

Preliminary View – 8 July 2020

(De-identified for publication)

My Preliminary View is the Telco should:

- Refund \$8,203.03 to the Consumer within 10 business days of receiving the Consumer's signed acceptance of this Preliminary View.

The Preliminary View 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 Background

The Consumer had services with the Telco since March 2017.

Originally, the Consumer had a Business Internet service billed at \$799 per month ('the old service').

In November 2018 the Telco contacted the Consumer and offered to upgrade the old service to a Fibre service ('the new service') at no additional charge and waive the early termination charge for the original service.

The Consumer completed and returned the signed order form in November 2018.

The Telco connected the new service in February 2019 and began to bill the Consumer for the new service at \$799 per month.

2 The complaint and the Telco's response

The Consumer complains the Telco did not disconnect the old service and invoiced the Consumer for both services between February 2019 and November 2019. They say the business was unaware it had two services connected and was only using one.

The Consumer is disputing the double charges from 19 February 2019 until 30 November 2019.

The Telco says the Consumer was responsible for requesting cancellation of the old service and transitioning to the new service when it was ready to do so. The Telco says it provided the new service from 19 February 2019 and the service was working and useable from this date.

The Telco says that while the Consumer was not using the new service until November 2019, this was not due to any failure on the part of the Telco. The Telco says it was due to the Consumer's delay in migrating its internal network to the new service.

The Telco says all the service charges are valid, but offered to credit the Consumer \$1,598. This is the equivalent of two months of service charges for one service. The Consumer rejected this offer.

3 Reasons

The reasons for my proposed resolution are:

- the Telco misled the Consumer by representing it would terminate the contract for the old service
- the Telco misled the Consumer by representing it would activate the new service
- It is not fair or reasonable for the Telco to charge for the old service from 19 February 2020

3.1 The Telco misled the Consumer by representing it would terminate the contract for the old service

I am satisfied the Telco misled the Consumer by representing it would terminate the contract for the old service.

This is because the Telco:

- contacted the Consumer to suggest that they take up the new service, and
- sent emails saying it would terminate the old service.

The contract for the old service allowed either party to terminate the contract by giving notice. The Consumer did not initiate the change in the service or the new service contract.

The Telco contacted the Consumer on or around 17 November 2018 with a “promotional offer” for an upgrade to the new service. The Telco then followed up with an email to the Consumer with details of the offer. The email included the following:

“We would look to have the new service implemented and active, then decommission your old service as to avoid any unwanted downtime between transition as well as allowing you time to sort any internal network changes.”

On 26 November 2018, the Telco sent another email, which included the following:

“Once the new service is in place we can terminate the old service along with its associated contract without any additional cost.”

I believe these emails were effective notice to the Consumer it was terminating the contract for the old service and would disconnect the old service.

The Telco should have decommissioned the old service as soon as the new service was operational.

3.2 The Telco misled the Consumer by representing it would activate the new service

I am satisfied the Telco misled the Consumer by representing it would activate the new service.

The Consumer complained the Telco “made no effort” to connect the premises to the new service or to tell the Consumer it would need to engage a technician to do this. They said they thought its premises were connected to the new service in February 2019. This was when the Telco started billing for the new service.

In my view, the emails quoted above give the impression that the Telco would implement and activate the old service.

On 24 June 2020, I asked the Telco to give me instructions it gave the Consumer about how to activate the service. On 2 July 2020, I sent the Telco a reminder to provide the information. The Telco did not respond.

Where a party fails to provide information to support their position, I may draw an adverse inference from that party's failure to comply with the request.

Section 5.2.1 of the Telecommunications Industry Ombudsman's Complaint Handling Procedures says if a party does not provide information requested, the Telecommunications Industry Ombudsman can draw inferences from this. This includes:

- that the party does not have information or evidence to support their position, or
- that the information the party holds supports the other party's position.

In the circumstances, I have drawn an adverse inference and accept the Consumer's account that the Telco did not provide them with any instructions about how to connect the premises to the new service, or tell them it would need to engage a technician.

3.3 It is not fair or reasonable for the Telco to charge for the old service after 19 February 2019

I am satisfied it is not fair or reasonable for the Telco to charge for the old service after 19 February 2019.

The Telco sold the Consumer the new service to replace the old service. The Telco represented it would disconnect the old service when the new service was operational.

The Consumer did not need both services. The Consumer did not and could not use both services at the same time.

The Telco should not benefit financially from its failure to tell the Consumer what it needed to do to use the new service or its failure to disconnect the old service.

4 Calculation of refund

My findings mean the Telco should refund the Consumer \$8,203.03 (see table 1).

Charge	Amount
19 to 28 February 2019 – 10 days @ \$26.63	\$266.30
1 to 31 March	\$799.00
1 to 30 April	\$799.00
1 to 31 May	\$799.00
1 to 30 June	\$799.00
1 to 31 July	\$799.00
1 to 31 August	\$799.00
1 to 30 September	\$799.00
1 to 31 October	\$799.00
1 to 30 November	\$799.00
Subtotal	\$7457.30
Add 10% GST	\$745.73
Total to be refunded	\$8203.03

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