

Decision – 21 November 2019

(De-identified for publication)

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

My decision is based on what I believe to be a fair and reasonable outcome, having regard to:

- relevant laws and codes (based on my view of what a Court would be likely to find in all the circumstances), and
 - good practice, including industry guidelines.
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1 Decision

My decision is the Provider must, within 15 working days of the Partnership accepting my decision, pay the Partnership \$5,794.49.

When this payment is made, the Partnership should make the equipment available for the Provider to collect.

This is because I am satisfied:

- a) The Provider misled the Partnership about the new equipment being suitable for an ADSL connection
 - b) The Partnership relied in good faith on the misleading information and suffered a loss
 - c) It is fair and reasonable for the Provider to compensate the Partnership for its loss
 - d) It is fair and reasonable for the Partnership to make the equipment available for the Provider to collect, once the Provider has paid the money to the Partnership.
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2 Background

Partner 1 (the Representative) and Partner 2 operate a Partnership trading as [company] from [location].

In September 2017, the Partnership's telecommunications services were provided by [provider 1].

On 19 September 2017, the Provider approached the Representative with an offer to transfer the services to a service delivered over the national broadband network (NBN).

The Provider offered to supply the Partnership with the following services and equipment:

- 1 X SIP channel with unlimited standard national fixed calls
- 100GB Data – NBN – 25/5 Mbps speeds
- 2 Mobile services with \$200 calls, unlimited texts and 200MB data
- 1 x [brand] system with 1 x cordless handset and 1 x cordless base station+ 1 x NBN [brand] modem + 1 x 8 Port POE Switch and voicemail. Full installation and training provided.

The total monthly cost quoted was \$219.81.

On 20 September 2017, the Representative (on behalf of the Partnership) signed an "Account Setup" document prepared by the Provider. The services agreed in the document were:

- 1 x SIP light billed at \$25 per month (no term nominated)
- NBN Broadband 25M/5M with 100GB allowance billed at \$11 per month for 36 months
- 2 mobile services billed at \$20 per month each

The same day, the Representative signed a 60-month Telecommunications Rental Agreement (rental agreement) with [equipment rental company], certified¹ by the Provider. The rental agreement did not list any equipment to be supplied but provided a monthly rental payment, of \$74.81.

The Provider later offered an ADSL service to the Partnership because the NBN service was not available at the business address. The Representative signed a contract for a

¹ The finance contract included a page with 'Certifier Details'. This was completed by the Provider representative who declared they had seen the originals of the ID docs, and that the contract was signed in their presence

business ADSL service on 23 November 2017.

The Partnership has since transferred its services to another provider. The Provider issued a final bill on 15 October 2019.

At the date of this decision, the NBN network is still not available at the business address and the Partnership does not use the equipment.

The Representative represented the Partnership in this complaint.

3 The complaint and the Provider's response

The Representative says the Provider told them NBN services would be available at the address and assured them it could supply an NBN service. On that basis, they agreed to services and equipment with the Provider.

The Representative became aware the NBN could not be connected when a technician came to install the equipment. The Representative said the Provider then told them the SIP services would work on an ADSL connection.

However, after the SIP services were connected, there were constant problems with the ADSL service supporting the services and the Representative says they reported these to the Provider. The Representative says the Provider offered a 4G dongle to act as a back up to the ADSL, but at an additional cost.

The Representative says the Provider did not take action in response to their fault reports, insisting the service worked as specified.

The Representative says if the Provider had not misled them about the availability of NBN or that the SIP services would work on an ADSL connection, the Partnership would not have entered the contracts. The Partnership wants full reimbursements of the additional costs incurred as a result of relying on the Provider's claims. The Provider says the Representative accepted the alternative solution of the ADSL service and the services worked as specified.

The Provider says it told the Representative prior to installation that the NBN would not be available and they chose to proceed.

The Provider says it relied on information from [wholesaler] in saying the NBN would be available at the Partnership's address.

4 Proposed resolution and the parties' responses

On 7 March 2019, I sent my proposal for resolving the complaint to the parties. I proposed that the dispute be resolved by the Provider:

- cancelling the services at no cost to the Partnership,
- accepting return of the equipment, and
- paying the costs of the Partnership cancelling the finance contract with [equipment rental company].

The Representative accepted my proposed resolution.

The Provider rejected my proposed resolution. In summary, the Provider's response was:²

- When the Provider became aware the NBN was not ready it offered the Partnership an opportunity to terminate the proposal (the NBN service and rental agreement), but the Partnership opted to proceed with the rental agreement to use on a current ADSL service
- I did not address the Representative's original complaint issues about billing and dropouts
- The services contract and rental agreement are not linked in any way

5 Reasons

The reasons for my decision are I am satisfied:

- a) The Provider misled the Partnership about the new equipment being suitable for an ADSL connection.
- b) The Partnership relied in good faith on the misleading information and suffered a loss
- c) It is fair and reasonable for the Provider to compensate the Partnership for its loss
- d) It is fair and reasonable for the Partnership to make the equipment available for the Provider to collect, once the Provider has paid the money to the Partnership.

6 The Provider misled the Partnership

I am satisfied the Provider misled the Partnership about the new equipment being suitable for an ADSL connection

Section 18 of the Australian Consumer Law (ACL) prohibits a supplier from engaging in

² Appendix A copy of the Provider's response is in the appendix to this document.

misleading and deceptive conduct in the course of trade or commerce. The Provider is a supplier and I am satisfied its dealings with the Partnership were in the course of trade or commerce. It is not relevant to liability under the ACL whether the supplier intended to mislead a consumer.

The Representative said when the NBN was not available, the Provider told them the SIP services would work over the existing ADSL service supplied by [provider 1]. From November to December 2017 the Representative complained to the Provider about the poor quality of the SIP services. The Provider provided a diagnostic test note from 20 November 2017 that said:

Test VoIP Services which indicated that there was some issues on the ADSL services that was causing some intermittent decreases in bandwidth....Suggested to Project team that an additional dedicated data service will be required.

A further note dated 23 November 2017 shows a 4G connection was set up for the SIP services. I am satisfied the Provider's acknowledgement that the SIP services could not work adequately on the existing ADSL service without either a dedicated data service or mobile broadband connection, means its initial claim the ADSL connection was sufficient was misleading.

7 The Partnership relied on the misleading conduct and suffered loss

I am satisfied the Partnership relied in good faith on the Provider's misleading conduct and suffered a loss as a result.

This is evident from the Partnership's decision to enter into a rental contract for equipment intended for a reliable internet connection. While the equipment could still be used on an ADSL connection, the Partnership needed additional services at additional cost to use the equipment properly.

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.

The Representative said if they had known the NBN was not available and that the equipment would not work adequately on an ADSL service, the Partnership would have continued to use its analogue phones, that it owned outright, until the NBN was available.

In my view, the Partnership's loss is:

- the cost of the equipment rental contract it would not have entered into, and

- the difference between the Partnership's original service costs and the service costs with the Provider.

I have set out the comparison of costs in Tables 1 and 2. I have calculated the costs of services to the most recent Provider invoice dated July 2019. The Partnership's loss is \$5,794.49, which is the difference between the costs.

Table 1 Financial position had the Partnership not entered into contracts with the Provider

	Per month	Total (22 months)
Telephone costs October 2017 – October 2019 (24 months)	\$191.59	\$4,598.16
Equipment costs	\$0	\$0
		\$4,598.16

Table 2 - Financial position from entering into the Provider contracts

	Per month	Total
Equipment rental costs (60 months)	\$74.81	\$4,488.60
Provider service charges October 2017 – October 2019 (22 months)	variable	\$5,904.35
		\$10,392.95

8 Fair and reasonable: the Provider must remedy the loss

In my view, it is fair and reasonable for the Provider to remedy the Partnership's loss. This is because the Provider's misleading conduct caused the loss, and the Partnership acted in good faith.

9 Fair and reasonable: the Provider is entitled to the equipment, once payment is made

Once the Provider has compensated the Partnership for its loss, it is fair and reasonable that the Provider is entitled to the equipment. Therefore, once payment is made, the Partnership must make the handsets that were provided available for the Provider to collect.

Judi Jones
Telecommunications Industry Ombudsman

Appendix – The Provider’s response to my proposed resolution

[copy of emailed response from Provider, 3 pages]