

30 November 2023

Two Degrees New Zealand Limited  
Level 2, 136 Fanshawe Street  
**AUCKLAND 1010**

Attention: [REDACTED]

By email only: [REDACTED]

Dear [REDACTED],

**Fair Trading Act 1986: Warning for misleading conduct and for making false and/or misleading representations around the sale of wiring maintenance service**

1. The Commerce Commission (**Commission**) has been investigating Two Degrees New Zealand Limited, trading as 2degrees (**Two Degrees**), under the Fair Trading Act 1986 (**FT Act**) about the sale of its wiring maintenance service (**WMS**).<sup>1</sup> We have now completed our investigation and are writing to inform you about our views.
2. The Commission has decided to issue Two Degrees with a warning because in the Commission's view, Two Degrees is likely to have breached section 11 and sections 13(e) and (h) of the FT Act.
3. WMS is an ancillary service primarily offered by Two Degrees' with its copper connection (ADSL/VDSL) services. Customers on copper connection services benefitted from WMS by getting faulty internal wiring, splitters, jackpoints and other wiring technology commonly used with copper connection services repaired at no cost.
4. WMS is not a service available to fibre or wireless broadband customers. WMS provided little to no benefit or use to customers with fibre or wireless broadband services, which are often used without internal wiring and instead connect to devices using wireless fidelity technology (or commonly known as Wi-Fi).

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<sup>1</sup> A wiring maintenance service is a service that covers customers for faults occurring in integrated/internal wiring or splitters related to wear and tear.

5. The Commission considers that Two Degrees is likely to have breached the FT Act in that it:
  - 5.1 engaged in conduct liable to mislead the public as to the suitability of WMS by allowing fibre or wireless customers to purchase WMS despite it being unsuitable for those connections (s 11 FT Act);
  - 5.2 made misleading representations when it sold and invoiced the WMS to fibre and wireless customers about the use, benefit, or need for WMS (sections 13(e) and (h) FT Act).
6. 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.<sup>2</sup> 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.<sup>3</sup>

### Background to investigation

7. Following completion of the Commission's investigation into Spark New Zealand Trading Limited (**Spark**) that resulted in a warning being issued and the provision of court enforceable undertakings,<sup>4</sup> the Commission opened investigations into the sale of WMS (or equivalent services) in the wider telecommunications industry in August 2022. Two Degrees was one of those investigated.
8. During the course of the investigation, Two Degrees informed us that it offered WMS to customers which covered faults occurring in integrated/internal wiring or splitters related to wear and tear. The WMS is primarily suitable and of use and benefit to customers with copper connections (ADSL/VDSL). If an applicable fault occurred, WMS would cover the costs of repairing that fault including the call-out fee for the Chorus New Zealand Limited (or local fibre company) technician attending the customers' premises.
9. During our investigation we obtained the following evidence, which we considered in reaching the view that there has been likely breaches of the FT Act:
  - 9.1 Two Degrees offered WMS to its ADSL and VDSL customers as an optional add-on when customers signed up online at the price of \$3.95 per month.
  - 9.2 Two Degrees ordinarily did not offer WMS to fibre or wireless connection customers when customers signed up online, in store or through its contact centre.
  - 9.3 Despite the above, Two Degrees identified that some active customers had WMS attached to their accounts and were charged WMS fees, despite

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<sup>2</sup> Commission's published *Enforcement Response Guidelines* at [41].

<sup>3</sup> Commission's published *Enforcement Response Guidelines* at [41].

<sup>4</sup> See the Commerce Commission case register on the Spark investigation - <https://comcom.govt.nz/case-register/case-register-entries/spark-new-zealand-trading-limited7>

switching from ADSL or VDSL connections to alternative connections that would not benefit from WMS (**Customer Incident**). The key causes for this were:

- 9.3.1 a flaw in Two Degrees' online customer self-service portal which led to customers retaining WMS after they migrated their copper connection services (ADSL/VDSL) to alternative connections; and
  - 9.3.2 isolated human errors in service provisioning (for example, a data entry error made by contact centre staff to an account).
- 9.4 The Customer Incident impacted a total of 1,115 fibre and wireless connection customers (**Impacted Customers**): 817 existing customers and 257 former customers were identified in August 2021. Two Degrees advised us in October 2022 that it identified a further 41 "in flight" customers impacted by the Customer Incident. The "in-flight" customers were in the process of transfer to fibre or wireless connections during the remediation process in August 2021 and were therefore missed.
- 9.5 Two Degrees informed us that the Customer Incident resulted in approximately \$83,500 of WMS fees been charged to the Impacted Customers and collected by Two Degrees.

### **Two Degrees response**

10. During the investigation, Two Degrees confirmed that it was made aware of the Customer Incident in August 2021 and the following remediation steps were taken:
- 10.1 it had implemented a temporary manual workaround as a short-term solution where ADSL or VDSL connections with WMS attached were reviewed daily and remediated while a permanent solution was being developed and implemented;
  - 10.2 a permanent solution was implemented in January 2022 and Two Degrees was confident that the solution successfully resolved the issue with the self-care portal that caused the Customer Incident;
  - 10.3 it had, and would continue to, conduct regular tests from June 2023 to May 2024 to ensure that the permanent solution continued to work, and any isolated human data entry errors would be captured and remediated;
  - 10.4 in relation to the Impacted Customers:
    - 10.4.1 all 817 existing customers had been refunded for a total of around \$66,000. Refunds were paid by way of credit to customers' accounts unless Two Degrees was otherwise notified by customers to pay refunds to nominated bank accounts;
    - 10.4.2 all 41 "in flight" customers had been refunded for a total of around \$1,230. Refunds were paid by way of credit to customers' accounts;

10.4.3 it had reached out to the 257 former customers by SMS text messages in December 2022 and follow up SMS text messages in June 2023. Two Degrees planned to contact any former customers owed a "large" refund (as determined by Two Degrees) by telephone if they did not make contact with Two Degrees after the two SMS text messages notifications.

11. As of 10 October 2023, 24 of the 257 former customers have been refunded \$2,334.45, with a further amount of approximately \$13,785 in WMS fees still to be refunded to the remaining customers. Two Degrees informed us that any unclaimed refunds would be treated as unclaimed money in accordance with the Unclaimed Money Act 1971.

### **How this conduct can break the law**

#### *Section 11: misleading conduct in relation to services*

12. Section 11 of the FT Act prohibits any business from engaging in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.
13. We consider that Two Degrees likely engaged in conduct liable to mislead the public as to the characteristics and/or suitability for a purpose of the WMS. Namely, that Two Degrees likely failed to inform the Impacted Customers that WMS's characteristics were not applicable/beneficial to the alternative services they were migrating to; and that by offering for sale and invoicing customers for the WMS together with a connection type to which it offered no real benefit, they were liable to have mislead customers that the service was suitable for their new connections, when it was not.
14. It is likely that this conduct was liable to mislead the Impacted Customers as to the nature, characteristics, and suitability for purpose of the WMS.

#### *Section 13: false or misleading representations*

15. Under section 13(e) and s 13(h) of the FT Act, no businesses shall, in connection with the supply or possible supply of goods or services, make false or misleading representations that services have any performance characteristic, uses or benefits;<sup>5</sup> or concerning the need for any services.<sup>6</sup>
16. We consider that Two Degrees likely failed to inform the Impacted Customers that WMS would no longer offer them the same benefits or uses, and they might no longer need the service, when they switched to alternative connections. In addition, by continuing to invoice the Impacted Customers, Two Degrees represented that the Impacted Customers had a need for the service, and would continue to receive the

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<sup>5</sup> s 13(e), Fair Trading Act 1986

<sup>6</sup> s 13(h), Fair Trading Act 1986

same use or benefit from WMS as they had before when they switched to their new alternative connections, despite it being principally unsuitable for those connections.

17. It is likely these representations were false or misled the Impacted Customers that WMS had performance characteristics, uses or benefits which were equally applicable to their new connections, and/or that the Impacted Customers had a need for the WMS when they might not have.

#### **The Commission's view**

18. We consider that the nature of WMS (and internet connection services in general) makes it difficult for customers without knowledge of telecommunications technology to identify its suitability for them, any potential use or benefits, and whether they have a need for the type of service.
19. In those circumstances, it was important for Two Degrees to provide accurate, clear and complete information to customers about the new connections and how signing up to alternative connections might affect previously acquired ancillary services. We are of the view that Two Degrees fell short of meeting these obligations that led to the Customer Incident.

#### **Warning**

20. 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 Two Degrees this warning rather than by issuing legal proceedings/prosecution.
21. This warning represents our opinion that the conduct in which Two Degrees has engaged is likely to have breached the FT Act. 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. This warning would also be brought to the attention of a Court in any subsequent proceedings brought by the Commission against Two Degrees.
22. In reaching our decision to issue a warning, the Commission acknowledges the proactive remediation steps taken by Two Degrees, once it was made aware of the issue, to refund the Impacted Customers and implement system fixes/updates intended to prevent the conduct from reoccurring. We also acknowledge Two Degrees' co-operation with our investigation.
23. We note that some of the Impacted Customers have not yet been refunded their WMS fees. Two Degrees should continue any suitable efforts to reach out to those customers about the refunds and to ensure that Two Degrees does not benefit from any unclaimed WMS fees that are yet to be refunded to those former Impacted Customers.
24. This warning is public information and will be published on the case register on our website. We will also be making public comment about our investigation and conclusion, including issuing a media release.

**Additional guidance**

25. To assist it with on-going compliance with the FT Act, we encourage Two Degrees to regularly review its internal compliance procedures and policies.

**The Commission's role**

26. 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 Fair Trading Act**

27. 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. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
28. Two Degrees 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**

29. 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 <http://www.comcom.govt.nz>. We encourage you to visit our website to better understand Two Degrees' obligations and the Commission's role in enforcing the Act.
30. You can also view the FT Act and other legislation at <http://www.legislation.co.nz>.
31. Thank you for your assistance with this investigation. Please contact us if you have any questions about this letter.

Yours sincerely



Rachael Manttan

Acting Fair Trading Investigations and Compliance Manager