

12 April 2019

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Via email only: [REDACTED]

Dear [REDACTED]

Fair Trading Act 1986: Warning

The Commerce Commission has been investigating Spark New Zealand Limited (**Spark**) under the Fair Trading Act 1986 (**FTA**) regarding Spark's failure to apply \$300 welcome credits to the accounts of all eligible consumers. We have now completed our investigation, which was initiated following a self-report by Spark, and are writing to you to alert you to our concerns.

In summary, the Commission considers that by issuing invoices to customers demanding payment without having applied the \$300 welcome credits, Spark represented to affected customers that it was not obliged to apply the welcome credits, when this was not the case.

We are issuing you with this warning letter because in our view, Spark's conduct is likely to have breached s13(i) of the FTA. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the law has occurred, and we have determined that at this time we will not be bringing legal action to establish fault.¹

The investigation

Between February and July 2018, Spark represented to consumers, on its website, that by signing up to a 12-month broadband contract, they would receive a \$300 account credit.

The agreement between Spark and its customers stipulated that Spark would apply the welcome credit on the date the customer's service was connected, and that the credit would be applied to any charges incurred on that account.²

In August 2018, Spark self-reported to the Commission that it had identified a number of customers who had either not received the welcome credit they were entitled to receive for joining Spark, or had not received the full credit amount to which they were entitled. Spark indicated that it had since applied the \$300 welcome credit to affected customers' accounts.

The Commission investigated Spark's conduct regarding the application of the \$300 welcome credit, and identified that Spark had issued invoices to customers demanding

¹ Commission's published *Enforcement Response Guidelines* at [41].

² <https://www.spark.co.nz/help/other/terms/personal-terms/broadband-account-credit/>

payment for services where no payment was in fact due because Spark ought to have applied some or all of the \$300 welcome credit against the invoiced amount.

Section 13(i) of the FTA provides:

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 and services,-

...

(i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993;

...

The Commission's view

The Commission considers that Spark is likely to have breached section 13(i) of the FTA each time Spark issued an invoice to a customer without having correctly applied the \$300 welcome credit against the charges incurred by the customer.

This is because in the Commission's view, it was a condition of the agreement between Spark and the customer that the \$300 welcome credit would be applied to the customer's account on the date the customer's broadband was connected. Because Spark failed to correctly apply the \$300 welcome credit to the customer's account on the connection date, each invoice subsequently issued by Spark did not reflect the application of the \$300 welcome credit and contained a false or misleading representation as to the existence or effect of a condition, with that representation being that Spark was not obliged to apply the welcome credit to the customer's account, when this was not the case.

In reaching its decision to issue this warning, the Commission acknowledges Spark's actions in identifying the welcome credit issue, and its subsequent decision to self-report the issue to the Commission, together with Spark's conduct in identifying all affected customers and applying the \$300 welcome credit to them.

We encourage Spark to continue to review the application of offers made to consumers to confirm their consistent application.

The Commission's role

The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FTA. The FTA prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the Fair Trading Act

Only the courts can decide if there has actually been a breach of the FTA. The court can impose penalties where it finds the law has been broken. A company that breaches the FTA can be fined up to \$600,000 and an individual up to \$200,000 per offence.

You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

Further information

We have published a series of fact sheets and other resources to help businesses comply with the FTA and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the FTA.

You can also view the FTA and other legislation at www.legislation.co.nz.

While we will not be taking any further action against Spark at this time, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against Spark.

This warning letter is public information. We may make public comment about our investigations and conclusions and intend on issuing a media release in relation to this letter.

Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely



[REDACTED]
Consumer Manager Wellington
Competition and Consumer Branch