

## TIO Decision – 03 December 2018

### (De-identified for publication)

This document sets out my Decision on a complaint made by the Consumer trading as the Company about the Provider.

On 29 October 2018 I advised the parties of my proposed resolution (reproduced in the Appendix). The Consumer has accepted the proposed resolution, but the Provider did not respond.

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### Directions

The Proposed Resolution is my final Decision in this matter.

Accordingly, I DIRECT the Provider to confirm by the close of business on Friday 21 December 2018, it will:

- Cancel the Consumer's contract for landline and internet services,
- Cooperate with the Consumer to ensure the Consumer is able to transfer the services to another provider of their choice without further inconvenience,
- Waive all charges resulting from interim diversions placed by the Provider during landline outages, and
- Pay the Consumer \$400 to cover excess data charges incurred when the Provider was unable to provide fixed line internet services.

Judi Jones

**Telecommunications Industry Ombudsman**

## Appendix – Proposed resolution

### Ombudsman’s Proposed Resolution – 29 October 2018

#### (De-identified for publication)

This document sets out my proposed resolution of a complaint from the Consumer trading as the Company about the Provider.

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#### **1 Proposed Resolution**

Based on the information given to me, my view is that the Provider should by 12 November 2018:

- cancel the Consumer’s contract for landline and internet services,
  - cooperate with the Consumer to ensure the Consumer is able to transfer the services to another provider of their choice without further inconvenience,
  - waive all charges resulting from interim diversions placed by the Provider during landline outages, and
  - pay the Consumer \$400 to cover excess data charges incurred when the Provider was unable to provide fixed line internet services.
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#### **2 Background**

The Company has had account number xxxxxxxxxx with the Provider since November 2017. The Company is receiving landline and internet services from the Provider. The service is located at [address].

#### **3 The complaint and the Provider’s response**

The Consumer complained about:

- Ongoing slow internet speeds
- Poor quality landline services
- The Provider billing the Consumer for call costs resulting from interim diversions placed by the Provider during landline outages
- Costs the Consumer incurred for mobile data when the Provider could not provide internet services

### 3.1 Ongoing slow internet speeds

The Consumer said they are still unhappy about the speed of their internet service. The Consumer said the speed is currently measured at about 2.5 Mbps. The Consumer said before switching to the Provider their internet speeds ranged between 15 to 20 Mbps.

The Consumer said they are unsure why the speed changed significantly, but recalls the Wholesaler carried out what was described as a 'line swap' before the Consumer was connected to the Provider. The Consumer said the slow speed made it difficult and inconvenient to use the internet and phones for their business.

### 3.2 Poor quality landline services

The Consumer said they have regular problems with the Consumer's landline service which they believe is affecting their business. The Consumer said the lines drop out intermittently and have done so regularly since November 2017. The Consumer said they did not experience these problems with the landline with their previous provider. The Consumer said they do not recall the Provider telling them it would be providing a VOIP landline service.

### 3.3 Bill for diversion

The Consumer said the most recent bill from the Provider showed the Consumer had been billed for 466 calls to their mobile from the business number. The Consumer said the Provider explained these were charges for diversions placed on the landline during service outages. The Consumer said they agreed to the diversion as an interim service while there were faults with the landline. The Consumer said they did not voluntarily request a diversion at any other time. The Consumer wants the Provider to reverse the charges related to the diversions.

### 3.4 Mobile internet costs

The Consumer incurred mobile data costs during a period beginning before Christmas 2017, when the Provider could not provide fixed internet services. The Consumer said there was a problem with the modem which took the Provider about three weeks to replace. The Consumer said during this time the Consumer used their personal mobile data for internet to continue to operate the business. The Consumer wants to be reimbursed for these charges.

### 3.5 The Provider's response

On 18 April 2018 the Provider provided an initial response saying:

*I will certainly do my best to assist in this situation.*

*Its certainly possible that the slow internet is causing call quality issues. The modem gets 3.5 mbps now.*

*The Sound to noise ratio is 10 (normal), and attenuation is 51DB (refers to distance from DSLAM sometimes varies provider to provider) not that great, this is typical speed they*

*should expect 4mb base on standards. further effected by quality of cooper in the building. Are other tenants experiencing similar issues? its certainly not a feature where we provider one person faster speeds than the other.*

*I can raise a ticket with the networks dept to carry out some testing.*

<i>Speed</i>	<i>Attenuation</i>
<i>2Mb</i>	<i>below 69dB</i>
<i>4Mb</i>	<i>below 56dB</i>
<i>8Mb</i>	<i>below 41dB</i>
<i>16Mb</i>	<i>below 25dB</i>
<i>21Mb</i>	<i>below 20dB</i>

*The Consumer can always try to engage an IT technician for advice and also try a better modem.*

On 18 June 2018 the Provider said it had organised a technician to visit the Company. After the technician's visit, the Consumer confirmed the service issues had not been fixed.

## **4 Reasons**

The reasons for my proposed resolution are:

- the Consumer is entitled to cancel their contract with the Provider
- the Provider is not entitled to charge for interim services substituting for normal services during landline outages
- the Provider should compensate the Consumer \$400 for mobile internet costs

### **4.1 The Consumer is entitled to cancel their contract with the Provider**

I am satisfied a court would be likely to find the Provider's failure to remedy the service issues is a major failure to comply with the guarantee as to due care and skill under the Australian Consumer Law. This would entitle the Consumer to cancel the services contract with the Provider.

Section 60 of the Australian Consumer Law (ACL) provides a guarantee that services will be provided with due care and skill. Section 267 of the ACL provides that a consumer may terminate a contract for services if a failure to comply with a guarantee cannot be remedied or is a major failure.

I am satisfied a court would be likely to find the Provider's failure to address the Consumer's services issues is a breach of the guarantee under section 60 to provide services with due care and skill and meets the criteria for a major failure in section 268 of the ACL.

Section 268 describes a major failure to provide services as:

1. The services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure, or
2. The services are substantially unfit for a purpose for which services of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose,

I am satisfied a reasonable consumer would not have acquired the services in this case, if they had been made aware of the service failures before entering into the contract. These failures include:

- Ongoing and unresolved slow internet speed,
- Ongoing and unresolved poor landline quality,
- Inadequate response by the Provider to resolve issues over at least an eight month period (December 2017 to July 2018)

I am satisfied that if a consumer was made aware of the failures listed above, a consumer would not have entered into this particular contract with the Provider. Therefore, a court is likely to find the criteria for major failure are met.

The Provider provides services which can be readily provided by another supplier. Despite this, the Provider has failed to adequately engage with the Consumer in a timely manner to resolve the issues. This also supports the view the criteria for a major failure have been met.

#### 4.2 The Provider is not entitled to charge for interim services substituting for normal services during landline outages

I am satisfied the Provider is not entitled to charge for diversion costs incurred while providing an interim service for the Consumer during landline outages.

To meet its obligations under the Telecommunications (Customer Service Guarantee) Standard 2011, the Provider is required to restore eligible standard telephone services within certain timeframes or provide an alternative or interim service. The definition of an interim service includes the following:

*Means a service for which that customer is, or may be, charged an amount for the ongoing supply of that service at the location requested by the customer that does not exceed the amount that*

*the customer would have been charged if the customer were supplied with a CSG<sup>1</sup> service on request*

The Consumer said the Provider charged them for calls through a diversion provided as an interim service during a landline outage. Applying the definition of an interim service, the Consumer is entitled to a refund of these charges as these charges are over and above what the Consumer would ordinarily have been charged for the landline service.

#### 4.3 The Provider should compensate the Consumer \$400 for mobile internet costs

The Consumer provided evidence showing the Consumer incurred \$400 of excess mobile internet charges between November 2017 and January 2018. Therefore, as it is likely these charges were incurred because the Consumer could not use the fixed line internet service provided by the Provider, the Provider should reimburse the Consumer \$400.

I expect consumers to take reasonable steps to mitigate damage or loss when they are experiencing a telecommunications outage or fault. In my view, using mobile data while the fixed internet services were not working is a reasonable way to mitigate business losses.

The Consumer provided the invoices for their mobile account showing the Consumer incurred the following excess data charges:

Billing period	Excess Data Charges
1 November 2017 – 30 November 2017	\$110
1 December 2017 – 31 December 2017	\$200
1 January 2018 – 31 January 2018	\$90

The Consumer also provided invoices for the February 2018 to June 2018, showing the Consumer did not exceed their data allowances in these months. I am satisfied it is likely the reason the Consumer exceeded their mobile data limit between November 2017 and January 2018 was because the fixed internet service was not working. Therefore it is reasonable for the Provider to reimburse the Consumer \$400.

Judi Jones

**Telecommunications Industry Ombudsman**

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<sup>1</sup> Customer Service Guarantee