

23 November 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]

Bigpipe Standard Form Consumer Contracts – Unfair Contract Terms

1. The Commerce Commission has received a complaint alleging that the Bigpipe Broadband Customer Terms and Conditions (Bigpipe terms) do not comply with the unfair contract terms (UCT) provisions of the Fair Trading Act (FTA).
2. The Commission has previously reviewed Spark standard form consumer contracts, but that review did not encompass the Bigpipe terms.
3. We are concerned that the Bigpipe terms 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.
4. 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

5. We have reviewed the Bigpipe Broadband Customer Terms and Conditions updated 17 March 2015 and currently available at <https://www.bigpipe.co.nz/terms-and-conditions>. The contracts are standard form consumer contracts.
6. In our view these contracts are standard form consumer contracts:
 - a. They are consumer contracts – the contracts relate to a service (broadband) 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

No representations

- 7. Clause 16 of the Bigpipe terms raises two concerns.
- 8. First it purports to contract out of the Fair Trading Act and the Consumer Guarantees Act by disclaiming the existence of:
 - a. representations, including as to suitability, reliability, availability etc; and
 - b. warranties, including implied warranties.
- 9. We think this term potentially causes a significant imbalance in the parties' rights and obligations under the contract. Read on its own, the clause clearly abrogates statutory rights that the customer otherwise has.
- 10. We acknowledge clause 22, but we are not convinced that the connection between clause 16 and clause 22 is sufficiently transparent that consumers will understand that Spark does not in fact disclaim the existence of those representations and warranties under consumer protection laws.
- 11. Second, under clause 16, Spark disclaims responsibility for unauthorised access to or alteration of the customer's communications or data. Customers appear required to assume this risk.
- 12. 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 – notwithstanding that Spark may have contributed to that access. Instead it seeks to pass the risk of unauthorised access onto the customer, regardless of whether the customer has itself contributed to that unauthorised access.

Limitation of liability

- 13. We have three concerns with Clause 22:
 - a. It limits Spark's liability, but customers have unlimited liability.
 - b. It disclaims liability for indirect and consequential loss, which is inconsistent with the FTA and Consumer Guarantees Act.

- c. It imposes a limitation period of 12 months on all claims a customer may make, which substantially reduces the period a customer would otherwise have under the law.
- 14. Clause 22 seeks to limit Spark's liability (other than under the FTA or Consumer Guarantees Act), to:
 - a. \$1,000 for any event or for any series of related events; and
 - b. a total of \$5,000 in respect of all events in any 12 month period.
- 15. Customers appear to have no corresponding limited liability. Under clause 22.3, customers agree to accept an apparently unlimited liability for any breach of contract or negligence.
- 16. This term potentially causes 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.
- 17. Additionally, in clause 22.5, Spark disclaims liability for any indirect or consequential loss (amongst other things).
- 18. This term potentially causes a significant imbalance in the parties' rights and obligations under the contract. The clause is inconsistent with the FTA and CGA, which both provide for indirect and consequential loss. The clause has the potential effect of removing the customer's rights to seek those losses.
- 19. Finally, clause 22 purports to restrict the relevant limitation period for bringing a claim against Spark, by requiring customers to notify Spark within 12 months of their becoming aware of the occurrence of the relevant event.
- 20. This term potentially a significant imbalance in the parties' rights and obligations under the contract as it limits one party's right to sue the other. Section 46M(k) of the FTA identifies this type of term as one that may be an unfair term.

Request for information

- 21. 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.
- 22. 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.
23. We look forward to receiving your response by Friday 4 December 2015. Please feel free to contact me on [REDACTED] or at [REDACTED] [@comcom.govt.nz](mailto:[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