

## Investigation Report

<b>File No</b>	ACMA2023/632
<b>Entity</b>	Trikon Pty Ltd
<b>ACN</b>	124 822 591
<b>Relevant Legislation</b>	<i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i> <i>Telecommunications Act 1997</i>

## Findings

The Australian Communications and Media Authority (the **ACMA**) has formed the view that Trikon Pty Ltd (**Trikon**) has contravened:

- (a) section 132 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the **TCPSS Act**);
- (b) the service provider rule set out at clause 1 of Schedule 2 to the *Telecommunications Act 1997* (the **Act**); and
- (c) subsection 101(1) of the Act,

by failing to comply with a decision made by the Telecommunications Industry Ombudsman (the **TIO**) on 4 October 2023 (the **TIO Decision**), identified as 2022/01/ [REDACTED] (a copy of the TIO Decision is at **Attachment A**).

## Background

1. This report presents the findings of an investigation conducted by the ACMA under paragraph 510(1)(aa) of the Act into a matter referred to it by the TIO.
2. On 9 November 2023, the TIO referred Trikon to the ACMA for failure to comply with the TIO scheme as required by section 132 of the TCPSS Act.
3. Specifically, the TIO alleges that Trikon failed to waive \$4,394 in early termination fees (**EFT**) charged to [REDACTED], as required under the TIO Decision. The EFT comprise \$3,619 for an NBN service and \$775 for a landline service. The TIO was satisfied its decision was a fair and reasonable outcome under the circumstances having regard to relevant laws and good practice, including industry guidelines.
4. On 4 October 2023, the TIO provided Trikon with a copy of the TIO Decision.
5. On 5 October 2023, [REDACTED] authorised representative, accepted the TIO Decision (**Attachment B**).
6. On 6 October 2023, the TIO provided Trikon with a copy of the TIO Decision, a copy of [REDACTED] signed acceptance of the decision, and advised that the TIO Decision was now binding as [REDACTED] had accepted it. The TIO also advised Trikon that it should waive the EFT by 20 October 2023 and provide the TIO with information demonstrating that this had been completed by 20 October 2023 (**Attachment C**).
7. On 9 October 2023, Trikon advised the TIO that the TIO Decision is 'disproportionately punitive' and 'does not accurately reflect the complexities of the situation' and requested a review of the TIO Decision. On 4 December 2023, the TIO advised the ACMA that a review of the TIO Decision was not undertaken as reviewing a decision is not part of the TIO complaint resolution process. The TIO explained that this is on the basis that TIO members such as Trikon have a number of opportunities throughout the TIO complaint resolution process to provide information

to support their position and to respond to the TIO's recommended outcome and preliminary view prior to the final decision.

8. On 25 October 2023, ██████ confirmed to the TIO that ██████ had not heard from Trikon in relation to waiving the ETF in accordance with the TIO Decision (**Attachment D**).
9. On 22 November 2023, the ACMA commenced an investigation under Part 26 of the Act into Trikon's compliance with section 132 of the TCPSS Act.
10. On 24 November 2023, the ACMA confirmed with ██████, that Trikon had not made any contact with either ██████ to indicate that the \$4,394 in ETF had been waived as required by the TIO Decision.
11. On 4 December 2023, the TIO advised the ACMA that it had not received any communication to date from Trikon to demonstrate that Trikon had complied with the TIO Decision (**Attachment E**).
12. On 6 December 2023, the ACMA sent its preliminary findings report to Trikon and invited it to respond by 21 December 2023.
13. On 7 December 2023, ██████ advised the ACMA that Trikon had confirmed to ██████ that it had waived the EFT on ██████ account and that the amount now owing on ██████ account is zero.
14. On 7 December 2023, Trikon provided the ACMA with a copy of the email and account invoice it sent to ██████ on 6 December 2023 demonstrating that it had implemented the TIO Decision on 6 December 2023 (**Attachment F**).

#### **The TIO scheme, TIO Constitution and Terms of Reference**

15. Subsections 128(1) and (2) of the TCPSS Act provide that each carrier and eligible carriage service provider (**CSP**) must enter into a scheme to be known as the TIO scheme. Subsection 128(3) of the TCPSS Act provides for only one TIO scheme, to be operated by the TIO Limited (ABN 46 057 634 787).
16. Section 132 of the TCPSS Act requires that a carrier or a CSP who is a member of the TIO scheme must comply with the scheme.
17. The TIO's Constitution<sup>1</sup> establishes the TIO Limited as a not-for-profit public company overseen by a Board of Directors and funded by its members to operate the TIO scheme.
18. Under clause 17(b) of the TIO's Constitution, in becoming a member of the TIO scheme, each TIO member agrees to be bound by and observe the TIO's Terms of Reference (which set out how the TIO scheme operates).
19. Relevantly, clause 6.7 of the TIO's Terms of Reference provides that if a consumer accepts a decision by the TIO, such as the TIO Decision, the member must comply with the decision.
20. Accordingly, the failure of a TIO member to comply with a TIO decision constitutes a failure to comply with the TIO's Constitution and Terms of Reference, and consequently a failure to comply with the TIO scheme and section 132 of the TCPSS Act.
21. The Act states that service providers (including CSPs) must comply with the service provider rules that apply to the provider (see subsection 101(1) of the Act). The relevant service provider rule in this case requires a service provider to comply with the TCPSS Act (see paragraph 98(1)(a) of the Act and subclauses 1(1) and (2) of Schedule 2 to the Act).
22. Failure to comply with section 132 of the TCPSS Act is therefore a breach of the service provider rules, and a contravention of subsection 101(1) of the Act. The law in this regard has been confirmed by the Federal Court of Australia in 2 cases in which the ACMA obtained court orders for the payment of civil penalties by CSPs for their failure to comply with TIO decisions:

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<sup>1</sup> <https://www.tio.com.au/sites/default/files/2022-11/CONSTITUTION%20as%20amended%2015%20November%202022.pdf>, accessed 24 November 2023

see *ACMA v Bytecard Pty Ltd and Morris* [2013] FCA 38 and *ACMA v Limni Enterprises Pty Ltd (formerly known as Red Telecom Pty Ltd)* [2022] FCA 795.

### Findings and reasons

23. Trikon is an eligible CSP in Australia, as it provides phone and internet services to residential and small business consumers.
24. Trikon is a member of the TIO scheme as evident from the list of current members available on the TIO's website.<sup>2</sup>
25. As a TIO member, Trikon is required under section 132 of the TCPSS Act to comply with the TIO scheme, which encompasses the TIO's Constitution and Terms of Reference.
26. The TIO Decision directed Trikon to waive \$4,394 in ETF. As [REDACTED] accepted the TIO Decision on 5 October 2023, Trikon is required to comply with the TIO Decision under clause 6.7 of the TIO's Terms of Reference.
27. Having examined the record of the TIO Decision, the ACMA is satisfied that the TIO Decision was made in accordance with the TIO's Constitution and Terms of Reference, and that Trikon was required to comply with the TIO Decision by waiving \$4,394 in ETF on [REDACTED] account by 20 October 2023, and providing the TIO with information showing that this had been done by 20 October 2023.
28. [REDACTED] advised the ACMA on 7 December 2023 that Trikon had waived the EFT on [REDACTED] account on 6 December 2023, and Trikon provided evidence to the ACMA on 7 December 2023 demonstrating that it implemented the TIO Decision on 6 December 2023.
29. For the above reasons and because Trikon did not waive \$4,394 in ETF on [REDACTED] account by 20 October 2023 as required by the TIO Decision, the ACMA is of the view that Trikon failed to comply with the TIO Decision.
30. Consequently, the ACMA has formed the view that Trikon contravened section 132 of the TCPSS Act, and thereby has also contravened the service provider rule set out at clause 1 of Schedule 2 to the Act and subsection 101(1) of the Act.

### Attachments

<b>Attachment A</b>	The TIO Decision identified as 2022/01/[REDACTED]
<b>Attachment B</b>	Email from [REDACTED] accepting the TIO Decision – sent 5 October 2023
<b>Attachment C</b>	Email from the TIO to Trikon providing a copy of the TIO Decision, a copy of [REDACTED] signed acceptance of the decision, and advising Trikon that it should comply with the decision by 20 October 2023 – sent 6 October 2023
<b>Attachment D</b>	Email from [REDACTED] to the TIO confirming that [REDACTED] had not heard from Trikon in relation to waiving the ETF in accordance with the TIO Decision – sent 25 October 2023
<b>Attachment E</b>	Email from the TIO to the ACMA confirming nil response received from Trikon demonstrating compliance with the TIO Decision – sent 4 December 2023
<b>Attachment F</b>	Email from Trikon to the ACMA providing documentary evidence demonstrating that it implemented the TIO Decision on 6 December 2023 – sent 7 December 2023

<sup>2</sup> <https://www.tio.com.au/members/who-we-work-with>, accessed 24 November 2023.