

Decision – 2 December 2019

(De-identified for publication)

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

My decision 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.
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1 Decision

My decision is that the Provider must, within five business days of receiving the Company's written acceptance of this decision

- Release the Company from its services contract without further charge, and
 - Pay the Company \$1,752.86 by bank cheque. This amount is made up of:
 - Refund \$432.86 in service charges, and
 - Refund \$1,320 taken from Company's account without authority.
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2 Background

The Company authorised the Representative to pursue the complaint.

Before October 2017, Provider 1 supplied the Company with its telecommunications services.

On 19 October 2017, on behalf of the Company, the Representative signed the Provider's Order Specification for:

- a Panasonic KX700 phone system and two KX-DT546 cordless handsets for \$150 over a 60-month term,
- three ISDN lines with Auto Attendant, Music On Hold, Voicemail and Voicemail to email (one on an Unlimited plan at \$60 per month and two on plans, each at \$30 per month) for a term of 60 months, and
- ADSL at \$50 per month for a term of 24 months.

On the same day the Representative signed a Rental Agreement for \$150 per month, plus GST of \$15. The schedule to that agreement says the goods supplied are:

- One Panasonic
- Two Panasonic Handsets.

On 1 March 2019, the Representative notified the Provider that in May 2019, the Company would be moving to a new address.

On 26 June 2019 the Provider debited \$1,320 from the Company's nominated bank account.

On 10 July 2019 the Representative asked the Provider to release the Company from its contracts. The Provider responded, quoting \$6,460 in termination costs, excluding GST.

3 The complaint and the Provider's response

The Representative complained that the Provider delayed in connecting the Company's services to the new premises when the business moved in May 2019. He said this left the Company without phone or internet for over two months.

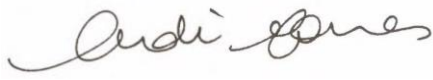
The Provider did not respond to requests from my office for information.

4 Proposed Resolution

On 4 October 2019, I advised the parties of my proposed resolution (reproduced in the Appendix).

The Company accepted my proposed resolution. The Provider did not say whether it accepted or rejected my proposed resolution, but on 29 October 2019 asked for time to resolve the complaint before I made a decision.

On 19 November 2019, the Representative told my office that the Provider had made no contact with the Company.

A handwritten signature in black ink, reading "Judi Jones". The signature is fluid and cursive, with the first name "Judi" and last name "Jones" clearly distinguishable.

Judi Jones

Telecommunications Industry Ombudsman

Appendix 1: Proposed Resolution

Ombudsman's proposed resolution

Service provider	The Provider
Account holder	The Company
Representative	The Representative
Date	4 October 2019

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

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 guidelines.

1. Proposed resolution

Based on the information given to me, my proposed resolution of this complaint is that the Provider should, within 10 business days of receiving the Company's acceptance of this proposed resolution:

- Refund \$432.86 in service charges
- Refund \$1,320 taken from the Company's account without authority
- Release the Company from its services contract without further charge.

This is because:

- The Provider did not supply services for almost six weeks despite the Company giving adequate notice of its planned move to new premises
- The Provider has not demonstrated any entitlement to take \$1,320 from the Company's account
- The Provider should not charge early termination fees

- It is fair and reasonable for the Provider to refund \$1,752.86 and release the Company from its contract without termination charge

2. Background

Before October 2017, Provider X supplied the Company with its telecommunications services.

On 19 October 2017, on behalf of the Company, the Representative signed the Provider's Order Specification for:

- a Panasonic KX700 phone system and two KX-DT546 cordless handsets for \$150 over a 60-month term,
- three ISDN lines with Auto Attendant, Music On Hold, Voicemail and Voicemail to email (one on an Unlimited plan at \$60 per month and two on plans, each at \$30 per month) for a term of 60 months, and
- ADSL at \$50 per month for a term of 24 months.

On the same day the Representative signed a Rental Agreement for \$150 per month, plus GST of \$15. The schedule to that agreement says the goods supplied are:

- One Panasonic
- Two Panasonic Handsets.

On 1 March 2019, the Representative notified the Provider that in May 2019, the Company would be moving to a new address.

On 26 June 2019 the Provider debited \$1,320 from the Company's bank account.

On 10 July 2019 the Representative asked the Provider to release the Company from its contracts. The Provider responded, quoting \$6,460 in termination costs, excluding GST.

A chronology of events, as described by the Representative, is set out in Appendix 1.

3. The complaint and the Provider 's response

The Representative complained that the Provider delayed in connecting the Company's services to new premises when the business moved in May 2019. He said this left the Company without phone or internet for over two months.

The Provider did not respond to requests from my office for information.

4. Adverse inference

I have drawn an adverse inference from the Provider not responding to requests from my office for information. I am satisfied it is more likely than not that either:

- The Provider does not hold information to contradict or cast doubt on the Company's position, or
- the information the Provider holds supports the Company's position.

5. Reasons

The reasons for my proposed resolution are:

- The Provider did not supply services for almost six weeks despite the Company giving adequate notice of its planned move to new premises
- The Provider has not demonstrated any entitlement to take \$1,320 from the Company's account
- The Provider should not charge termination fees
- It is fair and reasonable for the Provider to refund \$1,752.86 and release the Company from its contract without charge

6. The Provider did not supply services for almost six weeks, despite the Company giving adequate notice of its planned move to new premises

I am satisfied the Provider did not supply services to the Company for almost six weeks despite the Company giving the Provider adequate notice of its planned move to new premises.

The Provider's Terms and Conditions say that two months' notice is required to relocate network services and equipment.

On 2 March 2019, the Representative emailed the Provider, referring to a telephone conversation the day before about the relocation and asking for the necessary

paperwork. The Representative told my office the Provider did not send the paperwork until 14 April 2019. The Representative said he returned the documents promptly and asked for the connection to the new premises to be completed by the end of April.

The Representative said there were problems with the NBN network connection to the new premises, but he contacted NBN Co himself and had the necessary cabling done.

The Company moved premises on 14 May 2019, 10 weeks after the Representative first spoke to the Provider about the move.

The Representative said from 14 May until 21 June 2019, there were no telecommunications services at the new business premises. The Representative said he had to divert calls to his mobile and use a 4G dongle for internet. He said the Provider sent a technician on 13 June 2019, but the technician was not able to connect the services. On 21 June 2019, a third party technician connected the services.

7. The Provider has not demonstrated any entitlement to take \$1,320 from the Company's account

I am satisfied the Provider has not demonstrated any entitlement to take \$1,320 from the Company's account.

The Provider told the Representative the amount it debited from the Company's bank account was for the technician who attempted to connect the services and equipment to the building.

The Representative said the technician the Provider sent could not configure the phones. On 21 June 2019, a third party technician connected the phones to the network. The Representative says the third party technician completed the internal cabling for the new premises and contacted NBN Co directly to connect the premises to the building but said the job could have been done remotely.¹

The Representative provided a copy of the Company's bank statement showing the Provider debited \$1,320 on 26 June 2019. The Representative said this deduction was without notice and was not authorised.

The Provider has not provided any information to show it quoted for any work or sent an itemised bill before deducing the amount.

8. The Provider should not charge termination fees

I am satisfied the Provider should not charge termination fees if the Company terminates its service contract.

¹ See the Appendix 2 which sets out the Representative's recollection of events

This is because:

- The Provider did not disclose any early termination charges at the commencement of the contract
- Even if they did disclose early termination charges, the Provider 's Terms and Conditions relating to termination charges are likely to be unfair

8.1 The Provider did not disclose the early termination charges at the start of the contract

I am satisfied the Provider did not disclose the early termination charges at the commencement of the contract.

The Order form says the ADSL service was for a 24-month term and the voice services for a 60-month term.

Section 4.1 of the TCP Code 2015 requires the Provider to provide a Critical Information Summary to the Company before the sale. Critical Information Summaries must set out various matters including the minimum and maximum payments under the contract, the minimum term applicable and the maximum charge payable for early termination. The Provider did not provide the required Critical Information Summary, therefore breaching the TCP Code.

The Provider provided a brochure for the service, but this does not meet the requirements of the Code. In particular, it does not comply with clause 4.1(a)(ii), which requires the disclosure of "the maximum Charge payable for early termination of the Offer."

The Application form says:

IMPORTANT NOTICE TO THE PURCHASER – You have the right to cancel this agreement within 10 days from and including the day after you signed/received this Customer Agreement. Important details about your additional rights to cancel this agreement are set out in the Cancellation Notice/Information provided with this document.

The Total Minimum Consideration Payable for this Agreement is the total of the Total Minimum Payable for the Agreement Term for each service type. I acknowledge that the Minimum Payable amounts show for each service type may be subject to a bundled services offer. In the event that an eligible bundled service is cancelled, standing pricing will apply to remaining services. For details of any applicable Early Termination Fees, please see the Rate Sheet enclosed with this agreement or contact Customer Service.

The Rates sheet gives no details of any early termination charges.

The Provider's Terms and Conditions are published on its website. The Terms and Conditions have a Definitions section. However, that section does not define any of the terms "Total Minimum Consideration", "Total Minimum Payable", or "Agreement Term", nor do the definitions provide guidance about how to interpret the Application form.

In my view, the failure to provide the details of possible early termination charges precludes the Provider from now claiming them.

8.2 The Provider's terms about early termination charges are likely to be unfair

I am satisfied that even if the Provider did disclose early termination charges, a court would likely find the Provider's term about early termination charges to be unfair.

As a general comment, 24-month terms for services are standard in the industry. A term of five years is unusually long and if the Provider seeks to lock a customer into a contract for that period, I would expect it to draw the customer's attention to any termination charges with clear wording so the customer can weigh up whether it is wise to enter such a long contract.

In July 2019, the Provider told the Company it would charge termination costs of \$4,640 plus GST (38 months x \$170) if the Company cancelled its services contract. By then, the Company had been in the contract for services for 24 months.

The Australian Consumer Law provides that a term of a small business contract is void if:

- (a) the term is unfair, and
- (b) the contract is a standard form contract.²

I am satisfied that the contract between the Company and the Provider is a small business contract and that the Terms and Conditions are a standard form contract.

Under the ACL, a term is unfair if:

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

² Section 23

Guidance published by the Australian Competition and Consumer Commission (ACCC)³ on assessing the fairness of an ETC term in a business telecommunications contract says:

- 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,
- The Provider s should consider costs saved by no longer delivering services to a consumer.

The Provider says the early termination charge for the Company is calculated as the monthly charges multiplied by the months remaining on the contract.⁴ This means the early termination charge is equivalent to 100% of the remaining monthly service charges. The ACCC says this is likely to be unfair.

In addition to the early termination charge, the Provider reserves the right to charge an additional \$150 a month for the remaining months of a fixed term contract.⁵

In my view, both clause 13.3 and 13.5 are unfair contract terms and the Provider should not seek to enforce them.

8.3 It is fair and reasonable the Provider refund \$1,752.86 and release the Company from its contract without early termination fees

In my view it is fair and reasonable the Provider refund \$1,752.86 and release the Company from its contract without early termination fees.

The amounts that should be refunded are set out in Table 1.

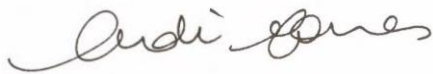
³ [Unfair terms in small business contracts: a review of selected industries](#)

⁴ Clause 13.3

⁵ Clause 13.5

Table 1

Item	Amount
50% of May 2019 account (\$258.39)	\$129.20
June 2019 account	\$303.66
Direct debit on 26 June 2019	\$1,320
Total to be refunded	\$1,752.86



Judi Jones

Telecommunications Industry Ombudsman

Appendix 1: Chronology

19 October 2017	The Representative signs the order form for equipment and services, Rental Agreement and Direct Debit Request form
26 February 2019	The Provider direct debited \$264.04 from the Company's account
1 March 2019	The Representative sent an email saying he was trying to call the Provider, but no one was answering. He asked the Provider to call him
2 March 2019	The Representative emailed the Provider to say someone from the Provider had said he would send through paperwork for relocating the service and to advise whether the NBN network was available and applicable rates, but had not sent this information.
26 March 2019	The Provider direct debited \$258.96 from the Company's account
29 April 2019	The Provider direct debited \$264.37 from the Company's account
22 May 2019	The Provider direct debited \$272.91 from the Company's account
18 June 2019	The Provider direct debited \$258.91 from the Company's account
26 June 2019	The Provider direct debited \$1320 from the Company's account
10 July 2019	The Provider emailed the Representative to say the Provider would charge the Company \$6,460 in termination charges if it cancelled the contract and said it had placed a \$150 on the account
10 July 2019	<p>The Representative emailed the Provider saying he provided the internet to the Company for the two months The Provider said it could not provide a connection, including sourcing a "4K" modem to run the business and the NBN connection. He said he had cabled the office so the phones could operate.</p> <p>The Representative said he was seeking reimbursement for internet costs the Provider had not provided</p>
29 July 2019	The Representative emailed the Provider saying the promised \$150 refund is not showing on the account and the Provider had added charges for calls to 1300 numbers, but most of those calls were to the Provider about faults
30 July 2019	The Provider direct debited \$306.66 from the Company's account