

**IN THE DISTRICT COURT
AT NORTH SHORE**

**I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA**

**CRI-2021-044-001410
[2022] NZDC 1580**

COMMERCE COMMISSION
Prosecutor

v

BRAND DEVELOPERS LIMITED
Defendant

Hearing: 1 February 2021

Appearances: K Mills and R Ching for the Commerce Commission
D Brinkman and S Hiebendaal for the Defendant/Company

Judgment: 3 February 2021

RESERVED JUDGMENT OF JUDGE A M FITZGIBBON

Delivery of judgment

[1] A summary of this decision was provided orally to the parties in open court on the day of the hearing, 1 February 2022 with an indication that the full written decision with reasons would follow.

Introduction

[2] The defendant, Brand Developers Limited, trading as TV Shop (BDL) has pleaded guilty to 10 representative charges under s 36U of the Fair Trading Act 1986 (the FTA). The charges relate to extended warranty agreements it sold to customers

between 1 May 2020 and 1 March 2021, which failed to comply with the disclosure requirements under the FTA.

[3] Disclosure violations during the charge period variously included; failing to provide a written extended warranty agreement to its customers at the time of purchase, failing to provide a summary comparing a customer's rights under the extended warranty agreement and the Consumer Guarantees Act 1993 (CGA) and failing to provide oral notice that a customer was entitled to cancel, without penalty, within a period of five working days.

[4] Accordingly, BDL's customers were not properly informed before purchasing the extended warranty agreements. BDL sold 18,114 extended warranty agreements during the relevant charge periods, deriving revenue of \$1,974,723.

[5] Each of the 10 representative charges to which BDL has pleaded guilty carries a maximum penalty of a fine of \$30,000 under s 40(1B) of the FTA. These are infringement offences, no conviction is entered.

The charges

[6] The charges are divided amongst three processes BDL had in place for providing disclosure when selling extended warranty agreements across the charge period:

- (a) Initial process: 1 May 2020 to 30 October 2020.
- (b) Interim process: 14 October to 11 November 2020.
- (c) New process: 12 November 2020 to 1 March 2021.

In respect of the new process, BDL changed the extended warranty terms and conditions on three occasions.

[7] The 10 charges comprise:

- (a) Six charges for breaches of ss 36U(1), 36U(2) and 36U(3) under BDL's initial process.
- (b) One charge for a breach of ss 36U(1) and 36U(2) under BDL's interim process.
- (c) Three charges for breaches of ss 36U(1) and 36U(2) under BDL's new process.

Summary of facts

[8] An agreed summary of facts is attached to this judgment as Appendix A. Some key facts follow.

Key facts

BDL's business

[9] BDL is located in New Zealand. It is a direct response sales business which sells a wide range of consumer products both nationally and internationally through different channels, including e-commerce and direct response television marketing. BDL generates most of its sales (87%) through customers who purchase products over the phone following TV infomercials, with 13% of its sales generated through online purchases.

[10] BDL spends approximately \$24,000,000 a year on advertising (mainly on infomercials). BDL has approximately 300 employees and generated \$48,000,000 in revenue (excluding intercompany and international sales) in the year ending 31 March 2020. BDL's corporate website branddevelopers.com advertises that Brand Developers is a marketing company that earns over \$200,000,000 in revenue per annum.

Extended warranty agreements (extended warranties)

[11] BDL began selling extended warranties to customers on 31 July 2019. BDL offers extended warranties for approximately 30 of its product lines.

[12] The price and duration of BDL's extended warranties vary according to the product to which they relate.

[13] Across the charge period, BDL had three separate processes in place for providing disclosure when selling extended warranties to its customers: its initial process, interim process (developed following notification of the Commission's investigation) and its new process. All three of these processes breached the disclosure requirements of s 36U of the FTA.

Commerce Commission (the Commission) investigation

[14] On 7 October 2020, the Commission requested information from BDL regarding its extended warranty disclosure. BDL cooperated and responded to the Commission's request on 12 November 2020 providing information. BDL informed the Commission that it had failed inadvertently to comply with s 36U of the FTA and set out what steps were being taken to remedy the situation.

[15] A further request was made by the Commission on 6 January 2021 requiring further information from BDL regarding its extended warranties. A response was made by BDL on 20 January 2021.

[16] The Commission was of the view that BDL's disclosure was still defective and did not meet the requirements of s 36U of the FTA. A voluntary interview was held between BDL's Director, General Manager of Direct Response Sales and its CEO with the Commission to discuss the Commission's view of BDL's non-compliance with s 36U of the FTA.

[17] Following the provision of further information by BDL to the Commission on 5 February and 22 March 2021, the Commission notified BDL on 25 March 2021 of its ongoing concerns with its processes.

Submissions – Commerce Commission

[18] The Commission has provided a useful comparison table of relevant cases.^{1&2} The Commission submits that in respect of the number of non-compliant extended warranties sold and total revenue received by BDL, BDL’s offending sits between *Commerce Commission v PB Technologies Limited (PB Tech)* and *Commerce Commission v Michael Hill New Zealand Limited (Michael Hill)*.

[19] The suggested starting point on that basis is between \$110,000 (*PB Tech*) and \$240,000 (*Michael Hill*).

Comparison table					
	Godfreys	Smart Shop	PB Tech	Michael Hill	BDL
Charges	10	2	14	12	10
No. of warranties	3,202	700-800	4,400	76,000	18,190
Revenue	\$169,000	Est. \$44,460 – \$50,590 ¹	\$500,000	\$8.8m	\$1,974,723
Level of culpability	Not explicitly addressed	Grossly negligent	Moderately careless	Careless	Highly careless (initial and interim process); Careless (new process).
Tangible benefit	Not explicitly addressed.	Not explicitly addressed.	PB Tech had honoured \$250,000 in claims.	Consumers provided with extended right to cancel.	See Appendix to these submissions.
Starting point	\$80,000	\$40,000 (before adjusting for totality)	\$110,000	\$240,000	\$180,000 – \$200,000

¹ Set out below. Note that the level of culpability and starting points are in dispute.

² The cases referred to are *Commerce Commission v New Zealand Vacuum Cleaner Company Ltd (Godfreys)* [2016] NZDC 26065; *Commerce Commission v Smart Shop Limited* [2016] NZDC 19377; *Commerce Commission v PB Technologies* [2018] NZDC 20733; and *Commerce Commission v Michael Hill New Zealand Limited* [2018] NZDC 25232.

[20] In its submissions, the Commission considers the nature of the breaches as follows:

Initial and interim processes

[21] The Commission submits that BDL's initial and interim processes (being largely similar) involved an abject departure from the requirements of s 36U of the FTA, with the only information provided to BDL customers regarding the terms of the extended warranty, being the oral advice that it was an extension of the manufacturer's warranty.

[22] The Commission submits that BDL's initial and interim processes bear similarities with the offending in *PB Tech*, However, submits that BDL's failings were more significant as it did not have a separate written extended warranty agreement. In comparison, *PB Tech* had a written (albeit inadequate) agreement.

[23] The Commission further submits that BDL's offending in respect of its initial and interim processes was more culpable than in *PB Tech* given BDL's history of FTA non-compliance and the volume of extended warranties sold. BDL sold over 13,000 extended warranties pursuant to its initial and interim processes (as compared with 4,400 extended warranties in *PB Tech*).

[24] Accordingly, the submission is that a considerably higher starting point than that adopted in *PB Tech* (\$110,000) would be appropriate based on the extended warranties sold pursuant to the initial and interim processes alone. That BDL also sold over 5,000 extended warranties pursuant to its new process further supports a considerably higher starting point.

New process

[25] The Commission submits that BDL's failings in respect of its new process were more similar to the offending in *Michael Hill*. In both cases, the extended warranty was founded with input from legal advisors and provided some consumer information (albeit this information was inadequate to compare the rights offered by the warranty and those under the CGA). The Commission submits that, while less culpable than its

offending under the initial and interim processes, BDL's conduct in continuing to breach s 36U under its new process was still more than a mere oversight.

Appropriate starting point

[26] Overall, the Commission submits that BDL's starting point should be lower than that set in *Michael Hill*, given *Michael Hill* involved the sale of 55,000 more extended warranties than BDL. However, the starting point should nonetheless reflect the fact that the majority of the charges (70%) against BDL relate to non-compliant extended warranties sold pursuant to BDL's initial and interim processes, which involved more serious failings than in *Michael Hill* and *PB Tech*.

[27] In light of the above, the Commission submit that an appropriate global starting point for BDL's charges would be in the range of \$180,000 to \$200,000.

Aggravating factors

[28] The Commission does not recognise any aggravating factors, beyond those mentioned, that would warrant an uplift.

Mitigating factors

[29] The Commission does not recognise any mitigating features of the offending itself.

[30] The Commission acknowledges that BDL has fully co-operated with the Commission's investigation, responding to information requests and attending a voluntary interview with the Commission.

[31] The Commission cites *Budget Loans Ltd v Commerce Commission*, where Moore J considered that a cumulative discount of 10% for mitigating factors such as co-operation and lack of previous convictions is to be regarded as being "at the high end indicated in cases of this sort".³

³ *Budget Loans Ltd v Commerce Commission* [2018] NZHC 3442 at [46].

Guilty plea

[32] BDL pleaded guilty to all charges at the first call. The Commission accepts BDL is entitled to a guilty plea discount of 25% in those circumstances.

End fine

[33] Allowing a 35% discount for co-operation and guilty plea, an end fine in the range of \$117,000 to \$130,000 results.

Submissions for BDL

[34] BDL has agreed with the Commission as to the proposed starting point of between \$180,000 to \$200,000 and the level of discounts, of 35% properly available to BDL.

[35] In summary, BDL submits that:

- (a) the starting point in respect of the charges should be set at the low end of the range (\$180,000), having regard to the nature of the conduct in light of the applicable sentencing principles, and in comparison with previous cases;
- (b) a discount of 35% is available, having regard to BDL's early guilty plea and full cooperation with the Commission's investigation;
- (c) which leads to a penalty of \$117,000.

[36] BDL agrees that there is a large measure of common ground between the parties in terms of the principles outlined in *LD Nathan*:⁴

- (a) the objectives of the FTA;
- (b) the degree of culpability in the context of wilfulness or carelessness;
- (c) the extent of prejudice or harm to consumers;

⁴ *Commerce Commission v LD Nathan & Co Ltd* [1990] 2 NZLR 160.

- (d) the defendant's attitude in respect of remorse;
- (e) co-operation with the authorities and remedial action; and
- (f) the effect of any publicity regarding the prosecution.

[1] However, counsel for BDL consider that the Commission is incorrect to assert that an additional criterion for culpability is:

...whether the protections actually afforded under the non-compliant extended warranties provided any tangible benefit to consumers above the protections afforded to under the [Consumer Guarantees Act 1993].

Starting point

[37] Counsel for BDL submits that the 76,000 non-compliant extended warranties in *Michael Hill* significantly exceed the 18,114 extended warranties sold by BDL.

[38] Counsel further submits that, in terms of the nature of the conduct, the earlier charges (relating to the initial and interim processes) in this case were inadvertent, not deliberate. Counsel compare this to the nature and conduct in *Commerce Commission v New Zealand Vacuum Cleaner Company Ltd (Godfreys)* where the defendant lacked awareness of the provision.⁵

[39] The submission is also made that the conduct in this case was not uniform. Rather, in terms of the later charges (under the new process), BDL *did* provide an extended warranty agreement to customers, albeit one which did not comply with each of the requirements of s 36U.

[40] Counsel further submits that BDL's offending is less serious than *Michael Hill* in the sense that, "there was an additional charge for essentially tricking customers into purchasing an extended warranty". There, a salesperson automatically included the price of the extended warranty in the total purchase price without informing the customers that they would be buying an extended warranty. Counsel submits that there is no such conduct in this case.

⁵ *Godfreys*, above n 2.

[41] BDL disputes the Commission’s characterisation of the offending as being the “most serious departure” from the requirements of s 36U to date. BDL submits that this overstates the gravity of BDL’s offending and is inconsistent with the fact that the Commission accepts that the appropriate starting point is lower than in *Michael Hill* (which was \$240,000).

[42] Furthermore, BDL does not accept the Commission’s characterisation of offending as “highly careless”. BDL accepts that there were inadvertent failures in its processes and is comparable to *PB Tech* in which the Court described the offending as being moderately careless.

[43] BDL submits that a comparison between the substantive rights offered under the CGA and the extended warranty are not relevant to sentencing:

...it is up to each business to propose its [extended warranty] terms, and for the customer to decide whether or not to agree. The FTA does not provide for the Commission to make its own assessment of those terms...

[44] Further to that, BDL submit that, in any event, the Commission’s comparisons of those rights in this case contain clear errors. For example, BDL disputes the Commission’s assertion that the extended warranty offers less rights than the CGA in terms of cover for faulty products, because the “warranty is limited to faulty material or workmanship”, whereas the CGA provides guarantees in relation to fitness for purpose.

[45] BDL notes that the extended warranty provides “if the product is faulty, we will repair or replace the Product, or refund the price paid for the Product (in accordance with our obligations under the CGA)” (emphasis added). BDL considers that whether or not a product is faulty is inherently connected with whether or not it is fit for purpose. BDL also emphasises that the clause explicitly states that BDL will give effect to the protections offered by the CGA.

Summary on starting point

[46] BDL submits that the conduct in this case is less serious than in *Michael Hill*, and falls closer to the circumstances in *PB Tech*. A starting point of \$180,000 is deemed to be appropriate.

Mitigating factors

[47] BDL disputes the Commission's assertion that there are no mitigating features of the offending.

[48] BDL notes its formal 30-day money back guarantee, which applied to all of its products, including extended warranties. Relevantly, the Court in *Michael Hill* observed that the defendant's culpability in that case was "tempered" because customers were allowed an extended period of 30 days to cancel over and above the minimum statutory five-day period.⁶

Discount

[49] BDL emphasise it has fully co-operated with the Commission throughout its investigation.

[50] BDL further notes that, upon being notified by the Commission of potential non-compliance with the requirements of s 36U in November 2020, BDL immediately began to amend its processes for selling extended warranty agreements.

[51] BDL agrees with the Commission that a discount of 10% is appropriate to reflect full co-operation. BDL also agrees with the Commission that a discount of 25% is appropriate to reflect its early guilty plea.

⁶ *Michael Hill*, above n 2, at [31].

Total fine

[52] Overall, BDL submits that a fine of \$117,000 is appropriate, being a 35% discount from the starting point of \$180,000.

[53] Both parties agree about a total discount of 35% being available to the defendant. The issue is the appropriate starting point for the offending.

[54] The Commission submits that an appropriate starting point is in the range of \$180,000 to \$200,000; BDL submits that \$180,000 is the correct starting point.

Approach to sentencing

[55] There is no tariff judgment for this type of offending. I have been provided with a table and copies of relevant case law which has been helpful. The table is set out at para [18] of this judgment.

[56] The Court of Appeal in *Commerce Commission v Steel & Tube Holdings Limited* set out the approach to sentencing in Fair Trading Act cases as follows:⁷

...Sentencing should begin with the objects of the Fair Trading Act, which pursues a trading environment in which consumer interests are protected, businesses compete effectively, and consumers and businesses participate confidently. To those ends it promotes fair conduct in trade and the safety of goods and services and prohibits certain unfair conduct and practices.

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

Factors affecting the circumstances of the offender include: any past history of infringement; guilty pleas; co-operation with the authorities; any compensation or reparation paid; commitment to future compliance and any steps taken to ensure it. The court may also make some allowance for other tangible consequences of the offending that the defendant may face. By tangible we mean to exclude public opprobrium that is an ordinary

⁷ *Commerce Commission v Steel & Tube Holdings Limited* [2020] NZCA 549 at [90]-[92].

consequence of conviction; publicity ordinarily serves sentencing purposes of denunciation and accountability. The defendant's financial resources may justify reducing or increasing the fine. Of course any other sentencing considerations applicable, such as totality and the treatment of like offenders, will also be taken into account.

[57] Having reviewed the case authority, I agree that the initial, interim and new disclosure processes employed by BDL were flawed and non-compliant with the requirements of the relevant provisions of the FTA. Examples of non-compliance in terms of each of the processes are as follows:

[58] **Initial disclosure process:**

- (a) no written extended warranty agreement was provided to customers at the time of purchase;
- (b) in the absence of a written agreement, the initial process failed to comply with s 36U(2) requirements to set out all of the mandatory information in an agreement (e.g. a summarised comparison between the CGA guarantees and the protections afforded by the extended warranty); and
- (c) BDL did not give customers oral notice, before they signed up to extended warranties, of their right to cancel the agreement within five working days.

[59] **Interim disclosure process:**

- (a) BDL changed its extended warranty process by requiring its sales representatives to give customers oral notice of the right to cancel the agreement within five working days or a longer period (either BDL's 30-Day Money Back Guarantee period or its risk-free trial period); and
- (b) therefore, in the absence of providing a written agreement that fulfilled the requirements in s 36U(2), the process remained significantly non-compliant.

[60] **New disclosure process:**

- (a) the customer could only determine the exact terms of the extended warranty by comparing the terms and conditions, the manufacturer's product manual, and a packing slip which recorded the warranty's duration and price, in breach of the requirement for the agreement to be presented clearly and in plain language under s 36U(1)(a));
- (b) the first page of all three versions of BDL's terms and conditions inadequately compared the protections offered under the extended warranty with CGA guarantees and inadequately summarised a consumers' CGA rights and remedies (in breach of s 36U(1)(a)(v) and 36U(2)(a)(i)-(ii)).

[61] In my view this continuation of offending, albeit to a lesser degree, is an aggravating factor.

[62] I refer to the following remarks of this Court in *Smart Shop*:⁸

[47] The defendant responds to and disputes the aggravating features said to be identified by the Commerce Commission's submissions. It says instead that at least to some extent the Commission has identified elements of the offending as aggravating factors. One of the key features of the submissions made on behalf of the defendant is that it claims to have been originally proactive in employing a compliance officer, Mr Freeman. Relying largely on that it denies any high degree of negligence but, of course, that has to be measured against compliance advice received from the Commission itself. It is suggested that although a lot of customers were misled (*sic*), taken in isolation each breach did not involve serious negligence and it is submitted that therefore an accumulation of numbers does not lead to a higher degree of negligence. With the greatest of respect, in my view, that offends against common sense. Repeated negligence, even if the contract is not specifically drafted for each customer, must increase culpability in my view. For it to be otherwise might suggest that an offender could enjoy some kind of immunisation for repetitive offending and that cannot be so. Culpability has to be sensibly assessed.

[63] I, too, consider the large-scale extent of the offending to be an aggravating element. I understand on the facts that BDL sold 18,114 warranty agreements involving revenue of \$1,974,723. I agree with the Commission that a considerable

⁸ *Smart Shop*, above n 2.

number of consumers had little to no prospect of understanding their rights and remedies under the CGA, how the CGA guarantees compared with the protections provided under the extended warranty agreement or their rights to cancel under the CGA.

[64] I am also of the view that BDL's history of non-compliance with the FTA should be factored in when reaching an appropriate starting point. I note that BDL has previously pleaded guilty to five charges under the FTA, albeit for other offences, and that the Commission has previously sent three compliance advice letters (in 2012, 2014 and 2016 respectively) regarding BDL's compliance with the FTA in respect of possible misrepresentations concerning the price of goods and the length of product guarantees and warranties. This history provides context to the apparent systematic failures within BDL's practices. It supports the notion that there is a need for specific denunciation.

[65] In terms of relevant case law, and in relation to BDL's submissions, it is my view that the most serious offending in *Michael Hill* was identified by the Court as being an isolated incident, leading to a discrete charge as a result of making a false or misleading representation, and did not reflect the majority of the offending. The relevant excerpts from the *Michael Hill* judgment are:

[33] As far as the bracelet charge, the misrepresentative charge, is concerned, with a maximum penalty, by virtue of the relatively recent increases at \$600,000, I see the aggravating factors as these. While a one-off, the subtext was, I accept, that the Commerce Commission had issued three compliance advice letters in the years 2011, 2012, and 2013 for similar conduct. It was not one-off in that context. Second, the financial harm to the couple purchasing the item was caused by the conflation of the warranty price with the price of the product. It was a consumer who was effectively gulled into paying for the warranty product without knowing they were doing so and without being given the choice to either buy it or not, the loss in dollar terms being \$149.90, but it was refunded as soon as practicably after it came to light.

...

[34] But of course, each case much be considered on its own merits, and here, the reality is that there are factors that temper culpability. The company did have proper policies and processes in place. An employee ignored those, and it was that person's aberrant behaviour that triggered the offending. Of course, the corporate reality is that the sins of employees are to be visited on the principal. I accept it was a one-off in that sense. I accept the consumer was refunded as soon as the company practicably knew and appreciated what happened.

[66] The misrepresentation charge aside, the seriousness of the s 36U non-compliance in *Michael Hill* was, qualitatively, less significant than BDL's offending. There, Michael Hill provided a written extended warranty agreement which partially complied with the requirements in s 36U, but it failed to set out a comparison between the protection provided by that agreement and the mandated CGA protection or an adequate summary of the consumer's rights and remedies under the Act.

[67] In comparison, BDL's initial and interim disclosure processes wholly failed to comply with the s 36U requirements. No written extended warranty agreement was provided. Such offending, which supports the majority of charges in this case, is in my view more serious than in *Michael Hill*.

[68] However, the quantity of the present offending compared with that in *Michael Hill*, is less significant. In *Michael Hill* 76,000 extended warranties were sold for a total revenue of \$8.8 million compared with BDL's 18,114 sales resulting in \$1,974,723 revenue.

Mitigating factors

[69] In terms of mitigating factors, I agree with BDL's submission that its culpability is slightly diminished due to its formal 30-day money back guarantee. As the Court in *Michael Hill* observed, the defendant's culpability in that case was "tempered" because customers were allowed an extended period of 30 days to cancel over and above the minimum statutory five-day period. The same can be said for BDL.

Conclusion

[70] Ultimately, due to the differences in the quantity and nature of offending between *Michael Hill* and the present case, it is difficult to directly compare the two to reach an appropriate starting point. The maximum penalty is \$300,000 under the FTA.

[71] I consider an appropriate starting point of between \$180,000 and \$200,000 to be in line with relevant caselaw mentioned and factoring in the prime sentencing

purposes of deterrence, denunciation and accountability. Factoring in the totality principle, I round the overall starting point to a figure of \$190,000.

[72] I accept a 10% discount from that starting point for the efforts taken by BDL to comply with the FTA and its cooperation with the Commission. On top of that is the full quota of 25% to reflect early guilty pleas. That makes a total discount of 35%.

[73] The end point is \$123,500. There is no conviction, a fine is imposed on each of the 10 charges of \$12,350.

Judge AM Fitzgibbon

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 03/02/2022

APPENDIX A

Caption Summary

Commerce Commission (Prosecutor)	v	Brand Developers Limited (Defendant)
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Charges 1 – 10:	Offence:	Being a warrantor under an extended warranty agreement, failed to comply with s 36U of the Fair Trading Act 1986
	Act/Section:	Sections 36U and 40(1B) of the Fair Trading Act 1986
	Penalty:	\$30,000 per charge (infringement offence) ⁹

(Representative charges)

Summary of Facts

1 Introduction

- 1.1 The defendant, Brand Developers Limited, trading as TV Shop (**BDL**), faces 10 representative charges in relation to extended warranty agreements (**extended warranties**) it sold to consumers between 1 May 2020 to 1 March 2021 (**charge period**).
- 1.2 The charges relate to BDL's failure to comply with the extended warranty disclosure requirements set out in s 36U of the Fair Trading Act 1986 (**FTA**).

2 The charges

- 2.1 The charges are divided amongst the three processes BDL had in place for providing disclosure when selling extended warranties across the charge period:
 - (a) **Initial process:** 1 May 2020 to 13 October 2020.
 - (b) **Interim process:** 14 October 2020 to 11 November 2020.
 - (c) **New process:** 12 November 2020 to 1 March 2021. In respect of the new process, BDL has changed the extended warranty terms and conditions three times.

⁹ No conviction can be entered for an infringement offence (s 375, Criminal Procedure Act 2011).

- 2.2 The 10 charges comprise:
- (a) Six charges for breaches of ss 36U(1), 36U(2) and 36U(3) under BDL's initial process.
 - (b) One charge for a breach of ss 36U(1) and 36U(2) under BDL's interim process.
 - (c) Three charges for breaches of ss 36U(1) and 36U(2) under BDL's new process.

3 The Defendant

- 3.1 BDL is a New Zealand-owned, vertically integrated, direct response sales business which sells a wide range of consumer products through different channels, including e-commerce and direct response television marketing. BDL generates the main bulk of its sales (87%) through consumers who purchase products over the phone following TV infomercials, with 13% of its sales generated through online purchases.
- 3.2 BDL processes a significant volume of consumer transactions. For example, BDL processed approximately 179,762 unique transactions between 1 October 2019 to 1 October 2020. Approximately 50% of its customers are repeat customers.
- 3.3 BDL was incorporated in 2010 and its sole director is Paul Meier. Mr Meier has managed sales businesses similar to BDL for approximately 25 years.
- 3.4 BDL spends approximately \$24m a year on advertising (mainly on infomercials). BDL advised the Commission it has around 300 employees and generated \$48m in revenue (excluding intercompany and international sales) in the year ending 31 March 2020. BDL's corporate website branddevelopers.com advertises that "Brand Developers" is a marketing company that earns over \$200m in revenue per annum.
- 3.5 Whilst BDL operates internationally,¹⁰ its head office and main business is based in New Zealand.
- 3.6 BDL offers a 30-Day Money Back Guarantee on all of its products (including extended warranties) which BDL states allows its customers to return products for a full refund during this period. BDL did not specifically inform consumers that the Money Back Guarantee applied to extended warranties sold under its initial process, but did under part of its interim process and its new process.¹¹

4 Section 36U of the Fair Trading Act 1986

- 4.1 Section 36U was introduced by the Fair Trading Amendment Act 2013. It came into force on 17 June 2014. It sets out various disclosure requirements relating to extended warranty agreements that a warrantor must comply with.

¹⁰ BDL has a related company incorporated in Australia (Brand Developers Aust Pty Limited).

¹¹ See summary of disclosure provided under initial process at [5.7].

- 4.2 Under s 36U(1), a warrantor must ensure that every extended warranty agreement complies with the requirements set out in s 36U(1)(a) and a copy of the agreement is given to the consumer at the time of purchase (s 36U(1)(b)).
- 4.3 The requirements set out in s 36U(1)(a) require warrantors to ensure that their extended warranty agreements are:
- (a) in writing;
 - (b) expressed in plain language;
 - (c) legible;
 - (d) presented clearly; and
 - (e) comply with s 36U(2).
- 4.4 Section 36U(2) requires a warrantor to ensure that:
- (a) the following information is set out on the front page of an extended warranty agreement:
 - (i) a summarised comparison between the relevant Consumer Guarantees Act 1993 (**CGA**) guarantees and the protections provided by the extended warranty;
 - (ii) a summary of the consumer's rights and remedies under the CGA;
 - (iii) a summary of the consumer's right to cancel the extended warranty under s 36V of the FTA; and
 - (iv) the warrantor's name, street address, telephone number and an email address.
 - (b) all the terms and conditions of the extended warranty are included in the written agreement;
 - (c) the total price payable is disclosed; and
 - (d) the agreement is dated.
- 4.5 In addition to the above requirements, s 36U(3) requires warrantors to give the consumer oral notice, where reasonably practicable,¹² before the agreement is entered into, of the consumer's right to cancel the extended warranty within five working days.
- 4.6 Pursuant to s 40B(d) of the FTA, a breach of s 36U of the FTA is an infringement offence.

¹² For example, where the agreement is entered into between a warrantor and consumer in each other's presence or by telephone.

5 BDL's extended warranties

- 5.1 BDL began selling extended warranties to consumers on 31 July 2019. BDL offers extended warranties for approximately 30 of its product lines.
- 5.2 The price and duration of BDL's extended warranties vary according to the product to which they relate.
- 5.3 Across the charge period, BDL had three separate processes in place for providing disclosure when selling extended warranties to consumers: its initial process, interim process (developed following notification of the Commission's investigation) and its new process. All three of these processes breached s 36U of the FTA.
- 5.4 Under its initial process and interim process, no written extended warranty agreement was provided.¹³ Under its new process, BDL introduced a written extended warranty agreement constituted by the following documents:
- (a) an invoice in the initial email sent to the customer after purchasing an extended warranty which recorded its duration and price;
 - (b) extended warranty terms and conditions in an electronic document that was accessed using a hyperlink provided in the same initial email. The terms and conditions were also provided in hard copy upon delivery of the product;
 - (c) the manufacturer's warranty; and
 - (d) the product manual provided to the consumer in hard-copy upon delivery of the product.
- 5.5 The initial process was implemented in July 2019. From 1 October 2019 to 30 April 2020 (outside the limitation period), BDL sold 11,219 extended warranties.
- 5.6 During the charge period (1 May 2020 to 1 March 2021), BDL sold 18,114 extended warranties for a total revenue of \$1,974,723.

Initial process

- 5.7 From 31 July 2019 to 13 October 2020, BDL's disclosure process for its extended warranties involved the following:
- (a) A BDL salesperson would advise a consumer of the possibility to purchase an extended warranty over the phone. The term and price of the extended warranty would be discussed in this initial call, together with the fact the extended warranty was an extension of the manufacturer's warranty.

¹³ Refer to paragraph 5.7 for the limited written information that was provided when the product was delivered.

- (b) If the consumer decided to purchase an extended warranty, they would be sent an invoice which recorded the price of the warranty, but not its duration.
 - (c) Upon delivery of the product, the consumer would receive a hard copy of the product manual, which included the manufacturer's warranty statement, but no terms and conditions relating to the extended warranty.
- 5.8 On 18 March 2020, the Commission carried out a test purchase of an "Invictus X7", a vacuum cleaner, and an extended warranty from BDL over the phone. In respect of this purchase:
 - (a) during the initial phone call, the Commission investigator was advised of the term and price of the extended warranty and was told it was an extension of the manufacturer's warranty;
 - (b) the Commission was sent an invoice which recorded the price of the warranty; and
 - (c) a hard-copy of the product manual which included the manufacturer's warranty statement was delivered along with the product.
- 5.9 On 7 October 2020, the Commission carried out another test purchase of an "Air Roaster Pro" and an extended warranty from BDL over the phone. In respect of this purchase:
 - (a) during the initial phone call, the Commission investigator was advised of the term and price of the extended warranty and was told it was an extension of the manufacturer's warranty;
 - (b) the Commission was sent an invoice which recorded the price of the warranty.
 - (c) a hard-copy of the product manual which included the manufacturer's warranty statement was delivered along with the product.
- 5.10 BDL's initial process did not comply with the requirements for disclosure under s 36U of the FTA as:
 - (a) No written extended warranty agreement was provided to consumers at the time of purchase. As a result, BDL failed to meet the disclosure requirements set out in s 36U(1)(a) and s 36U(1)(b). Accordingly, BDL also failed to meet the disclosure requirements set out in s 36U(2).¹⁴
 - (b) Consumers were not orally advised of their ability to cancel within five working days in breach of s 36U(3).
- 5.11 During the charge period (from 1 May 2020 to 13 October 2020), BDL sold at least 11,537 extended warranties under its initial process for a total revenue of at least \$1,030,970.

¹⁴ Section 36U(1)(a)(v) provides that warrantors must ensure that each extended warranty agreement complies with the requirements of s 36U(2).

Interim process

- 5.12 After being notified of the Commission's investigation, BDL changed its extended warranty disclosure process.
- 5.13 From 14 October 2020 to 11 November 2020, BDL's disclosure process for its extended warranties involved the following:
- (a) A BDL salesperson would advise a consumer of the possibility to purchase an extended warranty over the phone. The term of the manufacturer's warranty and the term and price of the extended warranty would be discussed in this initial call. The consumer would also be orally advised they had the option to cancel the extended warranty within a certain time:
 - (i) From 14 October 2020 to 22 October 2020, the consumer would be orally advised they had the option to cancel the extended warranty within five working days.
 - (ii) From 22 October 2020 to 12 November 2020, the consumer would be advised they had the option to cancel until the end of the 30 day Money Back Guarantee period or the risk-free trial period (as applicable). Both of these periods were longer than five working days.
 - (b) If the consumer decided to purchase an extended warranty, they would be sent an invoice over email which recorded the price of the warranty, but not its duration.
 - (c) Upon delivery of the product, generally the consumer would receive a hard copy of the product manual which included the manufacturer's warranty statement, or the manufacturer's warranty statement would be provided separate to the manual. However, no terms and conditions relating to the extended warranty were provided and in respect of at least one product (the iWalk Pro) no copy of the manufacturer's warranty was included with the product packaging.
- 5.14 BDL's interim process failed to comply with the requirements for disclosure under s 36U of the FTA as:
- (a) No written extended warranty agreement was provided to consumers at the time of purchase in breach of ss 36U(1)(a) and 36U(1)(b). During the phone call with consumers described at [5.13(a)], BDL would provide only the term of the manufacturer's warranty, and term and price of the extended warranty agreement, and state that the extended warranty was an extension of the manufacturer's warranty.¹⁵
 - (b) As a result of BDL's failure to provide a written extended warranty agreement to consumers, and its failure to do so at the time of purchase, BDL failed to meet the disclosure requirements set out in s 36U(1)(a) and s

¹⁵ The manufacturer's warranty was not provided at the time of purchase. It was delivered in hard copy together with the product. The length of time it would take for a product to be delivered varied. BDL would at times advise that delivery could take up to two weeks.

36U(1)(b). Accordingly, BDL also failed to meet the disclosure requirements set out in s 36U(2).¹⁶

- 5.15 BDL sold 1,556 extended warranties under its interim process for a total revenue of \$214,083.

New process

- 5.16 On 12 November 2020, BDL changed its extended warranty disclosure process again. For the first time, consumers were given a written extended warranty agreement. The extended warranty agreement failed, however, to meet all requirements of s 36U of the FTA.
- 5.17 From 12 November 2020 to 1 March 2021, BDL's disclosure process for its extended warranties involved the following:
- (a) A BDL salesperson would advise a consumer of the possibility to purchase an extended warranty over the phone. The term and price of the extended warranty would be discussed in this initial call. BDL states that its employees were then required to orally advise the consumer they had the option to cancel the extended warranty until the end of 30 day Money Back Guarantee period or the risk-free trial period (as applicable).¹⁷
 - (b) If the consumer decided to purchase an extended warranty they would receive an automatic order confirmation email which identified that an extended warranty was included in the order, noted its duration and price and included a hyperlink to the warranty terms and conditions available on BDL's New Zealand website.
 - (c) Upon delivery of the product, the consumer would receive a hardcopy of:
 - (i) the extended warranty terms and conditions;¹⁸
 - (ii) a manufacturer's product manual which included the manufacturer's warranty statement; and
 - (iii) a packing slip that recorded the products purchased and noted the warranty's duration and price.
- 5.18 BDL issued three different sets of its extended warranty terms and conditions under its new process:
- (a) First set of terms and conditions which BDL states was used solely for New Zealand customers (12 November 2020 to 30 November 2020).

¹⁶ Section 36U(1)(a)(v) provides that warrantors must ensure that each extended warranty agreement complies with the requirements of s 36U(2).

¹⁷ During the Commission test purchase carried out under the new process (summarised at [5.27], the BDL employee taking the call failed to advise the Commission investigator of the right to cancel the extended warranty purchased.

¹⁸ BDL only provided hard copy terms and conditions from 18 November 2020.

- (b) Second set of terms and conditions which added wording to reflect coverage for both Australia and New Zealand (and also made other minor alterations, for example, adjusting the wording relating to the CGA) (1 December 2020 to 17 January 2021).
 - (c) Third set of terms and conditions, which aligned the cancellation period with the end of the 30 day Money Back Guarantee period or the risk-free trial period (as applicable) (18 January 2021 to 1 March 2021).
- 5.19 BDL made effort to amend its process, which included taking legal advice and making necessary system changes. BDL failed to ensure its new process complied with the requirements for disclosure under s 36U of the FTA as:
- (a) The composition of the extended warranty agreements over various documents (as set out above at [5.4]) and the cross-referencing between them required in order to understand the terms of the extended warranty agreement, breached s 36U(1)(a) as the agreements were not presented clearly nor expressed in plain language.
 - (b) The front page of the extended warranty agreements (the first page of the terms and conditions) inadequately compared the extended warranty guarantees with CGA guarantees and inadequately summarised CGA rights and remedies in breach of s 36U(1)(a)(v) and 36U(2)(a)(i)-(ii):
 - (i) Given BDL's terms and conditions were generic, it should have summarised all guarantees provided for by the CGA. The only reference to any CGA guarantees under all three sets of the terms and conditions is the statement for cover for malfunction due to "wear and tear",¹⁹ which is inadequate.
 - (ii) BDL's description of the rights and remedies of consumers under the CGA across all of its terms and conditions was inadequate as it was too brief and did not refer to a consumer's ability, under the CGA, to have a faulty good remedied elsewhere or the ability to obtain damages from the supplier.
- 5.20 From 12 November 2020 to 30 November 2020, BDL sold 1,049 extended warranties under its new process using its first set of terms and conditions for a total revenue of \$142,427.
- 5.21 From 1 December 2020 to 17 January 2021, BDL sold 2,796 extended warranties under its new process using its second set of terms and conditions for a total revenue of \$298,571.
- 5.22 During the charge period (from 18 January to 1 March 2021), BDL sold 1,176 extended warranties under its new process using its third set of terms and conditions for a total revenue of \$216,157.
- 5.23 There were minor differences between the three sets of terms and conditions. Each version of the terms and conditions summarised a consumer's right to cancel

¹⁹ This is presumed to be a reference to the CGA guarantee that goods be of an acceptable quality (defined in the CGA as goods that are, among other things, durable – CGA, s 7).

in slightly different ways, and the second and third set of terms and conditions contained more (but still inadequate) information regarding CGA remedies than the information provided under the first set.

- 5.24 On 21 January 2021, the Commission carried out a test purchase of a “Pain Eraser Pro” and an extended warranty from BDL. In respect of this purchase:
- (a) during the initial phone call, the Commission investigator was advised of the term and price of the extended warranty, was told it was an extension of the manufacturer’s warranty but was not provided with oral notice of the right to cancel the warranty;
 - (b) the Commission was sent an automatic order confirmation email which identified that an extended warranty was included in the order, noted its duration and price and included a hyperlink to the warranty terms and conditions available on BDL’s New Zealand website; and
 - (c) the Commission received a hard-copy of the product manual, which included the manufacturer’s warranty statement, and a packing slip which recorded the warranty’s duration and price, along with the product.
- 5.25 The failure to advise the investigator of the right to cancel the extended warranty within the period of time set out in BDL’s sales script (see [5.17(a)]) constituted a breach of s 36U(3) of the FTA.
- 5.26 When this non-compliance was put to BDL it advised that the salesperson who received the Commission’s order was on their second day in the role, following a two-week induction, and the importance of giving verbal notice of cancellation had subsequently been discussed with them.

6 Commission’s investigation

- 6.1 BDL has fully co-operated with the Commission’s investigation.

First information request

- 6.2 On 7 October 2020, the Commission requested information from BDL regarding its extended warranty disclosure.
- 6.3 On 12 November 2020, BDL provided information in response to the Commission’s first request and advised in its response that:
- (a) it had failed to comply with s 36U inadvertently, not deliberately, but that it:
 - (i) offered the 30 day money back guarantee on almost all of its products (including extended warranties); and
 - (ii) already allowed consumers to cancel their extended warranties at any time in practice for a full refund (not only within five working days).

- (b) BDL regretted its error and had taken the following steps to remedy the situation:
 - (i) working with its legal counsel to prepare a written extended warranty agreement in accordance with s 36U of the FTA;
 - (ii) amending how extended warranties were recorded on customer invoices to make clear reference to the duration of the extended warranty;
 - (iii) amending its sales script to include verbal notice of the right to cancel within five working days; and
 - (iv) having quality assurance personnel listen to call recordings with a particular focus on ensuring that sales consultants used the amended sales script.
- (c) between October 2019 and October 2020, 337 warranties had been cancelled (whether by the consumer or by BDL) and 50 were cancelled outside five working days from the date of purchase.²⁰

Second information request

- 6.4 On 6 January 2021, the Commission requested further information from BDL regarding its extended warranties.
- 6.5 On 20 January 2021, BDL provided information in response to the Commission's second request and advised further in its response that BDL would send a link or hard copy of the terms and conditions to historical purchasers of extended warranties as a form of "corrective disclosure". The Commission's view is that this disclosure was still defective, as BDL's terms and conditions did not meet the requirements of s 36U.

Voluntary interview

- 6.6 On 22 January 2021, BDL's director, general manager of direct response sales and its CEO attended a voluntary interview with the Commission to discuss BDL's non-compliance with s 36U of the FTA.
- 6.7 At the interview, BDL's representatives stated that:
 - (a) BDL introduced extended warranties given it was a common practice by other New Zealand retailers, and in response to an unspecified number of customer requests;
 - (b) in conducting research on how to frame BDL's warranties, BDL's representatives purchased extended warranties from other retailers;

²⁰ In relation to BDL's initial process, when it did not advise consumers of any cancellation right or cooling off period, it allowed customers (in practice) to cancel their extended warranties at any time for a full refund. Under BDL's new process and terms and conditions, it also provides consumers with a longer cooling-off period than the five-day statutory requirement.

- (c) BDL's extended warranty was simply an extension of the manufacturer's warranty and there was no difference between the two. In fact, BDL's extended warranty agreement was not the same because it had further exclusions; and
 - (d) BDL had no dedicated internal compliance officer or legal counsel, but has a legal manager (not legally qualified), whose role is largely related to intellectual property matters.
- 6.8 In the course of the interview, BDL's CEO admitted that BDL had not complied with s 36U in respect of its initial process.
- 6.9 The Commission conveyed its ongoing concerns regarding the compliance of BDL's new process to BDL's representatives who attended the meeting.
- 6.10 BDL provided further information to the Commission subsequent to this interview on 5 February and 22 March 2021.

BDL's fourth proposed process

- 6.11 On 26 February 2021, BDL advised the Commission that it proposed to make further changes to its extended warranty processes (**fourth proposed process**) to address the Commission's concerns. Pending implementation of the fourth proposed process, BDL continued to sell non-compliant extended warranties pursuant to the new process described at [5.19] above.
- 6.12 The fourth proposed process remained deficient. The Commission notified BDL of its ongoing concerns regarding the fourth proposed process in more detail on 25 March 2021.

7 Defendant's previous history

Previous FTA convictions

- 7.1 In 2015, BDL pleaded guilty to five charges brought by the Commission under the FTA for selling multi-purpose ladders that failed to meet the relevant safety standard and in breach of an Unsafe Goods Notice issued by the Ministry of Consumer Affairs.

Warnings and compliance advice

- 7.2 In May 2010, the Commission warned BDL in relation to its advertising of products as "buy one get one free." The Commission considered that BDL's advertising was likely to breach sections 10 and 13(g) of the FTA by misleading consumers about the price of the products because the "free items" were in fact included in the sale price.
- 7.3 The Commission has also previously sent BDL three compliance advice letters (in 2012, 2014 and 2016 respectively) regarding BDL's compliance with the FTA in respect of possible misrepresentations concerning the price of goods and the length of product guarantees and warranties. In the compliance letter regarding

guarantees and warranties (dated 3 July 2014), the Commission recommended BDL seek legal advice on complying with the law and reminded BDL of the penalties for breaching the FTA.