

Decision – 19 September 2019

(De-identified for publication)

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

1 Decision

My decision is that the Provider must release the Company from the contract for services without charge. This must be done within five (5) Company days of the Provider receiving the Representative's written acceptance of my decision.

This is because:

- the Provider's conduct points to a breach of the Australian Consumer Law (ACL) guarantee to provide services that are fit for purpose
- the breach is a major failure of the guarantee
- the Company is entitled to cancel the contract without charge, and
- a negative review is not grounds to refusing an ACL remedy.

The Company wishes to retain the equipment supplied and related finance agreement provided with the service agreements.

2 Background

The Representative is a director of the Company. The Company operates a [service] from two offices located at [location 1] and [location 2].

On 17 October 2017, the Provider proposed the Company could meet its voice and data needs at [location 1] by purchasing from the Provider the following services:

- six SIP channels for services ported to the Provider
- an ADSL (Zone 1) data service, to be replaced by an NBN service when available.

The Provider's proposal also included two SIP channels for [location 2] and telecommunications equipment to support these services.

On 18 October 2017, the Representative and another director signed the contracts with the Provider for the above services and a SIP - Hosted Voice service. The Provider also arranged equipment finance with a third-party financier.

The Company retained its existing 10000/10000 Ethernet service with another provider to provide data services at [location 2] until the NBN became available.

The Provider bills the Company for the contracted services to account number xxxxxx.

3 The complaint and the Provider's response

The Representative says the Provider's ADSL service does not support requirements of the Company, particularly for voice services. They say the service is subject to poor speeds, drop outs and missed incoming calls.

The Representative engaged a contractor to audit the services at [location 1], who found the ADSL service was not conducive for operating VoIP services as it could only handle three simultaneous calls and suggested an upgrade of services.

The Representative says the Provider offered a free 4G back up service, but this did not fix the problem.

The Representative says the issues with the SIP services and internet are affecting the Company and they have commenced porting the services to a new provider. They say they will be retaining the telecommunications equipment with the third-party finance agreement.

The Provider initially said SIP-Hosted Voice contract with the Company includes a clause where the customer accepts responsibility to supply sufficient internet for the system requirements of 0.1mbps/0.1mbps of bandwidth for each simultaneous call, separate to any other data requirements.

The Provider says, before the ADSL service was installed, the Provider advised the Company the ADSL service would only support three simultaneous calls with the other three SIP channels allocated to mobile softphone users.

The Provider says the Company is liable for early termination fees of \$9,207.30 if the services are transferred away from the Provider.

The Provider says the services provided to the Company were fit for service, it offered appropriate remedies, and there was substantial usage on the service.

4 The Provider rejected my proposed resolution

I advised the parties my proposed resolution of the complaint was that the Provider should release the Company from the contract for services without charge.

On 19 March 2019 the Provider rejected my proposed resolution saying it would not release the Company from any agreement unless the Company removed negative reviews on digital platforms and signed a confidentiality agreement.

5 Reasons

The reasons for my proposed resolution are:

- the Provider's conduct points to a breach of the Australian Consumer Law (ACL) guarantee to provide services that are fit for purpose
- the failure is a major failure
- the Company is entitled to cancel the contract without charge, and
- a negative review is not grounds to refusing an ACL remedy.

6 The Provider's conduct points to a breach of the Australian Consumer Law (ACL) guarantee to provide services that are fit for purpose

I am satisfied the services the Provider has provided the Company are not fit for purpose. This is because the Provider agreed to supply a service it could not deliver, and the service it did provide is not fit for purpose.

Section 61 of Australian Consumer Law (ACL) provides a guarantee that services provided will be reasonably fit for any purpose that the consumer has made known to the supplier.

I am satisfied that the Provider is a supplier and the services were supplied in the course of trade or commerce.

6.1 The Provider agreed to supply a service it cannot deliver

The Provider contracted to supply six SIP channels to the Company at [location 1], which would allow six simultaneous voice calls. However, the service supplied will only support three simultaneous calls.

The Provider does not dispute the ADSL service will not support more than three simultaneous voice calls, but says three of the SIP channels are dedicated to the handsets in the office with the other three dedicated to mobile softphone users using the mobile network.

The Representative says the Provider did not advise the Company the service at [location 1] would be limited to three simultaneous voice calls. The Company is using the Provider's ADSL service not only to support its SIP channels but the other data needs of the Company.

The Provider has not provided information to show it advised the Company the service would only support three simultaneous voice calls, or that three of the six SIP channels are dedicated to mobile softphone users on the mobile network.

The Provider says the Company was only using two handsets at [location 1], which does not discount the Provider failed to supply a service needed to support six simultaneous calls as contracted.

6.2 The service is not fit for purpose

I am satisfied the service the Provider supplies is not fit for purpose.

The Provider's SIP Hosted Voice requires a minimum of 0.6mbps/0.6mbps of dedicated bandwidth to operate as set out in page 3 of the Provider's SIP - Hosted Voice agreement. The Provider's agreement says the customer must allow for 0.1mbps/0.1mbps of dedicated bandwidth for each simultaneous active voice call at any one time, which will be in addition to any other data usage.

Based on advice from my Technical and Regulatory Specialist, I believe 0.3mbps/0.3mbps per simultaneous active call is preferable to guarantee an acceptable grade of service. This view is reflected by NBN Co's published standard of 1mbps/1mbps required to support up to six simultaneous voice services. These minimum specifications assume the internet service in question has business grade quality of service protocols in place to prevent packet latency and jitter, which has no requirements for general data usage.

The Provider objected to this view, saying such requirements are excessive and referred to a standard published by ACMA indicating 0.056mpbs as an acceptable standard for a VoIP service. The TIO approached ACMA about these standards and was told this information was out of date, applied to different technologies and took action to remove the information from its website.

The Provider says it offered the ADSL service as an alternative until the NBN became available. In my view, the current bandwidth requirements published by NBN Co are the standard and the information published by ACMA previously is irrelevant to this matter.

The Company has provided results of an independent audit and screenshots of speed tests that show constant upload speeds of no more than 0.5mbps. The 0.5mbps upload is inadequate to support six simultaneous voice calls and I maintain this view.

The Provider says it relocated the six SIPs from [location 1] to [location 2] but has not provided any information to show when this occurred, that it resolved the problems, or that the Representative agreed to this course of action.

The Provider has also not provided confirmation the bandwidth available operates with minimum quality of service protocols expected in a business grade service.

All of the above leads me to the conclusion that the Provider's ADSL service is not fit for the purpose of supporting six SIP channels as well as the general data needs of the Company' [location 1] site.

7 The breach is a major failure of the guarantee

I am satisfied the breach is a major failure of the guarantee to provide services that are fit for purpose.

The Provider offered a free 4G dongle to provide additional bandwidth. The Representative says this did not resolve the shortcomings of the ADSL service.

The Provider provided the TIO with copies of email correspondence with the Company showing the 4G dongle was connected to an auxiliary modem to support extra devices not the SIP - Hosted Voice. The Provider then withdrew the offer to cover the cost of the 4G dongle after the Representative posted negative online reviews.

Therefore, the Provider cannot rely on the offer of the 4G dongle to support its claim it met its obligations by offering a remedy for the short comings of the ADSL service.

The independent audit suggests a secondary dedicated data service such as EFM link with a base service of 4mbps/4mbps is needed to provide for the Company's voice and internet needs at [location 1]. However, this solution would likely impose additional costs to the Company.

I believe the Provider's failure to provide a fit for purpose service is likely to meet the criteria for major failure set out at section 267 of the ACL.

8 The Company is entitled to cancel the contract without charge

I am satisfied the Company is entitled to be released from the contract for services, without charge.

Section 267(3) provides the following remedies to a consumer where the failure to comply with the guarantee cannot be remedied or is a major failure:

- a) terminate the contract for the supply of the services; or
- b) by action against the supplier, recover compensation for any reduction in the

value of the services below the price paid or payable by the consumer for the services.

9 A negative review is not grounds for refusing an ACL remedy

A negative review on an online forum or webpage about customer experience with provider is not ground for refusing a remedy provided by the ACL. Nor is a remedy under the ACL conditional on the consumer signing a release or confidentiality deed.

Judi Jones

Telecommunications Industry Ombudsman
