

## **Decision – 4 October 2019**

### **(De-identified for publication)**

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This document sets out my decision and direction on a complaint about the Provider from the Company. The Representative was authorised to represent the Company in this complaint.

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**

My decision is that the Provider must, within 10 business days of receiving signed acceptance of this decision from the Company:

- waive all service charges billed to the Company
- cancel all services without charging early termination fees
- cancel the equipment rental contract between the Company and the Provider and waive all charges, and
- pay the Company \$11,563.

This is because:

- the Provider breached consumer guarantees by failing to provide services within a reasonable time or with due care and skill
- the failures were major failures of the guarantees
- the Provider misled the Company about the services and products it would supply and the costs of them
- the Company relied on the misleading information given in good faith and

suffered loss, and

- the Provider should remedy the loss caused by its misleading and deceptive conduct.

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## 2 Background

The Company operates a retail business. Until June 2018, the Company had two landlines and an internet service with [provider A] for \$199 per month.

On 25 June 2018, the Provider's salesperson came to the store uninvited and spoke to the Company about the Provider's products and services. The Representative signed an Order Specification for the Provider to supply:

- Three Data/ADSL services
- Two cordless Gigaset handsets
- ATD Connection for Portable Phones
- Three 4G modems
- An alarm
- Two door sensors, a glass magnetic strip and two phone apps
- CCTV equipment (seven dome cameras and one bullet camera) with the Provider's cabling

The Order Specification shows the cost of renting the equipment as \$200 per month (ex GST) for 60 months. It does not set out the cost of the Data/ADSL services.<sup>1</sup>

On the same day, the Provider arranged for the Representative to sign a [rental company] rental agreement for:

- Eight 5 megapixel cameras
- One 24" HD monitor
- One 2 TB hard drive
- One alarm

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<sup>1</sup> A copy is attached at Appendix 1

The monthly rental cost set out in that agreement was \$264 (incl GST) for 60 months.

The Provider did not deliver any of the equipment in the Order Specification. The cameras, HD monitor and hard drive itemised in the [rental company] agreement were installed (and remain), but the alarm was never delivered.

The Provider invoiced the Company for service number XX XXXX XXX6 (for the alarm) from 12 October 2018 and service number XX XXXX XXX4 (the main number) from 24 January 2019.

In May 2019, the Company transferred its telecommunications services back to [provider A] and currently pays [provider A] \$125 per month for those.

On 4 June 2019, the Provider sent the Company a bill for \$6,194.30. Of this, \$5,280 is itemised as "ETC 29 May 2019".

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

The Company's complaint is about misleading and deceptive conduct, failure to deliver agreed services and products, and charging for services not ordered.

During the course of this complaint, the Provider's services failed, leaving the Company without phone or internet.

#### **3.1 Misleading conduct**

The Representatives say the salesperson misled them about:

- The cost of the products and services – in particular, that the Provider would supply three services, telephony equipment and a security system for \$60 per month more than they were paying [provider A] for just telephone services. In fact, the total cost was \$446 per month, and
- What would be delivered – in particular, that the Provider would supply all equipment listed in the order form and install it. In fact, the alarm, door sensors, magnetic strip, modems, and wifi extender were never delivered or installed.

#### **3.2 Disputed charges**

The Company says the Provider charged it for goods and services it did not deliver, specifically:

- Two 4G modems
- One Wifi extender
- One Alarm (itemised twice on separate documents, but not delivered)

- Door sensors and glass magnetic strip
- Telephone services

The Company also complained the Provider charged for Caller ID and Message Bank services that the Company had not requested.

The Company also complained about a bill from the Provider that claimed over \$5,000 in early termination charges.

### 3.3 Loss of service

The Company said on 3 January 2019, it reported its landline and internet services were not working.

The Company said it had suffered and continued to suffer business losses because of the ongoing landline and internet outage. While the main landline was being diverted to a mobile service and the Company was using a mobile broadband service from the Provider, the business was still being affected.

The Company has advised it will not pursue a claim for business loss through my office and said it had transferred its services back to [provider A] in May 2019.

### 3.4 The Provider's response

In response to the complaint, the Provider said:<sup>2</sup>

*We are not paying out the finance agreement.*

*Happy to release customer from the network contract.*

The Provider did not respond to any requests from my office for information about the complaint.

When a provider refuses to respond to a consumer's claims, or to provide information, I can draw an adverse inference from this refusal. In this case, I have drawn an inference that the Provider has no information to contradict the claims made.

## 4 Proposed resolution to this complaint

On 13 August 2019, I issued my proposed resolution for this complaint. Based on the information provided, my proposed resolution was that:

- The Provider should, within 10 business days of receiving signed acceptance of

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<sup>2</sup> Email from the Provider dated 15 May 2019 in response to my office's assessment of the complaint dated 10 April 2019

this proposed resolution from the Company:

- waive all service charges billed to the Company
  - cancel all services and waive all termination fees
  - cancel the Provider's equipment contract and waive all charges, and
  - pay the Company \$11,563, which is the difference between what the Company would have paid for the security equipment, had it not been induced to enter into the [rental company] contract by the Provider's misleading conduct and what it would have cost to buy the equipment outright.
- When this is done, the Company should make the handsets that were provided to it available for the Provider to collect.

The Company accepted my proposed resolution.

The Provider rejected by proposed resolution and said it could not be forced to pay out the equipment contract.

## **5 Reasons for this decision**

The reasons for my decision are I am satisfied:

- The Provider breached consumer guarantees by failing to provide services within a reasonable time or with due care and skill
- The failures were major failures of the guarantees
- The Provider misled the Company about the services and products it would supply and the costs of them
- The Company relied on the misleading information given in good faith and suffered loss
- The Provider should remedy the loss caused by its misleading and deceptive conduct.

## **6 The Provider breached consumer guarantees by failing to provide services within a reasonable time or with due care and skill**

I am satisfied the Provider breached the Australian Consumer Law (ACL) guarantees to provide services within a reasonable time or with due care and skill.

The ACL says a supplier of services guarantees those services will be provided within a reasonable time (section 62) and with due care and skill (section 60).

The Company signed the order for services on 25 June 2018. On 4 September 2018 the Company complained that no services had been provided and said it was still being billed by [provider A]. It asked the Provider to cancel the contract.

From 15 October 2018, the Provider began to bill the Company for Caller ID and Messagebank, despite the Company not asking for either service.

The Provider continued to send bills in October and November. On 17 December 2018, the Company asked the Provider how it could bill the Company when the lines were disconnected.

On 3 January 2019, the Company told the Provider its landline and internet services were not working. On 24 January 2019 the Provider offered a diversion for service number XX XXXX XXX4 to [Company Representative's] personal mobile service. It later billed the Company additional charges for that diversion.

The Company told my office the services were not restored, and the alarm was never installed, despite the Provider charging for a line to service an alarm.

The Company transferred its services back to [provider A] in May 2019.

A chronology of the dealings between the Company and the Provider is attached at Appendix 2.

### 6.1 The Provider's failure to comply with the guarantees were major failures

I am satisfied the Provider's failures to comply with the guarantees were major failures.

The ACL describes a range of circumstances that would constitute a major failure to provide services (section 268). The circumstance relevant to this complaint is the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure.

Based on the Company's experience, I am satisfied if the owners were fully acquainted with the nature and extent of the delay and the faults experienced, they would not have acquired the services and equipment from the Provider.

### 6.2 A waiver of all service charges and cancellation of the contract is an appropriate remedy

I am satisfied that an appropriate remedy for the major failure is for the Provider to waive all service charges and cancel the contract without charge.

On 18 June 2019, the Provider sent the Company a bill for \$6,249 for service charges and has continued to bill the Company since then.

The bill is not justified as the services were not provided within a reasonable time or with due care and skill. The full amount billed for services should be waived.

## **7 The Provider misled the Company about the services and products it would supply and the costs of them**

I am satisfied the Provider misled the Company about the services and products it would supply and about the costs of them.

Section 18 of the Australian Consumer Law prohibits a supplier from engaging in misleading and deceptive conduct in the course of trade or commerce. The Provider is a supplier and I am satisfied its dealings with the Company were in the course of trade or commerce.

The Representative told my office that in June 2018, a Provider salesperson came to the store uninvited and said the Provider could supply telephone and internet and a back to base security system for \$200 per month. Their full description of the salesperson's conduct is set out at Appendix 2.

I note the Representative's advice the Company was not interested in moving from [provider A], "until the security camera option was put to us".

At the time, the Company had two [provider A] services costing a total of \$195 per month. The Company was looking into a CCTV system for the store and had a quote from a firm dated 2 June 2015. That quote was for the installation of six cameras, LED monitor, digital recorder, and UPS for a total cost of \$3,850 plus GST. The Representative said the Company intended to go ahead with the installation and was saving to pay for it.

The Representative said the salesperson misled them by telling them that the Provider would supply three telephone/data lines and supply and install telephone and security equipment for \$260 per month. They said that they considered that the additional \$60 per month for telephone plus security equipment was a good deal and they signed on that basis.

In fact, the Provider signed the Company up to two different contracts:

- A Provider contract for services and equipment, and
- A finance contract with [rental company] for equipment.

The total cost for equipment was \$464 per month and telecommunications services were an additional \$55 per month.

The Representative says the Provider only delivered the handsets and no other equipment set out in the document they signed has been delivered or installed. The Company had to purchase an alarm separately and pay for its installation at a cost of \$400.

### 7.1 The Company relied on the misleading conduct and suffered loss as a result

I am satisfied the Company relied in good faith on the misleading representations made by the Provider salesperson and suffered a loss as a result.

This is evident from the Representative's description about why the Company decided to move the telecommunications services from [provider A] and to not pursue the installation of an alarm and CCTV equipment with another supplier, which was considerably cheaper (set out in Appendix 3).

The Provider did not supply the goods or services it said it would.

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.

To determine this, my office asked what the Company would have done, had the Representatives known the truth – that is that the cost of the services and equipment would be \$464 per month, rather than \$200, and that:

- for the Provider contract, only the handsets would be supplied, and
- for the [rental company] contract, the alarm would not be supplied.

The Representative advised that had they been given the correct information, they would not have changed providers and would have paid for the CCTV equipment and alarm outright.

In my view, the difference between the costs incurred by the Company and the cost they would have incurred had they not been misled, is the loss suffered that the Provider is required to remedy.

I have set out the comparison of costs in Tables 1 and 2, showing the difference is \$23,563 (\$28,240 less \$4,667). I have calculated the costs of services to the date that the Company cancelled its Provider services.

I have assumed that the services contracts would have been for two years, as this is standard in the industry and the Provider has not provided any information to show the Company agreed to a longer term.



**Table 1 Financial position had the Company purchased security equipment outright**

	Per month	Total
Alarm purchase	N/A	\$400
CCTV purchased outright	N/A	\$4,277
		<b>\$4,677</b>

**Table 2 - Financial position from entering into the Provider contracts**

	Per month	Total
The Provider rental costs	\$200	\$12,000
[rental company] contract	\$264	\$15,840
Alarm purchase	N/A	\$400
		<b>\$28,240</b>

## 7.2 The Provider should remedy the loss caused by its misleading conduct

In my view, the Provider must remedy the loss caused to the Company by its misleading and deceptive conduct and its likely breach of the ACL.

My proposed resolution is that the Provider should:

- Waive in full the equipment rental costs set out in the Provider Order Specification, and
- Pay the Company \$11,563, which is the difference between what it would have paid for the security equipment (which the Company is retaining), had it not been induced to enter into the [rental company] contract by the Provider's misleading conduct.

When this is done, the Company should make the handsets that were provided available for the Provider to collect.

Judi Jones  
Telecommunications Industry Ombudsman

## **Appendix 1 – Order Specification**

[copy of order specification]

## Appendix 2 – Chronology

25 Jun 2018	The Company signed a Provider Order Specification and a 60 month equipment finance contract with [rental company]
4 Sep 2018	<p>The Company emailed the Provider complaining about:</p> <ul style="list-style-type: none"> <li>• Being double charged for services</li> <li>• Paying for equipment that had not been supplied</li> </ul> <p>The Company said it thought its total charges would be \$264 per month, but there was another \$180 per month for the Provider's charges. The Company said it could not use the alarm because it was not installed and that 10 weeks had passed since the contracts were signed. The Company asked to cancel the contract due to the delay.</p>
5 Sep 2018	The Provider emailed the Company saying all the hardware had been installed except the alarm. The Provider said it would ask for \$14 per month to be credited in relation to the alarm "on receipt of the alarm being returned". The Provider said [provider A] had not released the lines, so the Company was not being double charged
15 Oct 2018	The Provider invoiced \$10.25 for Calling Number Display and Message Bank for XX XXXX XXX6 (paid by direct debit 29 October)
22 October 2018	The Company complained to the TIO
31 Oct 2018	The Provider emailed the Company wanting to discuss the complaint
6 Nov 2018	<p>The Provider emailed the Company saying it had tried to call but had only got a voice message</p> <p>The Company emailed the Provider saying it had also been trying to get hold of the Provider</p> <p>The Provider emailed the Company acknowledging their earlier phone call and that the Company wanted to be released from contract because the alarm was not installed and 2 modems had not been sent. The Provider offered a 1/3 discount off the cost of the equipment contract when all hardware was delivered and installed.</p>
14 Nov 2018	The Provider invoiced \$15.60 for Calling Number Display and Message Bank for XX XXXX XXX6 (paid by direct debit 28 November)
10 Dec 2018	The Provider invoiced \$15.60 for Calling Number Display and Message Bank for XX XXXX XXX (paid by direct debit 24 December 2018)
17 Dec 2018	The Company emailed the Provider asking how the Provider can

	charge when the line is disconnected. The Company asked the Provider to refund charges for the previous month
18 Dec 2018	<p>The Provider emailed the Company saying XX XXXX XXX6 is active</p> <p>The Company emailed The Provider saying does not have caller ID so was not sure why they are being charged</p> <p>The Provider emailed the Company saying caller ID and Line Hunt are forwarded directly from the upstream carrier. the Company would have to request a cancellation</p> <p>The Company requested the caller ID and line hunt be cancelled</p>
19 Dec 2018	The Provider emailed the Company confirming it had requested the upstream carrier to cancel caller ID and line hunt. However, the Provider said it would not refund the previous charges.
3 Jan 2019	The Company reported landline and internet service not working
11 Jan 2019	The Provider invoiced \$110.33, service charges from 15/10/18 to 31/1/19 for XX XXXX XXX6
14 Jan 2019	The Provider emailed the Company acknowledging an outage
15 Jan 2019	<p>The Provider invoiced the Company confirming payment would be direct debited on 25 January 2019</p> <p>The Company emailed the Provider asking how it could remove the direct debit</p>
24 Jan 2019	<p>The Company emailed the Provider following up on its email of 15 January 2019 as it had not received a response from the Provider.</p> <p>The Provider emailed the Company confirming it had cancelled the direct debit</p> <p>Landline diversion to mobile set up for XX XXXX XXX4 to XXXX XXX XX1</p> <p>The Provider emailed the Company asking it to contact the Provider urgently to get the phones and internet up and running.</p> <p>The Company called the Provider.</p> <p>The Provider emailed the Company proposing to send a Provider technician to sort out the landline and internet services</p>
29 Jan 2019	<p>The Provider emailed the Company a 'Friendly Reminder' for an unpaid invoice of \$110.33</p> <p>Automated notice from the Provider to the Company saying "you may have experienced some network problems today with your Provider Services. This was due to a carrier outage affecting services. The issue has now been resolved and all services restored"</p>
1 Feb 2019	The Company emailed the Provider saying the line is not working so the Provider should not be charging for it
7 Feb 2019	The Company emailed the Provider saying the internet and phone lines are still not working and asked the Provider to release its lines

	back to [provider A] and cancel the contract with the Provider.
12 Feb 2019	The Provider invoiced the Company \$24.30 for the calls diverted to the Representative's mobile, \$30 for the alarm and a late payment fee of \$20
14 Feb 2019	The Company asked the Provider to divert main number to another mobile service XX XXXX XXX8
4 Mar 2019	The Provider emailed the Company a 'Friendly Reminder' for an unpaid invoice of \$165.33
13 Mar 2019	[rental company] emailed Company with payout figure of \$15,576 for equipment
2 April 2019	The Provider sends "friendly reminder" for overdue amount of \$220.33
5 April 2019	The Provider sends "friendly reminder" for overdue amount of \$220.33
2 May 2019	The Provider sends "friendly reminder" for overdue amount of \$275.33
7 May 2019	The Provider sends "friendly reminder" for overdue amount of \$275.33
28 May 2019	The Provider sends "friendly reminder" for overdue amount of \$331.30
29 May 2019	The Company transferred its services back to [provider A]
30 May 2019	The Provider sends "friendly reminder" for overdue amount of \$331.30
4 June 109	The Provider issues invoice for \$6149.30 including Monthly Charges of \$5328.53
21 June 2019	The Provider sends "friendly reminder" for overdue amount of \$6194.30
26 June 2019	The Provider sends "friendly reminder" for overdue amount of \$6194.30
16 July 2019	The Provider issues invoice for \$6249.30

## Appendix 3 – Email from the Representative 2 August 2019

Monday 25/6/18, Provider Senior Telecommunications Consultant / Sales [person] came into our store to see sell us a new telephone package. In discussions with salesperson, they asked what services we currently had and what we were paying and then offered us a package with the Provider that at the time we were under the understanding that is was better than what we were currently receiving from [provider A] and if we had to purchase and install a security system ourselves.

The Sales Consultant was in our store from early morning to late afternoon approximately 4 hours in total and waited while we served customers to get us to sign up. I asked if we could review the paperwork and get back to them but they said it was best if we signed on the spot today. They were forcefully convincing and persistent that we were getting a 'good deal'. We were not looking to change our telephone contract over to another supplier until the security camera option was put to us.

The Provider sold us the communications package that if we were currently paying \$195 / month (this was the cost of our previous [provider A] plan for Telephone and Internet), then if we added the security camera system it would only be an extra \$60 a month making out Telephone, Internet and Security system \$260 / month for 60 months. This would mean we would only be payment \$3,840 over the 60 months for the security system which was similar to the independent quote (attached) we had to install a security system only we would get 60 months to pay it off instead of coming up with the \$3,840 up front. However it was actual \$260 on its own for the security system equalling \$15,600 over the 60 months. Then the telephone and internet on a seperate bill.

We requested a payout figure for the equipment contact and it was \$15,576 at 21/3/19

If we understood that there were two seperate components to the contract; Telephone Service and Equipment Supply, we would have never agreed or signed up to the deal as doubling our monthly telecommunication bill would have impacted our monthly cashflow.