Telecommunications Industry Ombudsman

Decision and direction – 7 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 about the Provider.

On 24 June 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, within 10 working days of receving confirmation that the Representative accepts my decision, to:

- release the Company from its contract without early termination charges
- provide the Company a final account showing a nil balance owing.

Judi Jones
Telecommunications Industry Ombudsman

Appendix

Ombudsman's proposed resolution – 24 June 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 and codes (based on my view of what a Court would be likely to find in all the circumstances), and
- good practice, including industry codes and guidelines.

1 Proposed resolution

Based on the information given to me, my proposed resolution of this complaint is that the Provider should release the Company from its contract by 15 July 2019 without early termination charges.

This is because I am satisfied the early termination charge is an unfair contract term.

2 Background

In 2017, the Company entered a 24-month contract for a wireless broadband service with the Provider. The Company is on a [name] plan for $399 per month. The Company's service is located at [address].

The Company has VoIP[1] services with another service provider.

The Representative is a director of the Company and is authorised to make decisions on its behalf.

[1] Voice over Internet Protocol is a standard telephone service operated using an internet connection

3 The complaint and the Provider's response

The Representative said before the Company entered the wireless broadband contract, the Provider told them the service would be capable of supporting a VoIP service.

The Representative said since September 2017, the wireless broadband service has experienced faults and has been unable to support a VoIP service as promised. As a result, the Representative says the Company moved its internet services to another provider. The Representative says the Provider told them it would charge a $4,500 early termination charge if the Company cancelled the contract.

The Representative would like the Provider to resolve the complaint by:

- releasing the Company from the contract without early termination charges,
- accepting the return of equipment, and
- allowing the Company to pay $250 to settle the account.

The Provider said there was no fault with the Company's wireless broadband service. The Provider said it did not identify any signal or session drop out issues with the service.

The Provider said it did not provide the Company's VoIP service, and is not responsible for any related faults. The Provider said the Company declined the Provider's offer to provide a VoIP service.

The Provider said the early termination charge is the monthly charge of $399 multiplied by the remaining months on the contract.

4 Assessment

On 11 February 2019 my office sent the parties an Assessment of the complaint. The Assessment said:

- the Company's wireless broadband service was operating correctly
- the Provider is not responsible for the Company's VoIP services
- the wireless broadband service was reasonably fit for purpose

Neither party objected to these findings, so I have not addressed these in my proposed resolution.

5 Reasons

The reasons for my proposed resolution are:

- the unfair contract terms provisions in the Australian Consumer Law (ACL) apply to the contract,
- the early termination charge is an unfair contract term,
- it is fair and reasonable for the Company pay the Provider for losses arising from the early termination of the contract, however
- the Provider has not substantiated its loss.

5.1 The unfair contract terms provisions apply to the contract

I am satisfied the unfair contract terms provisions of the ACL apply to the contract between the Company and the Provider. This is because the contract is for the supply of goods and services and is under the threshold amounts. The Company employs less than 20 people.

The Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 made changes to the ACL to include small business contracts, entered on or after 12 November 2016. The Company entered this contract in 2017 and therefore the unfair contract terms provisions apply.

The ACL provides that a term of a consumer or small business contract is void if the term is unfair and the contract is a standard form contract.[2]

A contract is a small business contract if:

- it is for the supply of good or services
- at the time the contract was entered into, at least one party to the contract is a party that employs fewer than 20 persons (excluding casual employees not employed on a regular and systematic basis)
- the upfront price of the contract does not exceed $300,000 (or $1,000,000 for a contract with a duration of more than 12months).

5.2 The early termination charge is an unfair contract term

I am satisfied a court would likely find the early termination charge (ETC) is an unfair contract term. This means the Provider cannot rely on this term to recover an ETC

[2] Section 23

from the Company.

Under the ACL, a term of a contract is void if:

- the contract is a standard form contract, and
- the term is unfair.

5.2.1 The contract is a standard form contract

I am satisfied the contract between the Company and the Provider is a standard form contract.

The ACL says a contract is presumed to be a standard form contract unless the other party to the proceeding proves otherwise.[3] The ACL sets out the relevant matters for determining whether a contract is a standard form contract, including:

- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented
- whether another party was given an effective opportunity to negotiate the terms of the contract

The Company's contract with the Provider refers to a Standard Form of Agreement (SFoA) and other terms and conditions. The Critical Information Summary (CIS) for the Company's plan also includes the ETC term. The information shows these terms were prepared prior to the Company entering the contract.

The Provider did not provide any information to show these terms were negotiable, or that the business was given an opportunity to negotiate these terms.

5.2.2 The ETC term is unfair

I am satisfied a Court would be likely to find the ETC term in the Provider's standard form contract is unfair.

The Australian Competition and Consumer Commission (ACCC)[4] provided the following guidance for assessing the fairness of an ETC term in a business

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[3] Section 27(1)

[4] The ACCC is the Australian competition regulator and national consumer law champion. The ACCC is responsible for promoting competition and fair trading.

telecommunications contract:[5]

- ETCs that equate to customers paying out the remainder of their contract are likely to be unfair,
- ETCs should reflect the provider's genuine estimate of losses if a customer terminates their contract before the term has ended,
- providers should consider costs saved by no longer delivering services to a consumer.

The Provider says the ETC for the Company's plan is calculated as $399 multiplied by the months remaining on the contract. The Company is on a $399 per month plan, which means the ETC is equivalent to 100% of the remaining monthly service charges. The ACCC says this is likely to be unfair.

The Provider has provided a list of costs which it says demonstrates the ETC is a genuine estimate of its loss. This list includes items such as a radio tower, transmitter, cabling, site fees and contractor labour, as well as customer side equipment and labour costs.

The Provider's calculations show its loss is $265.48 per month. This is approximately $133 less than the $399 per month used in the ETC calculation. The Provider has not provided any further information to substantiate the amounts it has attributed to each item. As the Provider has not provided any information to support its genuine estimate of losses, the term is likely to be unfair.

5.3 The Provider has not substantiated its genuine estimate of loss from the early termination of the contract

I am satisfied the Provider has not substantiated its genuine estimate of loss from the early termination of the contract.

It is fair and reasonable for the Company to pay the Provider for its genuine estimate of loss from the early termination of the contract.

My office gave the Provider information about what it needed to provide to allow me to consider an appropriate amount of compensation.

The Provider says the cost to provide the service to the Company is $265.48 per month (see Appendix 1). This means the Provider's claimed loss is $265.48 multiplied by the months remaining on the contract.

[5] In November 2016, the Australian Competition and Consumer Commission (ACCC) published a report titled "Unfair terms in small business contracts: A review of selected industries"

Despite requests from my office to do so, the Provider has not provided any information to support the costs claimed in its calculation. This means I am unable to accept the Provider's unsubstantiated claim for loss.

Judi Jones

Telecommunications Industry Ombudsman

Appendix

The Provider's estimate of its cost to provide the service

A End (Customer Side)	
Radio Module and Antenna:	$931.50
NTU	$150.00
Power Supply	$30.00
Antenna Mast	$60.00
Cable and accessories	$100.00
Contractor Labour	$500.00
Total	$1,771.50

B End (Provider Side)	
Transmitter	$10,000
Cabling	$2,000
Site fees, such as power backup and cabinet	$15,000
Radio Tower	$20,000
Land Rental Fee (for 24 months)	$12,000
Contractor Labour	$10,000
Total	$69,000

The transmitter can handle 15 customers.
$69,000 / 15 = $4,600
A End ($1771.50) + B End ($4,600) = $6,371.50
$6,371.50 / 24-month contract = $265.48 per month