

TIO Determination – 30 September 2013

(De-identified for publication)

Background

This complaint is about liability for charges following unauthorised transfers of three landline services between December 2011 and April 2012. The Consumer says that in late 2011 the company she represents (the Company) transferred its three landline services away from Provider A to Provider B and that, after the transfer took place, Provider A transferred the services back to itself without authorisation. The Consumer said that this sequence of a successful transfer to Provider B, followed by an unauthorised transfer back to Provider A, was repeated multiple times between December 2011 and April 2012.

The Consumer says that the Company's services are now with Provider B, and that she disputes charges billed to it by Provider A after December 2011.

The Consumer's claim

The Consumer says that:

1. she made repeated transfers of the Company's three landline services from Provider A to Provider B between December 2011 and April 2012, when the services remained with Provider B;
2. until April 2012, each time services were transferred to Provider B, Provider A transferred the services back to itself without authorisation;
3. after the transfer of services to Provider B in December 2011, Provider A continued to bill the Company for services, and has continued to pursue it for payment and charge late fees despite being aware the bill is disputed; and
4. to resolve the complaint, she would like Provider A to waive all charges on the Company's account.

The Provider's response

Provider A said that:

1. the issue is Provider B's responsibility as it did not provision or "churn" the lines correctly;
2. Provider B transfers "product A" and this causes the transfer to fail;
3. it is not in the habit of "stealing" lines back and, if a customer doesn't want to be with it, it doesn't want the customer to stay;
4. it will "rigorously defend" the costs it incurred while waiting for Provider B to take the lines; and
5. the Consumer did not raise the issue of transferring the services until February 2012 and the cancellation form sent and dated 2 February 2012 was not received and added to the account until 14 February 2012.

Provider A did not respond to the TIO's investigation and did not provide any documentation or evidence in support of this response.

Issues in dispute

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

1. Did the Company transfer its services from Provider A to Provider B in December 2011?
2. Did Provider A transfer the Company's landline services back to itself after 7 December 2011?
3. If so, did Provider A transfer the Company's services back to itself with the Company's authority?
4. What, if any, charges was Provider A entitled to claim from the Company after 7 December 2011?
5. What is the appropriate outcome of this complaint?

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, the Consumer and Provider A in relation to this complaint;
- Provider A's Standard Form of Agreement ("SFOA");
- Tax invoices issued by Provider A to the Company between November 2011 and May 2013;

- Tax invoices issued by Provider C to the Company in July 2013;
- Provider A Service Cancellation forms completed by the Consumer and dated 4 January 2012 and 2 February 2012;
- Tax invoices issued by Provider B to the Company in December 2011, January 2012, March 2012 and May 2012; and
- The Telecommunications Consumer Protections Code 2007 ("Code").

Assessment

1. Did the Company transfer its services from Provider A to Provider B in December 2011?

The Consumer says that she transferred the Company's services from Provider A to Provider B in December 2011.

The Consumer has provided copies of Provider B invoices issued to the Company, showing that Provider B billed the Company for line rental from 7 December 2011 for landline services A, B and C. In my view, this shows that these three services successfully transferred to Provider B on 7 December 2011.

Provider A claims that Provider B did not transfer the lines correctly, but has not provided any evidence to support this claim or responded to a request for information during the TIO's investigation.

Given the lack of any information to contradict the Consumer's claim I am satisfied that the Company did transfer its landline services from Provider A to Provider B on 7 December 2011.

2. Did Provider A transfer the Company's landline services back to itself after 7 December 2011?

The Consumer has provided the TIO with copies of bills issued to the Company by both Provider A and Provider B in late 2011 and early 2012.

The Provider B invoices show that Provider B billed line rental from 7 December 2011 and landline calls from 8 December 2011. However, Provider B did not bill the Company for landline line rental or phone calls between 17 December 2011 and 10 February 2012.

Provider A billed the Company for calls between 30 November 2011 and 7 December 2011 and also between 19 December 2011 and 24 December 2011.

In my view, this shows that the Company's services were provided by Provider B and Provider A at these different times during this period.

Later invoices show that Provider B provided land line service (on at least two of the three lines: services A and C) to the Company between 10 February 2012 and 15 February 2012, and that in April 2012 Provider A billed the Company for calls made in late February and March 2012 on services A and B and for product B on all three lines.

The Consumer says that Provider A transferred the Company's services back to itself. Provider A has not provided any evidence that is contrary to the Consumer's claim. On balance, I consider that Provider A did transfer the Company's services back to itself after 7 December 2011 on more than one occasion.

3. Did Provider A transfer the Company's services back to itself with appropriate authority after 7 December 2011?

The Consumer says that Provider A had no authority to transfer the Company's services back to itself.

Provider A would only have authority in two circumstances, being:

- After the transfer to Provider B, someone authorised to act on behalf of the Company asked Provider A to transfer those services back, or
- The terms of service between the Company and Provider A authorised it to do so.

The Consumer says that no one authorised a transfer back on behalf of the Company and Provider A has not provided any information to contradict this claim.

I have reviewed the terms of Provider A's SFOA, as I understand that this document set out the terms that applied to the Company's agreement with Provider A. In my view, there is nothing in the SFOA that entitled Provider A to transfer the Company's services back to itself after those services were transferred to Provider B.

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.

On balance, I am not satisfied that Provider A was authorised to transfer the Company's services back to itself after 7 December 2011.

4. What, if any, charges was Provider A entitled to claim from the Company after 7 December 2011?

The SFOA provided for termination by either Provider A or the Company at clause 9.1 and required one month's notice from either party. Under the terms of the SFOA, if the Company did not give Provider A one month's notice that it intended to terminate the agreement, Provider A could charge a month's access fees in lieu.

The Consumer has provided the TIO with copies of Provider A cancellation forms dated 4 January 2012 and 2 February 2012. However, these are well after actual transfer on 7 December 2011. I am satisfied that the Company did not notify Provider A of an intention to cancel the services before 7 December 2011.

The Company's services were transferred to Provider B on 7 December 2011. At that point, in my view Provider A was, in effect, notified of the Company's intention to cancel the agreement and was then entitled to charge the Company one month's access fees, until 6 January 2012. Provider A was also entitled to charge the Company for any unbilled call charges to the date of cancellation.

Provider A billed the Company for access fees for each month in advance. On 7 December 2011, the Company had paid access fees to 31 December 2011.

Provider A was entitled to a further six days, to 6 January 2012. This means that in January 2012, Provider A was entitled to bill the Company \$21.05 for six days of access fees, and this is calculated as follows:

- Monthly line rental charge in January 2012 for each line: \$32.95 (excluding GST)
- Daily line rental charge in January 2012 for each line: \$1.06 (excluding GST)
- Daily line rental charge in January 2012 for all three lines: \$3.51 (including GST)
- Total line rental charge for six days for all three lines: \$21.05
Total: \$21.05 (including GST)

Provider A was also entitled to charge the Company for all calls made up to the date of transfer, 7 December 2011. Provider A's January 2012 invoice shows that some calls were made on this date, and I consider that Provider A can charge the Company for these calls, as no Provider B calls were billed until 8 December 2011. This is a total of \$17.81, calculated as follows:

- 20 calls to 13/1300 numbers charged at \$ 0.27 each (excluding GST)= \$5.40
- 11 calls to mobile numbers charged at various rates (excluding GST)= \$7.30
- 16 calls to local numbers charged at \$0.15 each (excluding GST)= \$2.40
- 2 national calls charged at \$0.25 and \$0.84 (excluding GST)= \$1.09

Total: \$17.81 (including GST)

Considering both the line rental and the call charges, in my view Provider A was entitled to charge the Company a total amount of \$38.86 on the January 2012 invoice.

The SFOA did not entitle Provider A to charge any further amounts.

This is also consistent with the TIO's position statement '*Liability for charges following unauthorised transfer*' and 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, 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 Company did authorise its services to be transferred back to Provider A. 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 services back to itself.

5. What is the appropriate outcome of this complaint?

The information provided by the Consumer shows that:

1. The January 2012 bill issued by Provider A showed that the Company was in credit by \$146.69. This appears to be due to a duplicate payment by the Company in December 2011. I consider that the balance shown is an error and should have been a credit balance of \$148.45.
2. The Company paid \$3.63 in January 2012 after the bill was issued.
3. As set out above, Provider A was entitled to charge the Company \$38.86 at termination of the contract for line rental and calls.

I have set out below a table showing the actual billing and the correct calculations.

	Balance as at 1 January 2012	New charges	Balance payable
Actual	\$146.69 in credit	\$150.32	\$3.63 (paid 7 January 2012)
Revised	\$148.45 in credit	\$38.86	\$109.59 in credit

In my view, Provider A should refund \$113.22 to the Company, being the credit of \$109.59 that should have been shown on the January 2012 bill plus the overpayment of \$3.63.

Provider A should not pursue any of the charges that are currently shown against the Company's account. This means that Provider A should not pursue the amount of \$707.46 shown on 31 July 2013, as well as all charges applied since 31 July 2013, on the basis that it had no entitlement to charge those amounts.

Provider A should consider the Company's account paid in full and ensure that no further charges are applied. Provider A should now provide written confirmation to the Company stating that the Company has no liability to Provider A for outstanding charges, and also send the Company an account statement showing a nil balance due.

Provider C

The Company has recently received invoices from Provider C, which I understand has taken over Provider A's customer base.

As the Company was not a customer of Provider A after 7 December 2011, I consider that there is no basis for Provider C to issue any invoices to or claim that a debt is owing to it from the Company.

In the circumstances I consider that Provider A should now give instructions to Provider C for it to provide the Company a written confirmation stating it has no liability to Provider C for outstanding charges and to send the Company an account showing a nil balance.

The 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 \$113.22 to the Company and not to pursue any charges on the Company's account, to consider the Company's account paid in full and ensure that no further charges are applied.

This Preliminary View was sent to the parties on 4 July 2013 to allow them an opportunity to respond to the Preliminary View and reasons, provide any additional evidence, and provide a submission on the proposed outcome. On 31 July 2013 the Consumer advised that she accepted the findings in the Preliminary View. Provider A did not respond to the Preliminary View.

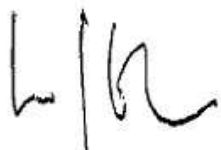
I have not changed the substance of the conclusions reached in the TIO's Preliminary View.

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 the amount of \$113.22 to the Company and not to pursue any charges on the Company's account, to consider the Company's account paid in full and ensure that no further charges are applied.

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 **\$113.22**
- Remove all charges currently shown against the Company's account, including the amount of \$707.46 shown on 31 July 2013.
- Provide written confirmation to the Company stating that the Company has no liability to Provider A for outstanding charges, and also send the Company an account showing a nil balance due.
- Instruct Provider C in writing, to take the following steps within seven days:
 - Close any account for the Company with Provider C and ensure that no further charges are applied or claimed from the Company; and
 - Provide written confirmation to the Company stating that the Company has no liability to Provider C and also send the Company an account showing a nil balance due.
- Provide to the Company a copy of its instruction to Provider C referred to above.



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Simon Cohen
Ombudsman

30 September 2013