

21 December 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 [REDACTED]

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

1. The Commerce Commission has completed its assessment of Spark New Zealand Limited's standard form contract terms and conditions for compliance with the new unfair contract terms (UCT) provisions of the Fair Trading Act (FTA).
2. We have also more recently assessed the terms and conditions relating to Spark's Bigpipe brand.
3. On the basis that Spark has agreed to amend its terms in the manner set out in correspondence with the Commission, the Commission has decided to close its investigation by providing Spark with compliance advice to assist it in its ongoing compliance with the UCT provisions.
4. We have assessed Spark's terms as part of an industry wide assessment. We identified potentially unfair terms in the contracts of other traders in the industry. Those traders have all now either justified their terms or agreed to amend them. We have, or will shortly, provide similar advice to those companies.
5. The Commission intends to then prepare a report, which we will make publicly available, setting out the findings of our review of the telecommunications sector.

#### **Compliance advice**

6. Section 46I of the FTA provides that a court can, on application of the Commission, declare terms in standard form consumer contracts to be unfair. 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.
7. 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.
8. Where the Commission considers that a standard form consumer contract contains an unfair term, it can apply to the Court for a declaration that the term is unfair. It is then an offence to include a term that has been declared unfair in a standard form contract.
9. We identified terms in Spark's standard form consumer contracts that we consider to be potentially unfair. Our concern was that those terms created a significant imbalance in the parties' right and obligations arising under the contract and were likely to cause detriment to consumers.
10. We wrote to Spark, advising it of our concerns, and then worked with Spark to assist it in complying with the UCT provisions.
11. Spark has now addressed the Commission's concerns, but given the issues we identified across the suite of standard form consumer contracts relied upon by Spark, we recommend that Spark exercise particular care in drafting and amending its contracts in the future to ensure compliance with the UCT provisions.

**Commission's assessment is not an endorsement or approval of Spark's terms**

12. It is important to note that, by completing our assessment and providing this compliance advice, the Commission does not endorse or unreservedly approve your standard terms and conditions.
13. Instead, our assessment identified terms that we thought could give rise to unfairness. Your proposed amendments address the concerns we have at this time, but we reserve the right to reconsider our position if we become aware of circumstances in

which these terms (or any of your other terms) are relied on in a way that may cause unfairness to consumers.

14. Please feel free to contact me on ([REDACTED] or at [REDACTED]@comcom.govt.nz if there are any matters you would like to discuss.

Yours sincerely

[REDACTED]  
Chief Adviser  
Competition