

2 October 2023

Avis Rent A Car Limited
Millennium 2, Building C, Level 3
600 Great South Road
Ellerslie
Auckland 1051

Attention: [REDACTED]

By email only: [REDACTED]

Copy: [REDACTED]

Dear [REDACTED]

Fair Trading Act 1986: Warning for representations concerning entitlement to claim money

1. The Commerce Commission (**Commission**) has been investigating Avis Rent A Car Limited (**Avis**) under the Fair Trading Act 1986 (**Act**). We have now completed our investigation and are writing to inform you about our views.
2. The Commission considers that Avis is likely to have breached the Act by making false or misleading representations to Customer A¹ that it was entitled to claim an amount.
3. Having finalised our investigation, we are issuing you with this warning letter because, in our view, Avis' conduct is likely to have breached section 13(i) of the Act.
4. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the law has occurred, and we have determined that at this time we will not be bringing legal action against Avis.² The purpose of this warning letter is however to inform you of our view that there has been a likely breach of the Act, to prompt changes in behaviour and to encourage future compliance.

¹ The Customer's name has been anonymised to protect his privacy.

² Commission's published *Enforcement Response Guidelines* at [41].

The investigation

5. The Commission investigated a complaint made by Customer A about a charge that was made on his credit card after he had returned a rental car, which was described on the invoice as 'miscellaneous'. After Customer A disputed the charge his credit card provider reversed the charge. Avis went on to issue further demands for payment.
6. Our investigation found that the charge was an excess charge which was miscoded as miscellaneous. While Avis was initially contractually entitled to make the charge, it did not make it clear to the customer what the charge was for, even after the customer disputed the charge with Avis. However, as Avis admitted, it was not entitled to the subsequent demands for payment once the repair cost had been recovered from a third party.
7. Our investigation did not find that a wide group of consumers was affected. We found that in Customer A's case, there were a series of compounding errors that occurred which ultimately led to incorrect demands for payment being issued to him.

Chronology of events

8. Customer A rented a car from Avis in August 2021. During the hire period the car was damaged by a third party. The customer informed Avis of the damage when he returned the car and provided Avis with the contact information of the third party.
9. Avis then charged an additional \$1178.22 to Customer A's credit card. The invoice from Avis referred to the charge as a miscellaneous charge.
10. Customer A initially queried with Avis what the charge was for but received no response. Customer A then disputed the charge with his credit card provider, which decided to reverse the charge in November 2021.
11. Avis had the car repaired in October 2021 at a cost of \$577.01. A payment demand was issued to the third party responsible for the damage, and she paid Avis on 16 November 2021.
12. In February 2022 Avis issued new demands for payment of \$1178.22 to Customer A and later referred the debt to an external debt collection agency to follow up. The debt collection agency issued a payment demand to Customer A on 18 March 2022. None of these demands specified to Customer A what the debt related to.
13. Customer A raised a dispute with the debt collection agency, which halted collection and made enquires with Avis. At this point Avis reviewed the charge, determined that Customer A was not liable for it, and instructed the debt collection agency to cease collection. Customer A was informed of this outcome by Avis on 4 April 2022.
14. Customer A was told by Avis on 13 April 2022 that the charge was a portion of the excess he was liable to pay for damage to the vehicle incurred during his rental period.

Evidence obtained

15. During our investigation, we obtained the following evidence, which we consider indicates a likely breach of the Act.
 - 15.1 Avis separately recovered the cost of the repair from the third party responsible for the damage. The repair occurred in October 2021 at a cost of \$577.01. A payment demand was issued to the third party responsible for the damage, and she paid Avis on 16 November 2021.
 - 15.2 After this date, Avis made further clear claims of having the right to charge Customer A \$1178.22, through its actions of:
 - 15.2.1 sending the demands to Customer A in February 2022; and
 - 15.2.2 issuing instructions to collect the money to a debt collection agency.

Avis' response

16. During the course of the investigation, Avis has cooperated with the Commission, in providing a comprehensive response to a request for information and attending a voluntary interview.
17. Avis responded to the Commission's enquiries by explaining that:
 - 17.1 The initial excess charged at vehicle check-in was incorrectly coded as a miscellaneous charge.
 - 17.2 Customer A was liable for the excess charge until such point as the true cost of the repair was known, or the responsible third party had paid.
 - 17.3 Errors occurred in the handling of this charge which led to incorrect demands for payment being sent. These errors occurred due to:
 - 17.3.1 human error;
 - 17.3.2 resourcing pressure; and
 - 17.3.3 disruption caused by Covid-19.
18. Had this initial miscoding not occurred, Avis considers that many of the subsequent errors are less likely to have occurred. The miscoding meant that the charge was not dealt with as an excess as it should have been.
19. Avis expressed that it was genuinely disappointed with what had occurred in this case and explained the steps it had taken to reduce the risk of incorrect demands for payment being sent again.

How this conduct can break the Law

20. Section 13(i) of the Act prohibits a person from making a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy.
21. By making the further demand for payment, Avis has made a false or misleading representation about the existence of a right to charge Customer A this amount. That conduct is likely to breach the Act.
22. The Commission notes that the contract allowed Avis to recover the excess payable by the hirer for each and every incident involving the vehicle.
23. Avis' website (protections and coverages) further states 'you will still be liable to pay the applicable excess amount even if a third party is at fault. Once the fault is established and the third party agrees to pay for the damages, we will refund you the excess.'
24. The effect of the condition is that Avis may charge the hirer the cost of the repair/excess until the third party has paid. If that cost is not recovered, then the hirer is liable.
25. Since the actual cost of the repair (\$577.01) had been paid by the third party, the representation by Avis of still having the right to claim the amount from the customer was false or misleading.

The Commission's view

26. In this case, and having fully considered relevant information received, the Commission's view is that it is likely that Avis' conduct breached the Act.
27. In our view Avis is likely to have breached section 13(i) of the Act by making demands for payment to Customer A which amounted to false or misleading representations concerning the existence or effect of the right to claim the money from the customer, when it did not have the legal right to do so.
28. We note that, following contact from the Commission, Avis has reviewed its systems and processes. We recommend that Avis ensures that it has robust systems in place to confirm a charge is valid before it sends demands for payments or refers a debt to external debt collection. Not doing so risks breaching the Act. It should also ensure that it has sufficient resources to respond quickly to customers that raise queries about invoices to avoid protracted disputes.

Warning

29. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided to conclude our investigation by issuing this warning letter rather than by issuing legal proceedings.

30. This warning represents our opinion that Avis is likely to have breached the Act and that legal action remains available to the Commission in future if the conduct is repeated.
31. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against Avis.
32. This warning letter is public information and will be published on the case register on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

33. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Act. The Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the Fair Trading Act

34. As indicated above only the courts can decide if there has actually been a breach of the Act. The court can impose penalties where it finds the law has been broken. A company that breaches the Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
35. You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

Further information

36. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.
37. We have published a series of fact sheets and other resources to help businesses comply with the Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
38. You can also view the Act and other legislation at www.legislation.co.nz.
39. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely

[REDACTED]

Rachael Manttan
Fair Trading Investigations and Compliance Manager (Acting)