IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2022-004-008104
[2026] NZDC 16387

COMMERCE COMMISSION
Prosecutor

v

BRAND DEVELOPERS LIMITED
Defendant

Hearing:	7 May 2026
Appearances:	N Flanagan and J Barry for the Prosecutor J Dixon KC, A J Steel and E R Harrison for the Defendant
Judgment:	27 July 2026
Reissued:	6 August 2026

RESERVED SENTENCING DECISION OF JUDGE B L SELLARS KC
[Reissued under r 1.6 of the Criminal Procedure Rules 2012]

Introduction

[1] In May 2025, following a Judge Alone trial that spanned 13 days, I found the defendant, Brand Developers Limited (BDL), guilty on 13 charges for breaches of ss 10, 13(e) and 13(i) of the Fair Trading Act 1986 (FTA).[1]

[2] The charges relate to various periods between 2017 and 2023 and fall into three broad categories concerning the following conduct:

(a) <u>Online reviews of BDL's products</u>

<u>Charges 1-3</u>

Three charges of making false or misleading representations that goods had any approval or endorsement - ss 13(e) and 41 of the FTA: maximum penalty $600,000.

<u>Charge 4</u>

Engaging in conduct liable to mislead the public - ss 10 and 40(1) of the FTA: maximum penalty $600,000.

(b) <u>Representations about the availability of refunds - Consumer Guarantees Act 1993 (CGA) (Charges 5-9 and 12-13)</u>

Seven charges of making false or misleading representations concerning the existence, exclusion, or effect of any warranty, guarantee, right or remedy - ss 13(i) and 40(1) of the FTA: maximum penalty $600,000.

[1] *Commerce Commission v Brand Developers Limited* [2025] NZDC 29789.

(c) <u>The use of "free", "bonus" and "special" offers in advertising its product the Air Roaster Pro (Charges 10 and 11)</u>

Two charges of engaging in conduct liable to mislead the public - ss 10 and 40(1) of the FTA: maximum penalty $600,000.

[3] The impugned conduct, in this particular context had not previously been considered by a New Zealand Court.

[4] BDL vigorously defended the charges and submitted that they were either wrong in law, fundamentally misconceived and/or grossly overstated. I found the charges proven as alleged by the Commerce Commission (Commission) in all aspects save for Charge 11. There, I accepted that one but not all of the subject advertisements breached the FTA.

[5] BDL's sole director, Mr Paul Meier, filed an affidavit for sentencing. The company accepts the Court's findings and now recognises that its "conduct fell well short of what is required under the FTA and of the standards properly expected in the commercial environment in which it operates". BDL has apologised for its conduct and issued a public apology on its website. It also offered to pay emotional harm reparation to each of the seven customers involved in the CGA conduct of $1,000 each. At the sentencing hearing, BDL indicated that those payments would be made immediately.

[6] BDL is now a significantly smaller operation than during the period of offending. It trades as the "TV Shop" and it appears that its fortunes have been affected by the change of viewing habits away from traditional terrestrial TV. In 2020, BDL employed 259 staff, 32 of whom were call centre salespeople focused upon the New Zealand market. It now employs a total of 89 staff, two of whom are call centre salespeople focused on the New Zealand market.

[7] I noted in the liability decision that for the year ending 31 March 2020, BDL had a total revenue for sales to consumers in New Zealand of approximately $48.2 million. For the year ending 31 March 2026, BDL's turnover in New Zealand was

$14.6 million with a trading loss of $2.2 million. That said, BDL does not suggest that its financial circumstances are such that it cannot pay an appropriate fine.

[8] There is a stark difference between the parties in relation to the appropriate starting point submitted for fines under each category of conduct. The Commission's starting points are approximately twice that of the defence.

Facts

[9] The facts are traversed in detail in the liability decision.[2] I will summarise them as required as I consider each category of offending.

[10] For the purposes of sentencing the parties invite me to make further factual findings that were not required to establish liability but that are required to evaluate culpability. There is dispute between the parties as to aspects of these facts. I remind myself that the standard of proof for disputed facts that have a material bearing on sentence is distributed between the parties pursuant to s 24 of the Sentencing Act.

The statutory and regulatory context

[11] The FTA is a consumer protection legislation. Its purposes are to contribute to a trading environment where "the interests of consumers are protected" and in which "consumers and businesses" participate confidently. Denunciation and deterrence are sentencing principles which are highlighted in this context.

[12] BDL accepts that its conduct likely undermined public confidence in New Zealand trading standards - whilst submitting that that this is likely to be the case in all FTA breaches.

[13] The Commission characterises BDL's conduct as being among "the worst of its kind" in relation to breaches of the FTA. The Commission emphasises that all the conduct was deliberate and systematic and relies particularly upon the fact that the offending occurred with the instigation, participation and/or knowledge of BDL

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[2] *Commerce Commission v Brand Developers Limited* [2025] NZDC 29789.

executives and senior management. Whilst BDL accepts that its conduct was serious it submits that it cannot accurately be described as amongst the "worst of its kind".

Sentencing offences under the FTA

[14] There is no tariff decision for FTA offending. Relevant aggravating factors were set out by the Court of Appeal in *Commerce Commission v Steel & Tube Holdings* as follows:[3]

> [90] Customary sentencing methodology applies. Factors affecting seriousness and culpability of the offending may include: the nature of the good or service and the use to which it is put; the importance, falsity and dissemination of the untrue statement; the extent and duration of any trading relying on it; whether the offending was isolated or systematic; the state of mind of any servants or agents whose conduct is attributed to the defendant; the seniority of those people; any compliance systems and culture and the reasons why they failed; any harm done to consumers and other traders; and any commercial gain or benefit to the defendant.

[15] These are considerations that may arise, but the list is "not exhaustive nor is it mandatory".

[16] The Court of Appeal in *Steel & Tube Holdings* cautioned against over reliance upon penalties imposed in previous cases, recognising that every case depends on its particular circumstances. The Court stated, "the starting point calls for an evaluative judgment against applicable sentencing purposes, principles and factors".[4]

[17] I accept that consideration of other cases is helpful and necessary to ensure consistency, bearing in mind the effects of inflation to ensure the same deterrent effect.[5]

[18] The Commission refers me to "recent developments" in sentencing in this area. The Commission submits that comments from the High Court in *Commerce Commission v NZME Advisory Ltd* have set a new "tone" and suggests that fines under the FTA have been set too low.[6] However, the penalty levels traversed in that case

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[3] *Commerce Commission v Steel & Tube Holdings* [2020] NZCA 549.
[4] *Commerce Commission v Steel & Tube Holdings*, above n 3, at [144].
[5] *Commerce Commission v Vodafone New Zealand* ("FibreX") [2023] NZHC 2149.
[6] *Commerce Commission v NZME Advisory Ltd* (NZME) [2023] NZHC 3425.

were specifically in relation to fines concerning product safety. I accept the defence submission that the High Court's comments as to District Court sentencing levels must be considered in that context. I do not accept that the Court's comments in *NZME* are a basis for the general proposition that *all* FTA fines have been set too low.

Starting point for the online reviews conduct

Offending

[19] Over a 16-month period between 21 May 2019 and 7 October 2020, BDL instructed its staff to write and post reviews about BDL and its products to increase poor star ratings and promote sales of the products. BDL staff posted such reviews on BDL's own product websites (Charge 1), the Product Review website (Charge 2) and Google (Charge 3).

[20] When it instructed or requested staff to do this BDL did not direct them to disclose their affiliation to BDL. In many instances staff were given instructions about how to post the reviews so that their association with BDL was not apparent.

[21] I found that these reviews could mislead readers into thinking they had been written and posted by independent consumers. The number of staff reviews identified by the Commission across the three platforms was 473, however, given the limitations of the information available to the Commission it is likely that this number is understated.

[22] For Charge 4 between 18 November 2017 and 11 November 2020, BDL instructed its staff to moderate and, eventually, to not publish low rated reviews on its own product websites. I accepted that this conduct was liable to mislead the public into thinking that consumer opinion about these products was more positive than it actually was. The available evidence indicated that these reviews would likely have numbered in the thousands.

Culpability factors

The importance, falsity and dissemination of the untrue statement

Charges 1 – 3

Importance

[23] Each party called expert evidence from marketing academics. It is clear there are many factors at play in consumers' purchasing decisions. For some consumers online reviews could be a primary factor, however, other factors such as the advertised qualities of the product itself, the price of the product, and its availability are important.

[24] Both experts agreed that online reviews are important and strongly influential in consumers' purchasing decisions. They also agreed that if consumers were aware that a company had failed to disclose affiliations within a review, that would be viewed very negatively.

Falsity

[25] The untrue statements were the implied misrepresentations that the staff reviews came from independent consumers. They were obviously false in this respect.

[26] It was not necessary for me to consider whether the reviews reflected the BDL staff member's genuine views of the product.

Dissemination

[27] The number of identified reviews is relatively small – 376 of the staff reviews were posted on BDL brand-specific websites, 60 were posted on ProductReview.com.au and 13 undisclosed staff reviews were identified on Google. All parties accept that these numbers are understated but there is no evidence available to indicate the extent of the understatement.

[28] BDL highlights that the total number of reviews on BDL brand-specific websites was 38,644. The Commission did not lead evidence at trial of the number of times any particular review was seen by a customer. BDL accepts that at least some consumers would have seen a staff review.

[29] The overall numbers must be considered in the context of evidence that established that at various stages the posting of staff reviews was targeted at certain products with the aim of boosting star ratings and sales of that product. The evidence demonstrated that there was a strategy in place to increase all reviews. This strategy aligns with the explanation provided by Mr Meier about transition of the business to online sales channels.[7]

Charge 4

[30] BDL's moderation and withholding of low rated reviews posted by customers is described by the Commission as the "flip side" of the posting of the staff reviews. This conduct resulted in a distortion of consumer sentiment being presented on BDL's websites but through different means.

The extent and duration of the offending

[31] The offending took place over a sustained period of time, charges 1-3 involved numerous reviews (376) while the conduct in charge 4 involved a far greater number of reviews (estimated in the thousands).

(a) Charges 1 – 3 occurred between 21 May 2019 to 7 October 2020 - approximately 16 months.

(b) Charge 4 took place over a period of three years (18 November 2017 to 11 November 2020) and became more serious in 2020 when more/all low rated reviews were withheld.

[7] Affidavit of Paul E Meier dated 30 April 2026 at para 19 – 20.

Whether the offending was isolated or systematic

[32] The conduct was clearly systematic, it occurred consistently or repeatedly over the charge periods. It was the result of instructions from managers to staff and in some cases was incentivised.

State of Mind

[33] BDL accepts that this was deliberate conduct in both respects (posting and withholding).

[34] It is clear from the evidence that BDL made concerted and repeated efforts to improve the online rating and reviews of its products and thereby deliberately mislead consumers. The methods that staff were instructed to follow for posting reviews were designed to circumvent Product Review and Google's processes to stop non independent reviews. In 2019, Product Review raised suspect reviews with senior BDL management. This further aggravates this factor due to proof of knowledge from BDL senior management who in 2019 were informed these reviews were concerning.

Seniority of staff

[35] BDL accepts that senior management were aware of, and directed, the conduct.

Compliance systems, culture and the reasons why they failed

[36] Given its size and resources at the time of this offending BDL should have had a robust compliance system in place. It accepts that it had an "inadequate" compliance culture. However, it appears that it had no compliance system in place in respect of the online reviews and instead fostered a culture that focussed upon an end goal (improved ratings, reviews and sales) with no consideration given to the means employed to achieve that goal.

[37] The Commission alleges that the review withholding offending was not a failure of BDL's policies but a feature of them. BDL disagrees.

[38] I accept that in theory a policy to withhold negative reviews for a brief period pending response from the consumer to confirm that they had used a product correctly could be appropriate. However, this should be a transparent process. In this case the consumer was not advised that their negative review would not be published if they did not respond to BDL, nor was that policy available to other consumers who visited the site. BDL accepts that it "went too far" as the policy expanded and resulted in an increased amount of lower rated reviews not being published.

[39] BDL's policy resulted in lowering the availability of negative information about BDL's products to consumers. I do not accept this was a "failure" of the policy given its lack of transparency, instead it appears to be an inevitable consequence.

Harm done to consumers and other traders

[40] This conduct had the potential to cause harm to consumers and other law-abiding traders. In this regard, the Commission refers to comments made by the Federal Court of Australia in *Australian Competition and Consumer Commission v Service Seeking Pty Ltd*:[8]

> [37] … It deprived registered customers and members of the public who visited the website of an opportunity to accurately compare services provided by those businesses on the website and select a business on a fully and properly informed basis. It influenced registered customers and others to select a business to provide services to them that they would not otherwise have selected because the business had more reviews, more favourable reviews, and/or a higher star rating than it would otherwise have had. It unfairly disadvantaged businesses whose profiles on the website only contained genuine reviews by registered customers who had used their services. It occasioned similar disadvantage to businesses who were not registered on the website.
>
> [60] … There was also wider harm in the potential undermining of confidence in web-facilitated commerce where trust in relevant systems is important. So the extent of loss or damage caused by the contravening conduct must also be assessed as significant.

[41] Many of those comments apply here, however the context is different. In *Service Seeking Pty Ltd* the defendant was the operator of a website and mobile app that provided an online tasking platform. Comparatively, BDL was not itself operating

[8] *Australian Competition and Consumer Commission v Service Seeking Pty Ltd* [2020] FCA 1040 at [37] and [60].

a market platform designed to facilitate web commerce between competitors. BDL's conduct likely resulted in less harm to consumers and other traders than in *Service Seeking* due the nature of the platform which was designed to facilitate comparison and online commerce.

[42] BDL accepts that at least some consumers will have seen at least some of those reviews and potentially placed reliance on them. With respect to the moderated reviews, BDL accepts that this will have led to product ratings being overstated and it is likely that at least some consumers would have relied on those overstated reviews in their selection of products.

[43] I accept that does not necessarily mean that without the reviews the consumer would not have purchased the product in question — but it means that they were deprived of the opportunity to make a fully informed choice.

[44] Competitors would also have been harmed from this conduct to the extent that they missed out on the opportunity to compete on a level playing field.

[45] BDL emphasises that this conduct does not raise any harm due to product safety concerns.

Commercial Gain/Benefit to Defendant

[46] The Commission submits that the posting conduct was aimed at "moving the needle" on ratings and, that it must have done so, given the concerted effort and emphasis placed upon improving reviews. As such, I should infer BDL must have had some commercial gain from its conduct.

[47] However, it is not possible to quantify any commercial gain from the conduct, given the circumstances. Whilst I accept that commercial gain might have resulted, equally the desired result might not have eventuated, necessitating ongoing and further misleading reviews. BDL obviously believed that this conduct would be to its benefit and commercial gain was its motivation but there is no evidence that occurred.

Comparable authority

Commerce Commission v Bachcare Ltd

[48] *Commerce Commission v Bachcare Ltd*[9] involved a holiday accommodation booking platform. Bachcare pleaded guilty to two charges under s 11 of the FTA in relation to the following offending over a period of 16 months:

(a) Withholding publication of low or negative rated customer reviews (those lower than 3/5 or 6/10) resulting in 13.7 per cent of total customer reviews being withheld (940 reviews were withheld from a total of 6,814 reviews). As a result of its conduct, the aggregate star ratings on 22 per cent of the properties listed on Bachcare's website increased.

(b) Editing customer reviews to remove negative comments about properties. This conduct impacted approximately 3.4 per cent of the reviews published on its website.

[49] The practices were applied inconsistently, with a small number of positive reviews also being removed, and a similar proportion of negative reviews not being edited.

[50] Bachcare's conduct was deemed "moderately to highly careless". Bachcare's directors and senior management were not aware of the practices, which had been adopted by the marketing team. It did not have processes and procedures in place to ensure that its marketing complied with the FTA. It failed to appropriately oversee the activities of the marketing team, and it failed to act promptly to rectify its conduct upon notification of the Commission's investigation.

[51] The Court adopted a global starting point of $180,000 (c. $230,000 inflation adjusted).

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[9] *Commerce Commission v Bachcare Ltd* [2019] NZDC 25483.

[52] Both parties accept that the facts of *Bachcare* are less serious than the present case.

Australian authorities

[53] The Commission has referred me to a number of Australian cases. I recognise that Australian legislation provides a civil pecuniary penalty regime with a maximum penalty of $1.1 million. These authorities are therefore difficult to apply within the sentencing process applicable in New Zealand. I have considered the authorities in terms of general principles but not for establishing the fine to be imposed.

Starting point for charges 1 to 4

[54] The nature and importance of the false statements in this case and in *Bachcare* are clearly similar. The conduct involved in creating those false statements is different in relation to the content of the reviews in question.

[55] The Commission argues that the editing of genuine customer reviews is less serious than the creation of false customer reviews. In *Bachcare* the editing involved the removal of complaints about aspects of the property. It did not involve the insertion of fabricated positive comments.

[56] BDL argues the contrary and submits that editing genuine customer reviews is more serious as it makes the review no longer independent but also means the review no longer genuinely reflects the views of the original consumer .

[57] In my view the falsity of the statements is comparable. I do not accept that an edited review is inherently worse than a false customer review. However, I consider that the conduct involved in the creation of a false review is more serious. This is because a false review requires further effort in its creation and in the steps taken to make sure it any links to BDL are concealed when published (i.e. by posting away from a different email address or using a different server).

[58] The overall scale and extent of BDL's offending is comparable to that of *Bachcare*. Although, unlike *Bachcare*, BDL's conduct extended beyond its own website.

[59] Whilst an aggravating factor in *Bachcare,* not present for BDL, was Bachcare's failure to remove the offending reviews for 6 months after being contacted by the Commission.

[60] However, the key difference between the two cases is that Bachcare's offending was characterised as careless and carried out without the knowledge of management. In contrast, BDL's offending was deliberate and systematic, and its managers and executives were aware of, and at times directed the unlawful conduct. Further, at the time of the offending BDL was a significantly larger and more sophisticated entity than Bachcare.

[61] BDL's conduct in relation to the online review charges was deliberate and sustained. It reflected marketing strategies conceptualised by management with the approval and/or direction of senior executives. Whilst it occurred at a time when this type of conduct had not previously been subject to scrutiny, its misleading nature was obvious, that the employees were instructed to take to disguise their connection to BDL - by posting from home for instance.

[62] It is difficult to quantify the extent of loss or damage caused by this conduct, but it undoubtedly undermined the interests of consumers and competitors. However, in my view it is not directly comparable to a scenario where the defendant is the operator of a platform designed to facilitate comparison and online commerce,[10] which I consider is more serious.

[63] I evaluate BDL's culpability as falling within the higher end of the scale, but near the lower end of that range, given the features of the offending traversed above.

[10] For example, *Australian Competition and Consumer Commission v Service Seeking Pty Ltd* [2020] FCA 1040; and *Australian Competition and Consumer Commission v Healthengine Pty Ltd* [2020] FCA 1203.

[64] The Commission submits that a starting point in the vicinity of $800,000 is appropriate. Whilst it accepts that the present facts are more serious than *Bachcare,* BDL submits that the Commission's calculation is excessive and that a fine between $430,000 and $460,000 is appropriate for the online review conduct.

[65] BDL faces four separate charges for this specific conduct, the first three are closely interlinked and arise from the same strategy. Charge 4 is different in kind but also linked given that the conduct focuses upon online reviews.

[66] I have found that BDL's culpability falls within the higher end of the scale but at the lower end of that range. Charges 1 to 3 are facets of the same offending, for those charges I would set a starting point between $350,000 to $400,000. I consider that on its own Charge 4 would justify a starting point in the same range. However, in the circumstances, it is appropriate to consider the overall culpability for this offending. I also bear in mind comparison to the global figure that was set in *Bachcare* in respect of conduct that was similar to both kinds of misleading conduct here.

[67] When I evaluate all of the factors set out above, in circumstances where all parties accept that a stern sanction is required to denounce the conduct, I consider a global starting point of $550,000 is appropriate for charges one to four.

CGA Conduct (Charges 5-9 and 12-13)

[68] These seven charges arose from the telephone interactions between BDL customers who considered that the products they had purchased from BDL were faulty or did not perform as advertised. In each case, BDL employees represented to aggrieved customers that the BDL terms and conditions (such as their 'risk free trial', '30-day money back guarantee', and warranties[11]) took precedence over New Zealand consumer law.

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[11] BDL offers a 30-day Money Back Guarantee (MBG) on almost all of its products. This enables the 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 a 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. BDL also separately offers a risk-free trial on some of its products. If either the MBG or risk-free trial is applicable to a particular purchase they operate separately to any applicable manufacturer's warranty for the product.

[69] The evidence established that in each case the employees were following BDL's returns and refund policies and internal staff guidance documents that were produced in evidence. These documents contained no reference to the rights available to consumers under the CGA (save for one instance).

[70] When he was interviewed by the Commission on 27 January 2022, Mr Meier was asked why the CGA was not mentioned in BDL's standard operation procedures for faulty products, he stated:[12]

> …we've always felt personally amongst everybody that we give a better guarantee than what the CGA requires. We go above and beyond that in a lot of cases, so that's part of the reason for me, there's not much from a mention point of view, …
>
> The CGA, yes its great for people who are running a shonky business, but we've never put ourselves in that category.

[71] The Commission submits that BDL's policies were designed to exclude customers from exercising their rights under the CGA. BDL submits that the misrepresentations did not arise from deliberately drafted contractual documentation designed to exclude or override statutory rights.

[72] The telephone call evidence illustrated that BDL staff were trained to follow specific procedures when dealing with customers. The evidence included calls between staff and customers that involved both New Zealand and offshore call centres.

[73] For instance, within BDL's document "Faulty Products and Components" a process is explicitly set out for the BDL employee to follow step by step. There is no mention at any stage of the CGA. The document appears to focus upon replacement rather than refund. The only time within BDL's operating document for faulty products that a refund is mentioned is in relation to "exceptional circumstances". BDL had "retention agents" whose role it was to "attempt to save the account".[13]

[74] Equally of concern is that BDL's warranty documents, which set out options for New Zealand and Australian consumers, contain no reference to New Zealand

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[12] Exhibit bundle, Tab 18, page 231.
[13] Exhibit bundle, Tab 45, page 1228.

consumer law but do recognise the rights available to Australian consumers under its consumer law.[14]

[75] Whilst I accept that it is technically correct to state that this case does not involve contractual documentation explicitly drafted to exclude or override statutory rights an irresistible inference arises that BDL actively resisted providing any refund outside of its 30-day periods, save in exceptional circumstances. This is inferred from the wording of the documents and the experiences of each of customers. This approach collides with remedies available under the CGA.

[76] I am satisfied that BDL's return and refund policies were designed to exclude customers from obtaining a refund outside of the 30-day period.

[77] Given the sphere in which it traded, its size and experience BDL should have recognised the issues that these policies raised with the CGA. It is simply bizarre that its warranty statements refer to Australian Consumer Law but not that of New Zealand, particularly given that BDL is a New Zealand company. I am highly suspicious that BDL knew that its practices resulted in customers being denied access to any CGA remedies that might be available. However, on the evidence, I cannot be satisfied beyond reasonable doubt of that fact, nor can I be sure that the procedures had been designed to exclude the CGA.

[78] I heard evidence from the impacted customers and received Victim Impact Statements from a number of them. [Redacted complainant 1] read her VIS at the sentencing hearing. It was clear that for all of them their dealings with BDL had been extremely frustrating and had caused them significant stress as well as financial loss. Many of the customers were elderly.

[79] At trial, BDL argued (amongst other things) that none of the BDL customers had any valid legal rights available to them under the CGA. It was not necessary for me to determine whether each customer's complaint about their product was properly founded and that they were in fact, entitled to a refund or return. BDL was insistent at trial that each customer had no valid claim, however, the Commission submits that

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[14] Exhibit M.

I can be satisfied of that each customer does in fact have a valid claim. I observe that in many, if not all of the cases, the evidence suggested that the complaint was well founded. However, I do not consider it necessary to determine that issue for the purposes of sentencing as the damage occurred to each victim's involved protracted dealings with BDL during which multiple misrepresentations about their general consumer remedies were made.

Culpability Factors

The importance, falsity and dissemination of the untrue statement.

[80] Representations made by a business about the CGA are extremely important to consumers given the protective nature of the legislation.

[81] The misleading representations were obviously false. For each charge BDL made general statements about consumers' rights that were contrary to the CGA and FTA. Those statements were particularly false where BDL acknowledged that consumers' rights existed but did not apply to BDL.

[82] The Commission submits that the misleading representations were likely to have been broadly disseminated. This is supported by the backdrop of BDL's operating policies which excluded the application of the CGA. I can therefore reasonably infer that similar representations would have been made to most consumers who contacted BDL seeking to assert their rights.

[83] BDL accepts that this conduct resulted from the inadequacies of its policy manuals and training that staff received. Nonetheless, BDL argues that it would be unfair to speculate as to number of customers affected or to assume that other consumers had similar experiences to the seven customers from the specific charges.

[84] The evidence established that the relevant operating policies and procedures were in place throughout the period of offending. Each customer had numerous interactions with multiple employees who followed the same songbook (i.e. acted in line with their training and followed BDL's operating procedure that were in place at

the time). I infer that similar representations were made to other concerned customers, but I cannot estimate the number involved.

The extent and duration of the offending

[85] The seven charges took place between 4 December 2019 and 1 August 2023, slightly less than four years. BDL submits that I need to consider the individual charging period for each offence which comes to a total of 10.5 months. BDL submits that the offending is qualitatively different from the sustained, continuous application of standard-form contractual terms considered in some of the comparator cases.[15]

[86] The time span of this offending is relevant. It is an aggravating factor that over a four-year period seven offences occurred against a backdrop of policy and procedure that did not change over that time. It can be safely assumed that during this period the same process was followed when any consumer contacted BDL to discuss concerns about a product. The aggravating feature is the length of time that these operating procedures and policies were in place.

Whether the offending was isolated or systematic

[87] The offending was systematic. It resulted from BDL's policy and procedures that resisted providing refunds once 30 days after purchase had elapsed.

The state of mind of the defendant.

[88] As set out above, I am not satisfied to the requisite standard that BDL deliberately denied consumers their statutory rights. However, it was an inevitable consequence of their procedures that customers were misled about those rights and were required to repeatedly insist upon them in the face of continued resistance from BDL staff. I consider its conduct was at the highest level of carelessness.

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[15] For instance, *Commerce Commission v 2 Cheap Cars* [2019] NZDC 12800.

[89] It also relevant that BDL was on notice of the Commission's investigation into alleged breaches from October 2020, yet the conduct continued until August 2023 (resulting in Charges 9, 12 and 13).

Seniority of staff

[90] BDL accepts that the policy documents were prepared by staff who held management positions. The staff who dealt with the seven customers were primarily front-line staff, although some of them were senior within that hierarchy.

[91] It is clear, the fundamental misunderstanding upon which BDL's approach was based came from the highest level, given Mr Meier's comments.

Any compliance systems, culture and the reasons why they failed

[92] There is no evidence that BDL had any system of compliance or culture of compliance with the CGA.

Any harm done to consumers and other traders

[93] BDL's conduct resulted in representations that are inconsistent with CGA rights. Such conduct undermines both the efficacy of and confidence in statutory guarantees for consumers. As such, this conduct causes significant harm to consumers.

[94] BDL accepts that the seven consumers subject of the charges were deeply affected by the misrepresentations. BDL's conduct caused them considerable frustration, stress, anger and wasted their time. Some of the victims were particularly vulnerable due to their age, financial means and health which exacerbated the impact of BDL's conduct upon them. This was particularly apparent in the case of [redacted complainant 1].

[95] All victims, save for Mr Purches, eventually received refunds but the process they endured, because of BDL's practice, caused the harm they have described above.

[96] The Commission submits this type of conduct is difficult to detect since it relies on individual complainants being aware of and insisting upon their rights being upheld in the face of a company's resistance and misrepresentations. This means that such conduct is generally under reported making it difficult for the Commission to ascertain its scope.

[97] As was apparent from this case many consumers in the victims' circumstances would have given up and simply accepted what they were told. I recognised that each of these complainants (other than Ms La Trobe) had the persistence and fortitude to pursue their complaints with BDL. Their frustration with the BDL processes for dealing with complaints about faulty/non-performing products was evident from the recordings of their numerous phone calls.

Commercial gain or benefit to the defendant

[98] An inference can be drawn from BDL's business emphasis upon replacement rather than refund that commercial gain would result from this conduct. However, I cannot quantify that gain.

Comparable authorities

[99] The parties have referred me to three District Court comparator cases - *Commerce Commission v Noel Leeming Group Ltd,*[16] *Commerce Commission v 2 Cheap Cars Ltd*[17] and *Commerce Commission v Ace Marketing.*[18]

Commerce Commission v Noel Leeming Group Ltd

[100] The conduct in this case is the most similar to that of BDL. The defendant pleaded guilty and was sentenced upon agreed facts. The Court's sentencing notes are brief (12 paragraphs long).

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[16] *Commerce Commission v Noel Leeming Group Ltd* [2018] NZDC 27403.
[17] *Commerce Commission v 2 Cheap Cars* [2019] NZDC 12800.
[18] *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165.

[101] Noel Leeming is a large national homeware and electronic appliance retailer. It pleaded guilty to eight charges of misleading consumers about their rights under the CGA contrary to s 13(i) of the FTA. The offending occurred on dates between March 2016 and January 2017 (approximately 10 months).

[102] Each charge related to an instance where a consumer had complained about a faulty product such as a phone, laptop, televisions or refrigerator and was incorrectly told by Noel Leeming that they had no available rights under the CGA. The representations were "direct and significant departures from the truth in every case."[19]

[103] None of the affected consumers were considered particularly vulnerable. Their experiences caused them frustration, stress and inconvenience.

[104] The Court did not accept that it could conclude the conduct was systemic on the evidence before it but noted that the representations were made not only by Noel Leeming's sales agents but also its national call centres.

[105] The Court described the offending as "moderate" and adopted a starting point of $275,000. Adjusted for inflation, the same starting point today would be approximately $350,000.

Commerce Commission v 2 Cheap Cars Ltd

[106] *2 Cheap Cars* involved a national used car dealership with 14 yards. It offered extended warranties, in conjunction with an insurance company, from which it would receive a percentage of profit. Where a customer did not purchase an extended warranty, it was usual practice for staff to request the customer to sign a "Warranty Waiver" which included false and misleading representations about consumers' rights under the CGA. The company faced eight charges that covered a four-year period. The Commission estimated that over this period more than 22,000 "warranty waiver" documents were presented to customers and approximately 20,000 were signed.

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[19] At [6].

[107] The Court was satisfied that the purpose of the documents was to encourage (or even coerce) consumers to buy a further product and otherwise forego their rights under the CGA.[20]

[108] The Court noted the heightened importance of CGA remedies when manufacturer warranties were not available for used cars. In *2 Cheap Cars* the conduct "may have had the effect that consumers did not seek to enforce their rights under the CGA where a vehicle had a fault of some kind, because 2 Cheap Cars had disavowed its responsibility for providing the consumer remedies".[21] It may have resulted in the company selling more extended warranties (and thereby profiting).

[109] A starting point of $550,000 was adopted for the offending (approximately $700,000 adjusted for inflation).

Commerce Commission v Ace Marketing

[110] Ace Marketing was a mobile trader selling goods to customers on credit at significantly higher prices than those from mainstream retailers. Mobile traders have the reputation of selling to customers who may not be able to obtain finance to buy goods through other means. It had 20 New Zealand based staff and 15 staff working from a call centre in Fiji. Ace Marketing entered more than 8000 contracts for the supply of consumer goods that contained misrepresentations about consumers' rights under the CGA. It pleaded guilty to 19 charges related to misrepresentations about consumers' rights, including those under the CGA which spanned approximately two and a half years.

[111] The Court described the offending as involving a high degree of negligence and described it as "particularly serious."[22] A starting point for the misrepresentations of $255,000 was adopted (approximately $340,000 inflation adjusted).

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[20] *Commerce Commission v 2 Cheap Cars,* above n 18*,* at [67].
[21] *Commerce Commission v 2 Cheap Cars,* above n 18, at [44(b)].
[22] *Commerce Commission v Ace Marketing Ltd*, above n 19, at [55].

Starting point for CGA review conduct

[112] BDL's conduct was at the highest level of carelessness and exacerbated by being put on notice by the Commission in October 2020 but continuing until August 2023. The conduct was systematic and resulted from BDL policies and procedures in the context of a culture which lacked entirely any consideration of compliance with the CGA.

[113] Whilst there are similarities with *Noel Leeming* the facts before the court in that case were significantly less detailed and the Court did not have any indication as to how the conduct had come about – simply that it had occurred. The reach and scope of the conduct in *2 Cheap Cars* and *Ace Marketing*, given the number of contracts involved, appears far greater than that of BDL. However, those cases were based upon documentation rather than specific complaints arising from oral misrepresentations.

[114] On balance, and contrary to the Commission's submission, I consider the culpability of the offending in *2 Cheap Cars* was similar but slightly more serious, given its scope and the added dimension of potential profit from the sale of warranties.

[115] Given my evaluation of BDL's culpability and having considered the approach to setting fines in the comparator cases, I consider that a starting point of $600,000 for the CGA offending is appropriate.

Air Roaster Pro Conduct

[116] BDL sold a product called the Air Roaster Pro ("ARP"). Between December 2018 and September 2021, BDL sold 5,071 ARP units:

<u>Charge 10</u>

(a) During this period BDL marketed the ARP as coming with a "free" or "bonus" pack of accessories valued between $63 and $65. BDL acknowledges that this advertising was liable to mislead the public as to the price of the ARP because BDL never sold the ARP without the accessory pack, and the pack could not readily be sold separately.

Charge 11

(b) In addition, in one infomercial aired over a six-month period, despite the ARP and accessory pack always being sold together, BDL represented the ARP with the accessory pack as a limited-time, special offer.

Culpability Factors

The importance, falsity and dissemination of the untrue statement

[117] The representations were entirely false.

[118] BDL accepts that if a customer thinks that they are getting something for free, then that makes a product more attractive and they are more likely to buy it. Likewise, a sense of urgency or product-scarcity is created (through limited-time only marketing), which can lead to rash purchase-decisions.

[119] The ARP was marketed widely, as noted by the Commission:

(a) Three television infomercials about the ARP ran from 12 December 2018 to 27 November 2020 in which the accessory pack was described as "free", an "incredible bonus", and a "special offer for viewers" so "order today!". The three infomercials aired about 1000 times.

(b) Nine emails were sent to BDL subscribers between 12 December 2019 and 28 May 2021. BDL estimated that those emails were each distributed to between 59,000 and 131,000 consumers.[23]

(c) On its website TVShop.co.nz, between 14 January 2020 and 22 December 2021, BDL posted multiple advertisements with at least six making reference to the accessory pack as being "free, a "bonus", and a "special offer." The Commission estimates that the numbers of

[23] Exhibit bundle, Tab 11, pages 117-118.

consumers exposed to these advertisements is likely to be in the multiple of millions.

(d) Professor Lang calculated the number of consumer exposures to BDL's ARP advertising campaigns was "virtually certain" to be in the millions, and likely more than 10 million.[24] In addition to the repetition of the claims within the advertisement itself, he noted that it is likely that some consumers were exposed to multiple advertisements through the multiple channels on which they were disseminated.[25]

The extent and duration of the offending

[120] Charge 10 occurred over a period of two years and nine months during which time BDL sold 5,071 ARP packs at a price between $390 and $600.

[121] Charge 11 occurred over a period of six months during which time the infomercial aired approximately 11 times per month.

Whether the conduct was isolated or systematic

[122] BDL markets a large range of diverse products, however this marketing strategy was employed in relation to the ARP only. However, the strategy was widely deployed in respect of the ARP.

State of mind

[123] The Commission submits that BDL deliberately chose to market the ARP in this way and was aware that it was employing a risky strategy. In 2010 and 2012, the Commission had warned BDL about marketing products as "buy one get one (or more)

[24] Brief of Evidence (BOE) of Professor Lang at paras 15.6 – 15.8.
[25] BOE of Professor Lang at para 15.12.

for free."[26]

[124] The Commission had taken issue with BDL representing items as "free" when they were in fact included in the price. BDL undertook to amend or adopt its compliance program and policy to "ensure the issue of concern raised by the Commerce Commission is considered each time [BDL] approves" an advertising campaign as part of a settlement proposal with the Commission.

[125] BDL submits that whilst the strategy was deliberate, it was a mistake that was not done with the intent to deceive customers, or to run the risk of doing so. BDL highlights the time elapsed since the warnings and the different nature of the ARP offer.

[126] Given the previous warnings it received, BDL had been made aware of the risks inherent in marketing of this nature. It is difficult to understand why it made this "mistake" and why it did not consult its own updated policy. That said, I note that this strategy was only adopted in relation to one of its multiple products. I consider that its conduct was at the highest end of carelessness in the circumstances.

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[26] The Commission records:

(a) In 2010, BDL was warned by the Commission for advertising a "buy one get one free" offer for its Thin Lizzy products.116 The Commission expressed to BDL that the "offer has been offered to the public for such a long length of time that the price of $49.95 is, in fact, simply the price of the entire package". The Commission advised that the advertising was "likely to breach sections 10 and 13(g)" of the FTA, and mislead consumers "as to the price of the entire package by representing items as free when they were in fact included in the price". In response to the Commission's concerns, BDL stated it "acknowledges and agrees that the price of the Thin Lizzy package as advertised could be interpreted by a sector of the public so as to mislead that sector of the public as to the price of the enter package" and it accepted it could be in breach of ss 10 and 13(g) of the FTA. It discontinued use of "buy one, get one free" advertising, and undertook to amend or adopt its compliance program to "ensure the issue of concern raised by the Commerce Commission is considered each time [BDL] approves" an advertising campaign as part of a settlement proposal with the Commission, resulting in the outcome of a formal warning.

(b) Despite that, similar conduct repeated itself in 2012 with the Aah Bra, for which BDL advertised multiple units together as a "buy one get x (number) free" offer. The Commission advised BDL it considered "its current and historical advertisements" risks "creating a "usual" price for multiple products purchased in a transaction, particularly where the offer of multiple products was "regularly" available at the advertised price for a single unit. In those circumstances, it reiterated that "this price becomes the usual purchase price" for multiple products and it is misleading to continue to represent the additional units were "free". The Commission provided BDL with a compliance advice letter, which also referred to the previous warning in 2010, and encouraged it to access resources to gain a better understanding of its obligations under the FTA.

Seniority of staff

[127] BDL accepts that Mr Meier and senior officers were involved in the creation of the marketing strategies.

Compliance systems, culture and the reasons why they failed

[128] BDL explained in its response to the Commission's 7th RFI that it had previously engaged lawyers to "produce a Fair Trading Act Pre-Advertisement Checklist to assist with BDL's compliance". However, BDL accepts that it failed to ensure that this document was consulted before approving the ARP advertising. No reason has been given as to how or why this occurred.

Harm done to consumers and other traders

[129] This advertising strategy resulted in customers being misled about the value of the ARP "deal" offered by BDL. It resulted in other traders not competing with BDL for sales of the ARP on an even playing field. However, the extent to which the strategy increased BDL's sales of the ARP and consequential harm to other traders who sold the ARP, or similar products, cannot be quantified.

Any commercial gain or benefit

[130] BDL obviously profited from sales of the ARP and accepts that it considered this marketing strategy would increase sales.

[131] I infer that BDL profited from this strategy, but the extent of profit cannot be quantified given the variety of ways the benefits of the ARP were promoted, aside from the "free" and limited time offers. That said, the "free" accessory kit aspect of the advertisements was prominent. In short, given that more than 5,000 units were sold over this time period it would appear that the campaign involving this misleading marketing was successful.

Comparable authorities

[132] The Commission has referred to *Commerce Commission v Bike Retail Group Ltd*[27] and *Commerce Commission v The Market.com Ltd*[28] for reference in setting the starting point for this offending.

[133] BDL submits that whilst there are no cases that are truly comparable, the cases relied upon by the Commission are materially different and not suitable comparators cases. Instead BDL refers me to *Commerce Commission v Kathmandu Ltd*[29] and *Commerce Commission v The Warehouse Ltd*.[30]

[134] In setting a starting point I have considered all of the suggested comparator cases.

Commerce Commission v Bike Retail Group Ltd

[135] In *Commerce Commission v Bike Retail Group Ltd*, the defendant was a significant nationwide retailer of bikes and was sentenced on 16 representative charges, for conduct over a period of two years contrary to s 10 of the FTA.[31]

[136] The offending arose from advertising campaigns over that period which featured reverse engineered "half price" sales to create misleading impressions of the original/true value of the bicycle. "Clearance" sales were also advertised where the deals were the same as the ordinarily available price.

[137] It was deemed "calculated" offending, the Court noted that the actual price of the products and the advertised discounts were "irreconcilable." The departure from the truth was significant.

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[27] *Commerce Commission v Bike Retail Group Ltd* [2017] NZDC 2670.
[28] *Commerce Commission v The Market.com Ltd* [2022] NZDC 171017.
[29] *Commerce Commission v Kathmandu Limited* DC Auckland, CRI-06004500110, 19 June 2006.
[30] *Commerce Commission v The Warehouse Ltd* DC Auckland, CRI-2008-004-11407, 27 February 2009.
[31] Half of the charges fell under the previous maximum penalty of $200,000 and the remainder under the current maximum penalty of $600,000.

[138] To publicise these “deals, Bike Barn ran a “pervasive” advertising campaign using website, radio, print and online media advertising, which cost $2 million per annum and reached a “vast number of consumers.” The campaign had a “significant financial impact.”

[139] Bike Barn had received three earlier warnings from the Commission, and upon receiving a “Stop Now” letter in relation to the offending conduct, it did stop.

[140] The Court adopted the agreed starting point of $1,200,000 (approximately $1,600,000 inflation adjusted).

Commerce Commission v The Market.com Ltd

[141] In *Commerce Commission v The Market.com Ltd*, the defendant was an online retailer and was sentenced on eight representative charges contrary to s 10 of the FTA for conduct that occurred for period over three and a half years.

[142] The misleading representations were considered “pressure selling techniques” designed to promote sales through invoking both time and quantity scarcity. The representations involved “daily deal” products which were said to be available “today only”, and the quantity of stock available for purchase, through use of an indicator on the website, was represented as lower than it was. The “daily deal” sales generated between 94 and 95 per cent of total revenue between 2017 and 2020.

[143] The conduct was considered highly careless, and the decision to implement the marketing devices was a managerial decision, thus the defendant was culpable to the upper levels management. The deals were promoted through extensive advertising campaigns. The Commission had previously written to the company, and its shareholder (at the time) to educate on its practices but no changes were made.

[144] The Court adopted a starting point of $1,200,000 (approximately $1,350,000 inflation adjusted).

Commerce Commission v Kathmandu Ltd

[145] In *Commerce Commission v Kathmandu*, the defendant was a large nationwide retailer who pleaded guilty to seven representative charges relating to misleading representations made in substantial advertising campaigns about seasonal sales. Products advertised to be available during these sales at substantial discount had already been available for the same price prior to the sale.

[146] Kathmandu had twice been put on notice by the Commission that this kind of conduct risked breaching the FTA. However, Kathmandu had considered that those warnings were not applicable to the offending conduct. The Court found the conduct to be careless and that culpability was not at the higher end. There was no compliance programme in place at the time.

[147] As this case dates back to June 2006, all charges under had the then maximum penalty of $200,000. The Court adopted a starting point of $40,000 (approximately $65,000 inflation-adjusted).

Commerce Commission v The Warehouse Ltd

[148] In *Commerce Commission v The Warehouse Ltd*, the defendant was sentenced on 17 charges for a range of offending. The offending conduct included misleading representations by advertising that goods were "exclusive" to The Warehouse and advertising that certain toys were available at a price for a limited time, when in fact the price was the same both before and after the offer period (similar conduct to Charge 11).

[149] This case dates back to 2009 and again involves the lower maximum penalty. There is also some difficulty in drawing parallels, as the starting point in this case was set for the totality of conduct which involved five types of offending. That starting point was $130,000 (approximately $200,000 inflation-adjusted).

Starting point for ARP conduct

[150] The Commission suggests that BDL has demonstrated a "propensity to financially benefit from similar types of illegitimate advertising mechanisms". They submit it is important to emphasise deterrence to ensure that BDL does not take a calculated financial risk to engage in similar behaviour in the future. A starting point of $250,000 is submitted by the Commission as appropriate.

[151] BDL submits that a global starting point between $100,000 and $120,000 is appropriate.

[152] I accept BDL's submission that both *Bike Barn* and *TheMarket.com* involved s 10 offending of a more serious character, qualitatively and quantitatively, compared to BDL's advertising of the ARP. Importantly, the commercial gain in those cases was significant and important in the context of each business.

[153] BDL's conduct involved widely disseminated advertising over a period of two years and nine months (charge 10) and six months (charge 11). More than 5,000 ARP units were sold over the relevant period. Given senior management was involved in the design of the campaign and previous warnings had been given, I consider that the conduct was highly careless.

[154] However, the ARP was just one of BDL's products advertised over this period and it is only in respect of the ARP that BDL faces charges. Unlike *Bike Barn* and *The Market.com* the offending conduct was not a cornerstone of its marketing strategy.

[155] I consider that a starting point for both charges of $180,000 is appropriate for the overall scope of the offending and the level of carelessness involved.

Totality

[156] The global starting point, combining the three starting points adopted, for the three categories of offending is $1,330,000.

[157] The Commission submits that an adjustment for totality is not appropriate given the discrete nature of each set of offending and emphasises the need to promote deterrence in relation to this type of offending.

[158] BDL seeks an adjustment for totality of 10 per cent, and refers me to the comments of the High Court in *Denver Videotronics Ltd v IRD*:[32]

> In a case involving this number of offences and convictions, it is of course very important that the sentencing Court should have regard to the totality of the offending and also to the totality and effect of the penalty imposed. In other words it is not only a matter of fixing an amount per offence, but at the end one has to stand back, consider the total effect of the sentencing and have regard to whether in the final result that achieves broad fairness.

[159] Whilst this offending involves three distinct categories, they are reflective of BDL's flawed overall approach during this time period. When I consider the overall criminality of the offender and the offending, I accept that a modest adjustment to the global starting point is appropriate and adjust the starting point downward by 10 per cent to $1,200,000.

Mitigating Features

[160] The parties agree that a 5 per cent discount is appropriate for co-operation. I also agree with the parties that a 5 per cent discount should be applied.

[161] BDL seeks a 5 per cent allowance for remorse which is opposed by the Commission. BDL has outlined the remedial steps that it has taken, and changes made since this offending. It has issued a public apology on its website and paid $7,000 reparation (twice that which was sought by the Commission). BDL has now accepted its culpability without reservation, although that acceptance has come late in the proceedings. I consider that a small allowance for remorse is appropriate and I set that at 3 per cent.

[32] *Denver Videotronics Ltd v Commissioner of Inland Revenue* (1986) 9 TRNZ 528 (involving 68 charges).

Aggravating Features

[162] BDL has two previous FTA convictions arising in 2015 and 2021. In addition to these convictions, the Commission notes that it has previously received one warning (in 2010) and three letters setting out compliance advice (in 2012, 2014 and 2016).

[163] BDL submits that the warning and compliance letters are not a basis upon which an uplift is justified and that the relevance of the two previous convictions is questionable when the facts of each of the convictions is considered.

[164] I note that the 2021 conviction relates to contemporaneous offending and the 2015 offence regarded a product safety issue.

[165] I do not accept that an uplift for previous offending or other non-compliance is appropriate in these circumstances.

Financial Capacity

[166] No uplift is sought by the Commission for financial capacity. Whilst I have not set starting points at the levels sought by the Commission, I do not consider an uplift for financial capacity is appropriate particularly given BDL's lessened financial capacity since the offending conduct took place.

Conclusion

[167] Taking into account the mitigating factors, the final total fine is $1,104,000 to be apportioned equally against each charge ($84,923).

[168] I make no orders of reparation given BDL's indication at the hearing that each of the seven affected customers would be paid $1,000 immediately.

Judge BL Sellars KC
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 27/07/2026