

Decision and direction – 27 August 2019

(De-identified for publication)

This document sets out my decision and direction on a complaint 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 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 and direction

My decision is I DIRECT the Provider to pay the Company \$10,400 as compensation for lost profits and expenses incurred.

This is because:

- the raw data supports a finding in favour of the Company
 - the Provider is responsible for the incorrect diversion
 - the faults disrupted the Company's operations between October 2016 and March 2017
 - the Company suffered foreseeable business loss
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2 Background

The Representative is the director of the Company. The Provider provides the Company with telephone and internet services and bills these to account number xxxxxx.

The Company provides [services] and is located at [address].

3 The complaint and the Provider's response

3.1 The complaint

The Representative says the Company experienced issues with its service since 2014. On 26 October 2016 the Representative said the Company's services failed completely after the Provider visited the premises. They said the Company told the Provider to divert calls to their mobile service, but the calls were diverted to an unrelated residential service.

The Representative said the Company made numerous requests to the Provider asking the Provider to alter the Company's number diversion to more appropriate numbers. The Representative said the Provider did not action these requests with the Company's number diverted to persons unrelated to the Company. As late as July 2018 the Representative says third parties calling the Company have reported being diverted to wrong numbers.

In January 2017 the Provider transferred the Company's services to the national broadband network (NBN). Service outages continued until March 2017. The Representative says the outages meant clients or referral partners could not contact the Company.

The Representative said the Company's services were affected from October 2016 to February 2017, initially estimating business loss of \$49,798. The Representative said the most substantial damage to the Company was the reduction in [service] bookings with a reduction in takings of 11% compared to the same period for the previous year.

3.2 The Provider's response

The Provider rejected the Company's claim, saying:

- the Company had not provided verifiable financial statements
- the Company's financial statements do not show a loss for the affected period
- the Provider diverted the Company's number to the correct number as advised in the original SIP application
- the Provider is protected by its terms and conditions, indemnifying it from losses incurred as a result of failure in the supply of its services

4 My proposed resolution to this complaint

On 10 May 2019, I issued my proposed resolution for this complaint. Based on the information provided, my proposed resolution was the Provider should pay the Company \$10,410 for business loss.

The Representative accepted my proposed resolution.

The Provider rejected my proposed resolution. In doing so, it provided raw data usage information, which my office had been asking it to provide for over eighteen months.

The Provider accepted liability for some faults but disputed the amount of compensation the Company is claiming. The Provider said:

- the raw data shows the Company's primary contact number was in constant use up to 30 January 2017, when it was converted to SIP on the nbn.
- the fault period is not from 26 October 2016 until 23 March 2017. The Provider only recognises:
 - a fault with the landline service from 14 December to 19 December 2016 when the Company reported no dial tone
 - the nbn fault, which ran from 21 February 2017 until 9 March 2017
- while the diversion was to an incorrect mobile number, the Provider does not think this is relevant because there is constant usage recorded against the service.
- the financials for the Company show the business experienced a drop in revenue prior to reporting any faults to the Provider

5 Reasons

The reasons for my decision are:

- the raw data supports a finding in favour of the Company
- the Provider is responsible for the incorrect diversion
- the faults disrupted the Company's operations between October 2016 and March 2017
- the Company suffered foreseeable business loss

5.1 The raw data supports a finding in favour of the Company

I am satisfied the raw data supports a finding in favour of the Company because it shows a number of repeat call attempts made within very short windows of time, combined with a high number of very short duration calls (under 10 seconds). This is reliable data supporting the Company's claims of service instability/drop outs.

The Provider says there was usage on the primary landline number every day over the alleged fault period from 26 October 2016 until 23 March 2017, and on 6 June 2019. The Provider has provided records of the usage for the relevant period.

The Provider says that this means the consumer's claim that the services were in "constant failure" is not correct.

I accept the Provider's usage records are correct. The data shows the Company had some use of its service every day over the fault period.

I agree that the Company does appear to have over-stated the extent of the faults, and claims that the service failures were in "constant failure" was hyperbolic.

However, the fact that the failures were not "constant" does not invalidate the claim. The raw data supports a conclusion there was a fault with the service.

5.2 The Provider is responsible for the incorrect diversion

In my view, the Provider is responsible for the incorrect diversion.

The Provider diverted calls to xxxxxxxx4, which is the personal mobile number for the Company's bookkeeper. The Provider says this is the number provided to it by the Company, and as a result considers it has acted correctly.

I have reviewed the Provider SIP application form which does contain the number xxxxxxxx4 under the heading 'Unreachable Destination'. There is no explanation on the form to explain what 'Unreachable Destination' means.

The Company has provided a Statutory Declaration from its bookkeeper about this. They said:

"I was asked what number should be used in case the Provider could not get in touch with the main line and I advised them that they could use mine."

I do not consider it is evident from the form itself that any calls would be diverted to the 'Unreachable Destination' number in the event of a failure of the SIP service. I consider it is a very different thing to agree to be contacted if the Provider could not get in touch with the Company than to agree all calls to the Company could be diverted to their personal phone.

Based on my review of the application form and the statement from the bookkeeper, I am satisfied that the Company acted on the Provider's instructions when inserting the mobile number on the form and could not have been aware that a different number should have been used.

The Provider says the services didn't fail, and therefore the unreachable destination number was not used. The Company has provided statutory declarations from its staff members which refer to the impact of the diversion to unrelated numbers.

The TIO cannot take evidence on oath, and I am therefore unable to give a Statutory Declaration any greater weight than an unsworn statement. However, I accept these statements from third parties as reliable recollections that some calls were diverted to incorrect numbers.

5.3 The faults disrupted the Company's operations between October 2016 and March 2017

I am satisfied there were two different faults which disrupted the Company's operations between October 2016 and March 2017.

The first fault

On 26 October 2016, a Provider representative attended the Company's premises to discuss moving the services to the nbn. The Company signed up for new [product] SIP access at this time. After the visit, the services failed.

The Provider's customer interaction notes show the Company did report a number of faults between 26 October 2016 and 16 December 2016.

There is limited information about the Provider's response to these fault reports. The Provider initially told the Company that it could not find a fault on the Network, however it appears that a technician attended the fault on 14 December 2016 and detected a loop or short circuit during automated line testing.

The second fault

The Company experienced faults with its service between 30 January 2017 and 23 March 2017, after the service was transferred to the nbn.

I am satisfied the Company's telephone and internet services were faulty during both fault periods, which adversely affected the ability to receive incoming appointment enquiries from customers.

Reports from the [service] management software used by the Company show an 18% drop in [service] bookings during this period compared to the same period in 2015/2016. The reports show the Company otherwise has a 20% increase in [service] bookings for subsequent years from 2015 to the present.

5.4 The Company suffered foreseeable business loss

I remain of the view that the Company suffered foreseeable business loss of \$10,400, for the reasons set out in my proposed resolution.

The Provider has disputed the accuracy of my calculations because:

- it says the claim period is incorrect. I do not agree. I have addressed this under heading 5.3 above
- the Company experienced a drop in profits from January 2016 until August 2016, prior to any fault being reported.

On an analysis of the Company's financials, both before and after the fault period, there is clear outlier drop in the [service] income during the fault period.

Given the protracted nature of this complaint, I have the benefit of financials for 2018 which show a consistent trend in profits.

It is clear there is a seasonal upswing in trade over the December/January period each year, which is to be expected in [location], a popular summer tourist destination. The financials show a consistent peak around December, followed by a sharp drop around February and April, with business picking up again around September or October.

The Provider argues that the business was in a downturn before reporting faults, but I do not agree. The variances the Provider refers to could equally be attributed to seasonal fluctuations, and I consider the seasonal fluctuation argument persuasive in this case.

The pattern of reduced profit between February and August is consistent across each of the reporting years.

I am satisfied the Company's financial information shows a loss of \$10,400 between October 2016 to February 2017.

Judi Jones

Telecommunications Industry Ombudsman
