

Decision – 21 June 2019 (De-identified for publication)

This document sets out my decision and direction on a complaint made by the Consumer about the Provider.

On 30 April 2019 I advised the parties of my proposed resolution (reproduced in Appendix 1). The Consumer accepted the proposed resolution and provided information showing the cost of cancelling the [finance company] contract (Appendix 2). The Provider rejected my proposed resolution but did not provide a written response.

Decision and direction

The proposed resolution is my final decision in this matter.

Accordingly, I DIRECT the Provider, within 10 working days of the Consumer accepting my decision, to:

- cancel the remainder of the Consumer's services contract without penalty,
- accept the return of the rejected equipment, and
- pay the Consumer \$5,895.60 which is the cost of cancelling the rental agreement with [finance company].

Judi Jones
Telecommunications Industry Ombudsman

Appendix 1

Ombudsman's proposed resolution – 30 April 2019 (De-identified for publication)

This document sets out my proposed resolution of a complaint from the Consumer 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.
-

Proposed resolution

Based on the information given to me, my proposed resolution of this complaint is that the Provider should by Tuesday 21 May 2019:

- cancel the remainder of the Consumer's services contract without penalty,
- accept the return of the rejected equipment, and
- pay the Consumer the costs of cancelling the rental agreement with [finance company], within 15 working days of receiving evidence of the costs of cancelling.

This is because:

- the Provider's conduct points to a breach of the Australian Consumer Law (ACL) guarantee to provide services within a reasonable time,
 - the Provider's failure to provide the services within a reasonable time is a major failure, and
 - therefore, the Consumer is entitled to the remedies set out in the ACL where there has been a major failure to comply with a breach of a guarantee.
-

Background

In August 2016 the Consumer said they entered into a contract with the Provider for the

Provider to supply their landline services, internet services and equipment. The Consumer also entered into a 48-month contract with [finance company] for \$196.52 (incl GST) to finance the phone equipment¹ supplied by the Provider.²

The Consumer said they had made previous enquiries about an internet connection with other providers and was told internet was not available at their property. The Consumer says they only entered into the contract with the Provider because its salesperson convinced them the Provider could provide internet.

The Consumer said the Provider's salesperson also signed them up for a phone system they would need to operate over the internet.

The complaint and the Provider's response

The Consumer complained the Provider was unable provide a working internet service and they had a phone system they did not want or need.

[Finance company] continues to pursue the Consumer for the unpaid charges under the finance contract.

The Provider has not responded to the Consumer's complaint nor requests for information from my office.

Reasons

The reasons for my proposed resolution are:

- the Provider's conduct points to a breach of the Australian Consumer Law (ACL) guarantee to supply services within a reasonable time,
- the Provider's conduct points to a major failure to comply with the guarantee, and
- this means the Consumer is entitled to the remedies set out in the ACL for a breach of a guarantee.

The Provider's conduct points to a breach of the guarantee to provide services in a reasonable time

I am satisfied the Provider's conduct points to a breach of the guarantee to provide services in a reasonable time.

The ACL says a supplier of services guarantees those services will be provided within

¹ 1 x [model] (PABX phone system) and 2 cordless handsets

² Page 1 of the [finance company] rental agreement says "You acknowledge the date the Goods were delivered and request that we pay the Goods supplier"

a reasonable time.³

The Provider has acknowledged it was unable to provide the Consumer the internet service it agreed to provide. Appendix 1 sets out a chronology of the Provider's inability to provide the internet service.

On 21 September 2016 the Consumer first reported to the Provider they were still waiting for their internet to be connected. On 23 November 2016 the Provider acknowledged it could not provide the internet service and offered to release the Consumer from the internet plan. By 8 March 2017 the Provider acknowledged it had exhausted the other options it investigated.

As the Provider was unable to provide the internet service at all, I am satisfied the Provider breached the guarantee to provide services within a reasonable time.

The Provider's failure to provide the services is a major failure

I am satisfied the Provider's failure to provide the services is likely to be a major failure because the criteria set out in the ACL is met.

The ACL describes a range of circumstances that would constitute a major failure to provide services.⁴ 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.

I am satisfied the Consumer would not have entered a contract for services and equipment with the Provider if they were fully acquainted with the nature and extent of the Provider's inability to provide the services. The Consumer said they only entered into the contract with the Provider for landline and internet services, because other providers had already told them they were unable to provide an internet connection to their property.

The Consumer is entitled to the remedies set out in the ACL for a breach of a guarantee

I am satisfied the Consumer is entitled to the remedies set out in the ACL for a breach of a guarantee, which in this complaint includes:

- the Consumer cancelling the remainder of their services contract,
- the Consumer rejecting the equipment connected to the service contract, but is responsible for returning the equipment, and

³ Section 62

⁴ Section 268

- the Provider paying the Consumer for the costs to the cancel the finance contract after receiving evidence of the cancellation cost.

The Consumer can cancel the remainder of their services contract

I am satisfied the Consumer can cancel the remainder of their services contract.

The ACL provides consumers the right to terminate a service contract if there is a major failure to comply with a guarantee.⁵

I am satisfied there is a major failure because the Provider was unable to provide the internet services in any form. The Provider had not billed the Consumer for internet services but has continued to supply and provide a landline service. In my view the Provider's failure to provide the internet service entitles the Consumer to cancel the remainder of the services contract, as these are not separate service contracts.

The Consumer can reject the equipment connected to the service contract

I am satisfied the Consumer 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 services.⁶ Where a supplier has provided goods to 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:

- the Provider's salesperson presented the finance contract to the Consumer in conjunction with the above equipment and service contracts,
- all the contracts were likely signed on the same day, and
- the Consumer entered into all contracts as a bundled package.

As the Consumer is entitled to cancel the remainder of their service contract with the Provider, the Consumer can reject the phone equipment because these goods are sufficiently connected to the service being cancelled.

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

⁵ Section 267(2)(b)(ii)

⁶ Section 270(1)(c)

- the size, or method of attachment, of the goods.⁷

I am satisfied it is reasonable for the Consumer to return the equipment to the Provider because there is nothing apparent to show there would be significant cost for the Consumer to do so.

The Provider to pay the Consumer the costs of cancelling the finance agreement

I am satisfied the Provider must pay the Consumer the costs of cancelling the rental agreement after the Consumer has provided the Provider evidence of the cancellation cost. However, the Consumer is not entitled to a refund of the payments they have already made for the phone system.

Cancellation costs are consideration for equipment

I am satisfied the costs for the Consumer of cancelling the finance agreement for the equipment will be consideration provided by the Consumer for the equipment.

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 goods⁸.

As the costs are constantly changing because of the remaining time left in the contact, I am satisfied it would be fair and reasonable to require the Provider to pay the Consumer directly after they have provided evidence of the cancellation costs.

No entitlement to a refund of the payments already made for the phone system

I am satisfied the Consumer is not entitled to a refund of the payments already made or incurred for the phone system because the Consumer acknowledged they are still using the equipment.

The Consumer believed the equipment that had been installed was for the internet service that was never connected. The Consumer provided photos of the equipment showing a PABX phone system. I am satisfied the rental agreement with [finance company] that the Consumer signed clearly described the equipment as being a phone system.⁹ I could not find any statements that may have misled the Consumer into thinking the equipment would be either for the internet service, or that the phone system was only compatible with an internet voice service.

Even though the Consumer was unlikely to need a PABX phone system for ordinary

⁷ Section 270(1)(d)

⁸ Section 270(1)(e)

⁹ Page 1 of the [finance company] rental agreement describes the equipment as “1 [brand, model] phone system” and “2x Cordless Handsets”

domestic use, the Consumer signed a rental agreement acknowledging the system was to be for business purposes¹⁰. In my view the Consumer would be liable for the costs of the phone system until they exercise their right to cancel the service, equipment and finance contracts. This is fair and reasonable because:

- the Consumer is still using the phone system, and
- the Consumer contributed to the delay in resolving this issue by taking 18 months to raise their complaint with my office.

Judi Jones

Telecommunications Industry Ombudsman

¹⁰ On page 3 of the Rental Document, the Consumer signed a 'Business Purpose Declaration', declaring the goods to be hired are to be hired wholly or predominantly for business purposes.

Appendix 1 – Chronology of attempts to connect the internet

Abbreviations

TIO – Office of the Telecommunications Industry Ombudsman

Date	Event
Aug 2016	The Consumer entered into a contract with the Provider for landline services, an internet service and equipment.
31 Aug 2016	The Consumer entered into a finance agreement with [finance company] for the phone equipment supplied by the Provider
21 Sep 2016	<p>The Consumer emailed complaint to the Provider, internet service not yet provided. Wanted connection by 22/9 or would seek legal advice and contact TIO.</p> <p>The Provider tried to call the Consumer to discuss, but the Consumer was unavailable (at work)</p>
5 Oct 2016	The Consumer emailed the Provider, modem received but internet not working. Did not believe they should have to pay the technician cost to install the modem.
26 Oct 2016	<p>The Consumer emailed the Provider saying they were still being charged by [previous provider]</p> <p>The Provider replied saying it would enquire about wireless internet options</p>
4 Nov 2016	The Consumer emailed the Provider saying services still not being provided so asked for the contracts to be cancelled.
16 Nov 2016	<p>The Consumer emailed the Provider asking it to close their account and have someone collect the equipment.</p> <p>The Provider emailed the Consumer asking if they had received a notification saying their finance was rejected.</p>
17 Nov 2016	<p>The Consumer emailed the Provider saying finance was not rejected, but had been put on hold until the issues were resolved.</p> <p>The [finance company] emailed the Consumer saying the rental contract commenced on 6/9/16</p> <p>The Provider emailed the Consumer offered to send a dongle while other options were looked into</p>

21 Nov 2016	The Provider emailed the Consumer saying it was having difficulty locating an ADSL 2+ service for their property and asked if they could provide the name of their neighbour who had an ADSL 2+ connection.
23 Nov 2016	The Provider emailed the Consumer saying the Provider cannot provide an ADSL 2+ connection and would be happy to release them from the plan. The Provider suggested an [other provider] wireless plan.
13 Dec 2016	The Consumer emailed the Provider asking about the cost of wireless internet.
14 Dec 2016	<p>The Provider emailed the Consumer saying they would need to contact [other provider] for the pricing of the wireless option.</p> <p>The Consumer emailed the Provider asking why they are paying the Provider and the [finance company]</p> <p>The Provider emailed the Consumer saying the Provider is providing the phone lines and system</p> <p>The Consumer emailed the Provider asking why they are paying the [finance company]</p> <p>The Provider emailed the Consumer saying they were paying the [finance company] for the hardware</p> <p>The Consumer emailed the Provider saying they did not want the 'black box or telephones'</p> <p>The [finance company] emailed the Consumer asking the Consumer to clarify their concerns in writing</p> <p>The Consumer emailed the [finance company] saying they wanted to cancel the finance contract because they did not need or want the equipment</p> <p>The Provider emailed the Consumer saying the phone system and phone lines work, so the Provider would not cancel</p> <p>The Consumer emailed the Provider saying the Provider is only providing one phone line and therefore they have no use for the rest of the phone system</p> <p>The [finance company] emailed the Consumer saying it was investigating their case and said the agreement with the [finance company] could only be terminated by paying out the contract</p>

15 Dec 2016	The Provider emailed the Consumer saying phone system works with the internet and is NBN compatible though NBN is not available in the area.
30 Jan 2017	The Provider emailed the Consumer saying it will try and order the ADSL 2+ service again.
8 Feb 2017	The Provider emailed the Consumer saying a booking to install a new line to provide a DSL service would take place on 10/2/17
10 Feb 2017	<p>The Consumer emailed the Provider saying line had been installed but it was installed in a different place to where the original box was located</p> <p>The Provider emailed the Consumer saying it would now provision the DSL service</p> <p>The Consumer emailed the Provider asking if the existing black box and modem would work</p> <p>The Provider emailed the Consumer saying the black box was a PABX, which had nothing to do with the internet. The Provider asked who provided the modem they had</p>
11 Feb 2017	The Consumer emailed the Provider saying the Provider had provided the modem
8 Mar 2017	The Provider emailed the Consumer saying it could not provide a DSL service because they were 4438 metres from their nearest exchange.

Appendix 2 – Cost to cancel [finance company] contract

In response to my proposed recommendation, the Consumer provided information showing the cost to cancel the [finance company] contract was \$5,895.60.

In my proposed resolution I said the Consumer was not entitled to a refund of the payments already incurred because they were still using the phone equipment associated with the [finance company] contract.

The Consumer provided a letter from [finance company] dated 5 June 2019 showing the contract had been cancelled and the Consumer had paid all outstanding amounts.

Figure 1 – Letter from [finance company] showing contract cancelled

[image of letter]

The Consumer's contract with [finance company] was for 60 months at \$196.52 per month, a total value of \$11,791.20. The Consumer provided a contract statement from [finance company] showing they were liable up to the 30th payment. As [finance company's] calculation of the costs to cancel is based on the total remaining payments for the contract, this means the cost to cancel the contract was \$5,895.60.

Figure 2 – [finance company] contract statement

[image of contract]