

Preliminary View – 13 July 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:

- Waive the debt of \$4,665.60.
- Close account number AAAAAAA with a balance of \$0.00.

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 currently has two accounts with the provider under his name.

Account number BBBB BBBB includes an internet and voice bundle and mobile service for approximately \$147.82 a month. This account is not in dispute.

Account number AAAAAAAA includes three mobile devices and three mobile services:

- Contract 1 - XXXX XXX XXX [name of plan] (Service 1) for \$55 a month on a month-to-month contract, and Apple iPhone 13 128 GB Sierra Blue 5G (Device 1) for \$47.18 a month on a 36-month contract. The contract started on 28 November 2021.
- Contract 2 - YYYY YYY YYY [name of plan] (Service 2) for \$45 a month on a month-to-month contract, and iPhone 13 Pro 256 GB Graphite 5G (Device 2) on a 36-month contract. The contract started on 28 November 2021.
- Contract 3 - ZZZZ ZZZ ZZZ 5GB [name of plan] (service) \$15 a month on a month-to-month contract, and Apple iPad Air4 64SG (device) \$30.52 a month on a 36-month contract. The contract started on 3 December 2021.

Account number AAAAAAAA has an outstanding balance of \$4,665.60. This account, the contracts and the outstanding balance are the subject of this dispute.

2 The complaint and the provider's response

2.1 The complaint

The consumer's complaint is about account number AAAAAAAA, the three contracts and outstanding balance of \$4,665.60.

The consumer says he is not liable for the account balance because he did not enter the contract with the provider, and he did not receive the devices or use the services.

The consumer says his identity was stolen by a third party, and the third party used his information to open account number AAAAAAAA with the provider under his name.

2.2 The provider's response

The provider says it cannot investigate the consumer's dispute about the contracts and account balance because its policy requires the consumer to provide it with a copy of his current driver's licence, and the consumer has declined to do this.

The provider says without completing an investigation, the consumer will remain liable for contracts and account balance.

3 The recommended outcome and the parties' response

3.1 The recommended outcome

On 30 March 2023 the Telecommunications Industry Ombudsman (TIO) issued a recommended outcome that found the provider should:

- Waive the account balance of \$4,665.60.
- Close account number AAAAAAAA with a balance of \$0.00.

This is because:

- The TIO has jurisdiction to consider whether the debt is valid.
- The provider did not contract with the consumer for the disputed services.
- The consumer did not receive the devices or any benefit from the services.

3.2 The parties' responses

On 30 March 2023 the consumer accepted the recommended outcome.

On 17 April 2023 the provider rejected the recommended outcome.

See Appendix A – 'The provider' reasons for rejecting the recommended outcome'.

Even though the provider rejected the recommended outcome, it says 'The provider is likely to agree that the debt is invalid and therefore waive the debt', but it has declined to do this until it 'investigate[s] using our internal process'.

4 The TIO's process is independent from the provider's internal processes

In response to the recommended outcome, the provider has made a number of comments about how the TIO's process has limited the provider's own internal complaint processes.

I confirm the TIO's process is independent from the provider's internal complaint processes. The TIO's complaint handling process is governed by our Terms of Reference and Complaint Handling Procedures – and is not limited by the provider's internal complaint processes in any way.

While the TIO has no jurisdiction over the provider's internal policies (as long as they are compliant with the law and regulations), this does not mean that the provider's internal processes limit the way the TIO handles a complaint, or how the TIO reaches its own fair and reasonable conclusions.

The TIO must be accessible as part of its benchmarks as a dispute resolution scheme. This means that in some circumstances the TIO's process may be more accessible than the provider's internal process – which in my view is the case with this complaint.

5 Reasons

In my view, the provider should:

- Waive the debt of \$4,665.60.
- Close account number AAAAAAAA with a balance of \$0.00.

This is because:

- The contract is not valid.
- The consumer did not receive the devices or use the services.

5.1 The contract is not valid

In my view, the contract is not valid.

This is because:

- The consumer did not intend to contract with the provider
- The provider did not take reasonable steps to verify the consumer as the person entering the contracts and did not protect his personal information from misuse.

5.1.1 The consumer did not intend to contract with the provider

In my view, the consumer did not intend to contract with the provider.

In law, there are four main elements to a contract:

- Offer.
- Acceptance.
- Intention to create a binding legal relationship.
- Consideration.

The contract is not enforceable if one of more of these elements is missing.

I have reviewed the webchat conversation between the provider and a person claiming to be the consumer on 28 November 2021. During this conversation, the person claiming to be the consumer tells the provider:

- His name is [the consumer's name]
- He is not a customer of the provider.

This is not correct. The consumer was an active customer of the provider at the time.

- His address is [an address in Australia].

This is not correct. The consumer's was living at [the consumer's address] at the time. His previous address, which was listed on account number BBBB BBBB and his driver's licence was [the consumer's address].

- His mobile number is WWW WWW WWW.

This is not correct. The consumer's mobile number is VVV VVV VVV and this was listed on account BBBB BBBB at the time.

The provider sent a link to WWW WWW WWW requiring the person to scan the driver's licence and their face. Even though the provider sent the link twice and confirmed it was sending it to the correct mobile number, the person claimed to not receive it.

The provider sent a form to WWW WWW WWW for the person to manually enter two forms of identification. The person entered the consumer's driver's licence number and Medicare number.

The provider tells the person it has found an account with the same details. The person responds 'my ex and I had the provider'.

The provider completes the order for Contract 1 and 2 and updates the contact information on the existing account to the information the person provided.

I have no information about the creation of Contract 3.

Even though the person provided the provider with the consumer's name, driver's licence and Medicare number, in my view, it was not the consumer who intended to enter the contracts. This is because the manual identification form was not sent to the consumer's existing provider mobile number, and so it was unlikely that the consumer provided those details.

In my view, the contracts are not enforceable because the consumer did not intend to create a binding legal relationship with the provider.

5.1.2 The provider did not take reasonable steps to verify the consumer as the person entering the contracts and did not protect his personal information from misuse

In my view, the provider did not take reasonable steps to verify the consumer as the person entering the contracts and did not protect his personal information from misuse.

The [Australian Privacy Principles \(APPs\)](#) govern the standards, rights and obligations around the collection, use and disclosure of personal information.

APP 10 explains the provider's obligation to take reasonable steps to ensure the personal information it collects is accurate, up-to-date and complete.

APP 11 explains the provider's obligation to take reasonable steps to protect personal information it holds from misuse, interference and loss, as well as unauthorised access, modification or disclosure.

As discussed above, the person entering the contracts under the consumer's name, provided the provider with personal information which did not match the personal information the provider already held about the consumer.

In my view, because of the discrepancy in the personal information provided, it would have been reasonable for the provider to take additional steps to ensure it was the consumer who was entering the contracts.

The provider could have done this a variety of ways, such as, asking the person to confirm the personal information it already held, but it did not do this or anything else. Instead, it proceeded to create the contracts based on the personal information provided, and updated the consumer's existing personal information to the personal information it was provided with during the conversation.

Based on this, in my view, the provider did not take reasonable steps to verify the consumer as the person entering the contracts and did not protect his personal information from misuse.

5.2 The consumer did not receive the devices or use the services

In my view, the consumer did not receive the devices or use the services.

The TIO expects consumers to pay for devices and services they receive and use.

The provider has provided two post office collection receipts from 2 December 2021 showing two packages were delivered to a [Australian town] post office. This post office across the road from [the address provided by the caller]. As discussed above, this was not the consumer's address.

I have compared the signatures on post office collection receipts with the consumer's driver's licence and the Statutory Declaration he completed on 9 May 2022. Although I am not a handwriting expert, in my view, the signatures on the two post office collection receipts are not the same, and neither share any similarities with signatures on the driver's licence and Statutory Declaration, which do look the same.

Considering this information, with the findings above, in my view, the consumer did not collect the devices from [Australian town] post office. Therefore he did not receive the devices or use the services.

Appendix A

The provider' reasons for rejecting the recommended outcome

This is a copy of the provider' email to the TIO of 17 April 2023.

'Hello [TIO case manager],

I still have further questions relating to this recommended outcome and to the answers you have provided. At this stage I do not think the provider can accept the recommended outcome though I am open to further discussion of my questions to try to reach an agreement.

1. The TIO does not investigate fraud and I have not completed a fraud investigation. What the TIO does consider is whether we consider this to be a valid debt based on the information available ie is there a contract between the parties, were the charges agreed to, was the service/equipment provided and should the consumer pay the charges. The reasoning for why I do not consider this a valid debt is outlined in the recommended outcome. This is distinct from a fraud investigation. The provider is always welcome to complete its own investigations to respond to a complaint. However, it does not override our recommendations or decisions which are based on the information available to us.
 - The TIO's view that the debt is invalid appears to be based on evidence of fraud, however, the TIO has confirmed that it has not conducted a fraud investigation.
 - The provider have asked the TIO to present its findings to support its Recommended Outcome, however the TIO has been unable to do so.
 - I agree that the TIO has jurisdiction to determine the validity of a debt, however, it has failed to adequately detail its reasons to support that the debt is invalid, based on fraud.
 - It is a general policy for the provider to investigate matters of fraud and the provider are the appropriately equipped body to investigate fraud, not the TIO.
 - Why in this case is the TIO allowing the consumer to circumvent the provider' ability to complete its internal process.
 - The provider has not refused to credit this balance in full, however, will not if it forms the view that the debt is valid.
 - The provider has explained that to absolve the consume of responsibility, business process must be adhered to.
 - It would be fair to argue that the TIO acting against its terms of reference, 2.7 - We

will not handle a complaint about the general telecommunications policy or commercial practices of a member.

- Is it deliberate that the TIO has omitted the word fraud from the recommended outcome while it states evidence of fraud for the reason the provider should waive these charges?
2. As per 5.2.5 of the TIO's [Complaint Handling Procedures](#), when we recommend an outcome we apply the standard of the balance of probabilities when reaching a view. This is for all ROs and complaints, not just this one. "Balance of probabilities" means that we are satisfied that an event occurred if we consider that the information indicates that the event more likely occurred, then it did not. "Beyond reasonable doubt" is a much higher standard of proof and the standard of proof used in criminal trials and not the standard the TIO uses. None of these standards are definite. The reasons why I consider the contracts were more likely than not taken out by someone who is not the consumer and why the equipment was received by someone who was not the consumer are outlined in the RO. I am not sure what you mean by 'how likely', but for simplicity's sake if something is 51%+ likely we would consider this more likely than not.
- Is the TIO stating that if something is 51% or more likely to have happened, that its decision is more robust than the provider's fraud investigation process?
 - The provider did not ask what the definition of more likely is in general terms, that is obvious, it has asked for more information specific to this complaint case and how the TIO has formed its view.
 - The provider asks for more information about this as the TIO has disabled the provider from completing a fraud investigation and formed its own view, The provider would like to compare the TIO's ability to determine fraud to its own.
 - It's important to note that if the provider were to complete a fraud investigation, and its findings demonstrated that the consumer was responsible for the acquisition of goods/services, the TIO would have allowed the consumer to circumvent a member's process, resulting in fraud.
3. I agree it is the consumer's responsibility to protect his identity. This does not change my view. As explained in the RO, I am not satisfied a Medicare card was checked because I have no information showing a card number. I made this point because even if the provider had checked a Medicare card, it would not be inconsistent with what the consumer has said. Regardless of the Medicare card, I am satisfied there was enough information that did not match, and that the provider did not take further steps at the time of the contract to investigate, and therefore it would not be reasonable to hold the consumer liable for the contract/s.
- You have explained that there was enough information that did not match, however, you are yet to detail or provide what information did not match to the provider –

The provider again asks you to present this information.

- The provider has evidence to confirm that it was provided with a valid Australian Drivers License and Medicare card at acquisition, it is also prepared to provide this information to the TIO.
- If the TIO does not accept this information when forming a view on a complaint, the provider would in-turn form the view that the TIO lacks conclusive evidence to support its own view.

4. NA

5. **No. The current driver's license was not the one used to take out the services, so the address is irrelevant.**

- I do not understand how proof that the customer residing at the delivery address would not change the TIO's view that this might or might not be fraud.
- I question the TIO's ability to make a fraud determination if you ignore evidence that the customer resides at the address he denied having resided at.
- This is further evidence that the most appropriate thing to do here is follow the provider' internal process and complete a fraud investigation as the TIO have stated they will actively ignore evidence.

6. NA

It is important to note than the course of action The provider are recommending will likely comply with the TIO's terms of reference regarding debt and the provider has not yet declined to credit/withdraw this balance/debt. The provider is likely to agree that the debt is invalid and therefore waive the debt after we investigate using our internal process, providing the fraud investigation doesn't uncover strong evidence this was not fraud.

The suggestion the TIO is making is arguably against the TIO terms of reference: 2.7 - *We will not handle a complaint about the general telecommunications policy or commercial practices of a member.* This is true for numerous factors of this complaint as there is more than one process involved here:

- The TIO will be invalidating the provider' internal process regarding fraud investigation.
- The TIO will be invalidating the provider' internal process regarding debt buyback.
- The TIO will be making the provider' financial teams non-compliant with internal processes when they make manual changes to the consumer's credit file without compliant records to approve these actions.
- The TIO would be instructing the provider to make a change to a customer's credit

file, without following its internal process by requesting valid ID for its record of the customer currently making the request.

The TIO's decision to disregard the provider' internal process could be putting the provider at risk of a privacy complaint:

- The consumer could later make a privacy complaint against the provider stating that the provider had breached his privacy by making unauthorized changes to his credit file.
- The provider would have insufficient evidence to support its changes to The consumer's credit file, required by our internal process, and the provider used ID it knew to be stolen or not current as evidence to modify his personal credit information.
- The provider' compliant internal process is the most appropriate way to proceed unless the TIO would be willing to assume all responsibility for the potential impact of its decision.

In conclusion, the TIO lacks conclusive evidence to support the view that the debt is invalid and has confirmed that it is not equipped to make a determination on fraud.

If the consumer declines to adhere to the provider' process/policy, the provider will not remove the outstanding charges, however, may resume collection in the future.'