

## TIO Determination – 28 October 2013

### (De-identified for publication)

#### Background

Mrs L made this complaint on behalf of a business, “the company”.

Mrs L said that the company was a customer of Provider A prior to May 2011 and that, in May 2011, she transferred its landline to another provider (Provider C). Mrs L said that after the transfer took place, Provider A transferred the service back to itself without authorisation. Mrs L said that this sequence of a successful transfer to the Provider C, followed by an unauthorised transfer to Provider A, was repeated multiple times between May 2011 and September 2011.

Mrs L disputes charges paid to Provider A in July and August 2011.

#### Mrs L’s claim

Mrs L says that:

- on 2 May 2011 she submitted a request to transfer the company’s landline service to its preferred provider, Provider C, and the transfer was completed on 10 May 2011;
- soon afterwards, Provider A transferred the service back to itself without the company’s authorisation;
- on 1 June 2011 she received a text message from Provider A, saying that she had to complete a cancellation form before she could transfer the company’s service;
- she submitted a cancellation notice on behalf of the company on 7 June 2011;
- despite this, and numerous attempts by the company to transfer its service to Provider C, Provider A repeatedly took the service back and invoiced the company until September 2011;
- she paid all charges billed to the company until September 2011 and did not pay the bill issued 1 September 2011 or subsequent charges;

- on 22 September 2011, the company successfully transferred its services to Provider C; and
- to resolve the complaint, she seeks a refund to reflect charges paid to Provider A in July and August 2011.

### The provider's response

On 3 November 2011, Provider B advised the TIO that it had "written off" the amount billed to the company in September 2011, reversed a late payment fee, and said that the account had been closed with a nil balance.

Provider B challenged the decision of the TIO to raise this complaint against it, on the grounds that the company had never been a customer of Provider B. Provider B argued that the company had been a customer of Provider A, "was only ever billed by" Provider A and that any complaint should be lodged with Provider A.

Provider B claimed that it had never received any payments from the company, either directly or indirectly. On 1 October 2011, Provider B reversed or wrote off charges billed to the company on 1 September 2011 by Provider A.

Provider B has not responded to Mrs L's claims that Provider A transferred the company's services to itself without authorisation.

### Issues in dispute

The following matters require assessment:

1. Is Provider B the appropriate entity to address this complaint?
2. Did the company transfer its services away from Provider A in May 2011?
3. Did Provider A transfer the company's landline services back to itself after May 2011?
4. Was Provider A entitled to transfer the company's services back to itself after May 2011?
5. What, if any, charges was Provider A entitled to claim from the company after May 2011?
6. What, if any, charges is Provider B required to waive or refund to the company?

## TIO's Preliminary View

After investigating this complaint, my office formed the view that an appropriate outcome to this complaint was for Provider B to refund the amount of \$106.55 to the company.

The TIO sent its Preliminary View to the parties on 20 September 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 23 September 2013 Mrs L wrote to the TIO and accepted the Preliminary View. Provider B 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 between Mrs L and Provider A and Provider B in June, September and October 2011;
- Correspondence to the TIO from Mrs L and Provider B and Provider A in relation to this complaint;
- Information provided to the TIO during phone conversations with Mrs L and Provider B and Provider A;
- Provider B's Standard Form of Agreement ("SFOA") dated 27 March 2013;
- Provider A and Provider B bills issued to the company between June and October 2011;
- A document provided by Mrs L showing the dates that the company's service was transferred to and from Provider C; and
- The Telecommunications Consumer Protection Code 2007 ("the Code").

## Reasons for decision

### *1. Is Provider B the appropriate entity to address this complaint?*

I consider that on the available information, Provider B is the appropriate entity to address this complaint.

I note Provider B's view that the company has never been its customer and that the company's services were provided by Provider A. Provider B argued that any TIO complaint should be addressed by Provider A, and was not its responsibility.

It is clear that the company was billed by Provider A until 1 October 2011, when Provider B issued an invoice showing a zero balance. At various times before 1 October 2011 the company was issued correspondence, including reminder notices, referring to Provider A, Provider B or another similar name and both entities' ABNs were used at different times.

The TIO understands that:

- a. Provider B acquired the customer base of Provider A, including the account of the company, with effect from 1 July 2010; and
- b. From 1 July 2010 Provider A acted as agent for Provider B when it provided services to, and sought and received payment from, customers.

In November 2011, Mr J wrote to the TIO stating that following his appointment as one of the Receivers and Managers of Provider A he was advised by Provider A's management that Provider A acted as agent for Provider B and therefore was not a direct supplier to customers, nor a party to customer agreements. He also stated that he had been provided with a copy of an agency agreement which purportedly evidences a transfer of the customer contracts held by Provider A as at 1 July 2010 to Provider B.

The TIO further understands that:

- c. This agency relationship between Provider B and Provider A was in place until the time that customers were billed by Provider B, from approximately November 2011 onwards (October 2011 in this case).

Mrs L's complaint is about unauthorised transfers of a landline service between May 2011 and September 2011. As these events occurred after 1 July 2010, and having regard to the acquisition by Provider B of Provider A's customers, and the particular circumstances of the case, I consider that it is appropriate that Provider B has responsibility for this complaint.

*2. Did the company transfer its service from Provider A to Provider C on 10 May 2011?*

On balance, I consider that the available evidence supports Mrs L's claim that she successfully transferred the company's service from Provider A to Provider C on 10 May 2011. Mrs L has provided the TIO with detailed information about the events that led to her complaint, and has provided copies of correspondence with Provider B about the transfer of the company's service. Mrs L has also provided the TIO with a document that she says was provided by Provider C that lists its records of when the company's landline service transferred to it, and when it transferred away. According to that document, the service transferred to and from Provider C on multiple occasions during 2011, with the first transfer to it occurring on 10 May 2011. This is consistent with Mrs L's claims.

The TIO has put Mrs L's claims to Provider B and asked it to respond and provide evidence during investigation. Provider B did not respond to the investigation and has not provided evidence that is contrary to Mrs L's claims.

For these reasons, I am satisfied that Mrs L did transfer the company's service away from Provider A on 10 May 2011.

*3. Did Provider A transfer the company's landline service back to itself after 10 May 2011?*

I accept Mrs L's claim that, after the company's service was transferred to Provider C on 10 May 2011, Provider A transferred the service back to itself without authorisation, and that this happened on multiple occasions.

For the purposes of this Determination, I consider that it is not necessary to form a view on exactly when, or how many times, the service was transferred to Provider A without authorisation. This is because the appropriate outcome will not be affected, whether the service was transferred from and back to Provider A once or several times.

In my view the available evidence supports Mrs L's view that Provider A transferred the company's service back to itself following a successful transfer to Provider C on 10 May 2011. This is evidenced by the company's invoices from Provider A, which show that it charged the company for line rental and calls at various times after 10 May 2011, including dates in June, July and August 2011. Consistent with a series of transfers away from, and back to, Provider A, the company's invoices show periods where Provider A has not billed for calls made.

These invoices, together with Mrs L's explanation of events and the information she says was provided by Provider C, support Mrs L's claim that Provider A repeatedly transferred the company's service back to itself

following multiple transfers to Provider C between May and September 2011.

4. *Was Provider A entitled to transfer the company's service back to itself after 10 May 2011?*

In my view, there is no evidence to show that Provider A was entitled to transfer the company's landline service back to itself after the service successfully transferred to Provider C on 10 May 2011.

I consider that the terms that applied to the company's agreement with Provider A and with Provider B are set out in Provider B's SFOA, as I am not aware of any tailored agreement between the parties. I do not have a copy of the SFOA that was in place in May 2011 when Mrs L transferred the company's service away, however I have a copy of Provider B's SFOA as posted on its website on 27 March 2013. This agreement provides at clause 14.8 that the terms and conditions have been filed with the Australian Communications Authority on 25 September 2009, and the revision schedule at clause 15 shows no amendments to the clause about termination (clause 9). Based on this, I consider that it is reasonable to conclude that the Provider B SFOA, as at 27 March 2013, applied to the agreement between Provider A and the company.

In my view, there is nothing in the SFOA that entitled Provider A to transfer the company's service back to itself.

The SFOA provides for its 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 spend 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 authorisation from the account holder or an authorised representative. Mrs L told the TIO that the transfers were not authorised, and Provider B has not provided any contrary evidence. I accept Mrs L’s claim that Provider A did not obtain the company’s authorisation 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 company’s service back to itself after 10 May 2011.

*5. What, if any, charges was **Provider A** entitled to claim from the company after 10 May 2011?*

In my view, Provider A was entitled to claim charges from the company in accordance with the terms of the agreement between itself and the company. I am not aware that there was a tailored agreement between the parties, and so I understand that the terms of the agreement were set out in Provider A’s SFOA.

The SFOA provided for its 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 fees in lieu. As explained above, I consider that the company’s service transferred away from Provider A on 10 May 2011. At that point, the agreement between the company and Provider A was terminated and in my view Provider A was, in effect, notified of the company’s intention to cancel the agreement.

Although Mrs L has told the TIO that she provided Provider A with a cancellation form on 7 June 2011, there is no evidence to show that she notified Provider A of an intention to cancel the service before 10 May 2011. Under the agreement, Provider A was then entitled to charge the

company one month's access fees, until 9 June 2011. Provider A was also entitled to charge the company 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 authorisation 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 Provider A 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 company's service were authorised by it. For that reason, I consider that Provider A was not entitled to charge the company for any calls made after it transferred the company's service back to itself.

Provider A billed the company for access fees in advance, from the 28th of each month until the 27th of the next (described on invoices as a 'value pack'). The monthly payment was \$36.95 (excluding GST) until September 2011. Although the TIO does not have a copy of the company's May 2011 invoice, based on the pattern of charges in subsequent months I have formed a view that, at 10 May 2011, the company had paid access charges to 27 May 2011.

The provider was entitled to a further 13 days, to 9 June 2011. This means that in June 2011, Provider A was entitled to bill the company \$17.02 for 13 days of access fees, and this is calculated as follows:

- Monthly access charge on June 2011 invoice (covering period 28 May 2011-27 June 2011): \$36.95 (excluding GST)
- Daily access charge (36.95/31): \$1.19 (excluding GST)
- Total line rental charge for thirteen days (28 May 2011-9 June 2011): \$15.47 (excluding GST)
  
- Total: \$17.02 (including GST)

Provider A was also entitled to charge the company for all calls made up to the date of transfer, 10 May 2011. The company's June 2011 invoice shows only one call charged, made on 29 April 2011, however there is no charge for this as Provider A applied a credit for the same amount described as 'local call rebate for included calls'.

Based on these calculations, I consider that Provider A was entitled to charge the company a total amount of \$17.02 on the June 2011 invoice.

6. *What, if any, charges is **Provider B** required to waive or refund to the company?*

Provider B is required to waive or refund all charges billed to the company after 10 May 2011, other than the \$17.02 that, in my view, Provider A was entitled to charge.

I have considered the information provided by Mrs L, including the Provider A bills dated between June 2011 and October 2011 and her advice that she paid all invoices until September 2011 and, based on this, I am satisfied that:

1. In June 2011, the company paid \$40.65 to Provider A to reflect the amount due on the June 2011 invoice;
2. the company paid a further \$82.92 to reflect charges on the July 2011 (\$41.00) and August 2011 (\$41.92) invoices;
3. the company did not pay the Provider A invoice issued on 1 September 2011 invoice or a late fee that was applied after that date; and
4. Provider B issued an invoice with a zero balance in October 2011, writing off charges of \$41.35 (reflecting the balance of the September 2011 invoice) and reversing a late fee of \$10.

In my view, Provider B should refund \$106.55 to the company.

This is calculated by adjusting the June 2011 invoice to show new charges of \$17.02, as that is the amount I consider Provider A was entitled to charge the company on the June 2011 invoice (as calculated above). This means that Provider B should refund all charges paid by the company after May 2011 other than \$17.02. As the company paid Provider A a total amount of \$123.57, the amount that Provider B should refund is \$106.55.

### 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 B to refund \$106.55 to the company.

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

- Issue the company a bank cheque for \$106.55

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**Simon Cohen**

**Ombudsman**

**28 October 2013**