IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI- 2019-004-006592
[2019] NZDC 25483

COMMERCE COMMISSION
Prosecutor

v

BACHCARE LIMITED
Defendant

Hearing:	11 December 2019
Appearances:	Ms A McClintock & Mr A Luck for the Prosecution Ms E McGill & P Ahern for the Defendant
Judgment:	17 December 2019

SENTENCING NOTES OF JUDGE A SWARAN SINGH

Charges:

[1] Bachcare Limited (B) pleaded guilty to two representative charges under sections 11 and 40(1) of the Fair Trading Act 10986 (FTA).

[2] Both charges concern B's conduct, which was liable to mislead the public as to the characteristics, or suitability for purpose, of services. B's conduct created an artificially positive impression of holiday accommodation, marketed on its website.

[3] The offending occurred over a period of 16 months, from 1 June 2017 to 28 September 2018.

[4] Each charge carries a maximum fine in the sum of $600,000, totalling $1.2 million.

[5] This is the first FTA case in New Zealand for misleading conduct involving consumer reviews.

Agreed Summary of Facts

[6] An agreed summary of facts provides the background and details of the offending.

[7] Incorporated in 2003, B is a nationwide holiday rental and accommodation company, employing approximately 40 full-time staff. As at mid-2018, number of annual bookings was approximately 25,000. B estimated that by number of bookings, it is the fourth largest accommodation booking platform operating in the New Zealand market. B also provides management services through 85 to 90 contractors nationwide.

Offending

[8] Holiday accommodation listed on B's website included:

(a) Aggregated Star Rating

(b) Edited Customer Reviews

[9] From 1 June 2017 to 28 September 2018, B's two marketing staff members had adopted the following practice:

(a) Rating Inflation:

Did not publish ratings or reviews from customers who had given a low or middling rating: 3 out of 5 or lower from the initial survey and 6 out of 10 or lower from the revised survey. Effectively, holiday

accommodation listed on B's website could not receive an aggregated star rating lower than 3.5 out of 5 stars.

During the relevant period, B had on its website at least 1,729 properties for rent. Out of a total of 6,814 customer reviews, B withheld a total of 940 reviews. Rating inflation resulted in an improved aggregate star rating of 384 properties, representing approximately 22% of the listings on B's website.

Hence, B's conduct in inflating rating was liable to mislead the public as to the characteristics and/or suitability for purpose of the affected properties.

(b) Review Editing:

Out of 5,802 customer reviews, B's marketing staff had edited 198 reviews, representing approximately 3.4% of the reviews published on its website, by removing negative comments about the properties and/or B's services relating to those properties. Examples of negative comments deleted included dissatisfaction with cleanliness (such as presence of cockroaches or dead bird), lack of amenities (such as insufficient hot water due to small hot water cylinder) and enjoyment of properties (such as lack of wifi or level of noise from neighbouring backpackers)

B's website did not provide any explanation regarding editing customer's reviews. Looking at the website, a customer would not know that negative comments had been edited. The effect of editing negative comments created an artificially positive impression of the affected properties.

Hence, B's conduct was liable to mislead the public as to the characteristics and/or suitability for purpose of the affected properties.

[10] According to the Agreed Summary of Facts, the practice adopted by the marketing staff was inconsistent. There were ten instances where B's staff removed positive comments. At least 200 out of 5,802 customer reviews contained negative comments.

[11] It is common ground that the B's Board of Directors and senior management were not aware of the practice adopted by its marketing team. B accepts its failure in this regard. It also accepts its failure to improve staff training. In the circumstances, B accepts being careless.

Law

Fair Trading Act 1986

Purpose

[12] Section 1A provides that the purpose of the FTA is to contribute to a trading environment in which "the interest of consumers are protected", "businesses compete effectively" as well as "consumers and businesses participate confidently".

[13] Section 40 of FTA provides for a fine of up to $600,000 for an offence under Part 1 of the FTA, which includes an offence under section 11. Prior to 17 June 2014, the maximum fine was $200,000. The substantial increase in maximum fines reflect the need for deterrence.

Sentencing Principles and Purposes

[14] In *Commerce Commission v LD Nathan & Co Ltd*[1], High Court set out the relevant factors to be considered in sentencing, which are mirrored in sections 7 to 9 of the Sentencing Act 2002.

[15] It is difficult to detect breaches of the FTA. Therefore, in sentencing an offender under FTA, deterrence and denunciation are important considerations. In *Commerce Commission v Auckland Academy of Learning*[2] the Court stated that:

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[1] *Commerce Commission v LD Nathan & Co Ltd* [1990] (HC) 2 NZLR 160.
[2] *Commerce Commission v Auckland Academy of Learning* [2017] NZDC 27148.

> In terms of sentencing principles, the one with greatest weight is deterrence, both specific and general. A company does not have a conscience .... It exists as a device to make profit. There is nothing wrong with that but the main lever for deterrence is a financial penalty that will deter the current defendant and others like it from breaching their obligations.

[16] Likewise, in *Budget Loans Ltd v Commerce Commission*[3] High Court observed that:

> Highly careless conduct by larger companies involving greater dissemination [will] attract heavy penalties up to the maximum.

[17] Under section 40(1) of the Sentencing Act, in determining the amount of a fine regard must be had to the financial capacity of the offender.

Relevant Culpability Factors

[18] In *Commerce Commission v Steel & Tube Holdings*[4] the High Court stated that the primary consideration in fixing a starting point is the state of mind accompanying the offending. In broad general terms, inadvertent conduct would warrant a fine of up to one-third of the notional maximum. For careless conduct, it would be between one-third and two thirds. Deliberate conduct would warrant a starting point from two thirds of the notional maximum and upwards.

[19] In *Steel & Tube,* both parties have sought leave to appeal the High Court decision, including the categorisation of culpability based on the state of mind.

[20] In the circumstances, Commerce Commission's submissions on the starting point is based on factors set out in *LD Nathan*[5]. Defence submissions is based on similar factors set out in *Commerce Commission v Ticketek NZ Ltd*[6].

Commerce Commission's Submission

[21] The objective of FTA is to protect consumers. By rating inflation and review editing B had undermined the trust consumers place on online reviews.

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[3] *Budget Loans Ltd v Commerce Commission* [2018] NZHC 3442 at [71].
[4] *Commerce Commission v Steel & Tube Holdings* [2019] NZHC 2098 at [92].
[5] *LD Nathan* Ibid.
[6] *Commerce Commission v Ticketek NZ Ltd* [2007] DCR 910 at [47].

[22] B failure to comply with FTA. By rating inflation and review editing, B had created an artificially positive impression of the customer ratings of the relevant properties. It compromised the integrity of the reviews, which is a matter of high importance to consumers.

[23] Rating inflation and review editing by the marketing staff, one of whom was at a managerial level, was deliberate. While the Board and senior management were not aware of the marketing practice adopted by the marketing team, it suggests that B:

(a) Did not have processes or procedures in place to ensure that its marketing complied with FTA; and

(b) Did not exercise appropriate oversight over the activities of its marketing team.

[24] Above failures suggest that the offending was the product of a high degree of carelessness on B's part.

[25] After the conduct was brought to B's attention in March 2018, it left the edited reviews on the website for a significant period after that. All reviews were removed by 15 October 2018.

[26] During the interview the Commission sensed that B's Director had expressed justification for the conduct, including stating that:

(a) Rating inflation was common in the industry.

(b) Where a property had a small number of ratings, a single low rating could skew the overall rating.

(c) Excluding customer ratings, which were 3 star and lower, did not risk misleading consumers.

(d) Editing customers' reviews had the effect of fairly representing the reviewed properties.

[27] Above response suggests that B's senior management either did not familiarise themselves with FTA or had adopted a blinkered approach.

[28] The offending was over a period of 16 months- from 1 June 2017 to 28 September 2018.

[29] Withholding 940 customer reviews affected 384 properties, representing 22% of the properties.

[30] Review editing resulted in altering at least 198 consumer reviews, representing 3.4% of the reviews published on the website in the relevant period. It had the effect of creating artificially positive impressions of the reviewed properties.

[31] B's conduct prejudiced consumers and competitors. It is not possible to quantify how many consumers would have made a different decision if ratings were not inflated and/or reviews were not edited.

[32] Need for deterrence is set out in [15] and [16], above. Offending such as this is difficult to detect. B's offending came to light only because a consumer noticed that his review had been edited.

Defence Submissions

[33] The defendant acknowledges the purposes of the FTA and accepts that its conduct infringes the objects which FTA seeks to promote.

[34] Consumers had other information on properties such as a detailed description of the property, amenities and photographs, other than ratings and reviews, on which to base their decision. Such other information was accurate. Inflated ratings and edited reviews were not critical.

[35] There is no evidential basis for Commission's submission that holiday accommodation tend to be most liable to disappoint when the experience proves to be less than represented. Defence submits that Commission's submissions in this regard goes too far.

[36] The defendant did not receive any complaint from customers that the reviews or ratings were misleading. When it implemented its review policy there was no change in booking levels.

[37] The defendant accepts it was careless. The Board was not aware of the practice adopted by the marketing team. It had not authorised such practice. Whilst the Board endeavoured to create a culture in which properties were to be represented accurately, it accepts that B did not specifically train staff on how to deal with reviews and ratings. It did not have a policy or guideline on ratings and reviews. Board accepts its failure to provide clear guidelines and giving staff too much autonomy.

[38] The defendant points to lack of industry guidelines or legal precedents on reviews and ratings. It's review and ratings procedure was more complex than those of companies that allow customers to directly upload reviews online. Staff subjectively decided what was best to include on the website as a fair representation of the property.

[39] Staff considered it to be an industry practice not to include ratings lower than 3.5 stars. Staff considered it permissible to delete comments in relation to services, which had been rectified. Staff believed that consumers would not be misled as negative service comment was not necessary once service issue had been addressed.

[40] In essence, the defence submission is that B's conduct was not deliberate and there was no wilful intention to mislead.

[41] Defence does not accept Commission's submission that senior management might not have put an end to the conduct even if it had been brought to their attention. When the Commission's concern was brought to its notice B had to investigate the issue. It immediately ceased sending out review questionnaires and publishing new reviews. By end of April 2018 the reviews on the website had been labelled "happy comments from happy guests", which was a holding position. After the internal investigation was completed, with the Commission's support, it removed all reviews from its website by mid-October.

[42] Director's responses at the interview were based on her understanding of explanations given by the staff.

[43] A total of 384 properties, representing 22% of the properties, had their aggregated ratings improved:

(a) 56% had their rating increased by 0.5 star.

(b) 26% had their rating increased by 1 star.

(c) 15% had their rating increased by 1.5 to 2 stars.

(d) 3% had their rating increased by 2.5 to 3 stars.

[44] Review editing affected 3.4% of all the published reviews. Defence explanation for editing is set out in [39], above.

[45] B's website was available to be viewed by the public. Infringing conduct affected a small number of properties and reviews, as set out in [43] and [44], above.

[46] There is no demonstrable harm resulting from the offending conduct.

[47] B fully cooperated with and assisted the Commission in its investigations. B collated the relevant data and provided it to the Commission in an easily analysable digital format. CEO voluntarily attended two interviews. She fully cooperated and was frank about the conduct that had occurred.

[48] B had publicly apologised for its conduct.

[49] It implemented a public Review Policy. Reviews cannot be edited by staff.

[50] B accepts the need for general deterrence. However, it considers it unfair to disproportionately punish B, a first offender, to set an example to others. B is not the biggest player and has not deliberately breached the FTA.

[51] Industry has already received the message through publicity of this case to date. There would be further media coverage upon sentencing, which will send a very clear message to the industry that reviews and ratings must not be compromised.

[52] B does not see the need for personal deterrence. It accepts its conduct infringed the purposes of the FTA and has acknowledged that it occurred due to lack of robust internal measures. Appropriate steps have been taken by B to improve its review and ratings policy to ensure that such conduct does not reoccur again.

[53] B did not profit or benefit in any way from it. During the 18-month period, it made a loss of $144,000.

[54] The prosecution and negative publicity have all acted as a strong deterrent.

[55] B has no issues with having to pay a fine.

[56] B pleaded guilty at the earliest possible opportunity, once the Agreed Summary of Facts had been formalised.

[57] B has no previous conviction.

[58] Totality principle is applicable in respect of the two representative charges.

Case Law & Starting Point

[59] This is the first FTA prosecution in New Zealand concerning reviews and ratings. Therefore, there is no case law on issues raised in this case. Both counsel have very helpfully provided submissions on case law relating to FTA sentencings concerning:

[60] Commerce Commission referred to the following cases:

(a) Quality & Benefit Cases: *Commerce Commission v Fujitsu General NZ*[7] *Ltd*; *Commerce Commission v HVR Clean Water Ltd.*[8]

(b) Country of Origin Cases: *Premium Alpaca Ltd v Commerce Commission*[9]; *Commerce Commission v Hyeon Co Ltd*[10]; *Commerce Commission v Farmland Foods Ltd*[11]; *Commerce Commission v Topline International Ltd*[12].

(c) Australian Review-Editing Cases: *Australian Competition & Consumer Commission v Aveling Homes Pty Ltd*[13]; *Australian Competition & Consumer Commission v Meriton Property Services Ltd (No 2)*[14].

[61] Defence referred to the following cases:

(a) *Farmland; Commerce Commission v Vehicle Logistics Ltd;*[15] *Commerce Commission v Nezam Anwer & Zodiac Motor Co Ltd;*[16] *Commerce Commission v Ace Marketing Ltd.*[17]

[62] In their detailed and meticulous submissions, having analysed these cases counsel have very helpfully provided their views on the starting point for my consideration. In the circumstances, I do not consider it necessary to revisit these cases, suffice it to state that I have carefully considered them and noted the relevant factors and distinguishing features referred to by counsel.

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[7] *Commerce Commission v Fujitsu General NZ Ltd* [2017] NZDC 21512.
[8] *Commerce Commission v HVR Clean Water Ltd* [2018] NZDC 2299.
[9] *Premium Alpaca Ltd v Commerce Commission* NZHC 1836.
[10] *Commerce Commission v Hyeon Co Ltd* CRI-2012-004-019312, Rotorua DC, 10 September 2013.
[11] *Commerce Commission v Farmland Foods Ltd* [2019] NZDC 14839.
[12] *Commerce Commission v Topline International Ltd* [2017] NZDC 9221.
[13] *Australian Competition & Consumer Commission v Aveling Homes Pty Ltd* [2017] FCA 1470.
[14] *Australian Competition & Consumer Commission v Aveling Homes Pty Ltd* [2018] FCA 1125.
[15] *Commerce Commission v Vehicle Logistics Ltd* [2018] NZDC 14788.
[16] *Commerce Commission v Nezam Anwer & Zodiac Motor Co Ltd* [2016] NZDC 25266.
[17] *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165.

Starting Point & Credits

Commerce Commission Submissions

[63] After analysing the cases, counsel for Commerce Commission submitted that an appropriate starting point is in the range of $200,000 to $250,000.

[64] B is entitled to 10% credit for absence of any previous conviction and for B's cooperation in the investigation.

[65] B is entitled to 25% credit for pleading guilty at the earliest possible opportunity.

[66] An end fine in the range of $135,000 to $168,000 is considered appropriate.

Defence Submissions

[67] After analysing the cases, defence counsel submitted that an appropriate starting point should be in the range of $110,000 to $150,000.

[68] B is entitled to 10% credit for absence of any previous conviction and for its cooperation in the investigation.

[69] B is entitled to 25% credit for pleading guilty at the earliest possible opportunity.

[70] An end fine in the range of $71,500 to $97,500 is considered appropriate.

Discussion

[71] I have carefully considered written and oral submissions from both counsel. Further, I have carefully considered the cases referred to by both counsel as well as their submissions on the starting point, having regard the totality principle.

[72] I note that this is the first prosecution under FTA, concerning offending involving rating inflation and review editing.

[73] Cases referred to by counsel are of some assistance in considering the culpability factors and starting point. However, it needs to be noted that prior to 17 June 2014 the maximum fine was $200,000 per charge. After 17 June 2014, Parliament increased it to $600,000 per charge.

[74] It also needs to be noted that the Australian legislation is not comparable to New Zealand FTA. Whilst the Australian cases referred by counsel for the Commerce Commission provides some guidance, it needs to be noted that the Australian legislation provides for a maximum fine of $1.1 million per charge for companies and $220,000 per charge for individuals. Australian legislation provides for a civil regulatory regime in which civil penalties are imposed, without any criminal aspect to it.

[75] On the issue of culpability, having carefully considered all matters placed before the court, I find that:

(a) After the Commission had notified B of its concerns, B had initiated internal investigations which would have taken time to complete. That may explain why it took until mid-October 2018 for B to finally remove all the offending material from the website.

(b) Commission submission is that B had not acted promptly in removing the edited reviews. Defence counsel takes issue with Commission's submissions on this issue. According to defence, B had acted promptly and any delay was due to the complexity involved in investigation process. For the purposes of sentencing, I find that B should have removed the edited reviews more promptly after notification. It continued to display reviews on website by labelling "happy comments from happy guests". However, I accept that in all other respects, B was fully cooperating with the Commission, providing invaluable data which would have assisted the Commission considerably, thereby saving unnecessary investigation costs.

(c) It is common ground that the Board and senior management were not aware of the practice adopted by the marketing team. B accepts that it should have implemented robust procedures and staff training on the need to comply with FTA. Hence, B accepts that it was careless.

(d) Unlike some cases referred to counsel, the extent of offending was limited to 22% of the properties involved in rating inflation and 3.4% of the reviews which were edited. Marketing was limited to the website. In some instances, marketing included various medium such as online, television and pamphlets.

(e) Relative to some cases referred to in submissions, whilst B is a sizeable company, it is not in the same league as some of the much bigger companies.

(f) Whilst the harm cannot be quantified, the offending conduct infringed the purposes of FTA. It compromised the interests of the consumers, fair competition and an environment in which consumers and businesses participate confidently.

(g) In my assessment, the level of carelessness was moderate to high for the following reasons:

(i) Lack of procedure and processes for compliance with FTA

(ii) Failure to train and supervise staff involved in marketing

(iii) Whilst acknowledging B fully cooperated with the investigations, it did not act promptly enough to remove the offending ratings and reviews.

(h) In my view, negative publicity to date as well as upon sentencing will, no doubt, have a deterrent effect on B.

Sentencing

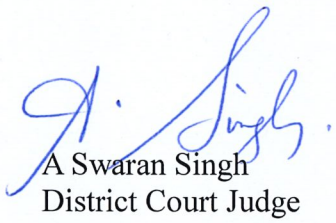
[76] In respect of both charges, I have adopted a totality starting point of $180,000.

[77] Counsel are in agreement that 10% credit is appropriate for B does not have any previous conviction and for cooperating with the Commission during the investigation and for providing data which would have assisted the Commission considerably.

[78] Counsel are also in agreement that 25% credit is appropriate for pleading guilty at the earliest possible opportunity after an agreed summary of facts had been finalised.

[79] Total credit is 35%, which equates to $63,000. The result is a total fine in the sum of $117,000.

[80] On each charge, Bachcare Ltd is fined $58,500, totalling $117,000. In respect of each charge, Bachcare will also pay $130 court costs, totalling $260.



A Swaran Singh
District Court Judge