

7 June 2019

Iyia Liu and Briar Howard,
Directors, Celebration Box Limited

By email only: [REDACTED]

Dear Iyia and Briar

Fair Trading Act 1986: Compliance advice for misleading representations - possible breaches of sections 13(a) and (i)

1. The Commerce Commission (**Commission**) has been investigating Celebration Box Limited (**CBL**) under the Fair Trading Act 1986 (**FTA**). We have now completed our investigation and are writing to inform you about our views.
2. In summary, the Commission considers that CBL may have breached the FTA by:
 - 2.1 providing two Celebration Boxes (to customers) which differed significantly from the products depicted and described online at the time of purchase; and
 - 2.2 including a clause in CBL's terms and conditions between July and December 2018, which we consider may mislead consumers about their rights under the Consumer Guarantees Act 1993.
3. After considering the factors set out in our Enforcement Response Guidelines,¹ we have decided to provide CBL with compliance advice for possibly breaching sections 13(a) and 13(i) of the FTA during its sale of Celebration Boxes. Compliance advice 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 to establish fault.²
4. We acknowledge that Celebration Box has made significant changes to its processes to ensure that similar issues do not reoccur. However, if this conduct is continuing or you remain unsure about your obligations, we recommend that you take immediate action to address our concerns and seek legal advice about complying with the FTA.

¹ Available at: <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>.

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

The investigation

5. During our investigation, the Commission considered several complaints which alleged that the product they had been supplied (by CBL) differed significantly from the product that they had ordered. Subsequently, the Commission also identified a term on CBL's website (in its terms and conditions) which it considered may mislead consumers about their rights under the Consumer Guarantees Act (**CGA**).
6. We also considered whether Celebration Box had breached the FTA by deleting adverse consumer feedback from its social media accounts and by instructing 'influencers' to promote its products on social media (without disclosing the advertorial nature of these 'posts').
7. During our investigation, we obtained the following evidence, which we consider indicates a possible breach of the FTA. This includes:
 - 7.1 Admissions from CBL that the boxes it provided two complainants were not fit for purpose and did not match their description; and
 - 7.2 A copy of CBL's terms and conditions displayed between July and December 2018, which included the following clause: *"we do not offer cash refunds under any circumstances. Store credit may be issued."*³

Celebration Box's response

8. CBL responded to the Commission's enquiries by acknowledging that it had grown more quickly than it anticipated, and for periods, struggled to keep up with demand.
9. At interview, CBL admitted that the boxes it provided to two complainants did not meet consumer expectations. CBL also confirmed that its terms and conditions included the term referenced at [7.2] between July and December 2018.
10. CBL said it deleted adverse consumer feedback in response to a massive surge of negative publicity, at the direction of the Police and Netsafe. It also commented that it provided celebration boxes to influencers free of charge but did not instruct the influencers to provide posts about its products.
11. During the investigation CBL also outlined a considerable number of changes to its policies, processes and staffing which allowed it to better cope with fluctuations in demand, adverse consumer feedback and returns or replacements.

The law

12. Section 13(a) of the FTA relevantly provides that no person, in trade, shall make a false or misleading representation that goods are of a particular kind, standard, quality.
13. Section 13(i) of the FTA prohibits any person in trade, from making a false or misleading representation concerning the existence, exclusion, or effect of any

³ A screenshot of this policy is available at **Attachment A**.

condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, remedy or right available under the CGA.

The Commission's view

14. In this case, and having fully considered relevant information received, the Commission's view is that CBL's conduct possibly breached sections 13(a) and (i) of the FTA.

Section 13(a)

15. We have reached this view because the boxes CBL provided to two complainants⁴ differed significantly from the products that they had ordered.
16. While CBL admitted that the products which were delivered varied from the description offered online, in the Commission's view, the differences (in the complainant's boxes) were significant because they related to:
- 16.1 the flavour of donut ordered;
 - 16.2 the nature of the 'add ons' provided to compliment the order;
 - 16.3 the presentation of the box; and
 - 16.4 the type of candy used as 'fillers' in the box.

Section 13(i)

17. We have reached this view because CBL's terms and conditions in relation to cancellation contained information which was likely to mislead consumers by representing that there were no circumstances in which they could obtain a monetary refund for defective goods, when this was not the case.
18. The CGA provides that a number of guarantees apply where goods are supplied to a consumer. In some circumstances, when a business fails to comply with a CGA guarantee⁵ - including where the failure is of substantial character - the consumer will have a choice of remedy (including the choice of obtaining damages from the supplier).

Other conduct

19. In relation to the deletion of adverse feedback and the provision of boxes to 'influencers,' we think there may be circumstances where such conduct could have the potential to breach the FTA. This may occur if:
- 19.1 The deletion of feedback had the effect of misleading consumers about the level of customer complaints (or satisfaction) CBL received; or

⁴ We raised the specific circumstances of two Celebration Box customers with Celebration Box at interview

⁵ The CGA contains guarantees that goods are 'of an acceptable quality,' and that goods 'match their description, sample of demonstration model' amongst others.

- 19.2 influencers are provided with product on the understanding they promote or endorse the product, and this fact is not clearly disclosed on any accompanying social media posts.

Compliance advice

20. 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 compliance advice. Compliance advice represents our opinion that the conduct in which CBL have engaged possibly breached the FTA.
21. The changes that CBL made have been factors in the Commission deciding to issue compliance advice on this occasion. However, you should be aware that we will consider the compliance advice history of a trader, if we receive further complaints.

The Commission's role

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

Penalties for breaching the FTA

23. Only the courts can decide if there has actually been a breach of the FTA. The court can impose penalties where it finds the law has been broken. A company that breaches the FTA can be fined up to \$600,000 and an individual up to \$200,000 per offence.

Further information

24. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies. We suggest that Celebration Box ensures that its terms and conditions are completely fit for purpose.
25. We have published a series of fact sheets and other resources to help businesses comply with the FTA 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.
26. You can also view the FTA and other legislation at www.legislation.co.nz.
27. Thank you for your assistance with this investigation. Please contact me on [REDACTED] or by email at [REDACTED]@comcom.govt.nz if you have any questions about this letter.

Yours sincerely,

[REDACTED]



Assistant Investigator
Competition and Consumer Branch- Wellington

Released under Official Information Act 1982

Attachment A

Screenshot of Celebration Box's previous 'cancellation policy'

Cancellation Policy

Orders can be cancelled up to 2 working days prior to the scheduled delivery date. Orders that are already prepared, dispatched or in transit cannot be cancelled or refunded.

Cancellation of order incurs a \$50.00 administrative fee. Money will be refunded less this fee.

If cancellation notice is received at less than 2 working days - cancellation is void.

A cancellation notice must be placed in email to hello@celebrationbox.co.nz

Orders cannot be cancelled on the day of delivery. In the event that the customer needs the box cancelled or re-delivered on the day of the delivery, the customer will be charged the same price for an additional box to be sent out.

We do not offer cash refunds under any circumstances. Store credit may be issued.

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