

TIO Determination – 28 October 2013

(De-identified for publication)

Background

This complaint is about liability for charges following unauthorised transfers of a landline service between November 2011 and August 2012.

The Consumer says that he transferred his landline service away from Provider A in November 2011 and that Provider A then transferred the landline service back to itself without authorisation.

The Consumer is seeking a refund of disputed direct debits made by Provider A between December 2011 and September 2012, a total amount of \$415.05.

The Consumer's claim

The Consumer says that:

1. in November 2011 he transferred his landline service from Provider A to Provider B;
2. after the transfer his landline service was transferred back to Provider A without authorisation multiple times;
3. Provider A continued to direct debit his account and on 8 August 2012 he asked Provider A to cancel this, and it said it had;
4. Provider A direct debited a total of \$415.06 from the Consumer's account without authorisation after November 2011, including amounts after 8 August 2012; and
5. when the Consumer discussed the complaint with Provider A, it told him that Provider B had not transferred the service correctly.

Provider A's response

Provider A did not provide a substantive response to this complaint at any stage.

During conciliation, when the TIO called Provider A to discuss the complaint, it advised that the service had transferred to another provider

on 30 August 2012, and that a final invoice was issued on 1 September 2012.

On 21 May 2013 the TIO wrote to Provider A and advised that it remained open to it to respond to the TIO's investigation or resolve the complaint directly with the Consumer. Provider A said that it had no record of this complaint or of the Consumer as a customer. The TIO sent Provider A a copy of the TIO's Notice of Investigation and received no response.

Issues in dispute

The issues considered as part of this complaint are:

1. Did the Consumer transfer his landline service from Provider A to Provider B on 9 November 2011?
2. If so, did Provider A transfer the Consumer's landline service back to itself after he transferred away?
3. If so, was Provider A entitled to transfer the Consumer's landline service back to itself?
4. What, if any, charges was Provider A entitled to claim from the Consumer after November 2011?
5. What is the appropriate outcome of this complaint?

TIO's Preliminary view

After investigating this complaint, my office formed the view that an appropriate outcome to this complaint was for Provider A to refund the amount of \$402.22 to the Consumer.

The TIO sent its Preliminary View to the parties on 29 August 2013 and provided them with an opportunity to:

- respond to the TIO's view
- provide any new and relevant information which might change the conclusions reached, and
- identify any misunderstanding or misinterpretation of the facts in the Preliminary View.

On 24 September 2013 the Consumer wrote to the TIO and accepted the Preliminary View. Provider A did not respond.

Information considered in making this Determination

In making this Determination, I have considered the law, good industry practice and what is fair and reasonable in the circumstances.

I have also considered the following:

- Correspondence to, and discussions between, the TIO and the Consumer in relation to this complaint;
- Correspondence from Provider B to the Consumer in November 2011, March 2012, May 2012, August 2012 and November 2012;
- The Consumer's bank statements showing disputed transactions between December 2011 and September 2012;
- Transaction records obtained from Payment website A;
- Provider A's Standard Form of Agreement ("SFOA");
- Tax invoices issued by Provider A to the Consumer on 1 November 2011 and 1 January 2012;
- Tax invoices issued by Provider B to the Consumer between November 2011 and December 2012;
- Provider A Service Cancellation form completed by the Consumer dated 7 August 2012; and
- The Telecommunications Consumer Protections Code 2007 ("Code").

Reasons for decision

1. Did the Consumer transfer his landline service from Provider A to Provider B on 9 November 2011?

I accept the Consumer's claim that his landline service was transferred from Provider A to Provider B on 9 November 2011.

The Consumer told the TIO that Provider B advised him that his service had successfully transferred to it on 9 November 2011. In support of this view, the Consumer provided the TIO with his Provider B invoices, including an invoice issued on 17 November 2011 and with a letter from Provider B dated 11 November 2011.

The letter that the Consumer provided (dated 11 November 2011) confirms the transfer of his mobile service to Provider B. Although the letter does not confirm transfer of his landline service, the Consumer says that both services were transferred the same day. This claim is supported by the note at the bottom of the letter sent by Provider B on 11 November 2011, listing the plan name as 'Plan A'. This name corresponds to a Provider B promotional letter provided by the Consumer, that he said

reflected the promotion he took up in November 2011. That letter referred to the 'Plan A', a bundle of home line and mobile phone services including free home phone line rental, and charged at \$49.95 per month.

The Consumer's claim is also supported by the Provider B invoice dated 17 November 2011. This invoice shows that Provider B billed the Consumer for a 'fixed line plan fee' from 9 November 2011 to 16 November 2011, and for a call made on 14 November 2011.

For these reasons I am satisfied that the Consumer transferred his landline service to Provider B on 9 November 2011.

2. If so, did Provider A transfer the Consumer's landline service back to itself after he transferred his service away?

In my view, the available evidence shows that, after the Consumer's landline service was transferred to Provider B, Provider A transferred it back to itself on one or more occasions.

For the purposes of this Determination, it is not necessary to determine exactly when, or how many times, the service was transferred to Provider A without authorisation, apart from the first occasion. This is because, after the Consumer's services were transferred from Provider A, Provider A was not entitled to charge for any services. That is, the appropriate resolution to this complaint will not be affected, whether the service was transferred from and back to Provider A once or several times.

The Consumer told the TIO that his landline service was transferred to Provider B and then transferred back to Provider A. He said that he transferred the service to Provider B on four occasions: 9 November 2011, 7 March 2012, 9 May 2012 and 9 August 2012. To support this claim, the Consumer has provided the TIO with letters sent to him by Provider B advising that he has transferred landline service to it on 28 March 2012, 9 May 2012 and 10 August 2012.

The Consumer has also provided a letter from Provider B about his mobile service dated 11 November 2011 and, as outlined above, I consider that the letter supports the Consumer's claim that he first transferred his landline service to Provider B on 9 November 2011. This is because a note on the letter indicates that the plan is called 'Plan A', and a Provider B promotional letter provided by the Consumer describes the Plan A as a home line and mobile phone bundle including free home phone line rental.

The Consumer has also provided the TIO with copies of his Provider B invoices and with two Provider A invoices, issued on 1 November 2011 and 1 January 2012. The Consumer told the TIO that he does not have any other Provider A invoices and said that Provider A stopped sending

him invoices. He said that he received some emails with electronic links about bill payments, and that he deleted those without opening them as he did not know what they were.

The Consumer's January 2012 Provider A invoice shows that it billed him for landline calls from 30 November 2011 to mid-December 2011 (and possibly after that date as I do not have a complete copy of the invoice). The Consumer's December 2012 Provider B invoice shows no landline call charges or access fees and lists a 'business access disconnection' for the service dated 11 November 2011 to 15 November 2011.

In my view, these invoices demonstrate that the Consumer's landline service was transferred back to Provider A after it transferred to Provider B on 9 November 2011. I also consider that the available evidence, in particular the letters from Provider B to the Consumer, support the Consumer's claim and indicate a pattern of repeated transfers between Provider B and Provider A.

I note Provider A's advice to the Consumer that his preferred provider, Provider B, did not transfer his service to it correctly. There is no evidence to support this claim and the available evidence indicates that the service was transferred correctly. During the TIO's investigation of this complaint, the TIO asked Provider A to provide particular information and evidence. Provider A has not provided any information or evidence that is contrary to the Consumer's claims or shows that the service did not transfer from Provider A to Provider B on 9 November 2011.

For these reasons, I am satisfied that Provider A transferred the Consumer's landline service back to itself after 9 November 2011.

3. If so, was Provider A entitled to transfer the Consumer's landline service back to itself?

In my view, there is no evidence to show that Provider A was entitled to transfer the Consumer's landline service back to itself after the service successfully transferred to Provider B on 9 November 2011.

I have considered the terms of Provider A's SFOA, as I understand that this document set out the terms that applied to the Consumer's agreement with Provider A. In my view, there is nothing in the SFOA that entitled Provider A to transfer the Consumer's service back to itself.

The SFOA provides for termination at clause 9.1:

"Termination: Either of us may terminate the Agreement (whether it is a non-fixed length agreement or a fixed-length agreement) by giving a calendar month's written notice to the other at any time. The notice to cancel the service will be effective on the date on which we

receive that request. Where notice is not provided and/or short notice is provided, We may bill you in lieu of providing a calendar month's notice, as well as: -

- (a) unbilled calls received to the date of receipt of your notice; and
- (b) where a fixed term agreement is in place, the minimum monthly period for the remaining whole months of agreement; and
- (c) the value of any hardware provided to you;
- (d) for DSL services, a disconnection fee of \$100 per service."

At clause 9.5, the SFOA provides that:

"We reserve the right to reject a cancellation notice including a transfer, or reverse churn, to another provider in the event that you have not provided notice in accordance with clause 9.1, you owe us money or we have been unable to verify a request to cancel service with us".

Clause 9.1 expressly provides that, where one month's notice of termination is not provided, Provider A may bill the consumer in lieu of this notice, in addition to other listed charges. It does not provide that Provider A can transfer the service back to itself without further authorisation. I have also considered clause 9.5 and in my view the meaning of this clause is unclear and it does not entitle Provider A to transfer a service back to itself after it has been successfully transferred away.

Aside from the terms provided in the SFOA, Provider A has obligations relating to customer transfers under Chapter 8 of the Code. Clause 8.1.3(d) provides that, before transferring a service, a provider must obtain consent from the account holder or an authorised representative.

The Consumer told the TIO that the transfer was not authorised, and Provider A has not provided any contrary evidence. In my view, Provider A did not obtain the Consumer's consent before transferring the service to itself and I am satisfied that it breached clause 8.1.3(d) of the Code.

For these reasons, I consider that Provider A was not entitled to transfer the Consumer's service back to itself after 9 November 2011.

4. What, if any, charges was Provider A entitled to claim from the Consumer after 9 November 2011?

In my view, Provider A is entitled to claim charges from the Consumer in accordance with the terms of the agreement between itself and the Consumer. I do not have a copy of a tailored agreement between the

parties, and so I have relied upon the terms of the agreement set out in Provider A's SFOA.

The SFOA provided for termination at clause 9.1, set out above. It provides that, if a consumer does not give Provider A one month's notice that it intends to terminate the agreement, it can charge a month's access fee in lieu. As explained above, I consider that the Consumer's service transferred away from Provider A on 9 November 2011. At that point, the agreement between the Consumer and Provider A was terminated and in my view Provider A was, in effect, notified of the Consumer's intention to cancel the agreement.

Although the Consumer has provided the TIO with a Provider A cancellation form dated 7 August 2012, there is no evidence to show that he notified Provider A of an intention to cancel the service before 9 November 2011. Under the agreement, Provider A was then entitled to charge the Consumer one month's access fee, until 8 December 2011. Provider A was also entitled to charge the Consumer for any unbilled call charges to the date of cancellation. In my view, Provider A was not entitled to charge any further amounts under the SFOA.

This view is also consistent with the TIO's position statement 'Liability for charges following unauthorised transfer'. This position statement is underpinned by clause 8.1.3 of the Code, which provides in part that, before transferring a service, a provider must obtain consent from the account holder or an authorised representative. The TIO's view is that, where an unauthorised transfer is a result of a fraudulent or negligent act, for example that the provider failed to take reasonable steps to ensure that the transfer was authorised by the account holder, the TIO expects the gaining service provider to waive any accounts issued.

Based on the available evidence, I consider that Provider A did not take reasonable steps to ensure that the transfers of the Consumer's service were authorised by him. For that reason, I consider that Provider A was not entitled to charge the Consumer for any calls made after it transferred the Consumer's service back to itself.

Provider A billed the Consumer for access fees in advance. In November 2011, the Consumer had paid access fees to 27 November 2011 (described as a 'value pack' on the Consumer's November 2011 Provider A invoice). Provider A was entitled to be paid a month's access fees in lieu of notice, to 8 December 2011.

This means that Provider A was entitled to bill the Consumer a further \$12.83 for access fees, calculated as follows:

- Monthly access charge as shown on November 2011 invoice, for the period 28 October 2011 to 27 November 2011: \$32.95 (excluding GST)
- Daily access charge (calculated by reference to period 28 October 2011 to 27 November 2011: 32.95/31): \$1.06 (excluding GST)
- Access charge for period 28 November 2011 to 8 December 2011: \$11.66 (excluding GST)

Total: \$ 12.83 (including GST)

Provider A was also entitled to charge the Consumer for all calls made up to the date of transfer, 9 November 2011. The Consumer's November 2011 invoice appears to include calls up to 27 October 2011. However, as I do not have a copy of Provider A's December 2011 invoice, I cannot be satisfied that the Consumer made any calls after 27 October 2011 and before the transfer date of 9 November 2011. The Consumer has said that he does not have any further Provider A invoices, and Provider A did not respond to the TIO's investigation, including a request for it to provide all invoices issued to the Consumer since November 2011.

In my view, and on the basis of the information at hand, Provider A was entitled to charge the Consumer \$12.83 on the December 2011 invoice.

5. What is the appropriate outcome of this complaint?

Provider A is required to refund or not to pursue all charges billed to the Consumer after 9 November 2011, other than the \$12.83 that, in my view, it was entitled to charge.

The Consumer has provided the TIO with copies of bank statements showing the following disputed payments:

Date	Amount	Description on statement
23 December (2011)	\$45.43	Payment website B
20 January (2012)	\$39.30	Payment website A
16 February (2012)	\$42.60	Payment website B
15 March (2012)	\$38.69	Payment website B

20 April (2012)	\$38.93	Payment website A
21 May (2012)	\$40.44	Payment website A
12 June (2012)	\$53.62	Payment website A
13 July (2012)	\$44.36	Payment website A
15 August (2012)	\$56.40	Payment website A
1 September (2012)	\$15.28	Payment website A
Total ,	\$415.05	

Although none of these transactions are described on the Consumer's statement as coming from Provider A, the Consumer told the TIO that he called Payment website B and asked it what the transactions were for, and that it said they were from Provider A. I have also, with the Consumer's consent, searched for these transactions on the websites of Payment website B and Payment website A, as both companies provide a transaction search facility. Payment website B did not produce any results for its transactions. Payment website A returned results for all its transactions and showed the biller name for all transactions as Provider A Telecom Pty Ltd. I also note that the transaction dated 23 December 2011 for \$45.43, shown as 'Payment website B' on the Consumer's statement, matches the amount listed as a 'payment/credit' on Provider A's January 2012 invoice.

Based on this evidence, and the information provided by the Consumer about the advice provided to him by Payment website B, I am satisfied that all the above transactions were paid to Provider A.

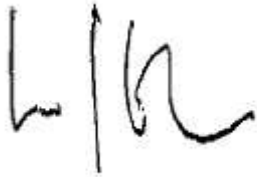
In my view, Provider A should refund \$402.22 to the Consumer. This is calculated by subtracting the amount Provider A was entitled to charge the Consumer (\$12.83) from the amount the Consumer paid to Provider A after 9 November 2011 (\$415.05).

Determination

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 a fair and reasonable outcome to this complaint is for Provider A to refund \$402.22 to the Consumer.

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

- Refund the amount of \$402.22 to the bank account from which Provider A direct debited the Consumer's charges, to another account nominated in writing by the Consumer, or by bank cheque.



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Simon Cohen
Ombudsman

28 October 2013