

13 June 2014

By hand

Mr Mark Callander
CallPlus Group
CallPlus Business Centre
110 Symonds Street
Auckland
1010

Dear Mr Callander

CallPlus Group – warning for non-compliance with information specifications under s 83 of the Telecommunications Act and notices under s 98 of the Commerce Act

Purpose

1. The purpose of this letter is to advise you of our concerns following our assessment of CallPlus Limited's (CallPlus), CallPlus Services Limited's (CallPlus Services) and Flip Services Limited's (Flip) (together referred to as the CallPlus Group) compliance with the information specifications issued under s 83 of the Telecommunications Act (Act) for the 2012/2013 TDL year (information specifications) and/or the s 98 notices issued under the Commerce Act during October 2013 (notice(s)).

Summary of findings

2. In summary, we consider that:
 - 2.1 CallPlus failed to comply with the information specifications;
 - 2.2 CallPlus provided incorrect information when responding to the information specifications; and
 - 2.3 CallPlus Services and Flip provided incorrect information when responding to the notices.

Warning for failing to comply with information specifications and notices

3. We consider that CallPlus should have included the specified information for CallPlus Services and Flip in its information disclosures when responding to the information specifications.

4. We further consider that:
 - 4.1 CallPlus provided incorrect information on the TDL status of CallPlus Services and Flip, by failing to disclose that either firm was a liable person and/or connected to a liable person via s 79 of the Act, when responding to the information specifications;
 - 4.2 CallPlus Services provided incorrect information by asserting that it was not a liable person, nor connected to a liable person via s 79, when responding to its notice; and
 - 4.3 Flip provided incorrect information by asserting that it was not connected to a liable person via s 79, when responding to its notice.
5. On this occasion, rather than taking stronger enforcement action, we have decided to issue this warning letter to the CallPlus Group.

Our decision to issue a warning

The potential contraventions

6. As set out in the final liability allocation determination for the period 1 July 2012 to 30 June 2013, our compliance review found that CallPlus Services both operated a component of a PTN and was connected to CallPlus via s 79 of the Act. We also found that Flip should be treated as one with CallPlus under s 79.
7. We therefore consider that relevant information for CallPlus Services and Flip should have been provided in CallPlus' response to the information specifications. It further follows, that we consider the assertions by the CallPlus Group that CallPlus Services and Flip were not liable persons and/or connected to a liable person via s 79, were wrong.
8. We consider that it is likely that CallPlus has contravened s 156A(1)(k) of the Act, by failing to provide the information for CallPlus Services and Flip required under the information specifications, without a reasonable excuse.
9. We further consider that the information disclosures of CallPlus, CallPlus Services and Flip are at risk of giving rise to the following possible breaches:
 - 9.1 CallPlus – contravention of s 156A(1)(l) of the Act, by knowingly supplying incorrect TDL information regarding the TDL status of CallPlus Services and Flip in response to the information specifications;
 - 9.2 CallPlus Services – contravention of s 103(1)(b) of the Commerce Act, by knowingly supplying incorrect information by asserting that it was not a

liable person, nor connected to a liable person via s 79, in response to its notice; and

- 9.3 Flip - contravention of s 103(1)(b) of the Commerce Act, by knowingly supplying incorrect information by asserting that it was not connected to a liable person via s 79, in response to its notice.
10. We may take court proceedings seeking a financial penalty or issue an infringement notice for a contravention of s 156A(1)(l) and s 156A(1)(k) of the Act.
11. We may also lay criminal proceedings for a contravention of s 103(1)(b) of the Commerce Act.
12. Only the courts can decide if there has actually been a breach of the Telecommunications Act or the Commerce Act. The court can impose penalties where it finds the law has been broken.

Our assessment of the CallPlus Group's conduct

13. We recognise that there is scope for a divergence of views on the correct interpretation of the relevant provisions of the Act. However, in our view, the CallPlus Group did not exercise the standard of care we expect of businesses when responding to information specifications under the Act, or our notices.
14. The decisions regarding the TDL status of CallPlus Services and Flip, and whether or not they were liable persons or connected to a liable person via s 79, were clearly at the margin. Accordingly, there was a significant risk of the CallPlus Group adopting the wrong position, even if this was against expectations.
15. In our view, the CallPlus Group's enquiries and assessment of the relevant matters was inadequate given the risk of making incomplete or inaccurate disclosures in response to the information specifications and notices.
16. In particular, we consider that the CallPlus Group failed to give proper consideration to all relevant aspects of the actual operation of CallPlus Services and Flip when reaching a view on whether or not they were liable persons or connected to a liable person via s 79. Such assessment is essential given the anti-avoidance element in the TDL provisions which is directed at ensuring that the levy liability is independent of how liable persons' businesses are structured.
17. Nevertheless, in this instance, we have decided to exercise our enforcement discretion not to issue an infringement notice or to seek a penalty from the court.
18. We have done so because for the 2012/2013 TDL year we were still in the early stages of the TDL regime and our initial guidance on the relevant provisions could have been clearer.

19. Our enforcement response was further informed by the CallPlus Group's constructive approach to resolving the issues by agreeing on the amount of the TDL payable for 2013 and committing to steps to eliminate a debate on the TDL status of CallPlus Services and Flip for the purposes of the LAD for 2014 and later years.

Our expectations regarding the CallPlus Group's future compliance

20. We encourage the CallPlus Group to engage with us if it has any concerns regarding responses to our section 83 information specifications or notices in the future.
21. We consider that compliance with the disclosure requirements under the Act is of utmost importance. This is particularly so where the regulatory scheme (such as Part 3 of the Act) relies on the complete and accurate reporting of information and where the failure to do so may have significant consequences for parties across the industry.
22. All Qualifying Liable Persons (QLPs) are responsible for ensuring that they comply with the information specifications under s 83 and any other notices we issue. It is therefore important that each QLP ensures that they have appropriate risk management and quality controls in place to ensure that their disclosures in response to the information specifications under s 83 and any of our notices are complete and accurate.
23. If any member of the CallPlus Group fails to comply with the information specifications under s 83 or any notice issued by us in the future, the conduct in this instance will be a relevant factor that is likely to lead us towards a stronger enforcement response.

Further information

24. This warning letter is public information and will be published on our website.
25. Please contact Mark Worsley, Senior Legal Counsel, on (04) 924 3784 or by email at mark.worsley@comcom.govt.nz if you have any questions about this letter.

Yours sincerely,

Stephen Gale
Telecommunications Commissioner