

28 July 2022

Spark New Zealand Trading Limited
167 Victoria Street West
Auckland 1010

Attention: [REDACTED]

By email: [REDACTED]

Dear [REDACTED]

Fair Trading Act 1986: Warning for misleading conduct and for making false or misleading representations around the sale of Spark's wire maintenance service

1. The Commerce Commission (**Commission**) has been investigating Spark New Zealand Trading Limited (**Spark**) under the Fair Trading Act 1986 (**FT Act**) regarding the sale of its wire maintenance service (**WMS**). Spark has stopped offering WMS to fibre and wireless connection customers. We have now completed our investigation and are writing to inform Spark about our views.
2. The Commission considers that Spark is likely to have breached the FT Act in that:
 - 2.1. Spark engaged in conduct liable to mislead the public as to the suitability of WMS by:
 - 2.1.1. automatically opting wireless and fibre connection customers in to purchase WMS until 30 October 2018, thereby creating the impression WMS was suitable for all customers when it was not;
 - 2.1.2. allowing wireless and fibre connection customers (who did not have or use integrated wiring) to opt in to purchase WMS between November 2018 and May 2021, despite it being unsuitable for those connections; and
 - 2.1.3. up until May 2021, making misleading representations on its website or on invoices to its wireless and fibre connection customers about the use, benefit or need for WMS. Spark failed to explain that WMS was not suitable for wireless customers and for most fibre connection customers and thereby created the overall

impression that WMS was suitable for use with all connection types.

3. We are issuing Spark with this warning letter because in our view, its conduct is likely to have breached sections 11, 13(e) and 13(h) of the FT Act. 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 proceedings.
4. In addition, Spark has offered, and the Commission has accepted, court enforceable undertakings (**Undertakings**), pursuant to section 46A of the FT Act, to record:
 - 4.1. Spark's commitment to refund the sum paid for WMS, to all wireless and fibre connection customers who paid for WMS between June 2014 and May 2021 (**Affected Customers**); and
 - 4.2. the steps that Spark will take to ensure Affected Customers who have not already been refunded have access to a refund.

The investigation

5. Following receipt of a complaint from a Spark customer in 2020, the Commission investigated allegations that Spark charged the complainant for WMS when the complainant had no need or use for, and received no benefit from, WMS after the complainant moved to a fibre connection service.
6. Spark has informed us that:
 - 6.1. WMS is a service that covers the cost of maintenance callouts for common faults to a consumer's on-premises telecommunications wiring, splitters and jack points. Customers are responsible for the maintenance of all wiring and equipment after the demarcation points to the individual jack points, including internal wiring within their properties. Network providers are responsible for any wiring or equipment faults before demarcation points.
 - 6.2. For copper-line 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.
 - 6.3. For fibre connections, the demarcation points are at the Optical Network Terminals, which are located inside buildings and connect the fibre network directly to modems through ethernet cables. WMS only applies to fibre connections in limited circumstances, where customers also have and use integrated wiring at their properties, e.g. to enable plugging telephone headsets directly into existing jackpoints in the premises. Spark has stated it does not know and holds no record of whether its fibre connection customers with WMS on their accounts have or use integrated wiring at their properties.

- 6.4. WMS has no application to wireless connections, which do not use any internal wiring.
7. During our investigation, we obtained the following evidence, which we consider indicates a likely breach of the FT Act:
 - 7.1. Between June 2014 and May 2021, Spark supplied WMS to some of its wireless customers and fibre connection customers, including naked fibre connection (**Naked Fibre**) customers. Naked Fibre connection refers to the use of fibre broadband connection service without any landline telephone service;
 - 7.2. For many years, WMS was an opt-out service for all customers who signed up for copper or fibre connections (landline and/or broadband services). This meant all customers had WMS added to their accounts automatically unless they chose to opt-out of the service. On 30 October 2018, Spark changed WMS from an opt-out service to an opt-in service, where customers needed to agree to purchase the service before WMS was added to their accounts. The change resulted from a wider discussion between the Commission and Spark in September 2018 on various compliance issues, where the requirement to opt-out of WMS was one of those discussed.
 - 7.3. Various website captures from 2017 to 2020 of Spark's webpage titled 'Understand Wire Maintenance' at <https://www.spark.co.nz/help/landline/manage/wire-maintenance/> shows that Spark provided information about what WMS does and does not cover, how it works and a stand down period. Screenshots of a video capture of Spark's webpage from the Wayback machine website (at <https://archive.org/web/>) are included in **Attachment A** of this letter. Spark did not make it clear that wireless and fibre connection customers (who did not have or use integrated wiring at their properties) would have no need, benefit or use for WMS. The impression created by the webpage was that WMS was suitable for all types of connections, when it was not. In April 2021, we noticed that this webpage has been updated to include "Note: This service is not available for customers using Fibre or Wireless services".
8. Spark collected around \$15.7 million in WMS fees between June 2014 and November 2020 from at least:
 - 8.1. 423 wireless customers, who had no need or use for, or benefit from, WMS; and
 - 8.2. 112,666 fibre connection customers, where only a limited number of those could benefit from or use WMS.

The relevant Law

9. Section 11 of the FT Act prohibits any businesses from engaging in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.
10. Section 13(e) of the FT Act provides that no businesses shall, in connection with the supply or possible supply of goods or services, make a false or misleading representation that services have any performance characteristics, uses or benefits.
11. Section 13(h) of the FT Act provides that no businesses shall, in connection with the supply or possible supply of goods or services, make a false or misleading representation concerning the need for any services.

Spark's response

12. Spark responded to the Commission's enquiries by explaining that:
 - 12.1. it had never intended to sell WMS to wireless or Naked Fibre customers and the sale of WMS to those customers had resulted from system and/or human errors; and
 - 12.2. various remedial steps were taken over the years, as and when Spark was made aware of the sale of WMS to wireless or fibre connection customers, who might have no need, received no use or benefit for WMS.
13. Spark has further confirmed to us that it has:
 - 13.1. ceased the conduct and also made a 'stop sell' decision in November 2020, where Spark would not sell WMS with any new fibre connections;
 - 13.2. put system fixes and blocks in place to minimise the risk of the conduct reoccurring;
 - 13.3. implemented proactive reporting to identify any unintended WMS sales, together with a clear escalation process to remedy any further issues identified; and
 - 13.4. as at 25 July 2022, applied refunds of around \$15.3 million for WMS fees to wireless and fibre connection customers (who had paid for WMS) in the form of payments or account credits. Refunds of \$348,757.93 are still to be paid to 4,921 former Spark customers whom Spark has endeavored to advise of the refunds using last known contact details.
14. In respect of the remaining refunds to be paid to former Spark customers referred to in paragraph 13.4, Spark has offered, and the Commission has accepted, the Undertakings to record Spark's refund commitment and process.

The Commission's view

15. In this case, and having fully considered relevant information received, the Commission's view is that it is likely that Spark's conduct breached the FT Act.
16. We have reached this view because we consider that:
 - 16.1. Spark is likely to have breached section 11 of the FT Act by engaging in conduct liable to mislead the public as to the suitability of WMS by:
 - 16.1.1. automatically opting wireless and fibre connection customers in to purchase WMS until 30 October 2018, thereby creating the impression that WMS was suitable for all types of connections, when it was unsuitable for all wireless customers and only suitable for some fibre connection customers who have and use integrated wiring; and
 - 16.1.2. allowing wireless and fibre connection customers (who did not have or use integrated wiring) to opt in to purchase WMS between November 2018 and May 2021, despite it being unsuitable for their connections.
 - 16.2. Up until May 2021, Spark is likely to have breached sections 13(e) and 13(h) of the FT Act by making misleading representations on its website or on invoices to its wireless and fibre connection customers about the use, benefit or need for WMS. Spark failed to explain on its website (until early 2021) that WMS was not suitable for wireless customers, or fibre connection customers who did not have and use integrated wiring, thereby misleading consumers into believing the service was suitable for all types of connections.
17. The nature of WMS means that it is difficult for customers to identify its suitability for them without knowledge of telecommunications technology, in particular the difference in demarcation points between copper-line and fibre connections. In those circumstances, it was important for Spark to provide accurate and complete information to customers so that they could make informed purchase decisions.

Warning

18. The Commission has concluded, after assessing Spark's conduct against 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 conclude our investigation by issuing this warning and accepting the Undertakings rather than by issuing legal proceedings.
19. This warning and the Undertakings represent our opinion that the conduct in which Spark has engaged is likely to have breached the FT Act and that legal action remains available to the Commission in future if the conduct were to be repeated.

20. We consider the conduct to be serious, given that it affected a large number of customers (with up to around \$15.7m of WMS fees charged) and took place over a significant period of time. We also consider Spark acted carelessly, as it was made aware of the issue on at least five separate occasions since 2015, but failed to satisfactorily remedy the conduct by implementing proper system fixes/blocks until some years later.
21. The Commission also considers it appropriate to accept the Undertakings from Spark relating to the unclaimed refunds payable to former Spark customers in order to hold Spark accountable for compensating those customers.
22. In reaching the decision to issue a warning and to accept the Undertakings, the Commission acknowledges the actions taken by Spark in 2020 and 2021 to remedy the harm to customers, prevent the conduct from recurring and Spark's co-operation with our investigation.
23. We may draw this warning letter and the Undertakings to the attention of a court in any subsequent proceedings brought by the Commission against Spark.
24. This warning letter and the signed Undertakings are public information and will be published on the case register on our website. We will be making public comment about this investigation and its conclusion, including issuing a media release.

The Commission's role

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

Penalties for breaching the FT Act

26. As indicated above, only the courts can decide if there has been a breach of the FT Act. The court can impose penalties where it finds the law has been broken. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
27. Spark should be aware that our decision to issue this warning and to seek enforceable undertakings does not prevent any other person or entity from taking private action through the courts.

Further information

28. To ensure on-going compliance with the FT Act, we encourage Spark to:
 - 28.1. continue reviewing its internal systems and processes to prevent the same conduct from reoccurring; and
 - 28.2. be mindful of changing technology that might lead to similar conduct occurring in the future.

29. We have published a series of fact sheets and other resources to help businesses comply with the FT 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 Spark's obligations and the Commission's role in enforcing the Act.
30. You can also view the FT Act and other legislation at www.legislation.co.nz.
31. Thank you for your assistance with this investigation. Please contact us if you have any questions about this letter.

Yours sincerely



Kirsten Mannix
Fair Trading Investigations and Compliance Manager

Attachment A – Screenshots of a video capture of Spark's webpage titled 'Understand Wire Maintenance' on the Wayback Machine website

The screenshot shows a web browser displaying the Spark website's 'Understand Wire Maintenance' page. The browser's address bar shows the URL: <https://www.spark.co.nz/help/landline/manage/wire-maintenance/>. The Wayback Machine interface is visible at the top, showing the date of capture as July 22, 2019. The page features a purple header with a search bar containing the text 'What can we help you with?' and a blue 'Search' button. Below the header, there is a navigation menu with options: 'Set up', 'Manage', and 'Troubleshoot'. To the right of the navigation menu, there are two icons: 'Chat with us' and 'Speak to a Tech Wizard'. The main content area is titled 'Understand Wire Maintenance' and contains the following text:

Over time, the wiring in your home or business can experience faults and may need repairing. For a small monthly fee you can sign up to our optional Wire Maintenance service. Then, if you have a fault, we'll send a technician to look at it. If it's covered we'll fix the fault and take care of the costs.

If the fault's not covered we'll charge you a locate fee. And if you ask us to fix the fault we'll charge you for our time and the materials. See below for these fees.

What Wire Maintenance covers

Unless the cause of the fault is one of the factors listed in the next section, Wire Maintenance covers:

- Faulty internal wiring
- Faulty splitters and jackpoints (sometimes called sockets)
- Issues such as:
 - Static on the line
 - Being unable to make or receive calls
 - Frequent disconnections or loss of broadband service

What Wire Maintenance doesn't cover

- Damage caused by renovations, alterations, wilful or deliberate actions
- Faults caused by faulty equipment. These include medical alarms, extension cables, phones, filters or

- Issues such as:
 - Static on the line
 - Being unable to make or receive calls
 - Frequent disconnections or loss of broadband service

What Wire Maintenance doesn't cover

- Damage caused by renovations, alterations, wilful or deliberate actions
- Faults caused by faulty equipment. These include medical alarms, extension cables, phones, filters or a modem that's out of warranty. If your modem was the only cause of the fault, there won't be a charge for the technician's visit if:
 - Spark supplied the modem, and
 - It's still in warranty or covered by the Consumer Guarantees Act
- Damage caused by exposure to weather or from natural disasters
- Faults caused by pets, vermin or other animals and insects
- Other changes that aren't required to fix the fault. For example, upgrading, adding or changing equipment such as wiring, a splitter or jackpoint while the technician is on site.
- Repairs to wiring or jackpoint installations if:
 - Someone other than a Chorus technician did the work, and
 - It doesn't meet telecommunications industry standards
- Damaged wiring outside your house, such as wiring between your house and shed
- Any Integrated Services Digital Network (ISDN) lines

Wire Maintenance and repair work costs

- If you choose to have Wire Maintenance, you'll be charged \$4.95 each month including GST
- If you choose not to have Wire Maintenance, you'll be charged repair costs for work inside the house to fix problems. These also apply to work that's not covered by Wire Maintenance. The costs include:
 - A fee to locate the fault: \$124.99 including GST
 - Labour rate (per 15 minutes): \$25.30 including GST plus any extra material costs

30-day stand down

- If you opt in to Wire Maintenance when you sign up for a service you're covered straight away
- If you choose not to have Wire Maintenance when you sign up for a service and add it later, there will be a 30-day stand down. The repair fees above will apply for any repair work you need done during the stand-down period.

Was this article helpful for you?

No

Yes

Shop

Mobile plans
Mobile phones
Accessories
Get broadband
Landline
Latest deals

Get More

Netflix
Lightbox
Spotify
Free WiFi
Free email
Spark Music

MySpark

Sign In
Register
My Mobile
My Mobile Broadband
My Internet

Help & support

Account
Broadband
Mobile
Landline
Book a call
Feedback
Store finder

