

TELECOM NEW ZEALAND LIMITED

AND

COMMERCE COMMISSION

SETTLEMENT AGREEMENT

DATED 11 October 2011

AGREEMENT DATED 11th day of October 2011

PARTIES

TELECOM NEW ZEALAND LIMITED (*Telecom*)

COMMERCE COMMISSION (*the Commission*) a statutory body established under section 8 of the Commerce Act 1986

1. PURPOSE OF AGREEMENT

- 1.1 Telecom advised the Commission that it had identified a software fault in the broadband data usage meter used to measure the amount of data usage of some customers who used its legacy broadband service, Fast IP Direct, during the period between 19 November 2010 and 10 June 2011 ("the relevant period").
- 1.2 Telecom admits that, as a result of the software fault in its broadband data usage meter, it overstated the amount of data used by some customers and that it consequently breached s13(b) and s13(g) of the Fair Trading Act 1986 ("the Act").
- 1.3 Telecom has co-operated fully with the Commission in relation to this matter.
- 1.4 This Settlement Agreement ("Agreement") records the background to Telecom's admissions and the means by which the breaches of the Act are to be resolved.
- 1.5 By this Agreement the Commission agrees to waive its right to issue legal proceedings in respect of Telecom's conduct as set out in paragraphs 2.4 to 2.5 of this Agreement, on the basis that Telecom acknowledges having breached the Act and agrees to refund affected customers as detailed in Part 4 of this Agreement.
- 1.6 The parties agree to take such steps as are necessary or desirable to give full effect to the terms of this Agreement.

2. BACKGROUND

- 2.1 Telecom is a New Zealand registered company that is publicly listed on the New Zealand Stock Exchange. Its registered office is located in Auckland. Telecom is a telecommunications wholesaler and retailer, providing telecommunication services to customers New Zealand wide.
- 2.2 On 16 June 2011 Telecom advised the Commission that it had discovered a fault with its broadband usage meter which measures data used by Fast IP Direct customers and that, during the relevant period, the broadband usage meter had, due to faulty software, incorrectly recorded the amount of data used by some customers.
- 2.3 Telecom advised the Commission that there were a total of 97,205 customer accounts using the faulty software (“affected customers”) and 47,445 of those customers were compensated because they were impacted by the fault and were charged overage, throttled, or upgraded their plans during the relevant period.
- 2.4 As a result of the fault Telecom made representations during the relevant period to some affected customers about the amount of data they had used which were incorrect. Those representations included:
- Representations in monthly accounts sent to some affected customers which detailed the amount of data used by that customer; and
 - Data cap alerts sent by Telecom to some affected customers.
- 2.5 During the relevant period Telecom, in reliance on the broadband usage meter, reduced the speed of the broadband service of some affected customers to dial-up speed (throttling), and accordingly represented to some affected customers that they had met or exceeded data caps set by Telecom under their broadband plans when this was not the case.

2.6 Some affected customers may have suffered the following loss or damage:

- They had the speed of their broadband service throttled to dial up speed as a result of data caps set by Telecom under their broadband plans.
- They upgraded to a more expensive monthly broadband plan to increase their monthly data allowance due to an incorrect perception about their data usage.
- They were charged overage fees for the amount of data that they used above their data cap.
- They reduced their data usage so as to not exceed their monthly data allowance.
- They were charged early termination fees for changing providers as a result of Telecom's representations.

2.7 Telecom elected to refund those affected customers who suffered one or more of the consequences set out in paragraph 2.6 above. Telecom has, to date, paid \$2,724,432.91 to those customers.

2.8 On 17 June 2011 Telecom made a public statement to the media and a statement on its website, outlining the nature of the fault and its intention to refund customers.

3 ADMISSIONS

3.1 Telecom acknowledges and admits the facts referred to in paragraphs 2.1 to 2.8 (inclusive).

3.2 Telecom admits that by making the representations referred to in paragraphs 2.4 and 2.5 of this Agreement, it has contravened section 13(b) and s13(g) of the Act.

3.3 The Commission acknowledges that Telecom has:

- Notified the Commission once it had identified the breach;
- Voluntarily made refunds to affected customers.

4. CONSUMER REMEDY

- 4.1 To the extent it has not already done so Telecom undertakes to:
- Refund customers in accordance with paragraphs 4.2 to 4.8; and
 - Report to the Commission on the settlement process as set out in paragraph 4.9 of this settlement agreement.
- 4.2 Where an affected customer was charged overage fees between 20 October 2010 and 9 July 2011 (compensation eligibility period) Telecom shall refund the customer the amount of those charges.
- 4.3. Where an affected customer had their broadband service throttled during the relevant period Telecom shall refund, for each impacted billing period during the compensation eligibility period, charges for broadband services from the day that the customer was throttled until the end of their billing period.
- 4.4 Where an affected customer upgraded their broadband plan with Telecom during the relevant period, Telecom shall refund that customer the difference between the cost of the upgraded plan and their previous plan for each billing period that they paid for the upgraded plan during the compensation eligibility period.
- 4.5 Where an affected customer advises Telecom that during the compensation eligibility period they changed their data usage behaviour prior to reaching their data cap, Telecom shall refund that customer 20% of their monthly plan charges for each month they used over 80% of their monthly data allowance during the compensation eligibility period.
- 4.6 Where an affected customer changed broadband service providers during the compensation eligibility period and was charged an early termination fee (ETF) Telecom shall refund the amount of the ETF.

- 4.7 If an affected customer wishes to change service providers as a result of the representations referred to in paragraphs 2.4 and 2.5, Telecom will waive any ETF otherwise payable by that customer.
- 4.8 An individual customer's eligibility to compensation under paragraphs 4.2 to 4.7 above began from the date that the fault affected them, and ceased when the fault affecting them was fixed or they relinquished their FIPD service – whichever came first. Where an affected customer is entitled to a refund under paragraphs 4.2 to 4.7 above, Telecom will provide that refund as follows:
- 4.8.1 If the affected customer has a current account with Telecom the amount of the refund shall be applied against that account unless the customer nominates that the refund is made into a bank account specified by the customer;
- 4.8.2 If the affected customer no longer has a current account with Telecom:
- i. The amount of the refund shall first be applied against any money owed by that customer to Telecom.
 - ii. If the amount of refund exceeds the amount owed to Telecom the difference (the remaining refund) shall then be credited against the customers' inactive Telecom account unless the customer requests that it is paid into a bank account nominated by the customer.
 - iii. If the remaining refund is not claimed by the customer either by re-activating the Telecom account or by requesting that it be paid into a nominated bank account, Telecom agrees that it will treat the remaining refund as money owed to that customer pursuant to section 5 of the Unclaimed Money Act 1971.

Report Requirement

- 4.9 Telecom shall provide a Report to the Commission of the refund process as set out in paragraphs 4.2 to 4.8 of this Agreement. This Report shall specify the date and the amount of the refunds made to impacted customers on the basis of the categories set out in paragraphs 4.2 to 4.7 above.

4.10 The Report shall be provided within six months after the date of this Agreement.

4.11 Telecom shall, on the Commission's request, provide the Commission with:

- A sample of the letters sent to affected customers;
- Any document held by Telecom evidencing the compensation process set out in paragraphs 4.2 to 4.8 above.

Provided that Telecom shall be entitled not to provide the Commission with documents that are subject to privilege.

5. IMPLEMENTATION AND EFFECT OF THE AGREEMENT

5.1 This Agreement does not preclude any person taking his or her own action against Telecom in relation to the conduct outlined in paragraphs 2.4 and 2.5 of this Agreement.

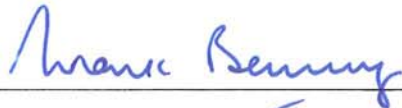
5.2 The Commission agrees to be bound by this Agreement. The Commission will not bring any further or other action in relation to the matters referred to in paragraphs 2.4 and 2.5 of this Agreement, subject to paragraph 5.4 below. Nothing in this Agreement shall prevent the Commission from commencing an investigation or bringing Court proceedings in relation to any conduct that occurred outside of the relevant periods described in paragraph 1.1 above.

5.3 The fact that this Agreement has been entered into is not confidential. The Parties have agreed that none of the contents of this Agreement are confidential and that this Agreement may be published on the Commission's website and may be released to the public.

5.4 If there is any material breach of Telecom's obligations under this Agreement, the Commission may in its complete discretion commence an investigation and take any action it deems appropriate including commencing criminal prosecution and/or civil proceedings under the Act.


5.5 If the Commission commences any Court proceedings pursuant to paragraph 5.4 above, Telecom hereby waives any limitation defence that may be available to it in respect of those proceedings to the extent that limitation arose solely as a result of the settlement recorded in this Agreement.

EXECUTED ON BEHALF OF THE COMMERCE COMMISSION by:



MARK NEWMAN BERRY
Chair, Commerce Commission

EXECUTED ON BEHALF OF TELECOM NEW ZEALAND LIMITED by:



Tristan Gilbertson
Group General Counsel