

11 October 2023

[REDACTED]

[REDACTED] NetX Broadband Limited

By email only: [REDACTED]

Dear [REDACTED]

Warning - Alleged breach of section 156A(1)(p) of the Telecommunications Act 2001

Purpose of this letter

1. The Commerce Commission (**Commission**) has been investigating NetX Broadband Limited (**Netwest**) under the Telecommunications Act 2001 (**Act**). We have now completed our investigation and are writing to inform you of the outcome.
2. In summary, the Commission considers Netwest is likely to have breached section 156A(1)(p) of the Act by failing to comply with the Commission 111 Contact Code (**the Code**) without a reasonable excuse between December 2021 and March 2023.
3. In this instance the Commission has decided to issue Netwest with a warning in respect of its failure to comply with the Act. A warning is not a finding of non-compliance; only the Courts can decide whether a breach of the law has occurred.¹
4. We expect Netwest to ensure that it implements and follows procedures to ensure compliance with the Code.

Compliance with the Code and the role of the Act

5. The purpose of the Code is to ensure that vulnerable consumers, or persons on their behalf, have reasonable access to an appropriate means to contact the 111 emergency services in the event of a power failure.
6. The Code sets out a range of obligations designed to ensure that consumers are made aware of, and are regularly informed about the Code, including the protections available to vulnerable consumers.
7. Compliance with the Code is important because it ensures that consumers are aware that modern voice services do not work in a power outage, and provides a pathway

¹ Commission's *Enforcement Response Guidelines* at [41] available [here](#).

by which vulnerable users can be assured of continued voice access to 111 emergency services in the event of a power failure.

8. Non-compliance with the Code, if it is found to have occurred without a reasonable excuse, breaches section 156A(1)(p) of the Act. The Commission can take enforcement action for such breaches, under section 156B of the Act.

Netwest's non-compliance with the Code

9. Netwest is a provider of retail landline services to consumers.²
10. Under the Code, Netwest must provide certain information to its retail landline customers, capably manage applications under the Code, and disclose information to the Commission each year. Failure to do so without a reasonable excuse gives rise to a likely breach of section 156A(1)(p) of the Act.
11. Between February 2021 and March 2023, Netwest failed to comply with the Code in the following ways:
 - 11.1 between 10 February 2021 and 28 March 2023, Netwest failed to display any of the information required under clause 5 and specified in clause 6 of the Code, to meet its clause 7 obligations to provide Code information to consumers at the point of sale, on websites and via direct communication.
 - 11.2 Netwest did not make available or operate a process for consumers to apply to be recognised as vulnerable under the Code, as required by clause 11, between 10 February 2021 and 29 March 2023.
 - 11.3 Netwest did not provide disclosure of its Code-related activities to the Commission as required by clause 38:
 - 11.3.1 at all in the 2020/21 disclosure year; and
 - 11.3.2 its 2021/22 disclosures were provided late, on 21 March 2023, as part of our investigation.

Netwest's explanation of its non-compliance with the Code

12. Netwest stated, via written correspondence, and at interview that:

² Under section D of the Code: (i) a 'provider' means a supplier or suppliers of a retail landline service, (ii) a 'retail landline service' means a landline service provided to a consumer at a premises, and excludes (a) mobile services, (b) naked broadband services, and (c) applications that provide voice services over broadband services (such as Skype); (iii) 'consumer' has the same meaning as given in section 232 of the Act, and, in the case of a retail landline service, includes: (a) the customer; and (b) a person who ordinarily resides at the premises where the retail landline service is supplied; and (iv) 'customer' means a consumer who has a contract with a provider for the supply of a retail landline service.

- 12.1 [REDACTED]
[REDACTED]
[REDACTED] and
- 12.2 the managing director received the communications from the Commission, but was unable to take steps in response due to [REDACTED]
[REDACTED] and others in the company were unable to complete the tasks required to come into compliance with the Code.

Our view of reasonable excuse

13. We note that Netwest was not sent information about the Code when it was published. Our first communication to the company about its Code obligations was in September 2021, in the form of an email advising recipients that the Commission would be creating a template for the first set of disclosures in November 2021.
14. The Commission's email to Netwest in September 2021 was not an explicit call to action. However, the email did outline the obligations that existed in relation to voice services. The email also provided a link to the Code.
15. We consider that between February 2021 and November 2021 Netwest may hold a reasonable excuse for its non-compliance with the Code. The Commission did not communicate the Code's requirements to Netwest until September 2021.
16. The Commission then continued to send Netwest information about the Code throughout 2021 and 2022. A Commission investigator also directly spoke with Netwest regarding its Code obligations in July 2022.
17. Despite this repeated contact, Netwest did not take steps to contact the Commission to share the issues it faced coming into compliance with the Code, and did not take steps to comply with the Code until our investigation was commenced.
18. Netwest was provided ample information and opportunity to comply with the Code. While we appreciate the challenges posed by [REDACTED]
[REDACTED] Netwest was informed about the Code in September 2021, in January 2022, and in July 2022, but took no action.
19. In our view, Netwest does not hold a reasonable excuse for its non-compliance with the Code in the period between December 2021 and March 2023, giving rise to a likely breach of section 156A(1)(p) of the Act.

Available enforcement responses for a breach of section 156A(1)(p)

20. Under section 156B(1) of the Act, the Commission may take one of the following actions where a person has failed, without reasonable excuse, to comply with section 156A(1)(p):

- 20.1 serve a civil infringement notice under section 156D requiring the payment of a pecuniary penalty of up to \$2,000;
- 20.2 enter into enforceable undertakings; or
- 20.3 apply to the High Court for an order requiring payment of a pecuniary penalty to the Crown.

Our decision to issue a warning.

- 21. Section 156C of the Act sets out matters the Commission must consider when deciding what enforcement action to take under section 156B of the Act.
- 22. The Commission uses its enforcement criteria to assist it in deciding whether to take enforcement action in response to a statutory contravention, and to assist it in deciding what enforcement action to take.³
- 23. The enforcement criteria applicable are:
 - 23.1 the extent of detriment and gain;
 - 23.2 the circumstances, seriousness and culpability relating to non-compliance; and
 - 23.3 public interest.
- 24. Our assessment is that detriment is limited. Netwest has a very small number of retail landline customers who did not receive information about the Code prior to March 2023. Netwest's failure to provide Code disclosures in November 2021, and by 30 November 2022 did not cause significant impairment to the Commission's duty to monitor compliance with the Code under section 9A(1)(c) of the Act.
- 25. We consider that paying careful attention to obligations, and engaging with the Commission when contacted, would have assisted Netwest's compliance with the Code.
- 26. We consider that there is significant public interest attached to the purpose of the Code. It is ultimately designed to protect the vulnerable, at times when they are at increased risk.
- 27. Based on our assessment of Netwest's non-compliance against the enforcement criteria, we have decided to issue Netwest with a warning at this time rather than take one of the stronger enforcement actions provided under the Act.

³ Further detail regarding our enforcement criteria can be found in our Enforcement Response Guidelines.

Our expectations regarding Netwest’s future compliance

- 28. We take non-compliance with the Code seriously. We expect Netwest to ensure that it implements and follows procedures designed to ensure ongoing compliance with the Code.
- 29. While we will not be taking any further action against Netwest at this time, we will take this warning into account if this issue arises again, or if Netwest engages 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 Netwest.

Further information

- 30. This warning letter is public information and will be published on our website. We may also issue a media release or make public comment about the outcome.
- 31. Please contact Zeb Walker, Principal Investigator on direct dial [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely,

A large black rectangular redaction box covering the signature of Tristan Gilbertson.

Tristan Gilbertson
Telecommunications Commissioner