IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2024-004-007227
[2024] NZDC 32079

COMMERCE COMMISSION

v

BED BATH AND BEYOND

Hearing: 20 December 2024

Appearances: J Barry and K Haszard for the Prosecutor
L Farmer for the Defendant

Judgment: 20 December 2024

NOTES OF JUDGE S J BONNAR KC ON SENTENCING

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[1] Bed Bath and Beyond Limited is a national homewares chain specialising in the supply of goods such as bedding, pillows, nightwear, hot water bottles, bathroom towels, furniture, and decorative items. The company was incorporated in 2012 in its present form but has traded in various forms since 1995.

[2] I will refer in the course of these sentencing remarks to the company by using the initials BBB.

[3] BBB operates by way of an online store and 55 physical retail stores across New Zealand. BBB is for sentencing today on five representative charges laid under the Fair Trading Act 1986 covering the period from 16 March to 13 October 2023.

[4] There are three charges involving the supply of goods in breach of an Unsafe Goods Notice issued under s 31(1) of the Act and two charges involving the supply of goods which were not compliant with an applicable product safety standard.

[5] Each of the charges carries a maximum available penalty of $600,000. Section 40(2) of the Act provides, however, that where an entity is convicted of two or more offences in respect of contraventions of the same provisions of the Act, and those contraventions are of the same or a substantially similar nature and occurred at about the same time, the aggregate amount of any fines imposed on that entity in respect of the convictions shall not exceed the amount of the maximum fine that might be imposed in respect of a conviction for a single offence.

[6] Mr Famer, for BBB, submits, therefore, on the facts of this case that the effective maximum available sentence would be a fine of $1.2 million in relation to the two sets of charges.

[7] It is arguable that the maximum available penalty is still to be assessed by reference to the five charges carrying a penalty of $600,000 each, that is, $3 million but that s 40(2) simply prevents the court from *imposing* a penalty of more than $1.2 million in aggregate.

[8] I do not need to determine that issue one way or the other because, on any assessment, the penalties to be imposed for the present offending will not approach $1.2 million.

[9] For convenience, I will refer to the three charges laid under s 31(5) of the Act as the "hot water bottle" offending and the two charges under s 30(1) as "the pyjama" offending.

[10] I intend to briefly summarise the offending now but will annex the full agreed summary of facts to the transcript of these remarks when it is prepared.

[11] Turning to the hot water bottle offending, under the Unsafe Goods (Hot Water Bottles) Permanent Prohibition Notice 2016 hot water bottles are declared to be unsafe

goods if they do not meet the requirements of the relevant hot water bottle standard. That standard includes a requirement that hot water bottles are to be accompanied with prescribed and detailed instructions as to their safe use, depending upon the design of the bottle. Those instructions detail: how the bottles are to be safely filled; their appropriate use; direct that a bottle should not be brought into contact with hot surfaces, oils, or grease; set out drainage and storage instructions; provide information regarding checking for wear and damage; and other matters.

[12] The hot water bottles supplied by BBB came in two litre, one litre, and 500 millilitre sizes and did have brief instructions stamped into the bottles' neck. However, those instructions did not meet the detailed requirements of the Hot Water Bottle Standard and no additional instructions were included in the packaging.

[13] The charges relate to the supply by BBB of 23,801 hot water bottles, supplied between 16 March 2023 and 13 October 2023, without the relevant instructions.

[14] The pyjama offending relates to requirements for labelling relating to fire hazards. The labelling of fire hazards is prescribed under an Australian and New Zealand standard relating to children's nightwear and limited daywear having reduced fire hazard. I will refer to that as the "nightwear standard."

[15] The nightwear standard specifies designs, flammability, performance, and fire hazard labelling requirements for children's nightwear garments that fall within a prescribed range of sizes and categories. To comply with the standard a garment must fall into one of four categories based on design and the flammability of the fabric. Category four garments involve those with the highest level of fabric flammability. Different categories of garments are subject to different rules.

[16] The two charges relating to the pyjama offending arise as a result of BBB's failure to properly comply with the nightwear standard. The first charge relates to the supply of 3,573 flannelette pyjama sets between 18 March 2023 and 13 October 2023. The sets were non-compliant with the standard as they lacked the prescribed fire hazard information labels in the appropriate location on the garment.

[17] The standard required the labels to be in a prescribed visible location on the top of the garments and for fire hazard information to be displayed online in relation to the online sale of the products.

[18] Further, the pyjama sets displayed the incorrect labels. They contained labels appropriate for category four garments when the pyjama sets were, in fact, category two garments. The product pages on the company's website did not list the necessary fire hazard information as part of the online image and product description.

[19] The second of the pyjama offending charges relates to BBB offering to supply 14 varieties of children's pyjamas on its website between 18 March 2023 and 13 October 2023 which were non-compliant with the standard because, again, the prescribed fire hazard information was not displayed as part of both the online image and product description.

[20] The Commerce Commission submits that the appropriate sentence falls in the range of a total fine of $292,500 to $331,500, calculated by adopting a starting point for the hot water bottle offending in the range of $300,000 to $350,000 and a starting point of $150,000 for the pyjama offending, subject to a totality adjustment, before discounts of 35 per cent for the company's guilty pleas, lack of previous relevant convictions and co-operation, and an uplift of 20 per cent to account for the company's financial capacity.

[21] BBB submits that an appropriate end sentence is a total fine in the range of $97,500 to $117,000, taking a starting point for the hot water bottle offending in the range of $110,000 to $130,000, a starting point of $100,000 to $110,000 for the pyjama offending, adjusting for totality, applying the 35 per cent discount and applying no uplift in respect of the company's financial capacity.

[22] The legal principles, in terms of assessing the level of fines in these cases, were identified by the High Court in *Commerce Commission v L D Nathan and Co Limited*.[1] That case provides guidance as to the general sentencing principles and factors to be considered. Those factors include: taking into account the objectives of the Act; the

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1 *Commerce Commission v L D Nathan and Co Limited* [1990] 2 NZLR 160.

degree of culpability of the offender in the context of wilful or careless offending; the extent of prejudice or harm caused to customers; the attitude of the defendant in respect of remorse, co-operation with the authorities and remedial action; the importance of deterrence; guilty pleas; the offending company's previous record; and the effect of any publicity regarding the prosecution.

[23] The Court of Appeal in *Commerce Commission v Steel and Tube Holdings Limited* held that while the *L D Nathan* case provides a helpful checklist of considerations, that list is not exhaustive and, in any given case, some of the listed considerations may not arise or may require closer analysis.[2]

[24] The Court provided a non-exhaustive list of other factors affecting seriousness and culpability, including: the nature of the goods or services provided; the use to which they were put; whether the offending was isolated or systematic; the state of mind of any employees or agents whose conduct is attributed to the defendant; the seniority of those people; the compliance systems and culture of the offending entity and the reasons why they failed; any harm done to consumers and other traders; and any commercial gain or benefit to the defendant.

[25] There is no dispute between the parties as to the purposes of the Act. Those purposes are to contribute to a trading environment in which the interests of consumers are protected and in which businesses compete effectively and consumers and businesses can participate confidently in the marketplace. To that end, the Act promotes safety in respect of goods and services.

[26] Purposes and principles of sentencing as set out in the Sentencing Act 2002 remain mandatory considerations for the Court.

[27] Before leaving the legal principles, the Commerce Commission places some reliance on the High Court judgment in *Commerce Commission v NZME Advisory Limited* which, it is submitted, set a new tone for prosecutions under the Act and in

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2 *Commerce Commission v Steel and Tube Holdings Limited* [2020] NZCA 549.

which, the Commerce Commission submits, the High Court recognised that fines for offending under the Act appear to have been set too low.[3]

[28] In that case, after reviewing 27 product safety decisions which had come before the court following the increase in the maximum penalty in 2014, the Court noted that starting points in all of those cases bar one had been set at less than 25 per cent of the maximum penalty for a single offence. Most cases involved small to medium sized traders.

[29] Andrew J considered that the District Court may have felt somewhat constrained by its own decisions in determining appropriate sentences under the Act and that penalty levels needed to rise over time to maintain the same deterrent effect.

[30] Mr Farmer submits that *NZME* is not, however, an indication on the part of the High Court that everything which went before it simply involved sentences which were too low.

[31] Turning to the nature, extent and duration of the present offending, over a seven-month period BBB supplied 27,374 non-compliant goods to New Zealand consumers, including 3,753 non-compliant children's pyjama sets over two product lines, and 23,801 hot water bottles in three different sizes.

[32] Additionally, it offered to supply non-compliant goods in respect of 14 other product lines through its website. The defence emphasises that this was a failure which existed only on the website, not in relation to the actual physical products supplied.

[33] It is also submitted by the company that there is a crucial distinction in relation to the characterisation of the missing warning on the website advertising, as the absence of the warning only applied at the time of online purchase, not in relation to the regular use of the goods once purchased.

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3 *Commerce Commission v NZME Advisory Limited* [2023] NZHC 3425.

[34] The charged offending extended across BBB's 55 physical stores and its website. The Commission submits that, having regard to all of that, the offending is significant, "dwarfing" the numbers seen in any previous product safety case.

[35] The company submits that all of the items were derived from one order and shipment in respect of each item or category of product. While the offer of sale was ongoing, the conduct did not emerge, it is submitted, from a repeated failure to source compliant products. The company also highlights that the goods subject to the charges represent only a small part of BBB's business, accounting for less than one per cent of its annual revenue.

[36] For those reasons, the defence submits that the offending should be categorised as at the lower end of the scale. The breaches were the result of isolated errors concerning a small proportion of BBB's product lines and were only partial failures, with warning labels and information being affixed to all products, albeit not in compliance with the relevant standards.

[37] In respect of the nightwear, the defence say that compliance checks were carried out on two occasions before the products were shipped to New Zealand and a complete absence of any labels had been identified and remedied before shipment. In that respect, the defence submits that the company's failure involved the failure to conduct a third check on the actual goods once they had arrived in New Zealand.

[38] Nevertheless, I accept that by virtue of the number of non-compliant goods supplied by BBB on a nationwide basis, and having regard to the duration of the offending, the offending must be considered as serious offending.

[39] In terms of the nature of the goods, the fact that they are subject to the relevant regulations and standards recognises the capacity for potential harm to consumers. The standards, in relation to both the hot water bottles and the pyjamas, seek to address and lessen the risk of burn injuries. The standards and legislation recognise that consumers may not be best placed to identify those dangers in the absence of express warnings and labelling.

[40] In that respect, the Commission highlights the connection between the existence of the regulations and the risk of harm to consumers and submits that the company's conduct impaired consumers' ability to properly assess and mitigate the potential dangers inherent in the goods.

[41] The Commission also submits that the company's offending followed failings in its compliance systems and processes. It submits that the company's failure to adequately train staff and the absence of written policies and guidelines regarding compliance practices meant that BBB relied almost entirely on staff and suppliers' pre-existing knowledge, which the Commission submits was insufficient.

[42] The defence, on the other hand, submits that the company's compliance systems and knowledge of applicable requirements generally worked well, these offences being isolated contraventions, and stresses the steps that the company has taken subsequently to further improve its systems.

[43] In this respect, the defence refers to correspondence annexed to the affidavit of Mr Hunt, the company's general manager which, it is said, demonstrates that the company as a whole had good knowledge of the required standards.

[44] Referencing the fact that the labels on the pyjama sets were of the type which applied to a category four garment, albeit in the wrong place on the pyjama sets, the Commission submits that the incorrect labelling undermines the purpose of categorisation under the standard. The defence submits that the standard anticipates that labels in excess of requirements for nightwear are appropriate in certain circumstances and argues that the decision was made out of an abundance of caution on the part of the company, recognising that all nightwear textiles are flammable to some extent.

[45] While the company recognised that the sets needed fire hazard labelling and instructed the supplier to so provide that labelling, the actual labelling in the present case was approved by a buyer's assistant who failed to recognise that the labels had been put in the wrong place.

[46] In relation to the hot water bottles, the defence argues that not all hot water bottles offered for supply by the company failed to include the required instructions and that, of the two pyjama set lines in breach, BBB's processes correctly identified that the necessary label had been missed.

[47] Additionally, the defence argues that other evidence indicates BBB had good working knowledge of the need for compliance.

[48] The Commission refers to the company's status as a relatively large national chain supplier with significant financial resources and with a focus on goods of the type supplied here and, therefore, there was a greater duty placed on the company to have appropriate systems in place to ensure compliance.

[49] In that respect, the prosecution refers to comments of Andrew J in the *NZME* case at paragraphs [61] to [62].

[50] The defence acknowledges that the company's size is a relevant consideration but asks the court to take into account that the product lines in issue represented but a small fraction of its total commercial activity. Accordingly, the defence submits that the company's size and financial capacity should not be considered as a significant aggravating factor.

[51] Nevertheless, it seems clear on the state of the authorities that a defendant company's size and resourcing is a factor which is to be taken into account in setting a starting point and I propose to take that into account in the present case.

[52] There is, to some extent, a dispute between the parties as to how I should categorise the company's conduct here. The Commission submits that it was careless in relation to the pyjama set charges and "highly careless" in relation to the hot water bottle charges. BBB accepts that its conduct was careless in respect of all charges but disputes the characterisation of the hot water bottle offending as highly careless.

[53] I do not consider it is necessary for me to determine whether the company's actions should be formally labelled as simply careless or as highly careless. Such

labels are inherently subjective and are open to interpretation. I accept and treat the company's offending as careless but for the reasons I have already identified I consider it to be a serious example of such careless offending.

[54] In terms of harm, no injuries appear to have been caused or reported as a result of the offending. There was, however, an increased risk of harm to a large number of consumers of the non-compliant products.

[55] I have already addressed the rationale for the standards which apply and the risks which are addressed by those standards.

[56] In terms of setting the starting point, the prosecution emphasises the need for deterrence. In *Steel and Tube* the Court of Appeal noted that courts have long accepted that gain from offending is a relevant consideration at sentencing but emphasise that the object of the measurement exercise must be kept in mind. The court warned against using net profit as an assessment of commercial gain and noted that courts do not usually need to engage in a close analysis of gain but, to the extent that a court thinks it necessary or appropriate to estimate gain, a court may find proved revenue attributable to the offending is an adequate measure of such gain.

[57] The Commission here submits that any penalty I impose must ensure that there is no financial benefit derived by BBB from the offending. BBB disputes that it achieved any significant commercial gain or any benefit over its competitors but submits that even if it had done so, the Commission's assessment of gain is overstated.

[58] Again, the company highlights the revenue obtained from hot water bottle sales and the small proportion of revenue reflected from those sales by comparison to BBB's sales generally. It invites me to take into account the small actual revenue from the offending items in setting the starting point.

[59] I do not consider it necessary in the context of this case to closely analyse or determine the actual gain obtained by the company. Clearly, BBB obtained revenue by reason of the sale of non-compliant goods. I do not accept, however, that the proportion of revenue obtained from the sale of these goods, relative to the overall

revenue of the company, is a significant feature in determining the appropriate starting point here.

[60] There is also an element of dispute between the parties as to comments of the High Court in *Commerce Commission v Vodafone New Zealand Limited* and in the *NZME* case, relating to the court's need to assess starting points having regard to the value of money at the time the fines were imposed or, in other words, to make an inflationary adjustment to those starting points to recognise the real difference in penalty since the imposition of previous penalties.[4]

[61] Subsequent cases have acknowledged those comments, particularly *Commerce Commission v Crackerjack Limited* and *Commerce Commission v Milkio Foods Limited*.[5]

[62] The defence submits that the dicta in the High Court cases only provides that the court is required, in setting the appropriate starting point, to consider whether the effects of inflation give rise to a result in which reliance on longstanding decisions would produce a starting point without a deterrent effect. Those comments are not a signal to automatically apply ever higher penalties in product safety cases. The court is simply required to consider the effects of inflation as a result of the passage of time when comparing starting points. I accept the defence submission on that point.

[63] In terms of relevant precedent decisions, in relation to the hot water bottle offending, both parties primarily rely on the decision in *Commerce Commission v Paramount Merchandise Company Limited*.[6] Both also refer to *Commerce Commission v ND Import & Export Limited*.[7]

[64] *Paramount* involved non-compliance with the hot water bottle standard and involved three charges relating to the supply of 2,280 hot water bottles which were non-compliant. One product line represented a burn risk to users due to non-compliant

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4 *Commerce Commission v Vodafone New Zealand Limited* [2023] NZHC 2149 at [279].
5 *Commerce Commission v Crackerjack Limited* [2024] NZDC 10425; *Commerce Commission v Milkio Foods Limited* [2024] NZDC 15111.
6 *Commerce Commission v Paramount Merchandise Company Limited* [2021] NZDC 17008.
7 *Commerce Commission v ND Import & Export Limited* [2021] NZDC 16449.

instructions and performance failures and two other product lines involved burn and suffocation risks due to marking, instruction, packaging and warning failures. 604 hot water bottles were successfully recalled. The company had 16 employees and an annual turnover of $7 million. In that case, a starting point of $110,000 was adopted.

[65] The Commission submits I should be considering a much more significant starting point than that adopted in *Paramount*. While the breaches were similar, relating to deficiencies in instructions and packaging, the Commission points out that in *Paramount* there was compliance in relation to other products on the same product line, suggesting the more serious breaches were aberrations. The Commission also argues that Paramount's conduct was further mitigated by the measures taken to attempt compliance and by reference to the period of offending.

[66] BBB submits I should adopt a similar starting point to that in *Paramount*, arguing that such an approach would reflect the greater number of hot water bottles supplied by BBB but the absence of some of the more serious aspects of Paramount's offending including the failure of one hot water bottle and the suffocation risks.

[67] *ND Limited* is a very different case on its facts, involving the sale of 13 non-compliant hot water bottles by a small company and, in that case, a $25,000 starting point was adopted. I consider that *ND Limited* is of limited assistance given the facts.

[68] Having regard to all of the foregoing matters, I adopt a starting point for the hot water bottle offending in this case of a total fine of $250,000.

[69] In terms of the pyjama offending, both parties refer to the *Crackerjack Limited* decision, to which I have already referred, as providing useful guidance. The parties are agreed that BBB's conduct here is less serious than that in *Crackerjack*.

[70] *Crackerjack* also involved non-compliance with the nightwear standard. It pleaded guilty to 18 charges under the Act, 16 of which related to non-compliance with the standard in terms of fire hazard labelling. The 16 pyjama product lines were missing designated labels with warnings that the products should be kept away from

heat and flames. None of the 16 lines had designated labels and four had no labels at all.

[71] In that case, 266 units of nightwear were sold over a period of just over one year. The full extent of non-compliance was not clear but Judge Fitzgibbon considered that it was likely that a majority of the children's nightwear sold by Crackerjack was in breach. The company had no knowledge or copy of the relevant standard, solely relying on its suppliers to ensure compliance. Its conduct was categorised as highly careless and a starting point of $205,000 was imposed.

[72] The Commission accepts that a lower starting point than that imposed in *Crackerjack* is appropriate in the present case. Nevertheless, it argues that the penalty I impose should still be stern given that the failure to appropriately locate the labels in the present case significantly undermined their utility and purpose.

[73] The prosecution also emphasises the greater number of garments sold and the 14 garment lines on the product page did not comply with the requisite standard. It submits the appropriate starting point is $150,000.

[74] The defence submits that the facts of the *Crackerjack* case demonstrate that the defendant company had a chaotic import structure, no awareness of the required standards, made no real effort to comply with the standards, and had no real ability to say how many products were non-compliant. The defence submits that an appropriate starting point for the pyjama offending here is in the range of $100,000 to $110,000.

[75] Taking all relevant matters into consideration, I consider that an appropriate starting point for the pyjama offending is a total fine of $130,000.

[76] If I was simply to add those two starting points together, they would result in total fines of $380,000. Both parties accept that there needs to be an adjustment for totality. I adjust the total fines to a starting point of $320,000.

[77] The parties are agreed as to the extent of discounts which should be applied for the BBB's early guilty plea, co-operation and lack of previous convictions.

[78] I reduce the total fine by an amount very close to 35 per cent, as recommended by the parties, and reduce the fine to $200,000.

[79] Turning to whether there should be an uplift for BBB's financial capacity, I note that the company's turnover for the 12 months ending June 2023 was a little over $125 million. Section 40(1) of the Sentencing Act 2002 provides that, in determining the amount of a fine, I am required to take into account the financial capacity of the offender.

[80] Uplifts of up to 25% have previously been applied in Commerce Commission prosecutions to recognise the financial means of large companies. In *Commerce Commission v Vodafone New Zealand Limited,* Moore J commented that the assessment of what the level of uplift should be in any case is an evaluative exercise requiring judgment having regard to all of the circumstances.[8]

[81] The Commission submits that I should apply a 20 per cent uplift, taking into account the financial capacity of BBB and argues that I must first consider whether the fine that I would otherwise impose, that is $200,000, is sufficient to adequately recognise the relevant principles and purposes of sentencing.

[82] BBB opposes any uplift, as I have previously indicated. It relies on comments in *Steel and Tube* concerning the requirement to ensure there is proportionality in the final sentence with the overall gravity of the offending.

[83] In the alternative, if I consider that an uplift is required, BBB submits it should be substantially smaller than the 25 per cent uplift ordered in the *Vodafone* case. It acknowledges the 20 per cent uplift in *Crackerjack* but argues that has to be assessed in the context of what it submits is more serious offending.

[84] I consider that an uplift to take account of BBB's financial capacity is appropriate. A sentence of $200,000 in total would not adequately reflect the relevant principles and purposes of sentencing and would carry no "sting" in any real sense.

8 *Commerce Commission v Vodafone New Zealand Limited* [2023] NZHC 2149 at [290].

[85] I apply an uplift of 15 per cent to take account of the company's financial capacity, in other words, an uplift of $30,000.

[86] The end sentence, therefore, is a total fine of $230,000. I impose a fine of $46,000 on each of the five charges.

Judge SJ Bonnar KC
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 23/01/2025

ANNEXURE – AGREED SUMMARY OF FACTS FOR SENTENCING

Caption Summary

Commerce Commission (Prosecutor)	v	**Bed, Bath and Beyond Limited** (Defendant)

Charges 1-3: Supply of goods in breach of an Unsafe Goods Notice (issued under s 31(1) of the Fair Trading Act 1986 declaring the goods to be unsafe).

Act: Sections 31(5) and 40(1) of the Fair Trading Act 1986

Penalty: **$600,000** per charge

Charge 4: Supply of goods not compliant with an applicable product safety standard (specified in section 29(1) of the Fair Trading Act 1986).

Act: Sections 30(1) and 40(1) of the Fair Trading Act 1986

Penalty: **$600,000** per charge

Charge 5: Supply of goods not compliant with an applicable product safety standard (specified in section 29(1) of the Fair Trading Act 1986).

Act: Sections 30(1) and 40(1) of the Fair Trading Act 1986

Penalty: **$600,000** per charge

Summary of Facts

1 Introduction

1.1 The defendant, Bed Bath and Beyond Limited (**BB & B**), faces seven representative charges under the Fair Trading Act 1986 (**FTA**) in relation to its supply of the following:

(a) three charges relating to 23,801 'Hush Hot Water Bottles' (the **Hot Water Bottles**) which it supplied between 16 March 2023 and 13 October 2023 without the instructions prescribed by the Unsafe Goods (Hot Water Bottles) Permanent Prohibition Notice 2016 (the **Notice**).

(b) one charge relating to the supply of 3,573 'BB&B Sleep Kids Flannelette Pyjama sets (pink and blue variants)' (the **Pyjama Sets**) which it supplied between 18 March 2023 and 13 October 2023 and which did not comply with the applicable product safety standard relating to labelling of fire hazards because the Pyjamas did not feature the prescribed fire hazard information labels in the prescribed location (on the products and online); and

(c) one charge relating to BB & B offering to supply fourteen varieties of children's pyjamas (together with the Pyjama Sets, the **Pyjamas**) on its website between 18 March 2023 and 13 October 2023 which did not comply with the applicable product safety standard relating to labelling of fire hazards because they did not have fire hazard information displayed as part of the online image and product description.

2 Defendant

2.1 BB & B is a national homewares chain specialising in the supply of goods such as bedding, pillows, nightwear, hot water bottles, bathroom towels and furniture and decorative items. BB & B was incorporated in 2012, but the business has traded in one form or another since 1995. BB & B has three directors: Trevor Brown, Murray Carter and Fred Bart.

2.2 BB & B operates 55 stores across New Zealand as well as the sales website www.bedbathandbeyond.co.nz. It currently employs approximately 550 staff. Its head office and distribution centre is based at 5 Chonny Crescent, Manurewa, Auckland.

2.3 BB & B's turnover for the 12 months ending June 2023 was $125.2 million.

3 Relevant legislation

The Hot Water Bottles

3.1 Pursuant to s 31(5) of the FTA, no person shall supply, offer to supply, or advertise to supply goods in respect of which there is in force a notice declaring the goods to be unsafe goods.

3.2 Under the Notice, hot water bottles are declared to be unsafe goods if they do not meet the requirements of *BS1970:2012 Hot Water Bottles manufactured from rubber and PVC – specification* (the **HWB Standard**).

3.3 The HWB Standard specifies the requirements for the physical properties (including marking and information requirements) and performance of both rubber and PVC hot water bottles.

3.4 Amongst other requirements, the HWB Standard requires hot water bottles to be accompanied with prescribed, detailed instructions which designate their safe use depending on their design (the **Instructions**).

3.5 In summary, the Instructions:

(a) detail how to fill hot water bottles safely;

(b) set out appropriate use, including that they are not to be used as a cushion;

(c) direct no contact with hot surfaces, oils or grease; and

(d) set out drainage and storage instructions, to check for wear and damage, and to retain the Instructions for future reference.

The Pyjamas

3.6 Pursuant to s 30(1) of the FTA, a person must not supply, offer to supply or advertise to supply goods to which a mandatory product safety standard applies unless that person complies with the product safety standard.

3.7 The applicable product safety standard for the Pyjamas is the Australian/New Zealand Standard *AS/NZS 1249:2014 Children's nightwear and limited daywear having reduced fire hazard*, as adopted under the Product Safety Standards (Children's Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2016 (the **Nightwear Standard**).

3.8 The Nightwear Standard specifies design, flammability performance and fire hazard labelling requirements for children's nightwear garments, together with some daywear or underwear items that may be commonly used as nightwear. The scope of the Nightwear Standard includes garments that fall within a prescribed range of sizes and prescribed categories of garment.

3.9 Garments are categorised by the risk associated with their design and the flammability of the fabric. Categories one, two and three are generally considered to have a reduced fire risk and category four garments have a higher fire risk.

3.10 To comply with the Nightwear Standard, a garment must fall into one of four garment categories based on their design and the flammability of the fabric. Garments in each of the four categories are required to have specified fire danger labels, with prescribed wording, images and colours affixed to them. Category four garments are required to have a more prominent 'high fire danger' fire warning, to reflect the fact that they have a higher flammability risk, and categories one, two and three are generally considered to have a reduced fire risk.

3.11 Garments within the scope of the Nightwear Standard, but which do not fall into any of the four categories, are considered to have a very high flammability rating, and are prohibited from sale altogether.

3.12 The Nightwear Standard also requires that garments offered for supply online provide clear and legible fire hazard information as part of the online image and product description. Garments will breach the Nightwear Standard if they do not have a fire hazard label in the correct format and displayed in the correct location (both on the garments and in online images and descriptions of the garments).

4 Commission's Investigation

Hot Water Bottles

4.1 On 1 September 2023, Commission staff conducted an in-store inspection at BB & B's Paraparaumu store located at Coastlands Mall and purchased three units of one size option of the Hot Water Bottles.[9]

4.2 None of the Hot Water Bottles were supplied with the required instructions for their safe use and maintenance.

4.3 **Schedule One** contains photographs of the purchased hot water bottles and the receipt of purchase.

4.4 On 13 October 2023, after being notified of the Commission's investigation, Mr Hunt wrote to the Commission accepting that the 'Hush 2 Litre Hot Water Bottle' did not have a swing tag with the appropriate wording.[10]

4.5 BB & B's responses to the requests for information issued on 17 November 2023 and 27 March 2024 confirmed that BB & B imported 24,231 Hot Water bottles across the 2L, 1L and 500mL "Hush" range which did not have the necessary instructions as prescribed by the HWB Standard. 23,801 of those water bottles were sold to consumers.

4.6 This conduct is the subject of charges 1-3. Each of those charges covers a period of two to two and a half months within the total charge period.

Pyjamas

4.7 On 4 September 2023, an online inspection of BB & B's website found that sixteen styles of children's nightwear products offered for supply were within scope of the Nightwear Standard.

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9 This style was described as 'Hush 2L Hot Water Bottles', and a unit of a pink, charcoal and cream variant was purchased.

10 Email from Guy Hunt to Donna Rider, dated 13 October 2023 (CC.BB.0153).

4.8 Fire hazard information was not provided as part of the online image and product description for any of these sixteen styles of children's nightwear in breach of clause 2.8.2(g) of the Nightwear Standard.

4.9 On 5 September 2023, a Commission staff member entered BB & B's Thorndon Quay store and examined various children's pyjamas on display. The staff member photographed the Pyjama Sets, noticing that the fire hazard label was incorrectly placed.

4.10 These photographs are contained in **Schedule Two**.

4.11 On 22 September 2023, the Commission purchased two pairs of the Pyjama Sets from BB & B's website. Upon receipt of these garments, a physical assessment was undertaken which indicated the Pyjama Sets had fire hazard information labels attached but not in the required location.

(a) Clause 2.8.2(a) of the Nightwear Standard requires labels to be inside the back neck of a top, and to be attached to the waistband or back seam of pants. In both instances the label is to be "as close as possible to the top and centre of each piece as the design allows".

(b) The Pyjama Sets had labels attached to the bottom inner side seam of the tops (around the mid-riff) and at the top side seam of the bottoms (around the waist/hip area). This positioning meant the labels were less prominent than they would have been had they abided by the Nightwear Standard. The labels' placement reduced prospective purchasers' visibility of these important risks at the time of purchase and during purchasers' ongoing use of the Pyjama Sets.

(c) Additionally, incorrect labels were displayed. The Pyjama Sets displayed the label for category four garments (the highest fire warning) when the Pyjama Sets were in fact all category two garments.

(d) Photographs of the Pyjama Sets the Commission purchased, and the location of the fire hazard labels on those Pyjama Sets are contained in **Schedule Three**.

4.12 The Pyjama Sets purchased by the Commission were sent to New Zealand Wool Testing Authority Ltd (**NZWTA**)[11] to verify the Commission's assessment that they did not comply with the Nightwear Standard. NZWTA concurred that the Pyjama Sets failed to comply with the Nightwear Standard as the fire hazard labels were the incorrect category and were positioned in the wrong location.

4.13 On 9 October 2023, the Commission notified BB & B of its investigation. The Commission also provided information about the products that the Commission had identified and the applicable safety requirements for the respective products.

4.14 On 13 October 2023, shortly after being notified of the Commission's investigation, BB & B's General Manager Guy Hunt (**Mr Hunt**) wrote to the Commission accepting that the fire hazard labels were in the incorrect locations on the Pyjama Sets. Mr Hunt also proactively provided information about the supply of the products the Commission had identified.[12]

4.15 On 17 November 2023 and 27 March 2024, the Commission made requests for information from BB & B. BB & B's responses to those requests confirmed that BB & B imported 3,830 units of the Pyjama Sets and that 3,573 of these were subsequently sold.

4.16 This conduct is the subject of charge 4 and 5. Charge 4 relates to the Pyjama Sets. Charge 5 relates to the failure to disclose fire hazard information on BB & B's website for the 14 other styles of children's pyjamas. Both charges cover charge periods of approximately six months.

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11 NZWTA are a competent testing laboratory for the purpose of assessing garments against the requirements of the safety standard and information standard (and other relevant consumer information standards relating to clothing).

12 Email from Guy Hunt to Donna Rider, dated 13 October 2023 (CC.BB.0153).

5 Defendant's response

5.1 After being notified of the Commission's investigation the Defendant took immediate steps to withdraw the Pyjamas and Hot Water Bottles from sale (both in store and online) and dispose of remaining stock. BB &B also facilitated and implemented a recall of the Pyjama Sets and Hot Water Bottles.

5.2 As at 20 March 2024, a small number of the Pyjama Sets and Hot Water Bottles had been returned but it is unclear if the returns were triggered by the recall because of BB & B's no questions asked returns policy.

Defendant's response to the investigation

5.3 The Commission conducted an interview with Mr Hunt and BB & B's buyer manager, Haley Johnson (**Ms Johnson**) on 20 March 2024. That interview provided information additional to BB & B's responses to the voluntary requests for information issued during the investigation.

5.4 During the investigation BB & B informed the Commission that:

(a) Mr Hunt and the CEO, Trevor Brown, are generally responsible for legal compliance within the company.

(b) BB & B does not have terms in agreements with the factories they source from to ensure compliance with New Zealand laws and regulations. Furthermore, BB & B's supplier information manual (which it provided to its suppliers) did not refer to any of the potentially applicable safety standards or the testing of products for compliance.

(c) It was not standard practice to require testing reports from its suppliers prior to supply.

(d) It was not standard practice for BB & B to conduct a physical inspection of ordered goods when they arrived in New Zealand (to determine whether they were compliant). BB & B did not carry out compliance checks (except for quality control such as ensuring that the goods were not damaged) in respect of the compliance of the Pyjamas and the Hot Water Bottles.

(e) BB & B subscribe to Retail NZ, Inside Retail, and hold Health and Safety meetings on a monthly basis. These measures are intended to ensure that BB & B follows applicable standards and identifies changes to regulations.

(f) Rather than a dedicated compliance role or specific on-the-job training, BB & B relies on hiring staff with a good working knowledge of relevant regulations and legal compliance issues to ensure compliance, as well as relying on reputable suppliers that it rarely changed from or moving into new product areas where they have less knowledge.

(g) Mr Hunt had an awareness of the HWB Standard and Notice and their requirements.

(h) Testing which took place on the Hot Water Bottles post-dated BB & B's initial supply of the Hot Water Bottles by two months (and were not received by BB & B until after notification of the Commission's investigation).

(i) The non-compliant Hot Water Bottles were imported from an existing supplier, but one which hadn't produced Hot Water Bottles for BB & B before. BB & B staff didn't recognise the non-compliance at any point prior to the Commission's investigation.

(j) Mr Hunt asserted BB & B was generally aware of the Standard and that the offending was attributable to gaps in their processes. BB&B had not always had a copy of the Nightwear Standard.

(k) Prior to the Pyjama Sets being shipped to BB & B, BB & B staff identified that the Pyjama Sets did not feature fire hazard labelling and instructed its supplier to confirm that the order had a fire warning as "this is a legal requirement for the product." Subsequently BB & B staff asked its supplier to provide a photo to show that the fire hazard labels had been affixed because this "was very important." BB & B were provided evidence of the labels being attached, but failed to identify that the labels were affixed in the incorrect location.

(l) The Pyjama Set samples were approved by a buyer's assistant who knew that the label needed to be present but failed to recognise the non-compliance caused by the location of the label being in the wrong place while the more experienced buyer was overseas.

(m) BB & B did not supply any test reports for the Pyjama Sets in relation to the Nightwear Standard.

(n) BB & B were unable to identify any specific instructions which it had sent to the suppliers of the Hot Water Bottles and the Pyjama Sets which referred to the requirements of the Notice and the Nightwear Standard.

(o) As a result of the Commission's investigation BB & B now requires:

(i) Testing reports to be provided prior to shipment (with the shipping sample);

(ii) Staff to participate in regular annual training as an added precaution to ensure ongoing compliance;

(iii) Prior to making an order, suppliers to be sent (irrespective of their degree of specialisation,) instructions to follow to ensure adherence with NZ standards;

(iv) Confirmation of shipping samples before approval to ship for bulk consignments is granted; and

(v) Buyers and/or their assistants to visually check all SKU's arriving in the warehouse before they are shipped to stores. This is to ensure they have the correct characteristics and meet any applicable legal requirements.

6 Detriment and gain

6.1 The FTA requires traders to follow minimum safety standards for products that may expose members of the public to particular risk.

6.2 The Notice is designed to protect consumers from the risk of serious burns or other injury associated with the use of a particularly risky good, hot water bottles. The provision of instructions dictating the use of these goods is instrumental in preventing the risk of misuse and the likelihood of hot water burns.

6.3 Similarly, the purpose of the Nightwear Standard is to prevent, or reduce the risk of, injury; specifically the risk of burn injuries to children. The Nightwear Standard adopted in 2016 is the most recent in a long history of product safety standards relating to the safety of children's nightwear; with legislative requirements for the sale of children's nightwear being in place in some form since 1977. The Nightwear Standard sets out the form and location of labelling so that fire hazard information is apparent to prospective purchasers and acts as an ongoing reminder for users throughout the life of the product to keep appropriate fire safety front of mind.

6.4 While there were no injuries reported as a result of the offending the conduct nonetheless undermined the objectives of the FTA to protect consumers. The reduced prominence of the fire hazard labels meant it was less likely that parents and caregivers would be cognisant of the potential fire hazard risks associated with the product at the time of purchase and throughout the lifetime of the product's use. These considerations take on even greater importance where the effected class of consumer are children.

6.5 BB & B's conduct exposed over 25,000 purchasers of the non-compliant products to this enhanced risk.

7 Defendant's history

7.1 BB & B has not previously been prosecuted for breaching the FTA.

Schedule 1 – Images relating to purchase of the Hot Water Bottles


HUSH
HOT WATER BOTTLE


Schedule 2 – Images of the Pyjama Sets in Thorndon Quay store

Schedule 3 – Images of the Pyjama Sets purchased by the Commission