

16 May 2024

StraitNZ Bluebridge Limited
T/A Bluebridge Cook Strait Ferries
Level 6, 36 Customhouse Quay
Wellington, 6011

Attention: [REDACTED]

By email only: [REDACTED]

Dear [REDACTED]

Fair Trading Act 1986: Warning for misrepresentations of consumer rights in case of delays or cancellation of ferry services

1. The Commerce Commission (**Commission**) has been investigating StraitNZ Bluebridge Limited trading as Bluebridge Cook Strait Ferries (**Bluebridge**) under the Fair Trading Act 1986 (**FT Act**). We have now completed our investigation and are writing to inform you about our views.
2. The Commission considers that Bluebridge is likely to have breached the FT Act when it made misleading statements to passengers about their rights to compensation when their ferry service had been delayed or cancelled (**affected passengers**). This is because until at least June 2023, Bluebridge's terms and conditions (**T&Cs**) available on its website¹ purported to exclude Bluebridge's liability to affected passengers for loss or damage occurring from ferry delays or cancellations in circumstances where rights to compensation may be available in law.
3. We are issuing you with this warning letter because in our view, Bluebridge's conduct is likely to have breached section 13(i) of the FT Act. 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 decided not to take legal action in relation to this matter at this time.²

¹ www.bluebridge.co.nz

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

4. We note the amendments proposed by Bluebridge, and the recently made changes to its T&Cs to acknowledge consumers' rights under the Consumer Guarantees Act 1993 (**CGA**). We also take note of Bluebridge's classification of events which cause delays or cancellation of passenger ferry sailings as either within or outside of its control, which determines whether Bluebridge will grant or deny compensation to affected passengers.

The investigation

5. The Commission opened its investigation in April 2023 following complaints received since November 2022 about Bluebridge's handling of compensation and refunds for cancelled or delayed passenger sailings.
6. In response to the Commission's enquiries, Bluebridge provided information in May, June, November 2023 and April 2024. During our investigation, we identified that since at least 2020, Bluebridge's T&Cs contained a broad exclusion of liability for loss caused by ferry delays or cancellations. The T&Cs also excluded Bluebridge's liability for errors or representations made by its staff and agents.
7. Below is an extract of the liability section of Bluebridge's T&Cs at 21 March 2023:

Our liability to you

[...]

- **Liability for delays or cancellations**

[...]

Without limiting anything set out in the paragraph above, we are not liable for any direct or indirect loss or expenses suffered by you because of any sailing departing or arriving late or early, or any cancellation of a scheduled sailing for any reason. We also do not assume any responsibility for you or other passengers making alternative travel arrangements, meeting any appointments, engagements or deadlines or any other obligations.

[...]

- **Errors, omissions and representations**

We are not liable for errors or omissions in publications of schedules or in statement, or representations made by any of our employees, agents, or representatives in respect of any of our services. [...]

- **Liability of our agents, etc**

Any exclusion or limitation of our liability in this section applies to and for the benefit of our agents, employees, representatives, and contractors.

[...]

8. In June 2023, Bluebridge added wording to its T&C's which referenced consumers' CGA rights, this was inserted under the 'our liability to you' heading. Bluebridge intended for the sub-headings to be read in light of this added wording and, as a result, Bluebridge did not make further amendments at the time.
9. Below is an extract of the liability section of Bluebridge's T&Cs at June 2023:

Our liability to you

Nothing in this agreement (including in the liability sections that follows) affects any rights you may have under the Consumer Guarantees Act 1993, or other legislation like the Fair Trading Act 1986, where you are a "consumer" as defined by those laws.

[...]

- **Liability for delays or cancellations**

[...]

Without limiting anything set out in the paragraph above, we are not liable for any direct or indirect loss or expenses suffered by you because of any sailing departing or arriving late or early, or any cancellation of a scheduled sailing for any reason. We also do not assume any responsibility for you or other passengers making alternative travel arrangements, meeting any appointments, engagements or deadlines or any other obligations.

[...]

- **Errors, omissions and representations**

We are not liable for errors or omissions in publications of schedules or in statement, or representations made by any of our employees, agents, or representatives in respect of any of our services. [...]

- **Liability of our agents, etc**

Any exclusion or limitation of our liability in this section applies to and for the benefit of our agents, employees, representatives, and contractors.

[...]

How this conduct can break the Law

10. Section 13(i) of the FT Act prohibits traders from making false or misleading representations concerning the existence or exclusion or effect of any condition, warranty, guarantee, right or remedy, including in relation to any guarantee, right, or remedy available under the CGA.
11. Statements which mislead consumers about the rights available to them under the CGA risk breaching section 13(i) of the FT Act.

Bluebridge's obligations under the Consumer Guarantees Act 1993

12. The CGA applies to all Bluebridge passenger ferry sailings that are acquired for personal use. The CGA includes guarantees that services will be provided with reasonable care and skill (s28), and that services provided will be fit for purpose (s29).
13. Section 32 of the CGA sets out customers' rights of redress against suppliers of services in circumstances where businesses have failed to comply with the guarantees set out in the CGA. Relevantly, section 32(c) sets out that consumers may obtain from the supplier (in addition to any other remedies) damages for any loss or damage to the consumer resulting from the failure which was reasonably foreseeable as liable to result from the failure.
14. Section 33 of the CGA limits customers' rights of redress against suppliers for breaches of the section 29 guarantee as to fitness for purpose and section 30 guarantee as to time of completion when the failure to comply with the guarantee is because of:
 - 14.1 an act or default or omission of, or any representation made by, any person other than the supplier or a servant or agent of the supplier; or
 - 14.2 a cause independent of human control³.

³ Note section 33 of the CGA does not limit a customer's rights of redress in relation to breaches of the guarantee of reasonable care and skill.

15. If a trader purports that a failure to comply with a CGA guarantee is because of a cause independent of human control, then it follows that the categorisation of the cause must be appropriately and carefully considered, and made at an appropriate time – either before or at the time of the consumer’s claim.
16. If Bluebridge fails to provide its services with reasonable care and skill, or its services are not reasonably fit for a particular purpose, affected passengers have rights to remedies under the CGA, including the right to compensation for any loss or damage that was reasonably foreseeable as resulting from the failure.
17. In the Commission’s view, until at least June 2023 Bluebridge made misleading statements in its T&Cs as to consumers’ rights under the CGA, by excluding in full any liability for delayed and cancelled ferries and thus not acknowledging consumers’ potential rights for compensation under the CGA.

Bluebridge’s response

18. Bluebridge responded to the Commission’s enquiries by stating that:

2023 disruptions

- 18.1 at the beginning of 2023, it faced a number of unusual and unexpected events (including Cyclone Gabrielle and other severe weather events) which led to the cancellation or delay of passenger ferry sailings in successive time periods during peak season;
- 18.2 while the timeframes for compensating consumers have not always been optimal, Bluebridge has processed all requests for compensation received from affected consumers. Only a minority of those requests were denied.

Classification of events within / outside of Bluebridge’s control – Bluebridge explained how it generally classifies whether a cancellation or delay of a sailing is caused by events within or outside of its control:

- 18.3 mechanical issues, changes to the original schedule, staffing related issues, operational incidents (if caused by Bluebridge) and resetting vessels due to delay (if the reason for delay was within its control), would generally be treated as being within its control; and
 - 18.4 weather disruption, regulatory requirements / restrictions imposed by Government, Acts of God and operational disruptions caused by third parties,⁴ would generally be treated as events outside of its control.
19. Following the Commission’s investigation and in response to the disruptions it faced in 2023, Bluebridge has taken the following initiatives:
 - 19.1 reviewing its customer claims and compensation process and establishing a new flow for processing requests, that better addresses disruptions of this level in a timely manner;

⁴ E.g. chemical spill which resulted in Picton port closing for several hours.

- 19.2 developing further written procedures around handling delays, cancellations, and customer compensation, including creating documented Standard Operating Procedures covering compensations requests;
 - 19.3 planning further staff training on handling delays and cancellations, Bluebridge's obligations to customers under the CGA and how it should approach customer compensation;
 - 19.4 updating its Frequently Asked Questions (FAQ) page to provide greater details regarding consumer rights and Bluebridge's obligations; and
 - 19.5 amending its T&Cs to better reflect consumer rights available in cases of ferry delays or cancellations.
20. The updated liability section of the T&Cs is available at **Attachment A**.

The Commission's view

- 21. In this case, having fully considered relevant information received, the Commission's view is that it is likely that Bluebridge's representation in its T&Cs breached section 13(i) of the FT Act.
- 22. In addition to the reasons expressed at 10-17 above, we have reached this view because Bluebridge's T&Cs represented that it would not be liable for any loss suffered due to cancellation or delay irrespective of the cause. This purported to contract out of the relevant consumer guarantees that may be applicable in certain circumstances, in particular the guarantees as to reasonable care and skill and fitness for purpose. We consider this constitutes a false representation concerning the existence, or effect of a guarantee, right or remedy available under the CGA.
- 23. If consumers viewing Bluebridge's T&Cs were not aware of their potential rights to redress under the CGA, and that these rights cannot be excluded in law, they may have formed the misleading impression that Bluebridge was not liable for any "direct or indirect loss or expenses suffered [...] because of any sailing departing or arriving late or early, or any cancellation of a scheduled sailing for any reason."
- 24. Whether the change made to Bluebridge's T&Cs in June 2023 was sufficient to remedy the misrepresentations is undetermined. In our view, while Bluebridge explicitly acknowledged that the CGA applies to sailings where passengers are 'consumers' (as defined in the CGA), the reference to the CGA was:
 - 24.1 not sufficiently instructive (about the circumstances in which Bluebridge may be liable to compensate customers for any direct or indirect loss) to nullify the risk that its contradictory absolute statements denying liability may mislead or deceive; and
 - 24.2 not sufficiently proximate to the statements about Bluebridge's position on compensating direct or indirect loss.
- 25. We have noted the further recent changes made by Bluebridge to the T&Cs liability clause and to the FAQ page on or around 18 April 2024, which better reflects consumer rights under the CGA and other applicable laws.

Warning

26. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate and sufficient to conclude our investigation by issuing this warning letter rather than by issuing legal proceedings.
27. This warning represents our opinion that the conduct in which Bluebridge has engaged is likely to have breached the FT Act and that legal action remains available to the Commission in future if the conduct continues or is repeated.
28. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against Bluebridge.
29. In reaching this outcome, we note that Bluebridge has co-operated with the Commission throughout this investigation. Based on the information we received, Bluebridge has demonstrated that it has:
 - 29.1 an understanding of its legal obligations under the CGA in practice, despite its previous T&Cs indicating otherwise;
 - 29.2 taken steps to improve procedures around the handling of delays and customer complaints;
 - 29.3 considered and taken a reasoned and appropriate approach to the categorising of events as within or outside of human control.
30. This warning letter is public information and will be published on the case register on our website. We may also be making public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

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

Penalties for breaching the FT Act

32. As indicated above only the courts can decide if there has actually been a breach of the FT Act. The court can impose penalties where it finds the law has been broken. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
33. 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

34. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.

35. We have published a series of fact sheets and other resources to help businesses comply with the FT 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.
36. You can also view the FT Act and other legislation at <https://www.legislation.govt.nz/>.
37. 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]

[REDACTED]

Acting Fair Trading Investigations and Compliance Manager

Attachment A – Bluebridge’s T&C available at <https://www.bluebridge.co.nz/terms-and-conditions/> updated on 18 April 2024

Our liability to you

Consumer laws

The Consumer Guarantees Act 1993 ("CGA") offers rights and remedies to consumers if goods or services do not operate as they should. For example, there is a guarantee that services will be provided with "reasonable care and skill". There are other guarantees in relation to services under the CGA which those reading these terms may wish to review.

"Consumers" are those who obtain goods or services that are ordinarily obtained for personal, domestic or household use (according to the CGA). Those who hold themselves out as obtaining goods or services for purposes such as resupplying them in trade, or for non-personal, domestic or household purposes, may not fall within this meaning.

The rights and remedies that consumers have under the CGA cannot be excluded in any circumstances. Nothing in this agreement (including in the liability sections that follows) affects any rights you may have under the CGA (where you are a "consumer" as defined by the CGA), or other legislation like the Fair Trading Act 1986 ("FTA").

[...]

The below sections on liability should be read in light of our comments about the rights and remedies that are available to consumers under the CGA, or other legislation such as the FTA.

[...]

• Liability for delays or cancellations

Sometimes our sailings will be delayed or may need to be cancelled. Our schedules, departure times and journey times are not guaranteed and may be subject to change. For example, journey times are approximate and may be affected by tidal and weather conditions, and other factors beyond our reasonable control.

Other than as required by the CGA or any other consumer laws", we will not generally be liable to you for direct or indirect loss or expenses suffered by you because of any sailing departing or arriving late or early, or any cancellation of a scheduled sailing for any reason. We also do not assume any responsibility for you or other passengers making alternative travel arrangements, meeting any appointments, engagements or deadlines or any other obligations. We will use our best endeavours to let you know of any changes in schedules, departure times and journey times as soon as we can.

[...]

• Errors, omissions and representations

We will do our best to ensure that information about the provision or timing of our services, including statements in our schedules and representations that are made, are accurate and current. However, sometimes oversights can happen despite our best efforts.

We may be liable for errors or omissions that we, as a business, make if we caused, or had control over, the information about the provision or timing of our services. This includes situations where we may be liable under the CGA, or other laws such as the FTA. However, we are not generally liable for errors or omissions that we did not make, that were outside of our reasonable control or can be excluded by law. For example, what an unrelated third party says about our services where we have had no contribution to what it says.

We may also be liable for errors or omissions our employees, representatives or agents make about our services, or the timing of them. Our liability to you depends on the circumstances (including whether you are a "consumer" for the purposes of the CGA).

[...]

• **Liability of our agents, etc**

Any exclusion or limitation of our liability in this section applies to and for the benefit of our agents, employees, representatives, and contractors unless it cannot be excluded under the CGA (or other laws that may apply such as the FTA).

[...]