

10 August 2017

Two Degrees New Zealand Limited
PO Box 8355
Symonds Street
Auckland 1150

By email to: [REDACTED]

Attention: [REDACTED] Director of Legal and Business Development

Dear [REDACTED]

Fair Trading Act 1986: Warning

1. The Commerce Commission has been investigating the conduct of Two Degrees New Zealand Limited (2 Degrees) under the Fair Trading Act 1986. We have now completed our investigation and are writing to you to alert you to our concerns.
2. In summary, the Commission considers that, because 2 Degrees' advertising of the price of its unlimited broadband plan either did not identify, or inadequately disclosed, the additional amount consumers were required to pay for a modem, and for the delivery of that modem, 2 Degrees made misleading representations about the price of the plan.
3. An example of the advertising in question is provided as **Attachment A**.
4. In the Commission's view, this conduct is likely to have breached the Fair Trading Act.
5. If this behaviour is continuing at the present time, we recommend that you take immediate action to address our concerns.

The investigation

6. During our investigation, the Commission considered the advertisement of 2 Degrees' unlimited broadband offer, including whether modem purchase and delivery fees were sufficiently disclosed. Section 13(g) of the Fair Trading Act prohibits the making of false or misleading representations about the price of goods and services.
7. 2 Degrees responded to the Commission's enquiries by stating, in relation to the modem purchase and delivery fees, that in its view, these charges were 'de minimis', meaning the existence but not the amount of the fees needed to be disclosed.

The Commission's view

8. In this case, the Commission's view is that 2 Degrees' conduct is likely to have breached the Fair Trading Act.
9. After considering the factors set out in our Enforcement Response Guidelines,¹ the Commission has decided to issue this warning letter to assist 2 Degrees to meet its statutory obligations.
10. In our view, consumers expect that the price stated for a good or service is the price that they will be asked to pay in order to purchase it. It is the initial impression created by an offer that is likely to be important. If there are unavoidable additional costs which are not included in the headline price, these should be disclosed in a way which is prominent and proximate to the headline representation, in order to prevent a breach of the Fair Trading Act.
11. In this case, an additional \$30 payment was required to receive the advertised service. This was comprised of \$15 for a modem and \$15 for the delivery of that modem. We do not agree that these charges are 'de minimis'.
12. The additional modem costs were either:
 - 12.1 disclosed well away from the headline representation of price in a very small font size; or
 - 12.2 not disclosed at all.

Concluding Comments

13. The Commission has publicly stated that retail telecommunications will be an organisation-wide priority for the 2017/18 year.
14. We encourage you to regularly review your compliance procedures and policies.
15. Where unavoidable costs are applicable to an offer they should be either included in the headline price or disclosed in a way which is prominent and proximate to the headline representation.
16. While we will not be taking any further action against 2 Degrees 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 2 Degrees.

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

17. This warning letter is public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.
18. 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

19. 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.
20. 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

21. 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. Included with this letter is a copy of our fact sheet "Pricing" for your consideration.
22. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
23. You can also view the Fair Trading Act and other legislation at www.legislation.co.nz.
24. 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

