

**COMMERCIALLY SENSITIVE INFORMATION REGARDING REVENUE
AND WEBSITE VISITS IS SUPPRESSED**

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2021-004-007423
[2022] NZDC 171017**

**THE COMMERCE COMMISSION
Prosecutor**

v

**THE MARKET.COM LIMITED
Defendant**

Hearing: 7 September 2022

Appearances: J Barry & A McClintock for the Prosecutor
M Sumpter & Ms Lau for the Defendant

Judgment: 7 September 2022

JUDGMENT OF JUDGE P WINTER

Introduction

[1] The defendant company themarket.com Limited (the company) pleaded guilty to eight representative charges laid under s 10 of the Fair Trading Act 1986 following a formal investigation against the defendant company commenced by the Commerce Commission in July 2020.

[2] Pleas of guilty to these charges were entered by way of a joint memorandum to the Court on 26 November 2021. The charges involve the defendant company's conduct over a three and a half year period in respect of misleading representations as to the remaining time available to purchase a "daily deal" product and the quantity of remaining stock available for purchase.¹ The defendant company was previously named "1-Day Limited" (1-Day). 1-Day was registered on 24 April 2007. At that stage 1-Day was initially part owned by Torpedo7, and then The Warehouse Group Limited. The Warehouse Group acquired a 51% stake in 1-Day's parent company Torpedo7 in 2013, and then acquiring the remaining 49% over the following three years. It provided support functions (like Human Resources and IT back office support) to the company's retail brands. Since 2016, 1-Day has operated under a separate management structure with 1-Day's general manager reporting to The Warehouse Group's leadership squad on a weekly basis.

[3] The company was an online sales only retailer. 1-Day marketed various products on its website as being on sale for "today only" (**Daily Deals**). This created the impression that the products were only available for purchase within a 24 hour period, but in fact they were frequently re-listed on consecutive days. Further, 1-Day displayed a stock level indicator on its listings of Daily Deals, purporting to show the proportion of stock available for sale during the 24 hour period but the stock level indicator was programmed in such a way that it would often understate the true quantity of goods available at that time for sale, creating a false sense of urgency to purchase the goods before they "ran out." 1-Day Ltd amalgamated with themarket.com Limited on 2 August 2021 but continued trading as 1-Day Ltd.

[4] The Commerce Commission prosecution relates to offending between 19 October 2016 and 6 June 2020. In 2018 1-Day began offering "Every Day Deals" which was an alternative sales structure operating alongside the company's pre-existing sales methods. Every Day "deals" did not offend against the Fair Trading Act (FTA) and were therefore not the subject of the present prosecution.

[5] On 19 December 2019 the Commission wrote to 1-Day to "educate" the company in respect of its practices which were in breach of the FTA. The Commission

¹ The charge period 19 October 2016 to 6 June 2020s was separated into four distinct time periods.

received no acknowledgment from the company and then communicated directly with The Warehouse Limited. Following the December letter, the Commission continued to monitor 1-Day's website before formally commencing an investigation in July 2020. 1-Day factored the Commission's advice into the website which it upgraded in early 2020, with Daily Deals and stock level indicators being removed from use between March and June 2020.

[6] The Commission as part of its investigation of 1-Day, issued two requests for information in respect of 1-Day's marketing and sales strategy in July and November 2020 respectively. 1-Day provided responses to these requests but declined the Commission's invitation to attend a voluntary interview regarding its activities. The Commission continued to monitor 1-Day's Daily Deals as advertised on its website. The Commission's investigation included analysis of sales data it received in respect of 61 products, each of which 1-Day advertised for sale on its daily page in 2018 to 2020. The Commission's investigations revealed that there were frequent instances where 1-Day advertised products on its website as Daily Deals on more than one occasion, and often over consecutive days. Commission staff also observed and recorded frequent instances where product stock levels appeared to be consistent depending on the time of day the consumers viewed the products.

[7] On 2 August 2021 1-Day and themarket.com Limited amalgamated as a single company continuing to trade as 1-Day. 1-Day has never had a prior interaction with the Commerce Commission. Torpedo7 Limited (trading as 1-Day.co.nz at the time) has previously been prosecuted by the Commerce Commission for its sale of unsafe bikes and was fined the sum of \$80,000.² Additionally, 1-Day's ultimate holding company, The Warehouse Group Limited, has also faced enforcement action previously.³

²Information on the prosecution of Torpedo-7 is available on the Commerce Commission's website with the internet reference [https://comcom.govt.nz/news-and-media/media-releases/2019/torpedo-7-fined-\\$80k-for-selling-bikes-with-no-front-brakes](https://comcom.govt.nz/news-and-media/media-releases/2019/torpedo-7-fined-$80k-for-selling-bikes-with-no-front-brakes).

³ In 2019, The Warehouse Limited pleaded guilty to multiple breaches of the FTA making false claims that certain products were "exclusive to The Warehouse" and false labelling on some of their duvets. *Commerce Commission v The Warehouse* DC AK CRI-2008-004-11407 [27 February 2009].

The facts

[8] The Commerce Commission brought representative charges against the defendant in respect of two types of offending: **Daily Deals** conduct which comprises Charges 1 to 4, and **stock level indicator** conduct which are Charges 5-8. Those offences were committed over four distinct periods:

- (a) 19 October 2016 to 31 May 2017;
- (b) 1 June 2017 to 31 May 2018;
- (c) 1 June 2018 to 31 May 2019; and
- (d) 1 June 2019 to 6 June 2020.

[9] All eight representative charges relate to offending under s 10 of the FTA which states:

10. Misleading conduct in relation to goods

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose, or quantity of goods.

A Body Corporate that commits an offence under s 10 is liable to on conviction to a fine not exceeding \$600,000.⁴

Daily Deals conduct: Charges 1 - 4

[10] During the investigation into the present case the Commerce Commission analysed certain particular products advertised for sale on the defendant's Daily Deals page over the charge period and found that there were frequent instances where the defendant's conduct was in breach of the FTA. Thus, in terms of the Daily Deals conduct the Commission stated in the accepted summary of facts, that although Daily Deals promotions were advertised as "today only", when the Commission analysed its data sample it was found that these products were often re-advertised for sale at the same price on subsequent dates and sold on consecutive dates as Daily Deals. The 24 hour countdown clock was always reset when the product was re-advertised.

⁴ S 40(1) Fair Trading Act 1986.

[11] Daily Deals were introduced in 2007 and the use of countdown timers had never been reviewed by the defendant since that time until the website was upgraded in mid-2020.

[12] The defendant acknowledged that it promoted particular products in particular categories multiple times within a monthly cycle. Its website automatically assigned the stock level indicator, countdown timer and “Today Only” text to products intended to be promoted as a “Daily Deal.” However, the defendant claimed that the Daily Deals countdown timer represented the time remaining until the product was subject to a “1-Day review” when the product might be relisted for sale, repriced and placed on a different part of its website, or removed from sale. The defendant company argues that it was not intended for the consumers to view these products as “one time only.”

[13] Research has shown that consumers’ responses to scarce products-offers are more positive than those with no scarcity appeal. This is because consumers’ perceptions and evaluations of a product’s attractiveness, desirability, expensiveness, quality and taste are affected by the knowledge that the product is scarce. That research shows that scarcity appeal is genuinely divided into two categories:

- (i) time scarcity: which includes promotional schemes that limit the duration of the offer; and
- (ii) quantity scarcity: which includes promotional schemes that limit the number of products available. These techniques are used to increase the urgency to purchase quickly.⁵

[14] Daily Deals conduct is a breach of s 10 of the FTA because it is liable to mislead consumers about the nature and characteristics of products. There is a misrepresentation in respect of the time left to purchase the products on the terms advertised. Thus, a consumer feels pressured to purchase due to their limited availability. The pressure was often illusory because the products would be offered again in the same way on the next day. The understanding that consumers were liable to take from the promotion – namely that products were only available for a limited

⁵ Agreed Summary of Facts, paras 3.1 & 3.2.

time, was reinforced through the use of a 24-hour countdown timer which typically ran daily from 12pm until 11.59am the next day.

[15] Analysis of the data sample showed that products were often re-advertised for sale at the same price on subsequent dates and sold on consecutive dates as Daily Deals. When re-advertised, the 24 hour countdown clock was also reset. For example:

- (a) “Apple Earpods with Remote Volume Control and Mic-Genuine”
“was sold 66 times on consecutive days and was at one point sold for 33 consecutive days as a Daily Deal;”
- (b) “Two Way Walkie Talkie 3 kilometre range Black-Pair” was sold 54 times on consecutive days and was at one point sold for 26 consecutive days as a Daily Deal; and
- (c) “Cadbury Dark Milk Hazelnuts 150 grams x one 9 pk” was sold 7 times on consecutive days and was at one point sold for 21 consecutive days as a Daily Deal.

[16] The Commission’s data analysis showed:

- (a) 36 products were sold on consecutive dates despite being advertised as Daily Deals with 14 of those products sold for more than five days consecutively at least; and
- (b) 6 products were sold at 10 or more separate times on consecutive dates as Daily Deals.

[17] 1-Day has acknowledged that it would promote certain products and product categories multiple times in a monthly cycle and stated that:

- (i) The product becomes a Daily Deal (as per the Commission’s definition) during the periods that the product has been specified as a promoted product in 1-Day’s planning cycles (which are typically for weekly). The product will remain a promoted product for the period specified in the plan ... the actual locked-in trading plan is generally about four to seven days in advance of the sales happening.

Stock level indicator conduct: Charges 5 -8

[18] The stock level indicator conduct, as previously described, related to the use of a stock level indicator on the Daily Deals promotions. The stock indicator often did not provide an accurate picture of the remaining inventory available for sale for Daily Deals products in that the true quantity of goods available for sale was often understated. The stock level indicator was an algorithmically pre-programmed “stock level” that was automatically adjusted to reduce according to the time of the day. The defendant accepted that it was only when the actual stock level was less than 10%, or when the stock level was less than the algorithmically calculated stock level, that the indicator accurately reflected their remaining inventory. Therefore when it was close to the expiry of a Daily Deal the indicator for many of the products displayed a stock level remaining of between 10% and 19% but that stock level often automatically reverted to 100% at 12pm when the listing was renewed.

[19] One example is 1-Day’s sale of “Apple Earpods with Remote Volume Control and MIC-genuine” (**Apple Earpods**). On 27 November 2017, 1-Day acquired \$15,000 worth of Apple Earpods, with 494 already in stock, meaning it had 1,994 units for sale overall. Between 27 November 2017 and 6 December 2017, 1-Day sold the Apple Earpods every day as Daily Deals. During this period no additional stock was purchased by 1-Day. 1-Day ultimately sold 501 units during this period meaning it always had at least 75% of its stock left. Despite this, the stock level indicator would be automatically adjusted according to the time of day to display the available stock left remaining as between 10% and 19% between 9am and 12pm. As such, the stock level indicator would be falsely showing limited stock before the stock level indicator was reset to 100% at 12pm, when the sale was renewed.

[20] The stock level indicator conduct breached the provisions of s 10 of the FTA because it was liable to mislead consumers as to the quantity of goods available for purchase in circumstances where the stock level indicator automatically reset itself at 100%.

[21] The defendant company had since its inception been an online retailer only and the “pressure selling techniques” played a central role in the defendant’s sales and marketing strategy. The defendant has stated that it had never reviewed the use of the

stock level indicator until its website upgrade in mid-2020, following the Commission's investigations into its sales activities relating to Daily Deals sales.

[22] 1-Day's revenue for the 2016 financial year was [redacted]. As previously stated, 1-Day introduced its Every Day Deals in June/July 2018. Prior to that, all products sold on 1-Day's website were sold as Daily Deals. Every Day Deals were listings of goods that lasted longer than Daily Deals and were typically priced higher than Daily Deals. However, between 2017 and 2020, 1-Day sales of products advertised as Daily Deals generated between 94% and 95% of its total revenue.

Sentencing approach

[23] Sentencing in respect of charges laid under the FTA is regulated by the objects of the FTA as set out in s 1A:

1A Purpose

- (1) The purpose of this Act is to contribute to a trading environment which –
 - (a) the interests of consumers are protected; and
 - (b) businesses compete effectively; and
 - (c) consumers and businesses participate confidently.

To that end the Act prohibits certain unfair conduct and practices in trade, provides for the disclosure of consumer information and promotes fair conduct and safety in respect of goods and services.⁶

[24] As noted in *Commerce Commission v Steel & Tube Limited*⁷ 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; any harm done to consumers and other traders; and any commercial gain or benefit to the defendant.

⁶ Section 1A(2).

⁷ *Commerce Commission v Steel & Tube Ltd* [2020] NZCA 549 at para [91].

[25] 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 defendant's financial resources may justify reducing or increasing the fine. The sentencing consideration of totality is also applicable. These considerations which are derived from the legislation and the case law are not exhaustive nor are they mandatory. Those categories are organised in accordance with the circumstances of the offence and the offender, consistent with modern sentence authority.⁸

[26] The relevant purposes of sentencing applicable in this case are:⁹

- (a) to hold the offender accountable for the harm done;
- (b) to denounce the conduct in which the offender was involved; and
- ...
- (f) to deter the offender or others from committing the same or similar offending.

[27] The relevant principles of sentencing are:¹⁰

- (a) the gravity of the offending;
- ...
- (e) consistency with appropriate sentencing.

[28] Section 40(2) of the FTA provides that where a person is convicted in respect of two or more contraventions of the same provisions and the contraventions are the same or of substantially similar nature and occurred at or about the same time, the aggregate fine may not exceed the maximum for a single offence. The Court of Appeal in *Steel & Tube* has noted that the prohibition on fines for multiple offences exceeding

⁸ *Commerce Commission v Steel & Tube Ltd* at paras [92] & [93].

⁹ Section 7(1) Sentencing Act 2002.

¹⁰ Section 8 Sentencing Act 2002.

the maximum for a single offence is to be tightly circumscribed and that s 40(2) is the legislative recognition that breaches of the Act may take the form of repeated and essentially identical offences which should be sentenced, in qualifying cases as if they were a single offence.¹¹

[29] The Court later expressed that s 40(2) does not exclude the totality principle in sentencing under the FTA but rather prescribes how it is to be applied in qualifying cases. Both prosecution and defence counsel agree that the sentencing should proceed on a totality basis.

The prosecution's submissions

[30] The Commerce Commission in its sentencing submissions argues that a starting point sentence of between \$1.3 million and \$1.5 million is appropriate on a totality basis in respect of the offending against the FTA committed by 1-Day Limited. It is acknowledged that a discount of 25% is appropriate for a guilty plea and a further discount of 5% for the defendant's co-operation with the Commission in that following those appropriate deductions an end sentence of between \$910,000 and \$1,050,000 should be imposed by the Court.

[31] The prosecution emphasises the s 7 principles of denunciation and deterrence as being applicable in this case.

[32] In its analysis of the seriousness and culpability of the offending the prosecution argues as follows in relation to the factors set out by the Court of Appeal in the *Steel & Tube* case appeal:

The nature and use of the goods

[33] The offending involved a wide variety of goods which were sold by the defendant's website and delivered directly to customers, including electronics, clothing, footwear, homeware appliances, sports gear, confectionery, toys and health and beauty products.

¹¹ *Steel & Tube* at para [82].

The importance and extent to which the conduct was misleading

[34] The Commission submits that the defendant's misleading conduct utilised "pressure-selling techniques" in respect of the timing and quantity of the goods available. Pressure to purchase the goods was illusory and there was often more stock available than indicated and the goods were often offered for sale for longer than one day. Consumers could not independently verify these matters and had to rely on the defendant's representations which played a principal role in its branding and marketing as expressed in the company name 1-Day Limited.

[35] Depending on the time at which a consumer viewed the website, it was not possible for consumers to independently verify these matters and they therefore relied on the defendant's representations. The Commission argues that the "Today Only" banners and the countdown timers utilised in respect of products which were re-listed on consecutive days entitles the Court to draw the inference that this conduct was designed to mislead or at least was liable to mislead consumers.

[36] The Commission analysed sales data in respect of 61 products advertised as Daily Deals between 2018 and 2020, including the top selling products over that period, 36 of those products (approximately 60%) were re-listed on consecutive dates despite being advertised as Daily Deals and 14 of these products were sold for more than five days consecutively at least once.¹² The Commission argues that this behaviour together with the use of the stock level indicator which displayed an algorithmically-calculated stock level which decreased in accordance with the time left for the "deal" to run and which was only correct when the actual stock level was less than the algorithm or when 10% of the actual stock held by the company remained was liable to mislead consumers. The exact degree of falsity in respect of the stock level indicators over the period of prosecution has not been able to be calculated but the prosecution submits that it was likely to have been extensive. The Commission argues that the defendant's conduct therefore was at least liable to mislead and could be viewed as "wilful."

¹² See para [14] supra and the Commerce Commission sentencing submissions at para [5.8].

[37] The Daily Deals sales revenue was significant and amounted to 90% of the company's considerable annual profit over the relevant period.

Dissemination

[38] There was extensive dissemination of the misleading misrepresentations on the defendant's website given that the promotion of Daily Deals formed a core aspect of the defendant's advertising and business model.

The extent and duration of trading relying on misleading conduct

[39] All Daily Deals on the defendant's website were advertised with representations as to the limited time and quantity of the product being available, this occurred throughout the charge period of 3½ years.

[40] Over [redacted] products were sold during the period 1 June 2017 to 1 June 2020, generating revenue of over \$ [redacted] for the defendant in that period. Also an average of nearly [redacted] visitors annually viewed the website during that period. Extensive advertising budgets for the branding and marketing of the website deals were spent on promoting the defendant's business not only on the website itself but advertising on television and radio.

The defendant's state of mind

[41] Although mens rea is not an express element of the offending of s 10 FTA, it is important to ascertain the defendant's state of mind before the sentencing process. The Commission's submissions refer to the "company's state of mind" and said that conduct could be viewed as "at least highly careless" in respect of the "Today Only" text and the countdown timer, and could be similarly viewed in respect of the stock level indicator. The Commission submits that the stock level indicator also had a deliberate element to it due to the indicator being controlled by an algorithm.

[42] The website's design, branding and operational decisions to re-list goods were management decisions. Accordingly, the Commission submits that the defendant's senior management were in control of the misleading conduct and therefore the management's state of mind can be attributed to the company.

[43] As previously stated, the availability of Daily Deals and the stock level indicator were removed from the website between March and June 2020. The Commission commenced a formal investigation into the defendant in July 2020.

The harm to consumers and other traders

[44] The Commission acknowledges the difficulty in quantifying the impact of the defendant's conduct but submits that the conduct would have inevitably influenced some consumers to purchase products that they would not have purchased otherwise. As previously stated, the sense of urgency created by the sales techniques were likely to restrict consumers' opportunities to compare the prices offered by the defendant's competitors. In doing so, the Commission submits that the defendant's conduct created "a clear potential for frustration of effective competition in the market."¹³ Given the defendant had a relatively large product range on its website and therefore a large number of potential competitors could have been affected.

"The first of its kind" and conduct

[45] This factor was not specifically listed by the Court of Appeal in the *Steel and Tube* case as a factor affecting the seriousness and culpability of the offending. It is submitted by the Commission that the present case is the first of its kind in New Zealand so far as its scale and methodology of operation is concerned.

Starting point

[46] In assessing the starting point the Commission accepts that there is an absence of case law relating to penalties for "pressure-selling" offending. The Commission drew an analogy with a decision in *Commerce Commission v Bike Retail Group Limited*.¹⁴ In that case the defendant operating as Bike Barn, pleaded guilty to 16 charges laid under s 12 FTA for conduct occurring between 1 July 2013 and 30 June 2015. The company had reverse engineered "half price" sales, and also advertised "clearance" and "final days" sales where the prices were in fact no different to those usually offered. It also used misleading "while/now" advertising. During the charge

¹³ Commerce Commission supplementary submissions at para [5.32].

¹⁴ *Commerce Commission v Bike Retail Group Limited* [2017] NZDC 2670.

period Bike Barn ran a calculated and comprehensive advertising campaign using website, radio, print and online media advertising. Bike Barn's turnover significantly increased during the charge period. Half of the charges were submitted to the previous lower maximum penalty of \$200,000 and the other to the current maximum penalty of \$600,000. The Court in *Bike Barn* did not adopt the orthodox categorisation of inadvertent, careless and wilful but described Bike Barn's activity as "calculated." Bike Barn had received three earlier warnings from the Commission. The Court adopted the agreed starting point of \$1.2 million. The Commission accepts that the offending in Bike Barn concerned the value of goods as opposed to the availability of goods as in this case. A credit of 25% was allowed for the guilty plea, a further 8% for remorse, assistance to the prosecution, lack of previous convictions and an assurance not to repeat the conduct which resulted in an end sentence, a fine in the sum of \$800,000.

[47] In *Commerce Commission v Reckitt Benckiser (New Zealand Limited)*¹⁵ the misleading representations were made in respect of the four different types of branding and packaging of the same drug, Nurofen. The company claimed that the newly packaged drug was specifically applicable to four different types of commonly experienced pain but in fact, all of the products were identically formulated. The company pleaded guilty to 10 representative charges made over a period of four years. There was extensive advertising and the products were widely sold. All of the representations in respect of the products, some of which were marketed using the company's website, were described as highly misleading. None of the marketed products were in fact specifically formulated for the type of pain stated. The company's potential benefit from those representations was said to be "over \$1 million." The company had previously been criticised for its marketing technique in Australia in 2011 but the company had chosen not to withdraw its products in New Zealand until July 2015. The Court adopted a starting point sentence of \$1.65 million. A 10% discount was afforded for that figure for mitigating factors which included co-operation, remorse and an apology. A further discount of 25% for the guilty plea was warranted resulting in an end sentence fine of \$1,080,000 million.

¹⁵ *Commerce Commission v Reckitt Benckiser (New Zealand) Limited* [2017] NZDC 1956.

[48] The Commission also referenced the decision in *Commerce Commission v The Warehouse Limited*.¹⁶ The Warehouse was a discount department store stocking goods similar to 1-Day. The Warehouse advertised products as being “exclusive to The Warehouse”, when in fact these were available from other retailers. The Warehouse also advertised certain products as being on sale for a “limited time only” when some of the toys were available at the same price prior to the sale period. There were also specific representations regarding certain DVDs which were inaccurate. Further charges related to goods which were described as “bait advertising” in that there was insufficient availability at that price to satisfy a reasonable demand for them. The sales technique was described as creating a sense of urgency to purchase which in turn encouraged customers not to consider competitors’ products.

[49] The period of offending in The Warehouse Limited was between June 2006 and November 2006 and comprised a total of 17 charges. The defendant’s conduct was described as “careless” indicating a lack of responsible business conduct. A starting point sentence (at the maximum sentencing level then available) of \$130,000 was adopted. No discount was available for previous good conduct as The Warehouse had a conviction for this type of offending. An end sentence of \$110,000 was imposed for the totality of the offending.

[50] The Commission next references the decision *Commerce Commission v Fujitsu General NZ Limited*.¹⁷ The defendant faced a total of seven charges, five of which were representative charges laid under s 12A of the FTA which involved unsubstantiated representations on its website about the efficiency of its heat pumps and a further two charges laid under s 13(e) of the FTA in respect of misleading representations about the performance characteristics of its heat pumps. The offending took place over a two year four month period during which 75,000 heat pumps were sold amounting to total sales of \$104 million. The company’s products were advertised as “New Zealand’s most efficient heat pumps” and as “carrying more energy stars than other brands.” The Court found that the home heating market was “big business”, that the representations were likely to have impacted on consumer decision-making. The exaggeration was “significant” and significantly inaccurate. A

¹⁶ *Commerce Commission v The Warehouse Ltd* DC Auckland, CRI-2008-004-11407, 27 February 2009.

¹⁷ *Commerce Commission v Fujitsu General NZ Limited* [2017] NZDC 21512.

global starting point of \$510,000 was adopted but reduced to \$480,000 on a totality basis. A discount of 35% for guilty pleas and co-operation was allowed, reducing the fine imposed to one of \$310,000.

[51] The Commission draws comparison to *ACCC v viagogo AG (No.3)*.¹⁸ That decision involved charges under the Australian legislation, which included misleading conduct as to the number of tickets available for various events advertised on the company website. The Court found that the company's website was calculated to "corral" customers into ticket acquisition and demonstrated a level of deliberateness that favoured a significant penalty. The *viagogo* case involved a company described as the world's largest ticket marketing platform and involved a very large number of contraventions, justifying a starting point of \$2.5 million for inaccurate availability of the quantity representations made by the company.

[52] In summary, the Commission submits that a starting point of between \$1.3 to \$1.5 million is appropriate on totality principles. The Commission argues that the *Bike Barn* case is the most comparable offending to that committed by the defendant in this case.

[53] Both cases have the following characteristics:

- (i) misleading conduct in that the defendant had control over the business operations which were calculated and sophisticated; and
- (ii) the dissemination of the inaccurate representations was extensive in both cases.

A higher starting point is justified in the present case however because 1-Day's offending occurred over a longer period of time and all of the offending in the present case postes the statutory penalty increase.

¹⁸ *ACCC v viagogo AG (No.3)* [2020] FCA 1423.

[54] The prosecution submits that a deterrent sentence is justified because the potential harm to consumers as well as the disadvantage suffered by competitors was high.

Defence submissions

[55] The thrust of the argument submitted on behalf of the defendant is that the conduct was careless but not deliberate. It is submitted that there is no evidence of any harm to consumers, who were readily able to compare the goods in issue with similar items available online and these were stocked by other retailers in New Zealand. Further, 1-Day was subject to competition from much larger and better resourced multinational competitors such as Amazon.com, Alibaba.com and Kogan.com. The defendant's trading did not harm those multinational competitors.

[56] It is submitted that a starting point sentence of between \$500,000 and \$700,000 is appropriate, before the application of a 35% discount for early guilty pleas and good character. The defendant argues that the level of fines that are sought by the Commission are out of all proportion to the culpability of the defendant's conduct and are out of step with other sentencing decision such as those referenced by the prosecution. So much so, it is argued, that the sentencing level advanced by the Commission would inflict on 1 Day, the "third largest fine in FTA history." Rather, it is argued that 1-Day's culpability stems from the company's failure in not keeping pace with its evolving business, having operated for many years around a particular business model. That evolving business model, was the company's decision to increase its range and the depth of the "desirable products" it offered in response to consumer demand.

[57] It is argued that the increase in consumer interest and revenue in reality stemmed from the company's skill at marketing, stocking desired brands and marketing them at the right price and then being in a position to deliver those items promptly from within New Zealand, following its customers' online purchase of them.

[58] Unlike the defendant in *Steel & Tube*, 1-Day was not guilty of providing any defective products to its customers. There is no evidence to suggest that the Commerce Commission's decision to prosecute the defendant was instigated as a

result of customer complaint arising from the way in which the products were advertised, or the company did business. In that regard, it is argued that the charges are less serious than those in *Steel & Tube* and far less serious than the offending in *Reckitt Benckiser New Zealand Limited* and *Carter Holt Harvey*.¹⁹ In the latter case, the conduct complained of was a supply of timber building products which were below industry standard and there were extensive misrepresentations over a three year period. The company's senior management was aware of that situation and the company made no attempt to alert the market to the fact the standard was not being met.

[59] The present offending it is argued is less serious than that in *Bike Barn*, *Gate Solutions*, *Fujitsu General New Zealand Limited* and *Budget Loans* because in those cases there were false representations as to price, the level of deer velvet in each capsule, the energy efficiency of the product compared to competitors or the rights of vulnerable consumers if they defaulted on loans. All of those misrepresentations went to the heart of the products or services sold. By contrast the representations made by 1-Day merely concerned merely the immediate availability of the product.

[60] In the present case consumers would have been aware that the products advertised by 1-Day were not exclusive to the company. An example is the Apple Earbuds offer which is a generic product that is also available in New Zealand from other established suppliers of electronics products.

[61] Likewise, it is argued, the present offending is less serious than that in *Commerce Commission v viagogo AG (No 3)*, which involved misleading statements about the quantity of tickets available online through a large multinational company with a dominant presence in the industry. The "one only" nature of the ticket offers made by that company and the limited ability of consumers to cross reference the availability of the once only tickets from other sources, carried with it the implication that the pressure exerted on consumers by viagogo's tactics was more intense and more reprehensible than the selling tactics employed by 1-Day in respect of the commonly available products it offered, albeit with a perceived time constraint.

¹⁹ *Commission v Carter Holt Harvey* DC Auckland, CRI-2005-004-418578, 12 October 2006.

[62] With reference to the defendant's state of mind, counsel acknowledges that the defendant should have reviewed its website more regularly. The "automatically applied" representations were liable to mislead the public as they often did not match 1-Day's operational practices at the time. It is argued however that while the company's website was initially accurate at the time of the company's inception (when it was owned by another corporate entity), because in the early days of its operation the company's products sold out very quickly.

[63] It is submitted that the company's failure to review the website was careless but no worse than that. There is therefore nothing to support the prosecution submission that 1-Day deliberately set out to mislead consumers.²⁰

[64] So far as the harm (gain) impact on consumers and other traders as a result of the defendant's activity, 1-Day accepts through its counsel that it is "statistically possible" that the representations influenced consumers to purchase products sold by the company. The defendant however rejects the submission²¹ that its representations had the potential to cause high harm to consumers and other traders for the following reasons:

- (i) Its representations did not interfere with consumer perceptions of price and product quality which figure most highly in consumer decision-making processes;
- (ii) The representations were accurate at the time that they really mattered to consumer decision-making, in that the stock level indicator was accurate when the stock level fell below 10% and 1-Day's consumer graphics were available for 24 hours at a time, which gave consumers the ability to shop around;
- (iii) The Commission did not receive any consumer complaints regarding the company's practices despite the great number of customers that visit the website;

²⁰ Defendant sentencing submissions dated 22 March 2002 at para [48].

²¹ New Zealand Commerce Commissions submissions on sentence at para [6.34].

- (iv) Consumer interest was not affected after 1-Day removed the offending representations from its website in March 2020;
- (v) Customers received the exact product that they wished to buy;
- (vi) 1-Day's competitors were significant global online retailers with more substantial marketing power than the defendant.

[65] No empirical evidence has been produced by the Commission to prove that consumers and competitors were in fact harmed to a high degree. It is argued by the defence that the "harm to a high degree" standard was specifically rejected in *Steel & Tube* for example, where there was no evidence of loss to the owners of buildings who purchased the non-compliant steel mesh.²²

[66] In summary it is submitted that the present case is not a "one of its kind case." It is accepted that the offending was misleading²³ but did not amount to pressure-selling techniques. This was not true pressure-selling offending and a deterrent fine is therefore not justified.

Decision

[67] The gravamen of the eight representative charges which were laid under s 10 of the FTA is that the company was liable to and did mislead the public as to the time available for those who visited the company's website to purchase the goods advertised there. The period of offending was between 19 October 2016 and 6 June 2020 and spanned 3½ years of the company's commercial activity. The accepted summary of facts to which the defendant has pleaded guilty recognises that it was inevitable that some at least of the defendant's customers would be persuaded into buying the goods offered for sale by the defendant because those customers were misled to believe that those goods would only be available for a time period of 24 hours or less depending on what stage in the 24 hour cycle the company's website was viewed, and further that stock held by the company and available to be purchased was constantly reducing as the 24 hour deadline approached.

²² At [118] and [119].

²³ Defendant's sentencing submissions at para [57].

[68] The company's method of doing business as defined by its name 1-Day Limited and reinforced by its banners of Today Only deals, the countdown timer and the stock level indicator, which was purely algorithmically programmed rather than accurately representing the real stock level. This was a pressure-selling technique designed to give an impression which was usually false as to the time available for a potential customer to purchase the product and the level of stock remaining at that time for possible purchase.

[69] The success of employing this type of pressure-selling technique relying as it does on time scarcity and quantity scarcity, is evident from the substantial turnover realised by the company during the time period as charged. The effectiveness of the company's sales method is highlighted by way of the corresponding lack of success generated by the "Every Day" Deals" that were introduced by the company in June and July 2018. Although the Every Day Deals were typically priced higher than Daily Deals, Daily Deals sales generated between 94% and 99% of the company's total revenue between 2017 and 2020.

[70] 1-Day's revenues in the respective financial years which are the subject of these charges are accepted to be between approximately [redacted] and [redacted] in revenue each year between January 2017 and 1 January 2020 from its Daily Deals sales alone. Over [redacted] items were sold during the period from 1 June 2017 to 1 June 2020. That generated a total revenue of \$ [redacted] for the defendant company in that period. There was an average of [redacted] visitors annually who viewed the website during that period. As previously noted, extensive advertising budgets for the branding and marketing of the website deals was spent by the company on promoting its business, which included not only the website itself but advertising and other media. There can be little doubt that the defendant's sales methods were at the very least, liable to mislead the public as to the availability and stock quantity of the particular product offered during the time period which the offer was said to be available.

[71] The defendant's website has operated in this way since 2007. On 19 December 2019 the Commission wrote to the defendant to educate it regarding these practices. No acknowledgement was received from the defendant company. The Commission then wrote to The Warehouse Group who were the defendant's ultimate shareholder. Although 1-Day have been operating under a separate management structure since

2016 1-Day's general manager had been reporting to The Warehouse Group leadership squad on a weekly basis since then.²⁴ The stock level monitor was discontinued and removed from the defendant company's website in June 2020.

[72] The seriousness and culpability of the defendant's offending was high in respect of the misrepresentations it made to the public in respect of the period to which the goods were said to be available and the quantity of goods held in stock by the company. The Commission has not been able to provide details as to the extent to which the company's practices affected its competitors. However, I am prepared to accept that the company's methods did impact upon its competitors because of the success of those methods and that is particularly so in respect of those companies in New Zealand which stocked the same goods as those sold by the defendant. There is no dispute that the goods sold by the company were not unique to the company.

[73] The purpose of the FTA legislation as defined in s 1A of the Act,²⁵ in particular the interests of consumers and the interests of businesses to compete effectively, as well as for consumers and businesses to participate confidently within the financial trading environment in New Zealand, must inform the seriousness and culpability of the offending. Given the lengthy period over which the defendant's offending occurred, the nature of the offending which involved a two-pronged pressure misrepresentation of limited time to purchase and limited stock availability as well as the background guidance and experience of the company, I find the defendant's offending was more than careless. The defendant's offending was wilful.

[74] The purpose of the defendant's misleading sales techniques was to pressure potential purchasers into making a snap or quick decision to purchase from the defendant company, at least within the 24 hour period as advertised as opposed to purchasing the same products from one of the defendant's competitors. The misleading conduct was therefore a central plank of the defendant's business strategy. This is a situation where only consumers who studied 1-Day's website over time, would realise that the Daily Deals were often re-listed. The Daily Deals were not always re-advertised on the next day. The stock level indicator automatically reset itself after 12pm if and when the deal was reoffered. The public had no way of

²⁴ Summary of Facts at para [11.2].

²⁵ Section 1A FTA (supra) at para [23].

knowing what the true stock level in fact was. The stock level indicator was inaccurate for most of the time. The extent of that inaccuracy has been referred to previously in detail.²⁶

[75] The defendant's conduct gave it an unfair advantage in the market place over its competitors who did not employ pressure-selling techniques of this type and therefore prevented effective competition. It is harder to identify potential short term harm caused to consumers by the defendant's actions. However, the frustration of effective competition does have long term impacts on consumers as well as on competitors. I accept that this is not a situation as in some of the other case law that has been referred to the Court, of misrepresentations in respect of price or product quality. Consumers did receive the exact goods they chose to buy at a price as advertised and they were then able to be delivered promptly. It is not disputed as the defence has argued that the Commission did not receive any complaints from the public in connection with the company's sales practices.

Starting point sentence

[76] The Court of Appeal in *Steel & Tube* stated as follows, when considering the purposes of sentencing for breaches of the FTA:

[90] The cases recognise that 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 in 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.

Given that the defendant's business was almost entirely centred around Daily Deals, the representations had the potential to cause harm to competitors. It was both culpable and serious and caused harm to consumers in the long term. Consumers and competitors were most likely oblivious to management decisions to re-list products on consecutive days and were unaware of the deliberately programmed stock level indicator as all this occurred without the knowledge of those outside of the company.

²⁶ Para [28].

[77] I do not find that the defendant's claim that the Daily Deals countdown timer represented the time remaining until the product was subject to "1-Day review" when the product might be re-listed for sale, repriced and placed on a different part of the website or removed from sale. The defendant's method of selling was intended to encourage consumers to view these promotions as available on that date only.

[78] There have been many prosecutions under the FTA in the preceding 35 years. I find that cases that pre-date 17 June 2014 when the maximum penalty for body corporates increased from \$200,000 to \$600,000 are of less assistance.²⁷ More recent cases provide better guidance for the appropriate sentence in this case.

[79] Given the length of time over which the offending occurred and the revenue obtained by the company over that 3½ period together with the average annual company website visitation of nearly [redacted] hits, I regard the sentencing principles of denunciation and deterrence to be relevant in this case.

[80] The Commission submits that a starting point range of between \$1.3 million and \$1.5 million is appropriate for the reasons previously stated. The Commission relies on the decisions in *The Bike Retail Group Limited (Bike Barn)* case as the most comparable authority for setting a starting point in this case. The similarities between the misleading conduct in that case and the present, are integral to each business operation. The misrepresentations were deliberate. Both companies adopted significant advertising budgets to ensure wide dissemination of the misrepresentations.

[81] In the *Bike Barn* case the Judge adopted an agreed starting point of \$1.2 million before the application of mitigating factors. The offending there lasted for over a period of 1½ years as opposed to a period of 3½ in this case. Some of the charges in the *Bike Barn* case were subject to the then lesser penalty. The charges in *Bike Barn* related to misleading statements in the defendant's advertising campaigns as to the value of goods, where the sale prices were no different to normal retail prices or the prices were reversed engineered as "half price sales" when they were not. The facts of *Bike Barn* differ however in that the offending there was designed to be misleading in so far as the nature of the product itself and that is not the case here. Misleading

²⁷ Section 27, Fair Trading Amendment Act 2013.

representations as to the nature of the product was also the subject of the decision in *Commerce Commission v Reckitt Benckiser (NZ Limited)*, where a starting point of \$1.6 million was set, with an end sentence of a fine of \$1.08 million, imposed in respect of 10 representative charges. There is more similarity between the present offending and that in *Commerce Commission v The Warehouse Limited*. There the misrepresentations related to the exclusivity of the advertised products and the limited time available for customers to be able to purchase those offerings. The offending was charged over an 11 month period and also subject to the earlier lesser tariff fine level. The offending was said to be careless. A starting point of \$130,000 was adopted which was apportioned between the 10 charges, as opposed to being imposed on the basis of the totality of the offending. The offending is less serious than that in *Commerce Commission v viagogo AG (No 3)* which as previously noted, involved a large multinational company with a dominant presence in the industry and with significantly greater misrepresentations than the offending here.

[82] The offering in *Commerce Commission v Fujitsu General Limited* involved charges which were laid under the provisions of s 12A (unsubstantiated representations) and s 13(e), false or misleading representation as to performance characteristics. The defendant was charged in relation to offending over a two year period where the defendant company's sales exceeded \$104 million. The offending in my opinion, was more serious there than in the present case, in so far as it related to the falsity of the claim of the superior nature of the product being offered to consumers. The offending however took place over a shorter period of time between May 2014 and October 2016. The starting point sentence of \$480,000 was based on totality principles.

[83] The seriousness, culpability and the extent of the defendant's offending can be assessed to a certain extent from the company's sales revenue and potential profits over the relevant period. Revenue of over [redacted] was generated by the company during the period 1 June 2017 to 1 June 2020. During the same period there was an average of [redacted] visitors annually who viewed the company's website. Whilst this emphasises the seriousness, culpability and extent of the defendant's offending, there is no evidence of the number of consumers specifically misled by the defendant's conduct. There is an irresistible inference however, that many were and further, that the sales revenue generated through the use of misleading statements must have had

the corresponding proportional effect on the defendant's competitors, some of whom at least were New Zealand-based companies. The misrepresentations were designed to allow the defendant company to be one step ahead of its rivals.

[84] In setting the sentencing starting point in this case I have regard to the principles previously outlined and the recent case law, recognising also that no two cases are alike.

[85] In *Commerce Commission v Go Healthy NZ Limited*²⁸ this Court noted that:

financial penalties in the commercial world are generally regarded as an effective means of deterrence and are important not only for the individual company concerned, but also for others in the marketplace who may contemplate advertising misrepresentations.

[86] I consider that a starting point fine of \$1.2 million is consistent with the aggravating aspects of the offending, but also consistent with the case law with reference to decisions that are broadly similar in terms of the level of fines that are appropriate for offending of this type. The sentence is set with regard to the penalties currently imposed for this type of offending and the value of the sales generated as a result of it, as well as the length of time over which the company is charged with operating contrary to the provisions of the Act under which it is charged. That sentence is based on the totality of the offending over the 3½ year period encompassed in the eight representative charges to which the defendant has pleaded guilty.²⁹

Mitigating factors

[87] The following mitigating factors apply in the present case. The defendant company pleaded guilty at an early stage and that was on 26 November 2021. The defendant's first appearance was scheduled to take place in the District Court on 30 November. The company pleaded guilty by way of a joint written notice and the Court date was able to be vacated. That amounts to a plea of guilty at the earliest opportunity. Implicit in that plea is a saving of Court resources and an acknowledgment of wrongdoing on the company's part. A full discount of 25% is therefore available.

²⁸ *Commerce Commission v Go Healthy NZ Limited* [2019] NZDC 25295 at para [30].

²⁹ In imposing a totality-based sentence which exceeds the maximum penalty available for a single offence, I refer to the Court of Appeal's decision in *Steel & Tube* sentence at para [150] where the Court expressed the view that s 40(2) does not exclude the totality principle in sentencing under the FTA.

[88] As previously stated, the Commission wrote to the defendant on 19 December 2019 regarding the Commission's view of the defendant's trading practices and to "educate" the company as to its responsibilities under the FTA. The Commission received no acknowledgement from the defendant company in respect of that correspondence. A reply was however received later from The Warehouse Group, which is themarket.com Limited's ultimate shareholding owner. The management association between the two companies has been previously referred to. Thereafter the stock level indicator was removed from the defendant's website. The defendant co-operated during the course of the investigation and volunteered information. The defendant declined to attend a voluntary interview with the Commission but instead the defendant provided a written reply to The Commission. The Commission has acknowledged in its submissions that a discount in the region of 5% is available for the defendant's co-operation with the prosecution.

[89] The defendant company does not dispute that it has used the type of representations since 2007. From 2007 to 2011 1-Day featured three products per day. From 2011 onwards 1-Day began featuring a greater number of products. The 'Today Only' aspect of Daily Deals with the accompanying stock level indicator has always been a feature of its method of operation. There has been a close corporate relationship between the defendant in its persona as 1-Day Limited and themarket.com and the Warehouse Limited. As previously noted, the defendant's directors were in weekly communication with some of those of the parent company and it was the parent company that first responded to the Commerce Commission's inquiries into the defendant's practices. The defendant argues that the Commerce Commission did not conduct an evidence-based inquiry into the themarket.com Limited's sales and that of its alter-ego 1-Day, prior to the first charging date relevant to the guilty pleas in these proceedings. It cannot be accurately stated the defendant used pressure-selling techniques throughout its trading lifetime. That submission appears to fly in the face of the established facts as previously discussed, starting with the trading name 1-Day Limited.

[90] The Commission argues that the defendant should not be afforded a further discount for the lack of any previous convictions of offending against the Act. The

Commission in its submissions³⁰ notes that the High Court in *Premium Alpaca Limited v Commerce Commission* noted that “ordinarily” discounts somewhere between 5 and 10% can be given for co-operation and previous good character³¹ and in *Budget Loans*, 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.”³² Further, the Commission has referred to a decision in *Klair v Commerce Commission*³³ which states that any concession to be gained by reason of a previously unblemished record can be dispelled by the prolonged and pre-meditated nature of the offending. For those reasons it would not be appropriate to allow the defendant a further 5% discount for lack of any previous convictions.

[91] Themarket.com is entitled to a discount of 25%, from the starting point sentence of \$1.2 million for early guilty plea and a further 5% for its early and extensive co-operation with the Commission. The 30% discount equates to the sum of \$360,000. The defendant is fined the sum of \$840,000. I do not consider that there is a need to apportion the fine between the two categories of charge, that is the Daily Deals offending and the stock level indicator charges in this case. Both sets of charges are brought under the same section of the legislation and both were designed to have the same effect and are equally serious in my view.

Judge P Winter

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 05/09/2022

³⁰ At para [7.3]

³¹ At para [104] of the decision.

³² At para [46].

³³ *Klair v Commerce Commission* [2014] NZHC 1811 at para [61]-[65].