

TIO Decision – 24 January 2018

(De-identified for publication)

This document sets out my Decision on a complaint made by the Representative on behalf of the Consumer about Provider A and Provider B.

On 21 December 2018 I advised the parties of my proposed resolution (reproduced in the Appendix). The Representative accepted the proposed resolution, but neither Provider A nor Provider B responded.

Decision and directions

The proposed resolution is my final Decision in this matter. Accordingly, I DIRECT, by 8 February 2019:

- Provider A should waive the \$1,299.35 cancellation fee on the Consumer's account.
- Provider B should waive the \$1,299.35 cancellation fee on the Consumer's account.

Judi Jones

Telecommunications Industry Ombudsman

Appendix

This document sets out my proposed resolution of a complaint from the Representative on behalf of the Consumer about Provider A and Provider B.

1 Proposed Resolution

Based on the information given to me, my proposed resolution is that 15 January 2019:

- Provider A should waive the \$1,299.35 cancellation fee on the Consumer's account.
 - Provider B should waive the \$1,299.35 cancellation fee.
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2 Background

The Consumer had an account for wireless internet broadband for \$99.95 a month.

On 27 July 2017 the Consumer entered into the contract with Provider A. The service was transferred to Provider B.

The Representative is the authorised representative for the Consumer. The Representative had use of the service without being the legal owner of the service.

3 The complaint and Provider B's response

In June 2018, the Representative complained to my office about Provider A.

The Representative complained about slow internet speeds, drop outs and outages experienced since the Consumer signed up.

The Representative also said they were confused about what company the Consumer has a contract with because in February 2018 they started to receive invoices from Provider B not Provider A.

The key events relating to the complaint are set out in Table 1 below.

3.1 Table 1 – Key events

Date	Action
27 July 2016	The Consumer contracted with Provider A.
July 2016 – June 2018	The Representative started reporting drop outs and slow internet speeds to Provider A.
February 2018	The Consumer started to receive invoices from Provider B.
June 2018	The Consumer moved the services away to another provider.
7 July 2018	Provider B charged the Consumer a cancellation fee of \$1,299.35.
27 June 2018	The Representative complained about Provider A.

The Representative said the service issues progressively got worse over time and between December 2017 and June 2018, the dropouts started happening almost every day. This meant the Representative was unable to connect to the internet for a couple hours to a couple days at a time.

The Representative said they contacted Provider A each time they experienced a problem with the service, often by phone, and participated in troubleshooting. However, the Representative says this did not improve the service.

The Representative says in June 2018, after numerous attempts to fix the problem they decided to leave Provider A. The Representative transferred the service to another provider.

At this point, Provider B charged the Consumer a cancellation fee of \$1,299.35. This includes the monthly cost for the remaining duration of the contract (\$99.95 x 13 months).

Provider A has not responded to the complaint or my office's requests for information.

4 Reasoning

4.1 Complaint about Provider A

I am satisfied the Representative is entitled to cancel the service contract with Provider A without penalty. This is because:

- I have drawn an adverse inference from Provider A not responding to information requests
- It is likely a court would find Provider A failed to provide services with due care and skill

- It is a fair and reasonable resolution for the Consumer to cancel the contract without penalty

4.1.1 *I have drawn an adverse inference from Provider A not responding to information requests*

I have drawn an adverse inference from Provider A not responding to requests from my office for information. I am satisfied it is more likely than not that:

- either Provider A does not hold evidence to show the service was reasonably fit for normal purpose, or
- Provider A holds evidence supporting the Representative's position.

Where a party fails to provide information to support their position, I may draw an adverse inference from that party's failure to comply with the request.

On 17 August 2018, my office requested the information from Provider A. Provider A did not respond.

On 3 and 7 September 2018, my office reminded Provider A about the information request. Provider A has not responded or provided any information to show that the Consumer's service was reasonably fit for normal purpose and was provided with due care and skill.

On 7 November 2018, my office sent a request for further information to Provider A. The request asked Provider A to explain why the Representative has received invoices from both Provider A and Provider B for the services. Provider A has not responded to this request.

Section 5.5 of the Telecommunications Industry Ombudsman's Complaint Handling Procedures says if a party does not provide information requested, the Telecommunications Industry Ombudsman can draw inferences from this. This includes:

- *That the party does not have information or evidence to support their position, or*
- *That the information the party holds supports the other party's position.*

4.1.2 *Provider A failed to provide services with due care and skill*

I am satisfied Provider A failed to provide services with due care and skill.

The Representative has provided copies of email correspondence¹ with Provider A and Provider B from August 2016 to June 2018. The Representative explained that the emails only reflect part of the reports and the remaining contact was by phone.

¹ Appendix A – Key interactions between with Provider A and Provider B.

The emails show the Representative reported slow internet speeds, drop outs and outages between August 2016 and June 2018. Consistent with the Representative's account, the emails became more frequent in 2018.

Provider A acknowledged the service issues and appears to have escalated the service issues from May 2018 onwards. However, the Representative continued to report issues with the service.

The information shows Provider A escalated the issue to a senior team and in June 2018 they upgraded the configuration of the equipment. There is no information to show what, if any steps Provider A took between December 2017 and May 2018. This is over five months and Provider A has not provided any evidence to show it took reasonable steps to identify, address and resolve the service issues in a timely manner.

The Representative said they consistently called Provider A to report the dropouts from December 2017 onwards. Often, they were unable to reach a representative and when they did, they say Provider A either attempted troubleshooting or told the Representative they were escalating the issues. However, the Representative says nothing eventuated from this. The Representative said Provider A did not send a technician to investigate the issue at any point during this period. The Representative says Provider A did not fix the service and told them this was because the drop outs were the result of switching the lines, power outages or other people using the service.

The Representative said the fault was ongoing and had not been fixed before they moved the services away to another provider on 28 June 2018.

Provider A has not provided any information to show when the fault was first reported or whether the fault was fixed at any point.

In the circumstances, I have drawn an adverse inference and accept the Representative's account that they first reported the fault in December 2017 and the fault was not fixed on 28 June 2018 when they moved the services away. In my view, this shows it is likely a court would find Provider A did not provide services with due care and skill.

Section 60 of the Australian Consumer Law ("ACL") provides consumers with a guarantee that any services supplied will be supplied with due care and skill. This means the supplier must:

- use an acceptable level of skill or technical knowledge when providing the services, and
- take all necessary care to avoid loss or damage when providing the services.

4.1.3 It is a fair and reasonable resolution for the Consumer to cancel the contract without penalty

In my view, it is a fair and reasonable resolution for the Consumer to cancel the contract without penalty.

In reaching my decision, I had regard to section 267(2) and 267(3) of the ACL which says if the failure to comply with the guarantee cannot be remedied, is a major failure or the supplier fails to remedy the fault within a reasonable time the consumer can cancel the service contract.

On the information available, it is likely a court would find Provider A's services were substantially unfit for normal purpose and could not be made fit within a reasonable time frame. This is because the dropouts and slow speeds meant the service was not working properly and Provider A had not remedied the issues after six months (December 2017 – June 2018). Therefore, this would have entitled the Consumer to cancel the contract for services.

The Consumer has already exited the contract. Therefore, Provider A should waive all termination fees associated with the cancellation.

4.2 Complaint about Provider B

On the information available, I am satisfied Provider B cannot charge the Consumer a cancellation fee. This is because I am satisfied the Consumer's services were transferred from Provider A to Provider B without the Consumer's authority.

On 28 June 2018, the Representative wrote to Provider A and Provider B to say since February 2018, Provider B, rather than Provider A, had sent them invoices. The Representative has provided my office a copy of the invoices² which show the change in ABN.

Under clause 7.9 of the Telecommunications Consumer Protection Code ("TCP code"), a losing service provider has obligations when it intends to transfer a consumer's service as part of a sale or reorganisation of a business. The obligations include notifying the customer in writing before initiating the transfer and advising the consumer of their termination rights.

The Representative confirmed they never received notice of the transfer of the services from Provider A to Provider B. In fact, the Representative says when they questioned the change in the ABN this was not addressed.

My office does not have any evidence suggesting Provider A met its obligations under the TCP code. In the circumstances, I accept the Representative's account that Provider A transferred the service to Provider B without the Consumer's authority.

I am satisfied the Consumer's service has been transferred without the Consumer's authority, Provider B cannot charge the Consumer the cancellation fee of \$1,299.35.

Judi Jones

Telecommunications Industry Ombudsman

² Appendix B – Invoices.

Appendix A – Key interactions with Provider A and Provider B

Date	Time	From/To	Extract
2 August 2016	10.12 am	The Representative to Provider B	<i>“...I have noticed the speed dropped considerably over the weekend. It was only at 4 yesterday. My daughter couldn't even log on and do her interactive homework.”</i>
12 March 2017	7.30 am	The Representative to Provider B	<i>“Sunday morning and no internet. I have tried to call but as per usually you don't answer.”</i>
3 April 2017	10.08 am	The Representative to Provider B	<i>“Sunday 26th of FEB to be exact, through to at least March 1st and 2nd. Then again on Sunday 12th March we had more interruptions.”</i>
31 August 2017	7.28 am	The Representative to Provider B	<i>“Guys we've got no internet and as per usual your phones don't get answered and are engaged.”</i>
15 May 2018	8.43 pm	The Representative to Provider B	<i>“We have continued to experience intermittent drop outs and low speeds throughout the night and over the last week.”</i>
16 May 2018	2.21 am	Provider B to the Representative	<i>“...This is bad I want a report on this where the issue was and why our customer is experiencing such poor service.”</i>
17 May 2018	3.04 pm	The Representative to Provider B	<i>“This is not the first time this has happened as I am sure you are aware, this is a continuing issue with Provider B. We have great internet for a few days then we experience drop outs, “power outages” that last for hours, and generally slow speeds for a few more days.”</i>

Date	Time	From/To	Extract
17 May 2018	3.29 pm	Provider B to the Representative	<i>"I have escalated this matter to a manager. To understand the exact issues here."</i>
24 June 2018	5.43 pm	The Representative to Provider B	<i>"Once again here we are with no internet and no answer on the phones. It has dropped in and out and been down for long periods all afternoon. This week has been shocking. Wednesday afternoon and all night. No internet."</i>
25 June 2018	9.59 pm	Provider B to the Representative	<i>"Your connection was stable today but still there are drop outs at the evening time. We see there is some signalling issues and our senior team is working on it."</i>
26 June 2018	12.07 pm	Provider B to the Representative	<i>"We did work on the link yesterday night and now it looks pretty good"</i>
26 June 2018	9.32 pm	The Representative to Provider B	<i>"Another night of no internet. No explanation and no call from below mentioned support."</i>
26 June 2018	10.02 pm	Provider B to the Representative	<i>"We are really sorry you're facing this issue...I see there is a drop out of 15 mins and I am forwarding this to my senior team."</i>
27 June 2018	4.58 pm	Provider B to the Representative	<i>"...We have worked on the dropout issue you raised and see that the connection is stable now. We have upgraded the configuration of the equipment to make sure the issue is resolved once for all."</i>
28 June 2018	4.07 pm	The Representative to Provider B	<i>"...last Wednesday night 20th it was down all night and Sunday 22nd was the same."</i>

Appendix B – Extract of invoices

[Extract of the Consumer's invoice from Provider A]

[Extract of the Consumer's invoice from Provider B]