IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2022-004-004372
[2023] NZDC 7018

COMMERCE COMMISSION
Prosecutor

v

MERCURY NZ LIMITED
Defendant

Hearing:	30 March 2023
Appearances:	A McClintock and D Houghton for the Prosecutor M Sumpter and G Spittle for the Defendant
Judgment:	2 May 2023

RESERVED JUDGMENT OF JUDGE S J LANCE
[Sentencing]

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[1] Mercury NZ Limited (Mercury) has pleaded guilty to six charges pursuant to s 13(i) of the Fair Trading Act 1986 (FTA).

[2] In general terms, the charges relate to Mercury making misrepresentations to affected customers that it had a right to charge an early termination fee (ETF) of $150 upon cancellation of their energy plan. Mercury did not have that contractual right.

(a) Charges 1 to 4 are representative charges and relate to invoices sent to approximately 2,048 customers which incorrectly stated that those customers were required to pay an ETF.

(b) Charge 5 is a representative charge and relates to instances where Mercury represented the right to charge an ETF in other (non-invoice) written communications.

(c) Charge 6 is a representative charge covering instances where Mercury customer service staff made the misrepresentations during phone calls with affected customers.

[3] The conduct occurred over a period of three and a half years between 1 July 2017 and 10 December 2020.

[4] The representative charges cover the same period, with the exception of charge 5 which concerns a more limited period between 1 October 2017 and 10 October 2018.

[5] In an explanation, Mercury stated that the initial error underpinning the charges arose from a technical billing issue where the system failed to recognise that the relevant customers were on renewal terms rather than on new contracts.

[6] Mercury's analysis in response to the Commission's investigation identified a total of 2,492 customers whose accounts had an ETF incorrectly generated on this basis.

[7] During the relevant period, Mercury became aware that some customers were being incorrectly charged an ETF and took steps to refund those customers. However,

the extent of the issue was not yet known by Mercury and incorrect charging continued.

[8] Following the Commission's investigation, Mercury took further steps to identify refund and compensate the remaining affected customers and to try to prevent the issue from reoccurring in the future. A total of 1, 647 of the 1,679 customers who paid the ETFs have now been refunded. For affected customers refunded after the Commission's investigation began, Mercury also provided an additional $50 in compensation. Mercury has donated the unaccounted balance from 32 customers who could not be traced to Starship Children's Hospital.[1]

[9] 'Keys facts' (and summary) are set out in the Commerce Commissions submissions as follows:

[10] During the charge period, Mercury was the third largest energy retailer in New Zealand with a market share of approximately 16 per cent of the retail electricity market. It is also a major player in the energy generation sector. In the final year of the charge period, Mercury had a net profit after tax of $141 million.

[11] Mercury offered various fixed term energy plans to consumers including plans for 1, 2, or 3 year contracts as well as a "Loyalty Plan" which had a two year fixed term and an additional discount. At the end of the term, all of these plans would automatically "renew" for a further fixed term without any action on the part of the consumer.

[12] Prior to 20 September 2016, customers terminating a fixed term plan (whether an initial or renewal term) were charged an ETF of $150. In 2015-2016, the Commission conducted a review into potentially unfair contract terms within the electricity sector. As a result, Mercury updated the terms and conditions for its fixed term contracts to provide that "[the] early termination fee does not apply…if your term is a renewal term".[2]

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[1] This introduction is taken from the agreed Summary of Facts.
[2] Agreed Summary of Facts (SOF) at [2.4].

[13] While Mercury had emailed staff to advise them of the updated terms and conditions on 21 September 2016, it did not implement any further specific training on the ETF changes. During the charge priod only two policy documents available to staff made reference to the rules for charging ETFs. One of these incorrectly indicated that customers cancelling auto-renewed plans could avoid an ETF only by cancelling within a "30 day window" of the renewal.[3]

[14] Following the introduction of the updated terms and conditions, a billing system issue arose where Mercury's computers failed to recognise that affected customers terminating their energy plans were on renewal terms rather than on new contracts.[4] As a result, Mercury's billing system would apply the ETF to affected customers' accounts. Mercury identified a total of 2,492 customers whose accounts had an ETF incorrectly generated on this basis.

[15] Mercury subsequently made the ETF misrepresentations in customer invoices, correspondence and/or phone calls with consumers as follows:

Invoice misrepresentations (charges 1-4)

[16] Between 1 July 2017 and 10 December 2020, Mercury issued invoices incorrectly containing an ETF (described on invoices as a "contract termination penalty") of $150 to approximately 2,048 customers.[5]

[17] The total value of the ETFs invoiced, if paid, would have been $307,200. In practice, 1,679 customers (82 per cent of those invoiced) ultimately paid the ETF totalling $251,850. In some instances, customers did not pay the ETF invoiced because it was waived following a complaint to Mercury. In other instances, however, the fee was waived only after the customer agreed to sign back up with Mercury upon receiving a retention call or upon themselves calling customer service representatives.

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[3] Agreed SOF at [1.1]-[6.5].

[4] This error was particularly prevalent for customers on the loyalty plan as a manual intervention was required when the plan rolled over to maintain the discount. This could be mistaken by Mercury's computer system for the commencement of a new contract. See Agreed SOF at [5.3] for further details.

[5] Estimate based on data provided by Mercury in the RFI process. A breakdown of the timeframes and number of invoices issued per charge is set out at para [4.1] of the Agreed SOF.

In total the parties identified 102 customers who had the fee waived only after they agreed to re-join Mercury.

Additional written communications (charge 5)

[18] The Commission's review of customer files identified that, on occasion during the period relevant to charge 5, being 1 October 2017 to 10 October 2018, further written misrepresentations reiterating Mercury's right to charge an ETF were made in the course of customer communications.

[19] Examples included an autorenewal letter sent in October 2017, which asserted a right to charge an ETF on cancellation, and an email sent to a customer from Mercury's resolution co-ordinator in October 2018 which asserted that the ETF had been correctly applied before agreeing to reverse it in light of the short period left before the renewal contract itself expired.[6]

Verbal representations by customer service staff (charge 6)

[20] In addition, Mercury customer service staff made verbal misrepresentations about the right to charge an ETF at various times throughout the charge period. These occurred either when customers called to query the ETF, or during retention calls made by Mercury staff after the customer terminated their contract.

[21] Examples of relevant conversations and representations are set out at paragraphs [4.10]-[4.13] of the Agreed SOF and Tabs 3 and 4 of that document. The calls included attempts to persuade consumers to re-join Mercury in order to avoid the ETF. In a notable case one consumer, Ms Garton, asked how charged an ETF was "even legal" when she had been with Mercury for five years and was told "well, it is".[7] Ms Garton explained that she was "stressed" as she was not in employment, that she had "no way of paying the $150" and that "the whole intent of [switching providers] was so that [she] could manage her finances weekly with a benefit".[8] The customer

[6] Agreed SOF at [4.5]
[7] Agreed SOF Tab 3 page 2.
[8] Agreed SOF Tab 3 page 2.

service representative again suggested that the account be reinstated in order to have the fee reversed which Ms Garton agreed she would "have to" do.[9]

[22] In July 2018, having become aware of the issue through customer complaints, Mercury applied an intervention to its billing system. This did not, however, capture all instances of ETFs being applied incorrectly with the result that the issue continued until the Commission investigation commenced in November 2020.

[23] Following the Commission investigation, Mercury implemented a number of measures to identify the full scope of the problem and refund affected customers. All customers who incorrectly paid ETFs have now been refunded with the exception of 32 consumers who could not be located. Customers identified and refunded after the Commission investigation also received an addition $50 in compensation.

The purposes and principles of sentencing

[24] It is noted (and I agree) by the Commission that the sentencing purposes of greatest importance in a case such as this are denunciation and deterrence. The FTA is consumer protection legislation. The need for deterrent penalties is well recognised in cases of FTA offending by corporates. The maximum penalty for each charge is $600,000. That maximum penalty was increased in 2014 (from a $200,000 maximum).

[25] Both parties submit and acknowledge that there is no tariff decision for FTA offending.

[26] However, the parties refer me to the cases of *Commerce Commission v L D Nathan and Co Ltd* and the more recent Court of Appeal decision of *Commerce Commission v Steel and Tube Holdings Ltd.* [10]

[9] Ms Garton followed up with Mercury's resolution team again at a later time, at which point she was told the fee would be waived if she left Mercury "as a good will gesture".

[10] *Commerce Commission v L D Nathan and Co Ltd* [1992] NZLR 160 (HC); and *Commerce Commission v Steel and Tube Holdings Ltd* [2020] NZCA 549.

[27] Those cases identify factors that affect the culpability of the offender and seriousness of the offence and may include the following:

(a) The nature of the good or service and the use to which it is put;

(b) The importance, falsity and dissemination of the untrue statement;

(c) The extent and duration of any trading relying on it;

(d) Whether the offending was isolated or systematic;

(e) The state of mind of any servants or agent whose conduct has attributed to the defendant;

(f) Seniority of these people;

(g) Any compliance systems and culture and the reasons why they failed;

(h) Any harm done to consumers and other traders; and

(i) Any commercial gain or benefit to the defendant.

[28] The factors affecting the circumstances of the offender include:

(a) Any past history of infringement;

(b) Guilty pleas;

(c) Co-operation with the authorities;

(d) Any compensation or reparation paid;

(e) Commitment to future compliance and any steps taken to ensure it.

[29] I am obliged to calculate the starting point by reference to the aggravating and mitigating factors of the offending and adjust that starting point to incorporate all aggravating and mitigating factors personal to the offender.

[30] In this case, both parties in their submissions have traversed the "culpability" factors with reference to the facts of this case, provided me with some comparable authorities, and calculated a starting point.

[31] The Commission nominates a starting point of $550,000 to $600,000. Mercury submits that a starting point of $350,000 to $425,000 is appropriate.

[32] Both parties are agreed that, as to the second stage in the sentencing process, a total discount of 35 per cent is warranted. That is calculated as follows – a full 25 per cent credit for early guilty plea and a further 10 per cent credit for co-operation and good character.

[33] I do not take issue with that proposed second stage adjustment. On the facts of this case, it is entirely appropriate.

[34] Both parties in identifying a global starting point refer to broadly comparative cases that are said to provide a useful comparison on the basis that they concern "billing beyond termination" (BBT). Each case involved billing errors by a major telecommunications provider that resulted in customers being incorrectly invoiced for a period after they had terminated their contracts. Those cases are as follows: *Commerce Commission v Vodafone NZ Ltd*; *Commerce Commission v Spark NZ Trading Ltd*; and *Commerce Commission v Core Plus Services Ltd, Flip Services Ltd and Orcon Ltd*.[11]

[35] It is said that the *Vodafone* case is the most helpful – in that case, Vodafone faced 14 charges under 13(i) FTA for misrepresentations that customers were obliged to pay for internet and/or landline services during periods after the customers had

[11] *Commerce Commission v Vodafone NZ Ltd* [2019] NZDC 15705; *Commerce Commission v Spark NZ Trading Ltd* [2019] NZDC 7801; and *Commerce Commission v Core Plus Services Ltd, Flip Services Ltd and Orcon Ltd* [2020] NZDC 2655.

terminated their contracts. The conduct occurred over a period of seven years during which the company overcharged 29,425 customers a total of $285,359.37.

[36] In that case, five charges were subject to the previous $200,000 maximum while nine were subject to the current $600,000 penalty. A global starting point of $450,000 was adopted by Judge Thomas but increased to $520,000 given Vodafone's previous record.

'Seriousness' of the offence and 'culpability' factors

Nature of the goods or service

[37] I accept the Crown proposition that retail electricity services are an essential consumer good for all households. It can be a significant ongoing expense. Accordingly, traders who supply essential services do have a responsibility to ensure that representations to consumers – many from lower socio-economic households – are not misleading. However, I also acknowledge Mercury's submission that the conduct here did not mislead consumers about the quality or use of electricity, (the product) but, rather, the cost of terminating a contract.

Importance of misrepresentation

[38] Mercury accept that the untrue statements were important. I accept the prosecution submission that there is a significant disparity of knowledge and sophistication between the likes of Mercury and many of the consumers to whom the services were provided. That can be seen in the large proportion of customers who paid the ETFs on their invoices, readily believing that the payments were somehow "legal".

[39] Under this heading, there is further disagreement between the parties. The Commission submit that the verbal representations were of particular importance as they had the purpose or effect of deterring consumers from switching providers. They say that the verbal representations show a degree of persistence on the part of Mercury and demonstrate a lack of proper training of Mercury staff. In their written

submissions, the prosecution state "The lack of proper staff training is a key concern for the Commission in pursuing these charges."

[40] There is cross-over under this factor with the "extent and duration of offending" factor.

[41] Under that heading, the Commission says:

> The conduct cannot be characterised as limited to an automatic billing system error. The manner in which customer service representatives repeated and expanded upon misrepresentations in phone calls is a significant aggravating factor stemming from Mercury's inadequate training, communication and regulatory compliance policies.

[42] Mercury rejects this contention and states, inter alia, as follows:

(a) That allegation goes beyond the wording of charge 6 and there is no support for it in the summary of facts. Charge 6 is worded the same as the invoice related charges and it covers the fact that Mercury made the representations verbally – not that Mercury "expanded upon" the representation verbally.

[43] The Commission in its submissions attach some transcripts of phone calls between customers and various email correspondence. I have now had the opportunity read those documents. This issue was discussed orally in submission.

[44] In short, I accept Mercury's position on this point. That was as follows. The initial 'point of contact' customer service staff who receive phone calls are people potentially located outside of New Zealand, sitting with headphones on, staring at a computer terminal. They relay information to customers from Mercury's automated billing systems, as is common procedure for other call centres. Those customer service staff are obliged to triage a huge range of customer queries in a "dynamic environment". It is said by Mercury that these staff were doing their best to respond to customers in circumstances where Mercury's billing systems mistakenly said the ETF was payable.

[45] Moreover, the Commission's expectation that these frontline customer service staff should not have relied on Mercury's automatic billing systems without manual "reference to the actual contractual position and without checking the circumstances of individual customers" is unrealistic given that Mercury believed its statements were accurate.

[46] Given the reality of the situation, I accept the submissions on behalf of Mercury. There may have been occasion (the Ms Garton call for example) where individual customer service staff overstepped the line in their conversation with customers. But they did so based on the information on the screen in front of them using material that Mercury had genuinely thought had been fixed and updated – within the software/IT billing systems of the company. It is a problem that they did try and address, no doubt utilising a third party 'specialist' contractor. The representations were a mistake. I infer they would not have been made had the 'billing system' fix been successful. The call centre staff were passing on incorrect information that they believed to be true.[12]

[47] As said in the submissions, whenever the issue was 'elevated' to Mercury's resolutions team, they recognised the error and refunded those affected.[13]

[48] Mercury accepts that its conduct may have had the effect of deterring some customers from switching providers. It appears that 102 customers were identified as staying with the business after receiving the misrepresentations.

[49] As I understand, those customers were advised and reimbursed as soon as Mercury realised the potential harm that had been caused to them.

[50] I do not overlook the submission by the prosecution that some of the verbal misrepresentation calls were "pro-active". However, again, this must be a scenario where the callers were simply relying on information from their computer screens that was in error.

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[12] SOF [4.15].
[13] SOF [4.14].

Extent and duration

[51] It is said by the prosecution that the "scale of the offending was reasonably significant". The conduct continued over a period of three and a half years with the invoice misrepresentations being made to approximately 2,048 customers.

[52] Mercury acknowledges this submission although notes that the billing mistakes were far less widespread than those involving Spark, Vodafone and Core Plus who over billed 72,000, 29,425 and 5,951 customers respectively.

[53] Here, the prosecution also suggests that as to the phone calls in which verbal representations were made, no figure can accurately be assessed – they say it is at least a real risk of more widespread misrepresentations occurring. Mercury note that they are satisfied the misrepresentation was made to 2,492 customers. For the purposes of sentencing, I do not believe that I can look beyond the agreed summary of facts.

[54] I do accept that the representations were a material departure from the truth that endured for a reasonably lengthy period.

Company's state of mind

[55] The Commission does not contend that Mercury's conduct in this case was deliberately or wilfully misleading. They suggest it was highly careless. They say Mercury was on notice from the outset (September 2016) after the Commission's review, that provisions charged in ETFs on auto renewed contracts were potentially unfair contract terms.

[56] Mercury has, as set out earlier, different customer plans. There is no evidence as to how many Mercury customers were on the "auto renewal" plan. It is said that Mercury became aware of the invoicing issue following complaints in July 2018. At that stage it implemented an intended fixed to its billing system. Despite the "fix" the misrepresentations continued in many cases.

[57] The prosecution say Mercury was, at this stage, on clear notice of the issue and did not effectively communicate it to customer service staff nor update training

materials. It did not investigate sufficiently to fully identify and resolve the issue. In response, Mercury states that it accepts its mistake and accordingly its conduct was careless. It believed that it had fixed the IT issue in 2018 and created a report for its managers to check that the billing system was still not incorrectly charging ETFs. Unfortunately, that solution missed a portion of their customers. Mercury acknowledges that objectively it was careless in not checking more thoroughly that its billing systems were working as they should have been.

[58] Here, in comparison to Vodafone, Mercury in acknowledging carelessness, reject the description of highly careless and submit that this "status ought to be reserved for cases like Vodafone who did not try and properly fix the billing error when first discovered".

[59] Here again, I accept this general submission by Mercury. It seems to me that, although they clearly should have and could have done better, Mercury did try to rectify the mistake. In saying that, I do not necessarily accept the follow up proposition that the "error was unmotivated by commercial gain".

Any compliance systems and culture and the reasons why they failed

[60] Mercury accepts its misrepresentations caused stress to some customers and deeply regrets that. Mercury submits that its suggested starting point as to penalty captures that harm.

[61] Mercury note it has a strong compliance culture evidenced by its near clean FTA record and response to the investigation in relation to this prosecution.

[62] It says that the vast majority of affected customers were repaid, and many were also provided a $50 compensation payment (33 per cent of the overcharge). It is difficult to assess with any accuracy how the misrepresentation may have caused detriment to competitors/competitive harm. The agreed facts do not directly address this issue. Mercury notes that the prices it set in relation to the 102 customers who signed back with Mercury (after being advised to pay an ETF) were set in a highly

competitive market and that such a small number of customers would not have any distortive competitive effect on rivals.

Comparative cases

[63] As has been said on many previous occasions, each case has its own set of facts. However, both parties refer to *Commerce Commission v Vodafone NZ Ltd* as the useful comparator.

[64] Mercury, state that it would be disproportionate for its starting point to be greater than the $520,000 starting point adopted in *Vodafone*. They say this for three reasons:

(a) Vodafone had been convicted for FTA breaches on several occasions, including a 2016 manual billings prosecution.

(b) Vodafone only repaid a small percentage of the customers it had overcharged. That overcharging occurred over a period of seven years and affected significantly more customers.

(c) Vodafone was aware of its billing systems issue and instead of trying to fix the core IT error it "highly carelessly" required staff to manually adjust its bills (with Vodafone routinely forgetting that step).

[65] Also, in the *Vodafone* case, Judge Thomas is setting the initial starting point of $450,000, included within that figure an 'uplift' as a culpability factor. That was the additional notice that Vodafone had owing to the manual billing's prosecution against it in 2016. He referred to it as a factor he considered in assessing the starting point "to a limited degree". In oral submissions, Mr Sumpter suggested that without that uplift the starting point may have been in the realm of $420,000.

[66] The one matter that does cause me some difficulty is the weight I give to the Commerce Commission's submission that as a general proposition there should be a higher start point here, given that all the offending is said to have occurred after the lift in maximum penalty. That is a policy reflected generally in case law following an

uplift in penalty. Mercury state in response that there needs to be some care with this blanket submission and refer to the comments in the *Steel and Tube* case where the Court of Appeal said:[14]

> The maximum fine was trebled seemingly not because existing fines had proved inadequate but to better align the legislation with Australian consumer laws.

[67] Further, Mr Sumpter states that there is no such thing as what he referred to as a "common law ratchet" and that the proper assessment is to simply assess the facts of this case and the culpability factors. In doing so, Mr Sumpter makes the point that the offending in this instance is less culpable than in *Vodafone*. I note that in Vodafone the majority of the charges (nine) were subject to the higher maximum penalty.

[68] Here the offending was for a significantly shorter period of time and involved a far lesser number of customers. Importantly, nearly all the people affected in this case were refunded and some, not only refunded in full but provided with a significant (percentage wise) compensation payment. In my view that clearly distinguishes this case from *Vodafone* in Mercury's favour. It demonstrates in a tangible way real remorse and regret for their error. Only a very small number of customers (32) could not be tracked or traced, the overpayment to those customers was paid in a charitable sum to Starship Hospital.

[69] Nonetheless, I do accept, that the offending here went on for too long. Mercury needed to do more, in particular once they were aware of the system malfunction in 2018. That failure should have been investigated thoroughly and fixed properly.

[70] Better training and advice to customer service agents would have followed. The verbal misrepresentations would not then have been made. Those mis representations were important, and a material departure from the truth. It need not have been that way.

[71] As has been said previously sentencing is not a precise science. Stepping back and taking all matters into account I impose a financial penalty near the top end of the

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[14] *Steel and Tube*, above n 10, at para [79].

defendant's range, namely $430,000.00 As set out earlier, I would then deduct $150,500 (35 per cent as agreed) leaving a balance of $279,500.00

[72] I discussed at the hearing how this penalty may be "apportioned".

[73] I will impose this fine namely $279,500.00 on charge 1. The defendant company will be convicted and discharged on charges 2-6.

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Judge SJ Lance
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 02/05/2023