

Disputed Customer Service Guarantee Claim Issue

Date of determination: 16 January 2003

Decision accepted by the complainant: Yes

The Complaint

The complainant contacted the TIO to advise that he was involved in a dispute with his telephone company over his eligibility for compensation under the Telecommunications (Customer Service Guarantee) Standard 1997 ('the CSG 1997') for delay in the provision of a telephone service in Walang NSW.

The complainant advised that he had requested connection of the service in July 1999 and agreed with his telephone company to a connection date of 30 August 1999. There was a delay in the connection, owing to lack of available infrastructure. The telephone company provided the complainant with an interim service in November 2000 but there were questions about the adequacy of the service. The permanent service was connected on 10 August 2001, a period of over 23 months past the agreed connection date.

The complainant advised that his telephone company had denied liability to pay compensation, predominantly on the basis that it believed that he intended to use the service as a data/fax line. Under the CSG 1997, a service used for fax and data transmission does not meet the definition of a 'standard telephone service'. Compensation is only payable where there is a delay in connection of a 'standard telephone service'.

The complainant denied that he intended using the service as a fax/data line.

TIO Response

The TIO raised the complaint against the complainant's service provider to seek its perspective on the matter. The service provider responded with evidence from its customer care notes in support of its claim that that the complainant intended using the line for fax/internet use.

As the service provider's position was that the complainant was not entitled to compensation under the CSG largely because of intended usage, the TIO asked the complainant for further information on this matter. The complainant supplied a Statutory Declaration, which stated that he intended using the service primarily for voice telephony.

The TIO considered the information provided by both parties and formed preliminary view on all matters in dispute, which it provided to both parties. The TIO's preliminary view was that pursuant to the CSG 1997 the service provider was required to pay compensation of \$14,258.25 to the complainant for the delay in connection of his service. The TIO indicated that without further evidence from the service provider, it would be willing to determine this complaint. As the TIO may

only give a binding direction up to the value of \$10,000, it indicated that it may also recommend that the service provider pay the complainant a further \$4,258.25.

The service provider responded to the TIO's preliminary view by letter arguing that by giving weight to the complainant's views over its system notes, the TIO had acted inconsistently with past practice. The service provider argued that its systems notes supported its position and that the TIO had made an unacceptable assumption that the service provider's notations may not have been an accurate reflection of the complainant's intentions. It did not accept the TIO's position.

The service provider acknowledged that in the event of a TIO Determination it is obliged to pay a maximum of \$10,000 to the complainant and stated that it would pay this amount as an ex-gratia final payment. In conversation with the TIO, the service provider indicated that it would refuse to pay the TIO's recommendation of \$4,258.25.

In order to ensure that the service provider's arguments regarding the importance of contemporaneous notes were fully considered, the TIO sought further information from it. In particular, the service provider was asked to provide copies of the original service order and of any system notes made at the time that the complainant contacted it and requested the service, so that the TIO could understand as fully as possible what was said at the time that the complainant made his service application. In response, the service provider provided the TIO with the original order for the service although this had been sent to the TIO previously.

Central issues in dispute

1. Whether or not the service is a 'standard telephone line' as defined in the CSG 1997.

The TIO noted that the complainant would not be entitled to compensation under the CSG 1997 if his service was not a 'standard telephone line'. If his service was correctly characterised as a 'fax/internet line' then it would not be a 'standard telephone line' because its primary use is not for voice telephony.

The service provider had argued that the complainant's "stated intention was that the service would be used primarily for the purposes of fax and connection to the internet". It has said "this was [the complainant's]... stated intention at the time of requesting the service and it was on this basis that [the service provider]...proceeded". However, the TIO noted that the service provider had not supplied any evidence contemporaneous with the time that the complainant requested the service, which would indicate that the primary use of the service was to be for fax/internet. In particular, there was no reference to the use of the service in the original order entered in the service provider's system. In light of this, the TIO found that it did not consider the service provider's argument on this point to be persuasive.

In reaching the conclusion that the complainant's service was a 'standard telephone service' as defined by the CSG 1997 the TIO placed particular weight on the following points:

(a) The evidence of the complainant's call patterns:

The interim services supplied to the complainant were not capable of fax transmission. However, of particular importance was his usage after the permanent connection was supplied and when he would have been able to use the service for fax/data transmission.

The call records supplied by the service provider did not show that the service was used significantly for fax/data transmission. On the contrary, the call records demonstrate that the service was predominantly used for voice telephony. This was confirmed in discussion with the provider. Therefore, insofar as the usage of the permanent connection is concerned, it did not appear that the service could be described as a fax/data line.

(b) The complainant had only requested that a single line be connected to his property

The service provider had argued that the fact that this was the first service (to the property) is irrelevant and that the CSG makes no reference to this. However, the TIO formed the view that it would be very unusual for the only line to a residence to be used for the purpose of fax and data transmission and not also for voice telephony. The TIO noted that there had been no subsequent requests for a further service to be connected to the property and found that this supported the complainant's claim that he intended to use the service primarily for voice telephony.

(c) Data Transmission

The TIO noted the service provider's argument that its notes indicated that on several occasions the complainant had contacted it because he was not able to use the interim services for fax transmission and Internet access. The service provider maintained that this indicated an intention to use the service as a fax/data line.

The TIO found that it was not convinced by the service provider's argument in this regard. The TIO formed the view that was quite reasonable for a customer to be dissatisfied with an interim service because it could not be used for fax/data transmission. However, the TIO found that this dissatisfaction was not of itself evidence that the customer intended to use the service predominantly or primarily for the transmission of fax and data. The TIO did not agree with the weight that the service provider had given to this point and found that the evidence of the provider's system notes were not irrefutable evidence of the complainant's intended usage. The TIO found that such dissatisfaction with the interim service was not inconsistent with the intention to use the line primarily for voice telephony. The TIO also noted that the provider's system notes recorded several complaints about the quality of the interim services for voice transmission.

(d) The complainant's Statutory Declarations

As noted above, the TIO asked the complainant to provide a statutory declaration explaining the intended usage of his service. To ensure that there was no bias in the statutory declaration, the TIO did not inform the complainant that his provider's system notes regarding comments about his intention to use the service for fax and data transmission were relevant to his

claim for compensation. The TIO did consider, however, that the complainant may have been aware of this fact by the time.

The complainant's first statutory declaration stated that the service was to be used as a normal phone line. He stated that he intended to use the service from his shed, whilst his house was under construction, and that he and his wife needed to be contactable for work purposes.

The TIO subsequently considered that the complainant needed to directly address the issue of his intended usage of the service and the service provider's system notes regarding comments about his intention to use the service for fax and data transmission. The TIO asked the complainant to supply a second statutory declaration addressing these points.

In his second statutory declaration, he declared that the intention of the original connection was for a fully functioning phone line to provide normal telecommunication access that included voice telephony primarily and then the options of fax or internet connection. He stated that his application for the service was for voice telephony and that there was no mention of specific fax or internet connection. In relation to his service provider's notes regarding his comments that he wanted to use the service for fax/internet transmission, the complainant declared that he complained 18 times about the poor quality of the interim service until a CDMA service was provided. He declared that the reference to fax and internet access was due to the inability of the interim service to provide a full range of normal telephone services.

The TIO formed the view that the complainant's explanation regarding the system notes was not only plausible but also consistent with other aspects of his conduct, e.g. his subsequent calling pattern. A customer is not denied compensation under the CSG 1997 because he wanted to use a service for data transmission, so long as the primary reason for the service is for voice telephony.

(e) The service provider's system notes

The service provider had argued that its system notes support its position that the complainant intended to use the service for fax and internet access. It has argued that contemporaneous system notes provide more probative evidence than call data and the complainant's Statutory Declarations regarding his intended use of the service.

However, the system notes that the service provider provided to this office were not contemporaneous with the complainant's application for the service. While the original order notes for the connection did show an application date of 27 July 1999 and the service provider's commitment date of 11 September 1999, the notes did not mention the intended use of the service. The TIO therefore formed the view that the system notes did not support the service provider's claims regarding the complainant's intention at the time of requesting the service.

2. The Universal Service Obligation

The service provider had also stated that the complainant was not residing at the location at the time he placed the order for the service. It has submitted that therefore the service was not a 'standard telephone service' and it had no obligation under the Universal Service Obligation ('USO') to supply the service.

The TIO noted that the provider had based this argument on section 149(1) of the Telecommunications Act 1997, which provides an obligation that standard telephone services are reasonably accessible to all Australians wherever they *reside or carry on business*. (emphasis added).

Part 9 of the Telecommunications Act 1997, which provided for the CSG, does not refer to the USO. Section 4 of the CSG 1997, the Standard's definition section, does refer indirectly to the USO and to an approved Universal Service Plan when providing for a 'guaranteed maximum connection period'. However, in this case the service provider made an agreement with the complainant concerning the connection date for the service. As such, the connection timeframes provided by Section 7 of the CSG 1997 apply.

The TIO found that it was not convinced by the service provider's argument that the service was not a 'standard telephone service' because the complainant was not residing at the location when he placed the connection order. For the purposes of the CSG 1997, this term is defined at Section 17 of the Telecommunications Act 1997 and there is no reference to the USO, or to a requirement that the service be connected to a residence or place of business.

3. The Interim Service

Though the CSG 1997 does not provide an exclusion to the CSG when an interim service is provided, Clause 3 of Part 1 of the Schedule to the *Telecommunications (Customer Service Guarantee) Direction No. 1 of 1997* provides that a delay in connecting a service is not a contravention of the CSG if the carrier provides an interim service, acceptable to the customer, of a similar kind to the service being connected.

The service provider confirmed that the complainant had complained about the adequacy of the interim service. The interim service was initially a GSM unit, which was replaced with another GSM unit and subsequently by a CDMA unit. It appeared that the complainant was satisfied with the standard of telephony provided by the CDMA unit, as no fault reports are recorded in that period.

The service provider's call charge records demonstrated that very few calls were made on the initial GSM unit of the interim service. A total of seven calls are recorded between November 2000 and March 2001.

The records indicated that the complainant's call patterns changed considerably from 24 March 2001, around the time that he was provided with the second GSM unit. From this time, his usage patterns were comparable, though lower, to the usage demonstrated with the CDMA unit and the permanent connection.

The CSG 1997 does not define 'interim service' or 'acceptable to the customer'. Based upon the complainant's complaints about the interim service, it appeared that

he did not consider the interim service acceptable. However, the TIO found that it did not consider that his dissatisfaction negated the fact that he was provided with a service that enabled him to make calls as a replacement to a standard telephone service. As such, the TIO found that by providing the interim service, the service provider's contravention of the CSG was temporarily halted.

The CSG 2000 commenced on 6 July 2000, prior to the date that the service provider provided an interim service to the complainant. The CSG 2000 provides assistance in considering the definition of 'interim service'. In Section 3 of the CSG 2000, 'interim service' is defined as follows:

- (a) that provides a customer with a telephone service; and
- (b) for which that customer is, or may be, charged an amount for the ongoing supply of that service at the location requested by the customer that does not exceed the amount that the customer would have been charged if the customer were supplied on application with a CSG service; and
- (c) *that is supplied to the customer:*
 - (i) *for a period that does not exceed 6 months; or*
 - (ii) *with the agreement of the customer, for a period of more than 6 months.*

(emphasis added)

Though the complainant accepted an interim service, the service provider did not provide evidence that he agreed to the interim service being extended past a six-month period. The evidence in the service provider's customer care notes indicates that the complainant was never satisfied with the interim service and that he made the service provider fully aware of this.

Although the complainant was supplied with three mobile units during the period of his interim service, the TIO found that this could not be regarded as intervening events that allowed the provider to extend the 6-month period it was able to supply an interim service.

Based on the evidence provided, the TIO formed the view that a satisfactory and working interim service was not provided to the complainant until 20 March 2001. The TIO acknowledged that the complainant was not satisfied with the second GSM interim service that was provided at that time and that he continued to complain about the performance of the service. However, the TIO found that his call patterns demonstrated that at that time he was provided with a working interim service and was able to make calls.

Therefore, the TIO found that although the service provider was able to rely upon the CSG's exclusion of liability clause by providing the complainant with an interim service, it was not able to do so until the second GSM unit was supplied to the complainant on 20 March 2001.

1. Non-Compliance with the CSG due to matters beyond the service provider's control

At a late time in the TIO's investigation of this complaint, the service provider provided evidence that a neighbour refused to allow it access to his land in order to install the cable that would service the complainant. It stated that this was a matter outside of its control.

Section 13(1)(c) of the CSG 1997 provides:

A carriage service provider is exempt from complying with this standard to the extent that non-compliance is due to circumstances beyond the control of the carriage service provider including... the need to obtain access to land or facilities of a third party.

The cable that was to have been installed in the neighbour's land, being an underground cable, could be characterised as a low-impact facility under Part 4 of the *Telecommunications (Low-impact Facilities) Determination 1997* ('the Determination').

The rights and obligations of carriers seeking to access land in order to install low-impact telecommunications facilities, such as underground cables, are governed by Schedule 3 to the *Telecommunications Act 1997* ('the Act'), *The Telecommunications Code of Practice 1997* ('the Code') and the Determination.

Schedule 3 to the Act attempts to balance certain powers and immunities enjoyed by carriers installing telecommunications infrastructure with the rights of owners and occupiers of land. The Code regulates the processes by which this balance is to be achieved, the Determination simply sets out what types of infrastructure are as a matter of law, low-impact in nature.

The combined effect of Schedule 3 to the Act and the Code is that in order to exercise its rights in respect of low-impact facilities, a carrier must serve notice of its proposal on an owner or occupier of affected land. In turn, an owner or occupier has (limited) rights of objection to the proposal.

Section 4.33 of the Code provides that if a landowner/occupier objects to the carrier's proposal, the carrier must not proceed with the installation unless:

1. The objection is resolved by agreement; or
2. The landowner does not request that the objection is referred to the TIO; or
3. The TIO deals with the objection by either giving or not giving a direction to the carrier.

Therefore, if a landowner or occupier objects to a carrier's proposal on his or her land and the objection is not resolved by agreement, the carrier is only prevented from accessing the land if the objector requests that the matter be referred to the TIO.

The service provider's notes state that the complainant's neighbour, objected to its proposal on 21 January 2000. The TIO was not provided with evidence of when or if the provider served notice of its proposal on the neighbour, although it was apparently well after the complainant first requested the service. However, it should be noted that the Code provides strict and short timeframes for the making of an objection. Section

4.32 of the Code provides that an objection must be given to a carrier at least 5 business days before it proposes to engage in the activity.

There is no evidence that suggests that the neighbour requested that his objection be referred to this office. In effect, this means that even if the service provider was not able to resolve the objection by agreement, it had a statutory right to proceed with its proposed activity on the neighbour's land. In fact, however, the service provider decided to redesign its cable route and avoid the neighbour's land. The TIO noted that was the service provider's decision and not a matter beyond its control.

Accordingly, the TIO found that the service provider was not able to rely upon the exemption provided by 13(1)(c) of the CSG 1997 beyond the extent of the timeframes provided in the objection provisions of Chapter 4 of the Code. The combined effect of Sections 4.34, 4.35 and 4.37 is that an objection may be dealt with in 30 business days. If the objector does not request that the objection be referred to the TIO within that time, the carrier may proceed with its activity.

As such, the TIO concluded that the service provider could claim an exemption from compliance with the CSG 1997 for 30 business days beginning on 28 January 2000.

Resolution

As the complainant's service provider did not agree to the TIO's recommendation to resolve the complaint and did not provide any additional information to cause the TIO to change its preliminary view, the Ombudsman made a formal determination and recommendation. He advised that the service provider was liable to pay compensation under the CSG 1997 for the period from 31 August 1999 (the day after the agreed connection date). However, as an interim service was provided, the Ombudsman found that the service provider was excluded from liability to pay compensation from 20 March 2001 (when the second GSM unit was provided) until 9 August 2001. The Ombudsman also stated that the service provider was exempt from liability for the period 28 January 2000 to 9 March 2000, being the consultation period after receipt of an objection to land access activity.

The Ombudsman determined that the service provider pay the complainant the amount of \$10,000 as damages under the CSG 1997 for delay in the connection of his service. He further recommended that the provider pay a further \$4,258.25 as damages under the CSG 1997 for the delay.