

1 December 2023

Kalkine New Zealand Limited
C/o Hamilton Locke
Level 35, Vero Centre
48 Shortland Street
Auckland 1010

Attention: [REDACTED]

By email only: [REDACTED]

Copy: [REDACTED]; [REDACTED]

Dear [REDACTED],

Fair Trading Act 1986: Warning for failure to disclose and expressly exclude the right to cancel during uninvited direct sales

1. The Commerce Commission (**Commission**) has been investigating Kalkine New Zealand Limited (**Kalkine**) under the Fair Trading Act 1986 (**FT Act**). Our investigation concerned allegations that Kalkine was conducting uninvited direct sales for subscription services through telephone calls without informing consumers of their right to cancel the agreement within five days of entering into the agreement.
2. We have now completed our investigation and are writing to inform Kalkine about our views.
3. We are issuing Kalkine with this warning letter because in our view between December 2019¹ and 31 July 2023², Kalkine's conduct is likely to have breached sections 36L(1)(a)(v) read with 36L(2)(a)(ii) and (iv), 36L(3) and 36M(2) of the FT Act because Kalkine did not comply with disclosure requirements for uninvited direct sales. We also consider that Kalkine likely breached section 13(i) of the FT Act by misleading consumers about their right to cancel the subscription services contract.

¹ Date Kalkine started operating in New Zealand.

² On 1 August 2023, Kalkine advised the Commission that changes to the subscription terms and to the call script had been implemented.

4. 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.³ The purpose of this warning is to inform you of our view that there has been a likely breach of the FT Act, to prompt changes in behaviour and to encourage future compliance.
5. However, if this conduct is continuing, we recommend that Kalkine takes immediate action to address our concerns and seek legal advice about complying with the FT Act. We note the amendments already made to Kalkine's sales agreement documents. We strongly recommend that you further review those documents to make it clear that the right to cancel also applies to past customers who purchase a subscription, regardless of whether that subscription is similar or different from the expired subscription.
6. Separate compliance advice will be given to Kalkine about clause 17 of the Website's Terms and Conditions about the governing law and applicable jurisdiction for disputes, which also formed part of the investigation.

The investigation

7. The Commission opened an investigation into Kalkine following a referral from the New Zealand Financial Markets Authority (**FMA**). The investigation focused on Kalkine's conduct when making uninvited telephone calls to consumers for the purpose of selling financial reports.
8. In response to the Commission's enquiries, Kalkine provided information in April, June and July 2023. Representatives of Kalkine also attended a voluntary interview on 10 July 2023.
9. The investigation established, to our satisfaction that:
 - 9.1 Kalkine sells equities, research and stock analysis reports on a subscription basis. Kalkine has offices in Australia and India and operates a call centre out of India. Its business model is primarily based on direct sales made by telephone. Kalkine also relies on its website <https://kalkine.co.nz/> and social media for marketing its services to the public.
 - 9.2 Kalkine obtains potential customer details from contact lists rented from third-party vendors, and from individuals visiting its website or social media accounts who input their contact details for the purpose of obtaining a free trial and/or information regarding Kalkine's reports and services. When submitting their contact details, visitors are required to tick a consent statement which reads:

By submitting your details and clicking on the button below, you agree to Kalkine's Terms of Use and agree to receive marketing offers, including to be contacted by email or phone, as set out in our Privacy Policy.

³ Commission's published [Enforcement Response Guidelines](#) at [41].

- 9.3 At 24 March 2023, Kalkine had 601 active paid customers, all signed up through direct sales made by telephone call. 361 customers were signed up after receiving a call from Kalkine following their visit of Kalkine’s website or social media accounts. 240 customers were signed up after their contacts details were obtained from third-party vendors. In the Commission's view all these sales were likely to be uninvited direct sales within the definition of the FT Act.
- 9.4 The documents constituting the sales agreement were the tax invoice, the Kalkine Subscription Agreement (**Subscription Agreement**) and the Website’s Terms and Conditions.
- 9.5 There is a “seven day money back guarantee” (**7-day money back guarantee**) provided in the Refund Policy and Pricing clause of the Subscription Agreement and at clause 5 of the Website’s Terms and Conditions, which is a reference to a seven-day cooling off period. However, the 7-day money back guarantee applies to new customers only. It does not apply to past or existing customers.
- 9.6 Under Kalkine’s processes, new customers receive a welcome email with the tax invoice and the Subscription Agreement, which contains information about the subscription terms and conditions and a hyperlink to access the Website’s Terms and Conditions. For sales made since January 2023, the welcome email also includes a reference to the 7-day cooling off period available to first-time subscribers and comes with a Financial Advice Provider disclosure statement.
- 9.7 Between 1 January 2021 and 24 March 2023, Kalkine entered into 2,301 agreements following sales calls made to New Zealand consumers.

Kalkine’s response

10. Kalkine responded to the Commission’s concerns by stating that:
- 10.1 A large proportion of the calls made to New Zealand consumers which resulted in sales agreements for subscriptions were not uninvited direct sales, because these calls were made following the consumer leaving their details on Kalkine’s website or social media page, and the consumer had ticked a box confirming that they agreed to be contacted by Kalkine for marketing purposes;
- 10.2 Sales staff were trained to say that the 7-day money back guarantee applied to first-time subscribers;
- 10.3 The 7-day money back guarantee is available to all new subscriptions whether availed by a first-time subscriber or when an existing subscriber adds a new unique report to their subscription. The 7-day money back guarantee does not apply to renewed subscriptions; and

- 10.4 Kalkine acknowledges a request of cancellation via both oral and writing modes. As a business practice, it encourages customers to additionally send an email to notify their cancellation request in writing.
- 11. Following the Commission's investigation, Kalkine undertook the following changes to its sales agreement documents and sales scripts:
 - 11.1 Inserted a reminder about the 7-day money back guarantee (which in the FT Act is specified to be 5 working days) at the bottom of the tax invoice;
 - 11.2 Amended its Refund Policy and Pricing clause of the Subscription Agreement and clause 5 of the Website's Terms and Conditions, to clarify the options for cancelling the agreement;
 - 11.3 Amended the Refund Policy and Pricing clause to clarify that the right to cancel also applies to existing and past customers who subscribe to a new report; and
 - 11.4 Included in the sales script a prompt to inform call recipients about the 7-day money back guarantee.
- 12. We note Kalkine's advice that the changes were implemented on 1 August 2023.

How this conduct can break the Law

- 13. Uninvited direct sales over the telephone is subject to special rules in the FT Act to ensure that consumers who are caught off guard by salespeople ringing unexpectedly are not pressured into purchasing products or services they had not sought out. Consumers in these situations often need time to fully consider whether they wish to proceed with any contracts to buy goods or services and the cost implications of the purchase.
- 14. The rules cover what salespeople have to tell consumers when negotiating sales, what information has to be disclosed about the contract, and how it must be done. There are also rules about how and when the consumer can cancel the agreement and when any agreements can be enforced against the consumer.

Likely breaches to the uninvited direct sale provisions

- 15. According to section 36K of the FT Act, a direct sale is uninvited where it is made as a result of negotiations that took place at the consumer's home or by telephone, and where the consumer did not invite the supplier to come or make the telephone call for the purposes of entering into negotiations relating to the supply of goods or services.
- 16. In the Commission's view, Kalkine engaged in uninvited direct sales: details of potential customers were obtained either from third-party vendors, or from visitors of Kalkine's website and social media that inputted their contact details for the purpose of obtaining information about Kalkine's reports and services, or receiving a

free trial (rather than for the purpose of entering into negotiations relating to the supply of a subscription).

17. A renewal agreement is not considered as an uninvited direct sale in the meaning of section 36K of the FT Act, where:
 - 17.1 the new agreement replaces an existing agreement; and
 - 17.2 the existing agreement is *in force* at the time the negotiations for the new agreement occur; and
 - 17.3 the new agreement involves the same or similar goods or services as those supplied under the existing agreement, and on the same or similar terms and conditions as those in the existing agreement.
18. In the Commission's view, by selling subsequent reports to existing customers, and by selling reports to past customers whose subscription had already expired, Kalkine made uninvited direct sales (rather than renewals).
19. Section 36M of the FT Act provides that a consumer may cancel an uninvited direct sale agreement by giving notice of the cancellation to the supplier within 5 working days after the date on which the consumer received a copy of the agreement. The notice of cancellation can be expressed in any way, including oral or written, that shows the consumer's intention to cancel the agreement.
20. Kalkine's Subscription Agreement and Website's Terms and Conditions required cancellations to be in writing, but did not inform customers that they could notify their wish to cancel by telephone.
21. Section 36L of the FT Act sets out the requirements for disclosure of consumer rights when entering into an uninvited direct sale agreement. The front page of the agreement must set out a summary of the consumer's right to cancel under section 36M (s36L(2)(a)(ii)) and other information, such as the consumer's name and street address (s36L(2)(a)(iv)). The supplier must also give the consumer oral notice of their right to cancel, and of the options for cancelling the contract, before the agreement is entered into (s36L(3)).
22. The tax invoice, which is the first page of Kalkine's sale agreement documents, did not contain a summary of the consumer's right to cancel. The right of cancellation (7-day money back guarantee) offered by Kalkine only applied to new subscribers. Despite Kalkine's assertion, it is not clear it was available for existing subscribers. In any case, past subscribers were excluded. There are also instances where Kalkine did not set out on the tax invoice the full details of the customer's name and street address.
23. The 7-day money back guarantee (right to cancel) was not mentioned in the call scripts that the FMA obtained from Kalkine in 2022, nor in the call recordings that the Commission was provided with by the FMA for sales made up to February 2022. Based on the information provided by Kalkine, the manner in which the contact

details were obtained, the call sales scripts up to July 2023, and the recorded sales calls that the Commission listened to (up to February 2022), we consider that the calls were likely to be uninvited direct sales and the oral right of cancellation was not explained to new or existing customers entering into new sales, for those applicable periods.

Likely misleading representations

24. Section 13(i) of the FT Act prohibits traders from making false or misleading representations concerning the existence or exclusion of a right to cancel.
25. Kalkine represented in the sales agreement documents, that the 7-day money back guarantee was not applicable to past or existing subscribers. This representation was false or misleading, because in our view, customers were all signed up through uninvited direct sales calls and had a right of cancellation within 5 days of entering into the agreement under section 36M of the FT Act. Therefore, the right of cancellation also applied to existing customers who subscribed to new reports, and past customers purchasing a report after expiry of their subscription.

The Commission's view

26. In this case, for the reasons expressed above and having fully considered relevant information received, the Commission's view is that it is likely Kalkine's conduct has breached sections 36L(1)(a)(v) read with 36L(2)(a)(ii) and (iv), 36L(3), 36M(2) and 13(i) of the FT Act.
27. We have noted the changes made by Kalkine to its sales call script and sales agreement documents. We strongly recommend that Kalkine further reviews its sales agreement documents to make it absolutely clear that:
 - 27.1 The 7-day money back guarantee applies to past subscribers purchasing any subscription, regardless of whether it is similar to the subscription previously purchased, where the sales call to renew the subscription was made after the subscription expired. This is currently not clear in any of the sales agreement documents, nor the sales call script; and
 - 27.2 The 7-day money back guarantee applies to existing subscribers purchasing further new subscriptions. This is currently not clear in clause 5 of the Website's Terms and Conditions.

Warning

28. 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 by issuing legal proceedings.
29. This warning represents our opinion that the conduct in which Kalkine has engaged is likely to have breached the FT Act and that legal action remains available to the Commission in future if the conduct continues or is repeated. If this (or similar)

conduct is continued or repeated, it is open to the Commission to take legal action in respect of that continued/repeated conduct.

30. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against Kalkine.
31. This warning letter is public information and will be published on the case register on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

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

Penalties for breaching the FT Act

33. As indicated above only the courts can decide if there has actually been a breach of the FT Act. The court can impose penalties where it finds the law has been broken:
 - 33.1 A company that breaches sections 36L(1), 36L(3) and 36M(2) of the FT Act can be fined up to \$30,000 and an individual up to \$10,000 per offence.
 - 33.2 A company that breaches section 13 of the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
34. 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

35. We recommend that Kalkine seeks legal advice, particularly with regard to [25] above, and encourage Kalkine to regularly review its compliance procedures and policies.
36. We have published a series of fact sheets and other resources to help businesses comply with the FT Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage Kalkine to visit our website to better understand its obligations and the Commission's role in enforcing the FT Act. The online page on 'Selling over the phone or door-to-door'⁴ is particularly relevant to Kalkine's business.
37. Kalkine can also view the FT Act and other legislation at www.legislation.co.nz.

⁴ <https://comcom.govt.nz/business/dealing-with-typical-situations/mobile-trading-and-door-to-door-selling/selling-over-the-phone-or-door-to-door>

38. 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]

Rachael Manttan
Acting Fair Trading Investigations and Compliance Manager