

24 October 2024

Kogan Australia Pty Limited T/A Dick Smith  
Level 10, 203 Queen Street  
Auckland 1010

Attention: [REDACTED] Director Dick Smith  
By email: [REDACTED]  
c/o: [REDACTED]

Dear [REDACTED]

### **Warning from the Commerce Commission for misleading conduct in relation to the FIRST membership subscription**

1. The Commerce Commission (**Commission**) has completed its investigation into Kogan Australia Pty Limited trading as Dick Smith (**Dick Smith**).
2. The investigation has considered whether in pre-selecting a FIRST membership subscription (**FIRST**), in the overall context of the purchasing process, Dick Smith is liable to have misled the public about the services being supplied when a transaction was completed on [www.dicksmith.co.nz](http://www.dicksmith.co.nz) (**Dick Smith website**).
3. In summary, having fully considered the relevant information we obtained, the Commission considers that Dick Smith has likely contravened section 11 of the Fair Trading Act 1986 (**the Act**) because the purchasing process on its website operated in a way that misled consumers into acquiring a service they had not intended to acquire between 3 July to 19 September 2023 (**relevant period**).
4. In this instance, the Commission has decided the appropriate enforcement response is to issue Dick Smith with a warning, rather than issuing legal proceedings. We have set out our reasons below. We note that only a court can determine whether there has been a contravention of the Act.
5. The purpose of this warning is to inform you of our views on why there has been a likely contravention of the Act and to encourage future compliance. Legal action remains available to the Commission in future if the conduct continues or is repeated.

6. We note Dick Smith does not agree with or accept the Commission’s interpretation of its conduct, but has ceased the conduct and taken additional steps to avoid future breaches, which we outline at paragraph [37] below.

#### **Details of the Commission’s investigation**

7. The Commission investigated allegations of misleading and deceptive conduct under the Act following complaints from consumers that they were supplied a 14-day “free” trial of FIRST (**FIRST trial**), which unknowingly entered them into a contractual obligation to pay \$149 (annually) or \$14.99 (monthly) once their trial period had ended.
8. During the investigation, the Commission obtained and considered the following information:
  - 8.1 Voluntary responses received from Dick Smith.
  - 8.2 Website screenshots and screen recordings about FIRST, which were used to examine FIRST choice architecture, disclosure text, cookie functionality, advertising, and general representations relating to FIRST services and prices.
  - 8.3 Emails consumers received about FIRST following the activation of a FIRST trial, which served to advertise the benefits of FIRST and provide a reminder the FIRST trial period was ending.
  - 8.4 Consumer complaints and statements confirming many consumers completed a purchase on the Dick Smith website without any knowledge they were agreeing to acquire FIRST services from Dick Smith. Many consumers believed they were only agreeing to purchase products and delivery from the Dick Smith website — rather than additional FIRST subscription services of free shipping, reward credits, member only pricing, and exclusive discounts.

#### **Details of the relevant law**

9. The Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.
10. Section 11 of the Act prohibits a business in trade from engaging in conduct that is liable to mislead the public as to the nature, characteristics, and/or quantity of services.

#### **The Commission’s view**

11. Having considered all the information we obtained during the investigation, the Commission’s view is that there is sufficient evidence to establish that Dick Smith has likely contravened section 11 of the Act.
12. We have reached this view for the following reasons.
13. During the relevant period, Dick Smith used a pre-selected tick box or option field (**selection field**) to add a FIRST trial to all eligible consumer shopping carts, unless

the consumer proactively unselected that option (see Attachment A, [Figure 6](#)). We consider the pre-selection of FIRST was liable to lead the public into error about the quantity, nature, and/or characteristics of services they were acquiring from Dick Smith.

14. In our view, the default addition of the FIRST trial offer — when viewed in context with the presentation and design of the Dick Smith website, and the initial focus on disclosing FIRST benefits — was liable to mislead consumers into acquiring a service they had not intended to acquire. In this way, pre-selection was liable to mislead consumers regarding the nature of FIRST as a subscription service with an ongoing payment obligation.
15. In addition, we consider the pre-selection of FIRST tended to lead consumers into error and to defy consumer expectations, because consumers were not expecting to look for a subscription field to unselect.
16. The evidence supports our view that the conduct had the tendency to mislead. During the relevant period, the majority of the Commission’s 241 complainants said they were not aware that they were acquiring a subscription service with their purchase. Statements from complainants illustrate the complainants thought they were agreeing to acquire goods and delivery, not additional FIRST services that entered them into a contractual obligation to pay \$149 annually (or \$14.99 monthly) once their trial ended.
17. When shopping online, a consumer’s primary focus is on their intended purchase, when they consider such factors as pricing, shipping, and product suitability. It was during this phase that Dick Smith advertised FIRST benefits (free shipping, exclusive savings, and reward credits) by various means, such as on its website product summary pages (see Attachment A, [Figure 1](#)) and product listings (see Attachment A, [Figure 2](#)). The potential savings of FIRST were mentioned when a consumer added a product to their cart (see Attachment A, [Figure 3](#)). At this pre-cart stage of the purchase the principal focus of the disclosures Dick Smith provided were on the benefits of free shipping, or discounted pricing, rather than the nature of the FIRST service as an ongoing paid subscription.
18. In our view, the contractual obligation to make ongoing payments arose for consumers at the point of checkout, where the agreement was formed to make future payments unless the consumer proactively exited the agreement.
19. At checkout, the FIRST service was not initially presented as a line item in the cart to indicate the consumer was acquiring an extra service with a payment obligation attached. The disclosure of the service and ongoing payment obligation was placed in a pre-selected tick box underneath the delivery section (see Attachment A, [Figure 6](#)). FIRST was not introduced as a line item until the order summary phase (see Attachment A, [Figure 8](#)).
20. A small number of people who contacted the Commission did see FIRST was pre-selected in their carts but believed FIRST was a free rewards or loyalty type program,

where one may choose to sign-up in exchange for a discount with their purchase. Such people in our view were misled as to the nature of the FIRST service.

*Inadequate disclosure text did not correct this impression*

21. Having considered the totality of disclosures Dick Smith provided consumers across the Dick Smith website, we do not consider the disclosures Dick Smith provided were sufficient to counteract the potential for pre-selection to lead consumers into error, especially for mobile users. We note that our view has taken into account the further information Dick Smith provided in its letter dated 5 September 2024.
22. Despite the presence of disclosure text being visible during the purchase process, in our view, that text was not sufficiently prominent, proximate, or instructive to make consumers aware that by adding an item to their shopping cart they were also entering into an agreement to start a FIRST trial and to ultimately pay for a recurring FIRST subscription. For example, in our view:
  - 22.1 The use of hyperlinks that directed consumers to FIRST terms and conditions or to more details about the service were not sufficient to correct any overall misleading impression (see Attachment A, [Figure 2](#)).
  - 22.2 The language in the text “Start a Free 14-day trial now, cancel anytime\*” relies on inference and implication and did not put the consumer sufficiently on notice of the true nature of the FIRST service (see Attachment A, [Figure 1](#)).
  - 22.3 In the cart, the disclosure text next to the selection field was significantly less prominent than line items in the shopping cart (see Attachment A, [Figure 6](#)).
  - 22.4 Within the pre-selected field, a bold font and red FIRST logo were used to draw attention to FIRST and the benefits available (such as free shipping), whereas the obligations that the consumer was activating with their order were detailed in a less prominent font (see Attachment A, [Figure 6](#)).
  - 22.5 For a period of seven weeks a pop-up displayed to consumers when entering the shopping cart omitted to mention that a FIRST trial and its related benefits were automatically applied to the consumer’s shopping cart (see Attachment A, [Figure 4](#) and [Figure 5](#)).
23. In our view, the FIRST disclosure inadequacies we set out above were further exacerbated for mobile users. FIRST disclosure text for mobile users was even less prominent and less proximate to the selection field (see Attachment A, [Figure 7](#)) and the order summary field (see Attachment A, [Figure 8](#)) because for some products the design of the Dick Smith website obscured those fields in the mobile context.
24. The FIRST service gives rise not only to a payment obligation but to a subscription service that creates a perpetual payment obligation on the consumer until cancelled. At no point prior to the shopping cart were consumers informed the FIRST trial would be automatically added to their order. This omission was significant and further highlights the inadequacy of the disclosures.

*Post-purchase emails did not remedy the disclosure issues*

25. We are aware that Dick Smith sent a series of reminder emails to consumers following the activation of FIRST and prior to any payment being taken from consumers. These emails included a reminder three days before the end of the 14-day trial period noting that the consumer would be billed for the FIRST membership upon the completion of the trial.
26. We do not consider the FIRST reminder emails Dick Smith sent were sufficient to bring the consumers' attention to the fact they had purchased a FIRST subscription. Most of the Commission's complainants did not realise a FIRST trial had been activated during their purchase until they received a \$149 charge from Dick Smith, after the completion of the 14-day trial.
27. In any event, in circumstances where there is online conduct that is liable to mislead consumers into making unwitting purchases, a business cannot rely on clarification, correction, or rectification after the fact of entry into the obligation to remedy the potentially misleading conduct.

**Response from Dick Smith**

28. During our investigation Dick Smith stopped using pre-selected fields and moved instead to a sign-up method that now requires consumers to actively select to join FIRST. Dick Smith also supplied information to the Commission voluntarily and provided refunds to all consumers who requested a refund.
29. In our letter dated 23 August 2024, the Commission provided Dick Smith with a final opportunity to comment on the Commission's intention to issue a warning and to provide any additional relevant information or identify incorrect information.
30. The Commission received a response from Dick Smith indicating it did not take issue with the Commission's intention to issue a warning, but it did not agree with the Commission's interpretation of its conduct and the application of the Act to the specific conduct under investigation. Additional information was provided to the Commission regarding further examples of disclosures.
31. When considering the overall context, Dick Smith believes the disclosures it provided were sufficient to notify consumers about the nature of the FIRST service. Dick Smith maintains that consumers who activated a trial through pre-selection were given sufficient information to make them aware they were agreeing to accept an ongoing obligation to pay for FIRST services once their trial had ended.
32. In particular, Dick Smith maintains that the text "free 14-day trial" and "cancel anytime" indicated FIRST was a subscription service that incurred a payment obligation after the free trial had expired. Dick Smith's view is that consumers would have inferred that FIRST was a subscription service because a consumer would know the option to "cancel" would only exist if the subscription was ongoing, and consumers would know a 14-day trial would not be promoted as "free" if they would not otherwise need to pay for the service. Dick Smith also considers that hyperlinks

on its website linking to further information were sufficient disclosure of relevant information about FIRST.

33. Dick Smith noted that some consumers received significant benefits from the FIRST membership. Consumers who cancelled their FIRST subscription during the trial period, or who received refunds, received all the benefits of the FIRST membership (such as, free shipping and FIRST-exclusive discounts) at no cost during the time they were enrolled in the service.

#### **The Commission's view remains the same**

34. Having considered Dick Smith's response, the Commission's view remains that there is sufficient evidence to establish that Dick Smith has likely contravened section 11 of the Act.

#### **Enforcement action for breaching the Act**

35. Where we consider that a person or business has likely contravened the Act, we have a range of potential enforcement responses available to us.
36. We reiterate that the Commission's view is based on the information collected during the investigation, and that only a court can determine whether there has been a contravention of the Act. A court can impose 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.
37. In deciding on the appropriate enforcement response in this case, we have considered the extent of the harm, the seriousness of the conduct, and the public interest. We have also considered:
- 37.1 At an early stage of our investigation Dick Smith stopped pre-selecting the FIRST trial and does not intend to re-instate pre-selection in the future;
- 37.2 Throughout the relevant period, Dick Smith changed the design of the Dick Smith website to better improve the visibility of selection fields and disclosure text; and
- 37.3 Dick Smith refunded all consumers who requested a refund.
38. Further detail on our approach to making enforcement decisions is contained in the Commission's "Enforcement Response Guidelines", available on our website ([www.comcom.govt.nz](http://www.comcom.govt.nz)).

#### **Consequences of this warning**

39. This warning represents our view that the conduct in which Dick Smith has engaged is likely to have contravened the Act and that legal action remains available to the Commission in future if the conduct continues or is repeated.
40. We may draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against Dick Smith.

41. We may also take this warning into account in the event of continued or repeated similar conduct by Dick Smith.

### **Publication**

42. This warning is public information and will be published on the case register on our website. We may decide to redact some details from the published version, such as personal information.
43. We will be making public comment about our investigation and conclusions, including issuing a media release, or making comment to media or otherwise publicising the outcome (such as, on our social media forums).

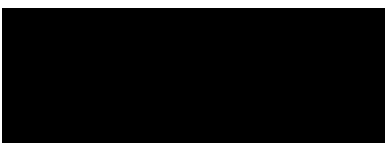
### **Further information**

44. We encourage you to regularly review your compliance procedures and policies and seek legal advice about the application of the Act to your business.
45. To avoid contravening the Act in the future, we recommend that Dick Smith ensures the main messages of any advertisements accurately reflect the key information about the quantity, nature, and/or characteristics of the goods or service advertised. Dick Smith should not rely on fine print, hyperlinks, help pages, FAQ sections, or inferences to disclose important information that would be critical to a person's decision to buy goods or services.
46. As a best practice, the Commission encourages businesses offering optional services during an online sales process to avoid pre-selecting or defaulting the option to acquire such services. Businesses that require consumers to actively select to obtain optional services reduce the risk consumers may unintentionally acquire services and/or agree to terms and conditions they would not have agreed to otherwise.
47. We have published a series of fact sheets and other resources to help businesses comply with the 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 Act. You can also view the Act and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).

### **Review of our decision**

48. You are entitled to request a review of our decision to issue this warning only if you identify relevant material that was not considered as part of our decision. You must request a review within 1 month of this warning being issued. Any review will be handled in accordance with the Commission's complaints process. Please submit any review request to [contact@comcom.govt.nz](mailto:contact@comcom.govt.nz).

Yours sincerely



Principal Investigator



### Attachment A – The positioning and design of FIRST representations

Figure 1 – Emphasis added in red (captured on 17 August 2023).

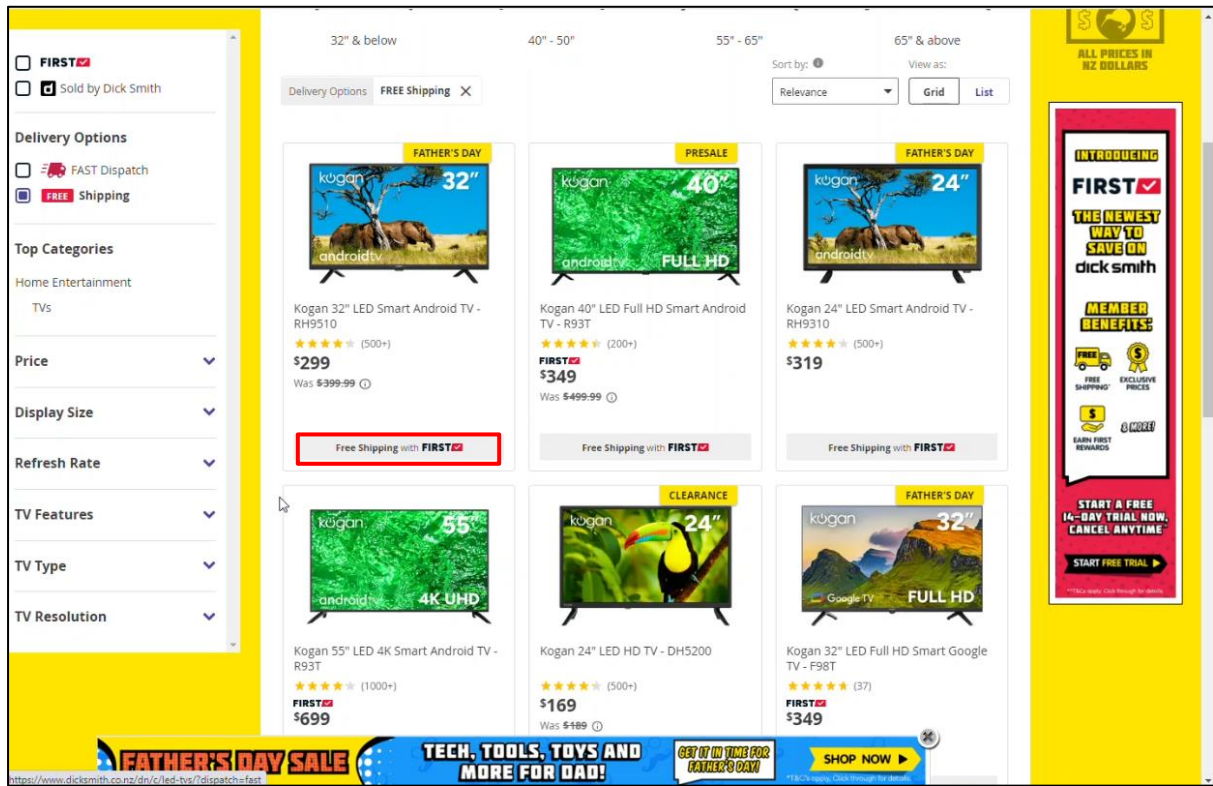


Figure 2 – Emphasis added in red. Dick Smith provided key information via a blue “Details >” hyperlink (captured on 17 August 2023).

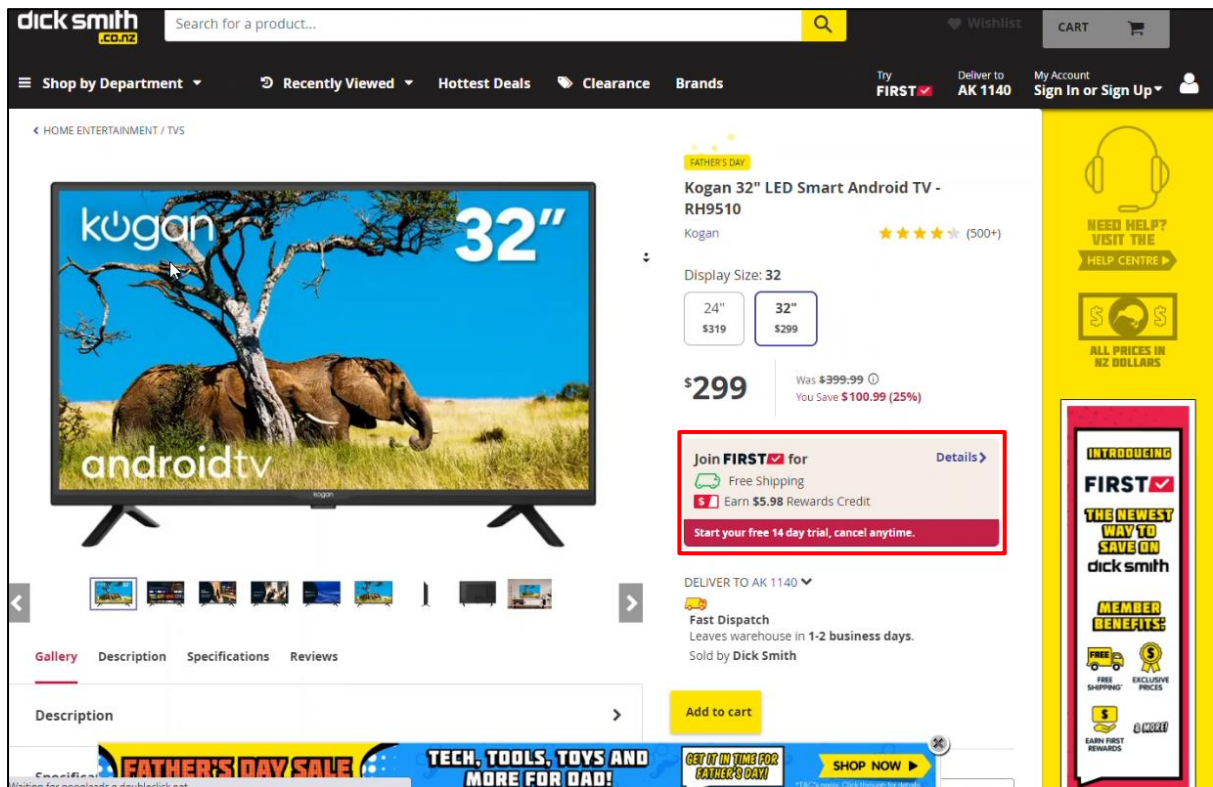




Figure 3 – Emphasis added in red (captured on 17 August 2023).

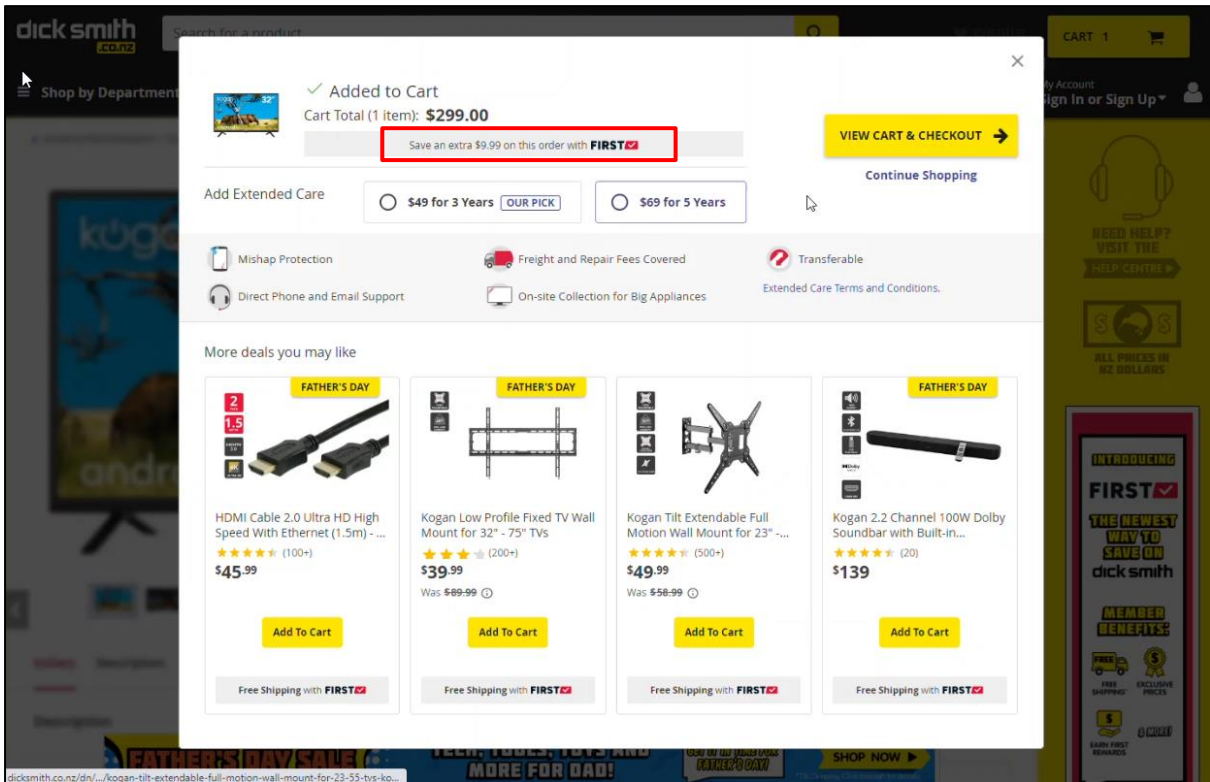
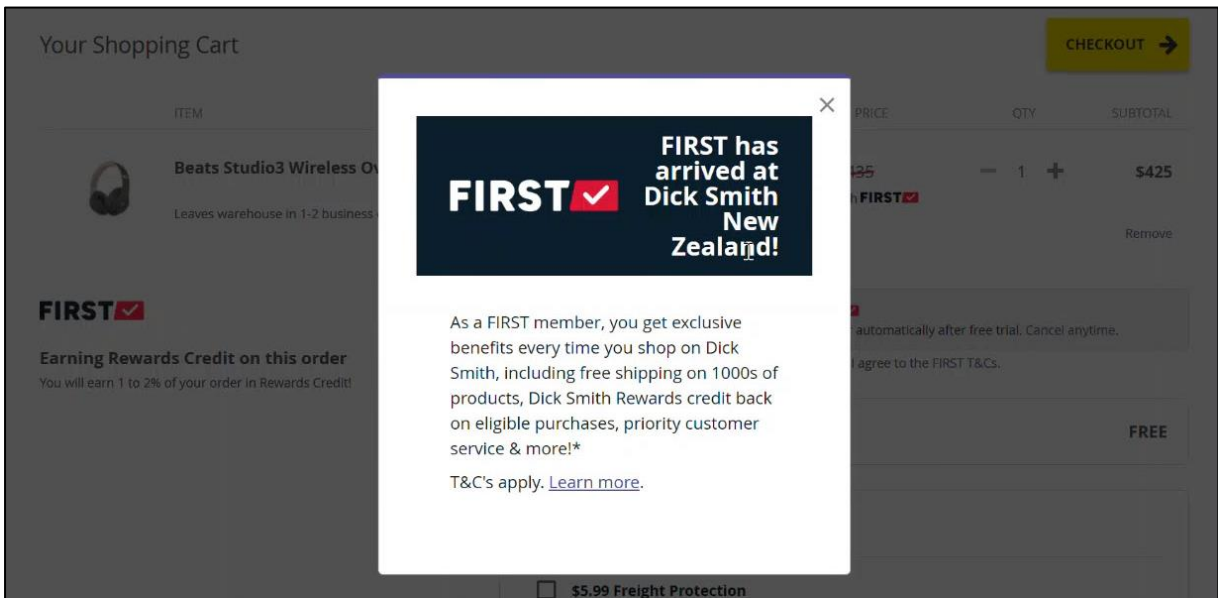
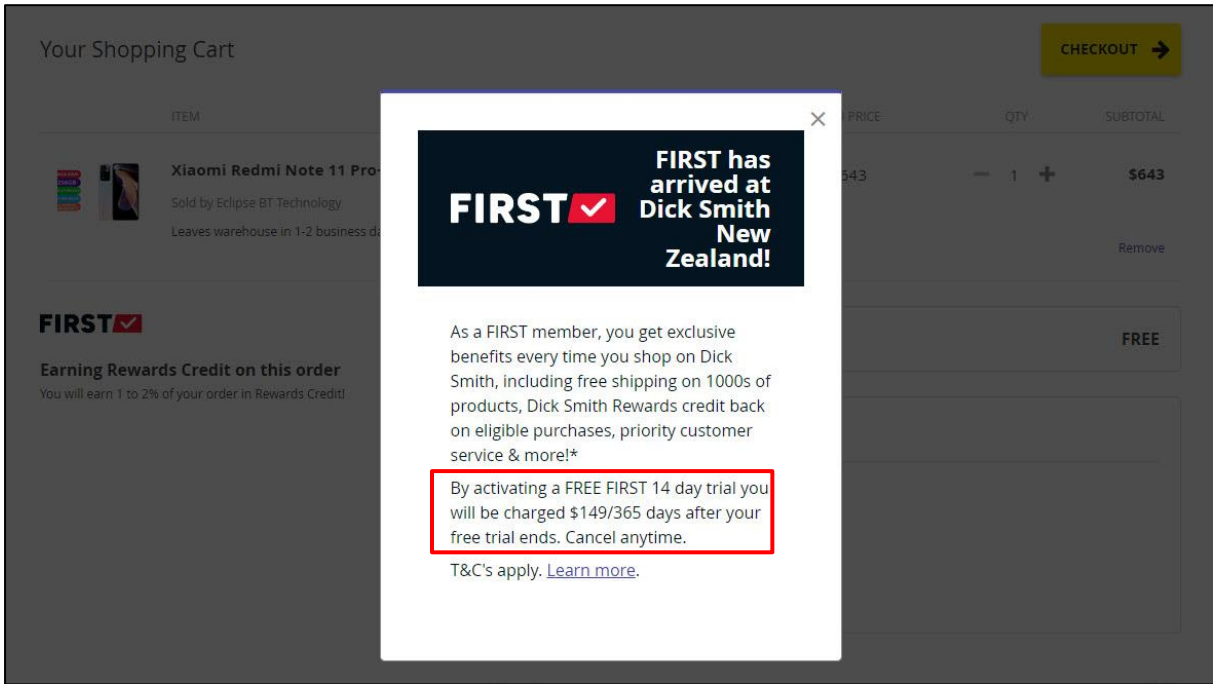


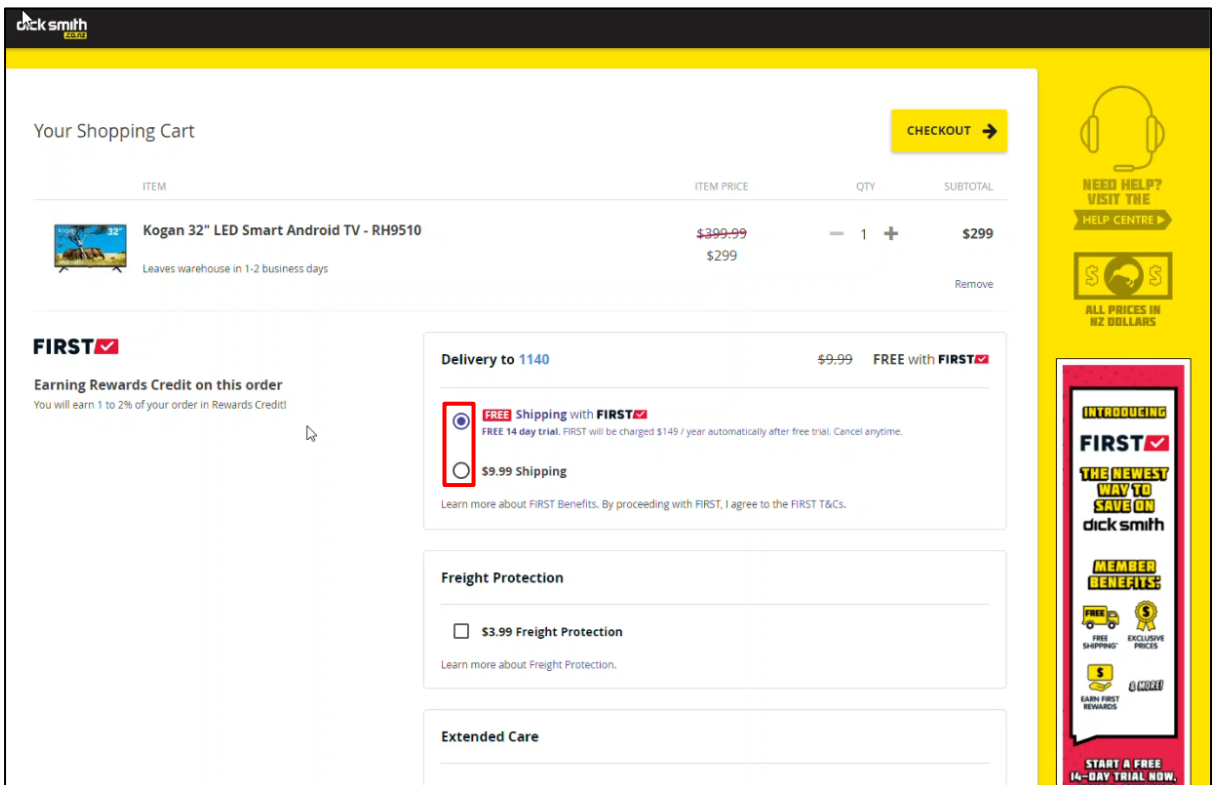
Figure 4 – For a period of six weeks from 3 July to 15 August 2023, Dick Smith consumers received the following pop-up when entering the shopping cart (captured on 8 August 2023).



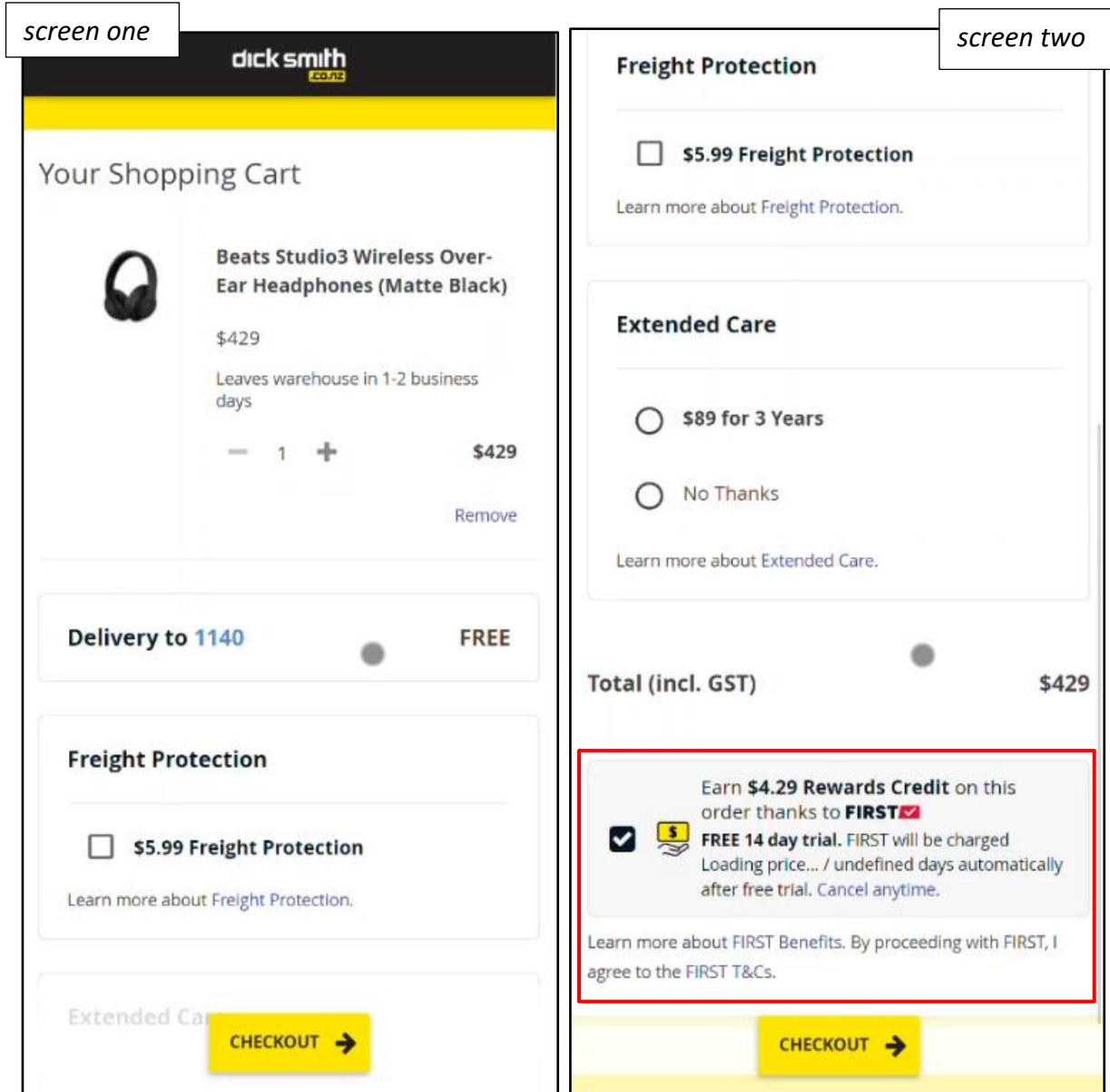
**Figure 5** – Emphasis added in red. Dick Smith later updated the pop-up. This pop-up was visible for a period of eight days (16 August - 24 August 2023) (captured on 17 August 2023).



**Figure 6** – Emphasis added in red (captured on 17 August 2023).



**Figure 7** – Emphasis added in red. In a mobile view of the checkout page the FIRST tick box (“Earn \$4.29 Rewards Credit on this order with FIRST”) was not visible to unselect unless the consumer scrolled to the bottom (screen one) of the shopping cart page on screen two (captured on 10 August 2023).



**Figure 8** – Emphasis added in red. In a mobile view of the secure checkout the order summary field was collapsed by default. Dick Smith contends this occurred for some but not all products (captured on 14 September 2023).

