

18 December 2017

NZ Fibre Communications Limited



Via email only: 

Attention:  – Managing Director

Dear ,

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

1. The Commerce Commission (Commission) has been investigating NZ Fibre Communications Limited (Stuff Fibre) under the Fair Trading Act 1986 (the Act). We have now completed our investigation and are writing to you to alert you to our concerns.
2. In summary, the Commission considers that Stuff Fibre is likely to have breached section 12A of the Act by making unsubstantiated representations that Stuff Fibre is “Probably NZ’s Fastest Internet”.

### **The investigation**

3. During our investigation, the Commission considered whether Stuff Fibre’s representation that it provides “Probably NZ’s Fastest Internet” (the representation) was unsubstantiated. We asked Stuff Fibre to provide us with the grounds and information that it had relied on at the time of making the representation.
4. The representation was made between August and November 2017 across media formats including online, on radio, television, in print media and outdoors on billboards and buses.
5. Stuff Fibre responded to the Commission’s enquiries by stating that it:
  - 5.1 only provides fibre broadband services and fibre broadband services are faster than other types of broadband services;
  - 5.2 offers two categories of fibre broadband services: speeds of 100Mbps and (up to) 950Mbps;

- 5.3 included the term 'probably' in the representation to reflect the possibility that there could be a broadband provider that *only* offers the fastest category of fibre broadband (speeds of (up to) 950Mbps); but
- 5.4 it did not undertake any comparison of the speed of its fibre broadband services and those provided by its competitors, and did not know if its fibre broadband services were in fact faster than those of its competitors.

### The Commission's view

- 6. In this case, the Commission's view is that Stuff Fibre's conduct is likely to have breached section 12A of the Act.
- 7. Section 12A of the Act states:
  - (1) A person must not, in trade, make an unsubstantiated representation.
  - (2) 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.
  - (3) This section does not apply to a representation that a reasonable person would not expect to be substantiated.
- 8. We consider that none of the information provided by Stuff Fibre established reasonable grounds for making the representation, and that as a result, the representation was unsubstantiated. We have reached this view because:
  - 8.1 consumers who see the representation are likely to interpret the representation as meaning that Stuff Fibre's broadband services are faster than those provided by its competitors;
  - 8.2 a reasonable person would expect an internet speed claim to be a scientific fact capable of substantiation; and
  - 8.3 Stuff Fibre does not hold information that provides it with reasonable grounds for representing that Stuff Fibre's broadband services are faster than those provided by its competitors.

### Stuff Fibre's response

- 9. Stuff Fibre has responded to the Commission's concerns by agreeing to remove the representation from all media. This was completed by 4 December 2017.

### **Enforcement outcome**

10. After considering the factors set out in our Enforcement Response Guidelines<sup>1</sup> the Commission has decided that a warning rather than prosecution is appropriate. In making that decision, we have noted that Stuff Fibre has assured the Commission that it has ceased making the representation.
11. While we will not be taking any further action against Stuff Fibre at this time, we will take this warning into account if this conduct continues or if Stuff Fibre engages 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 Stuff Fibre.
12. This warning letter is public information and will be published on the Enforcement Register on the Commission's website. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.
13. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.

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

14. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the 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**

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

### **Further information**

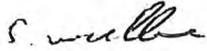
16. We have published a series of fact sheets and other resources to help businesses comply with the Act and the other legislation we enforce. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). We encourage you to visit our website to better understand your obligations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

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

18. Thank you for your assistance with this investigation. Please contact Zeb Walker on 04 924 3635 or by email at [zeb.walker@comcom.govt.nz](mailto:zeb.walker@comcom.govt.nz) if you have any questions about this letter.

Yours sincerely



Stuart Wallace  
Head of Consumer