

TIO Determination – 17 June 2014

(De-identified for publication)

This document sets out my Determination in relation to a complaint made by a Representative on behalf of the Consumer about the Provider.

Background

This complaint concerns the transfer of the Consumer's telephone service to the Provider. The transfer followed an unsolicited telemarketing call to the Consumer.

I understand that the Consumer is no longer a customer of the Provider.

On 11 February 2014, the Provider informed the TIO that it would refund \$763.69 to the Consumer upon receipt of a signed and completed refund claim form. It did not respond to the TIO's queries surrounding the validity of the charges and its compliance with the Australian Consumer Law ("ACL").

On 12 February 2014, the Consumer sent the refund claim form to the Provider in response to the Provider's advice that it had a 30 business day timeframe to process the refund.

On 27 March and 1 April 2014, the Representative informed the TIO that the Consumer had not received the refund.

The complaint

The complaint raised with the TIO is as follows:

- The Consumer is an elderly man who is easily confused.
- The Provider contacted him in an unsolicited telephone sales call and persuaded the Consumer to transfer his services to the Provider.
- The Consumer changed his mind shortly after, and asked to be transferred back. At that time, the Consumer paid \$763.69. The Representative says that this payment made was under duress and because the Consumer was distressed by the call.

- The Representative asked for this amount to be refunded.
- The Provider agreed to refund the amount upon receipt of a completed refund request.

The Representative says that, despite returning the refund claim form, the Consumer has not received the refund for \$763.69.

The last response to this matter from the Provider said that the matter was with its accounts department.

My preliminary view

On 2 June 2014 I advised the parties of my preliminary view that the Provider should refund the amount of \$763.69 to the Consumer.

The parties were asked to:

- respond to my 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.

The Representative has advised that he agrees with my preliminary view. The Provider has not provided a response.

My view on the information currently available to me

In forming my view about how this complaint should be resolved, I have considered the following information from the relevant parties:

- a photograph of a cheque butt dated 18 September 2013 from the Consumer's cheque book; the cheque butt indicates that the Consumer issued a cheque to the Provider on 18 September 2013 for the amount of \$763.69
- a photograph of the Consumer's bank account that shows a debit of \$763.69 under transaction number 002633
- a copy of a letter from the Provider to the Consumer dated 15 December 2013; the letter rejected the Consumer's refund request on the basis that "*the monies received were paid voluntarily and were for payment for legitimate fees owing on the account*"
- an email from the Provider to the TIO dated 11 February 2014 stating that the Provider would refund \$763.69 to the Consumer

- an email from the Representative dated 11 February 2014 including correspondence from the Provider that outlined a 30 business day timeframe for the Provider to process the refund once the refund form was received
- a copy of a signed and completed refund claim form dated 12 February 2014 from the Consumer to the Provider
- an email from the Provider to the TIO dated 18 February 2014, advising that the refund form completed by the Consumer had been forwarded to the Provider's accounts department
- an email from the Representative to the Provider dated 16 March 2014 to advise that the refund had not been paid into the Consumer's account
- an email from the Provider to the Representative (undated, but before 30 March 2014) that apologised for the delay as "*the refund should have been credited already*" to the Consumer's account; in the email, the Provider advised that it would follow up the refund with its accounts department, and
- an email from the Representative to the TIO dated 10 June 2014 advising that no money has been paid into the Consumer's bank account.

I have also considered information provided in the on-line complaints form completed on behalf of the Consumer and provided to the TIO on 2 January 2014, and information included in TIO file notes. Where relevant, these are included in this document.

My view, based on the available information, is that the Provider has failed to implement the resolution offered to the Consumer in relation to his complaint.

In forming my view, I have considered the Provider's obligations under the ACL and *Telecommunications Consumer Protections Code 2012* ("the TCP Code") as a company that provides services as a carriage service provider.

The issue that requires investigation is whether the Provider is required to refund \$763.69 to the Consumer.

My assessment

Has the Provider complied with the ACL?

The Provider is required to meet obligations under the ACL, including in relation to unsolicited agreements.

The information before me suggests that the telephone service of the Consumer was transferred to the Provider on the basis of an unsolicited consumer agreement, because the Provider contacted him by telephone in order to try to sell him a service. In these circumstances the Provider was required to provide to the Consumer a document evidencing the agreement made with him within five business days of its telephone agreement with him (section 78(2) ACL). Requirements of this agreement document include important consumer safeguards such as:

- i. the full terms of the agreement
- ii. a notice that informs the consumer of their rights to terminate the agreement, and
- iii. a notice that may be used by the consumer to terminate the agreement; see section 79 ACL.

I have been advised that the Consumer does not have a record of receiving the agreement document and, despite a request from the TIO to the Provider asking for a copy of the agreement document sent to him, it has not provided this information.

The effect of section 82 of the ACL is that, where the agreement document is not provided within five working days, the Consumer is entitled to terminate the agreement with the Provider within six months from the day after the agreement document was given.

Given this and, as no agreement document has yet been provided to the Consumer, he has at all relevant times been permitted to terminate the agreement with the Provider.

On the basis of the information available to the TIO, the following findings are made:

- the Consumer rang the Provider several weeks after the telemarketing call in which he agreed to a new service, seeking to withdraw from the agreement, and
- at this time, payment of \$763.69 was demanded by the Provider, and the payment was subsequently received by it.

One effect of a termination under section 82 of the ACL is that the supplier must immediately refund to the consumer any payment made to the supplier after the termination under the agreement (section 87 ACL).

Having regard to the information available to the TIO, the Consumer was permitted to and did terminate his agreement with the Provider. The payment of \$763.69 received by it after the termination must be

refunded. It therefore follows that the Provider is required to refund to the Consumer the payment of \$763.69.

Has the Provider complied with its obligations under the TCP Code?

Section 8.2.1(a)(xiii) of the TCP Code requires service providers to have complaint management systems that demonstrate fairness, courtesy, objectivity and efficiency by completing all necessary actions to deliver the resolution within 10 working days of the acceptance of an offer.

Service providers are exempt from complying with section 8.2.1(a)(xiii) if they provide evidence that the consumer agrees to a timeframe of longer than 10 working days, or if the implementation of the resolution is contingent on actions by the consumer that have not been completed.

The Provider says that a refund to the Consumer of \$763.69 is fair and reasonable. This offer has been accepted by the Consumer, but as at this time has not been actioned. This is despite the fact that the Provider has received a "Refund Request Form" from the Consumer on 12 February 2014.

On the basis of the information currently available to the TIO, I am therefore satisfied that the Provider has not complied with section 8.2.1(a)(xiii) of the TCP Code.

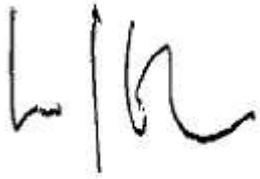
Is the Provider required to refund \$763.69 to the Consumer?

Having regard to the information available to the TIO, the law (including the relevant provisions of the ACL), good industry practice (including the requirements of the TCP Code) and what is fair and reasonable in all the circumstances, I am of the view that the Provider is required to refund \$763.69 to the Consumer.

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 the Provider to refund \$763.69 to the Consumer.

Accordingly, I DIRECT the Provider to refund the amount of \$763.69 to the Consumer's nominated bank account as outlined within 14 days of the TIO providing to the Provider a Confirmation of Resolution signed by the Representative.



.....

Simon Cohen
Ombudsman
Date: 17 June 2014