

5 July 2023

One New Zealand Group Limited
74 Taharoto Road
Takapuna, Auckland

Attention: Mr Tom Thursby
Head of Legal and Regulatory

Via email only: [REDACTED]

URGENT

Dear Mr Thursby

Fair Trading Act 1986: Stop Now Letter

1. As you are aware, the Commerce Commission (**Commission**) is investigating One New Zealand Group Limited's (**One NZ**) "100% mobile coverage" campaign (**the campaign**) arising from its collaboration with satellite communications provider SpaceX and the future provision of satellite direct-to-cell mobile phone coverage. Issues arise about compliance with the Fair Trading Act 1986 (**FT Act**).
2. The Commission has reviewed representations made across various media and advertising channels by One NZ in relation to the campaign. The Commission has also requested and received information and documents from One NZ, which included an interview with One NZ representatives held on 8 June 2023.
3. We are concerned that One NZ has engaged, and is continuing to engage, in conduct in breach of the FT Act and that consumers and competitors are being harmed by this conduct.
4. We note One NZ's advice that:
 - 4.1 the paid media advertising for the campaign would come to an end on or before 2 July 2023 ; and
 - 4.2 some static billboard advertising may remain in place after 2 July 2023 and advertising on the One NZ website and in store would be ongoing.

5. This response does not sufficiently address our compliance concerns because it is not clear that One NZ will not recommence the conduct and representations that have formed part of the paid media campaign, and in any event, conduct will be ongoing via One NZ's retail stores and on the One NZ website. We also understand that commercials promoting the campaign continued to be shown on television as recently as 4 July 2023.
6. This letter:
 - 6.1 sets out the nature of our concerns about compliance with the FT Act;
 - 6.2 requests that One NZ immediately stop and not recommence engaging in specified conduct; and
 - 6.3 sets out the potential consequences of failing to comply with the Commission's request in this letter.

Nature of our concerns

7. The Commission has concerns arising from the conduct and representations by One NZ in relation to the campaign, which we believe are likely to breach certain sections of the FT Act¹. The Commission's most significant concerns are set out below.
8. Please note that this is not an exhaustive summary of our compliance concerns with the campaign. Our investigation is ongoing and the breadth of this investigation extends to include additional claims made by One NZ not specifically referenced in this letter, and whether the relevant claims were sufficiently substantiated at the time they were made.

False or misleading claims that One NZ is offering "100% mobile coverage. Launching 2024"

9. One NZ makes the claim "100% mobile coverage. Launching 2024" across a range of media including billboards, stair wrap(s), social media, TV, radio, website, in-store and long form press and media releases. The majority of this media relies on this headline without caveat or explanation of the significant limitations or restrictions that apply to the coverage.
10. One NZ has informed the Commission that the intended meaning of the term "coverage" in the context of the "100% mobile coverage" campaign is that there is network infrastructure serving a geographic area, over which connectivity could be provided to customers, but that "coverage" is distinct from "connectivity". One NZ has also advised that while coverage is a critical ingredient of connectivity, coverage is not connectivity or a product that a customer can purchase. We do not agree that

¹ The relevant FT Act sections are included for your reference at Appendix A.

the “100% mobile coverage” representations made by One NZ would likely be understood by consumers in this way.

11. Our view is that consumers could understand the phrase “100% mobile coverage” as the ability to access all current types of mobile services (SMS/MMS, voice calling, data), in all locations in New Zealand, at all times, in a similar way they do now, from 2024.
12. The background and imagery associated with the “100% mobile coverage” representations, promoting and describing the partnership with SpaceX, the phrase “One giant leap”, images of the night sky and New Zealand viewed from space reinforce the impression of an equivalent or improved service for consumers.
13. However, what One NZ is proposing to deliver to consumers is:
 - 13.1 the ability to access SMS / MMS only by 31 December 2024, and voice and data (likely capped and throttled) by the end of 2025;
 - 13.2 in locations in New Zealand where the consumer’s mobile phone has line of sight to the sky; and
 - 13.3 with send and receive times initially averaging 2 minutes.
14. We consider that this conduct, being that set out in paragraphs 9 and 12 above, without providing prominent qualifying information that explains the limitations of the service and that it may not be available until 31 December 2024, is likely to breach sections 9, 11, 13(b) and/or 13(e) of the FT Act.

False or misleading representations and conduct by omitting to provide material information about what “line of sight to the sky” requires

15. One NZ acknowledges that line of sight to the sky from the mobile phone will be required for a customer to connect to its network in satellite coverage areas. This limitation is not disclosed in the majority of advertising material where the “100% mobile coverage” claim is made (which in our view is misleading as noted above).
16. One NZ representatives confirmed that, as their knowledge about the coverage solution has evolved, changes have been made to website content. On 9 May 2023 references to line of sight to the sky were added to the website content as follows:

When the service goes live, there will be 100% coverage across the country where you have line of sight to the sky.

...

... It will provide coverage anywhere in the country where you have line of sight to the sky ...

17. No further information is provided to consumers in relation to what “line of sight to the sky” requires in practice; and in response to questions from Commission staff, One NZ representatives have not been able to explain what “line of sight to the sky” means, indicating that testing is still to be done on that aspect. From what we understand from One NZ there will be limitations on the ability to use the service in certain locations.
18. Notwithstanding the paucity of information on this point, advertising material represents consumers using the satellite direct-to-cell network in dense bush, forest and inside a helicopter, even though it is unclear whether a device would have sufficient line of sight to the sky to connect to the network in those locations.
19. In our view, the statement referencing “line of sight to the sky” is misleading by omission as it does not make sufficiently clear the circumstances in which the services will be available. That is particularly so when, as noted above, some advertising shows the service being used in locations where it may not in fact be available. In particular, the requirement for line of sight to the sky may significantly reduce the usefulness of the service in a way consumers would not expect, which is not apparent from the advertising. Moreover, the advertising noted at paragraph 18 above may itself be affirmatively misleading.
20. We consider that this conduct is likely to breach sections 9, 11, 13(b) and/or 13(e) of the FT Act.

False or misleading representations and conduct through the depiction of messaging in advertising

21. A series of television advertisements (including those available on other media, such as social media and YouTube) used in the campaign show people in remote outdoor locations using the satellite direct-to-cell network. One NZ has suggested that:
 - 21.1 the use of messages in the advertisements demonstrates that the service is limited to text messaging; and
 - 21.2 the timestamps on the messages set consumer expectations that text messages will not be sent and received instantaneously.
22. We do not agree with One NZ’s comments on the advertising and note, in particular, that the messages appear to be exchanged nearly instantaneously and the timestamps are difficult to read. We also note that one of the message exchanges is depicted as occurring with someone who is apparently in dense bush and may not have sufficient line of sight to the sky to connect to the satellite network.
23. In our view, the advertising is misleading because it gives an overall impression that:
 - 23.1 any kind of messaging, including instant / data messaging platforms, will be supported when in fact coverage will be limited to SMS/MMS only;

- 23.2 instantaneous communication will be available, when that is not what will be provided; and
 - 23.3 the service will be available from a location where connectivity may in fact not exist.
24. Any qualifying information, such as the timestamps, is not sufficiently instructive to ensure consumers understand that message send times will initially average two minutes.
25. We consider that this conduct is likely to breach sections 9, 11, 13(b) and/or 13(e) of the FT Act.

Request to stop and not recommence conduct

26. The Commission requests that One NZ cease and not recommence:
- 26.1 making the following potentially false or misleading representations when referring to its satellite direct-to-cell mobile coverage:
 - 26.1.1 “100% mobile coverage”;
 - 26.1.2 “100% mobile coverage. Launching 2024”; and
 - 26.1.3 any statement using the term “100%” or “100 percent” in association with the terms “coverage” or “mobile coverage”,

without providing prominent qualifying information that explains the limitations of the service and that it may not be available until 31 December 2024;
 - 26.2 representing that coverage will be available where consumers “have line of sight to the sky” without providing prominent qualifying information that explains what “line of sight to the sky” requires; and
 - 26.3 representing in advertising about its satellite direct-to-cell mobile coverage:
 - 26.3.1 consumers sending and receiving messages nearly instantaneously when they are limited to time delayed text messages only and the average send and receive time will initially be up to two minutes; and
 - 26.3.2 consumers using their phone in locations where they may not be able to.

Further information on request to stop and not recommence the conduct

27. The Commission's immediate objective is to prevent further harm to consumers or competitors.
28. Whilst One NZ advised that the paid media advertising for the campaign would come to an end on or before 2 July 2023, we remain of the view that the conduct set out in paragraph 26 continues to be likely to cause significant harm to consumers or competitors.
29. It is not clear that One NZ has stopped or will not recommence the conduct and repeat representations that have formed part of the paid media campaign. One NZ has indicated that conduct and representations will be ongoing via One NZ's retail stores, on the One NZ website and potentially some billboards. Thus the Commission is not satisfied that all of the conduct set out in paragraph 26 has ceased. Nor is the Commission satisfied that there will be no further harm to consumers.
30. Therefore, to reduce on-going harm to consumers, the Commission requests that One NZ cease and not recommence, the conduct and representations specified in paragraph 26.
31. Moreover, this campaign has been very high profile and we are concerned that even if the conduct ceases, a lingering wrongful impression that requires correction will remain in the minds of consumers. The Commission reserves the right to take steps, including seeking injunctive relief or making its concerns public, to ameliorate that.
32. Further, the Commission will monitor One NZ's response to this letter, as well as any continued representations made as part of the current or new advertising campaigns, and consider appropriate legal action to enforce the FT Act.

Penalties for breaching the Fair Trading Act

33. Only the courts can decide if there has actually been a breach of the FT Act. The court can impose penalties where it finds the law has been broken. A company that breaches the FT Act can be fined (for each offence) up to \$600,000, while an individual can be fined up to \$200,000.

Next steps

34. Please confirm by no later than 4:00pm on Wednesday, 12 July 2023 that One NZ intends to comply with paragraph 26 and how and by when it will do so.
35. The Commission will consider its next steps on receipt of your response. Please note that the Commission may still bring legal proceedings in relation to this conduct, irrespective of whether it has subsequently ceased, without further notice to you. We recommend that you seek legal advice in relation to this letter or guidance on

your legal obligations. If you wish to dispute any aspect of the matters set out in this letter you should also do so by the date above.

36. A written response should be sent to [REDACTED], Senior Investigator, either by post to our Wellington office at 44 The Terrace, PO Box 2351, Wellington, 6140, marked for the attention of [REDACTED] or by email to [REDACTED].
37. As the Commission's investigation remains ongoing, we may also contact you again to request further information.

Public information

38. This letter is public information. We intend to make public comment about our investigation and this letter tomorrow morning, including issuing a media release, without prior notice to you or before your response (referenced at paragraph 34) has been received.

Yours sincerely

[REDACTED]

Kirsten Mannix
Acting General Manager
Fair Trading Branch

APPENDIX A

<http://www.legislation.govt.nz/act/public/1986/0121/64.0/DLM96439.html>

Section 9 of the FT Act states:

Misleading and deceptive conduct generally.

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 11 of the FT Act states:

Misleading conduct in relation to services

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

Section 13 of the FT Act states:

False or misleading representations

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services;

...(b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or

...(e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or