

Preliminary View – 28 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:

- Cancel the contracts in dispute.
- Waive the service fees relating to the contracts in dispute, which is approximately \$880.
- Invite the consumer to apply for assistance under its Financial Hardship policy to manage the remaining account balance of approximately \$4,469.72.

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 has account number AAAAAAA with the provider.

The account includes a NBN internet service, three mobile handsets, and three mobile services for a minimum of \$312.10 a month. This \$312.10 is made up of:

- \$64.99 - NBN internet service on a month-to-month contract.
- XXXX XXX XXX - \$40 The provider [named] Plan on a month-to-month contract, and \$29.95 iPhone 12 on a 36-month contract. The contracts started on 2 September 2021.
- YYYY YYY YYY- \$40 The provider [named] Plan on a month-to-month contract, and \$48.85 iPhone 14 Pro on a 36-month contract. The contract started on 16 September 2022.
- ZZZZ ZZZ ZZZ- \$40 The provider [named] Plan on a month-to-month contract, and \$48.58 iPhone 14 Pro on a 36-month contract. The contract started on 16 September 2022.

The contracts for YYYY YYY YYY and ZZZZ ZZZ ZZZ are the subject of this complaint.

2 The complaint and the provider's response

2.1 The complaint

The consumer has provided two versions of her complaint.

The consumer says she should not be liable for contracts and the provider should cancel the contracts and waive all fees associated with the contracts.

2.1.1 Version 1

The consumer says her online friend 'A Friend' accessed her provider account and fraudulently contracted for the two mobile handsets and services under her name.

The consumer says she did not know anything about the contracts until they appeared on her bills. She says she never received the handsets.

2.1.2 Version 2

The consumer says her online friend 'A Friend' contracted for the two handsets and services. She says she agreed to accept delivery of the handsets on A Friend's behalf and post the handsets to him overseas. She says A Friend was meant to pay handsets outright.

The consumer says she received the handsets and posted them to A Friend overseas.

2.2 The provider's response

The provider says the consumer voluntarily entered the contracts herself.

The provider says it is likely the consumer was scammed by her friend A Friend.

The provider offered to waive all the service fees, including late payment fees, which totalled \$447 as of 12 April 2023.

The provider says the consumer should be responsible for the handset fees of \$3,498 (\$1,749 x two) and the remaining account balance of \$566.45, which is a total of \$4,064.45.

The provider offered the consumer two options to manage the remaining amount owing.

2.2.1 Option 1

The consumer to keep her existing NBN internet and mobile contract which is not in dispute, and:

- Set up a 6-month payment plan for the unpaid undisputed charges of \$566.45.
- Set up a 36-month payment plan (consistent with the original contract) which is \$97.16 a month for over 36-months.

Assuming there are no changes to the NBN internet and mobile contract which is not in dispute, this option would cost the consumer \$326.46 a month for the first six months, then it would reduce to \$232.05 a month for next 30-months.

2.2.2 Option 2

If the consumer applies for assistance under the provider's financial hardship policy, and if approved, the provider will:

- Disconnect all post-paid services.
- Transfer the mobile number which is not in dispute to pre-paid.

This option would leave the consumer owing a total of \$4,155.88.

Depending on the information the consumer provided in her application for assistance, the provider would offer a long-term payment plan.

3 The recommended outcome and the parties' response

3.1 The recommended outcome

On 12 April 2023 the Telecommunications Industry Ombudsman (TIO) issued a recommended outcome that found the provider should:

- Cancel the two contracts in dispute.

- Waive the service fees associated with the contracts.
- Waive 50% of the handset fees, reducing the handset fees to \$1,749.
- Provide the consumer with a reasonable payment plan for the remaining account balance.

This is because:

- The consumer voluntarily entered the contracts.
- The consumer is liable for the cost of the mobile handsets.
- The provider did not meet its obligations to assess the consumer capacity to pay for the contracts under the National Consumer Credit Protections Act.
- The provider declined to provide its wholesale costs for the mobile handsets.

3.2 The parties' response

On 21 April 2023 the consumer sent the TIO an email accepting the recommended outcome. However, on 19 July 2023, during a telephone call with the TIO, the consumer rejected the recommended outcome.

This is because:

- She did not enter the contracts.
- She sent the handsets overseas, but she cannot remember any other details.
- A Friend fraudulently accessed her provider account and entered contracts under her name.

On 27 April 2023 the provider rejected the recommended outcome.

This is because:

- The TIO found the contracts were not fraudulent.
- It is usually the TIO's view that consumers pay for goods and services they contract for and receive, and in this instance, the consumer voluntarily entered the contracts and received the handsets.
- It should not be liable because the consumer sent the handsets overseas.
- The TIO has not been independent by considering the credit assessment and the consumer's capacity to pay when the consumer never raised this as an issue herself.
- The provider met its credit assessment obligations, and it was not required to do any more than review the consumer's payment history.

- The TIO has not considered the consumer's statement during the sales call that someone else would be paying her bill.
- It is not profiting from the contracts.
- It has participated in the complaint process in good faith.

4 Reasons

In my view, to resolve this complaint, The provider should:

- Cancel the contracts in dispute.
- Waive the service fees relating to the contracts in dispute.
- Invite the consumer to apply for assistance under its Financial Hardship policy to manage the remaining account balance of approximately \$4,469.72.

This is because:

- The contracts are valid.
- The consumer cannot derive a benefit from the services.
- The provider is entitled to charge the consumer \$3,498 for the handsets.
- The consumer may experience financial hardship because of the unpaid undisputed fees and the handset fees, but she has not provided enough information to determine a reasonable way to manage her services and debt.

4.1 The contracts are valid

In my view, the contracts are valid.

This is because:

- The consumer voluntarily entered the contracts.
- Even if the provider took additional steps to assess the consumer's credit worthiness it would likely have approved the contracts.

4.1.1 The consumer voluntarily entered the contracts

In my view, the consumer voluntarily entered the contracts.

The provider provided copies of telephone recordings between 15 September 2022 and 16 September 2022, which include the sales call and additional calls about the sale. During these calls:

- The caller identifies themselves as the consumer.
- The caller successfully passes the provider's identification process, which

includes Multi-Factor Authentication, using the consumer's personal information.

- The caller asks for the contracts and agrees to the terms and conditions.

The consumer provided screenshots of her online chat with A Friend from 11 October 2022 to 7 November 2022. During these chats, the consumer tells A Friend she has contracted for two handsets from the provider, which she has sent to A Friend overseas, and she is asking A Friend to reimburse her for the costs.

In my view, A Friend is likely a scammer and the consumer is a victim of his scam. This is a civil matter and does not involve the provider. This is because there is not information to show A Friend has had any dealings with the provider or acted on the consumer's behalf without her authority. All available information shows the consumer voluntarily entered the contracts with the provider.

4.1.2 Even if the provider took additional steps to assess the consumer's credit worthiness it would likely have approved the contracts

Even if the provider took additional steps to assess the consumer's credit worthiness it would likely have approved the contracts.

Section 6.1 of the [Telecommunications Consumer Protections \(TCP\) Code](#) outlines the provider's obligation to complete a credit assessment before providing post-paid services with a term of more than one month.

For existing customers, the provider must check their customer's payment history. For new customers, the provider must obtain information from the customer about their capacity to pay for the service, and complete an external credit check from a Credit Reporting Body.

The consumer was an existing customer of the provider, which means, at a minimum, the provider needed to check her payment history.

The provider has provided information which shows it considered the consumer's payment history when it approved the contracts.

I have reviewed the consumer payment history from 19 September 2020 to 23 September 2023. This shows the consumer paid her provider bill in full and on time each month, even when her bill increased.

The recommended outcome referred to [Australian Securities and Investment Commissions \(ASIC\) guide about responsible lending](#). It formed the view that the provider should have taken additional steps to assess The consumer's credit worthiness.

In my view, even if the provider took additional steps to assess the consumer's credit worthiness it would have approved the contracts.

This is because:

- The consumer could afford to pay an extra \$177.08 a month.
- The consumer would have passed an external credit check.

The consumer could afford to pay an extra \$177.08 a month

In my view, it is more likely than not, that the consumer could afford to pay an extra \$177.09 a month.

The consumer provided a copy of her bank statements from September 2022 and January 2023. I am not considering the bank statement from January 2023 because this is not relevant to her financial situation at the time she entered the contracts in September 2022.

The bank statement from September 2022 shows the consumer had a monthly income of \$3,608.53 and expenses of \$1,826.27 (see Appendix – Summary of the consumer's finances).

The consumer says she had additional expenses of \$803.05 a month. This includes \$393.50 for health insurance and \$410 for utilities. I am unable to determine if this is accurate because it does not appear on the bank statement. I acknowledge the consumer does withdraw cash that she may use to pay for these expenses.

Even if the consumer's expenses total \$2,585.31 (\$1,782.26 + \$803.05), this leaves a surplus of \$1,023.23 a month.

Based on this, in my view, the consumer could afford to pay an extra \$177.08 a month.

The consumer would have passed an external credit check

In my view, the consumer would have passed an external credit check.

On 19 July 2023 we called the consumer. We asked her to give us a copy of her credit file from a Credit Reporting Body by 24 July 2023. We explained it is free to access, and we sent her an email with links to the Credit Reporting Bodies' websites and telephone numbers.

During this call, the consumer told us that she has always had a good credit report, she has always been approved for loans that she has applied for, she has always paid her bills and loans on time and never had a problem paying for things.

The consumer has not provided a copy of her credit file from a Credit Reporting Body.

In the absence of any further information, in my view, if the provider completed an external credit check, it is more likely than not, The consumer's credit file would have shown that she has a good credit rating like she says she has.

Based on this, in my view, the consumer would have passed an external credit check.

4.2 The consumer cannot derive a benefit from the services

In my view, the consumer cannot derive a benefit from the services.

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

The consumer says she received the handsets and posted them overseas to A Friend (see above Version 2 of the complaint), which is consistent with her online chat history with A Friend. I accept this is likely to be true.

The handset package(s) would have included a SIM card for each mobile service. The SIM cards would have needed to be activated on the provider's network for the provider to be providing the services.

The provider has not provided any information to show the SIM cards were activated on its network, that it has been providing the services it has been charging for, or that that services have been used. Based on this, in my view, the provider has not been providing the services.

Since the provider has not been providing the services, the consumer has not been using or receiving any benefit from the services.

Based on this, in my view, the provider should waive the service fees – this is valued at approximately \$880 (\$40 a month x two) x 11 months).

4.3 The provider is entitled to charge the consumer \$3,498 for the handsets

In my view, the provider is entitled to charge the consumer \$3,498 for the handsets.

The [Australian Competition and Consumer Commission \(ACCC\)](#) says a cancellation fee should reflect the provider's genuine estimate of loss.

The contracts show the consumer agreed to pay the provider \$1,749 for each handset, for a total of \$3,498 over 36-months.

Based on this, in my view, \$3,498 is the provider's genuine estimate of loss for the handsets.

Although the consumer may have been scammed by A Friend into sending the handsets overseas, in my view, she received the handsets and made the decision to send them overseas even though she knew the contracts were in her name and she would be charged for them. In my view, it is not reasonable to hold the provider liable for the consumer's actions of sending the handsets overseas.

Based on this, in my view, the provider is entitled to charge the consumer \$3,498 for the handsets.

4.4 The consumer may experience financial hardship because of the unpaid undisputed fees and the handset fees, but she has not provided enough information to determine a reasonable way to manage her services and debt

In my view, the consumer may experience financial hardship because of the unpaid disputed fees and the handset fees, but she has not provided enough information to determine a reasonable way to manage her services and debt.

Section 7 of the [TCP Code](#) outlines the provider's obligation to have a Financial Hardship policy and ensure it is readily accessible for consumers.

Section 7.1.4(b) states the provider must provide a summary of its Financial Hardship policy to the customer and how it may assist the customer when it considers the customer may be eligible for assistance under the policy.

As of April 2023, the consumer's account balance included \$566.45 of unpaid undisputed fees. This is because the consumer had not made any payments for approximately four months.

I do not know if the consumer has made any payments towards the undisputed fees since April 2023. If she has not, the undisputed fees will have accrued to approximately \$971.27 ($\$566.46 + (\$134.94 \times \text{three months})$). The addition of the handset fees will increase the account balance to approximately \$4,469.27.

Considering the consumer's financial information (see above), in my view, this debt is likely to cause the consumer to experience financial hardship.

Based on this, in my view, it is reasonable for the provider to proactively contact the consumer to make sure she has access to its Financial Hardship policy and can apply for assistance if she needs to.

Senior Lead – Dispute Resolution
Telecommunications Industry Ombudsman

Appendix

Summary of the consumer's finances

Item	Income	Expense
Pension	\$3,183.01	
Concessions	\$425.52	
Rent		\$500.00
Insurance		\$393.50
Car Insurance		\$166.96
Car loan		\$176.72
Telecommunications		\$134.94
Groceries and personal		\$410.14
Total	\$3,608.53	\$1,782.26
Surplus	\$1,826.27	