

## Investigation Report

<b>File No</b>	ACMA2023/620
<b>Entity</b>	Digital Technologies & Telecommunications Pty Ltd trading as AirLan
<b>ACN</b>	081 278 677
<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**) finds that Digital Technologies & Telecommunications Pty Ltd (**AirLan**) 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 25 October 2023 (the **TIO Decision**), identified as 2022/12/ [REDACTED] (a copy of the TIO Decision is at **Attachment A**).

## Background

1. On 3 November 2023, the TIO referred AirLan to the ACMA for failure to comply with the TIO scheme as required by section 132 of the TCPSS Act.
2. Specifically, the TIO alleges that AirLan had indicated it would not comply with the TIO Decision to waive \$15,546.68 in fees charged to [REDACTED], as required under the TIO Decision.
3. On 2 November 2023, the TIO advised AirLan that the TIO Decision is now binding as [REDACTED] had accepted the TIO Decision. The TIO Decision required that AirLan must waive the fees by 16 November 2023. The TIO requested that AirLan provide the TIO with information showing that this had been done by 16 November 2023 (**Attachment B**).
4. On 17 November 2023, the TIO advised the ACMA that it had not received any communication from AirLan to demonstrate that AirLan had complied with the TIO Decision by 16 November 2023 (**Attachment C**).
5. On 20 November 2023, the ACMA commenced an investigation under Part 26 of the Act into AirLan's compliance with section 132 of the TCPSS Act.
6. On 21 November 2023, the ACMA confirmed with [REDACTED], that AirLan had not made any contact with [REDACTED] to indicate that the \$15,546.68 in fees had been waived as required by the TIO Decision.
7. On 22 November 2023, the ACMA sent its preliminary findings report to AirLan and invited it to respond.
8. On 11 December 2023, AirLan provided its submission to the ACMA (**Attachment D**).

## The TIO scheme and TIO Constitution

9. 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).
10. 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.
11. 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.
12. 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).
13. Relevantly, clause 6.7 of the TIO's Terms of Reference<sup>2</sup> provides that if a consumer accepts a decision by the TIO, such as the TIO Decision, the member must comply with the decision.
14. 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.
15. 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) and subclauses 1(1) and (2) of Schedule 2 to the Act).
16. 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: 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

17. AirLan is an eligible CSP in Australia, as it provides phone and internet services to residential and small business consumers.
18. AirLan is a member of the TIO scheme as evident from the list of current members available on the TIO's website.<sup>3</sup>
19. As a TIO member, AirLan 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.
20. In its submission to the ACMA on 11 December 2023, AirLan advised that the TIO Decision was flawed for the following reasons:
  - (a) The late payment handling fee is a justified labour cost for handling declined credit card payments or other fees incurred for declined transactions.

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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 12 January 2024.

<sup>2</sup> <https://www.tio.com.au/sites/default/files/2021-08/TIO%202021%20Modernised%20Terms%20of%20Reference%20FINAL.pdf>, accessed 12 January 2024.

<sup>3</sup> <https://www.tio.com.au/members/who-we-work-with>, accessed 21 November 2023.

- (b) The TIO concluded the contract included excess data fees when more than 600GB of data was used each month, which varied from AirLan's website pricing which listed this as 400GB. AirLan stated *the consumer incorrectly put 600GB in the contract*.
- (c) Sharing proportionate responsibility for excess usage should be a 50/50 proportion.
- (d) The 10% interest fee referenced by the TIO is GST, as AirLan's terms and conditions highlight the excess usage fee indicated in its pricing is ex-GST.
21. The ACMA notes that the TIO issued its preliminary view on 24 August 2023, and both AirLan and the consumer were given an opportunity to respond. AirLan provided its submission to the TIO's preliminary view on 8 September 2023 and based on the record of the TIO Decision, the TIO Decision was made following the consideration of submissions made by AirLan and the consumer.
22. The ACMA is satisfied that none of the matters raised in AirLan's submission to the ACMA on 11 December 2023 constitute evidence that the TIO Decision was not made in accordance with the TIO's Constitution and Terms of Reference.
23. For this reason, under clause 6.7 of the TIO's Terms of Reference, AirLan was required to comply with the TIO Decision by waiving \$15,546.68 in fees on [REDACTED] account by 16 November 2023.
24. In its submission to the ACMA on 11 December 2023, AirLan advised it had applied a credit of \$15,546.68 on the account of [REDACTED] in an invoice of the same date.
25. On 14 December 2023, [REDACTED], provided the ACMA with a screenshot of part of the invoice from AirLan dated 11 December 2023. The invoice records a credit of \$15,546.68 on [REDACTED] account. The ACMA understands the credit applied on 11 December 2023 to represent AirLan waiving the relevant fees.
26. For the above reasons, and because AirLan did not waive \$15,546.68 in fees on [REDACTED] account by 16 November 2023 as required by the TIO Decision, the ACMA finds that AirLan failed to comply with the TIO Decision.
27. Consequently, the ACMA finds that AirLan 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>	TIO emails to AirLan dated 26 October 2023 attaching the TIO Decision identified as 2022/12/[REDACTED].
<b>Attachment B</b>	TIO email to AirLan dated 2 November 2023 attaching [REDACTED] acceptance of the TIO Decision and advising that AirLan must comply with the TIO decision by 16 November 2023.
<b>Attachment C</b>	TIO email to the ACMA dated 17 November 2023 advising that the TIO had not received any further contact or communication from AirLan since 3 November 2023.
<b>Attachment D</b>	Submission from AirLan to the ACMA dated 11 December 2023 providing documentary evidence demonstrating that it implemented the TIO Decision on 11 December 2023.