

5 May 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 [REDACTED]

Spark Standard Form Consumer Contracts – Unfair Contract Terms

1. The Commerce Commission has assessed three sets of Spark's standard form contract terms and conditions for compliance with the new unfair contract terms (UCT) provisions of the Fair Trading Act (FTA).
2. Under the UCT provisions, a term is only unfair if the court is satisfied that all of the following three requirements are met:
 - a. the term would cause a significant imbalance in the parties' right and obligations arising under the contract;
 - b. the term would cause detriment (whether financial or otherwise) to a party if the term were applied, relied on or enforced; and
 - c. the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term. The burden of proving reasonable necessity rests with the party seeking to rely on the term.
3. The court can also consider any other matters it thinks relevant, but must take into account two mandatory considerations:
 - a. the extent to which the term is transparent; and
 - b. the contract as a whole.
4. We think that the contracts we have assessed each contain provisions that may be unfair, in that they appear to cause a significant imbalance in the parties' rights and obligations under the contract and detriment to consumers.

5. As a result, we are writing to you seeking your views on the fairness of the identified terms, including as to the reasonable necessity of the terms. We will then take that information into account before reaching a view as to whether these terms comply with the UCT provisions.

The contracts

6. We have reviewed the following standard form consumer contracts:
 - a. Residential Customer Terms and Conditions updated 17 March 2015, in conjunction with:
 - i. Broadband Terms and Conditions updated 17 March 2015; and
 - ii. Spark Home Phone Plans and Spark Home Connectivity Packages Terms and Conditions.
 - b. Spark Mobile Prepaid Agreement from 16 March 2015, in conjunction with Spark Mobile Service Specific Terms and Conditions.
 - c. Spark Mobile Postpaid Agreement from 16 March 2015.

The contracts are standard form consumer contracts

7. In our view these contracts are standard form consumer contracts:
 - a. They are consumer contracts – the contracts relate to a service (broadband, home phone or mobile) of a kind ordinarily acquired for personal, domestic or household use or consumption.
 - b. They are standard form contracts. Customers appear to be required to accept or reject the terms and conditions and the terms and conditions:
 - i. are not subject to effective negotiation;
 - ii. are prepared in advance by Spark; and
 - iii. do not appear to take account of the specific characteristics of the customer.

Potentially unfair contract terms – Residential Customer Terms and Conditions

Unilateral alteration of services

8. Section 46M of the FTA sets out a list of examples of terms that may be unfair contract terms. One of those is a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract.¹

¹ FTA, section 46M(3).

9. At clause 3 of the Residential Customer Terms and Conditions, under the heading *Other changes that have an impact on you*, Spark grants itself the right to unilaterally alter the services provided in a way that reduces those services.
10. We think that this term potentially creates a significant imbalance between the parties rights and obligations under the contract because customers do not appear to have a corresponding right to:
 - a. vary the terms of the contract; or
 - b. in all possible circumstances, cancel a minimum term contract without paying an early termination charge.
11. We do note that under clause 4 of the Broadband Terms and Conditions, broadband customers appear to have the right to cancel the broadband service without penalty if the variation to the service provided results in any negative change, higher price or materially reduced service.
12. But there does not appear to be any corresponding term for home phone customers. Also, it is not clear whether clause 4 of the Broadband Terms and Conditions applies to customers who have a bundled home phone/broadband service, allowing them to cancel both services without penalty.

Limitation of liability

13. Clause 14 seeks to limit Spark's liability (other than under the FTA or Consumer Guarantees Act), to:
 - a. \$5,000 for any event or series of related events; and
 - b. a total of \$10,000 in respect of all events in any 12 month period.
14. Customers appear to have no corresponding limited liability. Under clause 13.4, customers agree to accept an apparently unlimited liability for any breach of contract or negligence.
15. We think these terms potentially cause a significant imbalance in the parties' rights and obligations under the contract. Spark has limited liability, even where it has been negligent or has breached the contract, but the customer has no corresponding limitation to their potential liability.

Responsibility for charges

16. Under clause 8, customers agree to pay for the services "no matter who uses them". Customers are told that they are responsible for the charges for "anyone else's use of your telephone or your internet".

17. On its face, this clause appears to impose an obligation on customers to pay even where the customer has not been careless or negligent and the charge has arisen from unauthorised use of the service.
18. We think this term potentially causes a significant imbalance in the parties' rights and obligations under the contract. Under the clause, Spark assumes no risk for unauthorised access; instead it seeks to pass the risk of unauthorised access onto the customer, regardless of whether the customer has contributed to that unauthorised access.

Intellectual property rights

19. Under clause 23, customers agree to grant Spark a "perpetual, royalty-free, non-exclusive, irrevocable, unrestricted, worldwide licence to use, copy, sub-licence, redistribute, adapt, transmit, publish, delete, edit and/or broadcast, publicly perform or display the Customer Material."
20. We think this term potentially creates a significant imbalance in the parties' rights under the contract. Spark obtains rights over the Customer Material that it would not otherwise have, while the customer's rights over its own material are reduced.

Potentially unfair contract terms – Spark Mobile Prepaid Agreement

Unused credit following termination

21. Clause 10.3 allows Spark to retain any unused credit balance on prepaid accounts, or allow that balance to lapse where the agreements end for one of the reasons set out in clauses 10.1 and 10.2.
22. We think this term potentially causes a significant imbalance in the parties' rights and obligations under the contract because some customers who will have paid for the service will not receive it, and will not receive a refund for being denied the service.
23. This is so even where the customer has not breached the contract, such as where the customer upgrades to a Spark Postpaid plan or where the customer ports the number to another mobile provider.

Limitation of liability

24. Our concerns here are identical to those raised in paragraphs 13 to 15 above.

Potentially unfair contract term – Spark Mobile Postpaid Agreement

Limitation of liability

25. Again, our concerns mirror those in paragraphs 13 to 15 above.

Request for information

26. We consider that each of these terms potentially creates a significant imbalance in the parties rights and obligations under the contracts and could cause detriment to customers.
27. Consequently, we seek your views as to the fairness of these terms. In particular we welcome your comments on:
- a. How these terms are reasonably necessary to protect a legitimate interest of Spark.
 - b. If such a legitimate interest exists, whether there are fairer means by which the interest could be protected.
 - c. Whether there are any other matters, including the transparency of the terms and the contract as a whole, which you consider relevant to our consideration of the fairness of these terms.
28. We look forward to receiving your response by Friday 22 May 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.

Yours sincerely

[REDACTED]
Chief Adviser
Competition