheme Agent “should aim to identify pan-industry systemic issues as early as possible”. This may be either from a number of disputes across Scheme Members that relate to the same issue or a single dispute that could affect other customers in a similar manner to the customer involved in the dispute.⁵⁶ The Services Agreement specifies:

“11. 5 FairWay will report systemic issues related to a particular Scheme Member to that Scheme Member as soon as possible. FairWay will report pan-industry systemic issues to the Council on a quarterly basis. If appropriate, FairWay should bring an identified pan-industry systemic issue to the attention of the Council as soon as practicable. Details of pan-industry systemic issue reports should also be provided on the TORS website.”

⁵¹ Capability 7.2.2

⁵² Australian Key Practices for Industry-based Customer Dispute Resolution para 5.5.

⁵³ Explanatory Statement to Complaints Code. This wording is also used in ToR, cl 1.2(c).

⁵⁴ Clause 25.3

⁵⁵ Undated Services Agreement between FairWay and the TCF Schedule 1 clause 11. 1. This is narrower than the definition used by other schemes which would more clearly encompass repeat conduct issues eg that may be reflective of organisational culture – see for example <https://www.tio.com.au/about-us/policies-and-procedures/systemic-problem-investigation> which uses the definition “an issue that affects several customers of one provider, or, in the case of industry-wide issues, customers of a number of different providers”

⁵⁶ Clause 11.2

93. None of TDRS's last 3 Annual Reports make any reference to systemic issues.

Analysis of complaints and enquiries data

94. The TDRS publishes on its website annual and biannual reports with statistical information about RSM complaints and enquiries.
95. In addition, the TDRS provides each RSM with a monthly activity report as to the scheme's new enquiries, with specification of the number attributable to the RSM and the number attributable to other providers by way of comparative information. The report also provides information about the number of complaints closed in the previous month.⁵⁷
96. Some RSMs have criticised TDRS public reporting.⁵⁸ We heard doubts expressed about the integrity of TDRS data and, in fact, found some integrity issues in the course of our closed file review.⁵⁹ There were criticisms about RSM statistics including consumer dissatisfaction with WSMs - we pick up this issue later in discussion about scheme membership.
97. There were also RSM criticisms that reporting does not adequately differentiate between complaints and enquiries and that the focus should be on complaints. We found, however, that to give a complete picture of customer dissatisfaction, it is important that TDRS reporting includes enquiries. Moreover, we agree with the TDRS that more detailed statistical reporting of complaints alone would not be of much value given the low numbers of complaints.⁶⁰
98. In its annual and biannual reporting, the TDRS uses high level categories to provide some insight into the nature of complaints and enquiries.

Figure 5: Nature of complaints and enquiries received July – December 2020

| KEY | # | % |
|---------------------|-----|-------|
| Customer Service | 452 | 45.0% |
| Billing | 273 | 27.2% |
| Faults | 73 | 7.3% |
| Network Performance | 65 | 6.5% |
| Credit Management | 63 | 6.3% |
| UFB | 38 | 3.8% |
| Contracts | 23 | 2.3% |
| Other | 9 | 0.9% |
| Complaints handling | 5 | 0.5% |
| Transfer | 4 | 0.4% |

Source – Telecommunications Dispute Resolution Biannual Report July – December 2020, p.2

⁵⁷ Eg Vodafone Activity Summary for the Period 1 May 2021 to 31 May 2021

⁵⁸ 2degrees submission on industry dispute resolution scheme (17 December 2020), p 2 and 3; Vodafone submission on industry dispute resolution scheme (18 December 2020), p 2

⁵⁹ Eg one complaint was allocated two case reference numbers. A test case had not been omitted from the database.

⁶⁰ Eg Telecommunications Dispute Resolution Biannual Report July – December 2020 p.11

99. TDRS biannual reports also include quarterly data about mobile phone complaints and enquiries (all 3 providers) and broadband complaints and enquiries (5 largest providers). In both cases, this data is presented as a number per 10,000 connections.

Figure 6: Complaint and enquiries per 10,000 mobile connections – Quarter 4 2020

| Q4 | | | Based on total industry connections of 6,331,829 |
|-----------------------|---------------------|----------------|--|
| Scheme member | Per 10k connections | Total received | |
| 2degrees | 0.25 | 39 | |
| Spark | 0.20 | 48 | |
| Vodafone | 0.33 | 77 | |
| Other | | 6 | |
| Total | | 170 | |
| Industry average 0.26 | | | |

Source – Telecommunications Dispute Resolution Biannual Report July – December 2020, p.5

Figure 7: Complaint and enquiries per 10,000 broadband connections – Quarter 4 2020

| Q4 | | | Based on total industry connections of 1,856,982 |
|-----------------------|---------------------|----------------|--|
| Scheme member | Per 10k connections | Total received | |
| 2degrees | 1.52 | 20 | |
| Spark | 0.59 | 41 | |
| Trustpower | 1.16 | 12 | |
| Vocus | 1.66 | 39 | |
| Vodafone | 1.91 | 81 | |
| Other | | 46 | |
| Total | | 239 | |
| Industry average 0.26 | | | |

Source – Telecommunications Dispute Resolution Biannual Report July – December 2020, p.6

100. TDRS reports do not, however, provide segregated data as to the nature of complaints and enquiries by telecommunication service. By way of example, the TIO identifies the top 10 issues for each of mobile services, internet services and landline services⁶¹.
101. Nor does the TDRS report on the root causes of complaints and enquiries. This is notwithstanding that TDRS staff generally record this information for each matter and have a process to check this information with the RSM⁶². If, however, the TDRS were to report on this information, the TDRS would also ideally have a process to revisit and update the root cause classification for complaints that proceed through the formal complaint process, in the interests of reporting as accurately as possible.

⁶¹ TIO Quarterly report Quarter 3 Financial year 2020-21 p.5 https://www.tio.com.au/sites/default/files/2021-05/TIO%202020-21%20Q3%20Report_26May21_HiRes.pdf identifies the top 10 issues for internet services as no or delayed action by provider (42%), service and equipment fees (29%), delay establishing a service (19%), intermittent service or drop outs (18%), no phone or internet service (16%), slow data speed (13%), failure to cancel a service (10%), inadequate fault testing (7%), resolution agreed but not met (7%) and missed appointment (6%).

⁶² The Scheme Agent has told us that its service enquiry referral email specifies the categorisation and that there is an invitation to the RSM to revert to the Scheme Agent if the RSM considers that the categorisation is incorrect.

Figure 8: Example TDRS recent enquiries and complaints by complaint category and root cause classification

| | Case Number | Complaint Category | Root Cause |
|------------|-------------|----------------------------|-----------------------------------|
| Enquiries | 2xxxx | Billings | Disputed Charges |
| | 2xxxx | Customer Service | Failure to Action Request |
| | 2xxxx | Customer Service | Failure to keep Customer Informed |
| | 2xxxx | Customer Service | Installation Issue |
| | 2xxxx | Faults | Equipment Failure |
| | 2xxxx | Network Performance | Service Interruption |
| | 2xxxx | UFB | Installation |
| | 2xxxx | Billings | Pre-Paid Mobiles |
| | 2xxxx | Billings | Account Errors |
| | 2xxxx | Credit Management | Collection Agents |
| | 2xxxx | Customer Service | Incorrect or Inadequate Advice |
| Complaints | 4xxxx | Service / Product Delivery | Not specified |
| | 4xxxx | Account Errors | Not specified |
| | 4xxxx | Complaints Handling | Undertaking not Actioned |
| | 4xxxx | UFB | Installation Delay |
| | 4xxxx | Service Type | Not specified |
| | 4xxxx | Landline | Not specified |
| | 4xxxx | Account Errors | Not specified |
| | 4xxxx | Customer Service | Approach |
| | 4xxxx | Network Performance | Not specified |
| | 4xxxx | Billings | Double Billing |
| | 4xxxx | Service Type | Not specified |
| | 4xxxx | Contracts | Not specified |
| | 4xxxx | Faults | Recurring Fault(s) |
| | 4xxxx | Faults | SM Disconnect Error |
| | 4xxxx | Credit Management | Collection Agents |

Source: TDRS data supplied to the Commission

102. In our consultations, consumer organisations and some Scheme Members expressed a desire for more insight as to the nature of TDRS complaints and enquiries.
103. Scheme Members pointed out that the TDRS's ability to identify systemic issues is dependent on appropriate, sufficiently detailed classifications being consistently applied. In particular, the "Customer Service" classification was criticized as being so broad as to be meaningless.

104. The Scheme Agent is aware of this criticism and held a focus meeting late last year with Scheme Members to revisit its categorisation approach. We understand that the next Annual Report will include reporting based on the new categories.

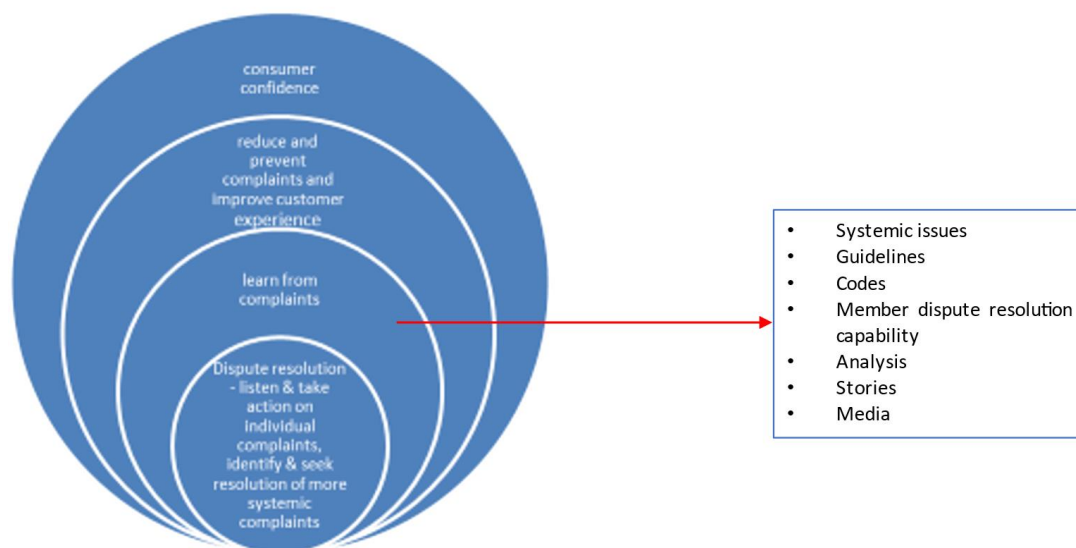
Finding 7.

Whilst the TDRS publishes regular statistical reports as to complaints and enquiries, these currently provide limited insight into the nature and root causes of complaints and enquiries.

Addressing root causes of complaints

105. In written submissions to the Commission and in our consultations, consumer organisations told us that the TDRS is not doing enough to identify and work to resolve the root causes of complaints and influence Scheme Member behaviour.⁶³
106. At our consultation meeting, the Council told us that strategic planning for 2021/ 2022 includes a focus on this. This is evidenced by the minutes for the Council’s March 2021 Strategic Workshop which included the following diagrammatic presentation of ideas that were discussed.

Figure 9: Diagrammatic presentation of ideas discussed at Council Strategic Workshop



Source: Minutes of Strategy Session 26 March 2021 held at FairWay Wellington and by video conference

107. Scheme Agent staff have however, told us that they consider the Complaints Code limits their power to take formal systemic issues action to disputes that proceed to an adjudicator for

⁶³ Consumer NZ submission on industry dispute resolution scheme (18 December 2020), p 3.

resolution by mediation or decision⁶⁴. The Scheme Agent has pointed to the small number of these disputes, and even smaller number that result in a positive outcome for consumers, as creating a very limited arena in which they can operate. (In July to December 2020, 14 complaints proceeded to an adjudicator for resolution and of these, 1 complaint was partially upheld, 7 settled and 5 were not upheld.)

108. Nevertheless, Scheme Agent staff have told us that they sometimes suggest to Scheme Members that they look into or address a particular issue that seems to be recurring – but this is done in quite an informal way.
109. We agree that it is very difficult for an EDR scheme to be effective in dealing with systemic issues, if its authorising environment does not clearly give it the necessary powers. Our observation is that the Complaints Code, ToR and Scheme Agent Services Agreement are quite limiting in that they do not expressly permit the Scheme Agent to analyse its full database of enquiries and complaints to identify possible systemic issues and to work with industry to address these.
110. This makes the TDRS less effective in addressing systemic issues than other New Zealand dispute resolution schemes whose annual reports give transparency to the active way in which they work with their members to address issues that could affect multiple customers, “*in the interests of improving the system for everyone*”⁶⁵.
111. The TIO also provides a relevant point of comparison. Equipped with clear powers⁶⁶, it regularly undertakes systemic investigations and releases public reports with its findings. These have included *Meeting the needs of consumers impacted by family violence*, *Systemic Investigation*

⁶⁴ The Complaints Code, ToR and Scheme Agent Services Agreement all refer to systemic issues arising from “disputes”. The Complaints Code defines a “dispute” as a complaint that reached deadlock and has been referred for investigation and resolution.

⁶⁵ Banking Ombudsman Scheme 2012/20 p.9 https://bankomb.org.nz/assets/Annual-reports/BOS-AR-2019-2020-full-version_compressed.pdf. See also Utilities Disputes Annual Report 2019/20 p.5 “We appreciate working with our membership group on complaint prevention, education, and resolution. Complaint data helps to identify common issues and problems, highlighting what isn’t working and what needs to change. We share complaint data and information, and provide training about how to recognise and effectively manage complaints via meetings, presentations, webinars, our membership forum, and induction.” <http://media.utilitiesdisputes.org.nz/media/Annual%20Reports/Utilities%20Disputes%20Annual%20Report%202019-20%20-%20web%20version.pdf>. Insurance and Financial Services Ombudsman Annual Report 2020 p.10 “Over the year we raised 8 systemic issues with our Participants. Outcomes included the Participant changing their processes, amending documentation, reviewing other claims, and issuing guidance notes to staff. One case was notified to the relevant regulator as required by the Financial Service Providers (Registration and Dispute Resolution) Act.” <https://s3.ap-southeast-2.amazonaws.com/ifso-files/docs/J000523-IFSO-2020-Annual-Report-A4-FINAL-DIGITAL-full.pdf?mtime=20200911160722&focal=none>

⁶⁶ Compare TIO’s Terms of Reference:

“5.1 Where we identify a systemic issue, we will work with the relevant TIO member to try to resolve the issue.

5.2 Where we cannot resolve the systemic issue by agreement, we may make recommendations to the TIO member for resolving the issue. The TIO member must consider our recommendations and take steps to resolve the issue.

When we make such recommendations we will discuss with the TIO member. If the TIO member agrees with our recommendations, the TIO member must implement them. If we think the systemic issue remains unresolved, we may use our powers under these Terms of Reference to share information about the systemic issue with other bodies [industry bodies, regulators and other government authorities].”

Report, December 2020⁶⁷ and Helping telco consumers sign up to the right phone and internet products, Systemic investigation report, May 2021⁶⁸.

112. The CCTS does not have formal systemic powers or mandate, however it has in recent times used its standing with its RSMs to pursue matters that were clearly systemic and to negotiate resolution for all customers impacted. The CCTS also has a role in identifying breaches of regulatory codes and reporting them to the regulator – which can involve identifying recurring issues or trends.

Finding 8.

The Complaints Code does not give the TDRS clear and sufficient powers to investigate systemic issues identified through complaints and enquiries and to work with Scheme Members in the interests of improving the system for everyone.

⁶⁷ https://www.tio.com.au/sites/default/files/2020-12/TIO%20Systemic%20Report_Meeting%20the%20needs%20of%20consumers%20impacted%20by%20family%20violence_December%202020.pdf

⁶⁸ https://www.tio.com.au/sites/default/files/2021-05/TIO%20Systemic%20Report_Helping%20Telco%20Consumers%20sign%20up%20to%20the%20right_fa_HiRes.pdf

7. Complaints handling process

Background

113. The TDRS's complaints handling process is expected to meet the principles of accessibility, fairness, efficiency and effectiveness.
114. Under the MBIE Framework Standard:
- d) There should be simplified, easy to use scheme entry processes⁶⁹
 - e) The scheme should be impartial⁷⁰
 - f) Procedural fairness should be accorded⁷¹
 - g) Processes should support early resolution of cases⁷²
 - h) Timeframes should be appropriate, without compromising the quality of decision-making⁷³
 - i) Reasons should be provided for decisions⁷⁴
115. Annexure 1 to the Complaints Code sets out the rules and processes for the resolution of complaints. These give Scheme Members an opportunity for early resolution. If resolution does not occur, the case proceeds through to a formal complaint, with opportunity provided to the Scheme Member to make a written response. Jurisdiction is then checked. A complaint that is within jurisdiction is then allocated to a TDRS-contracted adjudicator for mediation and decision.

⁶⁹ MBIE Framework Standard 2.2.4, Australian Key Practices for Industry-based Customer Dispute Resolution para 1.9

⁷⁰ MBIE Framework Standard 3

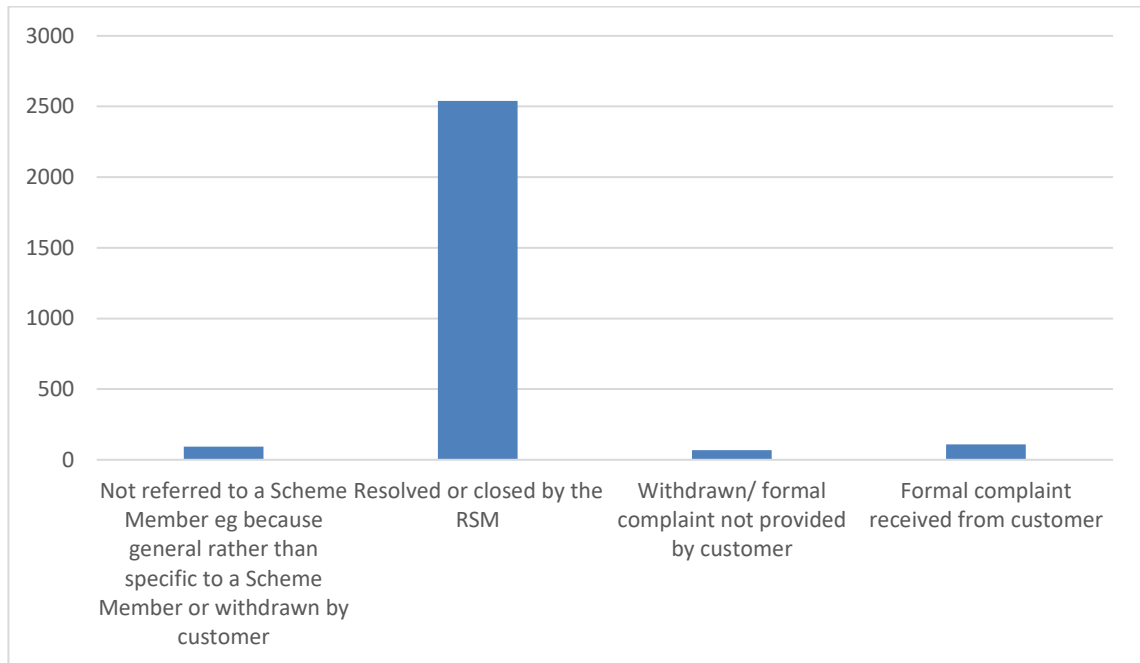
⁷¹ MBIE Framework Standard 3.2.2, Australian Key Practices for Industry-based Customer Dispute Resolution para 3.2 to 3.8

⁷² MBIE Framework Standard 7.1.2

⁷³ MBIE Framework Standard 6.1.1, Australian Key Practices for Industry-based Customer Dispute Resolution para 5.7

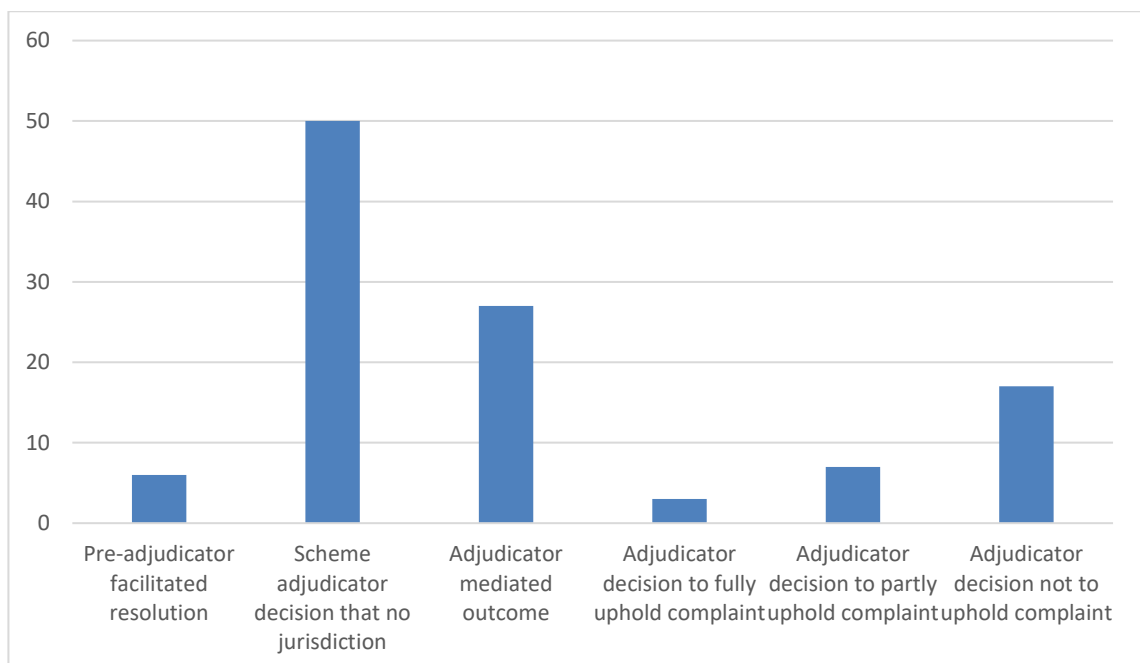
⁷⁴ MBIE Framework Standard 3.2.3, Australian Key Practices for Industry-based Customer Dispute Resolution para 3.7

Figure 10: Outcome of 2,812 TDRS enquiries and complaints closed or resolved in 2019/2020



Source – Telecommunications Dispute Resolution 1 July 2019 – 30 June 2020 Annual Report p.10

Figure 11: Outcome of 110 formal complaints that resolved or closed in 2019/2020



Source – Telecommunications Dispute Resolution 1 July 2019 – 30 June 2020 Annual Report p.10

Initiating a complaint

Overview of process

116. The Complaints Code does not prescribe how a customer may contact the TDRS. In practice, this is done via the TDRS's webform or by ringing or emailing the TDRS.
117. The TDRS does not publicly report on how matters are raised with it but they advised us that about 82% of matters are raised using the TDRS's webform.
118. If the matter is raised by a customer of an RSM and is specific to that relationship, a Scheme Agent employee (called a Resolution Coordinator) refers the matter to the RSM and allows the RSM 5 working days to try and resolve the matter.⁷⁵ The customer is advised of this timeframe by email and that, if the complaint is not resolved in that timeframe, they should get back in contact with the TDRS.⁷⁶
119. Other matters (those not referred to an RSM) are categorised as "non-relevant". These are matters that are not attributable to a Scheme Member or a Code within the TDRS' jurisdiction or do not arise from a customer relationship.⁷⁷ Where appropriate, the TDRS provides a person raising a non-relevant matter with details of other bodies that may be able assist. In the year to 30 June 2020, the TDRS recorded 94 non-relevant matters⁷⁸, however this does not include telephone non-relevant matters as these are not recorded in the TDRS' case management system.
120. Where a matter is referred to an RSM, the Resolution Coordinator is meant to check after 10 working days with the parties to see if the matter has resolved. Our review of closed cases showed, however, that this does not always occur.
121. If the matter reverts to the TDRS either at the instance of either of the parties or as a result of the Resolution Coordinator's follow up, the Resolution Coordinator will seek the RSM's confirmation as to whether deadlock has been reached⁷⁹. Under the Complaints Code, deadlock occurs either where the customer is not satisfied with the RSM's response and has received a referral number or where more than 6 weeks have passed since the customer first complained to the RSM without receiving a final response⁸⁰.
122. In appropriate cases, the Resolution Coordinator may ask the RSM at this stage whether a WSM should be notified of the complaint.⁸¹

⁷⁵ Whilst the 10 working day timeframe is not specified in the Complaints Code, clause 39.2 of the Complaints Code requires the Scheme Agent to refer a matter back to the appropriate RSM before registering it as a complaint.

⁷⁶ The TDRS has a template letter that Resolution Coordinators use for this purpose.

⁷⁷ Complaints Code clause 3 definition of "Non-relevant Enquiries"

⁷⁸ Telecommunications Dispute Resolution Annual Report 1 July 2019 – 30 June 2020, p.10

⁷⁹ Clause 39.6

⁸⁰ Definition of 'Deadlock' in Clause 3

⁸¹ Clause 39.6

123. Once the complaint is deadlocked, the customer is asked to provide their formal written complaint within 10 working days. This period can be extended by a further 5 working days.⁸² If the formal complaint is not provided on time, the Resolution Coordinator sends a follow up email. If no response is received the complaint is closed 15 working days later.⁸³ The complaint can, however, be re-opened anytime in the following 12 months.⁸⁴
124. A written complaint must detail the relevant events, explain the desired outcome and provide any substantiating documents.⁸⁵ The Scheme Agent may assist the customer to submit their complaint and may request any additional relevant information.⁸⁶
125. Once the formal complaint is received, the Resolution Coordinator prepares a document called a Complaint Summary that sets out the complaint and attaches the customer's documents. This is then sent to all parties to the complaint.

Written complaint

126. We were surprised that 82% of matters are webform-initiated. Whilst most schemes encourage customers to use a webform to initiate a matter, it seems telephone remains the more common method for initiating a complaint with a New Zealand EDR scheme.⁸⁷
127. A possible explanation for TDRS's different statistic is that TDRS Resolution Coordinators often ask customers who contact them by phone to set out their complaint information in a webform. We were not able to test whether this was the case, because telephone calls are not recorded. (In our experience, good practice is for EDR schemes to record frontline telephone calls and maintain this record for at least 6 or 12 months.) But in one reviewed case that a customer initiated by email, the Resolution Coordinator's reply email stated: *"TDR requires a complaint form to be filled in to be able to start the process."*
128. Once deadlock has been confirmed, the customer is asked for their formal complaint in writing. TDRS's email is based on a standardised template and states: *"If the complaint description you have already provided is sufficient please let me know."*
129. Our review of closed cases showed that sometimes this process led to more detailed or supporting information being provided. But sometimes the customer simply repeated or attached their earlier complaint. In a number of reviewed cases, the customer was either

⁸² Clause 39.8

⁸³ Clause 39.14

⁸⁴ Clause 39.8

⁸⁵ Clause 39.16

⁸⁶ Clause 39.9 to 39.13

⁸⁷ Eg Utilities Disputes Annual Report 2019/20 p.3 reported 7,815 contacts of which 6,675 (85%) were by phone: <http://media.utilitiesdisputes.org.nz/media/Annual%20Reports/Utilities%20Disputes%20Annual%20Report%202019-20%20-%20web%20version.pdf>. Insurance and Financial Services Ombudsman Annual Report 2020 p.6 reported 3,922 complaint enquiries were received of which 2,489 (63%) were by phone: <https://s3.ap-southeast-2.amazonaws.com/ifso-files/docs/1000523-IFSO-2020-Annual-Report-A4-FINAL-DIGITAL-full.pdf?mtime=20200911160722&focal=none>

confused by the TDRS's request for their formal complaint or felt frustrated because they interpreted the request as requiring them to repeat previously provided information.

130. The result is a less accessible complaint initiation process than is commonly the case for EDR schemes.

Finding 9.

The TDRS complaint initiation process is less accessible for customers than is usual for an external dispute resolution scheme, with customers typically being required to put their complaint in writing on two separate occasions.

Finding 10.

The TDRS does not record telephone calls received and made by its Resolution Coordinators. This takes away from the completeness of its records.

Joining a WSM to a complaint

131. In consultation meetings and in written submissions to the Commission, a few RSMs criticised the Complaints Code-stipulated processes for a complaint that is primarily or even solely about a WSM.
132. Spark noted that fibre wholesalers are increasingly engaging directly with customers. The result is that for some complaints it is clear from the outset that the complaint is solely about the WSM. Yet the Complaints Code requires the customer to raise their complaint with their RSM.
133. Spark submitted that the process is too complex for customers, unfairly penalises RSMs and does not create the same incentives on wholesalers to improve their (or WSM contractors') performance.⁸⁸
134. Vodafone submitted that the current arrangements contribute to a *"worrying trend whereby [wholesalers] are not willing to engage in resolving issues before they are deadlocked and sent for a TDRS decision."*⁸⁹
135. Spark would prefer that TDRS direct a complaint to the Scheme Member who appears most responsible, whether this is a WSM or an RSM. If the complaint is directed to a WSM, Spark considers that the RSM should be informed and kept up to date in case the customer contacts the RSM at any stage during the complaint process.

⁸⁸ Spark submission on industry dispute resolution scheme (18 December 2020), para 12.

⁸⁹ Vodafone submission on industry dispute resolution scheme (18 December 2020), p 2

136. On the other hand, Chorus, as the largest wholesaler, expressed satisfaction with current WSM TDRS processes.⁹⁰
137. Our closed case review supported the view that TDRS processes for WSM complaints can be cumbersome. In particular, deadlocking a complaint can take longer with both the WSM and the RSM being asked to confirm this (see next section). Our view is that, by directing all complaints through the RSM as required by the Complaints Code, the TDRS reduces timeliness and efficiency.

Finding 11.

TDRS processes for a complaint that is primarily about a Wholesale Scheme Member are unduly cumbersome, reduce the efficiency of the scheme and frequently provide a worse customer experience than needs be.

Deadlock processes

138. In written submissions to the Commission, several consumer organisations argued that the 6 week period until deadlock is too long.⁹¹
139. Utilities Disputes made comparison with the TIO's 15 day deadlock period.⁹²
140. Consumer NZ made comparison with the Disputes Tribunal which does not have a deadlock period.⁹³
141. The Canadian CCTS also does not use the concept of deadlock. Instead, it provides scheme members with 30 days (four weeks) to either resolve the matter with the customer or to provide CCTS with a full submission of their view of the complaint, along with all relevant documents or other evidence (eg. call recordings).
142. The Complaints Code 6 week deadlock period can also be compared with the 5 working day deadlock period that applies under both the 111 Contact Code⁹⁴ and the Copper Withdrawal Code⁹⁵.
143. On the other hand, some Scheme Members told us that the 6-week period is appropriate and that this time is needed to allow complaints to be properly resolved.
144. We agree with consumer organisations that 6 weeks is a long time. More generally, we agree with the Scheme Agent's view, expressed to us in our consultations, that some of the Scheme

⁹⁰ Chorus submission on open letter (18 December 2020) p. 1

⁹¹ Citizens's Advice Bureau submission on industry dispute resolution scheme (17 December 2020) p.1

⁹² Utilities Disputes submission on industry dispute resolution scheme (17 December 2020), p 2.

⁹³ Consumer NZ submission on industry dispute resolution scheme (18 December 2020), p 1

⁹⁴ Clause 42.2

⁹⁵ Clause 58.2

Member timeframes could be shortened, now that communication is typically via telephone and email rather than post.

Finding 12.

The Complaints Code Scheme Member timeframes have not been reviewed to reflect instantaneous communication practices. In particular, a 6 week deadlock period is very long in today's environment.

145. In addition, we are concerned that our review of past cases suggests that TDRS does not exhibit sufficient independence from Scheme Members in deadlocking complaints.
146. Whilst it is appropriate for TDRS to undertake some checking as to whether the Scheme Member has had a chance to resolve the complaint, sometimes the email trail provided by the customer will clearly show that an impasse has been reached or that the customer first complained to the Scheme Member more than 6 weeks ago. If the customer's email trail demonstrates this, we think that the TDRS should immediately deadlock the complaint. But rather than doing this, the TDRS process is to always seek the RSM's confirmation that deadlock has been reached.
147. When the TDRS approaches the RSM, sometimes the RSM quickly confirms deadlock. But our review of past cases identified a number where the RSM confirmation process unduly delayed deadlock (see next table).
148. It is also of concern that the only 111 Contact Code complaint to be received to date by TDRS took 1 month to reach deadlock, rather than the 5 days mandated by the Code.

Figure 12: Selection of reviewed TDRS complaints

| Case No. | Deadlock period |
|----------|---|
| 2xxxx | <ul style="list-style-type: none"> • Complaint was an ongoing matter that dated back to early 2017. • Initiated by customer with TDRS on 16 March 2020, with customer follow up with TDRS on 30 April 2020. • TDRS asked RSM on 30 April and again on 6 May if deadlock reached, at which point finally deadlocked. |
| 2xxxx | <ul style="list-style-type: none"> • Complaint first made to RSM on 25 May 2020. • Initiated by customer with TDRS on 3 June 2020, with customer follow up on 7 July 2020. • TDRS asked RSM on 7 July if deadlock reached. • Complaint deadlocked on 17 July. |
| 2xxxx | <ul style="list-style-type: none"> • Complaint first made to RSM on 10 March 2020. • Initiated by customer with TDRS on 17 April 2020, with customer follow up on 29 April 2020. • TDRS asked RSM on 22 May if deadlock reached and RSM confirmed that it had, so complaint then deadlocked. • 8 June RSM agreed to WSM being included in complaint and complaint 'undeadlocked' to give WSM time to resolve complaint • Complaint re-deadlocked on 2 July |
| 4xxxx | <ul style="list-style-type: none"> • 111 Contact Code complaint initiated by customer with TDRS on 23 April 2021 |

| | |
|--|--|
| | <ul style="list-style-type: none"> • TDRS contacted RSM and customer on 7 May with RSM advising complaint resolved but customer advising that not resolved • TDRS contacted RSM on 10 May and RSM reiterated complaint resolved • Deadlocked on 27 May without RSM's agreement • Objection to deadlock by RSM on 28 May and TDRS advised that Code permits deadlock after 5 days |
|--|--|

Source – Data provided by TDRS to Commission

149. These problems would not occur, or would be much less prevalent, if the TDRS quality assurance framework required reviewers to check whether Resolution Coordinators are deadlocking complaints promptly in accordance with the Complaints Code. As we saw from the Quality Framework review template, the review process does not require this.⁹⁶ In our view, this is a significant gap in that framework.

Finding 13.

The TDRS does not exhibit sufficient independence from Scheme Members in deadlocking complaints. The result is that deadlock is often occurring later than it should under the relevant Code.

Early resolution

150. The TCF's submission to the Commission claimed that Scheme Members have a good record of resolving issues referred by the TDRS to them.⁹⁷ The submission noted that 98% of referred cases are resolved, without the need for further intervention by the TDRS.
151. Age Concern New Zealand's submission to the Commission included a couple of case studies where RSM's promptly and fairly resolved TDRS referred matters.⁹⁸
152. This was consistent with what we found through our review of closed cases and customer interviews. Our conclusion is that the early resolution processes work well.

Finding 14.

Scheme Members have a record of commitment to fair and timely early resolution of matters referred to them by the TDRS.

⁹⁶ Eg Quality Framework – TDR for review conducted 9 April 2021

⁹⁷ TCF submission on industry dispute resolution scheme (18 December 2020), para 43

⁹⁸ Age Concern New Zealand submission on industry dispute resolution scheme (9 December 2020), p. 3 and 4

Credit recovery action

153. Once a customer has submitted their formal complaint to the TDRS, the RSM is restricted by the Complaints Code from disconnecting a customer's service for non-payment or taking credit recovery action in relation to a debt the subject of the TDRS complaint.⁹⁹ Prior to the customer submitting their formal complaint, however, no such restriction applies.
154. In its written submission to the Commission, FinCap argued that TDRS should have more power to pause debt collection and should make RSMs subject to more stringent disconnection notice requirements.¹⁰⁰ We note, however, that this would require amendment of the Complaints Code and so is a matter for the Council and the TCF¹⁰¹.
155. We were, however, surprised to see from our closed case review that, when notifying an RSM of a formal complaint where a debt is in dispute, TDRS Resolution Coordinators do not remind the RSM that credit recovery action can no longer be taken in relation to the debt. On the other hand, in one reviewed complaint where customer delay caused the TDRS to close the complaint unresolved, the TDRS's complaint closure notification stated that the RSM was now free to pursue debt collection.
156. This strikes us as somewhat skewed to the interests of the RSMs rather than those of the customer and increases the risk of a perception of bias. Almost all other EDR schemes with which we have worked focus effort on reminding their scheme members about their obligations to cease credit recovery action on receipt by TDRS of the complaint – rather than reminding them when they can recommence this action. The complaint referred to in Figure 14 later in this chapter suggests the benefits of a different approach.

Finding 15.

Where a customer makes a formal complaint that involves a disputed debt, TDRS does not, as a matter of standard practice, remind the RSM of its Complaints Code obligation to cease credit recovery action and to desist from disconnecting the customer.

⁹⁹ Clause 11.4 and 11.5

¹⁰⁰ FinCap submission on industry dispute resolution scheme (17 December 2020), p 3. The Australian requirements are more stringent. For example, an RSM must not restrict, suspend or disconnect a service because of overdue charges if any of the overdue charges are in dispute. A notice of restriction, suspension or disconnection for credit management reasons must specify the earliest date on which this will occur. The notice must use a method of notification that is reasonably acceptable to the customer based on their usage history. The customer must be told about the RSM's financial hardship policy. Before disconnecting, a separate disconnection notice must be sent including information about the consequences of non-payment. See TIO, *Restricting or disconnecting a service for credit management reasons – in detail* <https://www.tio.com.au/guidance-notes/restricting-or-disconnecting-a-service-for-credit-management-reasons>.

¹⁰¹ Clause 21.8 specifies that the Complaints Code will be reviewed by the TCF Board at the recommendation of the Council 2 years from implementation. Clause 21.9 provides that any person wishing to propose amendments to this Code should forward them to the TCF.

Procedural fairness

157. Where a formal complaint has been submitted to the TDRS, the Complaints Code requires the TDRS to ask the RSM (and WSM if one is involved in the complaint) to respond to the complaint, provide copies of relevant documents and give their views as to whether the complaint is within the TDRS's jurisdiction and, if not, why not.¹⁰² The response must be within 10 working days, unless the Scheme Agent allows an extension.
158. The Scheme Agent then forwards the customer the Complaint Summary updated to incorporate the RSM's (and if relevant, the WSM's) response and documents.¹⁰³ The customer is not, however, specifically invited to comment on the RSM's and any WSM response. If the customer nevertheless makes responding comments to the Resolution Coordinator (as occurred in a couple of cases that we reviewed), the Resolution Coordinator will usually pass these on to the Scheme Member. The problem is, however, that these further comments by the customer are accorded an informal status given that the Complaints Code does not allow a customer to "*add to, expand or materially alter the substance of the written complaint*".¹⁰⁴
159. As we saw in our case review, Scheme Members will almost always include in their response submissions that the complaint should be ruled outside jurisdiction. This Scheme Member mindset of objecting to jurisdiction is at odds with what we have seen in other EDR schemes with which we have worked - and is suggestive of a less mature approach to complaints resolution.
160. It is also of concern that the TDRS's process does not provide the customer with an opportunity to respond to Scheme Member submissions that the complaint should be ruled outside jurisdiction. Rather the Resolution Coordinator will typically send the Complaint Summary the same or next day to a TDRS-employed adjudicator for a jurisdictional assessment. This process is speedy, with a jurisdiction decision typically made within a day or two.
161. If the complaint is found to be outside jurisdiction, the customer does not have a review right.¹⁰⁵ We question the fairness of this given that, as we saw in our closed case review¹⁰⁶ and as the

¹⁰² Clause 39.20.10

¹⁰³ Complaints Code Clause 39.24. Clause 39.25 provides that the parties then have a further 5 working days to communicate directly or through the Scheme Agent to try to resolve the complaint. But, in practice, the Resolution Coordinator does not attempt to facilitate a resolution. Sometimes, however, a Scheme Member will ask that the process is halted at this time to allow them the 5 day period to negotiate with the customer. This happened in 1 of the 12 cases we reviewed that reached this stage of the TDRS's process. If, in fact, a resolution is effected at this stage, the Scheme Member avoids the TDRS case fee of \$500 that applies if the complaint moves to the next stage of the TDRS's process.

¹⁰⁴ Clause 40.8

¹⁰⁵ The TIO's processes include the opportunity for a customer to seek a review where the TIO decides to stop handling a complaint. A senior officer of the TIO conducts the review and will take into account any reasons given by the customer for disputing the decision. The reviewing officer provides their decision to both the customer and the TIO member: <https://www.tio.com.au/about-us/policies-and-procedures#pt5>.

¹⁰⁶ Eg Complaints Code clause 18.1.20 complaint relates to "general dissatisfaction" rather than specific to a product or service. Our closed case review included one complaint where the Adjudicator treated a building body corporate as a corporate customer on the basis of the number of phone connections by residents of the building – presumably an exercise of the discretion available to the Scheme Agent to determine that a business is analogous to a business with 20 or more full time equivalent employees.

following table suggests, the application of TDRS jurisdictional exclusions often involves complex factual questions and/ or the exercise of discretion.

Figure 13: Formal complaints received by TDRS in January to June 2020 that were found to be outside jurisdiction

| Case | Complaint Description | Desired Outcome | Jurisdictional exclusion |
|---------|---|---|--|
| T02xxxx | The customer was not happy with the speed they were receiving | The fault repaired | 18.1.21. if it relates to Broadband congestion or speed, unless the Broadband service is sold with a Committed Information Rate. |
| T02xxxx | Customer did not pay their bills because they were unable to afford them. The outstanding was subsequently sent to debt collection and the customer believes this is unfair | Debt withdrawn and credit rating restored | 17.10.4. A complaint must be made to the TDRS within 12 months of the Customer's initial discovery of the matter being complained about. |
| T02xxxx | Customer had multiple customer service, billing, email and fibre installation issues | An explanation for the poor service/communication and compensation for time and effort spent over the 3 months it took to resolve the issue | 17.11.3. if the Scheme Agent otherwise considers that it is not reasonable in the circumstances to proceed with accepting the Complaint. |
| T02xxxx | Customer has had multiple problems with their connection since fibre was installed and does not believe they have received good customer service either | Further compensation | 18.1.18. if the Customer has previously accepted, and been provided with by the Scheme Member, an agreed resolution to the specific event or events; 18.1.20. if the Customer's Complaint is "general dissatisfaction" not specific to a product, service or event; 34.8.1. the Scheme Agent can not consider claims for compensation that are based on loss of profits or indirect loss |
| T02xxxx | Customer disputes 'no fault found' fee charged after technician visited their home and was unable to find a fault | Charge reversed | 18.1.5. if it relates to the level of charges Scheme Members choose to set |
| T02xxxx | The customer expressed dissatisfaction with RSM ranging from services provided, billing, plans available and the customer | The top ups found and applied. | 18.1.20. if the Customer's Complaint is "general dissatisfaction" not specific to a product, service or event. |

| | | | |
|---------|--|---|--|
| | service provided. This culminated in the customer missing 2 top ups. | | |
| T02xxxx | Customer claims to have on going connections issues. Continually having to reset their modem and then call RSM to resolve the issue. | Issue to stop happening and services provided without error. | 17.11.3. the Scheme Agent otherwise considers that it is not reasonable in the circumstances to proceed with accepting the Complaint. |
| T02xxxx | Complaint expressed general dissatisfaction with RSM stemming from multiple service and customer service issues over a 5 year period. | An apology and acknowledgement of the customers poor treatment. | 17.11.3. if the Scheme Agent otherwise considers that it is not reasonable in the circumstances to proceed with accepting the complaint. |
| T02xxxx | Customer is unable to stream tv at all times without issue. | increase the customers speed to their home. | 18.1.21. if it relates to Broadband congestion or speed, unless the Broadband service is sold with a committed Information Rate. |
| T02xxxx | This complaint is specifically about speed. | The internet sped up. | 18.1.21. if it relates to Broadband congestion or speed, unless the Broadband service is sold with a Committed Information Rate. |
| T02xxxx | The customer and their neighbours are having significant problems obtaining a consistently useable internet service because of aged hardware and congestion which the network operator refuses to fix or upgrade. | WSM to fix the misconfiguration of our community system and other communities affected the same by this "upgrade", And return the system to being usable at times like it was before the "upgrade". We have no expectation that WSM can or will upgrade the backhaul capacity. | 18.1.6. if it relates to the extent of network coverage. |
| T02xxxx | This matter is regarding terms and conditions and disputing charges resulting from wi-fi calls when overseas. The customer believes they was charged incorrectly as they were using wi-fi not the cellular network. Customer would like all calls made from Brazil to be waived. | Given the circumstances and the fact that no cellular network was used any calls made while overseas should be waived. | 18.1.18. if the Customer has previously accepted, and been provided with by the Scheme Member, an agreed resolution to the specific event or events. |
| T02xxxx | The customer experienced issues with their ONT, contacted RSM to raise a fault, was read out a transcript that included that the customer would pay WSM \$135 if there was no fault found and a \$45 charge if cancelled. | RSM to accept they have an obligation to fix their service when it's not working, and that they have an obligation to log faults where it | 18.1.5. if it relates to the level of charges Scheme Members choose to set. |

| | | | |
|---------|---|--|---|
| | The customer objects to these charges. | appears - on reasonable inspection - that the network is at fault. RSM to accept that refusing to log a fault unless the customer accepts imposed terms is unfair, and the lack of right-of-response in their terms is unbalanced. | |
| T02xxxx | Customer recently signed up to RSM to take advantage of a \$200 credit for joining. On the website the customer clicked on the offer, put in their address and was offered 2 plans to choose from. The customer selected the Fibre Entertainment option. The next day the customer queried why the credit was not showing on their account only to be told fibre is not eligible for the promotion its only eligible for wireless connections. The customer believes the advertisement is misleading and RSM have not provided an adequate explanation to them. | Give the customer the \$200 account credit and revise their website. | 18.1.9. if it relates to the content of any Yellow Pages advertising service additional to that provided under a standard residential or business fixed line telecommunications contract. Complaints about advertising content should be referred to the Advertising Standards Authority. |
| T02xxxx | This complaint related to terms and conditions in RSM's Broadband contract, specifically the notification period customers must provide RSM and how customer are ineligible for a refund if their service is switched before the notice period ends. | Refund the customers money. | 18.1.20. if the Customer's Complaint is "general dissatisfaction" not specific to a product, service or event. |
| T02xxxx | Customer was having issues with network coverage at their home so switched RSM. The customer also had a significant amount owing on the phone which had been under an MRO with previous RSM. RSM subsequently requested payment in full for the phone now the customer had moved to another RSM and would not offer a payment plan beyond payment in full or 4 instalments. | The original 24 month instalment plan to continue. | 18.1.6. if it relates to the extent of network coverage. |
| T02xxxx | Customers bespoke fibre install was significantly delayed and they dispute the costs involved. | RSM not to charge for the install and compensation. | 18.1.5. if it relates to the level of charges Scheme Members choose to set. |

| | | | |
|---------|--|---|---|
| T02xxxx | Customer requested fibre installed. The technician arrived and scoped an overhead installation. The customer demanded an underground installation, without charge. The matter escalated to where WSM technicians were unable to continue with the install due to health and safety concerns for their staff which the customer disputes was their fault. | WSM to provide an underground UFB Fibre connection to the customers property. | 18.1.2. if it is frivolous or vexatious or trivial. |
|---------|--|---|---|

Source: Information provided by TDRS to Commission

162. The lack of customer opportunity to have input into the jurisdictional assessment process is of particular concern given that, in 2019/2020, 45% of formal complaints that progressed to jurisdictional assessment were found to be outside jurisdiction (see Figure 11). This figure is in marked contrast to the BSPAD Scheme operated by Utilities Disputes for disputes about access to shared property for broadband installation, which in 2019/2020 accepted 84 disputes for consideration and excluded only 3 of these (4%) on the basis that they were outside jurisdiction.

Finding 16.

TDRS's processes do not give a customer who has made a formal complaint sufficient opportunity to rebut the assertions (including jurisdiction-related assertions) of the Scheme Members who are party to the complaint.

Investigation, mediation and decision making

Overview of process

163. Once jurisdiction is confirmed, the complaint is allocated to one of three TDRS-contracted adjudicators for investigation and mediation or decision. If a complaint reaches this stage of the TDRS's process, a case fee of \$500 is incurred by the Scheme Member.
164. The Complaints Code requires the adjudicator to have regard to fairness in all the circumstances, any relevant legal requirements, the Complaints Code and Position Statements and any other relevant telecommunications code.¹⁰⁷ It specifies that normally the adjudicator will provide the customer with an opportunity to make oral submissions, provided that these do not add to, expand or materially alter the substance of the written complaint. If requested by the Scheme Member, the adjudicator will also allow the Scheme Member to provide an oral submission.
165. Where however, mediation seems unlikely to be successful, adjudicators move promptly to decide the complaint and issue a written determination explaining their reasons¹⁰⁸. (Adjudicators are expected by TDRS to resolve a complaint within 15 working days of being

¹⁰⁷ Clause 40.1

¹⁰⁸ Complaints Code clause 40.6 requires a determination to be in writing.

allocated the complaint.) Before a determination is sent to the parties, it is read through by another adjudicator, usually the TDRS-employed adjudicator.

166. A determination is binding on the Scheme Member if accepted by the customer within the 10 working day timeframe specified in the Complaints Code (a reminder and 5 working day extension is automatically provided if no response has been provided and then a further 20 working day grace period is allowed).¹⁰⁹ If the customer does not accept within that period, the TDRS Resolution Coordinator closes the complaint and notifies all parties of this.¹¹⁰

Discussion

167. Our review of closed cases showed that TDRS adjudicators read the complaint material carefully and engage well with the parties by phone and email.
168. Adjudicators ask relevant questions and often ask for additional documents. Some reviewed cases demonstrated, however, a tendency to place more of a burden on customers to support their assertions with evidence than other EDR schemes with which we have worked. For example, we reviewed a complaint where an RSM had signed an elderly customer up for its technical support service at a cost of \$870 over a 5 year period. The customer's representative asserted that the customer (the representative's grandmother) did not understand that the service was actually an optional extra. Moreover the customer had never used the service. The customer's representative told us that the adjudicator asked him to provide evidence that his grandmother had never asked for or used this service. Establishing a negative case is, of course, nigh impossible. In contrast to this, we have found other EDR schemes to be more sensitive to the unlevel playing field between the telecommunications provider and the customer in relation to such matters as access to data about service performance, records of previous interactions with the customer etc.
169. Adjudicators are transparent with customers about the limitations of what can be achieved through the scheme. This expectation management assists in achieving mediated outcomes.
170. Reviewed complaints included examples of mediation outcomes that seemed fair to both parties. In the complaint referred to in paragraph 168, however, we were told by the customer's representative that he settled on terms that he felt were quite unfair¹¹¹ – because he felt exhausted by the complaints process and because he was given no option. This was a complaint where we felt that the adjudicator may not have given full scope to the Complaints Code obligation on the Scheme Agent to have regard to “fairness in all the circumstances”¹¹².
171. If the complaint does not settle and so proceeds to determination, the adjudicator sometimes provides the parties with a proposed determination and gives the parties a few days to provide submissions in response. Our discussions with Scheme Members and our customer interviews suggested, however, that this does not commonly occur.

¹⁰⁹ Clause 40.9 to 40.12

¹¹⁰ Clause 40.12

¹¹¹ The customer was allowed to change provider without incurring a service fee for the balance of the month of transfer. There was, however, no refund for the fees charged for the service.

¹¹² Clause 34.6.1

172. In one reviewed complaint where this did not occur, the customer sent a lengthy email to the TDRS post-determination pointing out a number of errors in the decision. Our review of the complaint and our discussions with the customer suggested that some of the customer’s points had substance. We felt that, if the adjudicator had received the customer’s feedback before finalising the determination, the adjudicator could have incorporated and responded to the customer’s feedback. This would have made the determination stronger and would have enhanced the customer’s experience of the TDRS.
173. In consultations, some Scheme Members said that they also would like the TDRS to standardise providing the parties with a proposed determination, with an opportunity to provide their submissions in response to it.
174. A mandatory proposed determination step would be akin to the BSPAD Scheme Commissioner’s preliminary determination process¹¹³. If this were introduced, it might be necessary for a small increase to the fee paid by the Scheme Agent to its contracted adjudicators¹¹⁴.

Finding 17.

TDRS adjudicators do not usually provide the parties to a complaint with a proposed determination. As a result, the parties do not usually have an opportunity to point out any factual errors and provide comments.

175. The larger Scheme Members told us that they viewed TDRS determinations as generally being of high quality, but with some variability.
176. We reviewed 6 determinations. These were between 3 and 9 pages in length. We observed some tendency to legal language that diminished accessibility for customers. However, determinations were mostly clear and reasonably easy to understand. Empathy was often expressed for the customer’s situation, even if the complaint was not upheld.
177. A couple of interviewed customers, whose complaint had proceeded to determination, told us that they view the TDRS as “too much for the telcos”. One of these customers rejected the determination and instead took his complaint to the Disputes Tribunal, achieving a more favourable outcome.

Figure 14: TDRS determination and the Disputes Tribunal decision comparison

| | TDRS determination 02XXXX | Disputes Tribunal decision CIV-2020-096-000XXX |
|----------------------------------|--|--|
| Complaint about 3 disconnections | “Any action to restrict a service, or even enforce a debt, should not proceed when there is a live complaint. [The RSM] does | “The [RSM] disconnected or restricted [the customer’s] service at least once while it was clear that |

¹¹³

https://www.utilitiesdisputes.co.nz/UD/Disputes/Broadband_shared_property_access/Disputes_process/UD/Disputes/Disputes_process.aspx

¹¹⁴ The Scheme Agent pays its contracted adjudicators \$500 for each formal complaint that they handle, whether the complaint is resolved by mediation or by a determination.

| | | |
|--|---|--|
| in relation to disputed debt | have a fair point that just because there is a communication from a party that does not automatically mean there is a live complaint. I accept that there may have been a misunderstanding between the parties and therefore must conclude this aspect of the complaint has not been established.” | there was a real dispute between the parties”. |
| Mis-selling | The RSM’s conduct was misleading in describing the product provided to the customer as FibreX. | The RSM’s conduct was misleading in describing the product provided to the customer as FibreX. |
| Future TV | RSM’s decoder box was not ready for market and so service issues for 2 months of that service | TV service flawed |
| Loss re: disconnection, mis-selling and TV service | “I have been unable to see that he has incurred a loss receiving the HFC service rather than a full fibre service.” Refund of fees for TV service for period from provision of the faulty decoder box to reversion to previous legacy TV product | “I consider that [the customer] has suffered loss as a result of [the RSM’s] misleading conduct and failure to provide their services with reasonable care and skill....I consider a payment of \$1,000.00 is appropriate to compensate [the customer] for his losses in this case.” |
| Fair and courteous customer service | “I conclude that [the RSM] have not met this expectation in this case given the interactions with [the customer] taking account of his age. I accept however that this breach would have been inadvertent on the part of [the RSM]. The appropriate outcome would be that [the RSM] provide a written apology to [the customer]”. | “While I accept that this dispute has been very difficult and stressful for [the customer], I am not able to make an award of damages for these things.” |

Source: TDRS determination provided to CRK by TDRS and Disputes Tribunal decision provided to us by the customer

178. As this comparison demonstrates:

- a) The TDRS was much more forgiving of RSM breaches as “misunderstandings” or “inadvertent” than was the Disputes Tribunal.
- b) The TDRS took a more restrictive approach to the calculation of loss than the Disputes Tribunal.

(We discuss the calculation of loss further at paragraph 265.)

179. It seems to us that this is another instance where there may have been a failure to give full scope to the Complaints Code obligation on the Scheme Agent to have regard to “fairness in all the circumstances”¹¹⁵.

180. In its written submission to the Commission, Utilities Disputes put forward the view that a centralised decision maker, rather than a small group of contracted practitioners, would be a better model that would promote consistency.¹¹⁶ Our experience supports this. TDRS attempts

¹¹⁵ Clause 34.6.1

¹¹⁶ Utilities Disputes submission on industry dispute resolution scheme (17 December 2020), p 2

to compensate for this by having a peer support process for determinations (see paragraph 165) and is fortunate that it has a stable group of long-standing adjudicators. But the effectiveness of current Scheme Agent arrangements would likely be diminished if complaint numbers increase, as awareness of the scheme increases. We address this issue in paragraph 224.

Finding 18.

Whilst many mediations and determinations appropriately balance the positions of the parties, our review of closed complaints identified a couple of complaints where TDRS adjudicators:

- a) may not have given full scope to the Complaints Code obligation on the Scheme Agent to have regard to fairness in all the circumstances, or
- b) took a more restrictive approach to the calculation of financial loss than the Disputes Tribunal.

8. Governance

Background

181. The relevant principle when considering the governance structure is the principle of independence.
182. Governance arrangements and funding arrangements should be independent.¹¹⁷ Consideration should be given to users' perceptions about independence.¹¹⁸
183. Scheme staff should be selected through an independent process.¹¹⁹ The scheme must be properly resourced to carry out the service.¹²⁰ A confident scheme will have transparency as to its funding arrangements.¹²¹
184. The TDRS' governance structure is specified in the ToR.

TCF

185. The TCF Board is responsible for Complaints Code amendments, setting Scheme Member fees, appointing the Scheme Agent and approving the TDRS budget.¹²²

Council

186. A Council of eight people oversees the TDRS. Four of the Council are consumer representatives and four are industry representatives. One of the consumer representatives is appointed by the MBIE (Competition and Consumer Policy) and the other consumer representatives are nominated by Consumer NZ and the Tech Users Association of New Zealand (TUANZ) together.¹²³
187. The Council consumer representatives are currently Deborah Battell, the former Banking Ombudsman and Director of Competition and Fair Trading at the Commerce Commission as the MBIE's appointee, Craig Young, the chief executive of TUANZ, Kate Tokeley, a senior lecturer at

¹¹⁷ MBIE Framework Standard 4.2, Australian Key Practices for Industry-based Customer Dispute Resolution paras 2.6 to 2.9 and 2.11

¹¹⁸ MBIE Framework Standard 4.1, Australian Key Practices for Industry-based Customer Dispute Resolution para 5.15

¹¹⁹ MBIE Framework Standard 4.4.1, Australian Key Practices for Industry-based Customer Dispute Resolution para 2.5

¹²⁰ MBIE Framework Standard 8, Australian Key Practices for Industry-based Customer Dispute Resolution paras 2.11

¹²¹ MBIE Framework Standard 8.1.2

¹²² ToR clauses 3 and 10

¹²³ ToR clause 7

Victoria University of Wellington who specialises in consumer law and policy, and Paul Elenio, a journalist/media and communications professional.

188. The industry representatives are from 2degrees, Trustpower, Spark and Vocus Communications.¹²⁴
189. Each year, the Council chooses the Council Chair from amongst the consumer representatives.¹²⁵ The Chair is currently Paul Elenio.
190. The Council's role is "to provide independence and ensure industry and public confidence in the Scheme".¹²⁶ Its oversight responsibilities include selecting the Scheme Agent and approving Scheme Agent-nominated adjudicators and approving the business plan.¹²⁷
191. The Council's practice has been quarterly meetings (usually 2 to 3 hours). This year, for the first time, there has also been a Strategy Workshop held in March. The aim was to enable greater Council input into the Scheme Agent's Business Plan and Strategy.
192. Particularly in the last year, the Council has had a focus on improving awareness. A Marketing subcommittee was formed in early 2020. In November 2020, the Council passed a resolution supporting the refresh of brand identity, upgrade of the website and a general awareness campaign.¹²⁸

Scheme Agent

193. A Services Agreement between FairWay and the TCF documents FairWay's appointment as Scheme Agent and the terms of the engagement. The (undated) most recent iteration operates for the two years ending on 30 June 2022, unless extended or early termination occurs.¹²⁹
194. The Scheme Agent's responsibilities are to:
 - a) Promote best practice complaints handling by Scheme Members including by applying best practice to the management of TDRS complaints, providing complaints handling training on request to Scheme Members and making contributions to industry publications including information on complaints handling techniques and case studies of adjudications¹³⁰

¹²⁴ A list of the current Council members can be found at <https://www.tdr.org.nz/scheme-information/about-the-scheme/governing-council>

¹²⁵ ToR clause 9

¹²⁶ Code, page 2.

¹²⁷ ToR clause 6 and Schedule 1B

¹²⁸ Minutes of Council meeting 27 November 2020

¹²⁹ Clause 2

¹³⁰ Services Agreement Schedule 1 clause 2

- b) Promote the TDRS with the aim of improving awareness¹³¹ - this includes the maintenance of a professional website that provides stakeholders with high quality and useful information, encouraging Scheme Members to have a prominent website link to the TDRS website, development of a brochure that Scheme Members can provide to customers, providing TDRS brochures to relevant consumer organisations and regular liaison with consumer organisations¹³²
- c) Manage TDRS disputes in accordance with the Complaints Code including refer disputes to the adjudicator for final determination and accurately record statistical information for reporting purposes¹³³
- d) Aim to identify pan-industry systemic issues as early as possible¹³⁴
- e) Propose an annual business plan and budget and provide this to the Council for its consideration and to the TCF Board for approval¹³⁵
- f) Prepare high quality and comprehensive quarterly and annual reports about the TDRS scheme complaints and enquiries¹³⁶
- g) Provide monthly service level agreement reports to the Council¹³⁷
- h) Administer the Scheme Member joining process¹³⁸
- i) Maintain ongoing relationship with Scheme Members including the provision of quarterly reports to each Scheme Member about the number and type of their disputes and regular liaison with Scheme Members¹³⁹
- j) Provide proposals for the ongoing development and improvement of the TDRS which includes consideration of recurring issues and trends, systemic issues and jurisdictional issues¹⁴⁰
- k) Propose amendments to the Complaints Code, ToR and associated processes to ensure the TDRS meets best practice dispute resolution benchmarks – guidance may also be sought from the Council on policy and procedural questions¹⁴¹
- l) Invoice Scheme Members for fees¹⁴².

¹³¹ Services Agreement Schedule 1 clause 3

¹³² Services Agreement Schedule 1 clause 10.2

¹³³ Services Agreement Schedule 1 clause 4

¹³⁴ Services Agreement Schedule 1 clause 11

¹³⁵ Services Agreement Schedule 1 clause 5

¹³⁶ Services Agreement Schedule 1 clause 6.1 and 6.2. This refers to ToR Schedule 3 which specifies the content of the annual report but it provides for monthly reports to the Council rather than quarterly reports.

¹³⁷ Services Agreement Schedule 1 clause 6.3

¹³⁸ Services Agreement Schedule 1 clause 7.1

¹³⁹ Services Agreement Schedule 1 clause 7.2

¹⁴⁰ Services Agreement Schedule 1 clause 8.1

¹⁴¹ Services Agreement Schedule 1 clause 8.2

¹⁴² Services Agreement clause 5

195. The Services Agreement sets service level indicators (currently Net Promoter Score and timeliness service indicators).¹⁴³
196. For its services, the Scheme Agent is entitled to the Scheme Fees.¹⁴⁴ But failure to meet its service level indicators can put a percentage of the Scheme Agent's User Pays Fees at risk.
197. The Services Agreement gives the TCF the right to request the replacement of any of the Scheme Agent's TDRS employees, contractors or agents if the TCF is dissatisfied with their professionalism or competency.¹⁴⁵

Scheme Members

198. Scheme Members join by executing a Deed Poll.¹⁴⁶ This binds them to comply with the ToR and the Complaints Code.

Composition of Council

199. In submissions to the Commission and in our consultations, there were divergent views about the current structure of the Council. Utilities Disputes submitted that it created a perceived lack of independence to include industry representatives on the Council.¹⁴⁷ On the other hand, 2degrees and Vodafone submitted in favour of industry presence on the TDRS Council.¹⁴⁸
200. In our work with EDR schemes, we have seen the value that industry representatives can bring to a governance body. As well as bringing deep knowledge of the industry, we have observed that they often play a valuable role in facilitating industry support for the scheme.
201. In our experience, the TDRS is unusual in that industry representatives comprise 50% of the Council and a 75% majority is required to pass a resolution¹⁴⁹. We have more often seen scheme governance bodies where independent members and consumer representatives together comprise the majority – and where most resolutions are able to pass with a simple majority. To give a couple of examples:

¹⁴³ Services Agreement Schedule 2. The timeliness indicators are average speed of answer of calls, 80% of callers given correct information on first contact, daily call abandonment rate of less than 5%.

¹⁴⁴ Clause 5 If there is a revenue surplus at the close of the year the TCF holds the funds in reserve to be used at the direction of the TCF Chief Executive solely for the TDRS: Schedule 2 paragraph G

¹⁴⁵ Clause 8

¹⁴⁶ ToR clause 4.4

¹⁴⁷ Utilities Disputes submission on industry dispute resolution scheme (17 December 2020), p 2

¹⁴⁸ 2degrees submission on industry dispute resolution scheme (17 December 2020), p 2; Vodafone submission on industry dispute resolution scheme (18 December 2020), p 3.

¹⁴⁹ ToR clause 11.2(c)

- a) The TIO has a Board comprised of 3 industry, 3 consumer and 3 independent directors, with a resolution passed by simple majority.¹⁵⁰
 - b) The New Zealand Banking Ombudsman Scheme has a Board comprised of an independent Chair, 2 consumer and 2 industry representatives, with a resolution passed by a simple majority and the Chair having a casting vote.¹⁵¹
202. Whilst we were told that in practice the TDRS Council make consensus decisions and that industry representatives are not using their numbers to 'vote down' resolutions, we think that there is at least a risk that the current composition and voting requirements operate as a constraint on the resolutions that are put up for Council consideration. Even if this is not the case, we think that the current Council structure compromises the perception of the Council's independence.

Finding 19.

The Terms of Reference do not sufficiently ensure the Council's independence. This is because industry representatives constitute 50% of the Council and a Council resolution requires a 75% majority vote, effectively an apparent power of veto.

203. TDRS industry representatives have a 12 month term¹⁵², with no restriction on the number of terms. In our consultations, a Council industry representative, who had returned to the Council after a year off the Council, observed that it took some time to come back up to speed. Council and the Scheme Agent agreed that 12 months is a short term for industry representatives and that a 2 year term might be preferable.
204. TDRS consumer representatives have a 2 year term, with a cap on 3 consecutive terms. One consumer representative thought that staggered 3 year terms would provide a better balance between continuity and refreshment.
205. In our experience, EDR schemes have generally reported the same experience as other organisations - governance is improved with sufficient opportunity to build knowledge and corporate memory.

Finding 20.

The Terms of Reference stipulate short terms for Council members (1 year for industry representatives and 2 years for consumer representatives) and this has the potential to minimise the Council's effectiveness.

¹⁵⁰ TIO Constitution clauses 12 and 14 <https://www.tio.com.au/sites/default/files/2020-12/CONSTITUTION%20as%20amended%2015%20December%202020.pdf>

¹⁵¹ <https://bankomb.org.nz/about-us/our-board>. Constitution clause 10.

¹⁵² ToR clauses 7.4 and 12.2

Business plan, budget and TDRS fees

206. The Services Agreement between the Scheme Agent and the TCF specifies that each year the Scheme Agent proposes a business plan and budget to the Council for their consideration. However, it is the Board of the TCF that approves the business plan, budget and Scheme Member fees.¹⁵³
207. In its submission to the Commission, Consumer NZ argued that reliance by the TDRS on industry funding is problematic and creates potential conflicts of interest.¹⁵⁴
208. EDR schemes in many sectors and many jurisdictions are very frequently funded by industry. In our experience, that need not be a problem, provided that there is an independent process to determine the level of funding that is required for the scheme to be effective.
209. For the TDRS, the Council is informed of the total Scheme Agent contract price and a figure for the 'ring-fenced' marketing budget (case fees are in addition to the Scheme Agent contract price and are of course dependent upon volumes). The Council is not provided with a full operational budget for the TDRS. We find that this lack of transparency compromises the Council's ability to assess whether TDRS resourcing is sufficient and whether the scheme is efficient.
210. While we did not seek out RSMs' views on the Scheme Agent's fees, our observation of dozens of EDR schemes is that the funding and fees regime is an important part of the overall framework. The regime can assist in:
- Providing some confidence in the fairness of the 'user-pays' contribution as between members
 - Providing incentives for members to resolve complaints themselves
 - Ensuring that the Scheme Agent or outsourced decision-makers do not have any financial incentives that may impact on their dealing with complaints fully and fairly

Good practice is for EDR schemes to periodically review their fees regime to ensure that it is supporting the scheme objectives and is updated to reflect current usage and complaint volumes.

Finding 21.

The current funding process does not provide the Council with enough information to assess whether TDRS resourcing is sufficient and whether the scheme is operating efficiently. This lack of information compromises the independence of the funding process.

¹⁵³ Services Agreement clause 5.1. This is contrary to the ToR clause 6.1(d) which specifies that the Council approves the business plan.

¹⁵⁴ Consumer NZ "Submission on industry dispute resolution scheme" (18 December 2020), p 2.

Scheme Accountability

211. At each quarterly Council meeting, the Scheme Agent provides a Business Performance report against Business Plan-specified activities¹⁵⁵ and key performance indicators¹⁵⁶. Reporting is also provided about the number of complaints and enquiries the TDRS has received (categorized by subject matter), with trend information provided. High level financial performance information is also provided.¹⁵⁷
212. Our observation is that operational reporting to the Council is less detailed than for other EDR schemes with which we have worked. The Council's capacity to oversee the Scheme Agent's performance would be enhanced if reporting were to be provided about additional key metrics, such as the period of time to achieve deadlock (number of days since the customer first complained to the RSM as per evidence available), the number of formal complaints to be submitted and the outcome of formal complaints including jurisdictional exclusions (number by category).
213. In our experience, it is also usual for an EDR scheme governance body to receive reporting as to the numbers of complaints about the scheme's performance and the reasons for these complaints.¹⁵⁸ The Council does not currently receive this reporting.

¹⁵⁵ TDR Business Plan and Strategy (1 July 2020 – 30 June 2021) specified the following business activities:

- engagement with other complaint organisations and initiatives (at least 2 organisations quarterly)
- provide case-related information (monthly update of case studies, at least one article per quarter, recurring them and position statements as needed)
- engagement with scheme activities (6 operations meetings per year, 4 focus groups per year, 2 meetings with each Scheme Member per year, quarterly administration of service awards program)
- Marketing Plan implementation
- technology upgrade implementation
- engagement with wider community (weekly social media posts, 'influencer' video each quarter, reach out to a non-scheme member each quarter, sector specific awareness-advancing meeting each quarter eg older persons, Maori, rural)
- continuous improvement (technical TDRS- internal education session every 2 months, monthly adjudicator meeting, monthly monitoring of NPS results, bi-monthly operations meetings with Scheme Members, weekly operational meetings with the TDRS team, 2+ meetings per quarter with organisations representing/ made up of vulnerable customers)
- industry participation eg input into codes (as needed)
- meeting contractual timeliness/ customer service requirements and maintaining fiscal soundness of the TDRS.

¹⁵⁶ TDR Business Plan and Strategy (1 July 2020 – 30 June 2021) specified the KPIs for 2020/ 2021 were 80% of calls answered within 20 seconds, less than 5% abandonment rate each month, 95% of mini jurisdiction checks within 24 hours of customer contact, initial referral to RSM within 24 hours of complete complaint, 80% of matters resolved within 27 business days of allocation to the adjudicator, complainant survey NPS score of +60.

¹⁵⁷ Eg TDR Report to the Council February 2021: Income is divided into service delivery fees, ring-fenced marketing budget and complaint fees. Expenditure is divided into marketing and promotion costs and the balance of the contract price.

¹⁵⁸ The Scheme Agent's register records 7 complaints about its handling of TDRS complaints during the period from 1 July 2019 to 5 July 2021. Two of these were complaints that the adjudicator's determination did not correctly present the facts. Four complaints were about TDRS's jurisdictional assessment or scope. One was a complaint about debt collection activity by the RSM at a time when the customer thought his TDRS complaint was on hold.

214. In our consultation meeting, the Council expressed the view that they are an advisory body only and that this creates constraints. Consistent with this conception of the role, the Council did not review the Scheme Agent's performance or have significant input into the TCF's decision last year to extend the Scheme Agent's term¹⁵⁹.
215. Similarly, the Council have an advisory role only in relation to the Complaints Code.¹⁶⁰ In 2019 one of the consumer representatives provided a detailed memorandum to the TCF proposing changes to the Complaints Code, but the TCF did not progress this initiative and update the Code. (see paragraph 247).
216. In its submission to the Commission, Tech Users Association of New Zealand urged: *"The TDR Council should be strengthened with more governance powers and responsibilities delegated to it by the TCF to develop policy and be given the power to manage the contract with the service provider. This should include setting policy and budget. This move will increase the perceived independence of the scheme"*.¹⁶¹
217. We agree that the current TDRS governance design is a problem. The design splits the Scheme Agent's accountability between the Council and the TCF and creates risk that neither body takes full responsibility. In our experience, effective scheme governance only occurs where the scheme management operates with a strong sense of accountability to the governing body - and we do not think that this is the case at the moment. The result is a design and mode of operating that does not currently meet the independence principle.
218. To address this issue, the TCF has agreed to change the scheme rules after the Commission's review is complete so as to pass full governance responsibility for the TDRS to the Council.¹⁶² For effective governance responsibility to pass to the Council, it would be important for the Council to have decision making authority, not just in relation to the Scheme Agent, but also in relation to the parts of the Complaints Code that pertain to the TDRS (Scheme Members' responsibility to promote the TDRS, TDRS Position Statements, the specification of matters outside the TDRS's jurisdiction, TDRS powers and procedures, TDRS monitoring and enforcing of the Complaints Code and so on).

Finding 22.

The Council's current advisory-only role does not meet the independence principle.

Outsourcing

219. Since the inception of the TDRS, the TCF has outsourced the role of Scheme Agent to FairWay, a private company with around 70 staff¹⁶³. FairWay is an experienced operator of dispute

¹⁵⁹ The Council's update to the TCF in May 2021 stated that the Council supports a contract extension of 2 years from 1 July 2020 to allow flexibility while the Commission reviews the TDRS.

¹⁶⁰ ToR clause 6.1(h)

¹⁶¹ TUANZ "Submission on industry dispute resolution scheme" (18 December 2020), para 14(a).

¹⁶² Letter from the TCF to Commission dated 25 March 2021

¹⁶³ <https://www.fairwayresolution.com/about-fairway>

resolution schemes. It manages five other schemes and provides other alternative dispute resolution and decision review services to other government agencies and private sector organisations.

220. In 2020/ 2021, FairWay had 2.5 FTE engaged in TDRS work. This was complemented by some work by other staff. In addition, FairWay outsources part of the TDRS work, using 3 contracted practitioners to undertake TDRS mediations and decision making.
221. In its submission to the Commission, Utilities Disputes argued against the current model. *“Fairway is an employee trust owned company which we understand is run for profit. ... Fairway does not specialise in any particular industry rather it handles a wide and disperse range of dispute resolution schemes.”A centralised decision maker can be pivotal in a successful scheme, particularly where complaints are unable to be settled. It allows for greater consistency of decisions, without the cost of litigation to provide judicial precedent and provides certainty for both consumers and scheme members so long as decisions are readily accessible.”*
222. Our experience is that an EDR scheme often begins with an outsourced model, but that as awareness of the scheme and hence complaint volumes increase, the tendency is for the scheme to bring the management of the scheme inhouse within a not-for-profit enterprise, with employed (rather than externally contracted) lead decision makers. There can be a number of advantages that follow where this occurs. First, it is a more independent model, without the perception of client dependency that exists where a scheme operator is a service provider to the industry funders of the scheme. Secondly, as Utilities Disputes has suggested, this model tends to produce more consistency in decision making. Thirdly, employed senior decision makers can take on a broader role. This can be internally, for example, assisting with upskilling other scheme staff and contributing to position statements. As suggested by one Council member, an employed senior decision maker can also be a focal point for scheme external engagement with scheme members, consumer representatives and other stakeholders.
223. On the other hand, we recognise that there are advantages of housing a small scheme, such as the TDRS within a larger organisation such as FairWay, that also services other schemes. A larger organisation can find it easier to attract high quality staff because it can offer a more diverse career path to staff. There is also greater capacity to employ specialist staff because their services can be utilised across all schemes. Complaint volume fluctuations can be managed more readily, for example, by drawing on other staff as needed. Outreach work can be carried out for the group of schemes simultaneously.
224. Accordingly there are considerations that need to be balanced and revisited if, as we expect, complaint volumes continue to increase.

Finding 23.

Whilst the current TDRS outsourced operating model has benefits, it also brings challenges for the scheme’s independence.

9. Jurisdiction

Background

225. The most relevant principles when considering the jurisdiction of a dispute resolution are the accessibility principle and the effectiveness principle.
226. The scheme's scope should be clear and sufficient to deal with the vast majority of complaints in the relevant industry or service area.¹⁶⁴ Further, the compensation monetary cap should be consistent with the nature, extent and value of customer transactions in the relevant industry.¹⁶⁵
227. The Telecommunications Act 2001 specifies the TDRS's jurisdiction in relation to disputes relating to the 111 Contact Code or the Copper Withdrawal Code.¹⁶⁶ For these complaints, the TDRS has jurisdiction for all telecommunications service providers, whether wholesale or retail and whether or not a member of the TDRS. If a dispute relating to these Codes is referred to the TDRS, the dispute is decided in accordance with the rules of the scheme.¹⁶⁷ This implies that the scheme's jurisdictional exclusions are relevant.
228. The Complaints Code specifies the TDRS's jurisdiction for all other complaints and that a complaint must be brought against a telecommunications service provider with whom the customer has a billing relationship. A WSM can, however, be joined to an RSM complaint if implicated by the complaint.¹⁶⁸
229. Clauses 17.11 and 18 specify categories of disputes that are outside the TDRS. Some of these are mandatory exclusions and some give the TDRS a discretion whether or not to exclude.

Mandatory membership

230. TCF membership requirements require all TCF members to be a TDRS member.¹⁶⁹ As a result, the TDRS include all three mobile network operators and the five largest fixed broadband providers.
231. The TDRS also includes a number of service providers who are not TCF members.¹⁷⁰ This means that the TDRS is estimated to be available to over 99% of residential mobile market customers

¹⁶⁴ Australian Key Practices for Industry-based Customer Dispute Resolution paras 1.13, 6.1 and 6.2

¹⁶⁵ Australian Key Practices for Industry-based Customer Dispute Resolution para 6.2

¹⁶⁶ Section 241

¹⁶⁷ Section 242(2)

¹⁶⁸ Complaints Code clause 28 and 34.7

¹⁶⁹ TCF Rules para 6.2; Scheme ToR, clause 4.

¹⁷⁰ A list of scheme members can be found at <https://www.tdr.org.nz/about-tdr/tdr-scheme-members>

(but not all customers of mobile virtual network operators) and at least 87% of residential fixed broadband customers.¹⁷¹

232. In written submissions to the Commission and in our consultations, there was considerable support for the TDRS becoming compulsory for all telecommunication services providers.
233. Spark submitted: *“Mandatory, universal membership would mean that all providers would be subject to the same incentives to improve customer service and would be held to the same external standards. It would also create a more level playing field for providers and customers. Having mandatory, universal membership of TDRS would also help with general awareness of the scheme and to simplify messaging that the TDRS is there for customers whatever service they are on.”*
234. Vodafone’s submission pointed to customer situations that are outside the TDRS.
- “There are a number of customers with intact connections but no RSP associated with that connection. In this case the TDRS has no jurisdiction if there are any issues. For example, Chorus has been running a campaign to get customers ‘fibre ready’ by installing the final fibre drop and an ONT at the premise before any retail service is connected. Currently Chorus has more than 72,000 premises with fibre connected but no RSP. If there are any problems with this connection there is no recourse to the TDRS.*
- Many RSPs are not a member of the TDRS. For example neither Voyager, nor Lightwire are members despite having almost \$20m of qualifying telco revenue between them.”*
235. The Council and all other TDRS members and consumer organisations that engaged with the review agreed with this position. One consumer organisation told us that they are aware of a telecommunications service provider, that is not a TDRS member, with a customer base that has repeatedly experienced problems that are not being satisfactorily resolved by the provider.
236. Utilities Disputes submitted that mandatory membership would enhance confidence in TDRS independence. *“This reduces the influence, both real and perceived, of scheme members on the case management and decision-making process. An extreme example of a potential problem with a voluntary scheme would be where a scheme member threatens to withdraw because of a finding that was not favourable towards them. Another extreme example is where a voluntary scheme is incentivised to account for a scheme member’s concerns in a case and may find more favourably towards the scheme member than it would if it were fully independent.”*
237. On the other hand, an internet services provider industry association, whose members are mostly not TDRS members, expressed some concern about the costs and administrative burden that would result if TDRS membership were to become mandatory. The association considered that the competitive market environment operates as a driver for its membership to provide excellent customer service and to resolve their few complaints promptly and well. As a result,

¹⁷¹ See figures 17 and 18 of the 2020 Annual Telecommunication Monitoring Report for market share estimates at https://comcom.govt.nz/_data/assets/pdf_file/0030/247377/2020-Annual-Telecommunications-Monitoring-Report-Revised-version-16-March-2021.pdf

the association questioned the value that the TDRS would bring for the association's members or their customers.

238. In our experience, industry EDR schemes are typically mandatory. In Australia, the Telecommunications (Consumer Protection and Services Standards) Act 1999 mandates TIO membership¹⁷². In the United Kingdom, the Office of Communications General Conditions of Entitlement requires all communications providers to be a member of an approved EDR scheme¹⁷³.
239. Working with other EDR schemes, we have seen that some small members can have no or very few complaints and enquiries coming into the scheme. Schemes fees need to be set in a way that ensures fairness between members.¹⁷⁴ Where this is done successfully, industry participants are generally accepting of mandatory membership.

Finding 24.

Those who engaged with the review of the TDRS were almost universally supportive of the TDRS becoming mandatory for all telecommunication services providers.

Wholesale telecommunications service providers

240. In submissions to the Commission and in consultations, some RSMs expressed the view that WSMs should be full members of the TDRS.
241. We have discussed at paragraph 131ff the cumbersome processes for joining a WSM to an RSM complaint and the delay that this can cause in deadlocking a complaint.
242. Some RSMs are also unhappy about WSMs not contributing to the fixed costs of the scheme. Views were also expressed that the practice of attributing all WSM complaints to the relevant RSMs unfairly distorts statistical reporting about RSMs.¹⁷⁵
243. Chorus, on the other hand, expressed satisfaction with current arrangements. Chorus noted that for the year ending June 2020, Chorus was involved in 192 TDRS complaints and enquiries, of which only 4 went to adjudication.¹⁷⁶ (Chorus' volume of complaints is within the realm of

¹⁷² Section 128(1)

¹⁷³ General Condition C.4.3

¹⁷⁴ The TIO does not charge its members either a joining or an annual fee, with all revenue derived from case fees https://commsalliance.com.au/__data/assets/pdf_file/0005/1886/TIO-Fact-Sheet---Your-obligations-29Aug06.pdf. More commonly in our experience a nominal yearly fee will apply to members based on market share, as for Utilities Disputes' BSPAD Scheme: Scheme Rules Appendix C <http://media.utilitiesdisputes.org.nz/media/Scheme%20documents/BSPAD%20Scheme%20rules%20July%202017.pdf>

¹⁷⁵ 2degrees submission on industry dispute resolution scheme (17 December 2020), p 3, Vodaf one submission on industry dispute resolution scheme (18 December 2020), p 2

¹⁷⁶ Chorus submission on open letter (18 December 2020) p 1

the 5 broadband providers whose complaints and enquiries numbers are reported by the TDRS in its bi-annual reports - some of which may of course be more attributable to Chorus than the RSM.¹⁷⁷)

244. We find that market practices, TDRS complaint processes, scheme cost recovery issues and reporting practices all provide compelling reasons to revisit the way in which WSMs are part of the TDRS.

Finding 25.

The Complaints Code processes for involving WSMs in complaints are not currently fit for purpose and are diminishing the effectiveness of the TDRS.

Complaints Code

245. The Complaints Code content has not been amended since March 2016. In our consultations, we were told about a range of shortcomings in relation to the Code (see paragraphs 49, 107, 131, 138 and 144). Other issues in relation to the Complaints Code are set out in paragraphs 158, 248, 251 and 257.
246. Although the Scheme Agent Services Agreement confers responsibility on the Scheme Agent to propose amendments to the Complaints Code¹⁷⁸, our consultations have identified that the Scheme Agent has not been proactive in this respect.
247. As referred to in paragraph 215, a consumer representative on the Council did, however, undertake a review of the Code in June 2019 and provided a detailed memorandum to the TCF as to her views. In October 2019, the TCF formed a working group to review the Code (we understand that this group did not include either Scheme Agent or Council representatives but the TCF CEO met with both to discuss possible governance changes to the TDRS¹⁷⁹). Because of the Commission's review, the TCF decided, however, not to progress the working group initiative.¹⁸⁰

Finding 26.

The Complaints Code has not been regularly updated to address identified shortcomings.

¹⁷⁷ The provider with the lowest number for the 4 quarters ending 30 June 2020 had 47 complaints and enquiries and the provider with the largest number had 849 complaints and enquiries:
<https://www.tdr.org.nz/search/content/bi-annual%20report>

¹⁷⁸ Services Agreement between FairWay and the TCF Schedule 1 clause 8.2

¹⁷⁹ Letter from the TCF to Commission dated 19 July 2021, p.5

¹⁸⁰ Letter from the TCF to Commission dated 19 July 2021, p.2

Disputes under 111 Contact Code or Copper Withdrawal Code

248. The Complaints Code predates and so does not refer to the 111 Contact Code or Copper Withdrawal Code. This could be confusing for a reader who is not aware that the Telecommunications Act 2001 applies the Complaints Code TDRS dispute resolution procedures to disputes under those Codes.
249. The submission from the TCF to the Commission suggested: *“The expanded reach of the scheme to include disputes relating to the 111 Code and the CWC could also be clarified in the Scheme Rules as part of any other general changes.”*
250. We agree that the current framework is complex and could be made easier to understand.

Finding 27.

The Complaints Code does not presently acknowledge the expanded reach of the TDRS as a result of the 111 Contact Code and the Copper Withdrawal Code and to that extent is out of date.

Jurisdictional exclusions

251. In written submissions to the Commission and our consultations, views were expressed that the Complaints Code categories of jurisdictional exclusion warrant a review.¹⁸¹
252. Vodafone submitted that the jurisdictional status of TV and broadcasting services should be clarified and that the TDRS should not be able to consider complaints about the safety of technology deployments, such as 5G. Nor should it be able to consider mobile device problems.¹⁸²
253. An RSM told us that some exclusions should be less categorical. For example, some network coverage complaints should be within the TDRS’s jurisdiction, for example, if there is degradation of network service compared to what was promised at the point of sale. Whilst pricing is excluded, the RSM thought that complaints about disclosure, sales pricing promises and the communication of changes in pricing should be within jurisdiction.
254. Consumer organisations told us that the TDRS’s jurisdiction is too narrow. In particular, FinCap submitted that the TDRS should be able to handle complaints about irresponsible financing of mobile devices.¹⁸³
255. As a way of benchmarking the Complaints Code jurisdictional coverage, we compared its jurisdictional exclusions with those of the TIO.

¹⁸¹ 2degrees submission on industry dispute resolution scheme (17 December 2020) p.3

¹⁸² Vodafone “Submission on industry dispute resolution scheme” (18 December 2020), p.3

¹⁸³ FinCap submission on industry dispute resolution scheme (17 December 2020), p 2

Figure 15: Comparison of the TDRS and TIO jurisdictional exclusions

| TDRS jurisdictional exclusion | TIO jurisdictional exclusion |
|---|--|
| <p>17.8 if the customer has already pursued the complaint through the Disputes Tribunal, the Courts, the Commerce Commission or the Office of the Privacy Commissioner and the matter has been adjudicated on</p> <p>18.1.11. if a grievance subject to legal action or being pursued in alternative forums</p> <p>18.1.16. if the customer has previously made a substantially similar complaint to the TDRS about the same Scheme Member unless there is new information</p> | <p>Para 2.11 where the issues have been dealt with or are likely to be dealt with by a court, tribunal or a telecommunications or consumer regulator</p> |
| <p>17.9 if the customer has engaged a lawyer to contact the Scheme Member about the complaint</p> | |
| <p>17.10.4. Must be made to the TDRS within 12 months of the customer's initial discovery of the matter being complained about</p> | <p>Para 2.6: May be excluded if customer discovered problem between 2 and 6 years previously. Will be excluded if customer discovered problem more than 6 years ago.</p> |
| <p>17.11.1 and 18.1.2. if the complaint is frivolous or vexatious or trivial</p> <p>17. 11. 2 The customer has been abusive, threatening or behaved indecently to the Scheme Agent or Scheme Member</p> <p>17.11.3. If the Scheme Agent otherwise considers that it is not reasonable in the circumstances to proceed with accepting the Complaint</p> <p>18.1.24. If the Scheme Agent is reasonably satisfied that the customer has refused to engage with the Scheme Member or otherwise acted in bad faith in relation to resolving the complaint</p> <p>18.1.18. if the customer has previously accepted, and been provided with by the Scheme Member, an agreed resolution to the specific event or events</p> | <p>Para 3.20 if we consider that it is fair and reasonable to stop handling the complaint</p> |
| <p>18.3. if a request for information</p> | |
| <p>18.1.4. if it relates to equipment or applications that the Scheme Member does not support</p> | <p>Para 2.10(e) customer equipment that is not for the purpose of accessing the service</p> |
| <p>18.1.6. if it relates to the extent of network coverage</p> | |
| <p>18.1.7. if it relates to 111 emergency calls which should be referred to the relevant emergency service</p> | <p>Para 2.10(i) the 000 emergency service</p> |
| <p>18.1.8. if it is a grievance by one Scheme Member against another</p> | <p>Para 2.2 if not an end-user to a telecommunications service or directly affected by a telecommunications service</p> |

| | |
|--|--|
| 18.1.12. if it relates to matters that the customer does not have a sufficient interest in | 2.10(b) if about a commercial activity of a provider that is not related to a providing a telecommunications service |
| 18.1.9. if it relates to Yellow Pages advertising additional to that provided under a standard residential or business fixed line telecommunications contract | Para 2.10(h) business directories eg. Yellow Pages |
| 18.1.10. if it relates to privacy | |
| 18.1.13. if it relates to matters which the Scheme Member is prevented by law from resolving | |
| 18.1.14. if relating to domain names and within the jurisdiction of the Office of the Domain Name Commissioner | |
| 18.1.15. if the customer is claiming more than \$15,000 for that grievance and all grievances based on the same subject matter against the same Scheme Member | Para 3.11 compensation is capped at \$50,000 |
| 18.1.17 if it relates to a Corporate Customer (organisation with 20+ full time equivalent employees or other organisation that Scheme Agent regards as analogous to such an organisation having regard to its size, structure or nature of business) or a Government Customer | Para 2.2 a business customer that is not a small business – turnover (threshold of \$3m in revenue), employee numbers (threshold of 20), structure and nature considered |
| 18.1.19. if the customer cannot reasonably identify a specific event by timeframe or date | 2.10(a) if about telecommunications policy |
| 18.1.20. if the Customer’s Complaint is “general dissatisfaction” not specific to a product, service or event | |
| 18.1.21. if it relates to Broadband congestion or speed, unless the Broadband service is sold with a committed Information Rate | |
| 18.1.22. If it relates to interactions or conduct of the Scheme Member’s authorised debt collection or recovery agency | |
| 18.1.23. If the Scheme Member has previously offered the customer a written resolution and the customer has not responded within 6 weeks of the offer and the Scheme Member has warned the customer that failure to respond in that timeframe could exclude them from the TDRS | |
| | 2.10(c) a possible breach of law against anti-competitive behaviour or restrictive practices |
| | 2.10(d) if about content accessed through the telecommunications service |

| | |
|--|---|
| | 2.10(f) if about cabling beyond the end of a telecommunications network |
|--|---|

Source: Complaints Code and TIO Terms of Reference

256. The key issues that we draw from this analysis are:

- a) Customers have a lesser access to the TDRS (compared with the TIO) as a result of the requirements that:
 - i. a complaint must be referred to the TDRS within 12 months of discovery of the problem
 - ii. the right of access is lost if the customer fails to respond within 6 weeks to a Scheme Member offer to resolve the complaint and the Scheme Member has warned the customer of the consequences of this, and
 - iii. the right of access is also lost while the customer is using the services of a lawyer.

Whilst it is quite usual for an EDR scheme to encourage complainants to feel confident accessing the scheme without the benefit of a lawyer and to not provide compensation for legal costs that the complainant incurs, in our experience it is unusual for a scheme to exclude someone who has engaged a lawyer to manage their complaint.¹⁸⁴

- b) The TDRS has a somewhat narrower jurisdiction than the TIO – the differences in relation to broadband speed and debt collection practices are we think particularly significant.

Finding 28.

- a) The TDRS provides a more constrained right of access to customers than does the TIO, with a shorter period to access the scheme and a denial of right of access if the customer has failed to respond within 6 weeks to a Scheme Member offer to resolve the complaint and the Scheme Member has warned the customer about the consequences of this.
- b) Access to the TDRS is further limited by the exclusion of a customer while they have using the services of a lawyer.
- c) The TDRS has a somewhat narrower jurisdiction than the TIO with differences in scheme coverage in relation to broadband speed and debt collection practices being particularly significant differences.

¹⁸⁴ This exclusion is criticised by a Council consumer representative in a memorandum dated 18 June 2019 to the TCF Review of the TCF Customer Complaints Code – Issues from a consumer perspective

Compensation

257. In their written submissions to the Commission, Utilities Disputes and Consumer NZ submission called for the TDRS claims cap of \$15,000 to be raised.¹⁸⁵ Utilities Disputes argued that, particularly for small business complaints, the cap can be insufficient.
258. In consultations with us, consumer organisations said that the cap of \$15,000 can be inadequate where individuals incur high mobile roaming bills. In addition, consumer organisations argued that the cap is out of step with the Disputes Tribunal (cap of \$30,000) and with the TIO (cap of \$50,000).
259. On the other hand, Scheme Members told us that the \$15,000 cap is almost always sufficient. One WSM acknowledged, however, that occasionally driveway corrective works will involve a larger amount but said that if this was the case they will fully compensate notwithstanding the \$15,000 cap.
260. One RSM told us that the TDRS monetary cap was originally set to align with the Disputes Tribunal, but had not been increased when the Disputes Tribunal cap was increased – and it would be appropriate for this catch-up to occur.
261. We often encounter scenarios where ‘most’ or even all matters fit within a monetary cap – and frequently an accompanying assurance (along with examples) from scheme members that unusual situations above the cap will almost always be voluntarily accepted. However, customers can be deterred from accessing the scheme where they believe (rightly or wrongly) their claim exceeds the scheme's cap - and it can be hard to collect evidence that definitively shows the extent to which this is occurring.
262. In general, we have taken the view that the overriding principle should be that it is most important for customers to be confident about access to the scheme and that the scheme appears to be open to all reasonable claims – ie. that there is not an appearance of the industry trying to unfairly exclude matters. It follows that on a strict analysis of historical complaints, the monetary caps should appear to be fairly generous.

Finding 29.

The TDRS claims cap was intended to be aligned with the Disputes Tribunal cap but is now significantly less than that.

263. Consumer NZ argued that the TDRS should impose penalties for non-compliance, as there is otherwise no incentive for Scheme Members to comply.¹⁸⁶ But an EDR scheme is not a regulator and so we consider that penalties for non-compliance with consumer law are not properly within a scheme's scope. That said, a scheme should have some reserve power either to expel

¹⁸⁵ Utilities Disputes submission on industry dispute resolution scheme (17 December 2020), p 4; Consumer NZ submission on industry dispute resolution scheme (18 December 2020), p 3

¹⁸⁶ Consumer NZ submission on industry dispute resolution scheme (18 December 2020), p 2

a member that does not comply with scheme rules - and the Complaints Code Annexure 2 provides a framework for this to occur.

264. On the other hand, some EDR schemes are able to make a small award to a customer who has suffered extraordinary inconvenience and stress as a result of particularly egregious customer service issues. The CCTS has the power to award up to \$5,000 CAD for inconvenience although the amounts awarded are generally much smaller. But this is by no means universal practice for EDR schemes.¹⁸⁷ Without this power, however, there can be cases where the customer's complaint is upheld but the scheme provides no redress – which can be perceived by the customer to be profoundly unfair.
265. For the most part, however, we think that telecommunications fees can usually be reduced to compensate for a substandard telecommunications service – on the basis that the Scheme Member has not delivered the quality of the telecommunications service for which the customer has been charged. If this approach is taken to the calculation of financial loss, we consider that there is less need for the TDRS to have a power to provide minor awards to compensate for inconvenience and stress.

Finding 30.

Like many other external disputes resolution schemes, the TDRS is not empowered to make a small award for extraordinary inconvenience and stress as a result of particularly egregious customer service.

¹⁸⁷ The TIO does not have the power to compensate for anything other than direct financial loss: *Consumer guide to compensation for financial loss* https://www.tio.com.au/sites/default/files/2020-01/005_C_compensation%20for%20financial%20loss%20factsheet.pdf