**IN THE DISTRICT COURT**
**AT MANUKAU**

**I TE KŌTI-Ā-ROHE**
**KI MANUKAU**

**CRI-2020-092-11908**
**[2021] NZDC 17008**

**UNDER THE FAIR TRADING ACT 1986**

**COMMERCE COMMISSION**
Prosecutor

v

**PARAMOUNT MERCHANDISE COMPANY LTD**
Defendant

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| Hearing: | 25 May 2021 |
| Appearances: | K Mills and O Klinkum for the Prosecutor<br>A Murray for the Defendant |
| Judgment: | 23 August 2021 |

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**SENTENCING NOTES OF JUDGE R J EARWAKER**

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## Introduction

[1] Paramount Merchandise Company Ltd (Paramount) pleaded guilty to 5 charges under the Fair Trading Act 1976 (FTA) relating to its supply and marketing of 2,280 hot water bottles, across three product lines, between May 2019 and September 2019.

[2] One product line presented a burn risk to users, due to non-compliant instructions and performance failures. The other two product lines presented burn and

suffocation (from plastic packaging) risks due to marking, instruction and warning failures. The labels on two of the product lines stated that the hot water bottles complied with the relevant safety standard, when this was not the case.

[3] As a result, Paramount faced three charges (two being representative) for supplying a good in respect of which there was a notice in force declaring the goods to be unsafe under ss 31(5) and 40(1) of the FTA, (the supply offending).

[4] The charges relate to Paramount's supply of the following goods (collectively referred to as the Hot Water Bottles):

(a) 24 x 2L rubber hot water bottles (2L Hot Water Bottle); and

(b) 1,138 x 1L PVC hot water bottles (1L Hot Water Bottle); and

(c) 1,118 × 500 ml PVC hot water bottles (500ml Hot Water Bottle).

[5] Paramount faced two further representative charges of making a false and/or misleading representation under ss 13(a) and 40(1) of the FTA (the misrepresentation offending) relating to a label on the packaging of the 1L and 500ml Hot Water Bottles, designed by Paramount, which stated that those Hot Water Bottles complied with the safety standard "BS1970:2012".

[6] The maximum penalty available for each offence is $600,000.[1]

[7] The guilty pleas were entered to the charges on 1 April 2021, at the first opportunity.

[8] On 25 May 2021, both written and oral submissions were presented to the Court at a sentencing hearing. It was made clear that this was the first prosecution by the Commerce Commission (the Commission) involving hot water bottles. However, during the hearing it became apparent that the Commission had issued warnings to other traders in respect of the supply of defective hot water bottles, instead of

[1] Fair Trading Act 1986, s 40(1)(b).

proceeding to prosecution. It was argued on behalf of Paramount, that, given the present similarities to the cases which received warnings, the response by the Commission was disproportionate in the circumstances and that account should be taken of the previous warning policy when fixing the financial penalty.

[9] As a result of that submission, the Commission sought additional time to file further written submissions to address what account, if any, this Court could take of the warning letters and what relevance they were to the sentencing of Paramount.

[10] Further written submissions were subsequently received from the Commission, which have now been considered.

**Fact summary**

[11] Paramount operates as an importer and wholesaler based in Wiri, Auckland. It supplies imported low-cost products and conventional retail products to large retailers, such as the Warehouse, Mitre 10 and supermarkets. It was incorporated on 16 June 1997.

[12] Paramount has 12 full-time employees and four commission-based sales representatives, in addition to its director Mr Cao. Mr Cao's wife, Ms Zhang, also does some work for the company. Mr Cao reported that Paramount has an approximate annual turnover of $7 million.

[13] Between 23 May 2019 and 4 September 2019, Paramount supplied a total of 2,280 Hot Water Bottles. It supplied 24 units of the 2L Hot Water Bottle on 4 September 2019, 1,138 units of the 1L Hot Water Bottles between 23 May 2019 and 27 August 2019 and 1,118 units of the 500 ml Hot Water Bottles between 23 May 2019 and 27 August 2019. The total period of supply was approximately three months and two weeks.

*The Notice*

[14] Pursuant to s 31(5) of the FTA, no person shall supply, offer to supply or advertise to supply goods, in respect of which there is, in force, a notice declaring the

goods to be an unsafe good or notice prohibiting the supply of goods. The Minister of Consumer Affairs may, by notice in the Gazette, declare goods to be unsafe goods if it appears to the Minister that the goods will or may cause injury to a person.[2]

[15] The Unsafe Goods (Hot Water Bottles) Permanent Prohibition Notice 2016 (the Notice) was issued pursuant to s 31 of the FTA. The Notice applies to rubber and PVC hot water bottles supplied, offered for supply or advertised for supply, in trade.

[16] The Notice declares hot water bottles, which are made of rubber and PVC, to be unsafe if they (a) do not meet the requirements of the Standard as amended by Schedule 1 of the Notice, or (b) the documents required to be provided by Schedule 2 of the Notice have not been issued in accordance with Schedule 2 or are not held by the supplier or importer.

[17] The Hot Water Bottles were unsafe goods under the Notice (Charges 1-3) because:

(a) They failed to meet various requirements under the applicable safety standard (the Standard),[3] including requirements relating to marking, instructions, warnings and packaging and, in the case of the 2L Hot Water Bottles, performance testing.

(b) Paramount did not hold a test certificate or report in respect of the Hot Water Bottles as required by the Notice. The certificates Paramount purported to hold failed to properly identify the Hot Water Bottles and/or did not show full testing results as required.

[18] The labelling on the packaging of the 1L and 500 ml Hot Water Bottles also stated that the products complied with the Standard. This was a false and/or misleading representation, as they did not comply with the Standard (Charges 4-5).

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2 Section 31(1).

3 *BS 1970:2012 Hot water bottles manufactured from rubber and PVC – specification (the Standard).*

[19] The Commission submits that Paramount was careless in suppling the Hot Water Bottles, and highly careless in its marketing of the 500ml and 1L Hot Water Bottles. Its actions posed safety risks to users.

**The Commission's investigation**

[20] The Commission purchased units of the 500 ml and 1L Hot Water Bottles from a New Zealand based retailer which had been supplied by Paramount. The Commission subsequently purchased 24 units of the 2L Hot Water Bottles directly from Paramount.

[21] The Commission submitted two units of each of the Hot Water Bottles to an overseas laboratory, SGS, for limited technical performance testing. The 2L Hot Water Bottle failed the pressure test in cl 6.3 of the Standard, which requires that the bottle must not show visible leakage when tested in accordance with the Standard. Leakage was observed at the closure of the 1st of 500 cycles of the testing. Of the tests performed, no conclusive failures were identified in respect of the 500ml or the 1L Hot Water Bottles.

[22] Commission staff also assessed samples of the Hot Water Bottles against the Standard's requirements relating to markings, instructions, warnings and packaging, and identified the following failures:

(a) Marking failures: the 500 ml and 1L Hot Water Bottles did not comply with clause 7 of the Standard as they did not have the required permanent markings.[4]

(b) Written instructions and warning failures: the 2L Hot Water Bottles did not comply with the written instruction requirement of cl 8.2 of the Standard because they deviated from the instructions prescribed in that clause. The 500 ml and 1L Hot Water Bottles did not comply with the written instruction requirement in cl 8.2 or the warning requirement in cl 8.1.

[4] Being the name or trademark of the manufacturer or supplier, the name and date of the British Standard, and a date daisy wheel, displaying the year, month and week of manufacture.

(c) Packaging failures: the 1L and 500 ml Hot Water Bottles failed to comply with cl 9 of the Standard because the plastic packaging in which they were provided were not marked with a suffocation warning.

[23] The test reports Paramount purported to hold in compliance with clause 4 (b) of the Notice also failed to comply with the requirements of Schedule 2 to the Notice because they:

(a) Failed to clearly identify the product: the test reports held by Paramount in respect of all the Hot Water Bottles failed to clearly identify the specific Hot Water Bottles, as required by cl 1(a)(ii) of Schedule 2. The Hot Water Bottles had visual differences to those pictured in the test reports and had different packaging.

(b) Failed to state full test results: the test reports held by Paramount in respect of the 500 ml and the 1L Hot Water Bottles did not show test results for mandatory requirements in clauses in the Standard, namely clauses 7, 8 and 9.[5]

[24] After the failures above were identified, the advertising on the packaging of the 500 ml and 1L Hot Water Bottles that "THIS PRODUCT COMPLY WITH BS: 1970:2012" was identified as a false and/or misleading presentation.

**Paramount's response to the testing failure**

[25] Paramount was formally notified of the Commission's investigation into the 500 ml and 1L Hot Water Bottles by letter on 26 August 2019, and of its investigation into the 2L Hot Water Bottles by letter on 16 December 2019.

[26] Paramount arranged a recall through the Ministry of Business Innovation and Employment (MBIE) of the 500 ml and 1L Hot Water Bottles, which was posted on the recalls.govt.nz website on 26 September 2019. Paramount also placed a recall notice on its own website and wrote to all customers on 2 October 2019, enclosing

[5] In breach of cl 1(a)(iv) of Schedule 2 of the Notice.

hard copies of the recall notice. As of 17 January 2020, Paramount had initiated a recall with MBIE in respect of the 2L Hot Water Bottle and published a recall notice on its website.

[27] As at the date of sentencing, Paramount had advised the Commission that 604 units of the 500 ml and 1L Hot Water Bottle had been successfully recalled.

**Principles, Purposes and Relevant Considerations in FTA Sentencing.**

[28] The court is required to take into account the purposes and principles of sentencing as set out in the Sentencing Act 2002. The Commission submits that the court should prioritise the sentencing purposes of accountability, denunciation and the ongoing need for deterrent penalties. This of course must be balanced against the need to impose the least restrictive outcome appropriate in the circumstances and the general desirability of consistency with appropriate sentencing levels in respect of similar offenders, committing similar offences in similar circumstances.

[29] The core aggravating and mitigating features in FTA cases were initially analysed by the High Court in *Commerce Commission v L D Nathan* and Co.[6] In that case, Greig J set out the relevant factors for sentencing consideration in FTA prosecutions, which largely mirror the considerations in s 7-9 of the Sentencing Act. These considerations have recently been reaffirmed in the Court of Appeal decision in *Commerce Commission v Steel & Tube Holdings*.[7]

[30] The factors this Court is required to consider are:

(i) Whether the conduct undermined the objectives of the Act,

(ii) The importance of the failure to comply with the standards,

(iii) The degree of carelessness,

(iv) The extent of the offending,

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6 *Commerce Commission v L D Nathan & Co* Limited [1990] 2 NZLR 160 (HC).
7 *Commerce Commission v Steel & Tube Holdings* [2020] NZCA 549.

(v) The resulting prejudice or harm to the consumers,

(vi) The need to impose deterrent penalties.

**Statutory and Regulatory context**

[31] The FTA is consumer protection legislation. The purposes of the FTA are to contribute to a trading environment where the interests of consumers are protected, and in which consumers can participate confidently.[8] Those interests are especially heightened in product safety cases, such as here, given the risk that the unsafe goods posed to the welfare, or lives, of consumers – in this case to consumers of all ages who may use hot water bottles.

[32] The creation and enforcement of unsafe goods notices enables special oversight of particular types of goods, which will or may cause injury to any person.[9] This results in consumers being able to participate confidently in the market with the knowledge that stringent requirements are imposed in respect of inherently risky goods, and they may only be supplied, offered for sale or advertised if those conditions are met.

[33] The FTA also prohibits false or misleading representations and trade in regard to aspects of goods, including false or misleading representations that goods are of a particular standard when they are not. This ensures consumers can make informed decisions on the basis of accurate and truthful advertising material.

**Culpability factors**

[34] As already noted, the factors from *Commerce Commission v L D Nathan and Co Ltd* will be relevant when assessing the appropriate penalty and product safety cases.

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8 FTA, s1A(1).
9 FTA, s 31(1).

[35] In *Steel and Tube Holdings*, the Court of Appeal held that the *L D Nathan* factors offer a helpful but non-exhaustive checklist of consideration that may arise in any given case.[10] The court also noted that the factors affecting the seriousness and culpability of the offending may include, relevantly, the nature of the goods and the use to which they are put, whether the offending was isolated or systematic, any "compliance systems and culture and the reasons why the failed", and the extent of any harm.[11] The court did not attempt to establish sentencing bands, and noted that the bands adopted in the High Court "should not be used".[12]

[36] The Commission submits that the factors discussed in *L D Nathan* and *Steel and Tube Holdings* are also applicable when assessing the defendant's culpability for supplying goods contrary to an unsafe goods notice, and to making misrepresentations in respect of those goods. The Commission submits that the culpability factors applicable to Paramount are as follows.

*The conduct undermined the objectives of the FTA*

[37] As emphasised by the Commission, the FTA is designed to facilitate consumer welfare and effective competition through fair trading practices.[13] In respect of product safety, it requires traders to follow minimum safety standards for products that may expose members of the public to a particular risk.

[38] The Notice is designed to protect consumers from the risk of serious burns or other injury associated with the use of a particularly risky good, namely hot water bottles. The Commission submits that the penalty imposed in cases under this Notice ought to reflect the importance of compliance with all stipulated requirements, given the serious safety risk to consumers associated with improper use of hot water bottles. Further, this supply offending undermined the purpose of having restrictions on the supply of inherently dangerous goods, such as hot water bottles, in place.

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10 *Steel and Tube Holdings,* above n 7, at [88].
11 At [91].
12 At [106].
13 *Steel and Tube Holdings,* above n 7 at [90].

[39] The Commission also asserts that the prohibition of unfair conduct under the FTA, including misrepresentations as to the standard or quality of goods, is central to the objectives of the FTA. To participate confidently in the market, consumers must be able to rely on statements made by manufacturer and suppliers regarding the quality or standard of goods. The misrepresentation offending undermined this objective.

*Significant departures from the Notice*

[40] The Commission submits that the Hot Water Bottles failed to comply with the Notice in multiple respects.

[41] As already noted, a sample of the 2L Hot Water Bottle failed the pressure test, and by a significant degree (showing visible leakage at the end of the first of 500 testing cycles). The written instructions provided with the 2L Hot Water Bottle also failed to comply with requirements for written instructions in cl 8.2 of the Standard. Important warnings were omitted; for example, that overfilling the bottle "might cause the bottle to burst", and that adequate covering should be used to prevent burns if prolonged contact with the skin could occur.

[42] The Commission states that the 500 ml and 1L Hot Water Bottles also demonstrated significant failures when measured against the Notice. They failed to meet the requirements of clauses 7, 8.1, 8.2 and 9 of the Standard. They did not have the requisite permanent markings under clause 7, which would enable customers to identify the manufacturer of the hot water bottle and the age of the item. The warning required by cl 8.1, that "hot water bottles can cause burns" and prolonged contact with the skin should be avoided, was not provided. The written instructions did not meet the requirements of cl 8.2, and the plastic packaging was not marked with a suffocation risk warning. In respect of all three Hot Water Bottles, Paramount also breached cl 4(b) of the Notice as the test reports provided failed to satisfy clause 1(a), (ii) and/or (iv) of Schedule 2.

[43] The Commission submits that, when considered separately or in total, the departures from the Notice across the three product lines are varied and significant.

*Clear misrepresentations*

[44] As set out above, the 500 ml and the 1L Hot Water Bottles failed to comply with the Standard in multiple respects. The representation that they did comply with the Standard was unequivocal and prominently placed on packaging.

*The conduct was careless/highly careless misrepresentations*

(a) *Careless*

[45] The Commission submits that Paramount was careless in respect of the supply offending. While it engaged technical consultants to assist in assessing some products before purchase, none were involved in the purchase of the Hot Water Bottles. Despite the company's reasonably significant turnover, it had no formal compliance program.

[46] Based on his interview, Mr Cao was aware that the Standard was the applicable product safety standard but had not read it, choosing to rely on the test reports for the products as signifying the compliance. Further, he had limited understanding of the FTA, and had not seen the Notice prior to his interview with the Commission. The Commission accept that Mr Cao made some attempts to ascertain compliance with the 500 ml and 1L hot water bottles, including by way of correspondence with MBIE, but it is the Commission's submission that these measures were insufficient in circumstances where Paramount was supplying inherently risky goods, regulated by a regime that it had not taken the time to properly understand. Accordingly, the Commission asserts that Paramount was careless in failing to take further steps to understand the compliance regime and to ensure compliance.

(b) *Highly Careless*

[47] In respect of the misrepresentation offending, the Commission submits that Paramount's culpability becomes highly careless. Paramount was not only supplying Hot Water Bottles without ensuring their compliance, but it created labels which hold the goods out as being compliant with the Standard. The Commission submits that had Paramount carried out a brief visual inspection of the goods, measured against clauses 7, 8 and 9 of the Standard, their multiple compliance failures would have been immediately apparent.

[48] Paramount supplied a large quantity of Hot Water Bottles, namely 2,280 units, over approximately three and a half months. The Commission notes that every defective product made available for sale carries with it a latent risk of harm to consumers.

[49] The Commission states that Paramount's offending involved three different product lines, each representing a separate occasion where Paramount abrogated its responsibility to ensure it was supplying safe, compliant hot water bottles.

*The conduct exposed consumers, including children to risk of serious harm*

[50] The Commission points out that the Notice is designed to reduce the risk to all users of hot water bottles of suffering harm, including serious burns.

[51] The Commission submits that, as is common in cases of this nature, the prejudice to consumers from the offending will generally arise from exposure to the risk of harm, rather than in any manifestation of that risk. Each non-compliant good still in circulation presents an obvious risk of harm.

[52] The Commission submits that the quantity of Hot Water Bottles supplied was significant. Performance failures of the 2L Hot Water Bottle provide an obvious and immediate exposure to burn risk. The Commission further says that the other failures relating to markings and instructions are also significant, as complete and correct information is very important given the potential serious harm that may be caused by improper use of the Hot Water Bottles (or of the packaging).

[53] The Commission further notes that Hot Water Bottles are used by all ages, including children. While all the 2L Hot Water Bottles subject to this charge were supplied to the Commission investigators, this does not detract, says the Commission, from the potential exposure of consumers to the serious risks presented by that product line. As of January 2020, Paramount advised that 604 500 ml/1L Hot Water Bottles had been recalled. This still leaves over 1500 units in circulation.

*The need to impose deterrent penalties*

[54] I accept that the courts have recognised that product safety cases in particular give rise to a strong need for general and specific deterrence. The Commission submits that general deterrence is required in order to ensure that traders comply with the requirements of the Notice and associated Standard, and to ensure that traders who do comply with mandatory standards and bear the costs of doing so are not placed at a competitive disadvantage compared to those who do not.[14]

[55] The Commission submits that this case exhibits many of the features typical of cases in the product safety area. Such cases commonly involve small-to-medium-sized businesses, who sell a wide variety of products, and who either have no knowledge of the product safety standards, or who are aware that there are safety requirements but failed to check what those are. In this case, Mr Cao was aware of the Standard but had not read it and had not seen the Notice.

[56] Accordingly, the Commission submits that, to incentivise traders properly, the penalties for breaching unsafe goods notices must be meaningfully higher than the cost of complying with them. Without robust fines, traders may make economically rational decisions not to invest in compliance, safe in the knowledge that any non-compliant products will attract a fine lower than the risk-adjusted cost of investing in compliance procedures upfront.

[57] The Commission accepts that the size of the penalty required to deter individual traders will vary. However, it points out that Paramount is a medium-to-large company with approximately 18 full or part-time employees, including Mr Cao and his wife. The Commission submits that an approximate annual turnover of $7 million means that there can be no suggestion that Paramount lacked the resources to implement a robust compliance regime.

**Paramount's submissions in response**

[58] Paramount does not accept it is a medium-to-large sized business as the Commission suggests. It points out that, under the definition set out in s 67(A)(2) of

[14] See *Commerce Commission v 2 Boy Trading limited* [2019] NZDC 22557.

the Employment Relations Act 2000, Paramount would be considered only a "small to medium sized employer".

[59] Paramount has also been in business for over 24 years and has no previous convictions.

[60] Paramount also notes that, while accepting responsibility by pleading guilty to all the charges, it did take various steps to ensure compliance with the relevant laws before importing the bottles, for example, Paramount:

(i) Contacted MBIE to (a) check relevant legal requirements; and (b) determine the differences in marking requirements for other rubber and PVC hot water bottles,

(ii) Obtained and relied on test certificates from accredited laboratories, which Paramount believed confirmed that the bottles complied with the Standard and the Notice,

(iii) Contacted International Accreditation New Zealand in relation to test reports for the 1L and 500 ml Hot Water bottles to confirm that Intertek Testing Services Ltd was an accredited laboratory.

[61] As for the performance testing, Paramount notes that the Commission purchased samples of the 500 ml and 1L bottles from retailers and purchased 24 samples of the 2L bottle directly from Paramount. The Commission sent two samples of each type of bottles to a laboratory, SGS, for independent performance testing. It is noted that this is the same laboratory that previously tested and provided a test certificate that Paramount held in relation to the 2L bottle.

[62] As the summary records, because of the small sample size, only a small number of tests under the Standard were able to be conducted. Of the tests carried out there were no conclusive failures in respect of the 500 ml and 1L Hot Water Bottle. Only the 2L Hot Water Bottle failed pressure testing pursuant to clause 6.3 of the standard.

[63] Paramount points out that there was no evidence of any performance failures in relation to the 500 ml or the 1L bottles. Further, it was only a single sample of the 2L bottle that failed any performance tests. Paramount is critical that the Commission did not send any further samples to be tested. It notes that, after the Commission notified Paramount that a single sample of the 2L Hot Water Bottle had failed the pressure test, Paramount sent four further samples to the same laboratory (SGS) to be pressure tested. Each of these four samples of the 2L Hot Water bottle passed pressure testing.

[64] Paramount notes, by way of summary, that in relation to non-compliance with the Standard, (a) only one sample of the 2L bottle has failed a performance test and (b) the Commission accepts that the relevant breaches primarily concern labelling and marking breaches.

[65] Finally, Paramount notes that the Commission determined that, because of the non-compliance with the Standard, a statement on the packaging of the 500ml and 1L bottles that those bottles complied with the Standard amounted to a misrepresentation in breach of s 13 (a) FTA.

[66] However, the Commission did not allege that Paramount misrepresented anything in relation to the 2L Hot Water Bottle, only the 500 ml and the 1L Hot Water Bottles.

**Setting the starting point**

[67] The Commission submits that separate starting points for the supply offending and the misrepresentation offending respectively ought to be identified. The alternative approach is a global starting point, based on the total number of units supplied, but the Commission says separate starting points are appropriate in this case.

[68] I accept that submission. Here, Paramount's conduct and the nature of the two sets of charges are distinct. The three charges under s 31(5) relate to Paramount's supply of 2,280 hot water bottles across three product lines in breach of the Notice. The two charges under s 13(a) relate to Paramount's design of a label affixed to 2,256

hot water bottles and sold across two product lines, which constituted a false and/or misleading representation as to the standard of these goods. The breaches are of a different legal nature, and I agree that Paramount's conduct and culpability in respect of each set of charges requires independent consideration and evaluation

**Relevant Authorities**

[69] There is no tariff case for product safety offending in New Zealand, however I have been referred to several cases which are of assistance.

*The supply offending*

[70] The Commission points out that this is the first sentencing relating to breaches of the Notice.

[71] As already stated, the breaches in this case primarily concern labelling and marking breaches. I was referred to cases which were said to assist the Court.

[72] In *Commerce Commission v Brand Developments Ltd*, the company pleaded guilty to five charges (four being representative) under the FTA relating to the advertising and sale of two types of ladders over three years from March 2010 – March 2013.[15]

[73] Three charges related to misrepresentations made by the company through labels on the ladders, television advertisements and via a letter, that the ladders complied with the relevant safety standard to a local grading of 180 kg, when they did not. In November 2012, an Unsafe Goods Notice (Notice) was issued. The company continued selling the ladders in breach of the Notice, resulting in the other two charges. The two types of ladders failed one and/or two performance tests incorporated in low-grading testing in this standard and breached the requirements to have the minimum working length of the ladders labelled. A total of 7,881 ladders were sold over the charging period, and 2,001 were sold in breach of the Notice. All charges carried a maximum penalty of $200,000.

[15] *Commerce Commission v Brand Developers Ltd* [2015] NZDC 21374.

[74] The Court noted that the breaches were serious, and the company's conduct became reckless after the Notice was issued. The Court said it was, "a matter of luck that no one was seriously injured or worse". A starting point of $185,000 for the two charges under the Notice, and a starting point of $120,000 for the misrepresentation charges was adopted. After a totality discount of $50,000 and other applicable discounts, the sentence was a fine of $153,000.

[75] Paramount submits that this case is much more serious than the current offending, as the defendant supplied three to four times the number of offending items than Paramount did. Further, the defendant's offending (performance failures) was much more serious than in this case.

[76] In *Commerce Commission v Baby City Retail Investment Ltd*, Baby City pleaded guilty to six charges under s 30(1) relating to supplies and offers to supply two models of a cot for children, between October 2014 and October 2015.[16] The packaging, leaflet labelling and mattress base markings did not comply with the relevant safety standards. A total of 327 cots with defective packaging and/or labelling were supplied.

[77] The Court considered Baby City's conduct was careless for approximately half the supply period and was reckless from the point it received test reports showing non-compliance. Baby City operated fifteen physical stores in New Zealand and sold products online. The Judge imposed a starting point of $60,000.

[78] Paramount submits that this case is most similar to its own conduct, as it related to packaging and/or labelling breaches as opposed to performance failures.

[79] Paramount accepts that, while the defendant's offending in that case involved fewer items than Paramount, it lasted for a much longer time and was reckless because the defendant continued supplying the relevant item after becoming aware of non-compliance. In contrast, when Paramount was notified of the non-compliance, it initiated voluntary product recalls.

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16 *Commerce Commission v Baby City Retailers Ltd* [2017] NZDC 885.

[80] In *Commerce Commission v Cinevan International Ltd,* Cinevan faced five representative charges under the FTA in respect of the supply of 2,337 children's toys over an 11-month period.[17] Five product lines were involved; all failed small parts testing. The applicable maximum penalty for all charges was $600,000.

[81] The Commission argued Cinevan's conduct was highly careless, the company having failed to educate itself about the relevant standards. Cinevan argued it was only careless. Although the Judge did not make a finding as to Cinevan's level of culpability, he appeared to agree it was at least careless. A starting point of $120,000 was adopted.

[82] While it was accepted a similar number of items were supplied, Paramount argued that the offending was for a much longer period of time, and the offending behaviour amounted to performance failures and was therefore much more serious than Paramount's offending.

[83] In *Commerce Commission v Joint Future Wholesale Ltd,* Joint Future ran a distribution business, and over six-and-a-half years supplied 3,580 non-compliant children's toys across three product lines.[18] The toys failed small parts testing. The company had no formal compliance program or knowledge of the standards.

[84] Joint Future was a relatively small company with annual turnovers of between approximately $690,000 and $960,000 in the 2015-2017 financial years, two directors and five to six part-time and full-time employees.

[85] The Court assessed Joint Future's conduct as careless, though the long period of offending and multiple defective product lines was noted as increasing the seriousness of the offending. It is noted that the offending spanned the increase in the maximum penalty. It was not clear what proportion of toys were supplied under the lower maximum penalty, though the Judge noted that "in general terms, the charge periods evenly span the increase". The starting point adopted was $130,000.

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17 *Commerce Commission v Cinevan International Ltd* [2020] NZDC 2893.
18 *Commerce Commission v Joint Future Ltd* [2019] NZDC 3795.

[86] Paramount submits that this defendant's offending lasted 26 times longer than Paramount's offending, was in relation to approximately 50% more items and involved performance failures, making the defendant's offending much more serious than Paramount's.

[87] In *Commerce Commission v SDL Trading,* SDL operated an importation and distribution business.[19] It had a turnover of approximately 4 million, and around ten staff. It pleaded guilty to six representative charges under the FTA for supplying a defective bathtub baby toy which failed small parts testing. Over a period of approximately three years, SDL supplied 4,757 units of the defective toy to 63 retailers nationwide. Of the units supplied, 784 were subject to the pre-amendment maximum penalty.

[88] Judge Cunningham opted to adopt a starting point in respect of the 3,973 supplied post 2014, as those toys represented 84% of the total supplied. The Judge did not impose an uplift for the supply in the earlier period. The Judge held that, while SDL was aware of the relevant product's safety standard, it was not aware that the age-specific regulations would apply to the toy. The Judge characterised the offending as "negligent or careless" and adopted a starting point of $120,000.

[89] Paramount submit that this defendant's offending involved more than twice the number of items than Paramount, extended for around twelve times longer, and related to performance failures, making the offending much more serious than its own.

**Analysis**

[90] The Commission submits that, weighing the nature of the current offending and the similarities and differences with the cases above, the appropriate starting point range for this offending is $120,000 to $130,000. This falls between *Brand Developers* and *Baby City* and is very similar to the starting point adopted in *Cinevan, Joint Future* and *SDL*.

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19 *Commerce Commission v SDL Trading* [2018] NZDC 6626.

[91] Paramount, on its analysis, submits that the offending is not as serious as the cases referred to by the Commission, and submits that the appropriate starting point for the supply charges should be $80,000 to $100,000.

[92] As was made clear by the Commission's submissions, it is difficult to place Paramount's case on all fours with the authorities that have been cited. Each have their own aggravating and mitigating factors and are liable to different potential fines, having regard to amendments to the law in some cases over the offending period.

[93] Taking into account the size of Paramount's business, the fact that Paramount's supply of the hot water bottles was careless, the number of product lines and the length of the period Paramount offended, together with the steps that Paramount did take to comply, I consider the appropriate starting point for the supply offending is $110,000.

*The misrepresenting offending*

[94] The Commission referred to several cases concerning misrepresentation under s 13 of the FTA, by way of comparison, when considering this offending.

[95] In *Commerce Commission v Argyle Performance Workwear Ltd,* Argyle faced one charge under s 13(a) in relation to safety jackets which it supplied and falsely represented to be "70 Cal jackets", which could withstand a certain amount of energy before the wearer would be exposed to the risk of electrical burns.[20] In fact, it had no such protection. The misrepresentations were made over a year. They were made through emails to customers (4,546 of them), via tags on the jackets, on Argyle's website and in a Transpower guide sent to 32 contractors. However, there were only twelve supplies of the jacket. A further 37 were on sale at the time of the investigation.

[96] The Judge noted that Argyle had "grossly misrepresented" the nature of the jacket, and that this could have had lethal consequences. The Judge characterised the offending as "highly careless, if not grossly negligent". A starting point of $100,000 was adopted.

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[20] *Commerce Commission v Argyle Performance Workwear Ltd* [2018] NZDC 9443.

[97] In *Commerce Commission v Zodiac Motor Company Ltd,* Zodiac pleaded guilty to six representative charges under ss 13(e) and (f) of the FTA of making misrepresentations that it was an appraised AA dealership, and all its vehicles were AA appraised, when this was not the case.[21] The period for which the defendant was charged was over one year.

[98] The misrepresentations were made on Zodiac's website, on Trade Me listings, on flags at the dealership and via radio advertisements. There were 151 radio advertisements and at least 32 cars were listed online across Zodiac's Trademe and website listing as being AA appraised. The Judge found that the representations were a "complete departure from the truth" and a "large number of vehicles were sold…no doubt as a result or at least in part [due to] that description". The offending involved "a significant degree of recklessness". The Judge adopted a starting point of $150,000.

[99] In *Commerce Commission v Brand Developers Ltd,* Brand Developers made misrepresentations concerning the ladders they supplied on the labels of those ladders (a total of 7,881 were supplied), as well as through over 500 television advertisements, and in a letter to a stockist, Mitre 10[22] The Commission accepts that the misrepresentations were clearly more widely disseminated than in the present case, but also point out that the charges against Brand Developers were subject only to the $200,000 maximum penalty and not the $600,000 applicable in this case. The Court determined that a starting point of $120,000 was appropriate.

**Analysis**

[100] The Commission appeared to accept that Paramount's misrepresentations were not of the same magnitude as the defendants in the above cases. Paramount accordingly challenged the characterisation of "highly careless" made by the Commission. Paramount points out that it made misrepresentations only on the packaging of the 500 ml and the 1L Hot Water Bottle themselves, compared to the defendants in all of the above cases who made misrepresentations in multiple mediums, including email, internet, radio and television advertisements.

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21 *Commerce Commission v Zodiac Motor Company Ltd* [2016] NZDC 25266.
22 *Commerce Commission v Brand Developers Ltd*, above n 15.

[101] Given the disparity in the gravity of the offending between Paramount and the defendants in the above cases, Paramount does not accept the starting point of between $100,000 and $110,000 suggested by the Commission. Paramount submits that the appropriate starting point for the misrepresentations should be at least significantly lower than the $100,000 in *Argyle,* and submits that a starting point of between $75,000 and $90,000 is appropriate.

[102] Again, as the analysis in the submissions demonstrates, it is difficult to place Paramount's case on all fours with the authorities cited by the Commission.

[103] I accept that the seriousness of the misrepresentations in the *Argyle* case which were classified as "highly careless if not grossly negligent" were more severe than the present case and could have potentially had fatal consequences. Accordingly, notwithstanding the greater number of products supplied by Paramount, I consider a lesser starting point than that adopted in *Argyle* is appropriate.

[104] Similarly, I accept that the offending in *Zodiac,* which was classified as offending involving a "significant degree of recklessness", was more serious than the incident offending by Paramount.

[105] Paramount notes that:

(a) The misrepresentation charges relate only to the 500ml and 1L Hot Water Bottles and not the 2L Hot water Bottles,

(b) Paramount believed that the 500ml and 1L Hot Water Bottles complied with the Standard, it did not intend to mislead customers and had taken steps which it believed was enough to check compliance,

(c) The misrepresentations that the 500ml and 1L bottles complied with the Standard were only on the packaging of those bottles themselves, and not in any other form or medium.

[106] Having considered all the issues raised, I do accept the Commissions submission that Paramount was highly careless in respect of the misrepresentation

offending. Despite clearly labelling the products, with labels it had created, as complying with the Standard, the products did not so comply. I also accept the Commissions submission that, had Paramount carried out a brief visual inspection of the goods against the relevant clauses in the Standard, the multiple compliance failures would have been apparent. Paramount is a sufficiently large enough business to have a robust compliance scheme.

[107] Taking into account all of the above factors, including the authorities referred to and their distinguishing features, I consider a total starting point of $90,000 is appropriate.

**Global starting point**

[108] The separate starting points in respect of the hot water bottle supply offending ($110,000) and the misrepresentation offending ($90,000) result in a nominal global starting point of $200,000.

[109] The Commission acknowledges that an adjustment for totality is appropriate to reflect the fact that the hot water bottles compliance with the Standard is a common aspect to all charges. Balancing the similarities and differences between the cases addressed in this decision and applying the totality principle, I consider an appropriate totality adjustment of $40,000 is appropriate. This gives an end starting point for all charges of $160,000.

**Mitigating factors relating to the offending**

[110] The Commission submits that there are no mitigating features of the offending. It further submits that the limited steps Mr Cao took to ascertain compliance of the 500 ml and the 1L Hot Water Bottles have been taken into account when assessing Paramount's culpability, and as such do not warrant re-consideration.

[111] Paramount does not accept the Commission's submissions. Paramount points out, as already noted, that it did take significant steps to comply with the Standard and the Notice, including obtaining test certificates that Paramount relied upon and believed confirmed compliance.

[112] In addition, Paramount mistakenly believed the relevant written instructions complied with the Standard, but unfortunately the instructions in fact complied with the previous version of the Standard, which was from 2006.

[113] I do not accept there were mitigating features to Paramount's offending. The compliance measures that Paramount adopted had real deficiencies. Mr Cao had accepted that while he was aware of product safety and was conscious of it, he did not have an understanding of the FTA. Further, he had not obtained or read the Standards in relation to hot water bottles before being contacted by the Commission. Mr Cao was not able to explain what markings were required on the hot water bottles. It is accepted that Mr Cao believed that the SGS and the Intertek Test Reports for the Hot Water Bottles meant they met the Standard, and he considered he had complied with the requirements of the Notice. However, the voluntary interview with the Commission on 10 December 2019 was in fact the first time that he had seen the Notice.

[114] It is also noted that, before he purchased the Hot Water Bottles, Mr Cao had contacted MBIE on 30 October 2018, to check the relevant requirements.

[115] Taking all these factors into account, including the deficient compliance regime at Paramount, I accept the Commission's submission that there are no mitigating features relating to the offending.

**Aggravating and mitigating factors personal to the defendant**

[116] The Commission accepts that there are no aggravating factors personal to Paramount that would warrant an uplift to the starting point.

[117] The Commission also accepts that Paramount is entitled to a discount to reflect the extent of its co-operation with the Commission and its lack of previous convictions. In *Budget Line Ltd v Commerce Commission*, Moore J considered that a cumulative discount of 10% for all such mitigating factors is to be regarded as being "at the high end indicated in cases of this sort".[23]

[23] *Budget Line Ltd v Commerce Commission* [2018] NZHC 3442 at [46]. See also *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 183 at [104].

[118] Paramount, relying upon *Commerce Commission v Joint Future* and *Commerce Commission v Argyle,* submits that a higher discount for co-operation and previous good record is appropriate.

[119] I do not agree. When the cases in this area, involving a lack of previous offences, remedial action (such as product recalls) and cooperation, are reviewed, discounts of 10% are generally applied. I see no reason to depart from that level of discount in this case. This is also consistent with the High Court decision in *Budget Line Ltd.*

[120] A 10% discount is $16,000. I also accept that Paramount is entitled to a full 25% discount for its guilty plea, which was entered promptly after the charges were filed, which equates to $40,000.

[121] Taking those discounts into account the end sentence is a fine of $104,000.

**Impact of previous Commission warnings**

[122] As part of the submissions for Paramount, it was pointed out that this was the first prosecution involving hot water bottles. Paramount noted that previous enforcement action taken by the Commission in relation to hot water bottles had resulted in only warnings, rather than prosecution. The warning letters in respect of *Cinevan International Limited*, dated 19 August 2020, *Seymor Distributing Limited*, dated 11 September 2017, *Melrick International Limited*, dated 11 September 2017 and *TradeMe User "Elvis 53"*, dated 7 August 2020, were presented. Paramount submits that a discreet discount should be adopted to recognise what, on its face, was a disparity of treatment.

[123] The Commission was granted additional time to file submissions relating to the issue of the previous warning to other traders and its relevance to the sentencing of Paramount.

[124] Each warning letter explained that the Commission considered the recipient had likely committed an offence under s 40(1) of FTA, by supplying goods that did not fully comply with the Notice, contrary to s 31(5) of the FTA. The letters noted that

the Commission had decided, with reference to its Enforcement Response Guidelines, that in the particular case, a warning was the appropriate enforcement outcome rather than commencing legal proceedings.

[125] The Commission submits that the consistency principle in s 8(e) of the Sentencing Act 2002 relates to judicial precedent. Further, it submits that the wording of s 8, along with case law and legislative history, demonstrates that the section is not designed to provide that a Court may have regard to discretionary prosecution decisions by agencies granted the power to prosecute for statutory or regulatory breaches.

[126] Accordingly, the Commission submits that the warnings are irrelevant to the sentencing of Paramount.

[127] Section 8(e) of the Sentencing Act provides that in "sentencing or otherwise dealing with an offender", the Court must "take into account the general desirability of consistency" with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances.

[128] The phrase "other means of dealing with an offender…" is specifically defined in s 4(3) of the Sentencing Act, which provides:

> For the purposes of this act, otherwise dealing with an offender or other means of dealing with an offender –
>
> (a) means dealing with the offender in relation to an offence following a finding of guilt or a plea of guilty, instead of imposing a sentence; and
>
> (b) To avoid doubt, does not include dealing with a person for non-payment of a sum of money, disobedience of a court order, or contempt of court.

[129] The Commission submits that s 4(3)(a) cannot apply to a warning provided by a prosecutor. The "other means of dealing with an offender" must relate to an offence,

following a *finding of guilt or a plea of guilty*, which the Commission submits must relate to a finding of guilt by a Court, or a plea of guilty before a Court.

[130] Accordingly, the Commission submits that the recipient of a warning letter could not be considered to be an "offender" for the purposes of s 8 (e).

[131] The Commission submitted that there is no ambiguity inherent in s 8(e). Considerations of consistency can be engaged in respect of other Court imposed sentences, or other actions of a Court in respect of an offender who has pleaded or been found to be guilty. Previous warnings provided by a regulatory prosecutor do not fall within the ambit of s 8(e). That conclusion is supported by analysis of the legislative history and the case law which was set out in full in the submissions of the Commission.

[132] The Commission referred to the legislative history and cases involving prosecutorial discretion such as *Solicitor-General v Siemer,*[24] *Rameka v Police,*[25] *Tani v Police,*[26] and *O'Conner v R.*[27] The Commission also referred to *Commerce Commission v Lodge Real Estate Ltd,*[28] and a number of Australian authorities. I do not intend to go through the legislative history, or the cases referred to, in detail, as I accept the submission of the Commission that previous warnings do not fall within the ambit of s 8(e).

[133] I also accept the Commission's observation that, in making decisions as to the appropriate enforcement response in respect of a specified individual or company, the Commission takes into account all relevant factors in relation to each case, and the circumstances at the time. Various relevant factors are set out in the Commission's Enforcement Response Guidelines which are published online. These include an assessment of the harm, the nature of the conduct, and the public interest in litigation or a lower enforcement response. In addition, the Commission must also abide by the

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24 *Solicitor-General v Siemer* HC Wellington CIV-2010-404-8559, 13 May 2011.
25 *Rameka v Police* HC Rotorua CRI-2008-463-52, 24 November 2008.
26 *Tangi v Police* [2013] NZHC 2613.
27 *O'Connor v R* [2014] NZCA 328.
28 *Commerce Commission v Lodge Real Estate* [2020] NZHC 2329.

Solicitor-General's Prosecution Guidelines and its own, published, Criminal Prosecution Guidelines.

[134] The Commission submits that, given the multitude of considerations that go into enforcement response decisions, it is not possible or desirable for a sentence to be assessed in a legal proceeding with reference to the fact that warnings were issued in other instances.

[135] I also agree with that submission and, while Paramount may question why it was treated differently to other traders who received warning letters, it is not the role of this Court to analyse those differences and provide an answer.

[136] Paramount did not take the opportunity to respond to the supplementary written submissions filed on behalf of the Commission, which can be taken as an acceptance of the position set out by the Commission and adopted by this Court.

**Conclusion**

[137] For the reasons set out in this decision, the sentence can be summarised as follows:

(i) The appropriate starting point for the supply offending is $110,000.

(ii) The appropriate starting point for the misrepresentation offending is $90,000.

(iii) Having regard to the principle of totality, an appropriate adjusted global starting point is $160,000 (a reduction of $40,000).

(iv) Paramount is entitled to a discount of 10% to reflect the extent of its cooperation and a lack of previous convictions, being $16,000, and a discount of 25%, being $40,000, for its prompt guilty pleas.

[138] There is no additional discount to take into account the fact that warnings were previously issued to other traders in respect of offences relating to the supply of hot water bottles.

[139] Adopting the reasoning of *Moses v R,* where it was indicated that the discounts for personal mitigating factors should be applied at the same time as the discount for the guilty plea, the end result is a fine of $104,000.[29]

[140] I record that, during the course of submissions, Paramount indicated there was no need to consider its ability to pay the fine, so no allowance is required in that regard.

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Judge R Earwaker
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 23/08/2021

[29] *Moses v R* [2020] NZCA 296.