

24 November 2014

Mr Christian Derrington
General Manager Sales & Customer Care
Pulse Energy Limited
PO Box 10044
Dominion Road
Auckland 1446

Dear Mr Derrington

Fair Trading Act 1986: Warning

1. The Commerce Commission has been investigating Pulse Energy Limited (Pulse) under the Fair Trading Act. We have now completed our investigation and are writing to you to alert you to our concerns.
2. In summary, the Commission considers that Pulse's conduct is likely to have breached the Fair Trading Act (the Act) by:
 - 2.1 switching customers without their consent;
 - 2.2 comparing GST exclusive rates with GST inclusive rates; and
 - 2.3 misrepresenting the availability of low fixed daily rates to customers in certain areas.

The investigation

3. During our investigation, the Commission considered allegations that Pulse had made false and/or misleading representations when switching customers to their services.

Switching customers without their consent

4. The Commission considered allegations that Pulse switched 89 customers without their consent.
5. In response to the allegations, Pulse provided the Commission with records for 89 of their competitor's customers that it applied to have switched to Pulse. Pulse acknowledged that 17 of the 89 customers were not valid switches. These 17 customers originally gave consent to Pulse to switch but later withdrew it as their existing provider contacted their customers and "saved" them from the switch.
6. Pulse responded that the error of invalidly switching 17 customers was a result of human error. In particular, there was an error when recording whether a customer had been "saved" by their existing provider from the switch to Pulse.

7. Pulse has since implemented extra steps as part of their Quality Assurances process to record and verify that customers have agreed to switch. These additional steps will confirm all necessary details and that the customer wishes to continue with the switch. In addition, Pulse will continue to collect either a verbal, written or electronic confirmation that the customer wishes to join Pulse.

Comparing GST exclusive rates with GST inclusive rates

8. We considered allegations that Pulse compared its GST exclusive rates with customers' existing GST inclusive rates.
9. Pulse acknowledged that the rates offered to customers excluded GST. They explained that:
 - 9.1 they inform customers that the rates exclude GST during their phone calls; and
 - 9.2 the reason that Pulse makes rate comparisons that exclude GST is that the rates shown on retailer's invoices tend to be GST exclusive.

Availability of low user fixed daily rates

10. We considered allegations that Pulse represented to customers that they were eligible for "low user" fixed daily rates when this was not viable or available to certain customers because of the area the customers resided.
11. Pulse explained that it had a process issue that it was not aware of until after signing up customers. In particular, a sales person was not aware that the low user rate was not available in certain regions.
12. Subsequently Pulse has implemented two new steps to prevent customers being billed at the incorrect rate. In addition, Pulse has since contacted all customers in the affected region where low user rates are not available and have tried to rectify any problems directly with customers.

The Commission's view

13. In this case, the Commission's view is that Pulse's conduct is likely to have breached the Fair Trading Act. We have reached this view because of the reasons outlined below.

Switching customers without their consent

14. In our view Pulse made false and/or misleading representations that customers had agreed and authorised to switch their energy supply from their existing supplier to Pulse.
15. When Pulse requested to switch 89 of their competitor's customers Pulse implied to their competitor that those customers had agreed this switch. This representation is false and/or misleading as there is evidence that at least 17 of the 89 customers did not agree to switch.

16. Pulse is likely to be in breach of section 13(c) of the Act which states that no person shall in trade, in connection with the supply or possible supply of goods or services make a false or misleading representation that a particular person has agreed to acquire goods or services.

Comparing GST exclusive rates with GST inclusive rates

17. Pulse is likely to have misled customers as to the price of services by comparing Pulse's GST exclusive rates with customers' GST inclusive rates. In particular, Pulse likely misled customers as to the perceived savings of switching to Pulse.
18. Pulse is likely to be in breach of section 13(g) of the Act as no person shall, in trade, in connection with the supply or possible supply of goods or services make a false or misleading representation with respect to the price of any goods or services.
19. To ensure that these types of claims do not breach the Act, we think it is best practice for retailers to include GST in the price of goods or services sold to consumers.

Availability of low user fixed daily rates

20. Pulse is likely to have breached sections 11 and 19(1)(b) of the Act by representing that the low fixed daily rate was available to customers residing in a certain area where the rate being offered was not in fact available.
21. Section 11 prohibits a person in trade from engaging in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.
22. Section 19(1)(b) prohibits the advertising for supply at a specified price goods or services which that person does not have reasonable grounds for believing can be supplied by that person at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement.
23. Our enquiries have shown that Pulse offered low fixed daily rates to customers who could not get them because of their geographical location.
24. In our view Pulse ought to have known whether the offer was available to a specific customer, particularly because Pulse had customer's details including their addresses.

Reasons for issuing a warning

25. The Commission considers that the unauthorised switching of customers causes harm to:
 - 25.1 customers through unnecessary disruption, emotional stress, financial harm and inconvenience; and
 - 25.2 competitors by losing customers who have not agreed to switch.
26. Previously, we have given Pulse compliance advice in relation to switching customers in:

- 26.1 January 2011, the Commission provided compliance advice about allegations of price savings, price comparisons, competitor pricing and unauthorised switching of customers from other competitors.
- 26.2 February 2012, the Commission issued additional compliance advice about alleged misrepresentations of the benefits to customers on changing suppliers. This included savings to be gained by switching, unit prices to be charged for electricity, whether prices including and excluding GST have been compared on a like basis and matters relating to continued invoicing by a lines company.
27. Although we recognise that Pulse has sought to address some of the Commission's concerns, we reiterate the need for Pulse to have robust systems in place to ensure compliance and avoid similar issues from re-occurring.
28. If the alleged conduct continues, or if we see similar future conduct, the Commission is likely to consider stronger enforcement action against Pulse to ensure compliance with the Act. We therefore recommend that Pulse seek legal advice and regularly review its compliance procedures and policies.
29. This warning letter is public information and will be published on our website. We may also make public comment about our investigation and conclusions, including issuing a media release or making comment to media.

The Commission's role

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

Penalties for breaching the Fair Trading Act

31. Only the courts can decide if there has actually been a breach of the Fair Trading Act. The court can impose penalties where it finds the law has been broken. A company that breaches the Fair Trading Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
32. 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

33. We have published a series of fact sheets and other resources to help businesses comply with the Fair Trading Act 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 Act.
34. You can also view the Fair Trading Act and other legislation at www.legislation.co.nz.

35. Thank you for your assistance with this investigation. Please contact Fa'amoana Pa'o on (04) 9243766 or by email at faamoana.pao@comcom.govt.nz if you have any questions about this letter.

Yours sincerely



Ritchie Hutton
Head of Investigations
Competition Branch