

11 October 2023

[REDACTED]  
Engage Technology Limited  
PO Box 4002  
Marewa, Napier 4143

*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 Engage Technology Limited, trading as Gecko Broadband (**Engage**) 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 Engage 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.
3. The purpose of this letter is to inform you that the Commission has decided to serve a civil infringement notice on Engage under section 156D of the Act for a likely breach 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.

#### **Engage's non-compliance with the Code**

8. Engage is a provider of retail landline services to consumers. Under the Code, Engage 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 April 2023, Engage failed to comply with the Code in the following ways:
  - 9.1 between 1 February 2021 and 17 April 2023, Engage 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 Engage 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 17 April 2023; and
  - 9.3 Engage 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 17 April 2023, as part of our investigation.

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

10. Engage stated, via written correspondence, and at interview that:
  - 10.1 a staff member tasked with undertaking work to comply with the Code had left Engage abruptly in June 2022. While there was some awareness of the Code compliance workstream within Engage's management, work on compliance with the Code was not continued;

- 10.2 contact from the Commission between July 2022 and December 2022 regarding our concerns that Engage was non-compliant with the Code were not passed on to management within Engage; and
- 10.3 when its non-compliance with the Code was realised by management, Engage undertook work to come into compliance quickly, despite the impact of public holidays, staff leave and Cyclone Gabrielle.

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

11. We note that Engage was not sent information about the Code when it was published in November 2020. Our first communication to Engage about its Code obligations was in January 2022.
12. The email sent to Engage was an explicit call to action, and Engage responded appropriately to this email, commencing work to come into compliance with the Code.
13. 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 build a capacity to process applications under the Code.
14. We consider that between February 2021 and April 2022, Engage may hold a reasonable excuse for its non-compliance with the Code. The Commission did not communicate the Code's requirements to Engage until January 2022, and at that time Engage commenced work to bring itself into compliance with the Code.
15. It appears that our initial email to Engage about the Code in September 2021 may have resulted in Engage complying with the Code, if Engage had followed through on its original intent to implement the requirements for compliance with the Code.
16. However, after the abrupt departure of the staff member at Engage managing the implementation of Code in June 2022, Engage did not continue work towards Code compliance.
17. The Commission subsequently contacted Engage on six occasions between 4 July and 19 December 2022 asking to discuss the company's Code obligations, but this contact was not passed on within the company.
18. In our view, Engage's failure to comply with the Code stems from its management of the departure of the staff member working towards Code compliance in June 2022, and the subsequent failure of an Engage staff member to act on the Commission's enquiries about Code compliance. It seems to us that had our enquiries been referred appropriately, Engage may have resumed its work towards Code compliance in June 2022.

19. Managing the departure and performance of staff and internal reporting systems are matters within Engage's control. The failure to continue working towards compliance with the Code in 2022 is a circumstance of Engage's own making.
20. In our view, Engage does not hold a reasonable excuse for its non-compliance with the Code in the period between May 2022 and April 2023, giving rise to likely breaches of section 156A(1)(p) of the Act.

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

21. 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):
  - 21.1 serve a civil infringement notice under section 156D requiring the payment of a pecuniary penalty of up to \$2,000;
  - 21.2 enter into enforceable undertakings; or
  - 21.3 apply to the High Court for an order requiring payment of a pecuniary penalty to the Crown.

#### **Our decision to serve a civil infringement notice**

22. 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.
23. 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>
24. The enforcement criteria applicable are:
  - 24.1 the extent of detriment and gain;
  - 24.2 the circumstances, seriousness and culpability relating to non-compliance; and
  - 24.3 public interest.
25. Our assessment is that detriment is limited. Engage has a small number of retail landline customers who did not receive information about the Code prior to April 2023. Engage's failure to provide Code disclosures in November 2021, and by 30

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

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.

26. In our view Engage should have continued the work its staff member was doing towards meeting Engage's obligations under the Code. At interview, Engage explained that it had focussed on continuing other workstreams its departed staff member had been managing. This suggests Engage consciously decided to not comply with the Code, and instead, focused resources on operational requirements designed to enhance the business.
27. While there is nothing to indicate Engage'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.
28. 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.
29. In making our decision, we also considered that Engage does not have any history of non-compliance with the Act.
30. Based on our assessment of Engage's non-compliance against the enforcement criteria, we have decided in this case to issue a civil infringement notice.

#### **Further information about the infringement notice**

31. We note that Engage is likely to have committed numerous contraventions of the Act though its failure to comply with the Code during the period 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 breach:  
  
*'between 10 October 2022 and 1 April 2023, Engage failed (without a reasonable excuse) to provide 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.'*
32. The penalty for the alleged breach is \$2,000, which is due for payment by **8 November 2023**.
33. Payment can be made by bank account transfer to the account of the Commission [REDACTED] or by cheque.
34. The infringement notice is attached to this letter. It is important that you read all the information in the infringement notice.

35. You may object to this infringement notice by making an objection to the Commission under section 156E of the Act by **7 November 2023**. You may also appeal any Commission decision on an objection to the District Court under section 156I of the Act.
36. 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 Engage’s future compliance**

37. We take non-compliance with the Code seriously. We expect Engage to ensure it maintains compliance with the Code, and takes the steps necessary to ensure the departure or performance of its staff do not impact Engage’s Code compliance in the future.
38. While we will not be taking any further action against Engage at this time, we will take this infringement notice into account if this issue arises again, or if Engage engages in similar conduct in the future. We may also draw this infringement notice to the attention of a court in any subsequent proceedings brought by the Commission against Engage.

**Further information**

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

Yours sincerely,

[REDACTED]

Tristan Gilbertson  
Telecommunications Commissioner