



# Recommendation

13 November 2017

- **Consumer lease**
    - **Lease provider**
  - **Misleading and deceptive conduct**
    - **Inappropriate correspondence**
      - **Failure to meet obligations**
- under the terms of a lease agreement**

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21 September 2017

### **Recommendation of a reasonable offer**

1. This recommendation provides the parties with our assessment of the consumer's complaint.

### **Summary**

2. The consumer's complaint relates to a laptop she leased from the FSP in November 2015.
3. We find that:
  - (a) the consumer's claim that the FSP's documentation is misleading or deceptive has not been established,<sup>1</sup>
  - (b) we cannot require the FSP to repair the existing laptop, or provide the consumer with a new replacement laptop, or release the consumer from the lease agreement,<sup>2</sup> and
  - (c) the consumer did not suffer a direct financial loss as a result of the FSP not requesting her CVV number on the credit card payment form and not informing her that it would need to call her to process the payment.<sup>3</sup>
4. In relation to the consumer's claim that the FSP inappropriately issued a withdrawal of incident letter, we find that the FSP's offer to refund the administration fee of \$110 to the consumer reasonably compensates the consumer for any loss that she may have suffered as a result of the FSP's error.
5. Consequently, we recommend that the consumer accept the FSP's offer in full and final settlement of this complaint.<sup>4</sup>

### **Background to complaint**

6. The consumer leased a laptop (**the laptop**) from the FSP on 21 November 2015 (**the lease agreement**).<sup>5</sup>
7. The laptop's screen was subsequently damaged.

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<sup>1</sup> CIO Rule 36.1(d) – 10<sup>th</sup> Edition Rules. All reference to CIO Rules in this Review are a reference to the 10<sup>th</sup> Edition Rules.

<sup>2</sup> CIO Rule 36.1(a).

<sup>3</sup> CIO Rule 36.1(a).

<sup>4</sup> CIO Rule 20.1.

<sup>5</sup> Rental Agreement dated 21 November 2015 and FSP's terms and conditions dated October 2015, provided to CIO by the FSP on 7 September 2016.

8. The consumer contacted the FSP to lodge an incident claim to have the laptop fixed under the FSP product care provisions of the lease agreement.
9. The FSP told the consumer that she should remove all of her documents from the laptop. This was because she would not receive the same laptop back. Instead, she would receive a refurbished laptop as a replacement.

### **Consumer's claims**

10. The consumer claims that:<sup>6</sup>
  - (a) the FSP's documentation is misleading and deceptive,
  - (b) the FSP should be obliged to repair the existing laptop, provide her with a new replacement laptop, or release her from the lease agreement,
  - (c) the credit card payment form was misleading because it did not request her CVV number that was necessary for the payment to be processed, and
  - (d) in October 2016 the FSP inappropriately sent her a withdrawal of incident letter.
11. To resolve her complaint, the consumer wants the FSP to:
  - (a) repair the laptop and extend the 12 month lease at no extra cost to her, or
  - (b) provide her with a new replacement laptop of the same make and model and extend the 12 month lease at no extra cost to her, or
  - (c) refund all payments she has made since reporting the damage to the laptop, the consumer will then return the laptop in its current conditions and the parties will be released from the lease agreement, and
  - (d) update its lease agreement and terms and conditions to make it clear that Company X products will not be repaired.

### **FSP's response**

12. The FSP says that:<sup>7</sup>
  - (a) the consumer's dispute relates to Company X's in-house policy, which is to replace damaged items with a refurbished item, rather than repairing the original item. As this is the policy of a third party, the FSP is unable to change it,
  - (b) the requirement for the consumer to provide her CVV number for her credit card over the phone is an additional security measure that the FSP follows. This is an internal policy and the FSP believes it mirrors the industry standard that the CVV number should not be recorded in writing other than on the back of a credit card, and

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<sup>6</sup> Consumer's complaint form dated 2 September 2016, and email from the consumer to CIO dated 13 October 2016 and 24 April 2017.

<sup>7</sup> Email from FSP to CIO dated 12 April 2017.

- (c) it acknowledges that the letter advising of the withdrawal of the event was sent in error and it has apologised for any inconvenience that this may have caused the consumer.

### **Considerations CIO is required to have regard to**

- 13. In dealing with this complaint, CIO has observed procedural fairness and has had regard to:
  - (a) relevant legal requirements and rights provided by law to consumers,
  - (b) applicable codes of practice,
  - (c) good industry practice in the financial services industry, and
  - (d) fairness in all the circumstances.
- 14. Both the consumer and the FSP have been given the opportunity to provide information to support their respective positions.
- 15. We are satisfied that, with the exception of any information considered to be confidential and/or commercially sensitive, all information relevant to this complaint received from the FSP and the consumer has been exchanged between the parties.<sup>8</sup>

### **Is the FSP's documentation misleading and/or deceptive?**

- 16. The consumer claims that the lease agreement and its terms and conditions are deceptive, as:
  - (a) they fail to tell the consumer that the FSP will not consider the repair of any Company X product, and
  - (b) they do not advise that the FSP will replace the Company X product with a refurbished (second hand) product, when the FSP is aware that this will happen with every Company X product.
- 17. The consumer also claims that FSP's email, sent on 1 September 2016, was misleading because it implied that the FSP would consider whether the laptop could be repaired or replaced, when they already knew that they would replace the laptop with a refurbished laptop.<sup>9</sup>

### Misleading or deceptive conduct

- 18. Section 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) says that a person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive, or is likely to mislead or deceive.
- 19. Conduct is considered to be misleading or deceptive if it leads a person into error or if it induces or is capable of inducing error or leads to an erroneous assumption

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<sup>8</sup> CIO Rule 33.

<sup>9</sup> Email from consumer to CIO dated 13 October 2016.

or misconception. Conduct is misleading or deceptive if it causes, or is likely to cause, a person to misinterpret, or be deluded as to the relevant facts.<sup>10</sup>

20. The context in which the alleged conduct occurred is to be determined in light of the relevant surrounding facts and circumstances.<sup>11</sup>
21. It is not necessary to prove that a party intended to mislead or deceive.<sup>12</sup>

#### CIO's jurisdiction

22. CIO cannot deal with a complaint:
  - (a) that is about something done by a third party (i.e. someone other than the consumer or the FSP),<sup>13</sup>
  - (b) where the financial services provider has done no more than exercise its commercial judgment,<sup>14</sup> or
  - (c) where a consumer is seeking an outcome or remedy for which the scheme cannot make an order or award against a financial services provider.<sup>15</sup>

*Are the FSP's rental agreement terms and conditions misleading or deceptive?*

#### Our finding

23. CIO has reviewed the terms and conditions to the lease agreement (**the terms and conditions**),<sup>16</sup> which state (copied verbatim)[definitions added]:<sup>17</sup>

we [the FSP] may, at our discretion, choose to:

  - (i) repair the damaged Goods; [or]
  - (ii) replace the stolen, accidentally lost or accidentally damaged Goods with goods of similar age, original specifications ... and condition, but this may not necessarily be the same make or model; or
  - (iii) release you [the consumer] from your future obligations under this Agreement except for any payments in arrears at the time the incident was approved.
24. Accordingly, the terms and conditions do not state that the FSP will not consider the repair of any Company X product, rather it is up to the FSP's discretion as to the option it will choose.
25. The terms and conditions do not contain the words 'refurbished' or 'second hand', but they do state that goods may be replaced with goods of a similar age, specifications and condition.
26. While the terms and conditions do not say whether the replacement item will be new or used, we consider that a refurbished good is consistent with one that is of similar age, original specifications and condition.

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<sup>10</sup> Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (In Liquidation) and Another [2012] FCA 414.

<sup>11</sup> Ibid.

<sup>12</sup> Parkdale Custom Build Furniture Pty Ltd v Puxu Pty Ltd [1982] 149 CLR 191 at 197.

<sup>13</sup> CIO Rule 10.1(e)(ii).

<sup>14</sup> CIO Rule 10.1(f).

<sup>15</sup> CIO Rule 10.1(i).

<sup>16</sup> FSP Rental Agreement Terms and Conditions dated October 2015.

<sup>17</sup> Condition 13.4 of the Rental Agreement Terms and Conditions.

27. The wording of the clause at paragraph 23 above allows the FSP to exercise its discretion to replace or repair a damaged item in accordance with the policy of the manufacturer of that particular item.
28. Accordingly, we find that the terms and conditions are not misleading or deceptive as a result of not containing the words 'refurbished' or 'second hand'.
29. The FSP provides leases to consumers for a wide range of items, from a large and changing number of manufacturers. All of these manufacturers have different policies about how they deal with damaged or faulty items.
30. We therefore do not consider it unreasonable, or misleading or deceptive, for the FSP's terms and conditions to be drafted broadly.
31. Indeed, we consider that it would be too onerous to require the FSP to list the return policy for each individual manufacturer, and to update this list every time a manufacturer changes its policy.
32. Consequently, we find that this aspect of the consumer's complaint has not been established.<sup>18</sup>

*The consumer's desired outcome is an order we cannot make as against the FSP*

33. The consumer says that to resolve her complaint, the FSP should either repair the laptop, provide her with a new replacement laptop or release her from the lease agreement.<sup>19</sup>
34. As found above at paragraph 24, the FSP has the discretion to choose how it will deal with damaged goods under its product care program.<sup>20</sup>
35. Where goods remain under the manufacturer's warranty, we consider that it is an appropriate exercise of the FSP's discretion to return the damaged goods to the manufacturer to be repaired or replaced under warranty.
36. The FSP has informed CIO that all Company X items have to be sent to Company X for repairs in order to maintain the warranty of the goods.
37. Accordingly, the FSP is bound by Company X's policy for handling damaged goods during the warranty period.
38. CIO has reviewed Company X's Surface warranty. This warranty states that goods presented for repair may be replaced by refurbished goods of the same type, rather than being repaired. It also states that refurbished parts may be used to repair goods.
39. The FSP cannot require Company X to repair the consumer's original laptop or replace it with a new item.
40. As such, we find that the outcome the consumer is seeking is an order that CIO is unable to make, as the policies of a third party (Company X) are beyond the control of the FSP.<sup>21</sup>

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<sup>18</sup> CIO Rule 36.1(d).

<sup>19</sup> Email from consumer to CIO dated 24 April 2017.

<sup>20</sup> Clause 13.4 of the rental agreement terms and conditions.

<sup>21</sup> CIO Rules 10.1(i) and 10.1(e).

41. Accordingly, we cannot require the FSP to:
- (a) release the consumer from a valid contract, where we have found that the FSP has adhered to the terms and conditions of that agreement and done nothing wrong, or
  - (b) require the FSP to repair the consumer's original laptop or replace it with a new item.
42. Consequently, we find that this aspect of the consumer's claim is outside of our jurisdiction.<sup>22</sup>

*Was the FSP's email to the consumer regarding inspection of the goods misleading or deceptive?*

#### Our finding

43. On 1 September 2016, the FSP sent the consumer an email saying that once it had possession of the laptop it would have it inspected.<sup>23</sup>
44. The consumer says that the FSP's email implied that the FSP would inspect the laptop to determine whether to repair or replace it, despite the FSP knowing that the only option was for her laptop to be replaced with a refurbished laptop.<sup>24</sup>
45. CIO has reviewed the email from the FSP to the consumer, in which the FSP states that it will inspect the laptop before determining whether to repair or replace it.<sup>25</sup>
46. We do not consider that the FSP's email of 1 September 2016 was misleading or likely to mislead.
47. We consider that before sending the item back to Company X, the FSP would have to inspect the item to confirm that the damage would be covered under the terms of manufacturer's (Company X's) warranty.
48. Accordingly, we find that this aspect of the consumer's claim has not been established.<sup>26</sup>

#### **Was the FSP's credit card payment authority form misleading?**

49. The consumer says that:
- (a) the FSP should not have requested her credit card details because the FSP had no ability to take the payment until she provided the FSP with the card's CVV number, and
  - (b) the FSP did not advise her of this fact until after she had provided the FSP with her credit card details.

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<sup>22</sup> CIO Rule 10.1(f) and 10.1(i) and CIO Rule 36.1(a).

<sup>23</sup> Email from FSP to consumer dated 1 September 2016.

<sup>24</sup> Email from consumer to CIO dated 13 October 2016.

<sup>25</sup> Email from FSP to consumer dated 1 September 2016.

<sup>26</sup> CIO Rule 36.1(d).

### Relevant considerations

50. We refer to paragraphs 18 to 21 above.
51. The Payment Card Industry Data Security Standards (**PCI DSS**) is an international standard designed by the major credit card companies as a self-regulatory framework for financial institutions, merchants and entities involved in payment card processing to follow.
52. Whilst the standards do not form part of Australian legislation, they do set out what is considered to be good industry practice and the PCI DSS are often contained in merchant contracts.
53. Under the PCI DSS, card verification value (CVV) numbers are considered to be sensitive authentication data. Merchants and other entities involved in payment card processing are required to strictly protect this sensitive authentication data and securely delete it after authorisation in accordance with Requirement 3.2 of the PCI DSS.
54. The rules and guidelines under which CIO operates limit the types of complaints and issues that we can consider.
55. We are only able to award compensation that compensates a consumer for the loss they have suffered.<sup>27</sup>
56. In limited circumstances, we may award a consumer compensation for non-financial loss, including for stress and upset.<sup>28</sup>
57. Furthermore, we are not a disciplinary body. We are therefore unable to award punitive, exemplary or aggravated damages.<sup>29</sup>

### Our finding

58. We have reviewed the FSP's payment authority form, which was sent to the consumer to complete.
59. It is noted that the payment authority form did not advise the consumer that she would need to provide the CVV code to the FSP at a later time in order for the payment to be processed, or that the consumer could contact the FSP by telephone to provide the credit card details over the phone.
60. However, we consider that the FSP's explanation regarding why they did not request the CVV code on the form shows that the processes it has in place ensure that it complies with the PCI DSS, and good industry practice generally, by ensuring that a consumer's CVV code is not recorded on its systems.
61. Accordingly, we consider that it was appropriate for the FSP to send the payment authority form to the consumer to obtain payment for a fee and we do not consider that the payment authority form was misleading.
62. We are not a disciplinary body and we cannot require the FSP to change its practices or documentation to make its payment form clearer for consumers to understand.

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<sup>27</sup> Guideline 112.2(c), CIO Guidelines – 5<sup>th</sup> Edition.

<sup>28</sup> CIO Rule 9.8, Guideline 113.1, CIO Guidelines – 5<sup>th</sup> Edition.

<sup>29</sup> CIO Rule 9.9.



63. We note that while the consumer provided her credit card details to the FSP (which it could not use without obtaining her CVV code), we do not consider that this action resulted in the consumer experiencing any loss.
64. Accordingly, we do not consider it appropriate to award the consumer with compensation for this claim.
65. In limited circumstances, we may award a consumer compensation for non-financial loss, including for stress and inconvenience.<sup>30</sup>
66. While the FSP's conduct may have caused the consumer some inconvenience, we do not consider the consumer's circumstances warrant this type of compensation because it is expected that a consumer should tolerate a reasonable degree of inconvenience.<sup>31</sup>
67. Accordingly, we find that this aspect of the consumer's claim has not been established.<sup>32</sup>

**Is the FSP's offer regarding the withdrawal of incident letter sent to the consumer in error, a reasonable offer?**

68. The consumer says that on or around 13 October 2017, the FSP sent a letter to her stating that if no response to the letter was received within twenty one days, it would be assumed that the consumer no longer wished to proceed with the incident claim and it would be withdrawn.
69. The FSP has confirmed that the letter was sent to the consumer in error.

Relevant considerations

70. We can recommend that a consumer accept an offer if, in the circumstances and having regard to the information before us, we consider it to be a reasonable offer.<sup>33</sup>
71. We will only make a recommendation of a reasonable offer after undertaking a review of the complaint and forming a view of the likely outcomes that might be achieved if the complaint were to be determined by CIO.<sup>34</sup>

Our finding

72. The FSP has acknowledged that it sent the withdrawal of incident letter to the consumer in error and has apologised to the consumer for its error.
73. To compensate the consumer for its error, the FSP has offered to reverse the administration fee of \$110, which was payable by the consumer to lodge her incident claim.
74. In view of the above, we consider that the FSP's offer represents a reasonable offer and adequately compensates the consumer for its mistake.

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<sup>30</sup> Rule 9.8, CIO Rules; Guideline 113.1, CIO Guidelines – 5<sup>th</sup> Edition.

<sup>31</sup> Guideline 117.3(b), CIO Guidelines – 5<sup>th</sup> Edition.

<sup>32</sup> CIO Rule 36.1(d).

<sup>33</sup> CIO Rule 20.1.

<sup>34</sup> CIO Rule 20.2.

75. As such, we recommend that the consumer accept the FSP's offer in full and final settlement of this aspect of the complaint.<sup>35</sup>

Case Manager

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<sup>35</sup> CIO Rule 20.1.