

29 July 2015

Spark New Zealand Limited  
Level 7 Purple, Spark City,  
167 Victoria Street West  
Private Bag 92028, Auckland 1010

Attention: [REDACTED]

By email: [REDACTED]@spark.co.nz

Dear Ms Miller

### **Spark Standard Form Consumer Contracts – Unfair Contract Terms**

1. We refer to our letter of 5 May 2015 and your response of 22 May 2015.
2. We have now reviewed the information provided by Spark in response to the terms we identified as being potentially unfair.
3. The purpose of this letter is to provide the Commission's view on Spark's response, and in relation to some of the identified terms, seek further information from Spark.

### **Residential Customer Terms and Conditions**

#### *Unilateral alteration of services*

4. Spark proposes to amend clause 3 of the Residential Customer Terms and Conditions to make it clear that customers are not required to pay an early termination fee if they are cancelling their Spark service as a result of change in service that has a negative impact on them.
5. We think this proposed amendment is a significant improvement on the existing term. However, we have one remaining reservation with the proposed clause.
6. As it stands, the proposed clause allows Spark to determine whether the change in service has a negative impact on the customer. To ensure that this assessment is conducted appropriately, we suggest that the amended clause also state that the assessment of whether there has been a negative impact is made in good faith.

*Limitation of liability*

7. Spark says [REDACTED]  
[REDACTED]
8. We are not convinced that clauses 13.4 and 14 are reasonably necessary to protect a legitimate business interest. Our essential concern is that the liability of Spark and its customers is unnecessarily asymmetrical.
9. In particular, in light of clause 14, which limits Spark's liability, we are not convinced that Spark has a legitimate business interest in requiring customers to assume unlimited liability under clause 13.4. [REDACTED]  
[REDACTED]  
[REDACTED]
10. To allow us to assess the explanation, please provide:
- Evidence of past examples of the type and extent of damage caused by customers to Spark.
  - Evidence of past examples of the type and extent of damage caused by Spark to its customers that necessitate limiting liability to customers.
  - Examples of the type of foreseeable event that may occur that could give rise to Spark's liability to a large number of customers.
  - Details of the number of times that Spark (or any predecessor of Spark) has relied on clauses 13.4 and 14, or their equivalent in previous contracts.
11. We also note, that in response to concerns raised by the Commission about limitation of liability clauses, one other major telecommunications company has proposed to amend its terms and conditions to ensure the liability of the company and its customers is symmetrical.

*Responsibility for charges*

12. Spark says that [REDACTED]  
[REDACTED]
13. We remain concerned that this clause is potentially unfair – because it requires customers to assume liability for fraudulent or unauthorised use over which they have no control. We understand why Spark may want its customers to be liable for matters within that customer's reasonable control. However, by making customers liable for charges resulting from fraud or unauthorised use outside of the customer's reasonable control, we think the term is too broad.

14. [REDACTED]  
[REDACTED] But this is not what the contract says. The contract instead makes the customer liable for this charge.

15. We consider that the term would be fairer if customers were not liable for charges resulting from fraud or unauthorised use outside of the customers reasonable control.

*Intellectual property rights*

16. [REDACTED]

17. This goes some way to addressing our concerns. In addition though, we suggest that Spark make it clear that this term applies only to information posted on online forums operated or approved by Spark and not to any other information.

**Spark Mobile Prepaid Agreement**

*Unused credit following termination*

18. [REDACTED]
- a. [REDACTED]
  - b. [REDACTED]
  - c. [REDACTED]

19. These are helpful clarifications (although we note that the contract does not say that fixed line customers can transfer their prepaid balance to the new account). However, the explanation does not address why Spark considers it reasonably necessary to retain the balance for those identifiable customers who are not transferring to a Spark postpaid or fixed line account, such as those customers whose contracts have been terminated by Spark in accordance with clause 10.2.

20. We therefore invite you to provide any further information that you might have to assist us in the assessment of this term.

*Limitation of liability*

21. Our concerns here are identical to those raised in paragraphs 7 to 11 above.

**Potentially unfair contract term – Spark Mobile Postpaid Agreement***Limitation of liability*

22. Again, our concerns mirror those in paragraphs 6 to 10 above.
23. We look forward to receiving any response you may wish to make by Friday 14 August 2015. Please feel free to contact me on [REDACTED] or at [REDACTED]@comcom.govt.nz if you cannot meet that timeframe or if there are any matters you would like to discuss.
24. We are also available to meet with you to discuss the matters raised in this letter, although it is likely that any meeting would be most productively held after we have received and considered any further information you provide to us.
25. Please note that I am on leave between 5 and 19 August. Please contact [REDACTED], Chief Adviser on [REDACTED] or by email at [REDACTED]@comcom.govt.nz during that period.

Yours sincerely

[REDACTED]  
[REDACTED]  
Chief Adviser  
Competition