IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2018-004-003125
[2022] NZDC 6695

COMMERCE COMMISSION
Prosecutor

v

VODAFONE NZ LIMITED
Defendant

Hearing:	6 & 7 December 2021
Appearances:	N Flanagan, C Fleming and A Wiltshire for the Prosecutor F Pilditch QC, A Ferguson and K van der Plas for the Defendant
Judgment:	14 April 2022

RESERVED JUDGMENT ON SENTENCING OF JUDGE AA SINCLAIR

INTRODUCTION

[1] Vodafone New Zealand Limited (Vodafone) appears for sentence on the following charges laid under s 11 of the Fair Trading Act 1986 ("FTA"):

(a) nine representative charges relating to Vodafone's branding and advertising of its hybrid fibre-coaxial ("HFC") broadband network (the "Branding Charges"). Vodafone was found guilty of these charges following a 14-day trial in November 2020;[1] and

[1] *Commerce Commission v Vodafone* [2021] NZDC 7381.

(b) nine representative charges relating to representations made by Vodafone on its website as to the availability of broadband services including fibre-to-the-home ("FTTH") (the "Availability Charges"). Vodafone pleaded guilty to these charges on 16 November 2018.

[2] The maximum fine for a body corporate on a charge under s 11 of the FTA is $600,000.[2]

FACTS

(a) Branding Charges

[3] The factual findings are set out in *Commerce Commission v Vodafone*[3] ("the conviction decision"). In summary, Vodafone operates an HFC broadband network in parts of Wellington, Kapiti and Christchurch. This network uses fibre-optic cable to a street cabinet and coaxial copper cable from there to the home. In 2015–2016, Vodafone undertook an extensive upgrade of the HFC technology to DOCSIS 3.1. Following completion of the upgrade, Vodafone rebranded this broadband service as "FibreX".

[4] During the three charge periods (from 26 October 2016 to 28 March 2018), Vodafone undertook extensive marketing in Wellington, Kapiti and Christchurch to promote its upgraded service. Multi-media advertising was undertaken including digital, radio, billboards, adshels, flyers, online newspaper banners, instore and on Vodafone's website. The advertisements included the statement "FibreX is here" or "FibreX has arrived" while travelling beams of light were used as a background in the print advertisements.

[5] In 2015-2016, the rollout of the Government's ultra-fast broadband (UFB) network was underway. Fixed line broadband networks are identified in the telecommunications market by the technology used for the last mile to the home/premise. In the case of the Government's UFB network, the last mile is fibre

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[2] Fair Trading Act 1986, s 40(1)(b).
[3] Above n 1.

optic cable and it is therefore known by that technology as "fibre". In Wellington and Kapiti the UFB network is owned by Chorus and in Christchurch it is owned by Enable ("the Local Fibre Companies"). These companies invested millions of dollars in the promotion of fibre broadband and in establishing in consumers' minds that "fibre" meant "fibre to the home".

[6] The Court found that by October 2016, a significant number of consumers in the relevant consumer group[4] in each of the regions would have seen the promotional material put out by the Local Fibre Companies and would have understood "fibre" to mean a FTTH product. The Court further found that a substantial number of that consumer group, on viewing the Vodafone advertisements, would have been liable to be misled into believing that "FibreX" was also a FTTH product.

[7] The Court did not accept that the explanation of the access network contained in the offer summaries on Vodafone's website overcame the misleading brand name and advertisements.[5]

[8] The Court was satisfied that the HFC network (and particularly the architecture in the last mile) was a characteristic of Vodafone's broadband service. Furthermore, Vodafone's conduct in the branding and promotion of its service as FibreX was in relation to this characteristic.

[9] In addition, while not an element of the offence under s 11, the Court found that there are a number of inherent limitations in the HFC network that differentiates it from a FTTH network. These inherent limitations relate to variability, likelihood of congestion on the network, speed, latency, reliability and upgrade pathways (the

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[4] The "relevant consumer group" consists of the 250,000 "households passed" on Vodafone's HFC network during the three charge periods which Ms Nisha for Vodafone described as being those households which were within distance of running a coaxial cable to connect the home (the "FibreX coverage areas").

[5] Above n 1 at [81]. "As the Court of Appeal stated in *Godfrey Hirst NZ Ltd v Cavalier Bremworth Limited*, where a consumer is enticed into the marketing web by an advertisement on an erroneous belief, this will be misleading even if the consumer may learn of the true nature of the service before the transaction is completed. This is because the initial misleading advertising is seen as contributing to any subsequent sale."

"inherent limitations").[6] The Court was satisfied that each of these limitations are matters which some consumers would want to know about.[7]

(b) Availability Charges

[10] The facts relating to these charges are set out in the summary of facts. As part of its promotion of FibreX, Vodafone made representations to consumers living within the FibreX coverage areas in Wellington, Kapiti and Christchurch as to the availability of broadband services at their address (the "Availability Representations"). These representations were made through Vodafone's broadband availability checker tool on its website.

[11] In the first charge period from 1 November 2016 to 19 May 2017, consumers within the coverage areas who inputted their address into the availability checker were advised that no other broadband services apart from FibreX were available to them. In fact, some consumers in those areas were able to access other forms of broadband (including FTTH) from Vodafone or other retailers. In this same period, a further representation was made when consumers using the availability checker, navigated to the FTTH page and were advised that a FTTH service was not available when that may not have been the case. The Commission accepts that this particular representation occurred because of a technical error and was not intentional.

[12] In the charge period from 20 May 2017 to 31 October 2017, Vodafone changed the Availability Representation following an investigation by the Commission, so that during this period, the availability checker referred to "Vodafone broadband available

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[6] These inherent limitations are:

(a) FibreX is inherently more variable in its performance than FTTH, an issue which can be ameliorated but not eliminated by DOCSIS 3.1 software;
(b) Congestion is more likely on FibreX than on FTTH;
(c) The upload speeds offered on FibreX were less than those offered on FTTH;
(d) FibreX is inherently less reliable by virtue of its architecture;
(e) It has inherently worse latency;
(f) Its upgradability is inherently worse, for two reasons;
    (i) It is considerably more difficult to upgrade HFC because of its physical constraints; and
    (ii) FTTH is considerably more advanced in developing and providing actual upgrades; and
(g) Consumers on the FibreX network cannot change providers, whereas they can easily change on the FTTH network.

[7] *Commerce Commission v Vodafone* above n 1 at [104-145].

at your address". When consumers within the FibreX coverage areas inputted their address, the message received was that ADSL and VDSL "might not" be offered at the address. FTTH was not presented as an option even in the areas where it was available from Vodafone.

[13] In the final charge period from 1 November 2017 to 28 March 2018, Vodafone made a further change to its website removing the availability checker and directing customers to call to check as to whether fibre was available at their address. However, the availability checker was inadvertently retained on Vodafone's help page headed "can I get Vodafone fibre?". When consumers within the coverage areas inputted their address, it showed FibreX as the only available option when other forms of broadband (including FTTH) were available to some consumers in those areas.

SENTENCING METHODOLOGY

[14] The approach to be taken to sentencing in FTA cases has recently been considered by the Court of Appeal in *Commerce Commission v Steel & Tube Holdings Limited.*[8] The Court noted that it did not appear that any sentencing appeals had previously reached that Court. The Court of Appeal reviewed previous sentencing practice[9] and went on to synthesise:

> [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 and businesses participate confidently. To those ends, it promotes fair conduct in trade and the safety of goods and services and prohibits certain unfair conduct and practices.
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> [91] Customary sentencing methodology applies. Factors affecting seriousness and culpability of the offending may include the nature of the good or service and the use to which it is put; the importance, falsity and dissemination of the untrue statement; the extent and duration of any trading relying on it; whether the offending was isolated or systematic; the state of mind of any servants or agents whose conduct is attributed to the defendant; the seniority of those people; any compliance systems and culture and the reasons why they failed; any harm done to consumers and other traders; and any commercial gain or benefit to the defendant.
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> [92] Factors affecting the circumstances of the offender include: any past history of infringement; guilty pleas; co-operation with the authorities; any

[8] *Commerce Commission v Steel & Tube Holdings Limited* [2020] NZCA 549.
[9] At [85]-[89].

> compensation or reparation paid; commitment to future compliance and any steps taken to ensure it. The court may also make some allowance for other tangible consequences of the offending that the defendant may face. By tangible we mean to exclude public opprobrium that is an ordinary consequence of conviction; publicity ordinarily serves sentencing purposes of denunciation and accountability. The defendant's financial resources may justify reducing or increasing the fine. Of course, any other sentencing considerations applicable, such as totality and the treatment of like offenders, will also be taken into account.
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> [93] This catalogue of considerations is derived from the legislation and the cases. It is not exhaustive, nor is it mandatory. We offer it for several reasons. It seeks to make clear that the offender's state of mind is just one of a number of culpability factors, albeit important. It treats state of mind as a question of fact and degree. It recognises that the starting point should reflect not only the conduct and state of mind of those employees or agents responsible for the contravention but also their seniority and the existence and effectiveness of any compliance systems and culture, which are usually attributable to senior management. It includes the extent of any commercial gain or benefit and the defendant's size or financial capacity, as one would expect for offending in a commercial setting. Finally, it is organised according to circumstances of the offence and the offender, consistent with modern sentencing methodology.[10]

[15] The Court follows this approach in sentencing in this case.

[16] The parties referred the Court to a considerable volume of the evidence that was before the Court at the conviction trial, the notes of evidence and further evidence filed for the purposes of the sentencing hearing. I have given careful consideration to all this material and the parties' detailed submissions in reaching my findings and determining sentence.

CULPABILITY FACTORS

[17] The charges before the Court are of a strict liability nature. While mens rea was not an essential element of these charges, it is necessary to establish Vodafone's state of mind for sentencing purposes.

[18] Vodafone's state of mind is in dispute. Facts relevant to the further aggravating factors of commercial gain and harm, and mitigating factors of the offending are also in dispute. I have addressed these disputed facts in my consideration of each of these

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[10] Footnotes not included.

factors applying the burden and standard of proof in accordance with s 24 of the Sentencing Act 2002.

[19] Notably, Vodafone submits that treating commercial gain, harm to consumers and harm to competitors as distinct factors, risks double counting. The Court of Appeal observed in *Steel & Tube*, that the courts have long accepted that gain is a relevant consideration in sentencing for offending under the FTA generally and identified it as a separate factor.[11] The gain may affect the court's assessment of the gravity and culpability of the offending,[12] and is also likely to correspond to the extent of any economic loss, damage or harm to victims of the offending.[13]

[20] Financial harm and gain are inevitably going to be closely linked in FTA cases. However, as Vodafone acknowledges (and as discussed below), harm to consumers and competitors is not limited to actual financial harm.

Nature and use of the service

[21] The service in this case involves the provision of an UFB service. A reliable UFB service plays a crucial role in everyday life and is depended upon by New Zealanders for an expanding range of activities.

[22] The Government recognised the significance of UFB to the public and economy of New Zealand when it committed to roll out fibre to 87% of New Zealand at a cost of $1.7 billion. Notably, its importance was also acknowledged by Vodafone in its press release in November 2015 on the upgrade of the HFC network.

Extent to which the false statements were misleading

[23] The use of the brand name FibreX for its HFC network and statements "FibreX is here" or "FibreX has arrived" and use of travelling beams of light as a background

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[11] Above n 8 at [91] set out above.
[12] Above n 8 at [96]; Sentencing Act, 8(a).
[13] Above n 8 at [96]; Sentencing Act, 9(1)(d).

in its advertising material are plainly misleading with the result that consumers were liable to believe that Vodafone's FibreX network was a fibre network when it was not.

[24] The Availability Representations made in each of the charge periods informed consumers in FibreX coverage areas who used the availability checker, that FibreX was the only broadband service available at their address when in fact ADSL, VDSL and/or FTTH may also have been available. These representations involved a material departure from the truth.

Extent and duration of the offending

[25] The promotion of FibreX was limited to the three regions in which Vodafone's HFC network was installed being in Wellington, Kapiti and Christchurch.

[26] Following completion of the upgrade and rebranding as FibreX, Vodafone commenced its extensive advertising campaign in each of the regions. The campaign was launched in October 2016 and extended through the three charge periods to the end of March 2018 (a period of approximately 17 months).[14]

[27] The three versions of the Availability Representations were made on Vodafone's website consecutively over the same 17 month period.

Vodafone's State of Mind

Branding Charges.

[28] The Commission submits that Vodafone took a deliberate decision when it branded its HFC network as FibreX and undertook its marketing campaign aware that it was liable to mislead consumers into believing that FibreX was FTTH. In particular, the Commission submits that:

(a) Vodafone accepted through Ms Horton that it was important consumers knew FibreX was not FTTH;

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[14] The Commission says that the campaign continued until May 2019 when FibreX was renamed in its advertising as "Ultrafast HFC". However, such activity falls outside the Court's consideration for the purposes of sentencing.

(b) Vodafone admitted at interview and Ms Horton affirmed at trial that, internally there were concerns that consumers might be misled, but it proceeded anyway;

(c) Vodafone was put on notice that consumers were being misled and still persisted after that;

(d) the potential for consumers to be misled was so inherently obvious in the conduct that it can only have been apparent to Vodafone.

[29] Vodafone denies that it intended to mislead or deceive consumers into believing that FibreX was FTTH or that it knew that some consumers may be led to believe it was FTTH.

[30] The Commission relies upon what it says are admissions made by Vodafone's external counsel Ms Ferguson and Ms Horton at an interview with the Commission on 11 August 2017 and also by Ms Horton in her evidence, to the effect that there were internal concerns that the brand name FibreX might mislead consumers, but the name was chosen anyway. The Commission also relies on what it says is another admission made by Ms Ferguson as to what some consumers would understand the word "fibre" to refer to.

[31] I do not accept the Commission's submission that Ms Ferguson and Ms Horton made the admissions alleged. In my view, when the answers given by them both are considered in the context of the interview/cross-examination questions, or as subsequently clarified, it is plain that no admissions of the nature asserted by the Commission were made. Consequently, I do not place any weight on the answers given.

[32] I am unable to be satisfied on the evidence to the requisite standard that Vodafone intended to mislead or deceive consumers that FibreX was FTTH.

[33] Ms Horton gave evidence at trial as to the rebranding of the HFC network as "FibreX". She explained to the Court that the name "FibreX" suggested to consumers

that the network included fibre and something else – the X being coaXial. It was Vodafone's expectation that consumers would take out that FibreX was a "fibre like" network that used new technology that delivered a superfast, reliable broadband service but was not pure fibre (as it had the addition of X in the name).

[34] Ms Horton provided this explanation when the Commission wrote to Vodafone on 7 March 2017 advising that "some concern was held in the industry regarding Vodafone's name for its cable broadband service". It is also consistent with that given by Mr Angus Wilson, Head of Commercial and Product for consumers at Vodafone at the interview with the Commission.

[35] The Commission's letter was followed in May and June 2017 by two articles in the Consumer magazine. The second article contended that Vodafone's FibreX risked misleading consumers about the service they were getting (namely not fibre broadband). Vodafone is recorded in the article as defending the name, stating speeds are comparable to broadband delivered via the UFB rollout and fibre makes up part of the network that FibreX plans use. The article goes on "[Vodafone] says the FibreX network uses fibre optic cable between the exchange and the street cabinet but cable from the cabinet to people's houses."

[36] Vodafone has been steadfast in its defence of the FibreX name. While I concluded in the conviction decision on the basis of Professor Gendall's evidence and as a matter of common sense, that consumers would not have taken the "X" as meaning FibreX was not a FTTH product,[15] I accept that Vodafone's belief that the addition of the "X" was sufficient to differentiate its product from FTTH was genuinely held when the campaign was formulated and it continued to be its position through to trial.

[37] Consistent also with this position, is the information provided by Vodafone to its frontline agents. It was Ms Horton's evidence that Vodafone was concerned not to confuse consumers that FibreX was a FTTH product. In an instruction sheet to staff from October 2016, it was stated: "FibreX is NOT Fibre (aka the government backed UFB roll out), and we should not confuse customers that it is".[16]

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[15] Above n 1 at [80].

[16] Above n 1. The extract is set out in full at [45] of the conviction decision. While there was no

[38] Initial press releases made it clear that FibreX was Vodafone's upgraded HFC network. Information about the network access type was set out on Vodafone's website in the offer summaries.

[39] While I am not satisfied that Vodafone's conduct was wilful, I consider Vodafone was grossly careless in its choice of name and in the marketing of its FibreX service. In my view, it ought to have been obvious to Vodafone that consumers were liable to be misled into believing that FibreX was FTTH by the name FibreX and its advertisements including the statement "FibreX is here" or "FibreX has arrived" together with travelling beams of light as a background in the print advertisements.

[40] While Vodafone took the position at trial that it was not selling the network architecture, but was selling the service of internet access, it is of concern having regard to its responsibilities under the FTA, that Vodafone did not appreciate that its branding as FibreX was liable to mislead consumers. In the same way, having been put on notice by the Commission and Consumer magazine article that issues had been raised with regard to its name, changes were made to its promotional materials to include reference to the HFC network, but Vodafone otherwise continued to defend its name.

[41] Considerable evidence was given at trial by Ms Horton as to Vodafone's "layered approach" to the provision of information to consumers. (This approach involved the layers beneath the brand name being staff training, website material which differentiated between FibreX and FTTH UFB services and the offer summaries mandated by the Telecommunications Forum). Disclosure of the network was made in the offer summaries. Ms Horton acknowledged at trial that she was familiar with the *Godfrey Hirst NZ Ltd v Cavalier Bremworth Limited* [17] decision but did not accept that this was too late in the process to be providing this information to consumers maintaining Vodafone's position that it did not consider that the name was liable to mislead.[18]

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evidence of trial that this information had been provided by frontline agents, I accept that this was Vodafone's intention.

[17] Above n 5 and NOE 1095

[18] Above n 1 at [79].

Availability Charges

[42] The Commission characterises this offending as part and parcel of Vodafone's deliberate decision to conflate HFC with FTTH. It contends that Vodafone made a calculated decision to treat customers within FibreX coverage areas as "not eligible" for FTTH. It submits that Vodafone altered its website to ensure that customers in FibreX coverage areas interested in HFC did not come to know of the possible availability of FTTH at their address because such knowledge may have led to a change in their behaviour and shown that FibreX was not FTTH. While FTTH was not referred to on the availability checker, I am not satisfied that it can be inferred from the summary of facts (and in light of my findings above) that Vodafone had made such a decision.

[43] In the first charge period, the Availability Representation made to consumers in FibreX coverage areas was to the effect that the only broadband available was FibreX. After the Commission brought the issue to its attention, Vodafone changed the wording. The heading was amended to refer to "Vodafone broadband available at your address". When consumers inputted their address, the message received was that ADSL and VDSL "might not" be offered at the address. As noted above, there was no mention as to the availability or otherwise of FTTH.

[44] Vodafone told the Commission that having invested heavily in its HFC network, it had made a commercial decision that FibreX was the service it would offer to consumers in FibreX coverage areas. Consumers were able to check their eligibility for alternative broadband services on another provider's website or alternatively, by contacting Vodafone directly.

[45] I am not satisfied that Vodafone intended to mislead consumers. Rather, I find that it was careless in its presentation of the information on its availability checker. I do not assess the level of carelessness as being as high as for the Branding Charges and would describe it as being at a moderate level. It is evident from its own explanation that Vodafone's focus when designing the availability checker was on maximising its profit from FibreX rather than on ensuring the information provided to consumers was not misleading.

[46] I note that the Commission accepts that the second representation made during the first charge period was unintentional. Likewise, it accepts that the representation made on the website in the third charge period was made inadvertently. I have adjusted the fines for the charges in the final charge period to reflect this.

Senior Management and Compliance Culture and Systems

[47] It is not in dispute that senior management including marketing, technology and legal team members were actively involved in deciding upon the brand name FibreX and in developing and approving the FibreX marketing campaign.

[48] Vodafone adopted the brand name FibreX and undertook its advertising campaign on the basis of its own assessment as to what consumers would take from the name. Notably, while Vodafone engaged Colmar Brunton to conduct market research, it did not undertake any market testing on consumers' understanding of the letter "X".

[49] In my view, it is apparent from this offending that Vodafone did not have a sufficiently robust compliance structure. While launching a major new service and investing large sums in its promotion and advertising, I consider that Vodafone adopted a cavalier approach to its responsibilities under the FTA and in particular to consumer protection. This approach continued when having been put on notice as to concerns about FibreX name, Vodafone made changes to its promotional materials but otherwise defended its name and ignored the concerns expressed.

[50] With regard to the Availability Charges, it is evident that little consideration was given to ensuring that the information on its availability checker was correct. Concerningly, having been put on notice by the Commission, Vodafone's efforts to correct the representation in the second charge period were ineffective. The failure to satisfactorily correct the representation reflects a lack of understanding of the requirements of the FTA and also calls into question Vodafone's commitment to ensuring compliance with the legislation.

Extent of any commercial gain or benefit from the offending

[51] In *Steel & Tube* the Court of Appeal considered the assessment of commercial gain in the context of offending under the FTA. The Court said:

> [101] In practice courts do not usually engage in close analysis of gain, which does not set an upper or lower limit for fines. Other information, such as advertising data, sales volume or revenue may sufficiently inform the court about the scale and seriousness of the offending. Deterrence is only one consideration at sentencing, and the requirements in any given case are a matter of judgment rather than calculation. To the extent that a court thinks it necessary or appropriate to estimate gain, a court may find that proved revenue attributable to the offending conduct is an adequate measure. To such a case, defendants may be able to discharge an evidential burden of showing that an allowance ought to be made for expenses associated with the offending goods or services.

[52] In the present case, the Commission acknowledges that it is not possible to prove the precise amount of Vodafone's gain but says that inferences can be drawn as to its scale.

[53] Vodafone accepts that some commercial gain is implicit in this type of offending but says that the extensive gain alleged by the Commission is not substantiated by the findings at trial nor is the Commission's submission supported by admissible evidence.

[54] Vodafone further accepts that it is open to the Court to infer the scope of the offending and the extent of the harm caused without quantifying the exact figure. However, such an approach relies on inferential reasoning and the usual rules apply; namely factual conclusions can be drawn from proven facts but there is no place for assumption.[19] Vodafone says that in the present case, there is insufficient admissible evidence for the Court to find beyond reasonable doubt that the commercial gain asserted by the Commission is present.

[55] As a start point, the Commission says that while it is not possible to know the number of customers who signed up to or remained on Vodafone's HFC network

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[19] *Caswell v Powell Duffryn Associated Colleries Limited* [1940] AC152 (HL) at 169-170 per Wright LJ; *Pokai v R* [2014] NZCA 356 at [30] – [31]; and *R Kinghorn* [2014] NZCA 168 at [20] – [21] cited in *Steel & Tube* above n 8 at [77].

because they were misled by the FibreX campaign or the Availability Representations, it can safely be inferred from the offending itself, that these numbers must have been substantial.

[56] The Commission undertook an analysis of the actual HFC subscriber numbers in the three years to 30 June 2017, 30 June 2018 and 30 June 2019 and the projected HFC subscriber numbers for these three years (assessed prior to the upgrade and showing a steady decline). The Commission submits that even with the upgrade in the network, the rate of decline would have continued having regard to consumers' perception of cable.

[57] Using these numbers, the Commission says that the "Additional Subscribers" (being the difference between the actual and projected subscriber numbers) who joined the FibreX network in those years can reasonably be attributed to the misleading elements of the FibreX campaign.

[58] The Commission has used figures to the end of June 2019 contending that Vodafone's commercial gain continued for some years by virtue of the fact that customers signed up to fixed term contracts and/or were charged termination fees. Also, once settled, a lot of customers were "sticky" and did not readily change providers. Applying the Additional Subscriber figures and calculating the average prices paid by customers across the various FibreX plans, the Commission assesses Vodafone's annual revenue from the Additional Subscribers as being in the millions of dollars. The Commission acknowledges that Vodafone would have had some costs associated with providing the service but says these would have been limited.

[59] Vodafone is critical of the analysis which it contends is based on a number of assumptions. In particular, Vodafone submits that there are other possible reasons for the number of Additional Subscribers during the charge periods, being: (a) the slow roll out of FTTH in Wellington and Kapiti; (b) the competitive pricing of the plans offered by Vodafone for FibreX; (c) customers' needs for other services available on HFC; and (d) the decline in subscriber numbers was less than projected following the upgrade. In these circumstances, it says that the Commission's analysis cannot be relied upon.

[60] The Commission accepts Vodafone's criticisms but says the point of its analysis is to illustrate to the Court the order of magnitude of Vodafone's commercial gain as empirically as possible to provide an indication that the inferences able to be drawn from the offending itself are correct. The Commission says these inferences are:

(a) Vodafone's own marketing plan shows that Vodafone targeted 250,000 homes passed by the HFC network and focused on 66,000 homes that were intact (physically connected to the network) but inactive;

(b) the FibreX campaign was promoted broadly and involved extensive multi-media advertising in each region;

(c) the campaign was plainly an expensive and involved one. That cost would hardly have been incurred without the expectation of substantial commercial returns;

(d) the campaign follows millions of dollars of advertising by LFCs creating the perception among consumers that Fibre was best;

(e) the basic premise of the campaign was the conflation of HFC with FTTH. By definition then, Vodafone expected consumers to be motivated by that;

(f) as found at trial, consumers care as to how their broadband service is provided in particular, they prefer FTTH to cable which they see as slow and outdated.

The Commission submits that it can be concluded on the facts of this offending that the breaches must have had a substantial impact on consumer behaviour.

Analysis

[61] The Court is focused on the charge periods and therefore only on the annual revenue/commercial gain earned by Vodafone in those periods. The Additional

Subscribers in the 12 months to 30 June 2017 and subsequent 12 months to 30 June 2018 total 7721 and 9246 respectively.[20] The Commission assessed the annual revenue to Vodafone from the Additional Subscribers as being $7,400,000[21] in the year to 30 June 2017 and $9,600,000 in the year to 30 June 2018.

[62] Notably, both these years extend beyond the charge periods (being from the end of October 2016 - to the end of March 2018). The number of Additional Subscribers who joined in the shorter charge periods and therefore the revenue earned from them, is unknown.

[63] As is accepted, it is not possible to be able to determine the number of customers who signed up to or remained on Vodafone's HFC network because they were misled by the FibreX campaign or the Availability Representations. Likewise, as is also accepted, there are a number of other possible reasons unrelated to the offending as to why subscriber numbers increased in the years identified.

[64] The measurement of gain is to assist the Court in assessing the scale and seriousness of Vodafone's offending in order to set a starting point. I acknowledge the difficulty in approaching the assessment of commercial gain in this case. However, in my view, the exercise which the Commission proposes that I undertake is speculative. I am not satisfied that the inferences the Commission invites me to rely on are robust enough to arrive at a finding that Vodafone's revenue from its offending was "substantial" in the relevant charge periods or what that may mean (even generally) in empirical terms.

[65] Accordingly, I am not able to make any assessment of Vodafone's revenue/commercial gain from its offending on the basis contended by the Commission.

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[20] Taking the number of subscribers in each of these years to 66,994 (2017) and 65,609 (2018).
[21] Figures rounded.

Harm to Consumers

Admission of Evidence

Schedule of Complaints

[66] The Commission sought to admit a schedule of complaints made to the Commission in the period from October 2016 to December 2019 for the purpose of showing the number of complaints made by consumers in relation to FibreX during this period.

[67] Vodafone objects to the admission of Mr Walker's evidence producing the schedule on the grounds that the statement is opinion evidence. I do not accept that his evidence falls into this category. Rather, I see it as simply introducing the schedule which is what the Commission wishes to rely upon. Vodafone also objects to the admission of the schedule on the basis it contains hearsay statements. The truth of the complaints is not in issue, and I am prepared to admit the schedule for the limited purpose identified by the Commission.

[68] Mr Walker describes the complaints as "illustrating the real-life problems customers had with FibreX's performance" and others as being "from customers who were misled by Vodafone's advertising into thinking the product was fibre". A total 50 complaints are recorded in the schedule. The Commission submits that the number of complaints made is striking even though it is inherent in the offending that consumers may not have known they were misled.

[69] The complaints recorded are broad and varying in nature. Furthermore, while described by Mr Walker as customers, it is not clear that all the complaints have been made by persons who form part of the relevant consumer group. Twelve of the complaints were made following the end of the final charge period (reducing the number made in the relevant periods to 38). It is also noteworthy that a number of the

complaints appear to have been made following the articles in the Consumer magazine in May and June 2017 critical of FibreX.[22]

[70] Taking these factors into account, I do not place any particular weight on the number of complaints recorded in this schedule in considering harm to consumers from this offending.

Victim Impact Statements

[71] The Commission also sought to admit five victim impact statements which it submits, support the inference that consumers were harmed "in a very real way". Furthermore, it says the Court often takes into account such statements when assessing harm to a large cast of victims.[23]

[72] In a decision dated 15 November 2021, adopting a broad approach, I found that these consumers were persons against whom the offences had been committed under s 4(a)(i) of the Victims Rights Act 2002 (the "VRA"). I left it open to Vodafone to raise any objections as to the content of any of the statements at sentencing. In the event, apart from introductory paragraphs, Vodafone objects to the content of all the statements.

[73] The purpose of a victim impact statement is to enable the victim to provide information to the court about the effects of the offending; assist the court in understanding the victim's views about the offending; and inform the offender about the impact of the offending from the victim's perspective.[24] It should not include a victim's account of the offending[25]

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[22] The second article stated that the Commission was investigating Vodafone's FibreX service and wanted to hear from people with complaints. It is not to say that there was any effort to "harvest" complaints, rather, it reflects on the Commission's submission that the number of complaints is striking even though it is inherent in the offending that customers may not have known they were misled.

[23] *Commerce Commission v Vodafone* DC Auckland CRN 09004505626, 12 August 2011 at [10]. Notably, in that case, Judge Joyce QC also dealing with charges under s11 of the FTA, stated that there was no suggestion that the victim impact statements were unreliable.

[24] Victims' Rights Act 2002, s 17AB.

[25] *R v Proctor* [2007] NZCA 289 at [19].

[74] In each of the victim impact statements, the consumer described their experience of dealing with Vodafone and its staff with regard to FibreX and its installation, and the outcome/harm they say they suffered. Each consumer also expressed their opinion as to the misleading nature of the FibreX name. Vodafone says these statements contain factual assertions which have not been tested and go beyond the information intended to be provided in a victim impact statement.[26] It submits that the introduction of such evidence in these statements denies it the opportunity to cross-examine those consumers and challenge the reliability of their evidence.[27] The prejudicial effect is further increased by the Commission relying on untested statements made in each of the victim impact statements to then make submissions as to the extent of harm suffered by other consumers.

[75] The Commission submits that the victim impact statements do nothing more than reinforce what the Court has already concluded namely that calling FibreX misled some people and they cared about that.

[76] I am satisfied that the objections raised by Vodafone have been made out in respect of each of the victim impact statements. In my view, Vodafone's inability to cross-examine the consumers and test the reliability of this evidence is highly prejudicial to it. This is significant having particular regard to the purpose for which the Commission wishes to put the statements namely, to show actual harm to consumers and to invite the Court to take the statements into account when assessing harm suffered not just by these consumers but by other consumers in the wider consumer group. Accordingly, I do not place any weight on any part of these statements.

Harm

[77] Vodafone accepts on the basis of the Court's findings, that it caused harm to consumers within the FibreX coverage areas by depriving them of the ability to make an informed choice.

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[26] Victims' Rights Act 2002, s 17-19.

[27] By way of example, Vodafone submits that when two other complaints were investigated it had been found that consumers had been given the correct information about the network.

[78] This consumer group consisted of the 250,000 households in Wellington, Kapiti and Christchurch that were "passed" by the HFC network in the charge periods. It is acknowledged by the Commission that those outside of this group who may have been misled by the branding and promotion of FibreX, did not suffer harm.

[79] The choice of broadband is an important one for consumers. It is important not just to give consumers peace of mind. As discussed above, the medium of delivery of their broadband service and in particular, whether it is by cable or by fibre, is something that consumers care about.

[80] In addition, FibreX has inherent limitations not present with FTTH and as established at trial, those limitations are matters which at least some consumers would want to know about. Notably, one of those limitations means that a customer on HFC cannot easily swap retail providers. Instead, in order to be able to make that swap, FTTH must be physically installed by laying a fibre optic cable underground from the street to the customer's home which could involve a delay of some weeks.

Availability charges

[81] By showing only FibreX and not all available broadband types on its availability checker, Vodafone caused harm to consumers within the FibreX coverage areas by depriving them of the opportunity to choose the type of broadband most appropriate for their needs. For the reasons discussed above, this was an important choice for consumers.

Harm to the Market

[82] The objectives of the FTA include ensuring a trading environment where businesses compete effectively, and consumers and businesses participate confidently.

[83] Vodafone accepts that its offending by its very nature, would invariably have had an impact on market competition. In the present case, competitors include other retailers providing FTTH. Consumers who signed up to FibreX believing it to be FTTH may have instead purchased that product from another broadband provider. The

plans offered on FibreX were cheaper than for FTTH meaning that Vodafone was effectively given an unfair advantage over competitors selling true "fibre".

[84] Furthermore, such behaviour also causes both consumers and competitors to lose confidence in the market.

Harm to the Local Fibre Companies

[85] The Commission submits that the Local Fibre Companies suffered substantial financial losses because of Vodafone's offending. It says that Vodafone's FibreX campaign took advantage of the years of marketing that had been carried out in the three regions to establish "fibre" as the best broadband technology in the minds of consumers. The Commissioner contends that these marketing investments were unfairly co-opted by Vodafone.

[86] In addition, the Commission submits that because of Vodafone's offending, consumers signed up for FibreX when they otherwise would have signed up for FTTH. As a result, the Local Fibre Companies were denied the access fees they would have received from retailers for these consumers. The Commission undertook an empirical analysis of the losses which it says were suffered by Enable and Chorus. On the basis of this analysis, it estimates that together, the Local Fibre Companies suffered losses in the millions of dollars.

[87] I accept that the Local Fibre Companies would have suffered harm being the loss of access fees they would otherwise have earned but for Vodafone's offending. However, the Commission's analysis is based on a number of assumptions and I am not satisfied that it can safely be inferred from this analysis, that the harm/losses suffered by the Local Fibre Companies attributable to Vodafone's offending during the relevant charge periods is of the estimate or scale submitted by the Commission.

MITIGATING FACTORS OF OFFENDING

[88] Vodafone relies on its "layered approach" to the provision of information concerning the HFC technology to demonstrate that it had made genuine attempts to

prevent consumers from being misled based on what it understood to be a valid approach at the time and submits that this is a mitigating factor of its offending.

[89] On my findings, I do not consider the fact that a consumer could have found information about the architecture technology in the offer summaries materially mitigates culpability.[28] No other mitigating factors in relation to Vodafone's offending were identified.

STARTING POINT

Maximum penalty

[90] The parties agree that the offending should be treated as an overall course of conduct and a global starting point for all the offending should be determined. However, before undertaking this exercise, the issue arises as to whether s 40(2) of the FTA applies. This section states:

> Where a person is convicted, whether in the same or separate proceedings, of 2 or more offences in respect of contraventions of the same provisions of this Act and those contraventions are of the same or a substantially similar nature and occurred at or about the same time, the aggregate amount of any fines imposed on that person in respect of those convictions shall not exceed the amount of the maximum fine that may be imposed in respect of a conviction for a single offence.

[91] Section 40(2) was considered by the Court of Appeal in *Steel & Tube*.[29] Having discussed the policy considerations behind the Australian provision and subsequent New Zealand provision, the Court observed that the prohibition on fines for multiple offences exceeding the maximum for a single offence was to be tightly circumscribed; to qualify, the offences must be essentially similar and must be committed over a reasonably short period.[30]

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[28] Muir J took a similar view in *Financial Markets Authority v ANZ Bank NZ Limited* [2021] NZHC 399 at [49].
[29] At [80]-[82].
[30] At [82].

[92] The Commission says that s 40(2) has no application in this case and the maximum penalty must be calculated on the basis of all charges (giving a maximum of $10.8 million).

[93] In its written submissions, Vodafone contends that the Branding Charges and Availability Charges were ongoing courses of conduct rather than distinct and repeated offending and should be treated as only two distinct offences. In its oral submissions, Vodafone accepts the Commission's categorisation of charges into the three different time periods (making a total of six charges) and submits on this basis, that the maximum penalty is $3.6 million.

[94] Vodafone does not accept that there is any justification to differentiate between charges on the basis of geography and says that the offending was identical in and universal to each location.

[95] In relation to the Branding Charges, Vodafone submits that there was no evidence at trial showing any differentiation in the advertising between Wellington, Kapiti and Christchurch and the Court made no findings in this regard.

[96] At trial, evidence was given by Mr Walker and by Ms Horton as to the advertising undertaken in each region. Satellite images of the FibreX coverage areas in Wellington, Kapiti and Christchurch and a schedule prepared by Vodafone of its digital and print advertising material and targeting information were produced.[31] The promotion of FibreX did not involve one mass campaign. Rather, Vodafone undertook targeted advertising detailed in the schedule in each region. Advertisements were targeted differently depending on their nature and wording. For example, where a billboard was generally located within a region, the message "FibreX has arrived" was used and where a billboard was located directly within a FibreX coverage area, the message "FibreX is here" was used. By way of further example, the direct mailer offering a three-day install and $100 credit was only sent to addresses in the FibreX coverage areas which were in fact eligible for this offer (being those already connected to the HFC network).

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[31] Documents ZW04 and ZW05 respectively.

[97] In addition, the test of "the same or substantially similar nature" is directed at least in part to the extent and membership of the target audience".[32] In the present case, the localised nature of the advertising meant that there was a different target audience in Wellington, Kapiti and Christchurch (being those consumers identified as living within a FibreX coverage area in the particular region).

[98] In these circumstances, I am not satisfied that the Branding Charges meet the requirements of s 40(2) to qualify as a single offence for the purposes of sentencing.

[99] A different factual matrix is involved in respect to the Availability Charges. The Availability Representations made on Vodafone's website were directed to consumers living in the FibreX coverage areas in Wellington, Kapiti or Christchurch who used the availability checker to enquire about broadband services available at their address. The information supplied, although the same in each case, was related to the particular consumer's address. The coverage areas and the consumers to whom the representations were made, were different in each region. On this analysis, I reach the same position as that for the Branding Charges namely, that the offending does not satisfy the requirement of s 40(2) of being the same or of a substantially similar nature to qualify as a single offence.

[100] For these reasons, I conclude that the maximum penalty for both the Branding Charges and Availability Charges is $10.8 million.

[101] Having reached this view, I am mindful of the Court of Appeal's observation in *Steel & Tube* that in cases where a course of conduct has led to multiple identical charges a court needs to be conscious of a risk that the aggregate maximum fine will have a framing effect on the starting point. This risk can be addressed by either the adoption of a global starting point or a totality adjustment.[33] As noted above, in this case, the parties agree that a global starting point is appropriate.

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[32] *Commerce Commission v Zenith Corporation Ltd* [2006] DCR 757 [82].
[33] Above n 8 at [84].

Comparable Cases

[102] By way of comparison, the parties referred the Court to three cases (including *Steel & Tube*), the facts of which are briefly summarised below:

Commerce Commission v Steel & Tube Holdings Ltd

[103] In this case, Steel & Tube pleaded guilty to 24 representative charges under the FTA. The charges fell into two categories: the first involved breaches of s 10 by making representations (on batch tags, batch test certificates, invoices and the company's website) that its SE62 steel mesh was 500E grade (meaning that it had been tested and complied with the relevant building standard). The Commission charged that the company was liable to mislead the public about the product's suitability for purpose. The second category of offending concerned false or misleading representations in breach of s 13 namely that the mesh had been tested and certified by an independent building product testing laboratory when it had not been so tested.

[104] The charges spanned a four-year period from March 2012 to April 2016. Thirteen of the charges related to conduct and representations when the maximum fine was $200,000 per charge. The District Court imposed a fine of $1,885,000 (adjusted from a starting point of $2.9 million). On appeal, this fine was increased in the High Court to $2,009,280 (from a starting point of $3.8 million).

[105] The Court of Appeal undertook its own sentencing process. The Court determined that the offending was serious even though it did not involve intentional deception having regard to the important use to which the product is put, the vital importance of compliance with the standard, the absence of any adequate excuse, and the large scale and long duration of the offending.[34]

[106] The Court noted that it could not identify any loss to consumers. The departures from the standard went to process and not the finished product and there was no evidence that the consumers in fact got a different product from what they had

[34] Above n 8 at [140].

bargained for.[35] In addition, the Court of Appeal found that there was no harm to other suppliers as a result of Steel & Tube's conduct. With regard to commercial gain, the Court was unable to estimate the gain attributable to the offending.[36]

[107] The Court of Appeal adopted a global starting point for the compliance representations of $1.5 million and $900,000 for the independent testing representations (an overall starting point of $2.4 million). After adjustments for Steel & Tube's guilty pleas, remedial action and cooperation, the end penalty was a total fine of $1,560,000.

Commerce Commission v Reckitt Benekiser (NZ) Ltd[37]

[108] Reckitt Benekiser (RBNZ) is the manufacturer of Nurofen. RBNZ pleaded guilty to 10 representative charges under s 10 of the FTA relating to misleading representations made by RBNZ on its product packaging and webpages that four Nurofen products were specifically formulated to target the particular type of pain specified in the product name (e.g. Nurofen (migraine pain)).

[109] Judge Jelas accepted that RBNZ's marketing claims were "grossly misleading" and that the misleading statements were of "central importance to the product". Her Honour found that the marketing claims were a commercial strategy designed to encourage consumers to purchase a higher value product and to increase the quantities of product purchased. Furthermore, RBNZ was aware of criticisms about its marketing claims during the period of the offending and had also been directed by Australian authorities to withdraw the same misleading packaging in that jurisdiction.

[110] The offending occurred over a five-year period ending in December 2015. Accordingly, some of the charges were subject to a $200,000 maximum fine.

[111] A penalty of $1,080,000 (from a starting point of $1.6 million) was largely negotiated.[38]

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[35] Above n 8 at [118].
[36] Above n 8 at [125].
[37] *Commerce Commission v Reckitt Benekiser (NZ) Ltd* [2017] NZDC 1956, [2017] DCR 431.
[38] Counsel had filed a joint memorandum submitting that a fine in the range of $1 million would be appropriate.

Commerce Commission v Carter Holt Harvey[39]

[112] Carter Holt Harvey (CHH) supplies structural and other timber to the building sector. During the relevant period, timber produced by CHH was graded for its structural properties using a machine stress technique. Once sorted, it was given a grade which implied that it had certain properties and characteristics. In October 2006, CHH pleaded guilty to 20 charges under s 10 of the FTA having represented that timber it sold met minimum structural properties for the grade under the relevant Australian and New Zealand standards when most did not meet all the requirements of that standard.

[113] The offending occurred over a three-year period. Dissemination of the misrepresentations was extensive. On investigation by the Commission, it was found that CHH's managers had known for some time that it was marketing and selling non-compliant timber. CHH made no attempt to alert the market of this situation. Over the offence period, CHH reported $177 million in net sales revenue from timber sold as compliant.[40]

[114] The parties agreed that a fine of $45,000 should be imposed on each of 20 charges totalling $900,000. Notably, the maximum penalty at the time for some charges was $100,000 and $200,000 for others.

General Observations

[115] None of these cases relate to the telecommunications sector. To the extent that they are relied upon by the parties for the purposes of comparison as to the fines imposed, they are of limited value. In each of these cases, a number of the charges had a maximum penalty of $200,000 or, in the case of CHH, $100,000. In addition, in two of the cases, the penalty was largely agreed. The District Court sentencing cases are generally useful as to the approach taken in assessing culpability factors.

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[39] *Commerce Commission v Carter Holt Harvey* DC Auckland CRI-2005-004-18578, 12 October 2006.

[40] While not appearing in the sentencing decision, the Court of Appeal in *Steel & Tube* noted that it is contained in the summary of facts appended to the decision and appears to have been accepted by the Judge.

However, as the Court of Appeal observed in *Steel & Tube*, each case ultimately depends on its particular circumstances.[41]

Parties' Positions

[116] The Commission submits that a starting point of $4.8 million is appropriate in this case. This figure is double the starting point taken in *Steel & Tube*. The Commission contends that it reflects the serious aggravating features identified by the Court of Appeal in *Steel & Tube*, which it says are present in this case and were not present in *Steel & Tube*. In addition, it also reflects the absence of the mitigating ones.[42]

[117] Vodafone takes a different approach: in *Steel & Tube*, the starting point fixed by the Court of Appeal was 26% of the maximum aggregate penalty whereas the Commission's starting point in this case is 44% of the maximum penalty and nearly twice that in *Steel & Tube*. Vodafone submits that the maximum aggregate penalty in this case is $3.6 million (not $10.8 million). Using the same proportion as in *Steel & Tube* (26%) it says this would equate to a starting point of $936,000.

[118] Vodafone analysed the culpability factors in the three cases set out above and says that when regard is had to the duration and nature of the offending in each of those cases, the present offending is significantly less serious.

[119] Vodafone accepts that the fine imposed must "serve its purpose" but the fine must retain proportionality to the offending. Vodafone acknowledges it is a large organisation and can pay a substantial fine. In these circumstances, it does not advocate for a starting point of 26% but says that a global starting point of no more than $1.5 million to $1.8 million is appropriate.

[120] I note that the approach taken by Vodafone to fixing the starting point by reference to the maximum aggregate penalty risks doing what the Court of Appeal

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[41] Above n 8 at [141].
[42] Above n 8 at [139].

warned against namely having a framing effect on the penalty imposed and I do not adopt that approach here.

Fixing the global starting point

[121] Significantly, this offending relates to the provision of an UFB service which is an important one for New Zealanders. It involved the adoption of a brand name and use of advertisements by Vodafone in the context of its major campaign launching its upgraded HFC network which were clearly misleading as were the representations made on the availability checker.

[122] The offending occurred over a 17 month period. While not necessarily a lengthy period when compared to the cases discussed above, it is still significant. The offending was limited to Wellington, Kapiti and Christchurch. However, counter to this, the campaign was directed at 250,000 households in the FibreX coverage areas and involved extensive multi-media advertising.

[123] The Court was not satisfied on the evidence that Vodafone deliberately intended to mislead consumers on the branding and marketing of FibreX but rather, found that its conduct was grossly careless. A significant factor in this case, is the role played by senior management in the branding and marketing of FibreX and what I have found to be Vodafone's cavalier attitude to compliance with the FTA.

[124] In relation to the Availability Charges, the Court found Vodafone to be careless (at a moderate level) and inadvertent in relation to the final three charges. This offending again highlights Vodafone's inadequate compliance with the FTA but is less serious offending than the Branding Charges.

[125] As Vodafone accepts, harm to consumers is implicit in the nature of the offending. Significantly in this case, the offending denied consumers in the FibreX coverage areas the ability to make an informed choice about FibreX (Branding Charges) or to choose the type of broadband most appropriate for their needs (Availability Charges). As discussed above, this choice is an important one as consumers care about the method of delivery of their broadband service and in

addition, there are inherent limitations in the HFC network that are not present in an FTTH network.

[126] Similarly, by the nature of the offending, there was also harm to the market by creating an unlevel playing field for competitors. In addition, such behaviour undermines consumers and business confidence.

[127] I accept that the Local Fibre Companies would have suffered harm by being denied access fees which they would have been earned from an FTTH connection as a consequence of Vodafone's offending. Vodafone also accepts that there is an element of commercial gain in the offending. However, the Court has not found it possible to make any assessment of that gain or corresponding financial loss to any group (consumers, competitors or Local Fibre Companies).

[128] Weighing up all culpability factors and having regard to the applicable sentencing purposes and principles, I adopt a global starting point for all offending of $2,100,000.

AGGRAVATING AND MITIGATING FACTORS PERSONAL TO VODAFONE

Aggravating Factors

[129] Considerable time was spent at the sentencing hearing addressing Vodafone's previous convictions for breaches of the FTA. The Commission contends that Vodafone's prior offending has been of a serious nature and repetitive and warrants a substantial uplift. In this regard, the Commission submits that a 33% uplift is justified to reflect:

(a) Vodafone's significant history of past offending;

(b) The emptiness of its assurances that its systems and processes are adequate to prevent further breaches; and

(c) Its very substantial resources, which demand a very large fine if there is to be a meaningful personal deterrent (the Court addresses this factor separately below).

[130] Vodafone accepts that there may be grounds for an uplift to account for at least some of its previous convictions. However, it submits that these convictions are not as aggravating as the Commission contends and an uplift of between 10% to 15% of the global starting point would be stern and beyond that would be manifestly excessive.

[131] Vodafone's previous convictions and a 2013 out of court settlement are summarised (in reverse chronological order) as follows:

Billing Beyond Termination[43]

[132] In May 2019, Vodafone pleaded guilty and was convicted and fined $350,000 on 14 charges of breaching s 13(g) of the FTA. Vodafone made false or misleading representations with respect to charging customers who had given notice to terminate their contracts. For the billing period during which the termination was to take effect, Vodafone represented on the invoice that it had the right to bill for the entire month. However, in some cases, it included time beyond that notice period.

[133] The Commission accepted that the offending was not intentional and that the breaches had occurred due to errors in Vodafone's legacy billing systems. Senior management was not aware of the errors. Vodafone did not profit from the breaches with amounts being repaid to customers and donations made to charities. This was reflected in a discount allowed on sentence.

[134] Judge E M Thomas was satisfied that an uplift to the starting point was appropriate having regard to Vodafone's previous convictions. His Honour did not accept the Commission's submissions that the increase should be 25% but imposed an uplift of $70,000 (being 15%) on the $450,000 starting point.

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[43] *Commerce Commission v Vodafone* [2019] NZDC 15705.

Red Essentials Plan[44]

[135] In September 2016, Vodafone pleaded guilty and was convicted and fined $165,000 for breaches of s 13(g) of the FTA. Vodafone made false or misleading representations with respect to the price of the Red Essentials Plan by representing the incorrect price payable on its invoices. Judge Treston gave Vodafone credit for an apology given to its customers, and steps taken to refund customers who had been charged incorrectly.

Broadband Lite

[136] In 2013, the Commission and Vodafone reached an out of court settlement over conduct alleged by the Commission to be misleading in relation to Vodafone's promotion of its "Broadband Lite" service. Vodafone refunded its customers and entered into a settlement with the Commission which involved Vodafone instituting an effective compliance programme to ensure that in future, it met the requirements of the FTA.

Broadband Everywhere, Super Prepaid Connection Pack and Largest 3G Network Campaigns[45]

[137] In September 2012, Vodafone pleaded guilty and was convicted and fined $960,000 on 21 charges of breaching s 11 of the FTA in relation to advertising campaigns run from October 2006 to February 2009 for various broadband and mobile phone promotions. The charges covered the campaigns known as "Broadband Everywhere" (involving the marketing of a Vodem Stick with a claim that Broadband was everywhere); Super Prepaid connection pack (offering a $10 free prepaid credit once a customer had registered on Vodafone's website); and "Largest 3G Network" in which Vodafone claimed to have the largest 3G mobile network (in fact its coverage was less than that of Telecom).

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[44] *Commerce Commission v Vodafone* [2016] NZDC 18137.
[45] *Commerce Commission v Vodafone* DC Auckland CRI 2012-004- 012339, 10 September 2012.

[138] Judge David Harvey referred to the earlier sentencing decisions of Judge Joyce QC (in August 2011) and Judge Kiernan (in November 2011) noting that these decisions involved campaigns which were part of the same rollout and it was not a case of corporate recidivism but "part and parcel of an overall problem". No uplift was imposed.[46] A discount of 20% was given covering all mitigating factors.

$1 a Day Mobile Data promotion[47]

[139] In November 2011, Vodafone was found guilty of one charge under s 11 of the FTA in relation to its $1 a day mobile phone internet data charges promotion. Vodafone had represented that it would only charge customers $1 a day for 10 megabytes of casual data usage but failed to advise customers that the $1 threshold would be reached once the customer had used a particular amount of data.

[140] Referring to Judge Joyce QC's decision for the Vodafone Live! campaign, Judge Kiernan noted that, as the $1 a day campaign had followed this campaign, it was agreed that the sentencing should proceed on the basis that all charges had been dealt with together. Judge Kiernan allowed a 9% reduction for cooperation and imposed a fine of $81,900.

Vodafone Live![48]

[141] In July 2011, Vodafone pleaded guilty to 5 charges of breaching s 11 of the FTA in relation to its "Vodafone Live!" mobile phone internet service. Vodafone misled customers that its Vodafone Live! service was "free to browse" and customers would be warned before incurring any charges. Customers were not warned when they strayed from the free pages to pages which incurred fees and consequently believed they were still on free pages.

[142] The Court imposed a penalty of $402,375. Vodafone gave an apology to the public and fully cooperated with the Commission. Judge Joyce QC allowed a 7½% discount for these factors and a further 25% for Vodafone's early guilty pleas.

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[46] Above n 45 at [5] and [6].
[47] *Commerce Commission v Vodafone NZ Limited* [2012] DCR 291.
[48] *Commerce Commission v Vodafone* DC Auckland CRN 09004505626, 12 August 2011.

Fixing uplift for personal aggravating factors

[143] The parties differed as to how the sentencing decisions in 2011 and 2012 should be weighed. While there are three separate decisions, I take into account that the offending, the subject of the decisions, was seen as "part and parcel of an overall problem" and as a result, no uplift was imposed in either of the later decisions. Vodafone emphasised that the five campaigns occurred 14 to 15 years ago. However, significantly, Vodafone was convicted and sentenced for this offending only 4-5 years prior to the rebranding of the HFC network to FibreX. Moreover, two of the campaigns (Broadband Everywhere and Largest 3G Network) involved misleading representations and are therefore directly relevant to the current charges.

[144] Vodafone submits that the Red Essentials, Vodafone Live!, $10 free airtime, Billing Beyond Termination and (to some extent) the $1 a day convictions all involved offending stemming from systems or human error. I accept that some of the offending may have been in this category. However, it is evident from the sentencing decisions that Vodafone did not have the compliance systems and culture in place to prevent those errors from occurring and this elevated its culpability in each case.[49]

[145] As well as the convictions in 2011 and 2012, Vodafone was convicted again for offending under the FTA in 2016 and 2019. It is not in dispute that the Billing Beyond Termination offending occurred during the same period as the present charges and on that basis, those convictions cannot be regarded as aggravating offending. However, in my view, this conduct is still relevant as another example of Vodafone's culture of non-compliance.

[146] Vodafone has a significant number of convictions. It submits that these have been entered over a lengthy period and have involved different types of offending under the FTA and cannot be seen as a consistent course of conduct. I see the situation differently. I am satisfied that when viewed together, the offending reflects a clear

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[49] In the *Vodafone Live!* decision, Judge Joyce QC expressly rejected Vodafone's characterisation of the offending as a "technical oversight" observing that instead it was "extraordinary that a concern like Vodafone fell down in such an elementary way". Moreover, in the *Broadband Everywhere* decision Judge Harvey considered it an aggravating factor that when Vodafone found out about the errors, it failed to address them with the level of seriousness required despite having the expertise and financial resources to do so.

pattern of failure by Vodafone to take all steps necessary to ensure compliance with the FTA. Furthermore, I agree with the Commission's submission that the differences between each set of offending serve to further demonstrate the pervasiveness of Vodafone's cavalier attitude towards consumers.

[147] Vodafone has been reminded on each sentencing of the need for compliance and of the consequences in failing to do so. Large fines have been imposed. Moreover, as part of the 2013 settlement, Vodafone agreed to institute an effective compliance programme. Despite this commitment the offending continued, and it is apparent that by the time of the Billing Beyond Termination and present offending, Vodafone had not modified its behaviour, systems and processes sufficiently to ensure its compliance with the FTA.

[148] Taking these aggravating factors into account, I consider an uplift of 20% on the global starting point is appropriate, taking the total global amount to $2,520,000.

Personal Mitigating Factors

Co-operation

[149] Vodafone submits that it is entitled to credit for co-operation with the Commission during its FibreX investigation (including into the Availability Representations). The Commission says that Vodafone did nothing more than the Commission had the power to compel it to do.

[150] In *Commerce Commission v Reckitt Benekiser (NZ) Ltd*[50] the Commission accepted that RBNZ had cooperated fully with the investigation, Judge Jelas observed:

> [46] ....I accept this is a significant factor. Investigations of this type by their very nature are time-consuming and costly. Corporate cooperation with the Commission's requirements to enforcing the Fair Trading Act should be encouraged.

[151] I respectfully agree. In the present case, Vodafone cooperated with the Commission during the course of its investigation providing information and

[50] Above n 37 at [46].

supporting documents which subsequently became exhibits at trial and were heavily relied on by the Commission in proving the charges laid. In addition, Vodafone voluntarily attended an interview with the Commission.

[152] The Commission says that some of the information provided by Vodafone was wrong or misleading in important respects. This information principally related to the performance of the HFC network and its architecture. Some errors did not become clear until trial and resulted in additional time having to be spent on these matters.[51] This outcome was unfortunate, but it does not alter my view that a small discount for co-operation should be available.

[153] It is acknowledged that Vodafone's cooperation did not occur against the backdrop of guilty pleas on all charges, payment of compensation or the like. However, I consider that a discount of 5% is appropriate to reflect Vodafone's co-operation with the Commission during its investigation.

[154] After applying this discount, the total global amount is $2,394,000.

Availability Charges guilty pleas

[155] The Commission and Vodafone agree that Vodafone is entitled to a 25% discount following early guilty pleas on the Availability Charges.

[156] On this basis, it is necessary to now determine the proportion of the global amount that should be applied to the Availability Charges. The Commission contends that the Branding Charges are more serious and proposes that 33% of the total fine should attract the discount of 25%. While both parties appeared to be ad idem at the sentencing hearing, Vodafone in its written submissions, takes the position that the Availability Charges should be 40% of the "global starting point". If indeed that is Vodafone's position, I do not agree with this approach and consider that the discount

[51] In particular, Vodafone provided a diagram said to depict the end-to-end design of both networks. The diagram produced did not fully detail the FibreX network and considerable time was spent by the experts on this issue.

should be calculated on the amount after taking into account personal aggravating and mitigating factors.[52]

[157] As is evident from the above analysis, I agree that the Branding Charges are more serious. In my view, the appropriate split is 65% for the Branding Charges and 35% for the Availability Charges.

[158] Accordingly, Vodafone is entitled to a 25% discount of $209,475 on $837,900 (balance being $628,425).

[159] After making this deduction, the total global amount is $2,184,525.

VODAFONE'S FINANCIAL RESOURCES

[160] The Commission contends that if a penalty is to have a real deterrent effect, then it must be enough to make an impact on a very large corporate such as Vodafone. While Vodafone's considerable means are not an aggravating feature in themselves, the Court of Appeal in *Steel & Tube* has held that it is appropriate to have regard to a wealthy offender's means to ensure the fine does have the effect of punishing the offender, because a fine should "sting" from the offender's perspective and also serve as a personal deterrent.[53]

[161] Importantly, the fine should retain proportionality to the offending. For that reason, the Court of Appeal was of the view that it is good practice to determine the amount that would be payable but for the offender's means and then adjust that figure down or up as appropriate.[54]

[162] Vodafone delivered an EBITDAF of $447.8 million in the year ended 31 March 2021. Its revenue from fixed broadband alone was $728.1 million in 2021 up by around $20 million from 2020. Vodafone does not dispute its significant financial

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[52] While this approach may not strictly be in accordance with *Moses v R* [2020] NZCA 296, I consider it is a sensible approach in this case. Furthermore, at the end of the day, the ultimate question is whether the sentence is a just one in all the circumstances.

[53] Above n 8 at [103].

[54] Above n 8 at [105].

resources. Furthermore, it accepts that it is able to pay a substantial fine and proposed a considerable lift in its global starting point to reflect this.

[163] I am of the view that in order to have any sting and serve as a personal deterrent to Vodafone, an uplift is required. Applying the Court of Appeal's approach, and mindful that the fine should retain proportionality to the offending, I consider that an upward adjustment to $2,250,000 is appropriate.

RESULT

[164] Applying the 65%/35 % split between the Branding and Availability Charges, Vodafone is convicted and sentenced to pay the following fines:

- $1,462,500 on the Branding Charges, being $162,500 on each of the nine charges; and

- $787,500 on the Availability Charges, being $101,250 on each of the six charges for the charge periods from 1 November 2016 – 19 May 2017 and 20 May 2017 – 31 October 2017); and $60,000 on each of the three charges for the charge period from 1 November 2017 – 28 March 2018.

[165] The total amount of the fines imposed is $2,250,000.

AA Sinclair
District Court Judge