

10 August 2017

Spark New Zealand Trading Limited
Level 2, Spark City
167 Victoria Street West
Auckland 1010

www.comcom.govt.nz

By email to [REDACTED]

Attention: [REDACTED]

Dear [REDACTED]

Fair Trading Act 1986 - Warning

1. The Commerce Commission has been investigating the conduct of Spark New Zealand Trading Limited (Spark) 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 Spark is likely to have breached the Act by engaging in conduct that is liable to mislead the public as to the characteristics of services and by making unsubstantiated representations. The Commission's concerns relate to Spark's representations in a Skinny mobile advertising campaign that Vodafone's 2G network was shutting down (the Skinny Closed Campaign).
3. The Commission acknowledges that Spark considers it had reasonable grounds for making the representations it made in the Skinny Closed Campaign. For the reasons set out below, the Commission does not accept that reasonable grounds existed.

The investigation

4. Spark New Zealand Trading Limited is a subsidiary of Spark New Zealand Limited (collectively, Spark).
5. Skinny Mobile is a brand name used by Spark to market mobile telecommunications in New Zealand.
6. The Commission began this investigation after receiving a complaint about Spark's conduct during the Skinny Closed Campaign. Spark has cooperated with the Commission throughout the investigation.
7. On 16 March 2016, an article was published on www.stuff.co.nz entitled "Vodafone signals the end is nigh for its 2G voice service" (**Stuff article**).

8. In late July 2016, Spark ran the Skinny Closed Campaign - a Skinny Mobile advertising campaign targeted at Vodafone New Zealand Limited's 2G voice network customers. The campaign involved advertising on Adshel bus shelters, newspaper advertising, and web based content. The campaign was due to run until 5 September 2016.
9. The headline message of the campaign was "*Vodafone's 2G network is shutting down...*" accompanied by an image of a prominent swing tag, containing the Vodafone logo and the word "CLOSED", with the words "Switch before you're ditched" appearing below that. The same headline message was conveyed to consumers in all advertising, with slight variations between the different advertising mediums. (Refer **Attachment A**).
10. The Skinny Closed Campaign commenced on Sunday 24 July 2016. Vodafone raised an objection with Spark as to the content of the advertising and, as a consequence, Spark made changes to its campaign by withdrawing the original newspaper and online advertising on 27 July 2016, and the Adshel advertising on 31 July 2017.
11. Spark then changed the headline message of Spark's Skinny campaign to "*Vodafone's 2G network will close sooner or later...*" accompanied by an image of a prominent swing tag, containing the Skinny logo and the word "OPEN", with "Switch to Skinny on the 3G/4G network now ..." appearing below that.
12. In relation to the original Skinny Closed Campaign advertising, Spark denies that it engaged in conduct liable to mislead the public, and asserts that, when it commenced the campaign on 24 July 2016, it had reasonable grounds for believing that the closure of Vodafone's 2G voice network was imminent.
13. The two most prominent factors Spark relies on are:
 - 13.1 the 16 March 2016 Stuff article (including the apparent absence of corrective action by Vodafone following publication of the article); and
 - 13.2 a contemporaneous offer by Vodafone to upgrade the handsets of its 2G customers.

The Commission's view

14. In this case, the Commission's view is that Spark's conduct is likely to have breached the Fair Trading Act.
15. After considering the factors set out in our Enforcement Response Guidelines,¹ the Commission has decided to issue this warning letter to assist Spark to meet its statutory obligations.

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

Misleading customers as to the closure of Vodafone's 2G network

16. Section 11 of the Act provides:

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for purpose, or quantity of services.

17. The Commission considers that the likely impression created by Spark's Skinny Closed Campaign was that Vodafone's 2G network would close imminently. This is because:

17.1 the dominant messages of the campaign were the headline representations that "Vodafone's 2G network is shutting down", and the image of the swing tag with a rendition of Vodafone's logo and the word "CLOSED";

17.2 it is likely that customers were attracted to this advertisement partly because of this image; and

17.3 the advertisements contained a call to action with the wording "Switch before you're ditched" appearing below the swing tag image.

18. The Commission considers that a consumer seeing Spark's Skinny Closed Campaign advertising (and reading it in its entirety) would be likely to form the impression that Vodafone's 2G network was closing imminently, when it was not. Having formed that impression, consumers were likely to have been misled as to a characteristic of Vodafone's 2G network.

19. As a consequence, the Commission considers that Spark is likely to have contravened section 11 of the Act.

Spark lacked a reasonable basis for making the representations

20. Section 12A(1) of the Act provides:

A person must not, in trade, make an unsubstantiated representation.

21. Section 12A(2) of the Act provides:

A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading.

22. Spark considers that, when it made the Skinny Closed Campaign representations, it had reasonable grounds for doing so because of:

22.1 the Stuff article;

22.2 Spark's belief that the Stuff article was the result of a Vodafone approach to media;

- 22.3 Spark's knowledge of the contemporaneous offer by Vodafone to its 2G customers of a mobile phone upgrade; and
 - 22.4 what appeared to Spark to be a lack of action by Vodafone in the period between the 16 March 2016 publication of the Stuff article and the 24 July 2016 commencement of the Spark campaign to correct the Stuff article.
23. In particular, Spark relied on the following statements included in the Stuff article:
- 23.1 the headline "Vodafone signals the end is nigh for its 2G service";
 - 23.2 "consumers will soon have to replace hundreds of thousands of 2G mobile phones which soon won't work";
 - 23.3 "Vodafone New Zealand spokeswoman Elissa Downey said it planned to turn off its 2G voice service and would confirm the timing soon"; and
 - 23.4 "Downey said Vodafone would keep its 2G network running until 2025, but only to support machines such as smart electricity meters which send back meter-readings over the cell phone network". It would "retire 2G handsets and turn off voice services prior to that."
24. The Commission does not consider that the matters set out in paragraphs 22 and 23 above form a sufficient basis for Spark to make the Skinny Closed Campaign representations. In our view the matters relied on by Spark do not constitute reasonable grounds for Spark's representation that Vodafone's 2G network would close imminently, because it is apparent from the Stuff article that:
- 24.1 what could be said to be imminent was the setting of a date for Vodafone to turn off its 2G voice service network;
 - 24.2 Vodafone intended to provide more information once it had decided on that closure date;
 - 24.3 Vodafone had decided on a 2025 closure date for non-voice services; and
 - 24.4 a third party's opinion was that a one year notice period would be appropriate notice of the closure of the network.
25. Given the matters in paragraph 24 above:
- 25.1 there was no information in the Stuff article which required correction by Vodafone; and
 - 25.2 the fact that Vodafone made a contemporaneous offer to its 2G voice customers to upgrade their handsets does not give rise to an inference that the closure of Vodafone's 2G voice network was imminent.

26. As a consequence, the Commission considers that Spark is also likely to have contravened section 12A of the Act.

Concluding Comments

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

Penalties for breaching the Fair Trading Act

32. Only the courts can decide if there has actually been a breach of the Fair Trading 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.
33. 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

34. We have published a series of fact sheets and other resources to help businesses comply with the Fair Trading 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.
35. You can also view the Fair Trading Act and other legislation at www.legislation.co.nz.

36. 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 – Example of Adshell advertisement

