

23 May 2019

[REDACTED]  
General Counsel  
Spark New Zealand Trading Limited

AUCKLAND  
Level 13, 55 Shortland Street  
PO Box 105-222, Auckland 1143  
New Zealand  
Tel: +64 4 924 3600

[www.comcom.govt.nz](http://www.comcom.govt.nz)

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 representations made by Spark in notifying its in-contract customers about an increase to the price it charges for copper-based telecommunications services (**services**).

We have now completed our investigation and are writing to you to alert Spark to our concerns.

In summary, the Commission considers that Spark's notification of the price rise represented to its customers that it had a right to unilaterally increase price when in fact customers either needed to consent to the price rise, or if they did not consent, could terminate the contract without incurring an early termination fee. In our view, Spark needed to notify customers of their right to cancel or terminate in a clear way and at the same time as notifying them of the price rise, which it did not.

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 because its communication constituted a false or misleading representation as to the existence or effect of a right. 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.<sup>1</sup>

We recommend that you consider the views described in this letter in the event of any future price rises affecting in-contract customers.

### **The investigation**

During our investigation, the Commission considered complaints about Spark increasing the price of its services, representations made by Spark about the increase in the price of services and information contained within Spark's contractual terms and conditions.

Section 13(i) of the FTA prohibits false or misleading representations about the rights customers have, including rights provided under a contract.

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<sup>1</sup> Commission's published *Enforcement Response Guidelines* at [41].

Spark's contractual terms and conditions state:

*"If you are on a minimum term contract we will not change the monthly plan charge or any early termination fee during the term of your minimum term contract, without either your consent or giving you the option to terminate your contract without incurring an early termination fee."*

When informing in-contract customers about the increase in price, Spark's communications stated:

*"If you're in contract and want to discuss your options, there might be a solution available"*

### **Spark's response**

Spark responded to the Commission's enquiries by updating information on its website about the price rise and sending updated information to customers affected by the increase in price. These updated communications made it clear that in-contract customers had the right to terminate affected contracts without the application of early termination fees.

### **The Commission's view**

In this case, the Commission's view is that Spark's conduct is likely to have breached the FTA.

We have reached this view because when Spark initially communicated the price rise on its website and in direct communication with affected customers, Spark's communications focussed solely on the fact of the price rise and did not explain that if customers did not consent to the price rise they had a right to terminate their contract without penalty.

We consider that Spark's failure to refer to the customer's right to cancel when it communicated with customers about the price rise, would have caused customers to believe that Spark was entitled to raise its price without their consent and without the customers having the right to terminate the contract without penalty, when this was not the case. Put another way, they would have believed that they had no option but to accept the price rise and continue with the contract when this was not the case. As such, Spark's communication constituted a false or misleading representation as to the existence or effect of a right, in likely breach of section 13(i) of the FTA.

### **Warning**

After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate and sufficient to conclude our investigation by issuing this warning letter rather than issuing legal proceedings.

This warning represents our opinion that the conduct in which Spark has engaged is likely to have breached the Act, and that legal action remains available to the Commission in future if

the conduct continues or is repeated. 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 and will be published in the case register on our website. We will be making public comment about our investigation and conclusion, including by issuing a media release.

### **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 FTA**

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.

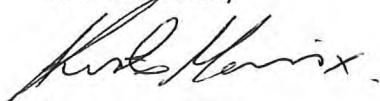
### **Further information**

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](http://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](http://www.legislation.co.nz).

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