EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2022-004-008104
[2025] NZDC 29789

COMMERCE COMMISSION

v

BRAND DEVELOPERS LIMITED

Hearing:	12 May 2025 – 16 May 2025 19 May 2025 – 23 May 2025 26, 29 and 30 May 2025
Appearances:	N Flanagan, J Barry, K Haszard, O Kazmierow for the Prosecutor L McEntegart, A Steel, M Ropati for the Defendant
Judgment:	12 December 2025

RESERVED DECISION OF JUDGE B L SELLARS KC

Introduction

[1] The defendant Brand Developers Limited (BDL) (trading as "TV Shop") sells a wide variety of products direct to consumers either through its call centres located in New Zealand and overseas or from its physical store in Avondale, Auckland. Examples in this case ranged from air fryers through to treadmills and skin care devices. BDL is a substantial organisation which in the financial year ending 31 March 2020 calculated a total revenue for sales to consumers in New Zealand of approximately $48,208,000 (excluding intercompany sales and international sales).

[2] The Commerce Commission alleges that BDL repeatedly and systematically misled its customers by breaching ss 10, 13(e) and 13(i) of the Fair Trading Act 1986 (FTA).[1] In contrast, BDL says that it cares deeply about its customers and treats them with the utmost care and respect. It considers that all charges it faces are either wrong in law and/or fundamentally misconceived and/or grossly overstated.

[3] The Commission says that this case involves conduct which disadvantaged and misled consumers in three distinct ways, which in their particular context, have not previously been considered by a New Zealand court. These are in relation to:

(a) Online reviews of BDL's products.

(b) Representations about the Consumer Guarantees Act 1993 (CGA), and, in particular, representations about refunds under the CGA.

(c) The use of "free", "bonus" and "special" offers in advertising its product the Air Roaster Pro.

General principles

Onus of proof

[4] The starting point is the presumption of innocence.[2] I must treat BDL as innocent until the Commerce Commission has proven its guilt. The presumption of

[1] These charges span the period between 18 November 2017 to 22 September 2021.
[2] *R v Wanhalla* [2007] 2 NZLR 573 (CA) at [49] (affirmed in *Hendriks v R* [2018] NZSC 98 at [6], and

innocence means that BDL did not have to give or call any evidence and does not have to establish its innocence.

[5] On all issues the Commission carries the burden of proof. The Commission must prove each element beyond reasonable doubt. That is a very high standard of proof, and it requires the Commission to have made me sure each element is proved.

[6] A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of BDL after I have given careful and impartial consideration to all of the evidence.[3]

[7] If, after careful and impartial consideration of the evidence, I am sure that BDL is guilty, I must find it guilty. On the other hand, if I am not sure BDL is not guilty, I must find it not guilty.

Separate charges

[8] I must determine each charge on the basis of the evidence that relates to that charge. I must consider each charge separately and come to a separate decision on each. The fact that I have reached a view about one charge does not mean that the same conclusion should follow in respect of the other charge.

Defendant giving evidence

[9] BDL chose to call evidence. It did not have to do so. The fact that BDL has called evidence does not change who must prove the allegations. The question remains the same; has the Commission proven that BDL is guilty beyond reasonable doubt.

Evidence

[10] I come to my verdicts solely upon the evidence that was before me in Court. It is for me to decide what evidence I accept and reject.

---

the New Zealand Bill of Rights Act 1990, s 25(c)).
[3] *R v Wanhalla,* above n 2, at [49].

Inferences

[11] It is necessary in this case to draw inferences. Any inferences I draw must be conclusions following logically from facts that I accept are reliably established. It is not permissible to guess or speculate.

Demeanour

[12] I remind myself that simply observing witnesses and watching their demeanour as they give evidence is not by itself a good way to assess whether their evidence is true or false. Ultimately it is a matter for me what I make of the evidence. I must look at a witness's evidence in the context of all the evidence in the case.

General Approach – Fair Trading Act 1986

[13] The FTA is aimed at the protection of consumers and promotion of fair competition. It pursues a trading environment in which consumer interests are protected, businesses compete effectively, and consumers in businesses participate confidently.[4] The FTA's primary driver is consumer protection through fair dealing.[5]

[14] As was explained when its purposes were inserted:[6]

> The FTA's purposes reflect the policy underpinning consumer law that consumers individually, and the economy as a whole, benefit from consumers making effective purchasing choices from a range of competing offers. In order to make effective choices, consumers and businesses need to have access to both good and accurate information and to be able to make their decisions without undue pressure or duress. Protections against unfair conduct also enable honest suppliers to compete on a level playing field. When products and services do not live up to the expectations set for them by the information provided by the seller, consumers can hold the seller to account.

[15] To this end, the FTA prohibits certain unfair conduct and practices in relation to trade, promotes fair conduct and practices in relation to trade, provides for the disclosure of consumer information relating to the supply of goods and services, and

---

[4] Fair Trading Act 1986, s 1A(1); and *Commerce Commission v Steel & Tube Holdings Ltd* (2020) 15 TCLR 743 (CA) at [90].

[5] *Hamid v England* (2011) 12 NZCPR 844 (HC) at [83].

[6] Consumer Law Reform Bill 2011 (287—1) (explanatory note). Those purposes were later amended to "highlight the importance of consumer protection": see Consumer Law Reform Bill 2011 (287—2) (commentary).

promotes safety in respect of goods and services.[7] The offences with which BDL is charged fall under the part of the FTA concerning unfair conduct, with s 10 directed at misleading and deceptive conduct and s 13 directed at false representations.

[16] The FTA is a hybrid statute, creating both civil remedies and criminal offences. If there should be ambiguity in the statute then, in general, the Courts will endeavour to give a purposive meaning to the ambiguous provision.[8]

Strict liability

[17] All charges faced by BDL (under ss 10 and 13 of the FTA) are offences of strict liability.[9] There is therefore no requirement on the Commission to prove that BDL had an intention to mislead.[10]

[18] In *Sound Plus Ltd v Commerce Commission* Anderson J observed:[11]

> It is plain to my mind that the offences created by sections 10, 13(g) and 13(i) of the Fair Trading Act 1986 are offences of strict liability. The whole concept of the Act from its long title throughout its components is plainly directed to regulating conduct in the interest of public welfare. Specific defences are provided by s 44. These specific defences are clearly analogous to the defence recognised at common law in relation to public welfare regulatory offences. There can be no doubt, in my view, that these are offences of strict liability.

[19] An offence under ss 10 and 13 is committed if a person makes a representation which is false or misleading, irrespective of whether the representor knows that a misrepresentation is involved or intends to make a representation.[12]

[20] Given the statutory policy in relation to ss 10 and 13 is one of strict liability, subject to the specific defences provided by s 44, correction of a misleading representation at or before the point of sale does not alter the fact that a misleading representation has been made.[13]

---

[7] Fair Trading Act, s 1A(2).
[8] *Adair v Commerce Commission* (1994) 6 TCLR 126, (1995) 5 NZBLC 103,615 (HC) at 131 [*Adair*].
[9] *Fastlane Autos Ltd v Commerce Commission* [2004] 3 NZLR 513 (HC) at [16] [*Fastlane Autos*]; referring to *Sound Plus Ltd v Commerce Commission* [1991] 3 NZLR 329 (HC) [*Sound Plus*]; and *Adair*, above n 8.
[10] *Commerce Commission v Vodafone NZ Ltd* DC Auckland 27 September 2011.
[11] *Sound Plus,* above n 9, at 333.
[12] *Fastlane Autos,* above n 9, at [16].
[13] *Fastlane Autos,* above n 9, at [17]; citing *Commerce Commission v Noel Leeming Ltd* HC

[21] In *Fastlane Autos Ltd v Commerce Commission,* Randerson J cited *Marcol Manufacturers Ltd v Commerce Commission* as authority for the proposition that in cases under s 13:[14]

> a) The offence is committed if a person makes a representation which is false or misleading, irrespective of whether the representor knows that a misrepresentation is involved or intends to make a representation;
>
> b) The question whether a representation is false or misleading is to be judged objectively. It is not a question of whether someone has actually been misled, although proof of that may well be helpful for an informant;
>
> c) The representation may be by words or conduct; the essence is that the representor must be communicating a statement of fact to the representee whether directly or by clear and necessary implication.

[22] Once the Court is satisfied, this being a point of law, that the material in question is capable of being seen as a representation and capable of being regarded as misleading, then it is entirely a question of fact as to whether a misleading representation has in all the circumstances been made.[15]

Common elements of the charges

[23] For the Commission to prove these charges, it must establish beyond reasonable doubt a number of elements. The following elements are common to all charges:

(a) BDL is a person within the meaning of the FTA

It is not in dispute that BDL was and is a body corporate.[16]

(b) BDL was in trade within the meaning of the FTA

It is not in dispute that BDL was and is a retail company in the trade, business, industry, profession, activity of commerce relating to the supply of goods. At the time of all relevant conduct, BDL was engaged

---

Christchurch AP139/96, 21 August 1996.

[14] *Fastlane Autos Ltd,* above n 9, at [16]; referring to *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC) at 506 – 508 [*Marcol Manufacturers*].

[15] *Marcol Manufacturers*, above n 14, at 507 – 508.

[16] Agreed Facts.

in the business of supplying goods to consumers through its websites, phone sales, and showroom;[17]

(c) BDL made the representations at issue

Section 45(2) of the FTA deals with when conduct by servants or agents will be deemed to have been engaged in also by the body corporate. It provides:

> **45 Conduct by servants or agents**
>
> (2) Any conduct engaged in on behalf of a body corporate—
>
> (a) by a director, servant, or agent of the body corporate, acting within the scope of that person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

I accept the proposition that for the purposes of the FTA the concept of agency has wider scope than under the law of contract.[18]

The facts are largely not at issue in this case (save for some exceptions discussed below). In the main BDL accepts that it made the representations at issue.

False or misleading representations

[24] All of the charges before the Court concern alleged false or misleading representations. I must consider:

(a) What amounts to a "representation"?

---

[17] Agreed Facts.
[18] See *Commerce Commission v Vero Insurance Ltd* [2007] DCR 115 at [56].

(b) What amounts to a "false" or "misleading" representation?

(c) To whom is the representation to be assessed as being misleading or deceptive?

"Representation"

[25] A representation is different from conduct:[19]

> The word 'representation' is not defined in the Fair Trading Act 1986 and must therefore be given its ordinary and natural meaning. A distinction must be drawn between the making of a representation for the purposes of s 13 and engaging in conduct, which is the concept with which ss 9 to 12 are concerned. The making of a representation although a species of conduct is of course a narrower concept than conduct generally.
>
> The Halsbury definition was adopted by the Judge below and has also been adopted in parallel Australian cases — see for example *Given v Pryor* (1979) 24 ALR 442, 446: 2 ATPR 18, 107 per Franki J. Halsbury says at para 1005:
>
> > 'A representation is a statement made by a representor to a representee and relating by way of affirmation, denial, description or otherwise to a matter of fact. The statement may be oral or in writing or arise by implication from words or conduct.

[26] As explained in *Marcol Manufacturers Ltd v Commerce Commission*:[20]

> The essence of a representation for present purposes is that the representor must be saying something to the representee either by words (whether spoken or written) or other means. The representee may of course be a specific person or group of persons or indeed persons generally such as shoppers who may come into a particular shop. The representor must be communicating a statement of fact to the representee either directly or by clear and necessary implication. It will usually be convenient to consider whether a representation has been made alongside the question of the subject-matter of the representation.

"False or misleading"

[27] Whether a representation was false or misleading is a question of fact. To fall within the FTA, a representation must be misleading and not merely confusing. In *Marcol Manufacturers,* Tipping J observed:[21]

---

[19] *Marcol Manufacturers*, above n 14, at 505.
[20] At 506.
[21] At 508.

> A representation will be misleading if it leads the mind of the representee into error … the question whether a representation is misleading is to be judged objectively. It is not a question whether someone has actually been misled, although proof of that may well be helpful for an informant. The question for the Court is whether the mind of the representee, in the present case the average New Zealand shopper, would be misled.

[28] The Court of Appeal in *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* clarified "who is the consumer?" The Court assessed case law across Australia and New Zealand and concluded:[22]

> [43] We see no real divergence in the way all these cases have answered the question "who is the consumer?". All the formulations seem to us to encompass most of the public, where the representation is made to the public at large, or most of the consumers in any class specifically targeted. Many of the cases refer, almost interchangeably, to the "average" or "ordinary" or "reasonable" member(s) of the public or the class. … As we observed in [26], we think Tipping J used the word "average" as synonymous with typical, not in its mathematical sense. The same, we think, applies to the other cases. Because of the potential for confusion, "average" is a term best avoided.
>
> …
>
> [50] We reiterate our response to the question "who is the consumer?". "The consumer" encompasses all the consumers in the class targeted by the allegedly misleading representations, except the outliers …. Or, if the representations are made to the public at large, it is all the public except the outliers.

[29] "The consumer" comprises all the consumers in the class targeted except the outliers; that being those consumers who are "unusually stupid or ill equipped, or those whose reactions are extreme or fanciful."[23]

[30] Whether a representation is misleading must be determined objectively. The fact some consumers have been misled is not conclusive.

[31] It is unnecessary to show any particular person has been led into error by the false or misleading statement, or that any person has been misled or deceived.[24] Nor is it necessary to prove the representee would undoubtedly be misled, so long as the

---

[22] *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] 3 NZLR 611 (CA) at [42] and [50] [*Godfrey Hirst NZ Ltd*]; referring to *Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12, (2000) 202 CLR 45 [*Campomar*]; and *Marcol Manufacturers*, above n 14.

[23] *Godfrey Hirst NZ Ltd*, above n 22, at [20]; endorsing *Adair*, above n 8; and *Unilever New Zealand Ltd v Cerebos Gregg's Ltd* (1994) 6 TCLR 187 (CA) at 193.

[24] *Taylor Bros Ltd v Taylors Textile Services (Auckland) Ltd* [1988] 2 NZLR 1 (HC) [*Taylor Bros*]; and *Commerce Commission v Amark Publishing (NZ) Ltd* (1989) 3 TCLR 567 (DC).

representation can be said beyond reasonable doubt to be such as might well mislead the representee.[25] It need only be proved that a representation had the chance or possibility of misleading them.[26]

[32] In *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd,* the Court of Appeal set out guiding principles to assist the courts in determining whether representations are false or misleading:[27]

(a) *Overall impression*: it is the "dominant message" or "general thrust" of the advertisement that is of crucial importance.[28]

(b) *Wrong only to analyse separate effect of each representation*: as a corollary from (a), when assessing the mental impression on consumers created by a number of representations in a single advertisement, it is insufficient only to analyse the separate effect of each representation.[29] The overall impression cannot be assessed by analysing each separate representation in isolation.

(c) *Qualifying information sufficiently prominent?:* whether headline representations are misleading or deceptive depends on whether the qualifications to them have been sufficiently drawn to the attention of targeted consumers.[30] This includes consideration of:

(i) the proximity of the qualifying information;[31]

(ii) the prominence of the qualifying information;[32] and

(iii) whether the qualifying information is sufficiently instructive to nullify the risk that the headline claim might mislead or deceive.[33]

---

[25] *Marcol Manufacturers*, above n 14, at 508.
[26] *Fair Trading* (Thomson Reuters, online looseleaf ed) at FT13.03(3).
[27] *Godfrey Hirst NZ Ltd,* above n 22.
[28] *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54, (2013) 304 ALR 186 at [45], [51] and [52] [*ACCC v TPG]*; *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 3, (2003) ATPR 41—908 at [28] [*ACCC v Signature Security*].
[29] *ACCC v TPG,* above n 28, at [52], citing *Arnison v Smith* (1889) 41 Ch D 348 (CA) at 369; *Gould v Vaggelas* [1985] HCA 75, (1985) 157 CLR 215 at 252. *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199 and 210—11 [*Puxu* (High Court)].
[30] *ACCC v Signature Security*, above n 28, at [25].
[31] *ACCC v Signature Security*, above n 28, at [26], citing *George Weston Foods Ltd v Goodman Fielder Ltd* [2000] FCA 1632, (2000) 49 IPR 553 at [46].
[32] *ACCC v Signature Security*, above n 28, at [27]; *National Exchange Pty Ltd v Australian Securities and Investment Commission* [2004] FCAFC 90, (2004) 49 ACSR 369 at [51]—[52] [*National Exchange v ASIC*].
[33] *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289, (2003) ATPR 41-971 at [35]—[41]; and *Energizer.NZ Ltd v Panasonic New Zealand Ltd* HC Auckland CIV-2009-404-4087, 16 November 2009 at [81].

(d) *Glaring disparity*: where the disparity between the headline representation and the information qualifying it is great, it is necessary for the maker of the statement to draw the consumer's attention to the true position in the clearest possible way.[34]

(e) *Tendency to lure consumers into error:* applying principles (a) to (d), **the question for the court is whether the advertisement viewed as a whole has a tendency to entice consumers into "the marketing web" by an erroneous belief engendered by the advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded**.[35] Enticing consumers into "the marketing web" includes, for example, attracting them into premises selling the advertiser's product. **Once a prospective customer has entered, he or she will often be more likely to buy. The misleading advertising would then have contributed to any sale.** It must follow that rival traders would also have been prejudiced, although protecting them is not the aim of ss 9 and 13.[36] That consumers could be expected to understand fully the limitations of the warranties by the time they actually purchased a carpet is no answer to the question whether the advertisement was misleading.

[emphasis added]

Evidence of consumer experience

[33] BDL is critical of the fact that the Commission has not tendered any evidence of customer surveys for these charges.

[34] The appropriate approach to the assessment of evidence in support of an alleged breach of ss 9, 11 and 13 of the FTA was considered in *Commerce Commission v Viagogo AG.*[37]

[35] In that case the defendant was critical of the fact that the Commission had not called any consumers to give evidence of their experience of the website which was the subject of the charges or to state that they believed they had been misled in any

---

[34] *National Exchange v ASIC*, above n 32, at [55], [58] and [62]; *ACCC v Signature Security*, above n 28, at [27].

[35] *ACCC v TPG*, above n 28, at [50], citing *Trade Practices Commission v Optus Communications Pty Ltd* (1996) 64 FCR 326 (FCA) at 338—9; *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* [1999] FCA 1821, (1999) 169 ALR 1 at [51]; *Australian Competition and Consumer Commission v Commonwealth Bank of Australia* [2003] FCA 1129, (2003) 133 FCR 149 at [47]; and *Bridge Stockbrokers Ltd v Bridges* (1984) 4 FCR 460 (FCAFC) at 475.

[36] *Trust Bank Auckland v ASB Ltd* [1989] 3 NZLR 385 (CA) at 389; *Commerce Commission v Noel Leeming Ltd* HC Christchurch AP196/96, 21 August 1996 at 4—5; *Zennith Publishing Ltd v Commerce Commission* HC Auckland AP139/98, 20 November 1998 at 11—12*; Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (FCAFC) at 197—199; *Commerce Commission v ABC Motor Group* [2005] DCR 262 (DC) at [10].

[37] *Commerce Commission v Viagogo AG* [2024] NZHC 713 [*Viagogo]*.

particular matter. Neither was there evidence of a "survey" of consumers to support its allegations. The Commission's submission was that evidence from a particular consumer or groups of them is not required to prove a case under this Part of the FTA (and therefore under these provisions of the FTA). That submission was accepted by the Court, and the Court explained:[38]

> Evidence that someone was actually misled or deceived may be given weight. The presence or absence of such evidence is relevant to an evaluation of all the circumstances relating to the impugned conduct. Where the conduct and representations are to the public generally and concern a body of simple direct advertising, the absence of individuals saying they were misled may not be of great significance. There was no such evidence here. The ACCC was criticised for that. That criticism is unfounded. The objective assessment of advertising using ordinary English words in an attempt to persuade can be undertaken without the lengthening of a trial by the bringing of witnesses of indeterminate numbers. Language, especially advertising, seeking to raise intuitive senses and associations, can have its ambiguities and subtleties. The task of evaluating the objective character and meaning of the language in the minds of reasonable members of the public is not necessarily one that will be assisted in any cost-effective manner by calling members of the public. The question is one for the court: *Taco Co of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202.

Charges 1-3 – Online review conduct – staff reviews

[36] The Commission alleges that BDL breached s 13(e) of the FTA by instructing staff to post online consumer reviews about its products and services on BDL's own product websites (Charge 1),[39] the ProductReview website (Charge 2),[40] and Google (Charge 3).[41] Each charge is representative.

Does the impugned conduct fall within s 13(e)?

[37] Section 13(e) of the FTA provides:

> **13 Misleading conduct in relation to services**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

[38] At [25].
[39] Between 14 June 2019 and 7 October 2020.
[40] Between 7 June 2019 and 28 September 2020.
[41] Between 21 May 2019 and 7 October 2020.

(e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits.

[38] In relation to this set of charges the Commission must establish beyond reasonable doubt that the representations at issue were:

(a) *In connection with the supply or possible supply, or the promotion by any means, of goods*;

This element of the offence does not appear to be in dispute. The phrase "promotion by any means" is wide. It is clear from the face of the email evidence that the posting of reviews was in connection with the promotion of goods. For instance, in an email the then CEO Scott Mitchell wrote "it gives us a really good head start for sales if we have reviews for the products right from the start."[42]

(b) *The representations were that the goods had certain sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; and*

(c) *The representations were false or misleading.*

[39] BDL submits in relation to these charges that the Commission cannot prove that the representations were that the goods had certain sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits.

[40] BDL submits that the charges must fail because, as a matter of law, a consumer review does not constitute an "approval" or "endorsement" within s 13(e) FTA.

[41] Both parties refer to the consideration given to the meaning of "approval" in *McDonalds System of Australia Pty Ltd v McWilliams Wines Pty Ltd (No. 2)*.[43] There, the Federal Court of Australia found that the most appropriate dictionary meanings of

[42] BOD 20, p 334.
[43] *McDonalds System of Australia Pty Ltd v McWilliams Wines Pty Ltd* [1979] 41 FLR 436 at 448.

"approve" were, "to confirm authoritatively; to sanction; to pronounce to be good; command."

[42] BDL submits that s 13(e) envisages authoritative approvals coming from a source of authority rather than a testimonial from another consumer and extends that interpretation to the meaning of "endorsement".

[43] BDL supplements its argument that a customer review cannot amount to an approval or endorsement by referring to the fact that whilst the Australian consumer legislation has been amended to include reference to "a testimonial by any person" the FTA has not been similarly amended.

[44] Further, BDL refers to the specific regulatory regime recently introduced in the United Kingdom to address online reviews.

[45] BDL submits that an online customer review or testimonial does not constitute an approval or endorsement that falls within s 13(e) of the FTA. Instead, it argues that the section is intended to address formal approvals or endorsements coming from certifications or authorities.

[46] The definitions from the New Zealand Oxford Dictionary provide that to 'approve' is to "give or have a favourable opinion", and 'approval' as the act of approving.[44] The NZ Oxford Dictionary defines 'endorse' as "Declare one's approval of" and endorsement, in turn, as "A recommendation of a product which can be cited in advertising material".[45]

[47] On a natural construction of the language of the section, I do not accept that BDL's proposition is correct, nor do I consider that such a restrictive interpretation of the FTA would be consistent with the public welfare aim of the legislation to protect consumer rights. Rather, I accept that the impugned conduct could fall within s 13(e) of the FTA.

---

[44] Tony Deverson and Graeme Kennedy *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 48.
[45] At 354.

Expert evidence

[48] Each party called evidence from a marketing expert to provide academic expert opinion on the charges. They provided their views as to how consumers would likely experience, interpret and be influenced by the material containing the alleged misrepresentations.

[49] I remind myself that in assessing the expert evidence and opinions, I must have regard to their qualifications and experience. However, this is not a trial by expert. It is for me to decide how much weight or importance to attach to their opinions, or whether I accept those opinions at all, in the context of all the evidence I have heard.

Relevance

[50] There was a divergence of opinion between the experts on various matters (such as the importance and influence of online reviews).

[51] As the Court stated in *Viagogo AG:*[46]

> Ultimately, however, as both parties accepted, this is not a case that turns on the expert evidence. The facts – what was said, how many times, when and so on – are not in dispute. The issue is whether what was said and how it was said breached the FTA.

[52] While many aspects of the expert evidence provided helpful background and context, much of it was of limited direct relevance given the approach to be taken, i.e. this is an offence of strict liability and the applicable test is objective.

How/why were BDL staff reviews posted?

[53] It is not in dispute, and it is clear from the documentary evidence that BDL staff posted reviews on BDL's websites, on ProductReview.com.au (an Australian based third-party review website) and on Google.com. In those reviews the staff did not disclose their affiliation to BDL.

---

[46] *Viagogo,* above n 37, at [54].

[54] BDL accepts that it asked members of its staff to post "genuine" reviews about products that they had used. It accepts that it did not require those staff to disclose their connection to BDL in their reviews. It relies upon the evidence of [redacted employee A] (called by the Commission) and Alan Meier (called by BDL).

[55] BDL does not accept that it systematically "instructed" staff to post reviews in the way alleged but, nevertheless, accepts that staff were encouraged to post reviews. The Commission produced multiple BDL internal emails. It submits that the documentary evidence indicates that BDL's instructions to staff in relation to posting reviews on the three websites were:[47]

(a) sent to large groups of staff;

(b) sent to overseas staff or contractors in Australia, India and the Philippines;

(c) demonstrate awareness by the executive, specifically Paul Meier, and managerial direction of the staff review practices;

(d) were followed up on to ensure the reviews were completed;

(e) did not use "optional" language;

(f) explicitly or implicitly sought positive reviews;

(g) suggested that reviews would assist the business and boost sales;

(h) suggested that increasing views on one web medium would assist with increasing reviews on another web medium;

(i) suggested that staff were actioning the requests to leave reviews;

[47] Commission's closing submissions dated 29 May 2025, at para 4.6 and Appendix B.

(j) suggested that reviews left by staff had or could have a material impact on the overall staff ratings;

(k) suggested that staff were rewarded for leaving reviews;

(l) explicitly did not require staff to have used the product, or were silent as to whether they must have used it before they could leave a review;

(m) requested family and friends to also leave reviews;

(n) directed staff to circumvent posting restrictions and the terms and conditions of review websites designed to prevent fake reviews being uploaded;

(o) never mentioned or required staff to disclose their affiliation with BDL.

[56] I have considered carefully the emails and agree with this analysis save for the following qualifications:

(a) Against this background, BDL was also putting in place a process to increase the posting of customer reviews on the ProductReview website.

(b) In some emails there is reference to using the product, for instance "If you've tried the Thin Lizzy."[48] and "for those who have tried it."[49] However, there are multiple examples of no such qualification and in some emails staff are randomly assigned products for review which tends to imply no such requirement.[50]

[48] BOD 20, p 405: "Thin Lizzy 57AA Reviews" email.
[49] BOD 20, p 399: "Thin Lizzy Xcellerate 35" email.
[50] For example: BOD 20, p 378.

Number and nature of staff reviews

[57] Whilst there is some dispute between the parties about the overall number of online reviews that are attributable to BDL employees or associates, BDL's own investigation indicated that there were 288 staff reviews on BDL's own websites.

[58] The Commission submits that staff-posted reviews were numerous and relies upon its data review which identified at least 376 staff reviews, of which at least 259 staff reviews were located online in relation to BDL's websites. In relation to ProductReview the Commission located at least 60 staff reviews and in relation to Google, the Commission located at least 59 staff reviews.

[59] I accept that the number of staff who posted positive reviews is likely to be greater than those indicated by the data because of the following deficiencies in the information available to the Commission:

(a) The Commission was not provided with a staff list from the international teams (who were instructed to leave reviews and indicated they had done so).

(b) The Commission had no means to identify family and friends of employees (whom staff were encouraged to enlist).

(c) For ProductReview and Google the Commission did not have access to any underlying data to identify the true name, email address or IP address of the review writer.

(d) Many users on all three platforms used pseudonyms.

(e) The Commission could not be certain of personal email addresses of BDL employees (the evidence indicates there was a practice of requesting that reviews be made through personal email addresses).

[60] Whilst the number of staff reviews available to the Commission was limited, the average star ratings from those reviews indicates that staff reviews were positive:

(a) BDL's websites - of the 376 reviews identified the average star rating was 4.82 stars.

(b) ProductReview – 44 reviews for BDL's products identified had an average rating of 4.86 stars, and 16 reviews for TV Shop had an average rating of 4.87 stars.

(c) Google – 26 reviews for BDL had an average star rating of 4.92 stars, and the 11 TV Shop reviews had an average rating of 4.81 stars.

Does this conduct amount to the making of a representation by BDL?

[61] BDL accepts that it encouraged employees to post reviews. The Commission asserts that it instructed employees to do so. The wording of emails about the posting of staff reviews differs and whilst some might be characterised as an invitation to assist BDL by posting a review others are very specific and directional, for instance "Everyone has to leave a review… Make sure this is done."[51]

[62] The context in which the messages were sent is important. They were sent from managers to subordinates about undertaking tasks that related to their work. [Redacted employee B] considered he was obliged to leave reviews, [redacted employee C] said she did so because she had been asked.

[63] In addition, there is reference to staff receiving "ad hoc points" for leaving reviews. These were a system for measuring staff productivity.

[64] [Redacted employee C] said that staff who did not leave reviews would receive follow up emails and texts reminding them to do so.

[65] There is no suggestion that any of the reviews were written at the staff member's own initiative. They were all at BDL's behest.

[51] BOD 24, p 741.

[66] I find that the posting by BDL staff of reviews in these circumstances amounts to the making of a representation by BDL.

Staff reviews – misleading representations?

[67] An approval or endorsement under s 13(e) need not be express. It can be implicit.[52] The Commission submits that it is implicit that a customer review comes from an actual customer independent of the product supplier.

[68] The Federal Court of Australia considered analogous conduct in *ACCC v Service Seeking Pty Ltd,* in respect of a system of generating online reviews known as "Fast Feedback".[53]

[69] Service Seeking is a website that connects customers with tradespeople. Under the Fast Feedback System, a registered business could click a button to "Get Fast Feedback" and select from pre-defined options (job completed "on time", "on budget", "to a professional standard", or "with good communication") as well as rate itself out of five stars. An email was then generated and sent to the email address provided for the customer of that job, who could click "I agree" or "I'll write my own review". If the customer agreed, the review would be published on that business' profile on the website. If they wrote their own personalised review, that would be published instead.

[70] However, if the customer did not reply within 72 to 96 hours of receiving the email or had not otherwise notified Service Seeking they disputed the review, then the review and star rating compiled by the business would be posted automatically - regardless of whether the customer had even opened the email. Approximately 80 per cent of the automatically generated reviews through this feature were published by default rather than because the customer clicked 'I agree'.[54]

[71] The Court explained the effect of this system:[55]

---

[52] See *New Zealand Olympic & Commonwealth Games Association v Telecom NZ Ltd* (1996) 7 TCLR 167 (HC) at 173.
[53] *Australian Competition and Consumer Commission v Service Seeking Pty Ltd* [2020] FCA 1040 [*ACCC v Service Seeking*].
[54] At [16].
[55] At [28] and [29]; referring to *ACCC v TPG*, above n 28, at [47] and *Campomar*, above n 22, at [105].

> 28 … many of the persons likely to have viewed the Fast Feedback – prospective customers looking for tradespersons or other service providers – are likely to have fallen somewhere between a customer considering substantial purchase 'in the calm of the showroom' and a person encountering 'an unbidden intrusion on the consciousness' in the form of (say) a television advertisement: … Someone looking for a business to fix a faulty light switch, for example, may well be interested in the content of the reviews, but could be expected to skim many of them rather than read them all closely.
>
> 29 In all that context, a statement, for example, that 'Axolot1 Electrical reported the job was completed on time, on budget, to a professional standard and with good communication' is liable to convey that those are the views of the customer. The question is whether that misconception is properly to be attributed to ordinary or reasonable members of the class of users of the website … Perhaps some reasonable users would read the statement carefully and understand it as only conveying the view of the business about its own performance. But I do not consider that users who did not read the statement carefully and understood it as representing the actual views of actual customers either reacted in an extreme or fanciful way (see *Campomar* at [105]), or failed to take reasonable care of their own interests (see *ACCC v TPG* at [30]).

[72] It was agreed by the parties as a fact that the Fast Feedback Reviews published on the website comprised representations by the defendant that purported to be testimonials by customers who had used the services of businesses on the website and relating to the services of those businesses. It was further agreed that Service Seeking's posting of reviews was misleading or deceptive, or involved the making of false representations, because its conduct had the effect of conveying a false impression to consumers that the number of favourable reviews of businesses by customers on the website, and the overall star rating which customers gave to businesses, was higher than was the case. These also constituted the making of representations under s 29(1)(e) because on each occasion Service Seeking published a review, it "made a statement, *at least by implication,* that a real customer had expressed the opinion recorded in the review, and so given a testimonial."[56]

[73] Lastly, the parties in *Service Seeking* also agreed that the conduct was liable to harm because it deprived consumers visiting the website of the opportunity to accurately compare services provided by those business on the website and select one on a fully and properly informed basis.[57] It influenced consumers to select a business

[56] *ACCC v Service Seeking*, above n 53, at [35].
[57] *ACCC v Service Seeking,* above n 53, at [37].

which they would not otherwise have selected because the business had more reviews, more favourable reviews and/or a higher star rating that it otherwise would have. It also unfairly disadvantaged businesses whose profiles only contained genuine reviews, and had created a similar disadvantage to businesses not registered on the website.

[74] Although the methodology of posting reviews (or testimonials) was different in *Service Seeking*, as in the instant case, the end result was that reviews written by the company were posted and it was agreed that they amounted to representations by the defendant that purported to be reviews from genuine customers.

[75] I heard evidence from three BDL staff members who had posted reviews, many of which are included in the evidence:

(a) [Redacted employee B] posted reviews for products he had never used.

(b) [Redacted employee C] posted reviews that included a false positive review about a product that she had used in training but did not like.

(c) [Redacted employee A] wrote reviews about Thin Lizzy products that she had used and liked.

[76] Many of the reviews indicated in their wording that the product had been purchased by the reviewer and used by them. BDL submits that its staff were familiar with its products and well-placed to write about them and suggests that the reviews were "genuine." However, the Commission's case is not about whether the staff reviews were "genuine" in the sense that they reflect a staff member's actual use and actual opinion of a product.

[77] The Commission submits that a review written by a staff member, even if it is truthful, without disclosure of their connection to BDL, is misleading per se because consumers expect reviews to come from their peers – i.e. actual consumers.

[78] This submission is supported by the expert evidence:

(a) Professor Lang stated that consumers tend to assume that reviews are written by independent peers, unless given a reason to believe otherwise, who have paid for and used the product as intended.[58] He defined peers as consumers "not involved in a conflict of interest situation."[59]

(b) Professor Steven accepted that as a baseline consumers expect reviews are not written by the company itself, but by consumers.[60]

[79] I find the posting of undisclosed staff reviews amounts to a representation that goods had certain approval or endorsement i.e. that the review was an approval or endorsement from an independent consumer (or a "real shopper"). This representation had a tendency to lead consumers into error because the reviews had not been written by independent consumers but by BDL staff members who were encouraged or instructed to do so in the context of working for a company which valued achieving high star ratings for its products.

[80] I turn to consider the evidence in relation to each website.

Charge 1 – BDL's websites

Facts

[81] BDL operates a number of websites.[61] Its primary website is www.tvshop.co.nz. Its other websites refer to particular products, for instance www.thinlizzy.co.nz, www.bambillo.co.nz and www.instachill.co.nz.

[82] BDL's websites displayed customer reviews. Reviews could be uploaded to one BDL website and syndicated to other BDL websites that featured the relevant product.

[58] Lang BOE dated 11 May 2025, at para 6.4(d); and NOE p 10.
[59] NOE p 46.
[60] NOE p 135.
[61] Agreed facts, at para 1.2.

[83] Professor Lang considered screenshots of reviews on BDL's websites and analysed them. That analysis was produced in evidence. In addition to his analysis, screen captures of the websites are included in many BDL emails that related to staff reviews. I note from that evidence that the Thin Lizzy website featured a box showing reviews with the heading "THESE ARE REAL REVIEWS FROM REAL SHOPPERS" and a menu that included "Real Customer reviews"[62] The InstaChill Evaporative Air Cooler (the InstaChill) website review box had the same heading "THESE ARE REAL REVIEWS FROM REAL SHOPPERS."[63]

[84] BDL previously used a provider called Power Reviews to facilitate its website review process. In January 2019 it changed providers to a third-party review platform provider called Yotpo. As part of the process BDL obtained previous review data from Power Review and provided it to Yotpo to upload.

[85] When a customer wished to review a product they could either visit the relevant BDL website to leave a review or would be sent an automatic request by email to leave a review through Yotpo. The email requested a star rating and comments. Yotpo would then allow BDL to moderate the customer's resubmitted review, which included the ability to withhold it entirely from publication.

[86] On Yotpo a reviewer could receive a label of "verified buyer" or "verified reviewer" or no label at all:

(a) "Verified reviewer" was accorded where a reviewer had confirmed their email address or social network.

(b) It was unclear to me from the evidence exactly how the "verified buyer" label worked. Mr Meier's evidence was that it was related to order numbers.[64]

[87] The Commission alleges that over the period 14 June 2019 to 7 October 2020. BDL instructed staff to post reviews on BDL's websites about various BDL products

[62] BOD 20, p 347.
[63] BOD 20, p 383.
[64] NOE pp 563 – 564.

and about services provided by TV Shop. Those instructions came in different forms including by email, over the phone and in person and that acting on those instructions, BDL staff posted positive reviews on BDL's websites about its products and the services provided by TV Shop, without disclosing their affiliation to BDL or that the reviews were posted under instruction to do so. The Commission relies upon the documentary evidence and the evidence of [redacted employee C].

[88] The email bundle that the Commission describes "as relating to posting reviews on BDL websites" indicates that during this time BDL was very focused upon increasing reviews and the star ratings for its products. This related to its own websites and also to ProductReview and Google seller ratings as well as the online presence of BDL's products in general. For instance, Jerry Jacob BDL's General Manager of DRTV Sales writes to other management on 27 June 2019: [65]

> "What we really need is our website which is just above it,[66] to show the stars like we have for sunshine and transforma ladders."

[89] Another email records "Scott has expressed that one goal for Thin Lizzy at the moment is to boost our overall review rating for Thin Lizzy as a brand on the website …" Detailed instructions then follow in this email about how to post a review on thinlizzy.co.nz and how emails can be posted by staff to avoid being "flagged by Google" by using a private email and not being connected to the BDL WiFi but "can be completed at work using 3G."[67]

[90] It is clear from this email, and others like it,[68] that BDL wanted its staff to post reviews on its websites as part of a strategy to obtain as many online reviews as possible. The emails contain phrases such as "needing" to reach a number of reviews and are expressed with a sense of some urgency. It is implicit from the context of the instructions about reviews (a desire to increase star ratings) that they should be positive.

---

[65] BOD 20, p 325
[66] This appears to be a reference to ProductReview.
[67] BOD 203, p 52 at para 381.
[68] For instance BOD 20, p 379

[91] In addition to obtaining staff reviews the emails indicate that BDL was trying to increase posted reviews in a number of ways that included populating ProductReview with reviews already available to BDL[69] and by obtaining reviews from customer whilst they were on the telephone.[70] This appears to have been occurring alongside the push for staff reviews.

[92] The evidence of the former BDL employees called by the Commission was consistent with the documentary evidence.

[93] [Redacted employee C] was employed by BDL in the customer service team between September 2019 and December 2020. She posted four reviews on BDL's websites (three four-star reviews and one five-star). She stated that the reviews were required to be left from home to avoid tracking.[71] [Redacted employee C] posted her reviews under the name "Rhythm."

[94] [Redacted employee A] was employed by BDL as a social media coordinator between April 2019 and April 2021. She worked primarily with the Thin Lizzy brand. She wrote 17 five-star reviews using her nickname and personal email address for BDL's website. The Commission was able to locate 15 of those reviews on the website.

[95] [Redacted employee A] was requested to write reviews both by email and verbally. The requests often asked her not to use her full name and not to use work internet or devices to do so.[72]

Were the representations false and misleading?

[96] BDL submits that:

> The real issue for the Court is whether the Commission has proven, beyond reasonable doubt, that the reviews complained of individually, or somehow collectively, amounted to misleading representations to typical consumers that BDL had "approvals" or "endorsements."

---

[69] See for instance BOD 20 p 328.
[70] BOD 20, p 313.
[71] [Redacted employee C] BOE dated 10 March 2025, at para 8.3.
[72] [Redacted employee A] BOE dated 31 October 2024, at para 12.

[97] Some reviews on the BDL websites were tagged "verified buyer" and some "verified reviewer." BDL submits that because BDL's websites display both verified and unverified reviews side-by-side, reasonable consumers would not assume that unverified reviews come from actual purchasers. Rather, BDL submits, they would distinguish between the two categories and treat unverified reviews with greater scepticism, recognising that such reviews lack the credibility that verified buyer status provides (and indeed may not represent the experience of independent consumers at all).

[98] First, I note that it is not the "reasonable" consumer that I must consider but the class of consumers targeted by BDL, except the outliers. BDL targeted a wide range of consumers through its television and internet advertising.

[99] Second, I do not accept that a consumer would make a differentiation to the extent that they would essentially disregard reviews that were not tagged "verified buyer," particularly given that many of the staff reviews were tagged "verified reviewer." BDL appears to argue that the reviews would not have been persuasive without such a tag but the issue is not whether the reviews had an effect upon the consumer's purchasing decision. It is whether they were objectively false or misleading.

[100] BDL also focuses upon the overall number of staff reviews in comparison to the total number of all reviews and how they might have displayed at any given time and submits that because of this low visibility they could not have had any real effect and do not amount to misleading representations. This contrasts with the views of BDL's marketing teams at the time who appeared highly focussed upon the posting of staff reviews and considered that staff reviews had the ability to effect overall star ratings of products.

[101] As set out above, I accept that not all staff-posted reviews were identified by the Commission. In my view the relevance of the number of reviews in this context is to demonstrate that the posting of undisclosed staff reviews was not an anomaly but the result of concerted effort by BDL.

[102] The issue is whether a consumer would have considered that the reviews, tagged or not, were reviews that came from an independent consumer. I consider that by definition they would have approached them on that basis.

[103] I further note that many of the staff reviews are detailed and written from the point of view of a consumer who had bought a product and was using it regularly. In addition, I note the reference on BDL websites to "real reviews from real shoppers" that underlines the nature of this misrepresentation.

[104] I accept Professor Lang's conclusion:[73]

> "It is my professional opinion that the conduct of BDL in allowing or encouraging employees to write positive reviews without disclosure is almost guaranteed to have misled consumers. The arguments presented by Professor Stephen do not, in my view, negate the extremely likely harm of that conduct. Instead, the evidence indicates that consumers place trust in online reviews and use them in decision-making; therefore, inserting false positive reviews, even a few, violates that trust and can influence consumer behaviour."

[105] I find it proven beyond reasonable doubt that BDL made false and misleading representations by causing its staff to post undisclosed staff reviews on its websites.

Charge 2 – ProductReview

[106] ProductReview is an Australian based website that publishes reviews about many different types of products and services. Its purpose is to make reviews available so that consumers can compare products and services. It has run promotions to incentivise consumers to post reviews by offering them grocery vouchers.

[107] It does not require reviewers to verify their purchase of a product. Companies such as BDL pay a fee for membership to ProductReview's brand management platform and are notified when a review is posted. BDL has no ability to modify reviews on ProductReview but may reply to them. Professor Lang observed that BDL engaged (i.e. posted a response) with a quarter of the staff reviews, underlining the impression that they were genuine consumer reviews.

---

[73] Lang BOE dated 11 May 2025, at para 13.3.

[108] The rules of ProductReview specify:[74]

> **Affiliation to the listing**
>
> Don't review a listing if you are affiliated with it or were affiliated with it in the past. This includes past or present employees, family and friends of employees. Please read our fake submissions policy and don't risk your listing being penalised.
>
> …
>
> **Review verification and requests for additional information**
>
> Out content team may run checks at their discretion to confirm if a reviewer has used the product or service they are reviewing. As part of these efforts, some members will need to provide additional information to confirm that they have purchased a product or are a customer of the service they are reviewing.

[109] BDL emails to staff often included specific instructions as to how to post reviews to avoid any link with BDL being disclosed to avoid rejection of staff reviews (for instance by posting reviews at home on personal devices).[75] The Commerce Commission identified 60 nondisclosed BDL staff reviews on ProductReview. [Redacted employee B] was employed as a customer service representative for BDL from July 2019 – December 2020, he and [redacted employee C] both posted reviews on the site.

[110] The screenshots for [redacted employee C]'s reviews (posted as "Rhythm") include a detail listed as "Incentivised Review – No."[76]

[111] [Redacted employee B] detailed how he was asked numerous times to post reviews on ProductReview through multiple communication channels and mainly through BDL managers. Not all of the reviews that he posted were located by the Commission on ProductReview. BDL is critical of the evidence of [redacted employee B] and [redacted employee C], submitting that their recollections are unreliable and that the circumstances of [redacted employee B]'s departure from its employment draw his credibility into question. I do not accept that criticism of either ex-employee

[74] Commission supplementary BOD 2, p 15.
[75] See for example BOD 20, pp 384-385 and 392; and BOD 24, pp 616, 619 and 632.2.
[76] BOD 29, pp 962 and 964.

is founded properly. Their evidence is consistent with the emails sent to staff in evidence before me and the reviews that were posted.

[112] BDL is critical of the ProductReview website because it does not verify purchases and because of the incentives it might offer for reviewers to post reviews. BDL suggests that it is not a trustworthy site and given the small number of staff posted reviews on the site they are not misleading because they would have had a negligible effect. The documentary evidence indicates that BDL considered ProductReviews's fees excessive and that they were aggrieved about how the listing process worked for their products which often had different brand names and websites. This was confirmed by Mr Meier in evidence. Despite that criticism, it is clear from the emails that BDL clearly considered that participation and visibility on ProductReview was important for its products, as were star ratings.[77]

[113] BDL produced a table which was a document used by customer service to collect customer service reviews. [78] On its face the table is problematic – it is unclear whether reviews are being collected about a particular product or service and the apparent star rating often does not accord with the recorded narration. None of the staff reviews produced by the Commission in evidence can be identified on the table.

[114] I accept that there was a practice in place at the relevant time for staff to collect customer reviews in this way, whilst noting that neither [redacted employee B] nor [redacted employee C] were aware of it. However, I do not accept that this practice relates to the undisclosed staff reviews produced in evidence.

[115] The identified staff reviews on ProductReview were positive with an average star rating of 4.86 stars.

[116] I find it proven beyond reasonable doubt that by having undisclosed staff reviews abouts its products posted, BDL made a false and misleading representation that it had the endorsement of ordinary, independent consumers.

---

[77] See for example BOD 2, p 691.
[78] Exhibit E

Charge 3 – Google

[117] The Commission identified approximately 45 instructions to staff to post reviews on Google about BDL and the TV Shop's "As Seen on TV Showroom." They were dated between May 2019 and July 2020.

[118] 59 staff reviews posted on Google were produced in evidence:

(a) 48 relate to BDL as a company. 22 of them were written about employees' experience working at BDL. 26 reviews did not disclose their affiliation with BDL. The average star rating of all the staff reviews was 4.92 stars against an average rating for BDL of 3.3 stars.

(b) 11 of the reviews related to the showroom. None of those were disclosed. They had an average rating of 4.81 against an average overall rating of 2.6 stars.

[119] The number of reviews is low, however, Professor Lang concluded that whilst they represented a non-trivial and smaller number, they were a bigger share of the reviews.

[120] BDL submits that "only the unusually stupid would accord any weight to 5 - star reviews when the aggregate score in large print is bigger that the individual rating." This misses the point that it is not about the star rating and effect that may have had on the targeted consumer, rather, it is about what those consumers would have thought about the source of the undisclosed staff reviews. They would have expected that they came from genuine independent peers. They would not have expected them to have been written by the company itself. I therefore find this charge proven beyond reasonable doubt.

Charge 4 – Online review conduct – withholding negative reviews

[121] Charge 4 engages section 10 of the FTA which provides:

10 Misleading conduct in relation to goods

> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of goods.

[122] For the Commission to prove this charge, it must establish beyond reasonable doubt the following elements:

(a) *BDL is a person within the meaning of the FTA;*[79]

(b) *BDL was in trade within the meaning of the FTA;*[80]

(c) *BDL engaged in conduct;*

BDL accepts that it engaged in the relevant conduct – that it moderated reviews.

(d) *that was liable to mislead the public; and*

Liable means something less than likelihood or probability. The concept invokes a "possibility of doing something, … a concept less than likelihood or probability". [81] That it will mislead the mind of the representee must be "a real possibility and not merely a possibility that could only be described as remote or far-fetched".[82]

As suggested by Anderson J in *Sound Plus*, the question of whether something is liable to mislead the public could equally be posited as "looking at the issue sensibly, could the conduct mislead the public?"[83]

In *Commerce Commission v Bachcare Ltd,* the defendant pleaded guilty to engaging in conduct liable to mislead the public in relation to services by artificially inflating review through the non-publication of 940 low or middling reviews on its website, and by editing 198 reviews

---

[79] See above at [23(a)] of this judgment.
[80] See above at [23(b)] of this judgment.
[81] *Sound Plus,* above n 9, at 332.
[82] *Commerce Commission v Pacific Dunlop Holdings (NZ) Ltd* DC Christchurch CRN 6009006902, 17 March 1997 at 10-11.
[83] *Sound Plus,* above n 9, at 333.

(without the writer's awareness) to remove negative comments.[84] This was said to be "liable to mislead" the public because it "created an artificially positive impression of the customer ratings of the relevant properties" and "compromised the integrity of the reviews".[85]

(e) *that conduct was in relation to the nature, characteristics and/or suitability for a purpose of goods.*

The above words are to be construed in their natural and ordinary meaning, and not to be read down by reference to other provisions of the legislation or reference to the general law of intellectual property.[86] The "obvious consumer orientation" of the FTA may leave room for the application of a purposive reading.[87]

As explained in *Commerce Commission v New Zealand Nutritionals (2004) Ltd*:[88]

> [53] The definitions of nature and character in this context overlap. "Nature" is relevantly defined in the Oxford online dictionary as the inherent or essential quality or constitution of a thing, the inherent and inseparable combination of properties giving any object its fundamental character. "Characteristics" is relevantly defined as that which serves to identify or to indicate the essential quality or nature of a thing.

In *Bachcare*, this encompassed the impression of the affected properties marketed on its website for hire.[89]

[123] The Commission alleges that between 18 November 2017 and 11 November 2020 BDL engaged in conduct liable to mislead the public as to the nature, characteristics and/or suitability for a purpose of the goods offered for sale by BDL by moderating and withholding low-rated reviews, such that "a more positive impression

---

[84] *Commerce Commission v Bachcare* [2019] NZDC 25483 [*Bachcare*].
[85] At [22].
[86] *Taylor Bros,* above n 24, at 27.
[87] *Taylor Bros*, above n 24, at 27. See Legislation Act 2019, s 10.
[88] *Commerce Commission v New Zealand Nutritionals (2004) Ltd* [2016] NZHC 832 at [53]
[89] *Bachcare*, above n 84, at [9].

of their products was presented to prospective customers than it otherwise would have."

[124] BDL submits that in order to demonstrate that BDL's moderation process created a misleading impression the Commission needed to prove that the published reviews materially misrepresented consumer sentiment.

[125] The Commission did not undertake a statistical analysis of the reviews to consider the effect of moderation. BDL submits that the Commission has therefore not proven that the moderation process was liable to mislead.

Evidence

[126] BDL was able to moderate and withhold reviews left on its own websites.

[127] BDL moderated reviews that awarded three stars or less to its products. If the customer did not respond the review was not published. This practice occurred between 18 November 2017 and 11 November 2020.

[128] When BDL contacted consumers who had left such a review it did not say that if they did not respond their review would not be published, nor did it reveal this practice to those who left reviews or read reviews.

[129] At interview BDL explained to the Commission that it was concerned that published reviews should be helpful and that a customer was using a product properly.

[130] The Commission produced an email between BDL's CEO and General Marketing Manager from January 2021 which indicated that from 2020/2021 BDL received 1,600 1 and 2 star reviews stated as 11 per cent of total reviews.[90]

[131] BDL provided the Commission with information for the period 1 January 2019 and 1 April 2021 about reviews which Mr Gale compiled in the following table in his evidence:[91]

---

[90] BOD 224, p 1764.
[91] Gale BOE dated 29 April 2025, at para 7.3.

	Total number of reviews in relevant period	Reviews where additional information was requested (%)
1 Star	5,430	786 (14.5%)
2 Star	2,413	346 (14.3%)
3 Star	3,897	336 (8.6%)
4 Star	6,975	59 (0.8%)
5 Star	30,132	48 (0.2%)

[132] Over the charge period the moderation practice changed. In January 2020 BDL's Philippines' team was trained on the review process and advised in a PowerPoint presentation under "IMPORTANT NOTES:"[92]

> 3 Star reviews – publish all
>
> 2 Star reviews – publish just 1, the rest should be private
>
> 1 star review – publish just 1, the rest should be private

[133] This was reiterated in a training session on 31 January 2020.

[134] On 12 February the Philippines team was instructed to publish and comment upon 4 and 5 star reviews, to publish limited numbers of 3 star reviews and to not publish 1 and 2 star reviews.[93]

[135] By 23 April 2020 there was a backlog of reviews and on 15 June 2020 the original PowerPoint was presented to the team.

[92] BOD 36, p 1197.
[93] BOD 16, p 173; and BOD 39, p 1206.

[136] BDL provided figures to the Commission that came through Yotpo and there appears to be some accuracy with the data.

[137] Mr Gale's review and recollection of the data that migrated from ProductReview to Yotpo indicated that over 80 per cent of 1 and 2 star reviews were not published over the period 2015 – 2019. The Commission submits this is indicative of the effect of the policy.

[138] Notwithstanding issues with the accuracy of the available data, I accept that the evidence establishes that BDL's moderation practices led to a significant number of negative reviews not being published.

[139] I accept that it is difficult to quantify the effect of the practice upon star rating however, it must obviously have had a positive (i.e. upwards) effect upon average ratings over this period of time.

[140] Aside from the issue of star ratings both experts accepted that reviews may have an extremely important influence on customers' buying decisions.[94]

[141] I accept Professor Lang's opinion that "BDL's review omission systematically lowered the availability of negative information about its products to consumers."[95]

[142] Whilst there was disagreement between the experts as to the impact of negative reviews upon consumer behaviour, it is clear from the evidence that BDL was concerned about them and considered that they were adverse to sales.

[143] I further accept that targeted consumers would have "assumed and understood that all reviews were published and that the webpage containing reviews was a fair representation of the feedback BDL had received from consumers."[96]

---

[94] NOE p 165.
[95] Lang BOE dated 24 May 2024 at para 14.9(f).
[96] Lang BOE dated 24 May 2024 at para 14.10.

Conclusion Charge 4

[144] I find it established beyond reasonable doubt that BDL's moderation policy was liable to mislead consumers as to the nature or characteristics of BDL's products because consumers considering the reviews on BDL websites were not advised of the policy and would have assumed and understood that all reviews were published. The absence of lower starred and or negative reviews gave an incorrect positively inflated impression of the goods and implied a lack of negative reviews.

Charges 5-9, 12 and 13 – Representations in relation to the return of goods

[145] The Commission says that BDL, as a matter of policy, would not honour the rights of consumers under the CGA by:

(a) refusing to provide a refund in the case of a product that was faulty or did not perform as advertised; and

(b) by not paying for return shipping or other such costs when this occurred.

[146] The Commission submits that this policy is evidenced from BDL's internal policy documents and that it was reflected in practice as demonstrated by the evidence of the customers called by the Commission.

[147] The Commission submits that what occurred with these customers was BDL's usual practice, consistent with its policy and not unsanctioned behaviour from "rogue" BDL employees.

[148] BDL submits that:

(a) As a matter of law the charges in this category are unsustainable because the representations in question do not fall within the ambit of the FTA.

(b) If that submission is not accepted, BDL submits that it did not represent that the customers concerned lacked any *available* CGA or FTA rights.

(c) In any event, in relation to the specific customer interactions relied upon by the Commission, BDL says that it did not represent that those customers "lacked any *available* CGA, or FTA, rights."

Determination of available rights?

[149] BDL submits that in order to determine what representations were made the Court must ascertain what rights, as a matter of fact, were available to each customer and what precisely was said to each customer.

[150] However, the Commission's case does not focus upon whether any of these consumers were, in the particular circumstances of their case, actually entitled to return their product and receive a refund. It is about what was said to them about the availability of remedies in the context of their general consumer rights. The facts about why they sought to return their purchases is the background context of the misrepresentations alleged by the Commission, not the focus of the charges.

[151] The evidence before me includes key telephone conversations and transcripts, I accept that it is important to consider what was said to each customer, however, given the allegations, I do not accept that I must determine exactly what rights were actually available to each customer.

[152] BDL appears (and is, of course, entitled) to take the view that the complaints made by these customers are unfounded because its products work effectively and as advertised, but that is a separate issue from what BDL communicated to each customer about the rights afforded to them by the CGA. Despite the fact that most of the customers eventually received refunds, BDL does not accept they were entitled to them.

[153] The alleged misrepresentations relied upon by the Commission are in relation to each customer's general consumer rights rather than what specifically applied to them. In other words, this case is about what BDL represented to its customers about the trading environment in which the customers had purchased goods and, in particular, how general rights under the CGA interacted with specific terms of BDL's sales, namely the money-back guarantee and the 30-day risk-free trial.

Money-back guarantee and risk-free trial

[154] BDL offers a "30 Day Money Back Guarantee" (MBG) on almost all of its products. This enables a customer to return a product within 30 days of receiving the product for no reason so long as they have complied with BDL's returns policy. If the product is returned under the MBG, the consumer is refunded the purchase price, excluding postage and handling costs and, if the product has been damaged, refurbishment costs.

[155] BDL also separately offers a risk-free trial on some of its products.

[156] The MBG and risk-free trial, if applicable to a particular purchase, operate separately to any applicable manufacturer's warranty that the product comes with.

BDL Documents

[157] The Commission produced BDL operational documents that had been provided to it by BDL. They are BDL's "Standard Operating procedures in relation to "Faulty Products and Components", "RMA – Replacement"[97] and "RMA – Refund." [98]

[158] The "RMA – Faulty Products and Components" document sets out a step-by-step guide for BDL staff to follow. It relevantly provides:[99]

> **USER ERROR –** If the consultant determines that the product or component are not performing correctly due to an error on the part of the customer:
>
> 4. Offer the customer the option to purchase a replacement part or a complete product at a discounted rate (the discount will be between 25% and 50% at Manager discretion).
>
> 5. If the customer agrees, create a new order, update the notes and close the callback.
>
> 6. If the customer does not wish to proceed, update the notes and close the callback.
>
> **FAULTY PRODUCT** – If the issue is determined to be the result of a faulty product:
>
> 7. Check that the product is still within its warranty period.

---

[98] BOD 43, 44 and 45.
[99] BOD 43, pp 1216–1217.

a) If not, follow **steps 4 to 7** above

b) If the product is within warranty, follow **steps 9 to 16** below

8. Check the **Inventory > Stock** screen in SOS.

9. If the product is not available, advise the customer when it will be in stock.

10. If the product is available, confirm which courier was used to ship out the original product. If the faulty product was a free gift with a larger or higher value item, it may need to be returned via an alternative courier. See a **Team Leader** for clarification.

11. Advise the customer that the faulty product will need to come back to us before the replacement product can be shipped out.

    NOTE: Refund request can be considered if the faulty is considered major (Product Quality Investigation to be requested).

12. Ask the customer to confirm their current address.

13. Follow **SOP RMA Replacement or SOP RMA Refund** to raise an RMA number to link the product being returned to the appropriate customer account.

14. If the customer is still within their trial period for the product, advise them that a new trial will start once they receive the replacement product and add a note to the account **AND** if the customer is on a payment plan, recast payments for 60 days.

15. Update notes on file.

16. Defer the callback into the Courier Ticket Queue or Pickup Queue.

[159] There is no reference in this operating procedure to the option of refund for faulty product.

[160] Similarly, the "RMA – Replacement" procedure document states:[100]

> **PRODUCT FAULTY** – As long as the product is still within the warranty, if something goes wrong that affects its usage, we will request that the customer returns the product to us and we will replace it for a new one OR service the product for the customer. The faulty product must be received by our warehouse before the replacement can be shipped.

[100] BOD 44, p 1219.

[161] However, the "RMA – Refund" document does make reference to refunds in exceptional circumstances, including "If the product is faulty and customer has requested full refund instead of replacement/repair."[101]

[162] BDL produced copies of its "limited warranty statement" applicable to these products.[102] For each of the products the statements provide:

> **LIMITED REPLACEMENT WARRANTY STATEMENT**
>
> If your product becomes defective due to faulty material or workmanship within a period of 10 years from the date of purchase, we warrant to do the following:
>
> - **For New Zealand Consumers**: We will replace the product with a new product, free of charge, or repair the product at our cost, at our discretion.
>
> - **For Australian Consumers**: Our goods come with guarantees that cannot be excluded under the Australian Consumer law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replace if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

[163] BDL also produced an internal policy document for staff reference that was available via BDL's SharePoint server that states:[103]

> **<u>30 Day Money Back Guarantee</u>**
>
> **It means we guarantee that the Product …**
> Can be returned within 30 days for a full refund of the purchase price, for any reason, no questions asked.
>
> **1 Year Warranty (or other stated period e.g. Lifetime Warranty)**
>
> **This is in keeping with the Consumer Guarantees Act.**
>
> **It means we guarantee that the product will …**
>
> Be of acceptable quality (free from workmanship defects or transit damage).
>
> Fit the description given in our advertising and packaging.
>
> Be legally sold by Brand Developers.

---

[101] BOD 45, p 1228.
[102] Exhibit M.
[103] Exhibit N.

> **Note: This Warranty is subject to further conditions outlined in the Warranty Statement included with product. It does not replace but is in addition to the customer's statutory rights.**
>
> **The 1-year Warranty is NOT a money-back guarantee.**
>
> **The decision regarding an item being defective under the Warranty rests solely with the distributor, who will repair or replace the item at their discretion.**

[164] The Commission submits it is apparent on the face of the above documents that, as a matter of both policy and practice, BDL would not give customers refunds for products that did not work as advertised. It took the view that the only applicable right was its 30-day MBG (although even then it requires that the consumer pay return shipping, in breach of the CGA). The Commission say the internal policy document produced by BDL makes that explicit. It provides only for a refund of the purchase price within thirty days, and only under the terms of the MBG. It does not mention consumers have a right to their money back and goes further by suggesting the only options are repair or replacement.

[165] The Commission submits this policy and practice was codified in BDL's internal policies for faulty goods, which set out apparently mandatory steps with no room for an alternative process, and which makes no provision for staff to allow or approve a refund.[104] This is reinforced by the terms of BDL's warranty statements which refer to Australian consumer law, but not the materially equivalent rights of New Zealanders.

[166] The Commission acknowledges that BDL's policies provide for refunds in one instance. However, these are only in "exceptional circumstances". Additionally, that guidance is found in a document to be used when processing a refund; it does not set out the eligibility for a refund, nor does it mention the CGA.

[167] The Commission argues that when BDL's policies and guidance were communicated to consumers, it resulted in straightforward breaches of the FTA because it was an inaccurate statement of their rights.

---

[104] BOD 43, pp 1216–1217.

[168] I agree with the Commission's characterisation of these documents.

Section 13 FTA

[169] Section 13(i) of the FTA provides:

> **13 False or misleading representations**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services—
>
> (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993.

[170] For the Commission to prove the charges, it must establish beyond reasonable doubt the following elements:

(a) BDL is a person within the meaning of the FTA;[105]

(b) BDL was in trade within the meaning of the FTA;[106]

(c) BDL made the representations at issue;[107]

(d) the representations were in connection with the supply or possible supply, or the promotion by any means, of goods;

(e) the representations were in relation to the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993; and

(f) the representations were false or misleading.

---

[105] See above at [23(a)] of this judgment.
[106] See above at [23(b)] of this judgment.
[107] See above at [23(c)] of this judgment.

Were the alleged representations made in "connection with the supply of goods" (temporal connection)?

[171] In each of these charges it is alleged that BDL breached s 13(i) of the FTA. That provision provides:

> No person shall, in trade, in connection with the supply of goods…
>
> (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993.

[172] BDL submits that, as a matter of law, the representations relied upon by the Commission were not made "in connection with the supply of goods". It is alleged by BDL that s 13(i) requires a temporal connection between the sale of a product and the claimed misrepresentation as to rights, i.e. that the representation must occur in connection with a "supply".

[173] BDL argues that in respect of all complainants for this group of charges, other than [redacted complainant 1],[108] the supply of goods was completed once the agreement to purchase was complete. Accordingly, it is submitted that any representations made by BDL staff after the relevant consumer had received the product were not made "in connection with the supply of goods".

[174] In support of this proposition counsel referred me to an introductory paragraph from commentary upon the FTA:[109]

> The wording 'no person shall, in trade', is familiar wording from previous sections, and will be interpreted consistently with these. 'In connection with' makes it clear that the section is not concerned with false or misleading representations per se; there must be a 'connection' between the representation and the supply or promotion. This does not require a direct causal link, **but will operate to prevent representations made after the supply or promotion from being in breach of s 13.**
>
> [emphasis added]

---

[108] Charge 5.
[109] Debra Wilson, *Fair Trading Act Handbook* (LexisNexis, Wellington, 2018) at [9.3].

[175] On its face this appears to support the defence proposition, however no authority is referred to by the author and case law touching upon the subject indicates its fallacy. When this proposition is considered with respect to the allegations, it would mean that a supplier could deliberately mislead a consumer about their rights if they tried to enforce those rights after the supply of a product (which would be the expected time that such a need arose).

[176] This would defeat the purposes of the FTA and the CGA, which are identical and share the same core purpose:[110]

> **1A Purpose**
>
> (1) The purpose of this Act is to contribute to a trading environment in which—
>
> (a) the interests of consumers are protected; and
>
> (b) businesses compete effectively; and
>
> (c) consumers and businesses participate confidently.

[177] Each Act contributes to the core purpose in a different way. To achieve this purpose, the FTA:[111]

> (a) prohibits certain unfair conduct and practices in relation to trade; and
>
> (b) promotes fair conduct and practices in relation to trade; and
>
> (c) provides for the disclosure of consumer information relating to the supply of goods and services; and
>
> (d) promotes safety in respect of goods and services.

[178] To that same end, the CGA provides that consumers have:

> (a) certain guarantees when acquiring goods or services from a supplier, including—
>
> (i) that the goods are reasonably safe and fit for purpose and are otherwise of an acceptable quality; and
>
> (ii) that the services are carried out with reasonable care and skill; and

[110] Fair Trading Act, s 1A(1); and Consumer Guarantees Act, s 1A(1).
[111] Fair Trading Act, s 1A(2).

(b) certain rights of redress against suppliers and manufacturers if goods or services fail to comply with a guarantee.

[179] Relevantly, in relation to the issue of supply, the CGA provides as follows:[112]

> **2 Interpretation**
>
> (1) In this Act, unless the context otherwise requires,—
>
> **supply,--**
>
> (a) in relation to goods, means supply (or resupply by way of gift, sale, exchange, lease, hire, or hire purchase;
>
> …
>
> (2) In any case where it is necessary under this Act to determine the time at which a guarantee in this Act commences to apply,--
>
> (a) goods shall be treated as supplied at the time when the consumer acquires the right to possess the goods;
>
> …
>
> (3) However, despite subsection (2), a guarantee under section 6 applies to the goods delivered to the consumer on and from the time at which the consumer receives the goods.
>
> [emphasis added]

[180] Section 6 of the CGA provides a guarantee as to acceptable quality. It is this section of the CGA that is of relevance to the charges.

[181] These sections of the CGA specify that the term "supply" does not apply in the strict temporal sense contended for by BDL in relation s 6 of the CGA.

[182] In the course of submissions Mr McEntegart referred to the case of *Budget Loans Limited v Commerce Commission.*[113] That case does not support the proposition advanced by the defence.

[183] Whilst that case concerned the supply of services rather than a product, the same reasoning applies. The Court states:[114]

---

[112] Consumer Guarantees Act, s 1A(2).
[113] *Budget Loans Limited v Commerce Commission* [2017] NZHC 695.
[114] At [81].

> The temporal and causal distinction alleged by *Budget* is strained in my view. The original supply of credit **was not an isolated event which can be hived off from the terms and conditions upon which that supply was made.** The advance of the principal sum, the collection of interest and fees on that sum, and the enforcement of the loan agreement (and subsequent judgment debt) were **interlinked activities which existed on a continuum**. The provision of credit was always subject to the terms and conditions upon which the advance was made, and in that sense was ongoing. Similarly, the enforcement of a judgment debt is directly connected to the underlying loan agreement which is the subject of that judgment and the terms and conditions upon which the credit was provided. Clearly the enforcement of the terms upon which the advance of credit was made was in "connection" with the supply of that credit.
>
> [emphasis added]

[184] In *Foodtown Supermarkets Ltd v Commerce Commission* the Court considered the decision of the trial Judge stating:[115]

> With the qualification that will be referred to hereafter, the basic argument of the appellant outlined above was put to the trial Judge but rejected. He held that the word "supply" was qualified by the preceding words "in connection with" which had the effect of modifying the word supply so as to broaden its application. The phrase "in connection with" means with reference to, or related, and thereby used in the section includes conduct at a different point in time from the conclusion of the contract at the checkout.

[185] Whilst that case involved conduct prior to conclusion of the supply the same reasoning must apply.

[186] This case concerns the enforcement of the rights obtained by a consumer upon the purchase of goods. The CGA provides that consumers have certain guarantees when acquiring goods and certain rights of redress if the goods fail to comply with a guarantee. Those rights of redress are obtained in connection with the acquisition, or supply, of the goods.

[187] It is relevant then that s 13(i) makes specific reference to the CGA so as "to avoid doubt" and the section was amended in 2013 to make it clear that the prohibition in that paragraph includes the condition, warrant guarantee, right, or remedy under the CGA.[116] Additionally, the Acts are explicitly linked by their shared common purpose. When enacting s 13(i), Parliament must have envisaged that misleading representations as to a consumer's rights under the CGA would be made temporally

---

[115] *Foodtown Supermarkets Ltd v Commerce Commission* [1991] 1 NZLR 466 (HC).
[116] Fair Trading Amendment Bill 2013 (287-1) (explanatory note).

after the supply has occurred. Otherwise, the protection for consumers offered by s 13(i) would be artificially constrained.

[188] I find that as a matter of law the alleged representations subject of Charges 6, 7, 8, 9, 12 and 13 were made in connection with the supply of goods.

Charge 5 – [redacted complainant 1] (Bambillo adjustable massage bed)

[189] Charge 5 alleges that between 5 December 2019 and 24 December 2019, BDL made false and/or misleading representations concerning the existence, exclusion, or effect of any warranty, guarantee, right or remedy in respect of its dealing with [redacted complainant 1] and the Bambillo massage bed received by her.

Did [redacted complainant 1] purchase a trial or a bed?

[190] BDL's argument in respect of the meaning of "supply of goods" is different for this charge. BDL submits that [redacted complainant 1] purchased a risk-free trial rather than a bed and as a result there was no "supply" to her of goods, as defined by the CGA. BDL argues that therefore the s 6 CGA guarantee did not apply to her and, accordingly, no representations were made about the applicability of the CGA.

[191] The Commission accepts that it appears that [redacted complainant 1] purchased a risk-free trial at the same time as she purchased the bed but maintains that she did, in fact, purchase the bed.

Facts

[192] On 26 November 2019 [redacted complainant 1] had a lengthy telephone call with a BDL customer service representative called Sunny which resulted in a Bambillo adjustable massage bed being delivered to her.[117] At that time [redacted complainant 1] was a loyal BDL customer who had previously purchased products from Sunny.

[193] The conversation was convoluted:

[117] BOD 46 and 47.

(a) After discussing various features of the bed, [redacted complainant 1] first decides not to purchase it.[118]

(b) The conversation then turns to the InstaChill and [redacted complainant 1] indicates that that she is "going to have one of those on that trial."[119] Payment is discussed, and [redacted complainant 1] is initially charged $49.98 for the InstaChill deposit.[120]

(c) [Redacted complainant 1] was read BDL's terms of the 30-day money back guarantee and after that "standard verbatim,"[121] there is discussion about free gifts and [redacted complainant 1] is offered other products as well as an extended warranty.

(d) The conversation then returns to the bed and Sunny mentions BDL's campaign for Black Friday and indicates that he will give [redacted complainant 1] the "deal of the century."[122] He then offers her a 40 per cent discount resulting in $4800 off the price of the bed, 15 months interest free payment and free gifts including the InstaChill.

(e) [Redacted complainant 1] appears to accept the offer and Sunny says "congratulations [redacted complainant 1] on purchasing the finest bed on the planet and getting an absolutely amazing offer."[123]

(f) Discussion then follows about payment instalments and usage of the bed.

(g) It is not until the closing stages of the conversation, after [redacted complainant 1] is congratulated on a "great investment" and informed that the 10 year guarantee has been "initiated" that [redacted complainant 1] is told "it is always a company policy to give you a 30

[118] BOD 47, pp 1233-1238.
[119] BOD 47, p 1240, line 40.
[120] BOD 47, p 1244, line 38.
[121] BOD 47, p 1243, line 14.
[122] BOD 47, p 1246, line 16.
[123] BOD 47, page 1247, lines 14-15.

day experience." [Redacted complainant 1] is then read the terms and conditions of that company policy and asked if she agrees.[124]

(h) It is then near the very end of the call that Sunny explains to [redacted complainant 1] that she has been charged $449.98 and that after 30 days are completed there will be 15 monthly payments of $480. She is told that "your risk-free trial of $49.99 all included in the price."[125]

[194] That initial payment is calculated as the risk-free trial of $49.99 and processing and handling of $399.99 but that is not expressly explained during the phone call.

[195] [Redacted complainant 1] was adamant in evidence and throughout her phone calls with BDL that she purchased a bed not just a risk-free trial. However, BDL is critical of [redacted complainant 1]'s recollection of events and suggests that she has misremembered events to avoid paying return shipping costs. I do not accept that proposition is supported by the evidence.

[196] BDL places much reliance upon the invoice that was sent to [redacted complainant 1] after the phone call,[126] and submits that this demonstrates that she did not purchase the bed itself. I disagree.

[197] The invoice lists the items purchased by [redacted complainant 1] and the gifts she received. Those items include the "Bambillo adjustable massage bed base split K" invoiced at $7199.99. The other items listed with a price are the "Perfect Fit Sheets Split King set and the "Risk Free Trial." The invoice does not specify to what product that trial applies. The fact that the bed is listed on the invoice is consistent with [redacted complainant 1] agreeing to purchase the bed. If she had only purchased the risk-free trial, as contended for by BDL there would be no need to include the bed on the invoice.

[124] BOD 47, page 1252, lines 25-44.
[125] BOD 47 page 1255, lines 1-8.
[126] BOD 76.

[198] Numerous other items are listed on the invoice at zero cost, including items that appear to relate to the bed such as the base and mattress along with another sheet set, an InstaChill, and a "Star Laser Light – Ultimate."

[199] [Redacted complainant 1] subsequently received an email from BDL that stated:[127]

> Congratulation on your recent purchase of Bambillo Adjustable Massage bed.
> …
> As this is one of the best investment you have made for a life time …

[200] The statement/tax invoice printed on 13 October 2020 sets out the payment plan that [redacted complainant 1] had agreed upon during the purchase phone call.[128] [Redacted complainant 1] provided her credit card details during the call. Payment #1 is for $449.98 and is listed as paid on 27 November 2019. Thereafter each payment is for the sum of $490 and due on the first day of each month.

[201] The evidence establishes that [redacted complainant 1] bought the bed (as she asserts) as well as the risk-free trial. Had she not sought to return the bed, the instalment payments would simply have been charged automatically with no further action required.

"In connection with the supply"

[202] BDL submits that [redacted complainant 1]'s position is akin to that of the plaintiff in *Rodrigues v ABE Copiers Pty Ltd*.[129] There the Court held that representations (in relation to photocopying machines) were not made in connection with any supply because neither party was contractually bound until the plaintiff had communicated its approval of the machine. The Court considered that "there was no more than the possibility of a lease of the machine."

---

[127] BOD 78, p 1402. The email is dated 12:23 pm 27 November 2019, although the email chain appears to indicate that [redacted complainant 1] may have replied to that email on 26 November 2019 at 13:16.
[128] BOD 83.
[129] *Rodrigues v ABE Copiers Pty Ltd* (1983) ATPR 40-379 (FCA).

[203] In contrast, [redacted complainant 1] had clearly agreed to purchase the bed and agreed upon terms of payment. As she observed, she would not have purchased an extra sheet set (designed specifically for the bed) had she not intended to keep it.

[204] In any event, the Commission submits that on any estimation BDL supplied [redacted complainant 1] with a bed and whether or not she purchased a bed or a risk free trial, the alleged misrepresentations should properly be considered to have been made "in connection with the supply of goods."

[205] I am satisfied beyond reasonable doubt that the representations at issue were made in connection with the supply of goods.

General representations

[206] When [redacted complainant 1] purchased the Bambillo bed she already had an electric bed but she was interested in the Bambillo bed's advertised ability to keep users "warm in winter and cool in summer." She was also concerned about how the split mattresses kept together. It is not those representations or the bed's effectiveness that I must consider. Instead, it is what BDL said to [redacted complainant 1] when she came to the conclusion that the bed was not as advertised and wished to return it.

[207] BDL focusses upon whether [redacted complainant 1]'s complaints about the bed were legitimate and submits that the comments made by BDL to [redacted complainant 1] must be considered in that context. There is much discussion during the phone calls about the substance of [redacted complainant 1]'s complaints about the bed and what she was told about the functioning of the bed. However, at issue is what was said by BDL to [redacted complainant 1] about her consumer rights in general.

[208] A list of [redacted complainant 1]'s calls to BDL in relation to her concerns about the bed and requests to return it is set out in the Agreed Facts. They are numerous and mostly lengthy. [Redacted complainant 1] spoke to a range of staff and was required to repeat her issues on multiple occasions. She became frustrated. There were 12 calls between 3 and 24 December 2019 with the longest being some 61 minutes. Eventually all products were collected from [redacted complainant 1] on 1 January 2020.

[209] [Redacted complainant 1] was concerned from the start that the mattress felt very warm to her and would not be able to keep her cool in summer. At first, she was prepared to try various solutions suggested to her by BDL during her calls but she quickly came to the conclusion that the problem could not be fixed and she felt that she had been misled about the thermo-regulating qualities of the bed and wanted to return it.

[210] [Redacted complainant 1] refers in the calls to the FTA and the Commerce Commission and differentiates between wanting to return the bed due to a change of mind and circumstances where BDL is in breach of the law. She was not prepared to pay return costs because she considered that BDL was at fault.

[211] Relevant exchanges from the telephone calls are:

(a) 19 December 2019 – Telephone call with Sam (a supervisor/manager[130] from the BDL returns team):[131]

> [Redacted complainant 1]: Okay, listen mate, go to the Commerce trading page and watch the videos and read up on The Fair Trading act.
>
> TV Shop: That is fine I mean it is their rules, we have a terms and conditions.

(b) 23 December 2019 – Telephone call with Sam:[132]

> TV Shop: Well if you are, if you aren't 100% satisfied for any reason, and do choose to send it back, that is where we give you the option to return it but we also say that it is your cost and responsibility to return it.
>
> [Redacted complainant 1]: Okay and the Commerce Commission says that any bulky and large items are your cost.
>
> TV Shop: Even though, do they know that you have agreed to those terms and conditions for the return. Did you tell them that?
>
> …

[130] BOD 65, p 1349, lines 13 – 23.
[131] BOD 63, p 1333, line 5.
[132] BOD 65, p 1346, lines 30 - 38

[Redacted complainant 1]: And the law states, the law states Sam, the law states that if, if an item that is being advertised as not fit for purpose, right, so the item that is advertised as not fit for purpose, the customer has the right to return it. Now, for small items the customer can be charged for returning the items but for large and bulky items it is an exception and you guys pay for it.

TV Shop: Are you aware that the Commerce Commission that, they only, they just don't look after us, they also look at other companies as well, I mean they will look at Warehouse, Kmart, whatever the other companies, Noel Leemings, and they have put that document together, it is standard terms and conditions from them, but they are aware

…

TV Shop: No no no just, hang on [redacted complainant 1], let me finish though. What I am trying to get to is that we have a 30 day guarantee period okay. They don't have 30 guarantee period. Warehouse doesn't have it.

[Redacted complainant 1]: Any other company that turned around and said on their box, or their packaging that the item does a certain thing and it does not do that certain thing then the consumer protection act comes in and if it is a large bulky item the company pays for it to be returned.

TV Shop: [redacted complainant 1] there is only a unique feature with our company of the 30 day risk free trial …

[212] I do not accept that Sam appears to be telling [redacted complainant 1] that because she is wrong about the bed's functioning BDL are not required to pay for return of the bed. Instead, these comments indicate that Sam's view was that the terms of the BDL risk-free trial override general consumer protection law.

[213] Later in the call, after [redacted complainant 1] requests to speak to a higher up manager or someone in the legal department, Sam reiterates his position by stating "By law you have agreed to the terms and conditions of the return [redacted complainant 1], so by law you are liable for the return."[133]

[214] [Redacted complainant 1] returns to the advice she has received from the Commerce Commission, stating that "the Trading Act overpowers that refund. 30 day

[133] BOD 65, p 1351, lines 15 – 19.

refund thing", and Sam tells her "but that, that only applies to other companies, not our company because we give you a 30 day trial, that applies to the company".[134]

[215] Sam further says during this call:[135]

> The Fair Trading Act does not apply completely with this company because we have the 30 day trial. It applies to the company that don't have 30 day trial.

[216] When [redacted complainant 1] again raises that "For big bulky items that you guys have to pick them up." Sam says "we have never done that." And then there is the following exchange:[136]

> [Redacted complainant 1]: You can't, you can't turn around and say that the law is for all the other companies except for you. And, and I am sorry Sam
>
> TV Shop: No but there is, there is a, there is a difference. Please also, there is a difference between this company and other companies because other companies don't offer you a risk-free trial. So that is why there is a little bit of difference and the law that applies to us."

[217] When interviewed by the Commission BDL's former CEO Scott Mitchell commented on Sam's statements and said: [137]

> … that's an incorrect statement from an employee at the time, one off person that's made a mistake and what they've said. It's not a systematic response to it at all, it's just unfortunately with large volumes of staff you do occasionally get the odd one that don't say what they're supposed to tell them.

[218] Although, whilst accepting that the comments are "inarticulately expressed", counsel for BDL does not appear to accept that the statements are incorrect per se. Instead, counsel argues that they are responsive to what remedies were actually available to [redacted complainant 1] and were made in an attempt to explain the additional remedies and options offered by BDL in addition to statutory rights.

[219] I do not accept that it is accurate to place that gloss upon these comments. There are numerous instances set out above where Sam refers to consumer rights in

---

[134] BOD 65, p 1352, lines 21 – 32.
[135] BOD 65, p 1353, line 7.
[136] BOD 65, p 1355, lines 6 – 11.
[137] BOD 18, p 234, lines 30 - 33.

general and company policy in general (including stating that BDL has never arranged collection of bulky items).

[220] In addition, the Commission relies upon BDL's internal policy documents referred to above.[138] As mentioned, these documents make plain there were systemic guidance in place at BDL that omitted to refer to the CGA (save one instance) and made no reference to the option of a refund (except in one document and even then only in "exceptional circumstances").

Conclusion – Charge 5

[221] I am satisfied beyond reasonable doubt that BDL made false and/or misleading representations to [redacted complainant 1] advising her about the existence, exclusion, or effect of any warranty, guarantee, right or remedy by:

(a) representing that as a result of the terms of the Risk-Free Trial it was not subject to the FTA, and that therefore the FTA did not apply to [redacted complainant 1]'s case; and

(b) stating that it could not be liable to pay for return shipping of the bed.

[222] These representations concerned the existence, exclusion or effect of [redacted complainant 1]'s rights because they were made in the context of [redacted complainant 1] raising a complaint that the bed did not function as advertised and was therefore not fit for purpose. She made reference to the Commerce Commission and the FTA and stated that she wanted to return the bed, had stopped any further payments and required BDL to arrange collection of the bed.

The Consumer Guarantees Act 1993

[223] These charges also concern customers who purchased products from BDL that did not live up to their expectations and sought to return them as a result. Issue is taken by BDL with the time frames in which return was sought and the defects raised

[138] See above at [157] – [168] of this judgment.

in relation to each product. Focussing upon those points, BDL argues that no misrepresentations were made in relation to the available rights of each customer.

[224] The interaction of BDL's MBG or Risk Free Trial with general consumer law is relevant in relation to each customer. Aside from [redacted complainant 3] (Charge 8) all of these customers sought to return their product after 30 days had elapsed.

[225] Those customers were each cross-examined about the timing of their use of the product and their contact with BDL to return the product. BDL is critical of these customers who did not use and/or express concern with products within a 30-day period. BDL essentially argues that for each of these consumers, 30 days constitutes a "reasonable time" as required by the CGA for the exercise of a right to return goods.

[226] If there is a failure to comply with guarantees in the CGA, and that failure can be remedied, then the consumer may require the supplier to remedy the failure within a reasonable under s 18 of the CGA. That section provides options where goods do not comply with guarantees, including a right to reject goods under s 18(2)(b). The right to reject goods, however, only come into effect if the consumer gives the original supplier the opportunity to remedy the failure and the supplier fails to do so within a reasonable time.[139]

[227] 'Reasonable time' in the CGA is "the period from the time of the supply of the goods in which it would be reasonable to expect the defect to become apparent".[140] This is an objective assessment,[141] and the Court should have regard to:[142]

(a) the type of goods:

(b) the use to which the consumer is likely to put them:

(c) the length of time which it is reasonable for them to be used: and

---

[139] *Acquired Holdings v Turvey* (2008) 8 NZBLC 102,107 (HC) at [14].
[140] Consumer Guarantees Act, s 20(1).
[141] *Nesbit v Porter* [2000] 2 NZLR 465 (CA).
[142] Consumer Guarantees Act, s 20(2).

(d) the amount of use to which it is reasonable to be put before the defect becomes apparent.

[228] In *Nesbit v Porter*, the Court of Appeal set out that the period must be reasonable in relation to the particular defect or combination of defects causing the buyer to reject the goods.[143] A reasonable period of time for exercising the right of rejection will not expire until the consumer is fully aware of the nature of the defect and in a position to determine whether the defect is substantial.[144]

[229] The supplier's actions are also relevant to this assessment, for example, a failure by the supplier to provide for sufficient information as to the nature and extent of a defect.[145]

[230] Section 20 of the CGA applies notwithstanding s 170 of the Contract and Commercial Law Act 2017.[146] Section 170 details the circumstances under which a buyer is deemed to have accepted the goods, including acceptance through the lapse of a reasonable period without the buyer indicating a rejection of the goods.

InstaChill Evaporative Air Cooler

[231] Four of these charges concern customers who purchased an InstaChill machine (or machines) from BDL. All machines came with the 30-day MBG. Some of the customers purchased an extended warranty. They spent between $349 and $979.96 (for 2 units).

[232] For various reasons there was a delay before each customer first used their machine. Each of these customers came to the conclusion that the InstaChill did not work as advertised, namely that it was not an effective cooling device. Some were also concerned by its noisiness. All of them sought to return it after 30 days had expired (between approximately five weeks and nine weeks). They sought to return it not because they had changed their minds or simply because they did not like the

[143] *Nesbit v Porter,* above, at 474.
[144] At 474.
[145] *Cooper v Ashley & Johnson Motors Ltd* [1997] DCR 170, (1996) 7 TCLR 407 (DC).
[146] Consumer Guarantees Act, s 20(3).

product, but because they considered it did not work as advertised/advised by BDL when purchased (and that the advertising, or what they had been told before purchase, was therefore misleading). They considered the InstaChill was not fit for purpose.

[233] All were advised that return was not possible after 30 days, usually on repeated occasions, after each customer tried to resolve their issues. Many were instead provided with advice on how to make the machine function better.

[234] Three of the four customers were eventually able to return their products for a refund.

[235] BDL does not accept that any of these consumers had a valid complaint and submits that any representation made about these customers' rights of refund is legally irrelevant because there was no such right.

[236] BDL submits that any issues with the cooling performance of the InstaChill should have been apparent relatively quickly in normal use and that a reasonable consumer would likely notice inadequate cooling within days or weeks, not months. BDL does not accept that it is legitimate for a consumer to wait for hot weather until using the InstaChill and essentially submits that no more than 30 days constitutes a reasonable time under the CGA.

Charge 6 – [redacted complainant 2] - InstaChill

[237] On 13 December 2019 [redacted complainant 2] purchased an InstaChill from a TV Shop pop up store in a shopping mall.

[238] [Redacted complainant 2] did not use the product immediately (she had purchased it as a Christmas present for herself and partner) but, once she did, it did not live up to expectations. She considered that it was unfit for purpose and contacted BDL on 11 February 2020 about this.

[239] [Redacted complainant 2]'s correspondence with BDL was by email.[147] During these exchanges she seeks to return the InstaChill and requests a refund. BDL advises in the email chain:

(a) "we will not be able to accept the return at this stage as the purchase was made two months ago."[148]

(b) "we will not be able to accept the return as its more than 30 days now and we were never informed anytime during within few days of purchase."[149]

[240] [Redacted complainant 2] makes repeated request to return the InstaChill and makes explicit reference to her rights under consumer law. BDL gives her suggestions on use of the product and offers her a $100 discount.

[241] Eventually, after much insistence and persistence on [redacted complainant 2]'s part, BDL advises [redacted complainant 2] that she may return the product at her own cost "as a goodwill gesture."

[242] BDL argues that there was no explicit, or implicit misrepresentation of [redacted complainant 2]'s **available** rights at any stage and, in any event, she did not exercise her asserted right to reject within a reasonable time within the terms of the CGA.

[243] For the reasons set out above,[150] I do not accept that [redacted complainant 2]'s available rights are relevant. At issue is BDL's representations about her rights in general. The statements made to [redacted complainant 2] are a bald assertion that it cannot accept any return of the machine after 30 days.

[244] [Redacted complainant 2] details why she considers that the InstaChill does not perform as advertised and advises BDL that in her view it does not work as

---

[147] BOD 85
[148] BOD 85, p 1448.
[149] BOD 85, p 1439.
[150] See above at [149] – [153] of this judgment.

advertised. She explicitly states "I have a legal right to return this product in brand new condition and get a refund."[151] In response BDL sends more advice as to how to make the InstaChill function best and reiterates that "we will not be able to accept the return as its more than 30 days now."[152] There is no hint of recognition that the machine could be returned if [redacted complainant 2] is correct, or if the machine is faulty. Instead, BDL focuses upon the 30 day time limit (as provided by the MBG).

[245] Nor do I accept that the time taken by [redacted complainant 2] can objectively be considered unreasonable. There is no obligation upon a consumer to use a product immediately after purchase nor is a consumer obliged to seek to return a product when they first become concerned with its performance. It is also logical and reasonable that until there was hot weather, customers would not be in a position to fully appreciate that the InstaChill was not an effective cooling device.

Conclusion Charge 6

[246] I am satisfied beyond reasonable doubt that BDL made false and/or misleading representations to [redacted complainant 2] about the existence, exclusion, or effect of any warranty, guarantee, right or remedy by advising her that the InstaChill could not be returned after the 30 days of the MBG had expired contrary to the rights afforded to consumers under the CGA.

Charge 7 – Jim Walker – InstaChill

[247] Mr Walker and his wife purchased an InstaChill by telephone from BDL on 29 November 2019 after seeing a television advertisement. He also purchased an extended warranty for the unit.

[248] Mr Walker received the product in early December but did not use it immediately due to cool temperatures where he lived in Ranfurly. When he began using the InstaChill in January he and his wife were disappointed by its cooling ability and noise level. He came to the conclusion that the product did not work as advertised.

---

[151] BOD 85, p 1447.
[152] BOD 85, p 1440.

[249] Mr Walker emailed BDL on 12 February 2020 setting out his concerns. He did not explicitly seek a refund or to return the machine, although his email appears to have been understood by BDL as a return request given its response.[153]

[250] BDL replied that day and advised:[154]

> Please be advised that we only accommodate return request if order is within the 30 day trial period. Hence, we can no longer process a return for the goods.
>
> However, the Instachill 019EX V2 is covered by a 12-month warranty and you have also purchased additional warranty for this as well.

[251] Mr Walker called BDL on 17 February 2020 to pursue the issue and was told that BDL could not accept a return because the product was outside of the trial period.

[252] In September 2020 Mr Walker pursued the matter again and emailed BDL requesting a refund and also a copy of the conditions of the extended warranty which he had purchased with the InstaChill.

[253] In response he did not receive a copy of the requested document and was again advised that BDL was "unable to process your return for refund request due to the item purchased was outside of the 30 days risk free trial on 05/01/2020.[155] Like [redacted complainant 2] he was provided tips on how to make the machine function best.

[254] Mr Walker sought legal advice and lodged a claim with the Disputes Tribunal, which was eventually settled with a refund in January 2021.

[255] BDL submits that Mr Walker's request to return the product was not made within a reasonable time and that no misrepresentation was made to Mr Walker because he had no available right to return the product.

[256] Mr Walker contacted BDL some two and a half months after purchase. Given the cold weather where he lived, there was a delay before Mr Walker had an opportunity to test the machine. He explained how he consulted the manual closely

---

[153] BOD 88, p 1460
[154] BOD 88, p 1459.
[155] BOD 88, p 1463.

to try to get the machine to work as advertised before contacting BDL. I do not accept that the time taken by him was unreasonably lengthy in the circumstances.

[257] BDL unequivocally advised Mr Walker by email that it could not accept a return request after 30 days had expired. The implication was that it could not accept any return request for any reason outside that time period which was contrary to the rights afforded to a consumer by the CGA.

Conclusion Charge 7

[258] I am satisfied beyond reasonable doubt that BDL made false and/or misleading representations to Mr Walker about the existence, exclusion, or effect of any warranty, guarantee, right or remedy by advising him that the InstaChill could not be returned after 30 days from purchase contrary to the rights afforded to consumers under the CGA and FTA.

Charge 9 – Raewyn and Stephen Durling – InstaChill

[259] On 31 October 2020 Mr and Mrs Durling purchased an InstaChill from BDL by telephone.

[260] Due to cool weather, they did not start to use it for a month. Once they started using it, they were disappointed that it did not appear to decrease temperature or humidity. They obtained a testing device from an electrician friend who indicated to them that the product was "100% ineffective."

[261] They were concerned that, despite their view that the product did not do what it was advertised to do or meant to do, they could not return the InstaChill because 30 days had elapsed. But after discussions with a friend (Sonya Baldwin) who told them about the CGA, they attempted to return it with her help. Ms Baldwin spoke to BDL on the Durlings' behalf pretending to be Mrs Durling (in Mrs Durlings' presence).

[262] On 21 December the Durlings and Mrs Baldwin spoke to Raj from TV Shop who advised he was a "senior manager." This is the first recorded call in evidence but

refers to the fact that a request to return has already been made. During the call there are the following exchanges:[156]

TV Shop:	Yes. So Stephen as I informed you earlier that because it is out of the 30 days trial period, so the return would not be possible. If there is a fault in the product you certainly have the warranty.
Mr Durling:	No I don't have it on me no.
TV Shop:	Sorry
Mr Durling:	What about the consumers act
TV Shop:	So Stephen at the point of sale all the terms and conditions were discussed with you, that if you have an issue with the product, if you don't like the product.

[263] Mrs Baldwin (posing as Mrs Durling) then comes onto the call and is again told that return is not possible "because the product is outside the 30 days of trial period."

[264] She replies "it is not about the 30 days, it is nothing to do with that, the fact is the product does not work, that is why I want my money back…" In response Raj starts to talk about tips for usage of the machine.

[265] Mrs Baldwin continues to ask about a refund and Raj says "as I have certain powers but even I have to abide by the [company's] terms and conditions."[157]

[266] Mrs Baldwin is clear during the exchange that she is referring to general consumer rights and there is no recognition from Raj, at all, that any refund can be made outside 30 days.

[267] There are very similar exchanges during a further three calls between the parties where BDL repeats that a return is not possible outside the 30-day trial period. At one stage BDL refers to making an "exception."

---

[156] BOD 97, p 1491, lines 34 – 45.
[157] BOD 97, p 1493, line 1.

[268] BDL submits that "there was no positive representation, in any of the calls, that Mr and Mrs Durling lacked any CGA rights". Nor was there any positive recognition that such rights exist. Instead, in response to clear and repeated reference during these phone calls by a customer to their rights to return a product that does not work, BDL constantly reverts to reference to its terms and conditions. BDL repeatedly stated in general terms that no refund can be made after 30 days. The implication from BDL is that the 30 days takes precedence over anything else.

[269] Whilst there is some recognition in the calls that a fault could be remedied, I note:

(a) CGA rights exist independently of any rights arising under a warranty; and

(b) like Mr Walker it appears that the Durlings did not have a copy of the warranty; and

(c) despite being told that the product was "not working", BDL did not progress available remedies under the warranty with the Durlings.

Conclusion Charge 9

[270] I am satisfied beyond reasonable doubt that BDL made false and/or misleading representations to Mr and Mrs Durling/Mrs Baldwin about the existence, exclusion, or effect of any warranty, guarantee, right or remedy by advising them that the InstaChill could not be returned after 30 days from purchase contrary to the rights afforded to consumers under the CGA and FTA.

Charge 12 – Graham Purches – InstaChill-

[271] On 20 December 2021 Mr Purches purchased two InstaChill units from BDL by telephone. He was expecting guests to arrive for the holidays and bought them for use in his guest bedrooms over the summer.

[272] When the products arrived just before Christmas Mr Purches tried one unit and didn't find it as effective at cooling as he expected, but he wanted his guests to try the units in the guest bedrooms before coming to any conclusions. He envisaged that his guests would arrive within the 30-day period but their trip was delayed. When his family arrived and used the InstaChills they found the products noisy and ineffective. Mr Purches further tested the units himself, and he concluded that the InstaChill made no difference to temperature and increased humidity.

[273] Mr Purches emailed BDL on 9 February advising that he found the Instachill units hopeless and referring to the discussion he had had with the sales representative when he bought them (which included assurances about effectiveness and noise level). His email was treated as a request to return the items and he was told that BDL would call him.[158]

[274] He had a number of calls with various staff and explained that he wanted to return the products because they did not do what they were advertised to do. He was repeatedly told that the product could not be returned because he was outside the 30-day MBG period. The Commission alleges that this was a false representation of Mr Purches' rights.

[275] Mr Purches contacted BDL 49 days after he bought the units. BDL submits that by that time his right to reject the goods was lost, he had no such right and reference to the 30 day period was not misleading in those circumstances. For the reasons set out above I disagree.[159]

Conclusion Charge 12

[276] I am satisfied beyond reasonable doubt that BDL made false and/or misleading representations to Mr Purches about the existence, exclusion, or effect of any warranty, guarantee, right or remedy by advising him that the Instachill could not be returned after 30 days from purchase contrary to the rights afforded to consumers under the CGA and FTA.

---

[158] BOD 107, p 1529.
[159] See above at [149] – [153] of this judgment.

Charge 8 – [redacted complainant 3] – Rejuderm

[277] On 8 May 2020 [redacted complainant 3] purchased from BDL a Rejuderm skin rejuvenation Device (Rejuderm) for [his partner]. He had seen it advertised on television but purchased it from BDL online for $150. The television advertising referred to the MBG and [redacted complainant 3] believed that his purchase included the MBG.

[278] The television advertisements said that the Rejuderm would improve skin appearance in 15 minutes and that you could look 10 - 15 years younger in seven days. [redacted complainant 3]'s partner immediately started using the device daily but noticed no difference.

[279] [Redacted complainant 3] emailed BDL on 1 June 2020 as follows:[160]

> Hi I would like to return the rejuderm I purchased for my partner it is not doing what your add states on tv at all. Can you please let me know how to proceed for a refund. Cheers.

[280] [Redacted complainant 3] was then called by BDL, and told that because he had purchased the product under clearance online it was not subject to the MBG. He was told "we cannot share any returns for the product because it is not subjected to the 30 days trial."[161]

[281] [Redacted complainant 3] refers to Consumer NZ and was further told "… if the product is not satisfactory Jonathan you can just maybe sell it to someone who wants it or what not. Because we are unable to set any returns, I really do apologise."[162]

[282] [Redacted complainant 3] continues to insist that he wants to return the device and refers repeatedly to Consumer New Zealand but is told that "we need to stick to the terms and conditions."

[283] [Redacted complainant 3's partner] then comes on the line and explains that she has been using the device and noticed no difference. She is also told that because

---

[160] BOD 90, p 1472.
[161] BOD 92, p 1474, line 31.
[162] BOD 92, p 1475, lines 17 - 19.

the product was purchased under clearance online it is not subject to the MBG. In response [redacted complainant 3's partner] asserts that the advertising is false because the product does not work.

[284] BDL submits that these interactions are centred upon the availability of the MBG and that [redacted complainant 3] had no contractual right to return the device. I disagree. It is clear that [redacted complainant 3] and [his partner] wish to return the product because they consider that it does not work, not because they have changed their mind.

[285] Whether or not the MBG applies, [redacted complainant 3] has rights as a consumer. Yet in this charge, as in many others, BDL asserts that their terms and conditions take precedence – i.e. here without an MBG no return can happen at all (under any circumstances).

[286] [Redacted complainant 3]'s reference to Consumer New Zealand highlights his concern about his rights as a consumer. [Redacted complainant 3's partner] refers to no remedy being offered for false advertising. For this reason, I do not accept BDL's submission that in these interactions the "TV Shop representative was explaining what the customer had contractually agreed to enter the contractual basis for their decision not to accept a refund (which the consumer was not entitled to)."

Conclusion Charge 8

[287] I am satisfied beyond reasonable doubt that BDL made false and/or misleading representations to [redacted complainant 3] about the existence, exclusion, or effect of any warranty, guarantee, right or remedy by advising him that the Rejuderm could not be returned after 30 days from purchase contrary to the rights afforded to consumers under the CGA.

Charge 13 – Sheryl La Trobe – iTread

[288] On 30 June 2021 Sheryl La Trobe purchase an iTread treadmill from BDL. She paid $1,799.99 for the product (plus additional fees and a risk-free trial).

[289] Ms La Trobe found the product was faulty because it would suddenly stop during use.[163] She hurt her elbow and knee when she fell from the machine. She contacted BDL about the fault.

[290] Only some records are available of Sheryl La Trobe's contact with BDL. Unlike the other consumers no telephone transcripts are available.

[291] It is, however, clear from the available evidence that Ms La Trobe had various interactions with BDL in relation to the stopping fault around September 2021 (after 30 days had expired). She was advised to try some suggested solutions and asked to send in a video of the fault. She was told that if the machine was returned to BDL and found to not be faulty she would have to pay the associated costs.

[292] On 6 June 2022 BDL sent Ms La Trobe an email advising her that the product would be collected. Then on 20 June 2022, without any consultation, Ms La Trobe was sent a replacement machine. She said this was unexpected and unwanted. BDL appears to take some issue with that but, in any event, it is not in dispute that the new machine remained unopened and unused by Ms La Trobe, who said she had lost confidence in it.

[293] When Ms La Trobe's daughter Amanda came to stay in June 2023 she noticed the unopened box of the new machine. Ms La Trobe told her daughter what had happened. She said that she had wanted and requested a refund. She did not want the replacement machine and asked for help to list the machine for sale.

[294] Instead, Amanda La Trobe vigorously pursued the issue with BDL, making repeated and specific reference to the CGA. She eventually secured a refund but was required to arrange and pay for collection of the replacement treadmill.

[295] The Commission alleges that further misrepresentations were made to Amanda La Trobe in her dealing with BDL about rights available under the CGA and specifically the availability of a refund and liability of return costs for a bulky item.

---

[163] She was also disappointed that it was heavier and bulkier than she expected.

Did Sheryl La Trobe request a refund?

[296] BDL submits that the evidence indicates that Ms La Trobe did not ask for a refund and emphasises that when Ms La Trobe first spoke to the Commission on 26 October 2023 its investigator recorded:[164]

> Sheryl explained that she rang up brand developers and told them it was faulty. She explained that although she couldn't be 100% sure because it was a while ago, she felt like she asked them for a refund. She explained that she no longer had confidence in the product because it would continue to stop suddenly.

[297] Ms La Trobe was cross-examined in detail about this issue. She was asked about specific calls on specific dates and was not able to state exactly what was said at particular times, but she remained firm that she had asked for a refund:[165]

> I remember specifically asking for a refund when I first contacted them because I believe the product was faulty. Whether it came up in conversation further down I can't remember. It may well have done because I still believed that under the commerce Commission I was entitled to a refund and they were just fobbing me off, and then, but I did what they asked, I thought, I'll try it, maybe it is operating not correctly, so I'll try everything that they ask me.
>
> … initially they fobbed me off trying to say: "well it was over 30 days" and I kept saying: "it's not about the 30 days, it's about it being faulty."

[298] In re-examination, Ms La Trobe was asked not to focus on timing but on the particular conversation that she had where the "Consumers Act" was mentioned. She stated:[166]

> … when the product was faulty and I rang the company and I said to them about it being faulty, and I recall that I knew my rights under the Consumers Act, the New Zealand Consumers Act anyway, and so when I asked them about the product and I said to them that it was faulty and could I have a refund, and their words were that if the product was faulty they would replace it, and if it wasn't faulty I'd have to pay for the transport costs, the courier costs. And I, I'm not 100% but I recall saying again that: under the Consumers Act I should be able to have a refund". And they really, they just said to me that they would replace it or repair it and so that was my recollection of the conversation. But I remember like I felt like I was really sort of fobbed off or pushed aside that really that didn't come into it, that their policy was that they would replace or repair, which is okay, but because the product was faulty, I really had lost confidence in it and I just really didn't want to go through that again …

---

[164] Exhibit F, p 30.
[165] NOE p 462
[166] NOE p 472.

[299] Ms La Trobe was a careful witness. She was unsure about timing, but she was firm that she did ask for a refund, she also clearly remembered reference by BDL to the 30-day period. Her evidence is consistent with the fact that she was not consulted before the replacement machine was sent to her and with the fact that she did not use the replacement machine. I also note the evidence of her daughter who stated that her mother had advised her in June 2023 that she had tried to get a refund but was instead sent a replacement.[167]

[300] I find that Ms La Trobe did ask for a refund, but that request was refused and/or ignored. Instead BDL replaced the machine.

[301] In the absence of transcripts, the exact words of the relevant BDL representatives cannot be analysed. However, I accept Ms La Trobe's evidence that she made reference to NZ consumer law and requested a refund but was "fobbed off." Ms La Trobe explained how she complied with BDL's instructions to resolve the fault but lost faith in the machine. I accept that she was not consulted about the replacement machine. There is no suggestion that BDL ever gave her the option of a refund.

[302] Tellingly, the BDL warranty for the iTread does not make any reference to consumer entitlement to a refund or to New Zealand consumer law. Instead, it records "We will replace the product with a new product free of charge, or repair the product at our cost, at our discretion."

[303] I find that by ignoring Ms La Trobe's request for a refund in circumstances where she explained that it was faulty and replacing the product without consultation with her BDL made a misrepresentation to Ms La Trobe in respect of the rights available to consumers under the CGA to reject goods.

Amanda La Trobe

[304] The Commission alleges that BDL also made misrepresentations to Amanda La Trobe in its dealings with her about the applicability of the CGA and FTA. BDL

[167] Amanda La Trobe BOE, at paras 5 – 7.

submits that at that stage there could be no possible right to reject the unopened product and that Amanda La Trobe lacked any available rights.

[305] Ms La Trobe made it clear to BDL that she was acting on her mother's behalf with her mother's consent in progressing the issue. Ms La Trobe made very specific reference to the CGA and FTA and asserted that her mother was entitled to a refund because the product was faulty. She was required to make numerous phone calls to BDL to progress the issue. She was told that the product was outside warranty and trial so a refund could not be processed. It was suggested that they sell the product.[168]

[306] As with the customers considered above the representations made to Amanda La Trobe indicate that BDL's terms and conditions take precedence over consumer law rights. These included statements such as: [169]

> … for returns, although you are entitled to a refund within the 30 day trial it has to be within the trial where you can call us and request for a refund if there is any faults on the problem. We also have the warranty a one year warranty.

[307] And when Amanda La Trobe refers to the provisions of the CGA where physical returns are not possible, she is told:[170]

> And your mum had actually accepted the terms and conditions during the sales that it is the responsibility to post it back to us, in case they don't want the item.

Conclusion Charge 13

[308] I am satisfied beyond reasonable doubt that BDL made false and/or misleading representations to Ms Sheryl La Trobe about the existence, exclusion, or effect of any warranty, guarantee, right or remedy by refusing or ignoring her request for a refund and by providing her with a replacement machine.

[309] I am satisfied beyond reasonable doubt that BDL made false and/or misleading representations to Ms Amanda La Trobe about the existence, exclusion, or effect of any warranty, guarantee, right or remedy by asserting that due to the effect BDL's

---

[168] BOD 112, p 1552.
[169] BOD 114, p 1563.
[170] BOD 128, p 1594.

terms and conditions a refund was not available and by representing that the effect of BDL's conditions results in it being a consumer's responsibility to incur the cost of returning an item despite the provisions of the CGA.

Return of goods charges

[310] In all of these charges there is a pattern of BDL employees representing to aggrieved customers that its terms and conditions and company policies take precedence over New Zealand consumer law. Such broad denials of liability are of concern. Each of the complainants (other than Sheryl La Trobe) had the persistence and fortitude to pursue BDL. They were required to make numerous attempts to resolve their issues that involved lengthy phone calls and being required to repeatedly explain their problem to different BDL staff. Before the intervention of her daughter Ms La Trobe had taken the path of least resistance despite her belief that she was entitled to a refund rather than a replacement.

Charges 10 and 11 – Air Roaster Pro

[311] The Commission alleges that BDL's advertising for a product called the Air Roaster Pro (ARP) was misleading. Specifically, by referring to the ARP accessory pack as "free" a "bonus" and a "special offer".

Facts

[312] BDL has sold the ARP since December 2018 for a price ranging from $389.99 to $599.99. Between 12 December 2018 and 22 September 2021 BDL sold 5,071 ARP units. All of those units came with the accessory pack. BDL never sold the ARP without the accessory pack.

[313] BDL purchases the ARP from a Chinese-based supplier. The product comes with five standard accessories: a rotisserie fork, mesh basket, cage tong, drip tray and wire rack.

[314] During the charge period BDL paid its supplier $43.50 for each ARP unit, which included the five standard accessories. In addition, with each unit it purchased

it received two additional accessories – the "Rolling Cage" ($2.80) and "Skewer Rack" ($2.50).

[315] All seven accessories are shipped to BDL in the same package. BDL does not include the drip tray and wire rack (which are required for the ARP to function) in its description of the "accessory pack."

[316] As part of the investigation Mr Gale purchased an ARP. All of the accessories arrived in the ARP box wrapped and inside the oven of the ARP itself.

[317] During the investigation Mr. Gale identified that the ARP was available for sale at other retailers. He noted that the same seven accessories appeared to come with the ARP but were not advertised as a "free" or "bonus" offering.

ARP advertisements

[318] BDL advertised the ARP through promotions on its website, emails to its subscriber base of approximately 1,077,275 consumers,[171] and infomercials. 18 documentary advertisements were produced in evidence (screenshots from BDL's website and copies of emails). Professor Lang calculated that there was likely to be more than 10 million consumer exposures of this material.[172]

[319] In all of the printed advertisements, except for one,[173] the accessory pack is clearly and unambiguously described as "free" and in many as "free" and a "bonus." However, I accept that in the advertisement in Tab 1 the layout is ambiguous. The word "free" obviously refers to the Air Fryer but it is unclear whether it also applies to the accessory pack. I do not accept that it is established beyond reasonable doubt that BDL described the accessory pack as "free" in this particular advertisement.

[320] Three variations of the ARP infomercial were played in evidence.[174] They all included the following features:

---

[171] Lang BOE dated 24 May 2024, at paras 15.6 – 15.7.
[172] Lang BOE dated 24 May 2024, at para 15.8.
[173] BOD 1, p 13 (Attachment C).
[174] BOD 138, 139 and 140.

(a) The ARP is shown with all of the accessories being used (such as the rotisserie fork and rolling cage). There is no explanation that any of them are optional accessories ie a caption such as "model shown with optional extras."

This is similar to depictions of the ARP in the printed advertisements. The first photograph of the ARP in these advertisements is always the ARP cooking a rotisserie chicken using the rotisserie fork which is part of the accessory pack.

(b) Certain functionalities of the ARP are emphasised such as its ability to cook rotisserie chicken (which requires the rotisserie fork), to cook French fries (which requires the rolling cage) and to cook other fried foods without oil (the mesh basket).

(c) Details of each specific purchase offer comes some way into each advertisement after the ARP is shown cooking food with the accessories without qualification.

(d) The offer is introduced as a "special offer for the viewers."

(e) The offer includes "free bonus accessories" valued at $63 (and $65). The listing of the accessories included in the pack is relatively fast and without paying diligent attention it is difficult to discern which accessories are included in the "free bonus."

(f) The ARP is pictured as it appears in the documentary advertisements with all of the accessories outside and beside it (including the drip and wire trays).

(g) One of the infomercials offers only the free accessory pack the other two offer additional free products (a copper pan set and small air fryer).

[321] Professor Lang reviewed all of the advertisements. He concluded that BDL's ads for the ARP would have had the following effect on consumers:[175]

(a) Increased awareness of BDL, and particularly the ARP.

(b) Increased knowledge of many functions (e.g., rotisserie, tumble fry), features and benefits of the ARP.

(c) Develop a positive attitude towards the ARP, in particular around:

(i) how exciting the offer is;

(ii) that the offer represents better value for money compared to what consumers are led to believe is the way in which the ARP is "normally" sold by BDL; and

(iii) that this offer is time-limited, therefore creating a sense of scarcity and thus increasing consumers':

(A) preference for the ARP

(B) intention to purchase the ARP;

(C) likelihood to visit BDL's retail store, call the call centre, or engage with BDL via other means (e.g., messaging, email);

(D) likely purchase of the ARP; and

(E) increased likelihood to speak positively about the ARP via [word of mouth], [online word of mouth], or online reviews.

[322] Professor Lang therefore concluded:

(a) Charge 10: BDL's conduct in describing the accessory packs as "free" and/or a "bonus" was liable to mislead consumers because consumers would have had a differential impression of the price of the ARP and an inflated perception of the value for money of 'the bundle'.

(b) Charge 11: BDL's conduct in describing the accessory pack as a "special offer" was liable to mislead consumers because it instilled the impression that the offer was time-limited when it was not.

[323] Professor Stephen, on the other hand, concluded that these promotional tactics "are very typical, familiar, and therefore likely very well understood by reasonable consumers".[176] He opined:[177]

---

[175] Lang BOE dated 24 May 2024 at para 15.62.
[176] Stephen BOE dated 24 April 2025, at para 82.
[177] At paras 78 – 81.

> Fundamentally, the ARP and free/bonus (charge 10) and limited time (charge 11) offers are in my view not likely to have misled consumers. Consider charge 10 and the offer of a free/bonus accessory pack with the ARP. Reasonable consumers would see this as a gift-with-purchase promotion and consider the entire bundle, i.e, core product (ARP) and gift (accessory pack), when deciding if they are interested in buying it.
>
> It is very common product marketing practice to, as a tactical promotion measure to increase sales, create a bundle of a core product and a free/bonus/gift item. I do not consider this to be misleading in the manner that Lang does and do not think reasonable consumers would either be confused or misled by this practice since they have very likely been exposed to similar promotional tactics by other companies throughout their lives as consumers.
>
> Apropos charge 11 (limited time offer) my opinion is the same: companies offer limited-time-only promotions regularly and consumers are very familiar with and understand this promotional tactic.

Charge 10

[324] For charge 10 the Commission alleges that BDL's advertising for the ARP breached the FTA because describing the accessory pack as "free" or a "bonus" was liable to mislead the public as to the nature and/or characteristics of goods (namely the price and terms of sale of goods) because:

(a) BDL never sold the ARP without the accessory pack, meaning the product lacked the quality of being "free" or a "bonus". It was in fact the standard offering; and/or

(b) The price that consumers were charged incorporated the cost of the accessory pack.

[325] BDL relies upon *Commerce Commission v Adair* where the Court of Appeal considered an offering of a "free bike" with the purchase of another bike.[178] BDL says it never charged any additional consideration for the accessory pack so therefore it was, literally free, and therefore there is nothing misleading in the description.

[326] However, the context of the free offer in *Adair* was quite different. In that case the offer was considered misleading because the retailer would sell the qualifying purchase bike for a discounted price if the customer did not want the "free bike." A

[178] *Adair*, above n 8, at 662.

customer who wanted the "free" bike paid full price for the qualifying purchase bike and therefore effectively paid consideration for the "free" bike.

[327] BDL never sold the ARP without the accessory pack. The ARP was not available to customers who did not want the accessory pack at a discounted or lessor price. Equally the accessory pack was not available to purchase (for $63 or $65).

[328] Professor Stephen was asked about this issue in cross-examination:[179]

> Q: Well if the company has only ever sold this bonus as part of the bundle and set the price for the bundle with regard to everything it's giving the consumer its straightforward and not free, correct?
>
> A: Okay, yeah fine.

[329] BDL submits that the difficulty with the Commission's case is that "it assumes consumers would approach the marketing with the assumption that the ARP would normally cost less without the accessory pack." However, I find that the advertising implies that customers would normally have to pay extra ($63 or $65) to receive the accessory pack. In fact, that was never the case.

[330] BDL submits "This issue for the Court is whether consumers would reasonably interpret something described as free - and for which BDL paid a premium over the cost of the core product – as suggesting the receipt of something over and above that which they would otherwise get."

[331] The usual meaning of "free" means free of charge.[180] A "bonus" is something given in addition to what is usual or expected.[181] BDL appears to accept that the accessory pack was not a bonus because it was something that a customer would usually get.

[332] The price of the ARP was set in circumstances where the accessory pack was always provided with it. I find that it was misleading to describe the accessory pack

---

[179] NOE p 178.
[180] *The New Zealand Oxford Dictionary,* above n 47, at 422.
[181] Peter Spiller *New Zealand Law Dictionary* (9th ed, LexisNexis, Wellington) at 35.

as "free" because the price of it was incorporated into the price of the ARP. It was therefore not provided free of charge.

[333] The ARP was never sold without the accessory pack. It was misleading to describe the provision of the accessory pack with the ARP as a bonus because it was not something that was given in addition to what was usual.

Legal principles relating to section 10

[334] For the Commission to prove this charge, it must establish beyond reasonable doubt the following elements:

(a) *BDL is a person within the meaning of the FTA;*[182]

(b) *BDL was in trade within the meaning of the FTA;*[183]

(c) *BDL engaged in conduct;*[184]

(d) *That conduct was liable to mislead the public; and*

(e) *That conduct was in relation to the nature, and/or characteristics of goods.*

Conclusion Charge 10

[335] For the reasons set out above,[185] I find this charge proven.

Charge 11

[336] The Commission further alleges that BDL's advertising for the ARP breached the FTA because describing the inclusion of the accessory pack as a "special offer" was liable to mislead the public with respect to the nature and/or characteristics of goods (namely the time available for consumers to avail themselves of the promotion)

[182] See above at [23(a)] of this judgment.
[183] See above at [23(b)] of this judgment.
[184] See above at [23(c)] of this judgment.
[185] See above at [324] – [333] of this judgment.

because it never sold the ARP without the accessory pack. In that sense, there was nothing "special" about the offer.

[337] The Commission submits that referring to the free accessory pack as a "special offer" represents it as a limited time promotion and is misleading because the ARP was never sold without the "free accessory pack."

Website and Email Advertising

[338] In the printed advertisements (aside from Tab 1) the offer of the free or bonus/free accessory pack is included with other offerings such as a cookware set/pans,[186] an additional free air fryer,[187] or a 30% off Black Friday Special.[188]

Television Infomercials

[339] The three infomercials relied upon by the Commission ran from 12 December 2018 – 21 June 2019,[189] 8 March 2019 – 27 November 2020[190] and 20 October 2020 – 21 November 2020.[191] The first infomercial offers only the free accessory pack, the second and third offer additional items (free cookware set/air fryer).

[340] The Commission focuses upon the description of the free accessory pack as a "special offer" and submits that it does not matter that other items were offered in conjunction with the accessory pack.

[341] The Commission submits that referring to the "free" accessory pack as part of the special offer is misleading because it was always available. I note, however, that the offer of the risk-free trial for $14.99 was also included in the advertisements as part of the special offers (and the risk-free trial was always available). The Commission has not alleged that reference to the risk-free trial was misleading.

---

[186] BOD 2, 5, 7 and 10.
[187] BOD 3, 4, 6, 8, 11, 12, 13, 14.
[188] BOD 9.
[189] BOD 138.
[190] BOD 139.
[191] BOD 140.

[342] Nor is the Commission alleging that reference to the addition of other items (additional air fryer etc) as a special offer was misleading.

[343] I consider that the "special offer" referred to in the advertisements includes all aspects of each offer. The advertisements do not refer to offers in the plural or, for instance refer to the accessory pack as "Special offer #1" and the pans (for instance) as "Special offer #2".

[344] Professor Lang accepted in cross-examination that no impression was given that the "special offer" was limited to the accessory pack.[192]

[345] In my view each special offer must be seen as a whole – the special offer is a package that contains different components offered in each advertisement. It is the particular "deal" that BDL was offering with the purchase of the ARP. Where part of that package changes it is a different special offer (or a different special promotion) i.e. there is a special offer that includes the accessory pack and pans and a special offer that includes the accessory pack and a discount.

[346] Whilst the Commission is critical about the impression given about the urgency of the offers, it does not allege that the advertisements were misleading because of the time each offer was available or because certain special offers were repeated.

Conclusion Charge 11

[347] In respect of all advertisements, aside from the first infomercial, I find that BDL's reference to a special offer that included the free accessory pack was not liable to mislead the public as to the time availability of a promotion.

[348] The first infomercial, where only the accessory pack is offered, is in a different category. In that advertisement the special offer is the free accessory pack (and the RFT). It is not in dispute that the free accessory pack was offered by BDL with every sale of the ARP.

---

[192] NOE p 96.

[349] I find beyond reasonable doubt that reference to the free accessory pack as a special offer in the first infomercial was liable to mislead the public with respect to the nature and/or characteristics of goods (namely the time available for consumers to avail themselves of the promotion) because BDL never sold the ARP without the accessory pack. I accept that in that sense, there was nothing "special" about the offer contained in that advertisement.

Conclusion

[350] Accordingly, I find BDL guilty on all charges.

Signed at Auckland this 12th day of December 2025 at 2.00 pm

_____

Judge BL Sellars KC
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 12/12/2025