

Preliminary View – 12 January 2023

Deidentified

This document sets out my Preliminary View on how this complaint about the provider from the consumer should be resolved.

My Preliminary View is the provider should:

- Immediately remove the consumer from the provider's marketing correspondence
- Make the other changes to the consumer's provider account if he appropriately identifies himself at a provider store or completes the multi-factor authentication process

However, the provider is not required to:

- Correct the email correspondence related to the provider handling the consumer's enquiry as a complaint
- Confirm it will only correspond with the consumer by email
- Retain call recordings

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.

23 August 2023

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1 The complaint

The consumer complained:

- The provider refused to accept his request to opt out of all marketing correspondence from the provider, unless the consumer completes the provider's multi factor authentication (MFA) process to confirm his identification
- The provider refused to correct personal information held by the provider (email correspondence between the provider and the consumer) where the provider referred to the consumer's email as a complaint
- The provider refused to accept the consumer's request to only correspond with him by email
- The provider agreed to provide the consumer a copy of a call recording but has now told the consumer that the call recording has been deleted

2 The provider's response

The provider said:

- it will only change the consumer's contact and marketing preferences after he completes the MFA process
- It will not allow the consumer to opt out of the MFA requirement altogether
- Due to the amount of time that has passed, it does not have the call recording the consumer is requesting
- It had not made any changes to the consumer's the provider account because he had not completed the MFA process

3 The recommended outcome and the parties' response

On 4 October 2022 the Telecommunications Industry Ombudsman (TIO) issued a recommended outcome that found the provider's response to the consumer's complaint was fair and reasonable because:

- The provider is within its right to ask the consumer to complete the provider's identify verification processes before making changes to his the provider account
- The consumer's request to opt out of the MFA process is not a reasonable request
- The provider cannot provide information it does not have

The provider accepted the recommended outcome, but the consumer did not.

4 The consumer's reasons for rejecting the recommended outcome

The consumer set out his reasons for rejecting the recommended outcome in several emails. In summary:

- The recommended outcome had failed to consider the provider's compliance with the Privacy Act and the Australian Privacy Principles (APPs)
- The consumer questioned whether the TIO Terms of Reference or other guiding document explained that the provider policies or business practices would take precedence over applicable regulatory and/or legislative obligations
- The recommended outcome had not addressed the consumer's concern about The provider's refusal to correct email correspondence that The consumer considered to be an incorrect opinion
- The recommended outcome incorrectly recorded that the consumer had declined to complete the provider's MFA process. The consumer said he had visited a provider store and had identified himself. He said the provider made some account changes, but not others (like deletion from marketing emails) that the consumer considered was in the provider's interest

5 Reasons

My Preliminary View is the provider should:

- Immediately remove the consumer from the provider's marketing correspondence
- Make the other changes to the consumer's provider account if he appropriately identifies himself at a provider store or completes the multi-factor authentication process.

This is because:

- The provider is required to provide the consumer a simple means for opting out of direct marketing
- Either method of identification satisfies the provider's requirement to protect its customers' personal information

However, the provider is not required to:

- Correct the email correspondence related to the provider handling the consumer's enquiry as a complaint
- Confirm it will only correspond with the consumer by email
- Retain call recordings

This is because:

- It was the provider's opinion that the consumer had made a complaint, and therefore it is not for the consumer to request a correction of the provider's opinion
- The consumer can express his preference to communicate by email, but the provider does not have to accept this
- Call recordings are not part of the data retention requirements under the Telecommunications (Interception and Access) Act 1979

5.1 The provider is required to provide the consumer a simple means for opting out of direct marketing

I am satisfied the provider is required to provide The consumer a simple means for opting out of direct marketing and is in breach of APP 7.3c by not providing the consumer a simple option.

APP 7.3c says an organisation may use or disclose personal information (other than sensitive information) about an individual for the purpose of direct marketing if the organisation provides a simple means by which the individual may easily request not to receive direct marketing communications from the organisation.

The Office of the Australian Information Commissioner's (OAIC) website provides guidance about the APPs. The guidance says being able to use the same communication channel to opt out as what was used for the direct marketing is reasonable.

The consumer has argued that he should be able to ask the provider to stop its direct marketing without having to follow the provider's MFA process. I agree. In each marketing email, the consumer should be able to reply directly to that email (or click a link in the email) to unsubscribe from any future The provider marketing. In my view these options would satisfy the provider's obligations under APP 7.3c to provide a simple way for the provider customers to opt out of the provider's direct marketing.

In my view, the provider is breaching APP 7.3c by requiring the consumer to complete the provider's MFA process before accepting his request to stop the provider's direct marketing. While the MFA step may still meet the threshold for a 'simple means' for some customers, in the consumer's circumstances, the MFA process for him is not simple. Therefore, I am satisfied it is reasonable for the provider to immediately remove the consumer from its marketing subscriber list.

5.2 Identification at a provider store will satisfy the provider's requirement to protect its customers' personal information

I am satisfied the consumer will adequately meet the provider's requirement for identification if he presents appropriate identification at a provider store.

The consumer said in August 2022 he had presented himself at a provider store to identify himself and make changes to his provider account. The consumer said the provider staff refused to make the changes and said these could only be done over the phone or online, where MFA could be carried out.

The purpose of MFA is to give providers engaging in remote transactions (i.e not face to face) a higher level of assurance they are dealing with someone who is who they say they are. Therefore, MFA is only a lesser substitute to being able to visually identify someone in person with physical identification.

There is no reasonable reason for the provider to reject the consumer's requests to make changes to his account if he presents appropriate identification at a provider store. The provider staff are visually confirming the identification of customers every day when selling goods and services. Therefore, I do not accept that the provider staff member cannot access the consumer's account (after he has identified himself) to make appropriate changes. If there are system limitations, the provider staff in store should still be able to contact the provider over the phone or online to confirm the consumer has been identified in store and to process his requested changes.

5.3 The provider is not required to correct the email correspondence

In my view, the provider is not required to correct the email correspondence that refers to the consumer's request/enquiry as a complaint. This is because:

- It was the provider's opinion that the consumer had made a complaint, not the consumer's opinion
- However, the provider has not met its obligations under APP 13.3 to explain why his request for the correction of his information was refused

5.3.1 It was the provider's opinion that the consumer had made a complaint

I accept the consumer's submission that an 'opinion' can be 'personal information'. Therefore, if someone's opinion is incorrectly recorded by an organisation subject to the APPs, that person is entitled to request the correction of that incorrectly recorded opinion.

However, in my view the opinion that the consumer seeks to correct is not his own that has been recorded incorrectly. The consumer is seeking to have the provider's opinion of his enquiry as a complaint corrected, but it is not his opinion. The provider is entitled to hold its own opinion of the circumstances (believing the consumer was complaining), just as the consumer is entitled to have his own opinion of the circumstances (not making a complaint), even if they disagree.

5.3.2 The provider did not meet its obligations under APP 13.3

In my view the provider did not meet its obligations under APP 13.3 to explain why the consumer's request for the correction of his information was refused. However, as I

have explained why the provider is not required to correct this, I am satisfied no further action is required by the provider.

APP 13.3 says an organisation must give a written notice to an individual when a correction request is refused, including:

- The reasons for the refusal
- The complaint mechanisms available to the individual

I reviewed all the information The provider provided and could not find any evidence of a written notice from the provider to the consumer explaining why the provider was refusing to correct the email references to the consumer's complaint.

5.4 Not up to the consumer to determine communication method

While customers can express the preference for a communication method, it is a provider's commercial decision as to what channels of communication they are prepared to use to engage with their customers.

The consumer receives his provider invoices by email and has requested all communication with the provider be only by email. The provider is free to accept, reject or negotiate further with the consumer about how future communication will be made. Either way, the provider's decision will be a commercial practice and outside the TIO's jurisdiction¹ to consider if the consumer is not satisfied.

While a provider can agree to a customer's communication preference, it is just a preference, not an agreement to only use that method of communication. In my view there are many circumstances where it will be appropriate for the provider to use other channels that may be available; those circumstances include, but are not limited to:

- Making reasonable attempts to contact a customer before commencing credit management action, including disconnection or suspension of a service and credit default listing
- Contacting a customer about suspicious activity on the account, especially where the suspicious activity has used the customer's preferred method of contact

5.5 Call recordings are not part of the data retention requirements under the Telecommunications (Interception and Access) Act 1979

I am satisfied call recordings are not part of the data retention requirements under the Telecommunications (Interception and Access) Act 1979 (the Act). Therefore, the provider was not in breach of its obligations under the Act by not retaining a copy of

¹ Clause 2.7 of the TIO Terms of Reference says we cannot consider a complaint about a provider's commercial practices

the call recording that the consumer is requesting.

The Act requires telecommunications companies to retain a particular set of telecommunications data for at least two years². I have reviewed the data set and there is no requirement for providers to retain call recordings for at least two years.

If the provider had retained the call recording, then I agree the provider would be required to provide the consumer access to the call recording as it would be considered the consumer's personal information. However, the provider has said it no longer has a copy of the call recording and unless there was available information that contradicted this, it would not be appropriate for the TIO to enquire further. I have not reviewed any information that would suggest the provider still has a copy of the call recording.

Senior Lead Dispute Resolution

Telecommunications Industry Ombudsman

² Link to required dataset on Home Affairs website, [Data Set \(homeaffairs.gov.au\)](https://www.homeaffairs.gov.au/data-set)