

10 August 2017

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www.comcom.govt.nz

By email to: [REDACTED]

Attention: [REDACTED]

Dear [REDACTED]

Fair Trading Act 1986: Warning

1. The Commerce Commission has been investigating MyRepublic Limited (MyRepublic) under the Fair Trading Act 1986 (the Act). We have now completed our investigation and are writing to alert you to our concerns.
2. In summary, the Commission considers that MyRepublic is likely to have breached the Act by making misleading representations to consumers. These likely breaches related to:
 - 2.1 MyRepublic representing that its 1Gibabit per second (1Gbps) service was available when it was not;
 - 2.2 MyRepublic representing that customers on its GAMER broadband service would not experience any lag or latency when, in fact, consumers could experience lag and latency caused by third party servers; and
 - 2.3 MyRepublic incorrectly representing that consumer's rights of cancellation under the uninvited direct sales (UDS) provisions of the Act ceased to apply once MyRepublic had commenced the service. Also that, following any cancellation of an uninvited direct sales agreement under section 38M of the Act, consumers would be obliged to return goods to MyRepublic, when the consumer obligations were only to take reasonable care of the goods and to allow MyRepublic to collect them.
3. We acknowledge that MyRepublic removed the UDS and lag and latency representations from its website after receiving a Stop Now Letter from the Commission on 21 February 2017.
4. However, if any of the identified behaviour is continuing at the present time, we recommend that you take immediate action to address our concerns and seek legal advice about complying with the Act. If the behaviour continues, we may in the

future revisit other enforcement options as outlined in our Enforcement Response Guidelines.¹

The investigation

5. The Commission began this investigation after receiving a number of complaints about MyRepublic's conduct.
6. Our investigation has included the following areas of MyRepublic's conduct; the availability of the 1Gbps upgrade offer; the accuracy of the no lag and latency representations on MyRepublic's GAMER webpage; and MyRepublic's representations relating to consumers' rights and obligations under the UDS provisions of the Act.
7. MyRepublic has cooperated with the Commission throughout the investigation by providing us with requested information and attending an interview with Commission staff.

The Commission's view

8. In this case, the Commission's view is that MyRepublic's conduct was likely to have breached the Fair Trading Act.
9. After considering the factors set out in our Enforcement Response Guidelines, we have decided to issue this warning letter to assist MyRepublic to meet its statutory obligations.

Upgrade to 1Gbps service

10. Between August and November 2016, MyRepublic promoted a "Free 1Gbps Upgrade" offer (1Gbps Upgrade). Examples of MyRepublic's 1Gbps Upgrade radio and facebook advertisements are reproduced at **Attachment A**.
11. In fact, the 1Gbps service only became available in October 2016 when Chorus began wholesaling its 1Gbps service as part of the national ultra-fast broadband initiative.
12. Prior to the 1Gbps service becoming available, consumers who signed up with MyRepublic would receive a 200Mbps service.
13. Section 13(b) of the Act prohibits any person, in trade, from making a false or misleading representation that services are of a particular kind, standard, quality or quantity. Section 11 of the Act prohibits any person in trade from engaging in conduct that is liable to mislead the public as to the nature or characteristics of services.
14. The Commission's view is that consumers who saw or heard MyRepublic's 1Gbps Upgrade advertisements in August, September and early October 2016 may have formed the impression that the 1Gbps service was available immediately and that

¹ Available at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>.

they would receive that service on signing up with MyRepublic. In particular, the Commission considers that the use of the phrase “switch to MyRepublic **today** and receive a free upgrade to 1 gigabit fibre broadband” in several of MyRepublic’s radio advertisements was likely to imply that the 1Gbps service was immediately available and would be supplied from the day that consumers signed up to MyRepublic.

15. The majority of advertisements did not identify that consumers who signed up with MyRepublic before the 1Gbps service was rolled out would initially receive MyRepublic’s 200Mbps service, until they could be upgraded to the 1Gbps service after October 2016. That was over two months after MyRepublic began advertising the 1Gbps Upgrade.
16. The Commission’s view is that the 1Gbps Upgrade advertisements were likely to mislead consumers about the kind, standard or quality of the service offered by MyRepublic, in breach of sections 13(b) and 11 of the Act.

Lag and latency representations

17. Prior to February 2017, MyRepublic promoted its GAMER plans, in part, by making the following representation on its GAMER webpage:

No Peak Time Lag

We buy more bandwidth per user than any other national ISP, to ensure you never experience peak time latency or speed issues. No throttling here!

18. In February 2017, the Commission sent a ‘Stop Now’ letter to MyRepublic in relation to this conduct. As a result of the Commission’s letter, MyRepublic ceased this conduct.
19. MyRepublic told Commission staff at interview that, while MyRepublic has put in place measures to limit the latency and lag that consumers may experience, ‘peak time lag’ caused by the third party servers that host online games are outside MyRepublic’s control.
20. MyRepublic further claimed that its GAMER plan customers were usually more knowledgeable about IT and broadband speed issues and therefore would understand the representations to mean that MyRepublic maintains an ‘acceptable level’ of lag and latency at on-peak times as well as off-peak times on the part of the network that it controls.
21. As stated above, Section 13(b) of the Act prohibits any person, in trade, from making a false or misleading representation that services are of a particular kind, standard, quality or quantity.
22. The Commission’s view is that MyRepublic cannot claim that consumers will experience “No Peak Time Lag” and “never experience peak time latency or speed issues”. These unqualified representations are likely to have caused consumers to form the impression that they would not experience peak time lag or latency or speed issues if they signed up with MyRepublic, when this was not the case. As a

consequence the Commission considers MyRepublic is likely to have breached section 13(b) of the Act.²

23. The representations made by MyRepublic were made on an open webpage to the public at large. MyRepublic must be mindful that not all consumers viewing its GAMER webpage will be educated about IT matters. Consumers may be susceptible to being misled by the absolute lag, latency and speed representations above.

Rights under the uninvited direct sales provisions

24. As a part of its promotional activity, MyRepublic engages in door-to-door sales.

25. Prior to February 2017, MyRepublic's 'Sales and Marketing Code of Practice' webpage stated that:

"If you signed up through our door-to-door team, you will have the right to cancel at any time during a 5-day cooling off period. In the event of cancellation during the cooling off period, your agreement is treated as if it had not been made. Please be aware that you will lose your right to cancel during the cooling off period once we have commenced activation of the services or you use the services, whichever is the earlier. Any Equipment provided to you free of charge, you will be required to be returned to us (unused and in the same condition as when it was provided to you) within 5 days." (emphasis added)

26. In February 2017, the Commission sent a 'Stop Now' letter to MyRepublic in relation to this conduct. As a result of the Commission's letter, MyRepublic removed the emphasised phrase in the extract above from its website.
27. The law in relation to door-to-door sales is set out in the uninvited direct sales provisions of the Act (sections 36K to 36S).
28. Section 36M of the Act provides that a consumer may cancel an uninvited direct sales agreement by giving notice of the cancellation to the supplier within five working days after the date on which the consumer receives a copy of the agreement. Nothing in the Act qualifies this right of cancellation, including the provision of goods or services.
29. Section 36Q of the Act sets out consumers' obligations on cancellation of a UDS. Section 36Q(5)(b) expressly states that a consumer is under no obligation to deliver, or to arrange delivery of, the goods to the supplier.
30. Section 13(i) of the Act provides that no person shall, in trade, make a false or misleading representation concerning the existence, exclusion, or effect of any right or remedy.
31. In the Commission's view, consumers who signed up to a MyRepublic plan through MyRepublic's door-to-door channel are likely to have entered into an uninvited direct sales agreement within the meaning of section 36K of the Act. Such consumers have the rights and obligations set out in the uninvited direct sales provisions.

² In addition to section 13(b) of the Act, the Commission considers that MyRepublic's conduct is also likely to have contravened section 11 of the Act.

32. The first sentence of the emphasised section of MyRepublic's 'Sales and Marketing Code of Practice,' referred to in paragraph 25 above, purports to limit the consumer's section 36M rights of cancellation of the uninvited direct sales agreement. It does that by asserting that the cooling off period ends on MyRepublic activating or the consumer using the services, even if this occurs during the statutory five day period.
33. In the Commission's view, this assertion is likely to be a breach of section 13(i) of the Act because it is a false and misleading representation of the effect of section 36M of the Act. This is because the consumer's right to cancel the uninvited direct sales agreement in accordance with section 36M of the Act cannot be changed by the uninvited direct sales agreement.
34. The second sentence of the emphasised section of MyRepublic's 'Sales and Marketing Code of Practice' above purports to oblige the consumer to return any equipment provided to them under the uninvited direct sales agreement, unused and in the same condition as when it was provided to them.
35. In the Commission's view, this assertion is likely to be a breach of section 13(i) of the Act because it is a false and misleading representation of the effect of section 36Q of the Act. Under section 36Q, the consumer is not obliged to return the goods and is not obliged to pay for the return of the goods. In relation to the return of the goods to the supplier, under section 36Q the obligation on the consumer is, at most, only to take reasonable care of the goods and allow the supplier to take possession of the goods from the consumer's address.

Concluding comments

36. We encourage you to regularly review your compliance procedures and policies.
37. The Commission has publicly stated that retail telecommunications will be an organisation-wide priority for the 2017/18 year.
38. While we will not be taking any further action against MyRepublic on these matters at this time, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future.
39. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against MyRepublic.
40. This warning letter is public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.
41. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Act. The Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the Act

42. Only the courts can decide if there has actually been a breach of the Act. The court can impose penalties where it finds the law has been broken. A company that breaches the Fair Trading Act can be fined up to \$600,000 per offence and an individual up to \$200,000 per offence.
43. 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

44. We have published a series of fact sheets and other resources to help businesses comply with the Act and the other legislation we enforce. These are available on our website at 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.
45. You can also view the Act and other New Zealand legislation at www.legislation.co.nz.
46. 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



Ritchie Hutton
Head of Investigations - Competition Branch

Attachment A: Examples of the 1Gbps advertisements

Facebook advertisement:



MyRepublic New Zealand
Sponsored · ↻

Stop the buffering! MyRepublic gigabit unlimited fibre broadband is here.



Unlimited Gigabit Fibre Broadband

6 Months Half Price Fibre Broadband with Free Install, Setup & Router.

[Learn More](#)

Transcription of radio advertisement:

"Is...your...internet...too...slow? Then switch to MyRepublic today and receive a free upgrade to 1 gigabit fibre broadband. Because who enjoys uffbububuffbuffbuffering. Then it's only \$59.99 a month for your first 6 months plus you could win one year of MyRepublic unlimited gigabit fibre broadband. Register online on your local win page at the hits.co.nz. 24 months term, ts and cs apply."

