

Undertakings to the Commerce Commission under section 46A of the Fair Trading Act 1986

Spark New Zealand Trading Limited

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1 Persons giving Undertakings

- 1.1 These Undertakings are given to the Commerce Commission (**Commission**) for the purposes of section 46A of the Fair Trading Act 1986 (**FT Act**) by Spark New Zealand Trading Limited (Company Number 391406), a company incorporated in New Zealand having its registered office at 167 Victoria Street West, Auckland (**Spark**).

2 Background

- 2.1 Spark is a supplier of telecommunication services to consumers in New Zealand. Spark offers a wire maintenance service (**WMS**), which covers the cost of maintenance callouts for common faults to customers' on-premises telecommunications wiring, splitters and jack points.
- 2.2 Customers are responsible for the maintenance of all telecommunications wiring and equipment after the demarcation points to the individual jack points, including internal wiring within their houses. Network providers are responsible for the maintenance of any wiring or equipment faults before demarcation points.
- 2.3 For copper-based connections, the demarcation points are usually outside of buildings. Given that faults do commonly occur after the demarcation points, WMS may be of some use to customers with copper-based connections. However, for fibre connections, the demarcation points are at the Optical Network Terminal which is located inside properties and connects the fibre network directly to a modem through an ethernet cable. Therefore, for most fibre broadband customers, there is no internal wiring to maintain between the demarcation point and the modem. For wireless connections, there is no internal wiring and therefore WMS has no applicability.
- 2.4 As new connections technology was rolled out, Spark continued to offer and supply WMS including to customers with fibre and wireless broadband accounts who had no need, benefit or use for WMS.
- 2.5 The Commission considers that Spark is likely to have breached the FT Act, by engaging in conduct liable to mislead the public as to the suitability of WMS and making misleading representations on its website and on invoices to its wireless and fibre broadband customers about the use, benefit or need for WMS.
- 2.6 In response to the Commission's investigation, Spark has:
- (a) admitted that its conduct likely contravened sections 11, 13(e) and 13(h) of the FT Act; and
 - (b) offered these Undertakings to the Commission.
- 2.7 The Commission has concluded, after reviewing the practices and criteria outlined in the Commission's Competition and Consumer Investigation Guidelines and Enforcement

Response Guidelines, that it is in the public interest to resolve this investigation by way of these Undertakings provided by Spark and a warning.

3 Interpretation

3.1 In these Undertakings and the Schedules:

- (a) **Affected Customer** means a natural person who currently holds or has previously held a fibre or wireless broadband account with Spark and made payments for WMS between June 2014 and May 2021.
- (b) **Refund Amount** means the sum to be credited by Spark to an Affected Customer as a refund pursuant to these Undertakings, being the sum paid by that Affected Customer to Spark for WMS in respect of a fibre or wireless broadband connection.

4 Purpose of the Undertakings

4.1 These Undertakings are given by Spark to:

- (a) record Spark's commitment to refund Affected Customers; and
- (b) record the steps that Spark will take to ensure Affected Customers have access to a Refund Amount.

5 Refund Undertakings

5.1 Spark undertakes to the Commission, to the extent that it has not already, that it will:

- (a) credit each Affected Customer's Spark account (whether that account is active or dormant) in the sum of that Affected Customer's Refund Amount by 31 August 2022;
- (b) carry out the steps provided for in clauses 5.3 to 5.11 below; and
- (c) use its best endeavours to ensure that each Affected Customer receives the Refund Amount.

5.2 For the avoidance of doubt, despite the mechanism described in clause 5.1(a) above, Spark acknowledges that Affected Customers are not required to spend the Refund Amount on goods or services provided by Spark. Spark will ensure that all Affected Customers are able to access the Refund Amount by obtaining a payment of money from their Spark account, free of charge.

Steps to contact Affected Customers

5.3 Spark will attempt to make contact with each Affected Customer that does not have an active Spark account, using the contact information in the records it holds, so as to inform the Affected Customer of their right to the Refund Amount.

5.4 Where Spark cannot make contact with an Affected Customer based on the records it holds, Spark:



- (a) Has sent further direct communications to that Affected Customer's last known contact details prior to 31 March 2022;
- (b) Will for any Affected Customers who still had a Refund Amount available in their Spark account on 31 July 2022, deploy an online advertising campaign prior to 31 August 2022, that serves at least 5 digital advertisements targeted to those Affected Customers, which encourages them to visit a Spark webpage with refund information;
- (c) Has, prior to 30 June 2022, engaged with advocacy groups for members of the community who are less likely to engage via digital platforms, including Age Concern, Grey Power and Super Gold, with materials about the payments of the Refund Amount and encouraged them to make their members aware that they might be Affected Customers entitled to receive the Refund Amount.

Deceased estates

5.5 If any Affected Customers are deceased, Spark will:

- (a) use reasonable endeavours to contact the representative(s) of the deceased Affected Customer and write to the representative(s) of the deceased Affected Customer informing them of the entitlement to the Refund Amount; and
- (b) pay the Refund Amount to a bank account nominated by the representative(s) of the deceased Affected Customer; or
- (c) if the representative(s) of the deceased Affected Customer has not contacted Spark within 3 months of Spark's last attempt to contact them, undertake the process as set out in clause 5.6 below.

Unclaimed refunds

5.6 If there are unclaimed Refund Amounts as at 30 November 2022, Spark will:

- (a) Where a Refund Amount exceeds \$100 and is owed to person, lodge that Refund Amount (+GST) with the IRD in accordance with the Unclaimed Money Act 1971;
- (b) Where a Refund Amount exceed \$100 and is owed to a deregistered company, lodge that Refund Amount (+GST) with Treasury in accordance with the Companies Act 1993; and
- (c) Where the Refund Amount is \$100 or less, continue to hold the money in the relevant Affected Customer's dormant account for 5 years from the date the Refund Amount was credited to their account and keep records of the same.

5.7 In order to ensure that Spark will not benefit from continuing to hold Refund Amounts which remain unaccessed but which have not been lodged with the IRD as unclaimed moneys, Spark will donate an amount equivalent to the value of the Refund Amounts that remain unaccessed as of 30 November 2022, to registered charities of its choice not associated with Spark (e.g. not the Spark Foundation) by no later than 15 December 2022.

5.8 As soon as practicable after 30 November 2022, Spark will calculate the amount to be donated under clause 5.7, which will be equivalent to the value of the Refund Amounts of

\$100 or less as outlined above at clause 5.6(c). By this date Spark will have executed all of the measures outlined above to re-contact and encourage Affected Customers to access their Refund Amounts.

- 5.9 Spark will ensure that the Affected Customers outlined in clause 5.6(c), continue to have an entitlement to access their Refund Amount even if the value of that Refund Amount has been reflected in the value of the donation described in clause 5.7.
- 5.10 Spark will continue to make available information on its website explaining how Affected Customers can access Refund Amounts, for example via a publicly accessible Spark Refunds webpage, for at least the full 5 Year Period. Spark will provide to the Commission the text of the website notice for the Commission's comments prior to publication.
- 5.11 Spark will report to the Commission by 15 December 2022 the number and value of Refund Amounts that have been accessed by Customers, the number and value of Refund Amounts that remain in dormant accounts, the number and value of Refund Amounts that have been lodged with IRD or Treasury, the amount to be donated under clause 5.7 and the recipient of the donation made under clause 5.7.

6 Effect of the Undertakings

- 6.1 The Undertakings are Court enforceable undertakings in terms of section 46A of the FT Act.

7 Commencement of Undertakings

- 7.1 The Undertakings come into effect when:
- (a) the Undertakings are executed by Spark; and
 - (b) the Commission confirms its acceptance of the Undertakings.

8 Duration of Undertakings

- 8.1 These Undertakings will continue to have effect until the earlier of:
- (a) the Commission for any reason discharging Spark from the Undertakings; or
 - (b) five years from the date the Commission confirms its acceptance of these Undertakings.

9 Compliance with the Undertakings

- 9.1 If Spark becomes aware of a breach of these Undertakings, whether advertent or inadvertent, it will notify the Commission within seven days of becoming aware, giving full particulars of the breach.



- 9.2 For the avoidance of doubt, nothing in paragraphs above prevents the Commission from directly seeking any information from Spark at any time for the purposes of checking compliance with these Undertakings.

10 Variation of the Undertakings

- 10.1 The Commission and Spark can agree at any time to vary these Undertakings.
- 10.2 No variation to these Undertakings will be effective unless it is in writing, executed by Spark, and signed as accepted by the Commission.

11 Miscellaneous

- 11.1 These Undertakings are properly executed if each Undertaking Party signs the same copy, or separate identical copies of the execution page. Where separate copies are signed by Spark or the Commission, the signed copy can be the original document, or an emailed copy.
- 11.2 Spark acknowledges that:
- (a) the Commission will make the Undertakings publicly available, including by publishing them on the Commission's enforcement response register on its website;
 - (b) the Commission will, from time to time, make public reference to these Undertakings, including in media statements and in the Commission's publications;
 - (c) nothing in these Undertakings is intended to restrict the right of the Commission, or the right of any other person, to take action under the FT Act or under any other statute or law.



Execution

Signed by and on behalf of Spark New Zealand Trading Limited

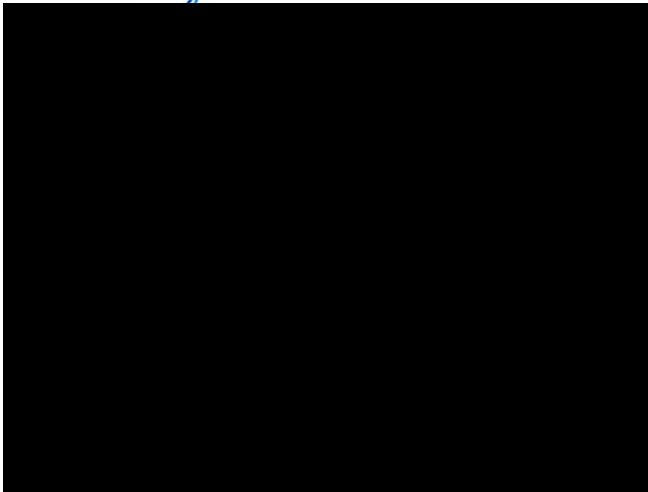


Director/authorised signatory

MELISSA ANASTASIOU

Name

In the presence of:



25 July 2022

Date



Acceptance

Signed by and on behalf of the Commerce
Commission by:


Chair

27 July 2022
Commerce Commission