

Decision – 30 March 2021 (De-identified for publication)

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

I have decided the Provider must refund the Consumer \$1,908.49:

- \$91 for service charges between 19 December 2018 and 4 January 2019
- \$1,817.49 for half of the early termination charge, being \$3,634.97.

This is because:

- The Provider should refund service charges for the period the service did not work
- The Consumer breached the contract by terminating it within the fixed term period
- The Provider should refund half of the early termination fee

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.

30 March 2021

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1 Background

The Consumer runs a business and had the following services with the Provider:

- Three voice services at \$45 a month, and
- An internet service at \$75 a month.

2 The complaint and the Provider's response

The complaint is about faults with the Consumer's services, and early termination charges.

The Representative says on 21 December 2018 the services started to be faulty, and this went on for an extended period. They say the Provider was not able to fix the faults, and did not refund charges for the faulty services. As a result, the Consumer decided to move the services to another provider.

After the Consumer cancelled the services, the Provider charged an early termination fee of \$3,634.97, and direct debited the amount from the Consumer's account. The Representative believes the Provider should not have debited this amount because the services were cancelled due to a fault.

The Provider said the Consumer breached the contract by cancelling the services part-way through the fixed term contract. The contract allows the Provider to recover the early termination fee, and as a result the Provider is not prepared to refund it.

3 Reasons

The reasons for my decision are I am satisfied:

- The Provider should refund service charges for the period the service did not work
- The Consumer terminated the contract within the fixed term period
- The Provider should refund half of the early termination fee

3.1 The Provider should refund service charges for the period the service did not work

I am satisfied the Provider should refund service charges for the period the service did not work.

According to the interaction notes provided by the Provider, on 21 December 2018 the Consumer reported that the internet and voice services were not working. The notes show the Provider escalated the fault to its upstream carrier, NBN Co, on the same day. On 28 December 2018, an NBN Co technician visit was scheduled to conduct repairs. The records show on 4 January 2018, the service was fixed and had been working for the last day and 20 hours. On this information, it seems the fault was fixed

in 13 days.

The Representative sent emails to the Provider asking for credits for this period. The Provider said it referred the matter to its billing team, but did not settle on a credit amount, or apply any credits to the account.

I am satisfied there was a period of 13 days the business was not able to use its services, and the Provider should refund charges for this period.

I have calculated the monthly minimum spend for the internet and voices services to be around \$210. The daily average spend based on this figure is \$7. As the business was not able to use its services for approximately 13 days, the Provider should refund \$91 of service charges for this period.

The Provider has confirmed it will process this credit.

3.2 The Consumer terminated the contract within the fixed term period

I am satisfied the Consumer terminated the contract within the fixed term period.

On 9 October 2017, the Consumer entered into a contract with the Provider to supply three voice services at \$45 per month over 36 months and an internet service at \$75 per month over 36 months.

Clause 15.3 of the Standard Form of Agreement for the service provides:

- a) If you have agreed to receive a Service for a fixed term and you cancel the Service after the cooling off period and before the expiry of the fixed term, you will be required to pay:
- b) Any applicable Early Termination Fee if your termination was not the result of our breaching the agreement.

The Consumer moved its services to another provider on 16 May 2019, terminating the Provider's contract within the fixed term period.

3.3 The Provider should refund half of the early termination fee

I am satisfied the Provider should refund \$1,817.48 to the Consumer because:

- The Provider did not breach the agreement
- It would not be fair for the Provider to charge the full value of the contract
- The Provider has not demonstrated what loss it suffered
- It is fair and reasonable that the parties share the loss

3.3.1 The Provider did not breach the agreement

I am satisfied the Provider did not breach the agreement, because it responded promptly to the fault report on 30 January 2019, and was unable to find a fault on its network.

The information available to me supports a conclusion that the Provider was supplying the services in line with the agreement.

3.3.2 It would not be fair for the Provider to charge the full value of the contract

I am satisfied it would not be fair for the Provider to charge the full value of the contract. This is because doing so has the effect of penalising the Consumer for the cancellation of the contract.

Our Terms of Reference set out the criteria for our decision making. Paragraph 1.5 of the Terms of Reference states that when handling complaints we will consider relevant law, good practice and what is fair and reasonable.

The Australian Competition and Consumer Commission (ACCC)'s guidance on assessing the fairness of a cancellation fee in business telecommunication contract says:

- Cancellation fees should reflect the provider's genuine estimate of losses if a customer cancels their contract before the term has ended,
- Cancellation fees that equates to customer's paying out the remainder of their contract are likely to be unfair,
- Cancellation fees should account for the costs the Provider saved by no longer delivering the service.¹

I consider this guidance represents 'fair and reasonable' factors which I should consider in deciding if a provider can recover an early termination fee.

In my view, the Provider's early termination fee is unfair, because the Provider has charged termination fees calculated at the minimum monthly fee times the remaining months of the contract. This means the early termination charge equates to the Consumer paying out the remainder of their contract.

Generally, early termination charges should reflect a provider's genuine estimate of losses if a customer terminates their contract before the term ends. This is because the provider is expected to have some cost savings as a result of not having to deliver services.

I accept that the Consumer ended the contract inside the fixed term period, which is likely to have led to the Provider suffering some losses. However, I also do not consider it fair and reasonable for the Provider to recover the full value of the contract when it is no longer required to provide services.

¹ [Unfair Terms in small business contracts: A review of selected industries](#)

It is reasonable to accept that ending the contract within the fixed term likely resulted in the Provider suffering some loss, such as upstream wholesale costs, and the Provider should be able to recover those costs. However, it is unlikely that the loss would be the equivalent of the cost of 100% service charges for the remaining term of the contract.

3.3.3 The Provider has not demonstrated what loss it suffered

The Provider has not demonstrated what loss it suffered.

The Provider considers it should not have to refund the early termination fee because it is a small business itself, and the loss of the benefits of the contract impacts the Provider deeply.

On 18 December 2019, the Telecommunications Industry Ombudsman asked the Provider for information to demonstrate that the early termination charge was a genuine estimate of the Provider's loss. The Provider has not provided information about the wholesale costs it incurred when the service was terminated.

The Provider says it had to bear the charges with regard to cancelling the services with its carrier, and it also lost expected profit from the contract.

I accept the Provider incurred financial loss as a result of the cancellation of the contract, and I agree that it should be able to recover the loss it suffered. However, at this stage, the only concrete information I have about the Provider's loss is the details about the connection fee in the contract. By entering into the contract for a 36 month term, the Consumer avoided the connection fee of \$49 for each handset which would have been payable without a fixed term contract.

The Provider will save some costs by not having to provide the service on an ongoing basis, but it is not accounting for any of that benefit it receives. I am of the view that expecting a consumer to pay out the remaining contract term penalises a consumer and is unfair.

3.3.4 It is fair and reasonable that the parties share the loss

I consider it is fair and reasonable for the parties to share the responsibility for the early termination equally.

The Provider charged early termination fees of \$3,634.97. It is reasonable for the Provider to refund half of the early termination charge, being \$1,817.48.

In the absence of information to show exactly what loss the Provider has suffered, I am satisfied that allowing the Provider to retain \$1,817.48 of the early termination charge covers the connection costs that the Consumer avoided by entering into the fixed term contract, as well as a reasonable amount to cover potential cancellation costs of the Provider's wholesaler.

Setting the early termination charge at half of the remaining access fees is also consistent with the Provider's early termination charges for its current internet plans over 24 months.²

Louise Halliday

Adjudicator

Telecommunications Industry Ombudsman

² The Decision contained a link to the Provider's current plans.