

Spark New Zealand Trading Limited
Level 7 Purple, Spark City
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T [REDACTED]
spark.co.nz



**Spark
New Zealand**

[REDACTED]
Chief Adviser
Competition
Commerce Commission New Zealand

By email: [REDACTED]@comcom.govt.nz

1 December 2015

Dear Mr [REDACTED]

Bigpipe Standard Form Consumer Contracts

We refer to the Commerce Commission's ("Commission") letter of 23 November 2015 to [REDACTED] in relation to Bigpipe's standard form consumer contracts ("Bigpipe Customer Terms") and the unfair contract terms provisions in the Fair Trading Act 1986 ("FTA").

Thank you for giving Spark the opportunity to address the Commission's concerns with the Bigpipe Customer Terms.

We set out our responses to your concerns below.

No Representations

1. We take on board the Commission's concerns, and will be deleting clause 16 of the Bigpipe Customer Terms that disclaims certain representations, warranties and responsibilities.

Limitation of liability

2. As you will recall in August this year, Spark carried out a further review of the liability positions in our Residential and Mobile Postpaid and Prepaid customer terms in response to your letter of 29 July 2015. We amended certain clauses under those terms as a result.
3. We have now carried out a further review of the Bigpipe Customer Terms and have decided to revise these with similar changes, as follows:
 - (a) We will apply a cap to the Bigpipe customer's liability;
 - (b) We will increase Spark's liability in clause 22.10 from \$1,000 for any event or any series of related events to \$5,000, and from a total of \$5,000 in respect of all events in any 12 month period, to a total of \$10,000, and
 - (c) We will make the liability cap positions mutual between Spark and Bigpipe customers, with the exception that Spark's limitation of liability does not apply to any rights consumer customers may have under the Consumer Guarantees Act 1993 and the Fair Trading Act 1986.

4. [REDACTED]



5. To reflect these positions, clause 22 of the Bigpipe Customer Terms will be amended as follows (changes shown in blue):

22. Consumer Protection Legislation and Liability

22. 1. As a consumer, it is important that you understand that any rights you may have, or obligations we may have to you, under the Consumer Guarantees Act 1993 and the Fair Trading Act 1986 apply alongside these Terms, and are not impacted by anything in this clause 22. The website www.consumeraffairs.govt.nz is a useful place to visit to help you understand your rights under this legislation.

22. 2. If you are acquiring the Services for the purposes of a business as defined in the Consumer Guarantees Act 1993 you acknowledge that the provisions of that Act do not apply to the Services that that we provide to you under this agreement.

22. 3. Your liability to us:

- you accept your liability to us for breach of contract or negligence, and
- you are not liable for any loss to the extent that it is caused by us (for example, through our breach of contract or negligence).
- If you are ever liable to us your liability is limited to:
 1. \$5,000 for any event or series of related events; and
 2. A total of \$10,000 in respect of all events in any 12 month period,

provided we notify you of our claim within 12 months after we reasonably become aware of the occurrence of the relevant event or series of events that gave rise to our claim. These limitations do not apply to your obligation to pay any charges, for any loss or damage caused by fraud, gross negligence, wilful breach or wilful damage.

22.4 We may become aware that we have suffered loss before you do. If we suffer any loss as a result of this agreement, we agree to take reasonable steps to avoid or minimise our loss and that you are not liable for any loss that results from our failure to take reasonable steps to do so.

22.5 Our liability to you:

- we accept our liability to you for breach of contract or negligence, and, subject to clause 22.2 above, for our breach of consumer protection laws, such as the Consumer Guarantees Act 1993 and the Fair Trading Act 1986.
- we are not liable for any loss to the extent that it is caused by you (for example, through your breach of contract or negligence).

22.6. We are not liable to you for any indirect or consequential loss, or for any loss of profits, revenue, goodwill, business or anticipated business or anticipated profits or savings.

22.7. You may become aware that you have suffered loss before we do. If you suffer any loss as a result of this agreement, you agree to take reasonable steps to avoid or minimise your loss and that we are not liable for any loss that results from your failure to take reasonable steps to do so.

22.8 We aim to provide quality services to you at all times, and exercise reasonable skill and care in performing our obligations to you. However, if we are prevented from performing any obligation in these Terms by reason of any act of God, act of State, riot, insurrection, civil commotion, strike, sanctions, boycott, embargo or any other circumstance beyond our reasonable control, we will try to advise you of the existence of the circumstances and its expected duration, and the obligations that are impacted by the circumstances. Our performance of these Terms and provision of Bigpipe Broadband Services to you will, to the extent that it is made impossible or impracticable by such circumstances (despite us taking reasonable steps to provide the services be suspended until such circumstances cease to exist. We are not liable to you for any failure or delay in performing any obligation set out in these Terms in the circumstances contemplated by this clause 22.8. You will not be required to pay any Charges for any Bigpipe Broadband Services to the extent that such Bigpipe Broadband Services are not provided by us due to the circumstances contemplated by this clause 22.8.

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22.9 No other Spark company, network operator and/or third party supplier (including their officers, employees, contractors and agents) will be liable to you for loss or damage of any kind arising from your use of the Bigpipe Broadband Services. This clause creates a right and benefit that other Spark companies, network operators and/or suppliers can enforce as a defence to any claim.

22.10 If we or any of the other parties listed in clause 22.9 are ever liable to you for any reason, the maximum combined amount we and all the other parties listed in clause 22.9 (together) will have to pay you and anyone else who uses the Services we provide for you (together), will be:

- \$5,000 for any event or for any series of related events; and
- a total of \$10,000 in respect of all events in any 12 month period,

provided that you notify us of your claim within 12 months after you reasonably became aware of the occurrence of the relevant event or series or events that gave rise to your claim. These limitations do not limit any rights you may have under the Consumer Guarantees Act 1993 and the Fair Trading Act 1986.

6. We are in the process of making these changes to the Bigpipe Customer Terms, and they will be updated, and customers notified, within the next two to three weeks.
7. We hope these changes will address the Commission's concerns. Please let me know if the Commission requires any further information.

As you will appreciate, certain information supplied in this letter is confidential, commercially sensitive and is of a nature that Spark considers may be protected from disclosure under the Official Information Act 1982. Spark would therefore appreciate the opportunity to discuss with you in advance of any proposed disclosure of the information supplied.

Please do not hesitate to contact me if you have any further questions.

Yours sincerely

[REDACTED]

Senior Counsel - Customer