

## TIO Determination – 19 September 2013

### (De-identified for publication)

#### Summary of Determination

This complaint is about liability for charges following unauthorised transfers of two landline services after November 2011. The Consumer says that in November 2011 he transferred two landline services (services A and B) from Provider A to Provider B and that, after the transfer took place, he received invoices from Provider B and from Provider A. The Consumer said that he disputes all charges billed to him by Provider A after 29 November 2011.

The primary matter for determination is whether Provider A transferred the Consumer's services to itself without authorisation and, if so, whether Provider A should refund any amount to the Consumer. I have determined that Provider A did transfer the Consumer's services to itself without authorisation, and that it was not entitled to do so.

I consider that the appropriate resolution to this complaint is for Provider A to refund all charges the Consumer paid for calls made after 28 November 2011 for service A and after 29 November 2011 for service B and all charges the Consumer paid for access after 27 December 2011 for service A and after 28 December 2011 for service B.

I have therefore directed Provider A to refund an amount of \$873.91 to the Consumer's bank account. I have also directed Provider A to issue an invoice or other statement showing that the Consumer's account is paid in full, and ensure that no further credit management or debt collection action is undertaken in respect of the Consumer's account.

#### The Consumer's claim

The Consumer says that:

1. In November 2011 he transferred his business landline and fax services from Provider A to Provider B
2. From December 2011 he received bills from Provider B and from Provider A

3. Provider A advised him that the services had not yet transferred to Provider B, and that the bills were correct, and
4. He repeatedly called Provider A to ask it to transfer the service to Provider B and each time he did this Provider A told him that he had to send a cancellation letter and wait 28 days for confirmation of transfer.

### Provider A's response

Provider A has not responded to the TIO at any stage during this complaint. Based on the information provided by the Consumer, Provider A's view appears to be that:

1. the Consumer's services did not successfully transfer to Provider B in November 2011, and
2. the Consumer remained a Provider A customer after that time and its charges were valid.

### Preliminary question of which provider the Consumer's complaint is about

The Consumer told the TIO that he considers that the reason he has been billed by both Provider A and Provider B since November 2011 is that Provider B failed to properly transfer his services to itself. He appears to base this view on information given to him by Provider A.

However, I am satisfied that Provider A is the appropriate provider to address this complaint.

In my view, there is no evidence to support a conclusion that Provider B failed to transfer the Consumer's services to it, or that it is responsible for any charges billed to the Consumer by Provider A.

I consider that the weight of information demonstrates that the Consumer did transfer his services to Provider B and that, following this, Provider A continued to bill the Consumer for services it did not provide and transferred his services back to itself without authorisation.

For these reasons, I am satisfied that Provider A is the appropriate provider to address this complaint.

### Issues in dispute

The issues that I have considered as part of this complaint are:

1. On what date were the Consumer's services transferred from Provider A to Provider B?

2. Did Provider A continue to bill the Consumer after he transferred his services away?
3. Did Provider A transfer the Consumer's services back to itself after he transferred his services away?
4. Was Provider A entitled to transfer the Consumer's services back to itself after November 2011?
5. What, if any, charges was Provider A entitled to claim from the Consumer after November 2011?
6. What is the appropriate outcome of this complaint?

### Information considered in making this Determination

The TIO makes decisions based on the law, good industry practice and what is fair and reasonable in the circumstances.

In making this Determination, I have considered the following:

- Correspondence to, and discussions between, the TIO and the Consumer (and his representative) in relation to this complaint
- Provider A's Standard Form of Agreement ("SFOA")
- Tax invoices issued by Provider A to the Consumer between December 2011 and November 2012
- Tax invoices issued by Provider B to the Consumer between December 2011 and May 2012
- Information provided to the TIO by Provider B, and
- The Telecommunications Consumer Protections Code 2007 ("Code").

### Assessment

#### *1. On what date were the Consumer's services transferred from Provider A to Provider B?*

I am satisfied that the Consumer's services were transferred to Provider B in November 2011.

The Consumer's Provider B invoices show that Provider B billed the Consumer:

- for line rental from 28 November 2011 and calls from 29 November 2011 for landline service A, and

- for line rental from 29 November 2011 for service B.

Provider B has also told the TIO that it provided the Consumer's services from 29 November 2011 to 28 April 2012. After this, I understand these services were transferred to another carrier's network.

The Consumer said that Provider A told him that his services did not successfully transfer to Provider B in November 2011. During the TIO's investigation of this complaint, the TIO asked Provider A to provide information and evidence to demonstrate that the services did not transfer to Provider B. Provider A has not provided any information or evidence that is contrary to show that the services did not transfer from Provider A to Provider B in November 2011.

For these reasons I am satisfied that the Consumer's landline services were transferred from Provider A to Provider B on 28 November 2011 and 29 November 2011.

### *2. Did Provider A continue to bill the Consumer after he transferred his services away?*

I accept the Consumer's claim that, after the services were transferred to Provider B, Provider A continued to bill him.

The Consumer has provided copies of invoices issued to him by Provider A between December 2011 and November 2012. Although the TIO does not have itemised copies of each month's invoice, the available invoices show that Provider A continued to bill the Consumer for line rental between December 2011 and July 2012 and for calls made at various times within that period, including in February, May and June 2012.

It is possible that Provider A also billed the Consumer for calls at other times, but I am unable to form a view on that as I do not have itemised invoices for the entire period. The invoices provided to the TIO show that Provider A billed the Consumer a total of \$1226.69 between December 2011 and July-August 2012. I have outlined on page 8 how this figure has been calculated.

### *3. Did Provider A transfer the Consumer's services back to itself after he transferred his services away?*

I am satisfied that, after the Consumer's services were transferred to Provider B, Provider A transferred the services 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 services were 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 services were transferred from and back to Provider A once or several times.

Provider B told the TIO that it provided the Consumer's services from 29 November 2011 to 28 April 2012, but has not provided dates of any transfers away from, and back to, it during that period.

I have examined the Consumer's Provider B invoices between December 2011 and April 2012, and Provider A invoices from December 2011 to August 2012. The itemised Provider A invoices that the Consumer has provided to the TIO show that it billed him for calls made from the services after 29 November 2011, during February, May and June 2012.

The only reasonable conclusion that I can draw from this is that Provider A transferred the Consumer's services back to itself at some point (or on multiple occasions) after November 2011.

#### *4. Was Provider A entitled to transfer the Consumer's services back to itself after November 2011?*

In order to transfer the Consumer's services back to itself after he transferred those services to Provider B, Provider A would require the Consumer's authority. I am not satisfied that any such authority was given.

I have considered the terms of Provider A's SFOA, which I consider set out the terms of the contract between Provider A and the Consumer. In my view, there is nothing in the SFOA that entitled Provider A to transfer the Consumer's services back to itself.

The SFOA deals with 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:

"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 customer in lieu of 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 he wanted his services to be with Provider B, and Provider A has not provided any contrary evidence. In my view, Provider A did not obtain the Consumer's consent before transferring the services to itself, was therefore not entitled to transfer the services back and breached clause 8.1.3(d) of the Code.

#### *5. What, if any, charges was Provider A entitled to claim from the Consumer after November 2011?*

In my view, Provider A is entitled to claim some charges from the Consumer in accordance with the terms of the Provider A's SFOA.

Clause 9.1 of the SFOA provides that failure to give Provider A one month's written notice of intention to terminate the agreement entitled Provider A to charge a month's access fee in lieu.

The Consumer's services transferred away from Provider A on 28 November 2011 and 29 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.

Under the SFOA, Provider A was then entitled to charge the Consumer one month's access fees, until 27 December 2011 for service A and until 28 December 2011 for service B. Provider A was also entitled to charge

the Consumer for any unbilled call charges to the date of cancellation. Provider A was not entitled to charge any further amounts.

This conclusion is 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 services back to itself were authorised by him, and accordingly, that Provider A was not entitled to charge the Consumer for any calls made after 28 November 2011 on service A and 29 November 2011 on service B.

Provider A billed the Consumer for access fees for each month in advance. On 28 November 2011, the Consumer had paid access fees to 27 November 2011. Provider A was entitled to be paid a month's access fees in lieu of notice, to 27 December 2011 for service A and 28 December 2011 for service B. This means that in December 2011 Provider A was entitled to bill the Consumer \$104.47 for access fees, and this is calculated as follows:

- Access charge from 28 November 2011 to 31 December 2011 for service B: \$36.24 (excluding GST)
- Access charge from 28 November 2011 to 31 December 2011 for service A: \$69.95 (excluding GST)
- Daily access charge for service B: \$1.07 (excluding GST)
- Daily access charge for service A: \$2.06 (excluding GST)
- Access charge from 28 November 2011 to 28 December 2011 for service B: \$33.17
- Access charge from 28 November 2011 to 27 December 2011 for service A: \$61.80

Total: \$104.47 (including GST)

Provider A was also entitled to charge the Consumer for all calls made up to the date of transfer, 28 November 2011 and 29 November 2011, so all calls billed on Provider A's December 2011 invoice (totalling \$168.40 (including GST) are valid.

For line rental and the call charges, Provider A was entitled to charge the Consumer a total amount of \$272.87 on the December 2011 invoice. That invoice includes calls to 28 November 2011 for service A and no calls for service B. Based on this call history, I have assumed that no calls were made from service B on 29 November 2011.

*6. What is the appropriate outcome of this complaint?*

Provider A is required to refund or not pursue all charges billed to the Consumer after 28 November 2011 for service A and after 29 November 2011 for service B, other than the \$272.87 that, in my view, it was entitled to charge.

I have examined the information provided by the Consumer, including the Provider A invoices and reminder notices dated between December 2011 and November 2012 and, based on this, I am satisfied that:

1. Provider A billed the Consumer total new charges of \$1226.69 between December 2011 and August 2012
2. This amount includes access fees, call charges and late fees billed during that time, and
3. Of this amount, based on the information and records provided by the Consumer and his representative, and by the amounts listed on Provider A invoices, I am satisfied that the Consumer paid Provider A all amounts other than \$79.91. This is a total payment of \$1146.78.

This table shows how the amounts charged, and the amounts paid, have been calculated. The Consumer's representative told the TIO that all Provider A invoices were paid, except the last invoice. I have considered that information, as well as the figures listed on Provider A's invoices and the notations made on copies provided to the TIO, in forming a view on the payments that the Consumer made to Provider A.

Invoice date	New charges	Late payment fees	Payments made
December 2011	\$285.23	\$10	None
January 2012 (reminder notice dated 23 January 2012)	\$138.63	\$10 (not carried forward to later invoice)	\$295.23 (based on notation on invoice provided and on 'payments/credits' shown on March



			invoice)
February 2012 (reminder notice dated 21 February 2012)	\$112.49	\$10 (not carried forward to later invoice)	None
March 2012	\$114.72 (based on reminder notice 21 March 2012)	\$10 (not carried forward to later invoice)	\$251.12 (based on amount listed as overdue on March invoice, and on 'payments/credits' shown on April invoice)
April 2012	\$112.19	\$10	None
May 2012	\$114.09	Additional \$10 carried forward to this invoice	\$246.91 (shown as paid on 10 May 2012 on May invoice sent to the Consumer on 10 May 2012)  \$114.09 (based on 'credits/payments' shown on June invoice)
June 2012	\$239.43	None	\$239.43 (based on 'credits/payments' shown on July invoice)
July 2012	\$69.91	\$10	Not paid (based on 'do not pay' notation on invoice provided)
<b>Total</b>	<b>\$1,186.69</b>	<b>\$40</b>	<b>\$1 146.78</b>

In my view, Provider A should refund \$873.91 to the Consumer, calculated as follows:

Total amount paid to Provider A by the Consumer after December 2011	\$1146.78
Adjusted balance of December 2011 invoice	\$272.87
Refund amount	\$873.91

Provider A should not pursue any the charges that are currently shown as owing on the Consumer's account. After refunding the amount of \$873.91, Provider A should issue an invoice showing the Consumer's account as paid in full.

### 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, the TIO formed the Preliminary View that an appropriate outcome to this complaint was for Provider A to refund the amount of \$873.91 to the Consumer. The TIO also said that Provider A should not pursue all charges currently shown as owing on the Consumer's account, ensure that no further charges are applied and issue an account showing that it is paid in full.

This Preliminary View was sent to the parties on 16 August 2013 to allow them an opportunity to:

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

### Responses to the TIO's Preliminary View

On 9 September 2013 the Consumer advised that he accepted the findings in the Preliminary View. The Consumer also said that he was seeking payment of a \$1000 administration fee to reflect loss of productivity, stress and the costs he incurred in employing a staff member to put together documentation required as part of the complaint.

As my office has advised the Consumer, the TIO does not award compensation for stress, inconvenience or the time spent on a complaint. As the TIO is an alternative dispute resolution service, consumers are expected to actively participate in the resolution of their own complaints and, generally, to meet any costs they incur during the complaint process.

The TIO does consider compensation claims for quantifiable loss, such as when a business has lost profit because of the action or inaction of its service provider. This type of compensation, however, does not appear relevant to the Consumer's complaint, as he has not claimed a loss of profit resulting from Provider A's unauthorised transfer of his landline services.

Accordingly, I consider that the Consumer is not entitled to be paid any amount of compensation by Provider A.

Provider A did not respond to the Preliminary View.

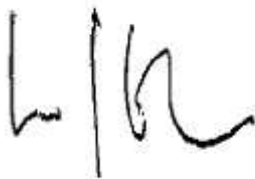
I have not changed the conclusions reached in the TIO's Preliminary View.

### 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 Provider A to refund **\$873.91** to the Consumer's bank account and to not pursue all charges currently shown as owing on the Consumer's account.

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 \$873.91 to the following bank account:
- Issue an invoice or other statement showing that the Consumer's account is paid in full, and
- Ensure that no further credit management or debt collection action is undertaken in respect of the Consumer's accounts.



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**Simon Cohen**  
**Ombudsman**

**19 September 2013**