

## TIO Determination - 4 February 2013

*(De-identified for publication)*

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### Summary of Determination

This complaint relates to excess data usage charges of \$1,765.45 incurred on a mobile phone service between 7 November 2011 and 30 November 2011. The complainant paid for and used the service and raised the complaint on behalf of the account holder. The CSP was the provider of the service.

The primary matter for determination is the meaning of the contract between the account holder and the CSP, and in particular the manner in which 500MB of data (included as part of the \$15 monthly cost of the CSP service provided to the account holder) should be calculated.

My determination is that the contract provides that the \$15 monthly cost includes 500MB of data in total, regardless of the manner in which this data is incremented or calculated.

I have therefore made a determination that the appropriate resolution for this complaint is for the CSP to refund \$1,765.45 to the account from which it was drawn (that is, the complainant's credit card account).

### The complainant's claim

The complainant's claim is that the account holder entered into an agreement with the CSP for a \$15 per month mobile service on a 12 month plan. The complainant says the plan fee included unlimited calls to local, national and mobile numbers, unlimited SMS and 500MB of mobile data.

The complainant says:

- the agreement between the account holder and the CSP specified that data would be *'charged in 1MB increments'*
- the complainant understood this to mean that *'data would be rounded up to the nearest megabyte at the end of the month for charging purposes'*

- the complainant understood the agreement was that 500MB of data could be used before incurring excess usage charges at a rate of 50 cents per megabyte
- the complainant began using the service in early November 2011 and used information from an online tool provided by the CSP together with a spreadsheet the complainant prepared to monitor the use of the service
- when the complainant began to use the service it was observed from the online tool that charges were rapidly accumulating, even though the complainant had used less than 500MB of data in total
- the complainant was concerned that the 500MB of included data had not been applied and spoke with the CSP several times. The complainant was told not to worry because the account holder would not be charged, as the usage was still below the 500MB limit
- at the end of the first month of billing, the CSP emailed the complainant a bill which reflected excess data charges of \$1,765.45. At this point a total of 127MB of mobile data had been used
- the service was suspended on 6 December 2011, immediately after the complainant disputed the charges and made a complaint to the TIO, and
- the CSP then direct debited \$1,765.45 from the complainant's credit card.

The complainant provided the TIO with:

- a spreadsheet listing data charges
- a screenshot of the CSP's website showing the terms of the contract the account holder agreed to, and
- a screenshot of a Credit Card Statement showing a payment on 9 December 2011 of \$1,765.45.

The complainant seeks a refund of \$1,765.45 to resolve the complaint.

### CSP's Response

The CSP told the TIO that the account holder agreed to the service on 12 October 2011 and provided evidence of the terms and conditions of the agreement. It is not disputed that this contract governs the relationships between the CSP and the account holder in relation to the service.

The CSP says:

- the agreement with the account holder included 500MB of mobile data, with data 'charged in 1MB increments' and excess data charged at 50 cents per MB
- the CSP was entitled to calculate data use by rounding up what it referred to as 'increments' of data to the nearest 1MB
- the inclusion of 500MB of data in the plan meant the first 500MB, after rounding up for each data session, would not incur charges
- it made available effective tools to monitor data usage and advised the complainant that the data displayed in the monitoring tool was a guideline only and might differ from what was billed at the end of the month
- the complainant acknowledged that the charges were understood and had said the charges had been incurred due to phone settings
- it explained to the complainant that the data charges could quickly reach thousands of dollars.

In support of its general position, the CSP provided the TIO with:

- an audio recording of the verbal agreement between the account holder and the CSP
- terms and conditions for the agreement, and
- 4 screenshots recording its notes of conversations with the complainant on 6 December 2011.

### The TIO's consideration of the complaint

The TIO has jurisdiction to make determinations and give directions relating to complaints about carriage services by end-users of those services.

I am satisfied that the TIO has jurisdiction to issue a determination and give directions in relation to this complaint, as it was raised by the end user and concerns the billing of a carriage service.

### What did the agreement provide for?

While the TIO has not been provided with the actual copy of the terms and conditions of the contract forwarded to the account holder by the CSP, written advice of the CSP, and a copy of the voice recording indicate that the following terms apply (extract provided below):

*"Price based on a 12 month bundle contract. Mobile broadband is optional at the customer's request. You may supply your own*

*[wireless device] or [the CSP] can supply for an upfront payment of \$89 inclusive of postage and handling for your choice of [device]. \$15 per month for 12 months. All calls to Australian landlines and mobiles are included and all standard SMS are included. 500MB Mobile Data Included. Additional calls and data costs apply. 13/15/18 calls are charged at 35 cents per minute + 15 cent flagfall. 90 cents per MMS. Voicemail messages charged at 15 cents per minute + 10 cent flagfall. Premium sms/calls are charged at the cost of provider and is passed from [the CSP's wholesaler]. These services will initially be blocked, activated upon request and deposit. Operator calls incur additional charges. Data is charged in 1 MB increments. Excess data 50 cents per MB. ... Excludes international usage, international rates are available upon request. Excludes Pivotel calls. Mobile sim only. No handset provided. \$10 sim, postage and handling payment required up front."*

The layout of the information above is consistent with both the manner in which it was presented in written form by the CSP, and the General Terms and Conditions on the CSP's website.

In considering the contract between the account holder and the CSP, I have had regard to the general principles of contract interpretation in Australia, including:

- a contract should be interpreted as having the meaning that would be given to it by a reasonable reader (or listener) in the position of the parties at the time the contract was made
- the text of the contract should be given its natural and ordinary meaning, and
- the text of the contract must be understood in its context, and the contract read as a whole.<sup>1</sup>

First, I note that I understand the word 'increment' to mean the rate element for a chargeable block of service usage.<sup>2</sup> For example, data may be charged in 1 MB increments, even if the amount of data used is less than 1 MB.

The question here is whether, on its proper construction, the contract provides that the data included in the 500MB allowance of the \$15 plan should be accounted for in 1MB increments.

My view is that, as it concerns this 500MB of included data, it should not be accounted for in 1MB increments. The 500MB of included data is the total amount included, regardless of how this data is incremented. This is

<sup>1</sup> *The interpretation of Contracts in Australia*, Lewison and Hughes, Lawbook Co, 2012

<sup>2</sup> Newton's Telecom Dictionary 26<sup>th</sup> ed, Newton and Schoen, Flatiron Publishing, 2011.

the meaning that a reasonable reader would give to the statement '*500MB Mobile Data Included*' in the contract. It is also the natural and ordinary meaning of this term.

Considering the contract as a whole, I note the reference to data being charged in 1 MB increments occurs at a later point in the contract. It is not adjacent the 500MB of data provided for each month for the \$15 charge, nor does it reference this included data. It is adjacent the charging information for excess data. It also occurs after the words '*Additional calls and data costs apply*' and in a part of the contract that deals with those calls, SMS and data that are not included as part of the \$15 plan. In my view a reasonable reader would see this incremental charging information as referable to excess data, and not to the 500MB of included data.

If it was the intention of the CSP to charge for the included value data in 1MB increments, this is something that should have been clearly stated, for example by including this information immediately after the statement '*500MB Mobile Data Included*'.

Finally, to the extent that the rival construction is open (that is, that the 500MB will be charged in 1MB increments for each data session), I would prefer the approach that regards the \$15 fee including 500MB of data in total. The reason for this is that the rival construction results in an unreasonable or unjust result. In particular, it potentially exposes the consumer of the service to a charge many times the monthly fee for the service in circumstances where the consumer may have used much less than 500MB of data, and as a result of the manner in which it has been charged. In my view, such an outcome would require a much clearer intention in the contract.

### What data charges should the account holder pay?

It is not disputed that the data accrued on the service did not, in total, exceed 500MB. The complainant has provided information compiled indicating the total data used was approximately 127MB, and the advice of the CSP is that data was accrued over some 3959 sessions.

The account holder was billed was \$1,765.45 above the monthly plan fee of \$15, and this amount was direct debited from the complainant's credit card account.

Given that less than 500MB of data was used, it follows from the reasoning above that the contract did not provide for any additional charges to be levied, and that the \$15 charge for services including 500MB of data should have been sufficient to pay for the data used.

Accordingly, the \$1,765.45 in additional charges ought to be refunded.

## Other matters

*Rate at which increments were charged:* There was some issue, during the investigation of this matter, that the excess increment charges were calculated on an incorrect basis, both in respect of the basic amount increment charged (51c instead of 50c) and that GST was added in addition to this charge. Given the view I have come to as to the terms of the contract and as the evidence on these matters is not entirely clear, I do not propose to express any view upon them.

*Unexpected high charges – notification from service provider:* An additional issue raised concerns the systems and processes in place within the CSP to prevent the consumer of the service from receiving an unexpectedly high bill. The Telecommunications Consumer Protection (TCP) Code 2007 – the operative Code at the time of the relevant events – required providers to have tools in place to monitor and control customers' expenditure and prevent financial over-commitment. This is reflected in the TIO's position statement '*Unlimited credit – financial over-commitment*', which provides a framework for assessing whether a provider took reasonable measures to limit a consumer's credit exposure.<sup>3</sup>

While it is unnecessary to express a concluded view on this issue, if the CSP was of the view that excess charges had been accrued – of more than 100 times the standard monthly fee of \$15 – it should have taken additional steps, such as by sending a text message or making a call to the complainant or account holder, to alert them to the high charges and assist in avoiding an unexpected high bill.

*Direct debiting of disputed charges:* The evidence in this matter suggests that the CSP direct debited the complainant's credit card after the complainant disputed the charges, and made a complaint to the TIO on 6 December 2011.

Clause 7.4.10 of the TCP Code 2007 provided that "*a supplier must not take Credit Management action in relation to genuinely disputed amounts while the dispute is being investigated and remains unresolved by the Supplier, TIO or relevant recognised agency.*" Credit Management includes the collection of an outstanding debt. Clause 9.1.6 of the TCP Code 2007 provided that while a complaint is being investigated, suppliers must not demand payment of genuinely disputed amounts that are the subject of the complaint.

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<sup>3</sup> [http://www.tio.com.au/\\_data/assets/pdf\\_file/0011/9389/Unlimited-credit--financial-over-commitment.pdf](http://www.tio.com.au/_data/assets/pdf_file/0011/9389/Unlimited-credit--financial-over-commitment.pdf).

## The TIO's Preliminary View

Having considered all of the material presented to the TIO in relation to this complaint, and having regard to the law, good industry practice and what is fair and reasonable in all the circumstances, I formed the Preliminary View that an appropriate outcome to this complaint was for the CSP to refund the amount of \$1,765.45 to the complainant.

I circulated my Preliminary View to the parties on 20 November 2012 to allow them an opportunity to:

1. respond to the my view and reasons
2. provide any additional evidence, and
3. provide a submission on the proposed outcome.

## Parties responses to the TIO's Preliminary View

On 23 November 2013 the complainant accepted the findings in my Preliminary View.

On 20 November 2012 and again on 18 December 2012 the CSP advised that it rejected my Preliminary View.

I have considered the matters raised by the CSP in its responses. Generally, these matters have already been considered and do not require a further response.

One matter that does require additional reasoning is the advice of the CSP that it did not direct debit the disputed amount after the TIO complaint began. I have again carefully reviewed the evidence on this matter and note the following:

- a customer care note provided by the CSP shows a conversation at 2:55PM on 6 December 2011 in which the CSP told the complainant that if its offer of resolution to waive a proportion of the disputed charges was not accepted, then the full amount in dispute would be direct debited the following day.
- The complainant contacted the TIO after this conversation to make a complaint, and as a result the TIO referred the complaint to the CSP for another change of resolution which records the time of sending as 3.23PM on 6 December 2012. This email included a request that credit management action on the disputed charges of \$1700 be suspended until the complaint had been resolved.
- The complainant's credit card statement shows the direct debit was made on 9 December 2011, 3 days later, and

- The TIO asked the CSP to provide information demonstrating that there were no direct debits of the complainant's account after 6 December 2012; however, no information directly relevant to this point was received.

Given these circumstances, I have not changed my view that the weight of the evidence clearly suggests that the CSP direct debited an amount which was genuinely in dispute, and which had been made the subject of a TIO complaint. This is inconsistent with the requirements of the TCP Code 2007.

### Determination and directions

For the reasons set out above, and having regard to the law, good industry practice, and what is fair and reasonable in all the circumstances I am of the view that the appropriate outcome to this complaint is for the CSP to refund to the complainant's credit card account the disputed amount.

Accordingly, I DIRECT the CSP to complete the following action within 14 days of the TIO providing to the CSP a Confirmation of Resolution signed by the complainant:

- Refund the amount of **\$1,765.45** to the credit card from which the amount was direct debited or to another account nominated in writing by the complainant and the account holder.

**Simon Cohen**

**Ombudsman**