

## **Decision – 15 October 2019**

### **(De-identified for publication)**

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

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### **1 Decision**

My decision is the Provider, within 10 working days of the Company accepting my decision, must:

- pay the Company \$20,505, and
- cancel the services contract without charge.

When this is done, the Company should make any handsets and other equipment that were provided under the [finance company] contract available for the Provider to collect.

The reasons for my decision are I am satisfied:

- the Provider misled the Company by representing it would pay out the Company's existing equipment finance agreement,
  - the Company relied on the misleading and deceptive conduct,
  - the Company suffered financial loss from relying on the Provider's misleading and deceptive conduct,
  - it is fair and reasonable for the Provider to pay the Company to remedy the loss caused by its misleading conduct, and
  - the Provider failed to supply the agreed services and has no grounds to require or accept payment.
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## 2 Background

On 10 October 2017 the Company entered into a telecommunications services contract with the Provider for three landlines and internet services, all supplied over the NBN network, for a total monthly cost of \$121.77.

The Provider signed the Company up to a phone equipment rental contract to be financed by a 60-month rental agreement with [finance company] at \$330 per month. The Provider supplied and installed the phone equipment.

At that time, the Company had a 60-month telecommunication equipment finance contract with [previous finance company], which still had 50 months left to run. As part of the deal, the Provider said it would pay out the [previous finance company] equipment finance agreement, up to \$13,800.

## 3 The complaint and the Provider's response

The Company complained:

- the Provider told it the Provider would pay out its existing equipment contract, if it agreed to enter into services and equipment contracts with the Provider,
- the Provider did not pay out its equipment contract as it said it would, and
- the Provider failed to provide services under the contract.

The Company says the Provider disconnected the landline services approximately nine months ago and the Company has not had a working service since then.

The Company said the Provider's failure to do what it promised caused the Company to suffer financial loss including:

- termination charges for the [previous finance company] contract,
- legal costs after [previous finance company]'s underwriter commenced legal proceedings for termination charges,
- double billing of services from the Provider and [previous provider],
- ongoing charges for an equipment lease contract with [finance company], and
- costs of uninstalling the [finance company] - financed equipment to reinstall the [previous finance company] equipment.

The Company wants the Provider to compensate it for that loss.

The Provider did not respond to my office's requests for information.

The Company provided an email from the Provider dated 31 October 2018 which said the Provider will only process a payout if the equipment is returned, not if the Company retains the equipment.

#### **4 My proposed resolution and the parties' responses**

On 30 April 2019, I sent my proposed resolution to the Company and the Provider. My proposed resolution was:

- The Provider should pay the Company \$12,078.19 for the costs of cancelling the Company's finance agreement with [previous finance company], as agreed
- Because the Provider had failed to comply with the ACL guarantee to provide services within a reasonable time the Provider should:
  - cancel the Company's services contract without early termination fees
  - accept the return of the rejected equipment, and
  - pay the Company the costs of cancelling its rental agreement with [finance company], within 15 working days of receiving evidence of the costs of cancelling.

The Company accepted my proposed resolution.

In its response to my proposed resolution, the Provider argued its services are not connected to the equipment because:

- the services contract is a separate agreement to the equipment contract, and
- my office previously said finance arrangements and the service contract were not bundled.

#### **5 Inference from the Provider's failure to provide information**

Despite being given multiple opportunities to respond to the complaint, the Provider has failed to provide any information in response to the claim, and as a result I have drawn an inference that the Provider has no information to contradict the claims made.

Under my Terms of Reference, I have the power to set my own procedures for considering a complaint. The Complaint Handling Procedures set out my procedures, which are inquisitorial. Inquisitorial means my office asks the parties questions and requires information from them. Both consumers and providers need to be prepared to answer questions about their claims or views and to provide supporting information and documentation wherever possible. In view of this it is necessary for my office to seek information about a complaint from both parties to clarify whether the claim can

be established and whether loss has been incurred.

Section 5.5 of the Complaint Handling Procedures says that when a provider refuses to respond to a consumer's claims, or to provide information, I can draw an adverse inference from this behaviour.

## 6 Reasons

I am satisfied my decision is fair and reasonable because:

- the Provider misled the Company by representing the Provider would pay out the Company's existing equipment finance agreement
- the Company relied on the misleading and deceptive conduct
- the Company suffered financial loss from relying on the Provider's misleading and deceptive conduct
- it is fair and reasonable for the Provider to pay the Company to remedy the loss caused by its misleading conduct
- the Provider failed to supply the agreed services and has no grounds to require or accept payment

### 6.1 The Provider misled the Company by representing the Provider would pay out the Company's existing equipment finance agreement

I am satisfied the Provider misled the Company by representing the Provider would pay out the Company's existing equipment finance agreement if the Company agreed to enter into contracts with the Provider for services and equipment.

In November 2017, the Provider contacted the Company uninvited and offered to sell services and equipment to the Company. The Representative said the Company was not completely satisfied with its then service provider, [previous provider], but had an equipment contract with [previous finance company], costing \$363 per month. The contract with [previous finance company] was not due to expire until December 2021.

The Representative said the Provider told them the Provider could supply a new phone system for a lower monthly cost and would pay out the [previous finance company] contract, if the Company entered into contracts with the Provider. Relying on the promise of lower costs and the payment of the costs of cancelling the [previous finance company] contract, the Company entered into a service contract with the Provider and an equipment lease with [finance company], arranged by the Provider.

The Provider Order Specification dated 10 October 2017 provides for the installation of

a phone system and the connection of Network services. It also provides for a Network Payout of up to \$13,800, including GST, for the Company to payout its previous Finance Company/Telephone Company.

The Company made numerous requests for the Provider to pay the costs of exiting the [previous finance company] contract and followed all steps the Provider asked the Company to take, including sending invoices and evidence of the payout costs. The Provider has not made any payment towards the termination costs.

Section 18 of the Australian Consumer Law prohibits a supplier from engaging in misleading and deceptive conduct in the course of trade or commerce. The Provider is a supplier and I am satisfied its dealings with the Company were in the course of trade or commerce.

## 6.2 The Company relied on the misleading and deceptive conduct

I am satisfied the Company relied in good faith on the Provider's misleading and deceptive conduct.

This is evident from the Company's actions in:

- entering into a services agreement with the Provider,
- entering into an agreement with [finance company], arranged by the Provider,
- providing a Deed of Guarantee & Indemnity and Charge to [finance company],
- cancelling the [previous finance company] equipment finance contract, and
- following all the steps the Provider gave to have the [previous finance company] contract paid out.

## 6.3 The Company suffered financial loss from relying on the Provider's misleading and deceptive conduct

I am satisfied the Company suffered financial loss from relying on the Provider's misleading and deceptive conduct.

As a result of its reliance, the Company incurred financial loss of:

- \$11,804 to pay out the [previous finance company] contract,
- \$3,597 for legal fees,
- \$15,708 for the [finance company] equipment contract over the 60-month period of that contract, and

- the current claim from the Provider for service charges.

The Representative says the Company will also have to pay \$1,200 for a technician to uninstall the [finance company] equipment and reinstall the [previous finance company] equipment, which the Company now owns.

The remedy for misleading conduct is not to make the promise come true. Instead, it is necessary to look at the loss caused in reliance on the representation.

To determine this, my office asked what the Company would have done, had it known the truth – that is the Provider would not pay the cost of cancelling the [previous finance company] contract. The Representative said the Company would not have ended its [previous provider] contract for services and its equipment contract with [previous finance company].

The Company now has its services back with [previous provider] and has paid out the remainder of the [previous finance company] contract, after the underwriter for that contract commenced legal proceedings against the Company.

I have considered the financial impact of the Company's reliance on the Provider's misleading conduct, compared to the position it would be in today, had it not acted as it did. While the Company would have paid the full costs of the [previous finance company] contract, I am satisfied it would not have had to pay legal costs, the reinstallation of the [previous finance company] equipment, or any costs towards the [finance company] contract. As set out in Table 1, this amounts to a financial impact of a loss of \$20,505.

**Table 1: Financial impact on the Company of relying on the Provider's misleading conduct**

Legal fees in defending proceedings commenced by [previous finance company]'s underwriter	\$3,597
Costs of the [finance company] contract	\$15,708
Costs to uninstall the [finance company] equipment and reinstall the [previous finance company] equipment	\$1,200
<b>Total</b>	<b>\$20,505</b>

#### 6.4 It is fair and reasonable for the Provider to remedy the loss

In my view, it is fair and reasonable for the Provider to remedy the loss caused to the Company by the Provider's misleading and deceptive conduct and likely breach of the

ACL. To do this, the Provider should:

- waive the outstanding balance on the account
- pay the Company \$20,505.
- cancel the service contract without early termination charges

I am aware the service contract is separate to the lease agreement. My decision is what I consider an appropriate remedy for the loss arising from the Provider's conduct.

The Provider arranged for the Company to enter into two separate contracts. One contract is for the telecommunications services, and that contract is between the Provider and the Company. The second contract is for the equipment lease, between [name] Pty Ltd (trading as [finance company]) and the Company.

[finance company] is not a member of the Telecommunications Industry Ombudsman scheme. I do not have jurisdiction to consider a complaint about the equipment lease, and I have not done so.

It is not clear whether the Provider ever intended to pay out the [previous finance company] contract or supply the services. However, there is no requirement for a supplier to intend to mislead or deceive for section 18 of the ACL to apply.

When the Provider has taken the required actions, the Company should make the handsets that were provided available for the Provider to collect.

### 6.5 The Provider failed to supply the agreed services and has no grounds to require or accept payment

The Provider failed to supply the agreed services and has no grounds to require or accept payment for the internet or landline services. Of the four services the Provider contracted to provide the Company on 10 October 2017:

- the Provider did not provide the NBN internet service
- the Provider did not provide the voice service for service number xx xxxx xxx1
- the Company provided incomplete information showing the voice service for service number xx xxxx xxx2 began on 12 March 2018, more than five months after the contract was signed
- the Provider did not provide the fax line for xx xxxx xxx3

The Provider has supplied the agreed mobile services and based on the information available to me, I am satisfied the Company has paid the charges for the mobile services.

**Judi Jones**

Telecommunications Industry Ombudsman