

## Decision – 21 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.

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

- relevant laws (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 within 10 working days of the Company accepting my decision, the Provider must pay the Company \$8,338, made up of:

- \$7,250 as compensation for lost profits, and
- \$1,088 for private technician costs.

This is because I am satisfied:

- The Provider breached its obligations to provide the services
- The Provider cannot limit or exclude its liability
- The Company suffered foreseeable business loss
- The Provider should pay the Company for the costs of mitigating the loss

### 2. Background

The Company is a [service A] firm that also provides [services B, C and D]. The Provider provides the Company with three landline services and internet services.

The Company agreed to migrate its existing services with the Provider to the National Broadband Network (NBN). The migration was to take place on 15 December 2017.

The Representative says during the migration, three issues arose:

- On 15 December 2017 the ADSL internet service was disconnected prematurely. The Representative says the Company was left without an internet service until the NBN was activated on 5 January 2018
- The three business landlines continued operating on PSTN until 15 January 2018 when they were migrated to the NBN, after which the Company lost use of the landlines for several days
- Both the internet and landline services were affected by intermittent faults until March 2018.

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

#### 3.1 The complaint

The Representative says the Company lost business when it was without internet and landline services between December 2017 and March 2018. The primary methods of contacting the business are phone and internet, so a breakdown in either of those methods of communication has a significant impact on the business. In addition, the failure of the internet service prevented the Company's personnel from accessing crucial documentation.

The Representative says revenue from their [service B] was significantly impacted. They say revenue from [service A] had been increasing significantly before the migration to NBN and the increase dropped during the fault period. The Representative says they are not concerned about loss of revenue from [service C and service D] as the loss is minor in comparison to revenue lost from [service B].

The Representative says the Company mitigated its losses by cutting down on casual staff, using a back-up internet device, using mobile phones as Wi-Fi hotspots for two laptop computers, and diverting calls to a mobile phone number. These measures minimised harm to the business but did not prevent it.

The Company claims \$9,380 compensation, made up of:

- \$7,250 compensation for business loss, which is equivalent to a loss of five clients at \$1,450 per client
- Reimbursement of private technician costs of \$2,130 - the Representative says the private technician assisted the business to install a backup 4G internet service and troubleshoot the fault.

#### 3.2 The Provider's response

The Provider offered to pay half of the Company's private technician cost but denied

liability for any loss of business.

The Provider said:

- The Company's loss was the result of a "Force Majeure" event and the responsibility lies with NBN co not the Provider
- It does not believe the services were affected for several months because either NBN co did not find a fault, or faults were fixed by NBN co within timeframes
- The Company could have reduced the loss by using mobile services and going out to clients
- The Company was not using a modem supplied by the Provider
- The fault from 30 January was caused by a power outage at the Company's premises
- There is no business loss because the Company's revenues increased in 2018 and service usage increased over the fault period

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

On 6 March 2019, I sent the parties my proposal for resolving the complaint. My proposed resolution was the Provider should pay the Company \$7,250 compensation for lost profits and reimburse \$1,088 for private technician costs. This was because I was satisfied:

- On at least three separate occasions between 15 December 2017 and 5 March 2018, the Provider failed to provide a service that was fit for purpose
- The Provider should compensate the Company for its business losses
- It was fair and reasonable for the Provider to pay the Company compensation of \$8,338 for losses suffered by the Company

The Representative accepted my proposed resolution.

The Provider rejected my proposed resolution and said:

- The Provider is not required to compensate its customers for events outside of its control
- The Company's claimed loss and my award in the proposed resolution is speculative guess work
- The Company had access to a service at all times

- A Mass Service Disruption was a major factor in the delay in connecting the NBN

## 5. Reasons

The reasons for my decision are:

- The Provider breached its obligations to provide the services
- The Provider cannot limit or exclude its liability
- The Company suffered foreseeable business loss
- The Provider should pay the Company for the costs of mitigating the loss

## 6. The Provider breached its obligations to provide the services

I am satisfied the Provider's conduct points to a breach of the Provider's common law duty to act with reasonable care and skill and a breach of the statutory guarantee to provide services with due care and skill.

Telecommunications services providers have a common law duty of care. They are required to act with reasonable care and skill. This is similar to the statutory guarantee under the Australian Consumer Law (ACL) that services will be rendered with due care and skill<sup>1</sup> in every contract for the supply of services by a person to a consumer in the course of a business.

From 15 December 2017 until 5 March 2018, the Provider failed to provide the services on a number of occasions. The Provider's failure to properly respond to the reported faults was a breach of the duty to provide services with due care and skill which gives the Company a right to damages in the form of compensation for lost profits.

While the Company says it experienced faults with its services from the time they were moved to NBN until 19 March 2018, the Provider cannot be expected to address a fault it is not aware of. As a result, I have only considered the faults that the Company reported to the Provider.

In total, the Company was intermittently without service for five weeks:

- From 15 December 2017 the Company lost all internet services (and with it all email services) until 5 January 2018
- From 30 January 2018 until 1 February 2018, the Company experienced issues with the telephone and internet services due to an issue with the modem the Provider supplied. The fault was resolved after the Provider agreed to the

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<sup>1</sup> Section 60 ACL

Company using its own modem

- From 28 February 2018 until 5 March 2018, the Company experienced issues with the telephone and internet services because the modem was incompatible with the nbn service.

The Provider has provided data about the Company's outgoing calls. I accept the Company made calls between these dates. Given the nature of the fault being dropouts it is not unexpected that there would still be some call data still evident on the service.

## 7. The Provider cannot limit or exclude its liability

I am satisfied the Provider cannot limit or exclude its liability for the Company's loss because:

- The Provider cannot exclude liability under the ACL
- The MSD is not relevant to this complaint
- Force majeure is not relevant to this complaint

### 7.1 The Provider cannot exclude liability under the ACL

The degree to which liability can be limited or excluded under the ACL depends on whether the services are of a kind ordinarily acquired for personal, domestic or household use. Section 64 of the ACL says a contract term is void to the extent that it purports to exclude, restrict or modify the liability of a person for failure to comply with a consumer guarantee relating to the supply of goods or services.

In handling and making decisions on complaints, I consider relevant laws, good practice and what is reasonable in the circumstances.

The ACL sets out several consumer guarantees for goods and services. Consumer guarantees cannot be excluded, restricted or modified by contract. For services, a provider guarantees that they will provide the service with due care and skill.

While section 64A of the ACL permits some limitations where the services supplied are not of a kind ordinarily supplied for personal, domestic or household use, in this case, I am satisfied the landline and internet services the Company ordered fall within the meaning of those ordinarily acquired for personal, domestic or household use. It makes no difference to the operation of section 64 that they were used for business purposes.

The consumer may recover damages for any loss or damage suffered by the consumer because of the failure by a provider to meet a consumer guarantee, if it was reasonably foreseeable that the consumer would suffer loss or damage as a result of the failure.

I accept that the Provider cannot promise 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. Therefore, it is reasonable that providers limit their liability for service issues experienced by end-user consumers, as the Provider has under its Standard Form of Agreement.

However, while the Provider is not obliged to provide a fault free service, it cannot exclude liability for loss that arises from a breach of the ACL.

## **7.2 The Mass Service Disruption is not relevant to this complaint**

This complaint is not about a claim for Customer Service Guarantee compensation, so the Mass Service Disruption (MSD) is not relevant.

The MSD and any other exceptions or allowances in the Telecommunications (Customer Service Guarantee) Standard (CSG Standard) have no bearing on the Provider's obligations in this case.

The purpose of the CSG Standard is to provide an efficient mechanism for dealing with mass claims about disruption to standard telephone services and to allow consumers to avoid the cost and inconvenience of court proceedings to recover loss. Section 116 of the Telecommunications (Consumer Protection and Service Standards) Act (the Act) anticipates that a customer may have rights or remedies available otherwise than under the CSG Standard, which indicates that CSG compensation is not intended to preclude recovering compensation which may exceed the compensation set out in the CSG Standard.

## **7.3 Force majeure is not relevant to this complaint**

This complaint is not about billing, so the definition of force majeure under the Telecommunications Consumer Protection Code (TCP Code) is not relevant.

The Provider has referred to the definition of Force Majeure in the TCP Code to deny liability for the fault, which it says was outside its control.

The TCP Code defines Force Majeure to mean "an unforeseen or uncontrollable force or event, such as fire, flood, earthquake, storm or other disturbance, whether caused by the elements, an act of God, war, strike, lockout, riot, explosion, insurrection, governmental action or another event of the same kind, which is not reasonably within the control of a party."

Under the TCP Code, the defined term of "force majeure" is only relevant in the context of a provider's billing obligations.

## 8. The Company suffered foreseeable business loss

I remain of the view that the Company suffered foreseeable business loss, for the reasons set out in my proposed resolution.

It is reasonably foreseeable the Company would suffer loss if services contracted for were not provided. The Company had a business account with the Provider and the Provider was aware the account was for business purposes.

As the Company contracted for multiple telephone lines, I am satisfied it was necessary for the Company to have multiple lines and receive multiple calls at any one time.

It was reasonably foreseeable that a business that contracted for three VoIP lines and an internet service and could not use them would experience ongoing loss. The Company would not have ordered these services if it did not require them for its business.

I agree with the Provider that the calculation of business loss is somewhat speculative. This is the nature of a claim for business losses. In circumstances where I am satisfied the Provider has breached an obligation it owes to its customer, it is not reasonable for the Provider to attempt to avoid liability because the customer is unable to prove beyond doubt the exact amount of their loss. The test for establishing liability and loss is the balance of probabilities.

It is not possible to say absolutely how many clients the Company lost from the ongoing fault. It is not reasonable for a business to keep records of how many clients it lost, or of orders it did not receive.

I am satisfied the Provider breached an obligation it owed to the Company. The onus is then on the Company to establish, on the balance of probabilities, that it suffered a loss, and the loss was caused by the Provider. These calculations are, by necessity, only projections of what the Company would have earned in a hypothetical world where the fault did not occur.

The Company has calculated its loss at \$7,375.34 based on the loss of five potential clients. It says this is a conservative estimate, because it averaged four to eight new matters a month before the issues with the internet service.

I consider that the Company has adequately demonstrated it suffered financial loss as a result of the faults with the telecommunications service provided by the Provider.

## 9. The Provider is liable to compensate the Company for its mitigation costs during internet outages

I am satisfied the Company took reasonable steps to mitigate its loss during the fault period, and that the Provider should compensate the Company for the costs of doing

so. This is because the Company would not have incurred these expenses if not for the problems with the Provider's services.

The Company obtained a 4G service during internet outages and accessed mobile phones as alternative contact points. It also took steps to engage a technician to assist with identifying and addressing the fault.

These steps helped limit the loss the Company experienced, but I am satisfied it did not prevent the loss entirely.

Judi Jones

Telecommunications Industry Ombudsman

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