

## **Determination**

**Subject:** Liability for charges for calls made by a minor to a 190 service

**Date of determination:** May 2007

**Decision accepted by the complainant**

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### **Circumstances of the complaint**

This complaint relates to \$1010.13 in charges for calls made to premium rate service number 1900\*\*\*\*\* during the period 23 January to 17 April 2006. The complainant is a customer of one telecommunications provider but was billed by another Carriage Service Provider (the CSP) for the disputed charges due to the fact that calls of this nature are not pre-selectable but must be billed by the company that has entered into the agreement with the 190 content provider. The complainant is billed by their normal telecommunications provider on a monthly basis. The CSP billed him on a quarterly basis.

Service number 1900\*\*\*\*\* is used by the content service provider in connection with its website which is used to host a web-based game. The game is targeted at children. An integral part of the game is the furnishing of a player's virtual hotel room with virtual furniture. In order to acquire that furniture, players must purchase it. They must, however, purchase it with real, not virtual, money. There are a number of ways the content service provider has devised for children to buy the 'credits' necessary to pay for their virtual furniture. One of these ways is to ring a 190 premium service number to purchase credits on that number, with the costs associated with the call being billed to the telephone account holder's telephone account by the CSP. The fact that the game is targeted at minors led the TIO to consider closely the contractual basis on which the CSP is able to recover the charges relating to service number 1900\*\*\*\*\* notwithstanding the fact that the contract between the minor and the content service provider appears to be unenforceable.

### **The complainant's position**

The following is a summary of the claims made by the complainant. The calls to 1900\*\*\*\*\* were made by his 12 year old daughter. He accepted that as the account holder of the service, he was liable for calls made by his daughter. However, he believed he should only have been responsible for the charges accrued in the first month of the billing period as he believed that had the CSP billed him monthly, as his usual telecommunications provider does, or made him aware of the accruing charges by some other means at an earlier point in time, he could have taken steps to prevent further charges of this type from accruing on the account. He therefore believed that it would be fair and reasonable for him to be liable only for the charges relating to calls made during the first month and he has, accordingly, paid the amount of \$369.93 to the CSP leaving an amount of \$640.20 outstanding.

### **Issues arising from the complaint**

The TIO believes that there are two distinct issues which may affect whether it is fair and reasonable for the complainant to be held liable, or fully liable, for the charges:

1. The nature of the charges, and
2. The CSP's credit management of the complainant's account.

The TIO will consider each of these issues in turn.

## **The nature of the charges**

The TIO's investigation of this complaint at Level 2 and 3 status did not focus on any concerns arising from the fact that the game's website is a website that is targeted at minors. However, the TIO did raise these concerns with the CSP in another complaint and in that complaint the TIO expressly informed the CSP that the further information sought in that complaint would be considered in this complaint.

### The CSP's position as set out in similar complaint previously considered by the TIO

The following is a summary of the CSP's position in relation to this issue as set out in response to the TIO's investigation of a similar complaint previously considered by the TIO. The complainant, as the account holder of the service, is liable for the disputed charges as per the CSP's terms and conditions under which an account holder is liable for usage of a service even if that usage is unauthorised. The complainant is responsible for monitoring the usage of the service, and any concerns regarding the game's website should be referred to the content service provider and if unresolved to the Telephone Information Services Standards Council. The CSP is not responsible for the game's website nor is it a party to any contracts with minors. The CSP believes its position is supported by the TIO's Position Statement on Liability for calls made by third parties. Notwithstanding the view that the CSP took, it agreed, as a commercial decision without any admission of liability, to remove the charges in dispute in order to resolve that complaint.

### TIO preliminary view

The TIO considered the CSP's position in the complaint referred to above. Rather than specifically require the CSP to respond to the same issues again in this complaint, the TIO decided it was appropriate for the TIO to issue a preliminary view in this complaint based on the CSP's position in response to the investigation relating to that complaint.

The TIO's preliminary view was sent to the parties on 14 February 2007. The TIO concluded in its preliminary view that due to issues relating to the nature of the transaction between a minor and the content service provider, it would be fair and reasonable for the CSP to waive the outstanding disputed charges of \$640.20 and to refund to the complainant the amount of \$369.93 that he had already paid for charges relating to calls to service number 1900\*\*\*\*\*.

In reaching its preliminary view, the TIO noted the following:

- The calls were made by a minor to a premium rate number.
- The complainant did not authorise the calls.
- The calls were made in furtherance of what appears to be an unenforceable contract between the content service provider and a minor. Even though the CSP is not a party to this contract, it appears that the effect of the CSP's agreement with the content service provider by which the CSP bills account holders for charges associated with a child's purchase of 'credits' on the 190 premium rate number, is that the CSP has become the mechanism by which the content service provider seeks to enforce any contract it has entered into with a minor.
- The game's web-site contains a warning that states *'Always get permission from a parent or guardian before using your home phone to buy Credits. You will be permanently banned from this site if you don't have permission, or if the payment is later refunded. Any credits that are not paid for will be removed from your [...] account.'* This statement appeared to the TIO to imply that a refund may be appropriate in circumstances where the child does not obtain the permission of the

account holder of the telephone service before making calls to the premium rate number.

The TIO also had regard to its position statement on Liability for calls made by third parties which states (emphasis added):

*As a general rule, the TIO considers that consumers are responsible for ensuring the security of their telephone. The TIO takes the view that in most cases the account holder of a telephone is liable for the bills that accrue from its use, even if they did not give permission for other parties to make calls.*

*In considering calls of this nature, the TIO will consider the particular circumstances of the complaint and whether the complainant contributed to the problem through their own actions - or inaction. For example, the TIO will consider an account holder liable for calls made by their child even where the account holder asserts they never gave the child permission to make the calls. The TIO takes the view that the account holder should have been aware that family members may use the phone - even without their permission - and should have taken appropriate measures to limit access if they wanted to prevent those family members using the phone.*

*'Appropriate' measures may include the activation of call barring or call control, or simply the exercising of parental control.*

*By contrast, if the calls were made by a burglar, and it can be established that the account holder took all reasonable steps to protect the security of their phone (and house) while they were absent, the TIO will likely expect the provider to waive the calls in questions on the basis that it is not fair and reasonable for the complainant to have to pay the call charges in the circumstances. The TIO will expect the complainant to substantiate that they were absent, that they took reasonable steps to protect the security of their phone and house, and that they were in fact burgled.*

*In any given case involving disputed charges, the TIO will consider whether or not to apply its position in relation to ['Unlimited credit - financial over-commitment'](#).*

The TIO noted that unlike situations to which the position statement usually applies where there is only one relevant contractual relationship (i.e. between the telephone company and the account holder), there appeared to be three separate relevant contractual relationships in this case: (a) between the CSP and the complainant, (b) between the CSP and the content service provider, and (c) between the content service provider and the complainant's daughter.

The TIO acknowledged that although the CSP's contract with the complainant did, prima facie, entitle it to recover the disputed charges, this situation arose from a consideration of the circumstances from a purely legalistic point of view and only when the contractual relationships of the parties are considered in isolation. On the basis of the information before the TIO at the time it formed its preliminary view, the TIO believed that it was not appropriate to consider the contractual relationships of the parties in isolation when considering whether it is fair and reasonable for the complainant to be held liable for the disputed charges. The TIO believed that the third and fourth dot points above suggested that the net effect of the three contractual relationships referred to above was to bring about a situation where the CSP effectively acts as the billing mechanism, and therefore also the enforcement mechanism, for an unenforceable contract between the content service provider and a minor. The TIO felt that this situation was distinguishable from a situation where a

minor simply makes telephone calls without his/her parents' permission which was the sort of situation contemplated in the example given in the TIO's position statement.

The TIO noted that, in its investigation of the complaint previously considered by the TIO and discussed above, the TIO had requested the CSP to provide specific information in relation to the game's website and also the following:

1. A copy of the bilateral arrangement between the CSP and the content service provider;
2. Advice as to whether there are any provisions in the bilateral agreement between the CSP and the content service provider which address circumstances where payments made in relation to 190 calls are refunded.

The CSP did not provide the requested information to the TIO but instead sought to resolve the complaint by crediting the disputed charges. The CSP put forward the view that as the CSP is not responsible for the game's website, it is inappropriate for the TIO to request the CSP to provide the information requested regarding the content of the website.

The TIO formed the view that, in the absence of any information from the CSP to rebut the factors stated in dot points three and four above, it was not fair and reasonable for the complainant to be liable for the disputed charges and all of the disputed charges relating to the game's website should be waived.

#### The CSP's response to the TIO's preliminary view

The following is a summary of the CSP's response to the TIO's concerns regarding the game's website set out in the TIO's preliminary view. It is a mistake for the TIO to treat the 'ordinary' telephone account between the CSP and the complainant as in some way 'tainted' by a separate arrangement between the game's website and the website user. The CSP has no control over the game's website nor does it have 'any particular view on the enforceability or otherwise of its terms.' The CSP's part in the transaction is very much routine and it is merely acting as a payment mechanism in the same way that a credit card company does. The CSP believes that the TIO's preliminary view would 'overturn well accepted payment methods underlying many types of website-based transactions'. The CSP believes that the TIO's preliminary view would have implications for other Infocall services, and stated as follows:

*'If the TIO's preliminary views that the CSP cannot enforce a standard Infocall contract were to stand, then the CSP would not be able to provide any infocall services over an account to which a minor has access. Further, the CSP would have to review the enforceability of charges for other services provided on such accounts. This outcome, whether or not the TIO would like to see it happen from a policy viewpoint, has no basis in statute or contractual principle'.*

The CSP also made reference to the fact that the complainant has not disputed his liability for the first month of calls to service number 1900\*\*\*\*\*.

#### Conclusion

The TIO is not persuaded by the arguments the CSP has put to the TIO in response to the TIO's preliminary view on this issue.

In its preliminary view, the TIO put the CSP on notice that the basis of the TIO's reasoning supporting a conclusion that it would not be fair and reasonable for the complainant to be liable for the charges was that:

1. The calls which led to the disputed charges were made in furtherance of what appears to be an unenforceable contract between the content service provider and a minor. Even though the CSP is not a party to this contract, it appears that the effect of the CSP's agreement with the content service provider by which the CSP bills account holders for charges associated with a child's purchase of 'credits' on the 190 premium rate number, is that the CSP has become the mechanism by which the content service provider seeks to enforce any contract it has entered into with a minor.
2. The game's web-site contains a warning that states '*Always get permission from a parent or guardian before using your home phone to buy Credits. You will be permanently banned from this site if you don't have permission, or if the payment is later refunded. Any credits that are not paid for will be removed from your [...] account.*' This statement appears to the TIO to imply that a refund may be appropriate in circumstances where the child does not obtain the permission of the account holder of the telephone service before making calls to the premium rate number.

The CSP has not expressly challenged either of these two points. Instead the CSP has suggested that the CSP's involvement is comparable to being involved as part of a 'routine' payment mechanism. As regards the CSP's view that it is merely acting in the same way that a credit card company would, the TIO notes that the CSP has not provided the TIO with a copy of the bi-lateral agreement between the CSP and the content service provider. Therefore the TIO is not in a position to know what the precise arrangement is between the CSP and the content service provider. Nevertheless, the TIO believes that the CSP's comparison with it acting like a credit card company is not completely apposite or particularly helpful for two reasons. Firstly, unlike a credit card, the primary purpose of a telephone service is to be a means of communication and not a payment mechanism. Therefore, it is not unreasonable for a parent to allow their children to have access to a telephone service on the understanding that it is a means of communication. Secondly, it is by no means clear what the situation would be if a minor used their parent's credit card without the parent's permission. In such a situation, the parent may well have grounds to insist that the transaction be reversed.

The TIO notes the CSP's view as to what it believes would be the wider implications for the approach taken by the TIO in this case. However, the TIO believes it is appropriate for the TIO to consider each particular case before it on the merits of the particular case. In this case, the TIO believes it is appropriate to be concerned that the CSP is seeking to hold a telephone account holder liable for unauthorised calls that have been made by a minor pursuant to what appears to be an unenforceable contract between a content service provider and a minor, with the content service in question being specifically targeted at minors. The TIO is bound to consider such a situation not only on the basis of 'statute or contractual principle' as the CSP has done but also on the basis of what is fair and reasonable in all the circumstances, and having done so, the TIO believes it is appropriate to maintain the view expressed in its preliminary view.

### **The CSP's credit management of the complainant's account**

During the course of the investigation of this complaint the TIO raised concerns with the CSP arising from the fact that the CSP had issued bills to the complainant on a quarterly basis rather than on a monthly basis contrary to his billing arrangements with his usual telecommunications provider. The TIO notes that the first recorded call to 1900\*\*\*\*\* from the complainant's service was on 23 January 2006. However the bill containing the charge for this call was not issued until 26 April 2006. The CSP has responded to this issue by stating that since 22 January 2005 it has sent the complainant quarterly bills for 190 calls and if he was unhappy about the bills being issued quarterly he could have raised the matter with

the CSP prior to 22 April 2006. The CSP has also informed the TIO that on 19 April 2006 the CSP barred the complainant's service from accessing the CSP 190 Information service numbers due to the usage on the complainant's account satisfying the following criteria:

1. Unusually high call usage must be a minimum value of \$900 (for fixed services only); and
2. The call usage must be double the call usage from the last bill.

As a means of providing a resolution to this complaint, the CSP has offered to withdraw 50% of the outstanding amount of \$640.20. The TIO has put this offer to the complainant and he has rejected it, maintaining his view that he should only be liable for the first month's usage.

Although the TIO acknowledges that the complainant was billed by the CSP for information calls on a quarterly basis since January 2005, the TIO notes that the totals of these bills were: \$0.55, \$1.73, \$2.83 and \$4.29 respectively. The TIO believes that it is not reasonable to expect that quarterly bills for such low amounts should necessarily have alerted the complainant to the need to request the CSP to bill him on a monthly basis in order to reduce the likelihood of incurring unexpectedly high charges. Although the TIO acknowledges that the CSP correctly applied its own criteria for detecting uncharacteristically high usage, the TIO does not accept that this of itself should necessarily lead to the complainant being fully liable for the disputed charges. The TIO notes that the complainant was only billed by the CSP for information calls and the largest bill he had received prior to the bill containing the disputed charges was for \$4.29. In light of this, the TIO questions the effectiveness of a \$900.00 trigger in circumstances where the customer is only billed for information calls and so the \$900 does not include other call charges as would have been the case if the complainant had been pre-selected to the CSP.

The TIO accepts that there is currently no positive obligation for the CSP to bill the CSP 190 charges to customers of other service providers in accordance with the billing period applied by the customer's service provider. Nevertheless, the length of the billing interval, and the circumstances by which that interval was arrived at, are relevant factors in considering whether the complainant should be held liable for the full amount of an unexpectedly high bill.

Having considered all of the information provided by the complainant and the CSP in relation to this issue, the TIO believes that the resolution proposed by the complainant would, if there were no other issues arising, be a fair and reasonable outcome to this complaint. A further issue has arisen, however, in the TIO's consideration of this complaint, that being the nature and enforceability of the 190 premium rate charges incurred by the complainant's child.

## **Conclusion**

In exercising its functions to investigate, make determinations relating to, and give directions relating to complaints about billing by members for the supply of content services provided by means of a carriage service, the TIO must have regard to the law, good industry practice, and what is fair and reasonable in all the circumstances. Accordingly, the TIO is not bound simply to choosing between the outcomes that are put forward by the parties to the dispute. Nor is the TIO bound only to pursue those issues which are specifically raised by the complainant. Rather, the TIO must decide for itself what it believes the salient issues to a complaint are and what it considers to be a fair and reasonable outcome to the complaint.

Whilst the TIO accepts that the outcome proposed by the complainant is a fair and reasonable outcome to the dispute relating to the CSP's credit management of his account, the TIO believes that the outcome proposed by the complainant is not appropriate in light of the issues relating to the nature of the charges. The TIO believes that a more appropriate outcome, in

light of these concerns, is that all of the charges for calls made to service number 1900\*\*\*\*\* should be withdrawn and/or refunded.

**Direction**

**For the reasons set out above, I have concluded that a fair and reasonable outcome to this complaint is for the CSP to waive the outstanding disputed charges of \$640.20 and to refund to the complainant the amount of \$369.93 which he has paid for charges for calls made to premium rate service number 1900\*\*\*\*\* during the period 23 January to 17 April 2006. Accordingly, I direct the CSP to waive the disputed charges of \$640.20 and to refund the amount of \$369.93 to the complainant.**

**This action should be completed within 14 days of the TIO providing the CSP with a completed TIO Release Form signed by the complainant.**

**John Pinnock  
Ombudsman  
May 2007**