

17 December 2019

[REDACTED]  
Lead Counsel – Legal  
Vodafone New Zealand Limited

Via email only: [REDACTED]

Dear [REDACTED],

### **Fair Trading Act 1986: Warning**

The Commerce Commission (**Commission**) has been investigating Vodafone New Zealand Limited (**Vodafone**) under the Fair Trading Act 1986 (the **FTA**). We have now completed our investigation and are writing to you to alert Vodafone to our concerns.

We are issuing Vodafone with this warning letter because the Commission considers that Vodafone's conduct is likely to have breached the FTA. 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 to establish fault.<sup>1</sup>

We recommend that you consider the views set out in this letter when planning future promotions.

### **The investigation**

During our investigation, the Commission considered complaints about:

- Vodafone not applying two distinct types of credits to individual customer accounts despite its staff representing to these customers, either verbally or by email, that credits would be applied.
- An offer where Vodafone represented by email to existing customers that they would receive a \$10 per month loyalty discount for re-signing with Vodafone for a further fixed term. Complainants believed the content of the email was misleading because it gave them the impression that in accepting the offer they would receive a \$10 discount off the monthly price they were currently paying. In fact, the \$10 discount was off Vodafone's standard pricing plans. Further, there were terms and conditions pertaining to the offer that were not disclosed up-front, including that the customers' previous discounts (with the exception of the \$10 On Account discount)

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<sup>1</sup> Commission's published *Enforcement Response Guidelines* at [41].

would be removed. In some cases, this resulted in customers paying more per month having re-signed than they were under their previous agreement with Vodafone.

### **The relevant law**

Section 13(g) of the FTA prohibits false or misleading representations, in connection with the supply of services, with respect to price.

Section 13(i) of the FTA prohibits false or misleading representations, in connection with the supply of services, about the existence of any conditions or rights.

### **Vodafone's response**

Vodafone responded to the Commission's enquiries by explaining that it has made changes to its systems to reduce the likelihood of consumer account credits not being applied as represented in the future.

It also advised that it has amended the promotional materials relating to the loyalty discount offer to make it clear that discounts were off Vodafone's standard plan price, not off the price consumers were already paying for their Vodafone plan.

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

In this case, and having fully considered the relevant information received, the Commission's view is that Vodafone's conduct is likely to have breached the FTA. We set out our reasoning below.

#### *Account credits*

Vodafone represented to individual customers, verbally and in emails, that it would apply credits to their accounts on a monthly basis. These monthly credits included:

- Contract-term credits (for consumers entering into 12 or 24-month fixed term contracts with Vodafone); and
- Discretionary credits (offered to consumers by Vodafone's retention team).

When Vodafone then issued invoices, which did not include the agreed credits, we consider it made false representations about the price consumers were required to pay, in likely breach of section 13(g) of the FTA. The representations of the price payable were likely to be false because they were higher than what customers had agreed with Vodafone to pay each month.

This conduct is also likely to have breached section 13(i) of the FTA. When Vodafone issued invoices for amounts, which did not include the agreed credits, in our view Vodafone falsely represented that it had the right to seek payment of these invoiced amounts. Because the application of the credits was a condition of the agreements between Vodafone and consumers, each invoice was also likely a false representation concerning the effect of a condition of the agreement.

### *Loyalty discount offer*

Vodafone offered consumers who were at, or near the end of, existing broadband contracts a \$10 per month loyalty discount for re-signing for a further 12 month term. An example of the offer email consumers received is provided as **Attachment A**.

The Commission received complaints from consumers alleging that if they had accepted the offer, they would end up paying more for their broadband services than if they were to continue under their existing agreement with Vodafone (on a rollover, month by month basis). This was because these customers would lose the discounts they may already have (in exchange for the \$10 per month loyalty discount), and because Vodafone had increased the price of its broadband services since these customers first signed up. For example, one of the consumers who complained to the Commission was paying \$89.99/month for their Vodafone services when they received the loyalty discount offer. If they accepted the loyalty discount offer, they would have paid \$94.99/month after the \$10/month loyalty discount was applied.

Consumers signed up to the offer online. The terms and conditions of the offer were presented to consumers at the third step of the sign-up process. One of the important conditions was that by accepting the offer, consumers would lose any existing discounts (except for the \$10 On Account discount) they may have been receiving.

In our view, the offer email contained representations likely to breach section 13(g) of the FTA. The representations were likely to mislead customers because the email created an overall impression that in return for continuing to procure broadband services from Vodafone those customers would receive an additional discount on top of the price they were currently paying. In fact, the \$10 discount was off Vodafone's standard pricing plans applying at the time of the offer and consumers would lose their existing discounts, aside from the \$10 On Account discount.

We have reached this view because:

- The offer email referred to the discount coming off the standard price of "*your* broadband" (emphasis added). We consider customers were likely to interpret the \$10 discount as coming off the monthly price they were already paying, rather than Vodafone's current plan prices at the time the offer email was sent.
- The instruction "*all you need to do is re-sign with us for another 12 months*" contributed to the impression that the customer would be re-signing to their existing plan, with the \$10 discount coming off that plan price.
- The promotion appeared to be bespoke to the customer's contract. It was sent by targeted email or direct message to the customer.
- The discount is called a "loyalty discount" and was made to existing customers at or near the end of their contracts. In our view, consumers would not expect to be rewarded for their loyalty by paying more than they were already paying to receive the same services.

- The important condition about consumers losing all but one of their existing discounts was not disclosed in a way we consider sufficiently prominent or proximate, given the relevance of the loss of existing discounts to consumers' consideration of whether to accept the offer.

During the re-sign journey consumers followed if they accepted the offer, Vodafone disclosed the price payable under the offer, which may have alerted some consumers to the fact that the offer was not what they may have believed it to be. However, because Vodafone did not disclose (or provide comparisons with) the amount consumers were currently paying and would continue to pay if they did not accept the offer, only those consumers who were aware of the current price they were paying may have realised this.

Consumers enticed by Vodafone's loyalty offer may have been dissuaded to look around for a better deal from other providers.

### **Warning**

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 this warning letter rather than issuing legal proceedings.

This warning represents our opinion that the conduct in which Vodafone has engaged is likely to have breached the FTA, and that legal action remains available to the Commission in future if the conduct continues or is repeated. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against Vodafone.

This warning letter is public information and will be published in the case register on our website. We will be making public comment about our investigation and conclusions, including issuing a media release.

### **The Commission's role**

The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FTA. The FTA prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

### **Penalties for breaching the Fair Trading Act**

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

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**

We have published a series of fact sheets and other resources to help businesses comply with the FTA and the other legislation we enforce. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the FTA.

You can also view the FTA and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).

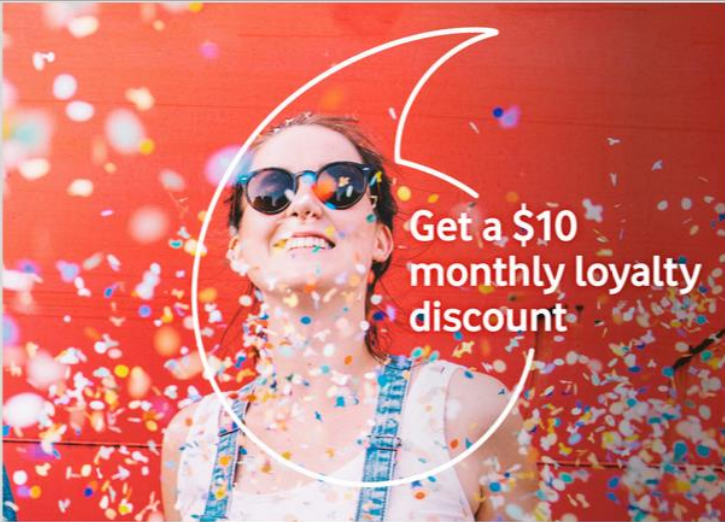
Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely



[REDACTED]  
Consumer Manager Wellington

## Attachment A



**Get a \$10 monthly loyalty discount**

Hi there


Did you know you can get a \$10 monthly loyalty discount off the standard plan price of your broadband? All you need to do is re-sign with us for another 12 months.

It's super simple to do – just click the [button below](#) to get going.

**Re-sign now**

Thanks  
Your team at Vodafone

The future is exciting.  
**Ready?**



**Our powerful broadband promise**

- Super Wi-Fi**
- Vodafone NINJAS MASTERS OF TECH**
- Vodafone ALWAYS CONNECTED**  
with our latest consumer mobile plans

Account Number: [REDACTED]      Unsubscribe

Broadband not available everywhere. Residential use only. \$199 early termination fee applies. Not available with other offers. **\$10 loyalty discount:** Your broadband plan comes with a \$10 discount per month for 12 months. After 12 months, your broadband plan will revert to its standard plan price. You cannot transfer your discount to another plan. This offer can be withdrawn at any time. See [vodafone.co.nz/loyaltydiscount](http://vodafone.co.nz/loyaltydiscount). For full details and charges, see [vodafone.co.nz/broadband/internet-plans](http://vodafone.co.nz/broadband/internet-plans). **Always connected:** Available to customers who have home broadband and one of the latest consumer mobile plans with Vodafone where outage is caused by Vodafone network or hardware and can't be fixed straight away. For terms see [vodafone.co.nz/alwaysconnected](http://vodafone.co.nz/alwaysconnected).

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