

11 October 2023

[REDACTED]  
The Digital Lab 2007 Limited  
Level 5, 27 Gillies Avenue  
Newmarket, Auckland 1023

By email only: [REDACTED]

Dear [REDACTED]

## **Civil infringement notice issued under section 156A(1)(p) of the Telecommunications Act 2001**

### **Purpose of this letter**

1. The Commerce Commission (**Commission**) has been investigating The Digital Lab 2007 Limited, trading as Kiwi Internet and IT, (**Digital Lab**) under the Telecommunications Act 2001 (**Act**). We have now completed our investigation and are writing to inform you of the outcome.
2. In summary, the Commission considers Digital Lab is likely to have breached section 156A(1)(p) of the Act by failing to comply with the Commission 111 Contact Code (**Code**) without a reasonable excuse during the periods set out in this letter.
3. The purpose of this letter is to inform Digital Lab that the Commission has decided to serve two civil infringement notices on Digital Lab under section 156D of the Act for likely breaches under section 156A(1)(p) of the Act.

### **Compliance with the Code and the role of the Act**

4. The purpose of the Code is to ensure that vulnerable consumers, or persons on their behalf, have reasonable access to an appropriate means to contact the 111 emergency services in the event of a power failure.

5. The Code sets out a range of obligations designed to ensure that consumers are made aware of, and are regularly informed about the Code, including the protections available to vulnerable consumers.
6. Compliance with the Code is important because it ensures that consumers are aware that modern voice services do not work in a power outage, and provides a pathway by which vulnerable users can be assured of continued voice access to 111 emergency services in the event of a power failure.
7. Non-compliance with the Code, if it is found to have occurred without a reasonable excuse, breaches section 156A(1)(p) of the Act. The Commission can take enforcement action for such breaches, under section 156B of the Act.

#### **Digital Lab's non-compliance with the Code**

8. Digital Lab is a provider of retail landline services to consumers. Under the Code, Digital Lab must inform its retail landline customers about the Code, capably manage applications under the Code, and disclose information to the Commission each year. Failure to do so without a reasonable excuse gives rise to a likely breach of section 156A(1)(p) of the Act.
9. Between February 2021 and February 2023, Digital Lab was non-compliant with the Code in the following ways:
  - 9.1 between 1 February 2021 and 1 February 2023, Digital Lab failed to display any of the information required under clause 5 and specified in clause 6 of the Code, to meet its clause 7 obligations to provide Code information to consumers at the point of sale, on websites and via direct communication.
  - 9.2 Digital Lab did not make available or operate a process for consumers to apply to be recognised as vulnerable under the Code, as required by clause 11, between 1 February 2021 and 1 February 2023.
  - 9.3 Digital Lab did not provide disclosure of its Code-related activities to the Commission as required by clause 38:
    - 9.3.1 at all in the 2020/21 year, and
    - 9.3.2 its 2021/22 disclosures were provided late, on 10 February 2023, as part of this investigation.

#### **Digital Lab's explanation of its non-compliance with the Code**

10. Digital Lab stated, via written correspondence, and at interview that:
  - 10.1 the quality and detail of the Commission's September 2021 email about the Code was insufficient to alert the company director that they needed to act;

- 10.2 following the Commission's contact on 5 May 2022, Digital Lab intended to come into compliance, and that the work undertaken would have achieved Code compliance in December 2022, but for a cyber-attack which affected the company from 30 November 2022; and
- 10.3 Digital Lab faced additional complexities in complying with Code obligations because it is not naturally a provider of mobile services, which were a likely solution to provide as an alternative means of contacting 111 emergency services for vulnerable consumers.

### **Our view of reasonable excuse**

11. We note that Digital Lab was not sent information about the Code when the Code was published in November 2020. Our first communication Digital Lab was in September 2021, in the form of an email advising that we would be creating a template for the first set of Code disclosures in November that year.
12. Our September 2021 email to Digital Lab was not an explicit call to action. However, the email did outline the Code obligation that existed in relation to voice services.
13. That email also provided a link to the Code, and Digital Lab acknowledged that the email was opened upon receipt. In our view, three months is sufficient time for a provider to bring itself into compliance with the parts of the Code relating to the provision of Code information to consumers, and a capacity to process applications under the Code.
14. We consider that between February 2021 and November 2021, Digital Lab may hold a reasonable excuse for its non-compliance with the Code. The Commission did not communicate the Code's requirements to Digital Lab until September 2021.
15. However, Digital Lab failed to make any enquiries about its compliance obligations following its initial receipt of Code information in September 2021.
16. An investigator from the Commission re-affirmed Digital Lab's obligations under the Code in May 2022, but it was not until July 2022 that Digital Lab commenced work towards complying with the Code.
17. Digital Lab's implementation of Code compliance was not completed prior to the cyberattack which affected the company on 30 November 2022.
18. In our view, Digital Lab's non-compliance with the Code stems from its initial treatment of the email in September 2021 which made the company aware of the Code.

19. Digital Lab's subsequent failure to promptly engage with its Code obligations between May and July 2022, and the lengthy implementation period that followed are circumstances of its own making, and within its own control.
20. In our view, Digital Lab does not hold a reasonable excuse for its non-compliance with the Code in the period between December 2021 and 30 November 2022.
21. We consider the cyber-attack which affected Digital Lab may provide a reasonable excuse for the period of non-compliance between 30 November 2022 and 1 February 2023.

#### **Available enforcement responses for a breach under 156A(1)(p)**

22. Under section 156B(1) of the Act, the Commission may take one of the following actions where a person has failed, without reasonable excuse, to comply with section 156A(1)(p):
  - 22.1 serve a civil infringement notice under section 156D incorporating a pecuniary penalty of \$2,000;
  - 22.2 enter into enforceable undertakings; or
  - 22.3 apply to the High Court for an order requiring payment of a pecuniary penalty to the Crown.

#### **Our decision to serve civil infringement notices**

23. Section 156C of the Act sets out matters the Commission must consider when deciding what enforcement action to take under section 156B of the Act.
24. The Commission uses its enforcement criteria to assist it in deciding whether to take enforcement action in response to a statutory contravention, and to assist it in deciding what enforcement action to take.<sup>1</sup>
25. The enforcement criteria applicable are:
  - 25.1 the extent of detriment and gain;
  - 25.2 the circumstances, seriousness, and culpability relating to non-compliance; and
  - 25.3 public interest.
26. Our assessment is that detriment is limited. Digital Lab has a small number of retail landline customers who did not receive information about the Code prior to February 2023. Digital Lab's failure to provide Code disclosures in November 2021,

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<sup>1</sup> Further detail regarding our enforcement criteria can be found in our Enforcement Response Guidelines [here](#).

and by 30 November 2022 did not cause significant impairment to the Commission's duty to monitor compliance with the Code under section 9A(1)(c) of the Act.

27. In our view Digital Lab had ample opportunity to comply with the Code, but failed to do so in a timely fashion. At the interview with the Commission, Digital Lab acknowledged that it was resistant to complying with the Code at the outset, and that this had impacted its timeliness in complying.
28. While there is nothing to indicate Digital Lab's failure to comply with the Code has resulted in actual harm to consumers, the nature of the Code and the information and protections it requires extended to consumers mean that non-compliance with the Code will always create an opportunity for harm to occur.
29. We consider that there is significant public interest attached to the purpose of the code. It is ultimately designed to protect the vulnerable, at times when they are at increased risk. two
30. In making our decision, we also considered that Digital Lab does not have any history of non-compliance with the Act.
31. Based on our assessment of Digital Lab's non-compliance against the enforcement criteria, we have decided in this case to issue two civil infringement notices.

#### **Further information about the infringement notices**

32. We note that Digital Lab is likely to have committed numerous contraventions of the Act though its complete failure to comply with the Code during the periods described in this letter. We are required to prescribe the particulars of an offence when issuing an infringement notice. To meet this requirement, we have elected to refer to the following breaches:

*'between 10 October 2022 and 30 November 2022, Digital Lab failed (without a reasonable excuse) to display any of the information required under clause 5 and specified in clause 6, to meet its clause 7 obligations to provide Code information to consumers at the point of sale, on websites and via direct communication.*

&

*'between 10 October 2022 and 30 November 2022, Digital Lab failed (without a reasonable excuse) to make available or operate a process for consumers to apply to be recognised as vulnerable under the Code, as required by clause 11.'*

33. The penalty for each of the alleged breaches is \$2,000, which is due for payment by **8 November 2023**.

34. Payment can be made by bank account transfer to the account of the Commission [REDACTED] or by cheque.
35. The infringement notices are attached to this letter. It is important that you read all the information on the infringement notices.
36. You may object to these infringement notices by making an objection to the Commission under section 156E of the Act by **8 November 2023**. You may also appeal any Commission decision on an objection to the District Court under section 156I of the Act.
37. We intend to include information about this enforcement response on our Case Register after any objections or appeals have been resolved. We may also issue a media release or make public comment about the outcome.

**Our expectations regarding Digital Lab’s future compliance**

38. We take non-compliance with the Code seriously. We expect Digital Lab to ensure it maintains compliance with the Code.
39. While we will not be taking any further action against Digital Lab at this time, we will take these infringement notices into account if this issue arises again, or if Digital Lab engages in similar conduct in the future. We may also draw these infringement notices to the attention of a court in any subsequent proceedings brought by the Commission against Digital Lab.

**Further information**

40. If you have any questions about this letter or the infringement notices, please contact Zeb Walker, Principal Investigator by email at [REDACTED].

Yours sincerely,

[REDACTED]

Tristan Gilbertson  
Telecommunications Commissioner