

## Decision – 13 September 2019 (De-identified for publication)

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

On 16 July 2019 I advised the parties of my proposed resolution. The Representative has accepted the proposed resolution, but the Provider did not respond.

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### 1 Decision

The proposed resolution is my final decision in this matter.

Accordingly, the Provider must waive the Partnership's current account balance of \$5,493.46. This is because:

- by its conduct, the Provider on behalf of [finance company], accepted the Partnership's cancellation of the contracts for equipment, and
  - the Provider is not entitled to recover from the Partnership the remaining charges of \$5,493.46, incurred after the expiry of the contracts.
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### 2 Background

From 2003, the Partnership has had account number xxxxxxxx with the Provider. The account billed the Partnership for charges under three telecommunications equipment rental contracts, and a telecommunications services contract.

The three telecommunications equipment rental contracts are with a linked credit provider<sup>1</sup>, [finance company], white labelled<sup>2</sup> as [name].

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<sup>1</sup> A linked credit provider is defined in s 2 of the Australian Consumer Law (ACL) and applies to a linked credit contract as defined in s 278(2) of the ACL to mean a contract that a consumer enters into with a linked credit provider of a person (the supplier) for the provision of credit to supply by way of sale, lease or hire-purchase of goods to the consumer by the linked credit provider where the supplier supplies the goods, or causes the goods to be supplied, to the linked credit provider.

The equipment rental contracts between the Partnership, the Provider and [finance company] are complex, not in dispute, but crucial to my decision.

## 2.1 The equipment rental contracts

The total charge for all three rental contracts for telecommunications equipment should have been \$371.17 per month. This total sum comprised:

- the 19 April 2012 equipment rental contract of **\$216.07** per month (19 April 2012 Contract);
- the 1 September 2014 equipment rental contract of **\$93.24** per month (1 September 2014 Contract); and
- the 20 November 2014 equipment rental contract of **\$61.85** per month (20 November 2014 Contract).

There was also a maintenance contract which was \$33.00 per month charged on a month to month basis.

These three telecommunications equipment rental contracts are collectively referred to in this proposed resolution as “the contracts”.

## 2.2 19 April 2012 Contract

The 19 April 2012 Contract was for a fixed term of 60 months and expired on 19 April 2017. The contract described the telecommunications equipment as a [brand, model], 11 handsets.

The Representative and the Provider have confirmed this is the *original contract* signed by the Representative for the equipment rental contract.

## 2.3 1 September 2014 Contract

The 1 September 2014 Contract was initially for a term of 36 months but was reduced to a term of 33 months. The 1 September 2014 Contract expired on 1 June 2017. The contract described the telecommunications equipment as a [brand, model], 3 handsets, 8 station card and cabling.

The Representative says they added the additional handsets for the expansion of the office. This added \$93.24 to the monthly phone system rental. The total amount payable for this contract was \$3,076.92 over 33 months.

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<sup>2</sup> A *white label* arrangement is an arrangement in which one authorised deposit-taking institution (ADI) is the credit provider but the credit is typically labelled with the logo or name of the other ADI who will primarily be responsible for any interaction with the borrower; *Explanatory Statement; Select Legislative Instrument 2010 No. 303 for the National Consumer Credit Protection Act 2009* etc at page 4.

## 2.4 20 November 2014 Contract

The 20 November 2014 Contract was initially for a fixed term of 30 months but was reduced to a term of 29 months and expired on 20 April 2017. The contract described the telecommunications equipment as 2 *[brand] Handsets, Cabling and MOH*.

The Provider has confirmed this contract was created on 20 November 2014 for an additional 2 *[brand]* handsets for the phone system. This added \$61.85 charges onto the existing equipment contracts.

## 2.5 Summary table of the contracts

	19 April 2012 Contract	1 September 2014 Contract	20 November 2014 Contract
Legal entity	[business name]	[partnership name]	[partnership name]
ABN	[ABN number] <sup>3</sup>	[ABN number]	[ABN number]
Signatory and position	[Representative] as Partner	[Representative] as Partner	[Representative] as Partner
Guarantor	[Representative]	[Representative]	[Representative]
Term	60 Months	33 Months	30 Months
Expiry date	19 April 2017	1 June 2017	20 April 2017
Monthly payment amount	\$216.07	\$93.24	\$61.85

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<sup>3</sup> Between 15 June 2005 and 19 Feb 2013 ABN xxxxxxxx was registered to [business name].

### 3 The complaint and the Provider's response

The Representative explained that the Partnership had had an initial five-year contract with the Provider for a multiline office telephone system. Under the 19 April 2012 contract, the Partnership paid about \$216.00 a month for the system rental and \$33.00 a month for maintenance, totalling \$249.00 a month. The Partnership later contracted for additional handsets increasing total monthly cost to about \$311.00.

The Representative says they asked the Provider several times to cancel the account, stop charging for the services and collect the equipment. The Representative says the Provider continued to charge the Partnership for services and equipment after the contracts ended.

The Provider said it undercharged the Partnership for the telecommunications equipment rental and was entitled to recover this undercharging.

#### 3.1 Cancellation notice

On 13 March 2017, the Representative emailed the Provider, saying:

*"...We would like to advise that we had a new system installed and the old one is available for picking up.*

*We would like to thank [y]ou for your assistance whilst we had this system in place and ask that you please advise your account department accordingly..."<sup>4</sup>*

I refer to this email in this proposed resolution as the Cancellation Notice.

#### 3.2 Payout figure

On 3 August 2017, the Provider emailed the Representative to say there would be a "[p]ayout figure" of \$3,366.53 (payout figure).

In that email, the Provider advised the Partnership the amount of \$3,366.53 was "...due to a billing error and this is the total of backdated charges in relation to your phone system through us."<sup>5</sup>

#### 3.3 Rental equipment charges error

The Provider said it made a billing error by invoicing the Partnership \$277.93 per month for the contracts instead of \$371.17. The Provider had neglected to invoice the Partnership the \$93.24 per month agreed to in the 1 September 2014 contract (\$371.17

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<sup>4</sup> A copy of this email is provided in the appendices as Appendix One: cancellation notice

<sup>5</sup> A copy of this email is provided in the appendices as Appendix two: Payout figure email

– \$93.24)<sup>6</sup>.

### 3.4 Resolved issues

When the Provider told the Representative of the payout figure in August 2017, the Partnership disputed it. It was not until 12 February 2018 the Provider explained this was not a billing error.<sup>7</sup>

To resolve the dispute, the Provider agreed to waive 50% (\$1,729.76) of the total charge outstanding for the 1 September 2014 Contract.<sup>8</sup> The Partnership accepted this offer because it had use of some of the telecommunications services during the 1 September 2014 Contract term.

As to the charges the Provider billed after June 2017, the Partnership disputed that it was liable. The Representative said the telecommunications services were transferred away to the Partnership's new telecommunications provider in late 2016.

Although the Partnership was under the impression all its services had been transferred to the new provider, this was not the case. Some services provided by the Provider did not port (for reasons which are not the subject of this complaint) and remained available for the business to use. The Partnership continued to use some, but not all, of the available Provider services.

Since the business was not using all the services, on 18 June 2018 the Provider agreed to issue a credit for unused services up until then for the total sum of \$2,571.06.<sup>9</sup>

This total credit amount provided by the Provider is \$4,300.82 (\$1,729.76 + \$2,571.06). the Partnership accepted this credit amount and it is reflected in my calculations.<sup>10</sup>

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<sup>6</sup> The difference is \$277.92 which is a difference of one cent. I accept the one cent difference between figures is likely to be from rounding

<sup>7</sup> A copy of an email from [Provider] with an explanation as to the billing error is provided in the appendices as Appendix Three: explanation email.

<sup>8</sup> Email from [Provider] Customer Resolutions [Provider email address] to Telecommunications Industry Ombudsman dated Wednesday 15/08/2018 11:26 AM.

<sup>9</sup> Email from [Provider] Customer Resolutions [Provider email address] to Telecommunications Industry Ombudsman dated Monday 18/06/2018 12:04 PM.

<sup>10</sup> See Appendix four: account reconciliation

## 4 Jurisdiction to consider a complaint about equipment

I am satisfied I have jurisdiction to consider the Partnership's complaint about the equipment because clause 2.7(b) of my terms of reference says:

*We handle the following types of complaints .... a consumer's complaint about a problem with telecommunications equipment supplied by a TIO member ... that affects the consumer's access to a telecommunications service supplied or offered by a TIO member*

I am satisfied the equipment is supplied by the Provider.

## 5 Reasons for my decision

The reasons for my decision are:

- by its conduct, the Provider on behalf of [finance company], accepted the Partnership's cancellation of the contracts for equipment, and
- The Provider is not entitled to recover from the Partnership the remaining charges of \$5,493.46, incurred after the expiry of the contracts.

## 6 The Provider on behalf of [finance company], accepted the Partnership's cancellation of the contracts for equipment

I am satisfied by its conduct, the Provider on behalf of [finance company], accepted the Partnership's cancellation of the contracts for equipment.

The [finance company] contract sets out the requirements for a consumer to cancel the equipment contract at the end of the fixed term.<sup>11</sup> I am satisfied the Partnership did not meet the requirements to effectively cancel the equipment contracts.<sup>12</sup> However, despite the Partnership not meeting the contractual requirements to cancel the contract, I am satisfied the Provider accepted the Partnership's written notice of cancellation on 13 March 2017 by its conduct. Therefore, [finance company] is bound by the cancellation notice.

The Representative says the Provider contacted them in or about December 2016 to say the Partnership's telecommunications service and equipment contracts were to expire. The Representative says it was around this time they gave the Provider the Partnership's first notice of its intention to terminate the service and return the equipment.

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<sup>11</sup> Clauses 18.1, 18.2 and 18.3

<sup>12</sup> The Partnership did not give [finance company]/the Provider at least 90 days notice in writing prior to the end date of all three contracts.

On 13 March 2017 the Partnership emailed the Provider of its intention to cancel the Contracts at the end of their fixed terms. I am satisfied the Provider accepted the Partnership's notice of cancellation for the contracts because:

- in December 2016, the Partnership gave the Provider notice of its intention to cancel, after the Provider initiated contact between the parties to discuss the end of the fixed term contracts,
- the Provider did not reject the 13 March 2017 notice or explain to the Partnership why the notice did not meet the requirements of the contract, and
- the Provider did not attempt to charge the Partnership early termination fees for the contracts.<sup>13</sup>

In my view this means by the end of May 2017 both parties acknowledged the notice of cancellation had been effective.

## **7 The Provider is not entitled recover the remaining charges of \$5,493.46**

I am satisfied the Provider is not entitled to recover from the Partnership the remaining charges of \$5,493.46. This is because the Provider cannot recover charges for the equipment incurred after the contracts expired.

On 13 March 2017 the Partnership told the Provider it would cancel the contracts at the end of their fixed terms and the equipment was available for the Provider to pick up. The Provider did not pick up its equipment and did not provide instructions for the Partnership to return the equipment until 18 June 2018, more than a year after the notice of cancellation.

Despite the cancellation in May 2017 of the fixed term contracts, the Partnership continued to use some of the telecommunications services after the expiry of the contracts. I am satisfied the Partnership is liable for these remaining charges and on 29 October 2018, the Partnership paid the Provider \$1,160.36. This amount consisted of the balance owed to the Provider from my calculation.<sup>14</sup>

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<sup>13</sup> This would have showed [finance company] considered the Contracts had automatically extended for another 180 days as per clause 18.3, and the Partnership was attempting to cancel the Contracts before the extension had finished.

<sup>14</sup> See Appendix four: account reconciliation

This means the remaining charges of \$5,493.46 are for [finance company] equipment charges incurred after the expiry of the Contracts. Therefore, as the Provider did not pick up the equipment or provide timely instructions for return, I am satisfied the Provider is not entitled to recover these charges.

Judi Jones

Telecommunications Industry Ombudsman



### **Appendix one: Cancellation notice**

[image of cancellation email from the Representative to the Provider]

### **Appendix two: Early termination charge email**

[image of early termination charge email from the Provider to the Representative]

### **Appendix three: Explanation email**

[image of explanation email from the Provider to the Representative]





## Appendix four: Account reconciliation

Invoice #	Invoice date	Billing period	New charges	The Provider's credit	Adjustments <sup>i</sup>	Explanation for adjustments	New balance due
	19 May 2017	15 Apr – 14 May			(\$229.53)	\$180.05 <sup>ii</sup> + \$49.48 <sup>iii</sup> = \$229.53	
	19 June 2017	15 May - 14 Jun	\$954.14	(\$125.90)	(\$310.93)	\$216.07 + \$61.85 + \$33.00 = \$310.92	
	19 July 2017	15 Jun – 14 Jul	\$916.27	(\$160.85)	(\$310.93)	As above	
	18 Aug 2017	15 Jul – 14 Aug	\$866.32	(\$302.85)	(\$310.93)	As above	
	18 Sept 2017	15 Aug – 14 Sept	\$855.23	(\$231.85)	(\$310.93)	As above	
	18 Oct 2017	15 Sept – 14 Oct	\$829.87	(\$231.85)	(\$310.93)	As above	
	20 Nov 2017	15 Oct – 14 Nov	\$1,049.61	(\$196.90)	(\$310.93)	As above	
	18 Dec 2017	15 Nov – 14 Dec	\$1,066.31	(\$302.85)	(\$310.93)	As above	
	18 Jan 2018	15 Dec – 14 Jan	\$928.07	\$0.00	(\$332.93)	\$310.93+\$22.00 = \$332.93 <sup>v</sup>	
	19 Feb 2018	15 Jan – 14 Feb	\$1,052.59	(\$302.85)	(\$332.93)	As above	
	19 Mar 2018	15 Feb – 14 Mar	\$787.06	\$0.00	(\$332.93)	As above	
	18 Apr 2018	15 Mar – 14 Apr	\$684.85	(\$161.95)	(\$310.93)	\$216.07 + \$61.85 + \$33.00 = \$310.92	
	18 May 2018	15 Apr – 14 May	\$682.88	(\$196.90)	(\$310.93)	\$216.07 + \$61.85 + \$33.00 = \$310.92	
	18 Jun 2018	15 May – 14 Jun	\$374.81	\$0.00	(\$310.93)	\$216.07 + \$61.85 + \$33.00 = \$310.92	
	17 Jul 2018	15 Jun – 14 Jul	\$314.24				
	17 Aug 2018	15 Jul – 14 Aug	\$166.31				
				(\$160.85)			
				(\$31.66)			
				(\$40.95)			
				(\$40.95)			
				(\$40.95)			
				(\$40.95)			
Totals			<b>\$11,528.56</b>	<b>\$2,571.06</b>	<b>\$4,337.62</b>	<b>\$1,729.76<sup>vi</sup></b>	<b><u>\$1,160.36<sup>iv</sup></u></b>

See notes on following page

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<sup>i</sup> Adjustments are made from the date the Contracts came to an end and the Representative should not have been charged for the equipment rental charges.

<sup>ii</sup> The 19 April 2012 Contract –  $\$216.07/30\text{days} = \$7.2 \text{ per day} \times 25 \text{ days} = \$180.05$

<sup>iii</sup> The 20 November 2014 Contract -  $\$61.85/30 \text{ days} = \$2.06 \text{ per day} \times 24 \text{ days} = \$49.48$

<sup>iv</sup> The Provider has applied the credit of \$1,729.76 but has not shown whether it has recovered the charges for the 1 September 2014 Contract. The Representative has made payment of \$1,160.36 on 29 October 2018, and the current balance outstanding should be Nil.

<sup>v</sup> The Provider did not comply with the TIO complaint notification and continued to charge the customer a Late Payment Fee of \$22.00 – Referral (Level 1) issued on the 20 December 2017

<sup>vi</sup> The Representative made payment of \$1,729.76 on 20 September 2018.