

TIO Decision – 19 December 2018

(De-identified for publication)

This document sets out my decision on a complaint from the Representative on behalf of the Company about the Provider.

On 24 October 2018 I advised the parties of my Proposed Resolution (reproduced in the Appendix). The Company accepted the Proposed Resolution but the Provider rejected it.

1. Decision

My decision is the Provider must, within five working days from the Company accepting this decision:

- Release the Company from its contract, waiving any early termination fees
- Pay the Company \$6,565.78 compensation for business loss
- Waive the outstanding balance on the Company's account including the handset non return fee of \$2,700.03

2. Background

The Company contracted with the Provider to provide telecommunication services and equipment under account xxxxxxxx. The services were located at [address], and included 10 hosted IP Phone services with the Provider.

3. The complaint

The Representative says in 2016, the Provider approached a family relative, offering a phone solution which cost less than the Company's current services. The Representative says the Company entered into an agreement with the Provider in June 2016.

The Provider connected the service at the business premises in July 2017.

The Consumer says from August to December 2017, the Company experienced faults with its services (the fault period). The Company reported the faults to the Provider.

The Representative says the fault was that if there was more than one call the second call was distorted and would often disconnect, and any further calls would fail.

The Representative says the Provider's phone system was not suitable for the Company's needs and was not installed with due care and skill.

The Representative says to run the phone services, they had to maintain the private fibre connection of Provider A, the Company's previous provider. The Representative says this meant the Provider contract did not cost less than the Company's original services.

4. The Provider's response

The Provider says it responded to the Company's fault reports. The Provider says the Company ported its services out to a new provider, [Provider B], while the Provider was conducting further testing and sending a replacement modem.

To resolve this complaint, the Provider agreed to:

- Apply a credit of \$3,162.44 to the Company's account. This amount was to cover service and equipment charges for the period without usage, and late payment fees. After applying this credit, there would be an outstanding balance of \$2,573.93
- Waive the Early Termination Charges for the services
- Accept the return of the equipment, but if the Company did not return the equipment, the Provider would apply its handset fee.

The Provider refused to consider a business loss claim because it says the Company has not provided sufficient information to allow the Provider to assess a claim.

5. Ombudsman's Proposed Resolution (OPR)

Based on the information provided, my proposed resolution of this complaint was the Provider should, within five business days of the Company's acceptance:

- Release the Company from its contract, waiving any early termination fees
- Pay the Company \$6,565.78 compensation for business loss
- Waive the outstanding balance on the Company's account
- Accept return of the equipment by the Company to any of the Provider's stores and upon receipt of the equipment waive the handset non return fee of \$2,700.03.

5.1. The Company's response to the proposed resolution

The Company confirmed on 6 November 2018 it accepted my proposed resolution. The Company confirmed it had returned the Provider's equipment to the nearest Provider store. The Company provided a document showing receipt of the goods from

the Provider representative. The Company has requested the funds to be deposited in its account by bank transfer.

5.2. The Provider's response to the proposed resolution

The Provider said the Company's private fibre connection with Provider A can impact the flow of data to the equipment installed, which may have been the cause of the fault.

The Provider said the Company's service with Provider A would have acted as an alternative service, so the Provider is not liable for any financial compensation claim.

The Provider said the fault relating to "invalid credentials" is not a failure with the phone system but an error which occurs when there is packet loss.

The Provider rejected the adverse inference for not supplying incoming call data. The Provider said once the services are disconnected in the system the associated data records disappear. The Provider said the Company had access to this information through the self-managed portal before the services were disconnected.

5.3. The Provider's response to new information

On 28 November 2018 I sent the Provider new information obtained from nbn co which was relevant to my decision. The Provider responded to this information on 12 December 2018.

The Provider said the information supports its position that there were no faults on the Provider's side of the network and the fault is most likely an issue with the customer's Local Area Network (LAN).

The Provider says the Company was able to maintain its private fibre connection to run its phones.

The Provider says it no longer uses QOS settings on its hardware and prefers a dedicated channel approach rather than using Traffic Class 1 over the National Broadband Network (NBN). The Provider says its [service] was supplying enough bandwidth to support its hardware in accordance with the breakdown provided by [its hardware supplier].

6. Reasons for my decision

The reasons for my decision are:

- The Provider failed to take reasonable steps in providing telecommunication services to the Company
- The Provider cannot exclude its liability for business loss
- The Company suffered \$6,565.78 in business loss from the Provider's failure to take reasonable care and skill in providing the service

- It is fair and reasonable for the Provider to allow the Company to terminate the contract without an early termination charge, the Company should pay an amount for the services provided, and the Provider should waive the non-return of equipment fee.

6.1. The Provider failed to take reasonable steps in providing goods and services to the Company

On the balance of probabilities, I am satisfied the Provider did not take reasonable steps to resolve the fault with the Company's services and as a result did not supply the Company with a service which was fit for purpose or supplied with due care and skill.

The Australian Consumer Law (ACL) sets out a number of guarantees relating to the supply of goods and services. Under the ACL providers have obligations to supply goods of an acceptable quality and supply services with due care and skill. The ACL also says goods and services must be fit for purpose.

6.1.1. *Not fit for purpose*

On the balance of probabilities, I am not satisfied the Provider's telecommunications solution was fit for the purpose of having more than one call, which was the service for which the Company had contracted with the Provider.

The contract the Company signed with the Provider on 10 June 2016 provides for five simultaneous calls. I am satisfied from the nature of the fault the service the Provider provided to the Company did not allow the Company to have multiple calls simultaneously.

The agreement provided for the Provider to supply the Company with 10 hosted IP phones installed by the Provider, a [type] network switch and a "mp264" NBN modem. Initially the Company was due to receive a new fibre connection with Provider B.

The Provider's technical notes show from 15 June 2017 the Company's phones were not registering or working on the customer's Provider B fibre service. On 21 June 2017 the Provider spoke with the Company about using its old internet connection with Provider A.

On 26 June 2017 the Provider contacted the Company to organise a dedicated channel NBN service. The Provider and the Company agreed to place the service on the Company's fax service xx xxxx xxxx. The Provider's notes say it advised the Company of the process for NBN installations and an order was raised for the NBN dedicated channel on 27 June 2017.

On 24 July 2017 the Provider technician spoke with the Provider technical support saying they were not getting a connection from the modem. The technician was told to ensure the modem is connected to xx xxxx xxxx (which is the Provider NBN dedicated channel line). The technician then confirmed the phones had been registered and the

Company's numbers could be ported to the Provider.

After installation of the services in July 2017 the Company continually reported faults with the phone system provided by the Provider. The nature of the fault was the Company could not have more than one phone call at a time, for example:

- First call: to reception would be of an acceptable quality;
- Second call: had poor quality and would often disconnect completely; and
- Third call: would fail.

The Provider and the Company completed extensive troubleshooting to determine the nature of the fault. The troubleshooting included testing the Company's phones with different equipment, for example:

- calls were tested without the switch;
- calls were tested with a new modem;
- calls were tested with different handsets; and
- calls were tested with different phone programming.

Despite this troubleshooting the Provider could not identify the cause of the fault, and the problems continued.

6.1.2. Not supplied with due care and skill

I am satisfied the Provider failed to provide its services to the Company with due care and skill.

The Company attempted to work with the Provider to identify the cause of the fault over a three month period, but the Provider was unable to resolve the fault. In my view, three months is an unreasonable amount of time for a business to be expected to continue participating in troubleshooting for the same fault without making progress.

I do not believe the Company's fibre service with Provider A impacted the Provider services as they were run on separate connections. I am satisfied the Provider was providing an NBN voice service to the Company to run the ten hosted IP phones.

In determining whether the Provider has provided the services with due care and skill I considered the Provider's technical expertise as the supplier in this instance and the steps taken by the Provider during the troubleshooting process.

I have sought advice from my Technical and Regulatory Specialist about whether the Provider took reasonable steps in providing goods and services to the Company and note:

- The contract specifically refers to a maximum of five simultaneous calls

- The Provider's technical notes show the service was set up using the Provider's NBN voice service technology
- The Provider did engage in troubleshooting from August 2017 to October 2017. However the Provider did not undertake speed tests with the Company even though the Provider's notes mentioned it could be the reason the services were impacted
- Information provided by nbn co shows the Provider did not report any faults with the service. In circumstances where a consumer is reporting faults, suppliers refer faults to its wholesaler in case there are issues with the infrastructure. No testing was done to determine if an nbn co visit was necessary or if there were faults with the infrastructure
- The Provider was aware the Company was using the Provider's NBN voice service as per the Provider's technical notes dated 8 September 2017
- The Provider's NBN voice service is covered under the Provider's Customer Terms of Agreement for Broadband Services
- The Provider's Customer Terms of Agreement for Broadband Services says in the event of the Company reporting a fault with its Broadband Service, the Provider may require the Company to conduct some basic preliminary testing of the Company's service including Customer- Premises Equipment (CPE) to help the Provider determine the source of the fault
- As part of the troubleshooting process the Provider did not tell the Company to test its internal wiring to see if the fault was on its side of the network
- As part of the troubleshooting process the Provider did not send one of its own technicians to the Company's premises to check infrastructure, internal wiring or installation of the equipment
- The Provider wanted to replace the Company's modem with a different type of modem that was not Provider approved, suggesting the Company's current modem was not fit for the purpose of supplying ten hosted IP phones
- The Provider has acknowledged the nature of the fault particularly in relation to "invalid credentials" occurs when there is packet loss
- The Provider as the service provider would be responsible for any packet loss impacting call quality
- The Provider's Customer Terms of Agreement for Broadband Services says it will endeavour to respond and resolve the fault within a reasonable timeframe, unless a specific service level agreement has been contracted

Section 60 of the ACL says "if a person supplies, in trade or commerce, services to a

consumer, there is a guarantee the services will be rendered with due care and skill”.

This includes the supply of the telecommunications service and the skill and knowledge required to repair those services or to suggest steps the consumer should take to repair the services.

6.2. The Provider cannot exclude its liability for business loss

I am satisfied the Provider cannot exclude its liability for business loss. This means the Provider cannot rely on the limited liability clauses in its Customer Terms to reject the Company’s claim for business loss.

I accept the Provider cannot provide a fault free service, and services may be impacted by factors outside the Provider’s control. The nature of telecommunications network is such that a variety of factors can lead to service degradation, many of these being beyond the control of the service provider.

However, the consumer guarantees in the ACL cannot be excluded by contract. Where a provider fails to meet a consumer guarantee, the consumer may recover damages for any loss or damage suffered by the consumer because of the failure, if it was reasonably foreseeable the consumer would suffer loss or damage.

6.3. The Company suffered \$7,875 in business loss from the Provider’s failure to take reasonable steps in providing the service.

I am satisfied the Company suffered \$7,875 in business loss from the Provider’s failure to take reasonable steps in providing the service. This is because I am satisfied:

- The Provider’s breach of obligation was directly responsible for the loss
- The loss was foreseeable as a result of the Provider’s breach of obligation
- The Company took reasonable steps to reduce its loss

6.3.1. *The Provider’s breach of an obligation was directly responsible for the loss and the loss was foreseeable as a result of the Provider’s breach of obligation.*

I am satisfied contact by telephone is an integral part of the Company’s business, and it was foreseeable the reduction in lines available to make and receive calls would have an affect on the Company’s ability to conduct its business and generate profit. This is because the nature of the Company’s business as an accountancy firm means it has peak period which coincide with key accounting dates, including the tax return period from July to October. I have reviewed the Company’s website, which invites customers to make appointments by telephone or email.

In calculating the business loss, I have considered the period from August 2017 (when the fault was first reported) to the end of January 2018 (when the Company’s loss should reasonably have stopped). The Provider’s fault notes show the Company first reported a fault with the service on 28 July 2017. The initial fault was with a voice

delay. The Company reported the fault involving difficulties with the second line on 2 August 2017. The fault continued until the Company transferred its services to another provider in December 2017.

I have based my calculation of the Company's loss from the Company's cash summary for 1 July 2016 to 28 February 2017. This summary shows a profit of \$54,103.89. During this period, the Company had 310 appointments, meaning the average profit per appointment is \$175.

The Representative said the Company had 45 fewer appointments during the fault period than the same period for the previous year. In the absence of information from the Provider about missed calls, I have accepted this figure.

Multiplying the profit per appointment (\$175) by the reduced number of appointments (45) results in an estimated loss of profits of \$7,875. Figure 1 below summaries my calculations.

Figure 1 Summary of calculation of lost profits for period 2 August 2017 to 31 January 2018

Profits for period 1 July 2016 to 28 February 2017	\$54,103.89
Number of appointments 1 July 2016 to 28 February 2017	310
Average profit per appointment	\$175.00
Reduction in number of appointments 2 August 2017 to 31 January 2018	45
Estimated loss of profits	<u>\$7,875.00</u>

In assessing the value of lost business, I have relied on information from the Company about its appointment numbers. This is not the best information for assessing the Company's business loss. I would prefer to have had access to incoming call data to analyse the impact on profits.

This information is normally supplied from the telecommunications provider who is generally the only party to a complaint with access to this information as it can require contact with wholesalers. The Provider has advised while the Company's services were active the Company also had access to this information.

The TIO can only make decisions with the information provided - in this complaint the Provider has not provided any information to show the number of missed appointments in the Company's appointment diary is incorrect or inaccurate.

6.3.2. The Company took reasonable steps to reduce its loss.

I am satisfied the Company took reasonable steps to reduce its loss, which included

retaining its connection with Provider A.

On the balance of probabilities, I am satisfied Provider A was not supplying an alternative service to the Company. From the information provided Provider A was supplying internet to the Company through an optical fibre connection. As discussed above, the Provider was supplying an NBN voice service for the hosted phones through a copper cable connection.

Based on the information provided from the Company, I believe the Company retained Provider A because it thought Provider A was supplying the internet for its phone service. However the Company was using the Provider NBN voice service.

6.4. Fair and reasonable: The Provider should allow the Company to terminate the contract without penalty, pay for services it used and waive the equipment non-return fee

I am satisfied a fair and reasonable resolution of this complaint would be for the Provider to release the Company from contract without early termination charges. The Company is liable to pay for services it used. The Company returned the equipment to the Provider on 6 November 2018.

6.4.1. Release from contract without penalty

The Provider has offered to waive the early termination charges associated with the Company cancelling the contract with the Provider.

6.4.2. The Company should pay for some service charges

Considering the incoming call fault, the absence of call records, and the number of outgoing calls, I am satisfied the Company should pay for some of the service charges during the fault period. The Company was able to make between 172 and 386 outgoing calls a month. I have calculated the valid service charges to be \$1,309.22, which is made up of usage, equipment and service charges during the fault period.

I believe it is reasonable in the circumstances the amount the Company should pay the Provider for services should be deducted from the business loss the Provider is liable to pay. Therefore the Provider should pay the Company \$6,565.78 in business loss, and waive any balance outstanding on the Company's account. Figure 2 below summarises my calculation.

Figure 2 Calculation of amount the Provider is to pay the Company

Estimated business loss	\$7,875.00
Less the service charges the Company owes the Provider	-\$1,309.22
Amount the Provider needs to pay the Company	<u>\$6,565.78</u>

There should be no outstanding balance on the Company's account, subject to the Provider waiving the non-return of handset fee dealt with below.

6.4.3. The Company returned the equipment to the Provider

The Provider agreed to waive the non-return handset fee if the Company returned the equipment.

In accordance with the Proposed Resolution, the Company returned the Provider equipment to the Provider [at location] on 6 November 2018.

The Company has provided a receipt showing confirmation the goods have been received by a representative of the Provider. The receipt is shown in Appendix B.

I am satisfied it is reasonable in the circumstances for the Provider to waive the non-return of handset fee of \$2,700.03.

Judi Jones

Telecommunications Industry Ombudsman

Appendix A

Proposed resolution

Date 1 September 2018

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

The Representative is authorised to manage this complaint for the Company.

Proposed resolution

Based on the information provided, my proposed resolution of this complaint is the Provider must, within five business days of the Company's acceptance:

- Release the Company from its contract, waiving any early termination fees
 - Pay the Company \$6,565.78 compensation for business loss
 - Waive the outstanding balance on the Company's account
 - Accept return of the equipment by the Company to any Provider store and upon receipt of the equipment waive the handset non return fee of \$2,700.03
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1. Background

The Company contracted with the Provider to provide telecommunications services and equipment under account xxxxxxxx. The services are located at [location]. The Company had 10 hosted IP phone services with the Provider.

2. The complaint

The Representative says in 2016, the Provider approached the Representative's family relative, offering a phone solution which cost less than the Company's current services. The Representative says the Company entered into an agreement with the Provider in June 2016.

The Provider connected the service at the business premises in July 2017.

The Company says from August to December 2017, the Company experienced faults with its services (the fault period). The Company reported the faults to the Provider.

The Representative says the fault was if there was more than one call then the second call was distorted and sometimes disconnected.

The Representative says the Provider's phone system was not suitable for the Company's needs and was not installed with due care and skill.

The Representative says to run the phone services; they had to maintain the private fibre connection of Provider A, the Company's previous provider. The Representative says this meant the Provider contract did not cost less than the Company's original services.

3. The Provider's response to the complaint

The Provider says it responded to the Company's fault reports. The Provider says the Company ported its services out to a new provider [Provider B] while the Provider was conducting further testing and sending a replacement modem.

To resolve this complaint, the Provider agreed to:

- Apply a credit of \$3,162.44 to the Company's account. This amount was to cover service and equipment charges for the period without usage, and late payment fees. After applying this credit, there would be an outstanding balance of \$2,573.93
- Waive the Early Termination Charges for the services
- Accept the return of the equipment, but if the Company did not return the equipment, the Provider would apply its handset fee

The Provider refused to consider a business loss claim because it says the Company has not provided sufficient information to allow the Provider to assess a claim.

4. Jurisdiction to consider this complaint

I am satisfied I have jurisdiction to consider this complaint. I am able to consider a complaint about equipment where it is bundled with telecommunications services.

My Terms of Reference (ToR) explain what the Telecommunications Industry Ombudsman scheme does, the types of complaints we handle, and how the complaints are handled.

Clause 2.7(b) of the ToR says:

We handle the following types of complaints:

(b) a Consumer's complaint about a problem with telecommunications equipment infrastructure supplied by a provider, or with the provider's network infrastructure, that affects the consumer's access to a telecommunications service provided or offered by the provider.

The Company has complained the bundled equipment and services did not work, and has provided information to show it reported the faults to the Provider on multiple occasions.

5. Reasons for my proposed resolution

I believe the proposed resolution is fair and reasonable because I am satisfied:

- The Provider failed to take reasonable steps in providing the telecommunications services to the Consumer
- The Provider cannot exclude its liability for business loss
- the Company suffered \$6,565.78 in business loss from the Provider's failure to take reasonable care and skill in providing the service
- The Provider should allow the Company to terminate the contract without an early termination charge, payment of an amount for the services provided, and return of the equipment

5.1. The Provider failed to take reasonable steps in providing goods and services to the Company.

On the balance of probabilities, I am satisfied the Provider did not take reasonable steps to resolve the fault with the Company's services and as a result did not supply the Company with a service which was fit for purpose or supplied with due care and skill.

The Australian Consumer Law (ACL) sets out a number of guarantees relating to the supply of goods and services. Under the ACL providers have obligations to supply goods of an acceptable quality and supply services with due care and skill. The ACL also says goods and services must be fit for purpose.

On 10 June 2016 the Company entered into an agreement with The Provider for 10 Hosted IP Phones installed by the Provider, a Voice only NBN service, a [type] network switch and a "mp264" NBN modem.

After installation of the services in July 2017 the Company continually reported faults with the phone system provided by the Provider. The nature of the fault was the Company could not have more than one phone call at a time, for example:

- First call: to reception would be of an acceptable quality;
- Second call: had poor quality and would often disconnect completely; and
- Third call: would fail.

The contract signed by the Company on 10 June 2016 provides for five simultaneous calls. I am satisfied from the nature of the fault; the service the Provider provided to the Company did not allow the Company to have multiple calls simultaneously.

The Provider and the Company completed extensive troubleshooting to determine the nature of the fault. The troubleshooting included testing the Company's phones with different equipment, for example:

- calls were tested without the switch;
- calls were tested with a new modem;
- calls were tested with different handsets; and
- calls were tested with different phone programming.

Despite this troubleshooting, the Provider could not identify the cause of the fault, and the problems continued.

I have sought advice from my Telecommunications Technical and Regulatory Specialist about whether the Provider took reasonable steps to provide goods and services to the Company and note:

- The contract specifically refers to a maximum of five simultaneous calls
- Troubleshooting was undertaken from August 2017 to October 2017. However the Provider did not undertake speed tests with the Company even though the Provider's notes mentioned it could be the reason the services were impacted
- Lack of speed or bandwidth is one of the main causes of faults with VOIP services on the National Broadband Network (NBN)
- The Provider's Customer Terms of Agreement for Broadband Services says in the event of the Company reporting a fault with its Broadband Service, the Provider may require the Company to conduct some basic preliminary testing of the Company's service including customer-end Equipment to help the Provider determine the source of the fault
- As part of the troubleshooting process the Provider did not tell the Company to test its internal wiring to see if the fault was on its side of the network;
- The Provider spoke about arranging a technician to attend the Company's premises however this was not done because of a lack of managerial approval;
- The Provider wanted to replace the Company's modem with a different type of modem that was not Provider approved, suggesting the Company's current modem was not fit for the purpose of supplying ten hosted IP phones;

- The Provider's bills refer to "No QOS setting" under the NBN dedicated channel voice service charge on the Company's bill;
- QOS settings refer to Quality of Service; these settings need to be set to VOIP for IP phone systems. The setting ensures phone packet transfers are given priority over data packets, the loss of data packets can impact call quality.
- The Provider's Customer Terms of Agreement for Broadband Services says it will endeavor to respond and resolve the fault within a reasonable timeframe, unless a specific service level agreement has been contracted.

I am satisfied the Company attempted to work with the Provider to identify the cause of the fault over a three month period, but the Provider was unable to resolve the fault. In my view, three months is an unreasonable amount of time for a business to be expected to continue participating in troubleshooting for the same fault.

5.2. The Provider cannot exclude its liability for business loss

I am satisfied the Provider cannot exclude its liability for business loss. This means the Provider cannot rely on the limited liability clauses in its Customer Terms to reject the Company's claim for business loss

I accept that the Provider cannot provide a fault free service, and services may be impacted by factors outside the Provider's control. The nature of telecommunications networks is such that a variety of factors can lead to service degradation, many of these being beyond the control of the service provider.

However, the consumer guarantees in the ACL cannot be excluded by contract. Where a provider fails to meet a consumer guarantee, the consumer may recover damages for any loss or damage suffered by the consumer because of the failure, if it was reasonably foreseeable that the consumer would suffer loss or damage.

5.3. The Company suffered \$7,875 in business loss from the Provider's failure to take reasonable steps in providing the service

I am satisfied the Company suffered \$7,875 in business loss from the Provider's failure to take reasonable steps in providing the service.

In assessing the value of lost business, I have relied on information from the Company about its appointment numbers. This is not the best information for assessing the Company's business loss. I would prefer to have had access to incoming call data to analyse the impact of the reported fault on the Company's service and therefore impact on profits. This information needs to be provided by the Provider as it is not information held by the Company. However, despite requests to do so, the Provider has not provided this information.

In considering the Company's claim for business loss I have drawn adverse inferences

against the Provider's failure to provide the incoming call data. Where a party to a complaint fails to provide information to support their claim, I may draw an adverse inference from that failure. This is because the unexplained failure of a party to give information may, in appropriate circumstances, lead to an inference that the information would not have assisted that party's case.

To be successful in a business loss claim, the Company needs to show the Provider's breach of obligation was directly responsible for a loss, that the type of loss being claimed was foreseeable as a result of the breach, and the Company took appropriate steps to mitigate the loss.

I am satisfied that contact by telephone is an integral part of the Company's business, and it was foreseeable that the reduction in the lines available to make and receive calls could have an affect on the Company's ability to conduct its business and generate profit. This is because the nature of the Company's business as an accountancy business means it has peak periods that coincide with key accounting dates, including the tax return period from July to October. I have reviewed the Company's website, which invites customers to make appointments by telephone or email.

In calculating the business loss, I have considered the period from August 2017 (when the fault was first reported) to the end of January 2018 (when the Company's loss should reasonably have stopped). The Provider's fault notes show the Company first reported a fault with the service on 28 July 2017. The initial fault was with a voice delay. The Company reported the fault involving difficulties with the second line on 2 August 2017. The fault continued until the Company transferred its services to another provider in December 2017.

I have based my calculation of the Company's loss from the Company's cash summary for 1 July 2016 to 28 February 2017. This summary shows a profit of \$54,103.89. During this period, the Company had 310 appointments, meaning the average profit per appointment is \$175.

The Representative said the Company had 45 fewer appointments during the fault period than the same period for the previous year. In the absence of information from the Provider about missed calls, I have accepted this figure.

Multiplying the profit per appointment (\$175) by the reduced number of appointments (45) results in an estimated loss of profits of \$7,875. Figure 1 below summarises my calculations.

Figure 1 Summary of calculation of lost profits for period 2 August 2017 to 31 January 2018

Profits for period 1 July 2016 to 28 February 2017	\$54,103.89
Number of appointments 1 July 2016 to 28 February 2017	310
Average profit per appointment	<u>\$175.00</u>
Reduction in number of appointments 2 August 2107 to 31 January 2018	45
Estimated loss of profits	<u>\$7,875.00</u>

5.4. Fair and reasonable: the Provider should allow the Company to terminate the contract without penalty, pay for services it used, and return the equipment

I am satisfied a fair and reasonable resolution of this complaint would be for the Provider to release the Company from contract without early termination charges. The Company is liable to pay for services it used, and should return the equipment.

5.4.1. Release from contract without penalty

The Provider has offered to waive the early termination charges associated with the Company cancelling the contract with the Provider.

5.4.2. The Company should pay for some service charges

Considering the incoming call fault, the absence of call records, and the number of outgoing calls, I am satisfied the Company should pay for some of the service charges during the fault period. The Company was able to make between 172 and 386 outgoing calls a month. I have calculated the valid service charges to be \$1,309.22, which is made up of usage, equipment and service charges during the fault period.

I believe it is reasonable in the circumstances the amount the Company should pay the Provider for services should be deducted from the business loss the Provider is liable to pay. Therefore the Provider should pay the Company \$6,565.78 in business loss, and waive any balance outstanding on the Company's account. Figure 2 below summarises my calculation.

Figure 2 Calculation of amount the Provider is to pay the Company

Estimated business loss	\$7,875.00
Less the service charges the Company owes the Provider	-\$1,309.22
Amount the Provider needs to pay the Company	\$6,565.78

There should be no outstanding balance on the Company's account, subject to the appropriate treatment of the non-return of the handset fee dealt with below.

5.4.3. The Company must return the equipment to the Provider

The Provider agreed to waive the non-return handset fee if the Company returned the equipment. The Provider said it would provide a separate email with steps the Company would need to follow to return the equipment. However, the Provider has charged the Company a non-return handset fee without giving the Company any instruction about how to return the equipment.

I believe it would be fair and reasonable for the Provider to accept return of its equipment at any Provider store. Upon receipt of the equipment in a reasonable condition, the Provider must waive the non-return handset fee.

Judi Jones
Telecommunications Industry Ombudsman

Appendix B

[copy of receipt of equipment]