

28 January 2019

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Via email only: kelly.baxter@Spark.co.nz

Dear Ms Baxter,

Fair Trading Act 1986: Warning

1. The Commerce Commission (Commission) has been investigating Spark New Zealand Limited (Spark) under the Fair Trading Act 1986 (the Act). We have now completed our investigation and are writing to alert you to our concerns.
2. In summary, the Commission considers that Spark has likely breached the following sections of the Act:
 - 2.1 12A by making unsubstantiated representations; and
 - 2.2 13(g) by making false and misleading representations regarding price.
3. A warning is not a finding of non-compliance; only the Courts can decide whether a breach of the law has occurred.¹

The investigation

4. During our investigation, the Commission considered information provided by a complainant, representations made by Spark on its website and information provided to the Commission by Spark.

Issues investigated

5. The two issues that we investigated are:
 - 5.1 Spark's representations that three of the portable Wi-Fi hotspot devices that it sold provided consumers with download speeds up to a specific figure, without representative real world testing of the performance of those devices on its network to substantiate those claims. Specifically that the:
 - 5.1.1 MF910 device provided download speeds of up to 150Mbps;
 - 5.1.2 MF65+ device provided download speeds of up to 21Mbps; and
 - 5.1.3 MF730M device provided download speeds of up to 42Mbps.

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

- 5.2 Spark charged consumers \$5 for a trio sim card that was represented as free.

Spark's response to the allegations

6. Spark provided the Commission with detailed information in response to each of the issues. That information is summarised below:
- 6.1 Spark has included the maximum download speed (as provided by the supplier) capacity in some of its product descriptions. On receipt of the Commission's concerns, Spark reviewed relevant marketing material and removed all references to maximum speeds for portable Wi-Fi hotspot devices from its website; and
- 6.2 a software fault caused the \$5 credit to be cancelled on 178 orders for trio sim cards. The software fault has been corrected, further checks have been added to the testing process of the software and the affected customers have been refunded the \$5 overcharge.

The Commission's view

7. Having considered the available evidence, the Commission's view is that Spark has likely breached the Act by:
- 7.1 making representations that three types of portable Wi-Fi devices that it sold provide consumers with maximum download speeds without having reasonable grounds to support that the represented speeds would be achieved by most consumers, in breach of s 12A; and
- 7.2 making false representations regarding the price of its trio sim card by advertising them as "free" when it actually charged consumers \$5, in breach of s 13(g).
8. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.
9. 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.
10. This warning letter is public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

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

Penalties for breaching the Act

12. Only the courts can decide if there has actually been a breach of the Act. The court can impose severe penalties where it finds the law has been broken. A company that breaches the Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
13. 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

14. We have published a series of fact sheets and other resources to help businesses comply with the 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.
15. You can also view the Act and other legislation at www.legislation.co.nz.
16. Thank you for your assistance with this investigation. Please contact Wiremu Lourie on (04) 924 3652 or by email at wiremu.lourie@comcom.govt.nz if you have any questions in relation to this letter.

Yours sincerely



Kirsten Mannix
Consumer Manager Wellington