

## Preliminary View – 15 March 2023

### Deidentified

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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's offer of \$1,500 in compensation is fair and reasonable.

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 the provider account AAAAAA. In April 2022 he had the following services on his account:

- bundled landline (XX XXXX XXXX) and NBN internet service on the 'DOT' plan, \$110 per month
- main Business Number (MBN) ZZ ZZZZ ZZZZ at \$5.50 per month, and
- mobile MMMM MMM MMM on the 'X-Small plan' at \$45 per month.

## 2 The complaint and the provider's response

On 27 April 2022 the consumer asked the provider to relocate his services to address [new address]. The consumer moved into the premises early May 2022. The connection was delayed until 17 May 2022.

The consumer's complaint is about the delay in connecting his services from 27 April 2022 to 17 May 2022 and the losses he incurred because of that delay.

The consumer asked to resolve the complaint by:

- waiving all disputed charges on the account
- assessing his eligibility for compensation under the Customer Service Guarantee (CSG) Standard
- providing \$19,000 compensation including:
  - \$15,000 business loss compensation
  - \$250 to scan documents
  - \$2,000 legal fees, and
  - \$1,500 compensation for non-financial loss

The consumer said, on 2 June 2022, the provider told him it would be recommending a payment of \$15,000 to resolve the complaint. He later received a voicemail confirming the provider would pay him \$15,000 in compensation. He says the provider should be estopped from denying that he would receive \$15,000 in compensation.

The provider instead offered \$1,500 as a goodwill gesture, for the consumer's loss of business compensation claim, as well as for the inconvenience caused by the delay. It also:

- offered an additional \$250 for facsimile related charges.
- applied a \$200 credit during the complaint (appearing on the consumer's August 2022 invoice).

### 3 The recommended outcome and the parties' response

On 17 October 2022, the Telecommunications Industry Ombudsman (TIO) issued a recommended outcome that found that the provider's offer of \$1,500 was fair and reasonable because:

- The consumer has not substantiated his losses.
- The Business is unable to claim compensation for losses it incurred, because it isn't a contracting party with the provider.
- There is no evidence the provider offered to pay the consumer \$15,000.
- The provider has already applied \$450 to the account to cover potentially invalid charges.
- The outstanding charges on the account are payable, and
- The provider has offered the maximum compensation amount under the TIO's 'non-financial loss' scheme.

The provider accepted the TIO's recommended outcome.

The consumer presented two main grounds for his rejection of the outcome:

- The TIO incorrectly applied the law around promissory estoppel, and the Dispute Resolution Officer should have sought advice from the TIO's internal legal team.
- On 9 June 2022, he received a voicemail from the provider that it had received approval to give him \$15,000 in compensation. He says the provider must be estopped from denying it would give him \$15,000 in final settlement of this complaint.

### 4 Reasons

I have not considered whether the charges are valid, nor whether the \$450 total credit offered to cover those charges is fair and reasonable. This is because the consumer didn't provide any reasons for rejecting this element of the TIO's Recommended Outcome sent on 17 October 2022.

In my view, the provider's offer to provide \$1,500 as a goodwill gesture is fair and reasonable because:

- I do not accept the consumer's claim that the provider should be estopped from denying it will provide \$15,000 to resolve the complaint:
  - The evidence does not suggest the provider created a state of affairs that it would provide the consumer with \$15,000 in final resolution of his complaint.

- The consumer did not rely upon the state of affairs to his detriment. In fact, he says he had suffered that detriment during the delay in connection.
- The consumer has not provided evidence to show he suffered losses as a result of the delay in connecting his services.
- The provider's offer of \$1,500 is the maximum the TIO can consider for non-financial losses.

#### **4.1 The provider is not estopped from denying it would provide \$15,000 in compensation to the consumer**

The consumer says, because of the phone calls from the provider on 2 June 2022, and the voicemail left on 9 June 2022, the provider should be estopped from denying it would provide him with \$15,000 in final settlement of his complaint. It's my view the provider does not need to provide the consumer \$15,000.

##### **4.1.1 The principles surrounding promissory estoppel**

Estoppel is a principle of law. The consumer provided three court judgments that help establish the framework to support a claim of estoppel. It is unnecessary to cover those cases here in detail.

There are four primary elements to establishing that a party should be estopped from denying a state of affairs exists:

1. There is a promise or conduct by one party (Party A).
2. That promise or conduct induces or encourages the other party (Party B) to believe that a state of affairs exists.
3. Party B relies on that conduct or promise to their detriment, and
4. It is unconscionable for Party A to deny that state of affairs exists.

These are commonly held requirements surrounding estoppel.

In the consumer's case, he essentially says:

1. The provider left him a voicemail that said it would provide \$15,000 in compensation to finalise this matter.
2. He was induced to believe that the provider would provide that \$15,000 in compensation.
3. He relied on that promise to his detriment.
4. It's unconscionable to allow the provider to now deny that state of affairs exists.

In my view, the consumer's argument fails on two grounds:

1. The evidence the TIO has available to it does not support the provider promised to provide him \$15,000 in compensation to finalise the matter.
2. The consumer did not rely on that promise to his detriment. This is because he said that he had already suffered the detriment he said he suffered.

#### 4.1.2 The evidence does not support that the provider promised or suggested it would provide the consumer \$15,000 in final settlement of this matter

The evidence available to the TIO does not support that the provider promised or offered the consumer \$15,000 to settle this complaint. The consumer says this promise or offer occurred in a voicemail on 9 June 2022, with preceding calls from the provider suggesting that it was seeking approval to give him \$15,000.

The most important call here is therefore the one on 9 June 2022, where the consumer says:

‘Then on 9 June 2022, I was advised by [provider agent] that approval had been given for the payment of \$15,000.00... It was a voice call message to my mobile’

The consumer has not provided a copy of this voicemail. The provider has also been unable to provide a recording of this voicemail.

The account notes left by the provider do not suggest that it had left a voicemail saying approval had been given for the payment of \$15,000. The notes say:

*Contact Date and Time: 09/06/2022 12:50 PM*

*Number Dialed: [mobile number]*

*Attempted to contact Legal Lessee [The Consumer]*

*Contact Attempt Outcome: **unable to reach, left voicemail** [emphasis added]*

On the same day, it emailed the consumer and said it was seeking approval to provide \$15,000:

I hope you're doing well today.

I'll just seek approval of the \$15,000.00 business compensation you are requesting.

I'll provide you an update within 24-48 hours.

Best regards,

The next day, it referred the complaint to its Business Loss team:

Task created

10 June 2022 at 11:35 AM

#### Complaint Referral - Loss of Business

Subject: Complaint Referral - Loss of Business  
Name:

*Edited to omit consumer and provider identifiers*

There are no other notes between the email and the referral to the provider's Business Loss team.

In my view, it's unlikely the provider called the consumer and left a voicemail it would pay him \$15,000 in loss of business compensation. If it was the earlier voicemail, the email that followed confirmed that it was merely seeking approval. The referral to the Business Loss team the next day suggested no approval had been given.

### 4.1.3 The consumer did not rely on that alleged promise to his detriment

A key element of estoppel is that the other party must rely on the promise or suggestion that created the state of affairs to their detriment. In other words, even if the consumer believed that he would be receiving the \$15,000, he must take some positive action in reliance upon that belief to his detriment.

In this case, the consumer hasn't demonstrated that he suffered any detriment by relying on that belief.

The consumer said he suffered the following detriment:

- An inability to trade on the stock exchanges and other markets between 27 April and 17 May 2022.
- An inability to pay online bills or engage in online transactions between 27 April and 17 May 2022.
- Legal costs.
- Delays and poor customer service when dealing with the provider staff.

In my view, none of these indicate the consumer took action to his detriment in reliance upon the belief that he were to be receiving the \$15,000 payment from the provider.

Because of this and the lack of evidence, I'm not satisfied that the provider should be estopped from denying that it agreed to pay \$15,000 to finalise this matter.

### 4.2 The consumer has not provided any evidence of loss

In my view, the provider does not need to provide any compensation to the consumer for his financial losses because he has not provided any evidence of that loss.

The consumer maintains that his claim for financial losses total \$17,250. This is broken

down as:

- \$15,000 business loss compensation
- \$250 to scan documents, and
- \$2,000 legal fees.

The remaining \$1,500 of his claim are non-financial losses and are considered below.

When the TIO assesses financial losses, we expect consumers to provide evidence to demonstrate those losses. The consumer was asked to provide this evidence to the provider or the TIO on:

- 20 June 2022
- 8 September 2022
- 30 September 2022

To date, the consumer hasn't provided any evidence that he experienced these losses. He explained that he was unable to, as he does not operate like a 'corner store'.

Generally, the burden is with the person that suffered loss to prove the losses they're claiming.

On balance, the provider therefore doesn't need to provide any compensation to the consumer for his financial losses.

### **4.3 The provider's offer of \$1,500 in non-financial loss compensation is the maximum the TIO can consider**

The TIO cannot compel the provider to offer any additional non-financial loss compensation, because it is the maximum the TIO can consider under our policy.

Our Factsheet on Compensation for Non-Financial Loss says:

'The limits on the amount of compensation we can award are:

- A maximum of \$100,000 for complaints about privacy rights
- A maximum of \$1,500 for all other complaints.'

The consumer's claim is not about privacy rights. The provider's offer is therefore at the limits of what we can award.

In my view, the provider doesn't need to offer anything further.



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