

TIO Decision – 30 May 2019

(De-identified for publication)

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

On 29 April 2019 I advised the parties of my proposed resolution (reproduced in the Appendix). The Representative has accepted the proposed resolution, but the Provider did not respond.

Decision and direction

The proposed resolution is my final decision in this matter.

Accordingly, I DIRECT the Provider to:

- immediately waive all charges for the early termination of the Provider contracts, and
- pay the Company the costs of cancelling the rental agreement, within 15 working days of the Company providing evidence to the Provider of the costs of cancelling the rental agreement.

Judi Jones

Telecommunications Industry Ombudsman

Appendix

Ombudsman's proposed resolution – 29 April 2019

(De-identified for publication)

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

My proposed resolution 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.

1 Proposed Resolution

Based on the information given to me, my proposed resolution of this complaint is that the Provider should by 20 May 2019:

- waive all charges for the early termination of the Provider contracts, and
- pay the Company the costs of cancelling the rental agreement, within 15 working days of the Company providing evidence to the Provider of the costs of cancelling the rental agreement.

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 Provider did not remedy the service failures within a reasonable time, and
- it is fair and reasonable for the Company to receive the remedies set out in the ACL for a likely breach of a guarantee that has not been remedied in a reasonable time.

2 Background

In August 2017 the Representative said the Provider offered the Company a SIP trunk service which would allow the Company to use and access its current phone number from 'anywhere in the world' as long as the Company had an internet connection and

mobile phone. The Company was interested in the offer because the Company was in the process of moving premises and thought it would need new phone numbers. The Representative believed the SIP trunk offer would allow the Company to retain its existing phone number.

The Company had also purchased a [brand name] PABX which it had not installed. The Company planned to install the PABX once it had relocated to its new premises.

The Representative said they checked with the Provider about the compatibility of the [brand name] PABX with the services and equipment it was offering. The Representative said the Provider assured the Company the PABX would be compatible. On this basis the Company continued with the negotiations.

On 17 August 2017 the Company entered into a 24-month contract with the Provider for the following services:

- NBN, \$75 (\$90 plan with \$15 discount)
- Two SIP lines (service numbers xx xxxx xxx1 and xx xxxx xxx2), \$15 each
- Two [link name] licenses (originally \$15 each, but reduced to \$0)

At the time the Company also entered into a 60-month rental agreement with [finance company] for:

- An IP Hosted Desk phone handset
- A bluetooth ear piece

On 28 November 2017 the Provider delivered and installed the equipment.

The Representative said in early February 2018, [installer] installed the PABX.

3 The complaint

The Company complained the equipment and services had not worked as promised. The Company wanted to be released from the Provider contract and [finance company] rental agreement.

On 7 September 2018 the Company changed providers for its phone services, and the Provider cancelled the remaining services.

4 The Provider's response

4.1 Compatibility of the Provider services with the PABX

The Provider said it had no obligation to ensure its services were compatible with the Company's PABX because:

- the Provider's standard form of agreement (SFOA) says the Provider does not represent or guarantee equipment will be compatible with its services, and
- the Provider did not give an 'express contractual warranty' its services would be compatible with the Company's equipment.

The Provider believes it acted in good faith and outside of its contractual and statutory obligations by taking steps to assist the Company and alleviate the compatibility issues with the PABX system. The Provider said its responses to the Company's fault reporting showed:

a continued pattern by which the Provider has time and again tried to assist the Company and address queries in a timely manner.¹

4.2 Liability for the Provider contract and [finance company] rental agreement

The Provider does not believe it breached either its contractual obligations or its obligations under the Australian Consumer Law. The Provider said there was no basis for it to release the Company from the service contracts without penalty. Therefore the Provider would not acknowledge any liability for the Company's costs of cancelling the [finance company] rental 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 Provider did not remedy the service failures within a reasonable time, and
- it is fair and reasonable for the Company to receive the remedies set out in the ACL for a likely breach of a guarantee that has not been remedied in a reasonable time.

5.1 The Provider's conduct points to a breach of the ACL guarantee to provide services that are fit for purpose

I am satisfied the Provider's conduct points to a breach of the ACL guarantee to

¹ Provider's response dated 23 November 2018

provide services that are fit for purpose.

The ACL says where a consumer, expressly or implicitly, makes known to the supplier any particular purpose for which services are being acquired, the supplier guarantees the services will be reasonably fit for that purpose.²

I am satisfied a working landline is implicitly a particular purpose for which a consumer acquires telecommunications services. The Representative said they had made it quite clear to the Provider how they wanted the phone system and services to work. The Representative said they wanted to be able to answer calls to the Company's main number on their mobile handset and to be able to make outbound calls from their mobile, as if they were calling from the Company's main number.

The Company first raised issues with the Provider's services in November 2017 and again in early February 2018.

The Provider has maintained throughout the process the faults experienced by the Company are related to the compatibility of the Company's PABX system and not the services or equipment the Provider provided. While some of the issues may have been related to the compatibility of the PABX, the Company also reported specific faults with:

- the Provider mobile phone application (app), and
- the IP Hosted Desk Phone (desk phone).

Both work independently³ of the PABX. As both the app and desk phone did not work properly I am satisfied this points to a breach of an ACL guarantee.

5.1.1 The app did not work properly

I am satisfied the Provider's app likely did not work properly.

The Representative said the app never worked properly, either not working at all, or having limited functionality, for example:

- able to make outbound calls, but unable to receive inbound calls, and
- the mobile phone continuing to ring, even after the call had been answered.

The Provider said it made changes to the app software, and installed an update. The Provider suggested any further issues should be taken up with the mobile phone manufacturer, [brand name]. The Provider also reversed the costs of the [link name] licences and agreed to provide the links at no cost for the remainder of the contract. The

² Appendix 1 discusses why section 61(2)(b) is satisfied and why the exception at section 61(3) does not apply

³ Based on the Provider setting these up prior to the installation of the PABX

Provider said it was not responsible for providing support for the link and suggested the Company was free to uninstall the [link name] licence. The Provider said it could cancel the [link name] licence without penalty. The Representative said there were no issues with any other applications on their [brand name] mobile and so did not believe their mobile was the problem.

In my view, while the Provider did not acknowledge responsibility for the [link name] licence issue, at the very least the Provider's response shows it acknowledges the Company has not been able use the [link name] the way it was promised to work.

5.1.2 The desk phone did not work properly

I am satisfied the Provider's desk phone did not work properly.

The Representative said the Provider promised the desk phone could be used anywhere it could be connected to the internet. The Representative said on a number of occasions they had attempted to use the desk phone while the PABX had problems but the desk phone either worked intermittently or not at all. The Representative said 18 May 2018 was the last time the desk phone worked.

The Representative provided a video which they said was recorded on 23 May 2018 showing an inbound call where:

- the desk phone was not ringing,
- one mobile was not ringing, and
- the other mobile was ringing but did not stop when it was answered.

The Representative said if the system was working properly, the desk phone and both mobiles should be ringing when someone had dialled the Company's main number. Also, once the call was answered, the ringing should have stopped.

The Provider said if the desk phone had been unplugged for an extended period of time it deregisters the licence and cannot sync up with the server.⁴ This prevents the desk phone from completing updates to firmware, software, patches and settings. The Provider said this was likely to be the issue with the desk phone.

However, the Company had raised the issue with the desk phone in March, April and May 2018. The Provider did not provide any information until September 2018, to show it had explained to the Company how to fix the issue with the desk phone.

5.2 The Provider did not remedy the service failures within a reasonable time

I am satisfied the Provider did not remedy the service failures within a reasonable time. The service failures included:

⁴ In an email to my office dated 4 September 2018

- the [link name] licence/mobile app not working properly (first raised when installed in November 2017)
- Incompatibility of services with the PABX (first raised in February 2018)
- The desk phone not working properly (first raised in March 2018)

The ACL says if the supplier is unable to remedy the failure to comply with the guarantee within a reasonable time, the consumer can cancel the contract.⁵

The Provider said it believed it responded in a timely manner each time the Company raised an issue. Despite generally being timely with its responses to the Company's fault reporting, I am not satisfied the responses were always adequate. The Provider never offered or organised to send a technician to visit the Company to understand exactly what the Company's remaining issues were. The Provider said it had only troubleshooted remotely and was satisfied any outstanding issues were user related or related to the PABX.

In the circumstances I do not believe the Provider's response was appropriate. This is because the Provider understood how the issues were impacting the Company's ability to run its business and the duration of the unresolved issues was unacceptable.

For each of the services failures above, as neither were adequately addressed at all, I am satisfied the failures were not remedied in a reasonable time.

5.3 It is fair and reasonable for the Company to be entitled to the remedies set out in the ACL for a breach of a guarantee

I am satisfied it is fair and reasonable for the Company to be entitled to the remedies set out in the ACL for a breach of a guarantee, which in this complaint includes:

- the Company cancelling its service contract with the Provider,
- the Company rejecting the equipment connected to the service contract, but is responsible for returning the equipment, and
- the Provider paying the Company the costs to cancel the rental agreement, within 15 working days of the Company providing evidence to the Provider of the costs of cancelling the rental agreement.

5.3.1 *The Company can cancel its service contract with the Provider*

I am satisfied the Company can cancel its service contract with the Provider.

The ACL provides consumers the right to terminate a service contract if there is a

⁵ Section 267

major failure to comply with a guarantee⁶. As set out above the Provider's conduct points to a major failure of the guarantee to make services fit for purpose within a reasonable time. Therefore, it is reasonable for the Company to exercise its right to cancel the service contract with the Provider.

Alternatively, the Provider's terms and conditions for sale of goods and services says a party may terminate their obligations at any time for a material or persistent breach by the other party. If the breach is capable of being remedied, a party may only terminate if the breaching party has not remedied the breach within 120 days after written notice is given.⁷

I am satisfied on 17 April 2018 the Company emailed the Provider its intention to cancel its contracts unless all of its links were working. As more than 120 days had elapsed by 7 September 2018 when the Company ported its services away, I am satisfied the Company was entitled to exercise its contractual right to cancel its services contract because the services were still not working properly.

5.3.2 The Company can reject the equipment connected to the service contract

I am satisfied the Company can reject the equipment connected to the service contract but is responsible for returning the equipment.

The ACL provides consumers the right to reject goods that are connected with terminated services⁸. Where a supplier has provided goods to the consumers that are connected with the services, the consumer is taken to have rejected the goods at the time of the termination of the service contract. I am satisfied the phone equipment is connected to the service provided by the Provider because:

- both contracts were entered into on behalf of the Provider and [finance company] by the same agent,
- the Provider logo headlines each page of the rental agreement,
- the Provider technicians installed the equipment,
- the equipment relies on the services provided by the Provider, and
- [finance company] has had no involvement in dealing with any technical issues relating to the equipment.

Therefore, as the Company is entitled to cancel its service contract with the Provider, the phone equipment is considered to be rejected as these goods are sufficiently

⁶ Section 267(2)(b)(ii)

⁷ Clause 10(b)

⁸ Section 270(1)(c)

connected to the service being cancelled.

5.3.3 *The Company is responsible for returning the equipment to the Provider*

I am satisfied the Company is responsible for returning the equipment to the Provider because there is nothing apparent to show there would be significant cost for the Company to do so.

The ACL says a consumer must return the equipment to a supplier unless there would be significant cost to the consumer because of:

- the nature of the failure to comply with the guarantee to which the rejection relates, or
- the size, or method of attachment, of the goods⁹

5.4 *The Provider to pay the Company the costs of cancelling the rental agreement*

I am satisfied the Provider must pay the Company the costs of cancelling the rental agreement, within 15 working days of the Company providing evidence to the Provider of the costs of cancelling the rental agreement.

The ACL says where there has been a breach of a guarantee and the breach is not remedied, a consumer may recover an amount that is equal to the value of any other consideration provided by the consumer for the goods¹⁰.

I am satisfied the costs for the Company to cancel the rental agreement for the equipment will be consideration provided by the Company for the equipment. I am satisfied a direction requiring the Provider to pay the Company within 15 working days of evidence of the costs of cancellation is fair and reasonable.

The Provider argued its SFOA released it from liability in any way from a third party equipment finance contract.¹¹ However, the ACL prohibits a person in trade from making a false or misleading representation concerning the existence of a warranty, guarantee, right or remedy.¹² As a breach of an ACL guarantee for services may trigger the right to reject goods, the Provider's SFOA potentially misrepresents a consumer's rights.

⁹ Section 270(1)(d)

¹⁰ Section 270(1)(e)

¹¹ Clause 4.7

¹² Section 29(m)

Judi Jones

Telecommunications Industry Ombudsman

Appendix 1 - Purpose of services disclosed explicitly

I am satisfied the purpose of the services were disclosed by the Company to the Provider explicitly.

Section 61(2)(b) says a consumer may make known, expressly or by implication, to the supplier a particular purpose the services are being acquired for. I am satisfied on the balance of probabilities the Company is likely to have enquired with the Provider about the compatibility of the Provider's services with the new PABX because:

- the Company had only just purchased the [brand name] PABX seven weeks before entering the contracts with the Provider with the intention of using it at the Company's new premises, and
- as the Company had just paid \$1,901.90 for the [brand name] PABX, the Company would ensure this would be compatible with the new services.

The Provider argued against placing any weight on the Company's assertion that the Provider sales representative had represented its services would be compatible with the Company's PABX. In any case the Provider said its SFOA says:

You agree that we do not represent or guarantee the extent to which the Equipment we specify as being compatible for use with a particular Value Added Feature will be able to be used with that Value Added Feature.

In my view the Provider is not able to rely on this clause in its agreement. This is because the Company's PABX does not have a compatibility problem with a 'Value Added Feature'. The Company's PABX is likely to have compatibility issues with the Provider's SIP service and/or [link name] licences.

Value Added Features means any of the *Services value added features as specified in your Application*. I am satisfied the SIP service is a primary service, rather than a 'value added feature', and therefore not intended to be covered by the Provider's exclusion clause.

Appendix 2 - Chronology

Table 1 below sets out the chronology of events relevant to the Company's complaint.

Table 1 - Chronology

Date	Event
17 Aug 2017	The Company entered into a rental agreement for equipment with [finance company] for 1 [link name] licence, 1 IP Hosted telephony system, 1 Bluetooth Headset and 1 SIP Plan.
14 Nov 2017	The Company entered into a contract with the Provider for 2 Provider [link name] Mobility IP Voice plans, an NBN 25/5 internet plan and porting 3 service numbers.
28 Nov 2017	The Provider installed the equipment and the Company signed a delivery acceptance/authority. The Representative told the installing technician that the Provider app on their mobile was not working. The Representative said the technician undertook to follow this up.
Early Feb 2018	The Representative requested information from the Provider to help [installer] complete the installation of the PABX.
16 Feb 2018	The Provider said it contacted the Company about the complaint
28 Feb 2018	The Representative contacted the TIO about their unresolved issues with the phone system and services
Early Mar 2018	The Provider said it provided the Company with the necessary information for [installer] to set up the PABX
16 Apr 2018	The Provider believed it had resolved the Company's complaint and attempted to confirm settlement
17 Apr 2018	The Company accepted the Provider's offer of resolution on the condition that all links are working as per the contract by the close of business on 18 April 2018.
18 Apr 2018	The Provider replied to the Company but was unable to confirm that all links were working.
20 Apr 2018	The Company told the Provider it was still experiencing issues with the service. The Provider responded saying it had taken steps to resolve the issue
24 Apr 2018	The Company told the Provider it was still experiencing issues with the service

27 Apr 2018	The Representative said their mobile was not receiving calls
30 Apr 2018	The Provider said it attempted to contact the Company to address the issues but did not receive a response. The Representative said they called the Provider to report nothing was working
1 May 2018	The Company emailed the Provider to say the phones had not been working for three days. The Provider confirmed it believed the internet service was working. The Provider's view was any remaining issues appeared to be with the PABX.
2 May 2018	The Company told the Provider it was still having difficulties with the [link name] and the Provider requested more information so it could troubleshoot
3 May 2018	The Provider told the TIO it had resolved the Company's complaint
4 May 2018	The Company told the Provider it was still experiencing issues with the service
11 May 2018	The Provider told the TIO it had addressed everything it was responsible for, and the remaining issues were with the compatibility of the PABX. The Company told the TIO it was still unable to receive calls on the mobile phone.
14 May 2018	The Company told the Provider it was still experiencing issues with the service
23 May 2018	The Representative recorded a video showing an incoming call, but only one of the mobiles was ringing. Another mobile and the desk phone were not ringing. When the call is disconnected the phone continues ringing.
29 May 2018	On 9 July 2018 the Provider said this was the last time it had a conversation with the Company about unresolved service issues
9 Jul 2018	The Provider set out the actions it had taken to address the [link name] fault: <ul style="list-style-type: none"> • The default settings on the app had been changed to reduce the need for the Company to have to opt in to certain settings • The app was tested heavily in house and with multiple providers to try and replicate the issue the Company was

	<p>having</p> <p>The Provider said it had not received any contact from the Company since 29 May 2018</p>
31 Jul 2018	The Provider said it had not received any contact from the Company since 29 May 2018
16 Aug 2018	The Company explained the [link name] still did not work how it should and why it believed the issues were not related to the PABX. When the call diversion is activated on the PABX, the mobile phones ring without any problems. However, when the diversion is off, and the links are turned on, the mobiles should ring but do not.
28 Aug 2018	The Provider responded to the Company's email of 16 August 2018 wanting more information about whether or not the phone had been off line around daylight savings time. If so it would have lost its registration. The Provider said the Company had not raised any issues for four months.
31 Aug 2018	The Company responded to the Provider's email of 28 August 2018 questioning why unplugging the phone should be an issue, as the portability of the phone (disconnecting and reconnecting in different locations) was one of the sales features.
4 Sep 2018	The Provider responded to the Company's email of 31 August 2018, justifying its response to the Company's complaint
7 Sep 2018	The Company ported its landline services to a new provider. The Provider responded by cancelling all of its services with the Company.