

**IN THE DISTRICT COURT  
AT NORTH SHORE**

**CRI-2016-004-007350  
[2017] NZDC 16384**

**COMMERCE COMMISSION**  
Prosecutor

v

**SALES CONCEPTS LIMITED**  
Defendant

Hearing: 14 March 2017

Appearances: A M McClintock and G A Barkle for the Prosecutor  
J Edwards for the Defendant

Judgment: 14 March 2017

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**NOTES OF JUDGE P J SINCLAIR ON SENTENCING**

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[1] Sales Concepts Limited has pleaded guilty and is for sentence in respect of 10 charges laid under the Fair Trading Act 1986.

[2] The charges relate to door-to-door sales made throughout the North Island between October and December 2015. The sales were part of a “Christmas Deals Promotion” of electronic goods. Sales Concepts advertised and sold the Christmas deal bundles of between three and seven items for between \$599 and \$1599. Sales Concepts sold the bundles to customers on the promise that goods would be delivered by Christmas 2015. In fact, consumers were to receive only one of the goods in the bundle prior to Christmas 2015. The remainder of the goods were to be delivered on full payment. For the majority of contracts, full payment and delivery would have occurred 14 to 15 months later in January or February 2017, not one or two months as represented.

[3] Specifically the charges involve the following conduct:

- (a) Charge 1 – false or misleading representations as to a benefit of services, s 13(e).
- (b) Charge 2 – false or misleading representations as to the country of origin of the goods, s 13(j).
- (c) Charges 3 and 4 – false or misleading representations as to the total price of goods, s 13(g).
- (d) Charge 5 – false or misleading representations as to cancellation rights, s 13(i).
- (e) Charges 6 and 7 – false or misleading representations as to consumer rights under the Consumer Guarantees Act 1993, s 13(i).
- (f) Charges 8, 9 and 10 – failure to comply with the disclosure requirements for uninvited direct sales agreements, s 36(l).

[4] Except for charge 5, all of the charges are representative. The first seven charges carry a maximum penalty of \$600,000 per charge. The remaining three charges carry a maximum penalty of \$30,000 per charge.

[5] Sales Concepts was established in 2013 by two business partners, Kchitij Tiwari and Ajit Srivastava. It operates a number of businesses including a mobile trader business. Mobile traders are businesses that do not have fixed retail premises. Some mobile traders operate mobile shops while others, such as Sales Concepts, employ sales staff who sell goods door-to-door using catalogues and brochures. Mobile traders use a variety of sales techniques, including uninvited direct sales through door-to-door or telemarketing sales, mobile truck shops in prominent locations and using websites and Facebook. Sales Concepts mobile trader business consists of selling self-branded portable electronic products such as phones, laptops and tablets directly to consumers, door-to-door and also online.

[6] Sales Concepts is based in Auckland and sells primarily in the Auckland area. At the time of the offending, Sales Concepts employed between about eight to 12 sales staff at any one time who operated out of cars and sold door-to-door using various catalogues produced by the company. However, staff frequently went on three to four-day road trips throughout the North Island.

[7] In early 2015, two Commission investigators were in the Hawke's Bay in relation to another unrelated door-to-door business. While they were there, they were advised by staff from Hawke's Bay Community Law Centre that it had received complaints about Sales Concepts conduct. On 3 November 2015, the two Commission investigators coincidentally drove past and then returned to covertly observe a salesperson trying to make a sale to a young woman pushing a pushchair with a young child on a residential street in Napier. He was unsuccessful, but shifted his attention to the two Commission investigators who were sitting in their car. The salesperson made a pitch to the investigators during which he made a number of representations that raised concerns.

[8] The investigators met with a salesperson the next day and one of them entered into an agreement to purchase a mega deal bundle of products for the purpose of the investigation. The representations made by the salesman at the second meeting raised further concerns. As a result, the Commission widened its investigation and sought information directly from Sales Concepts. The Commission interviewed 33 customers, 25 of whom had entered uninvited direct sales agreements with Sales Concepts to purchase Christmas deals during 2015. It also interviewed 15 former or current Sales Concepts employees and the directors. A total of 731 people entered into uninvited direct sales agreements to purchase the bundles.

[9] The Commerce Commission submits that the appropriate starting point for charges 1 to 7, that is, the misrepresentation charges, should be between \$240,000 and \$280,000. The Commerce Commission submits the appropriate starting point for the three charges for Sales Concepts failure to comply with disclosure requirements for the uninvited direct sales agreements should be in the range of \$30,000 to \$40,000 producing a global starting point of between \$270,000 and

\$320,000. The Commission submits that taking into account mitigatory factors, an end fine in the range of approximately \$160,000 to \$190,000 would be justified adding that a fine towards the upper end of that range – at around \$180,000 – would appropriately reflect both the culpability and mitigating factors of the case, and satisfy the purposes and principles of the Sentencing Act 2002.

[10] Sales Concepts submits that the final penalty should be in the region of \$66,000 to \$82,500 reached by setting a global starting point of between \$120,000 to \$150,000 and allowing a discount of 45 percent for mitigating factors. Sales Concepts accepts there were errors in its template sales agreement, its online terms and conditions and its requirements that cancellation needs to be in writing. However, it submits that the template was intended to be legally compliant and had been reviewed by an external law firm. Furthermore, the website was intended to provide additional information for customers and Sales Concepts did not seek to rely on any online terms which were contrary to the Consumer Guarantees Act so there was no intention to mislead customers. Sales Concepts submits that this is not a case where the directors or management were aware of, or complicit with, its staff misleading consumers. It never intended to mislead or deceive customers. Sales Concepts submits it is a small relatively new company which was careless and should have had more checks and balances in place to reduce the risk of employees misleading consumers.

[11] Therefore, Sales Concepts submits that the starting point proposed by the Commission is too high as the Commission has mischaracterised the degree of culpability of Sales Concepts management and its directors. Sales Concepts submits there is limited applicability of the authorities referred to by the Commission and the Commission has not had full regard to the principles of totality.

[12] With regard to the disclosure breaches, Sales Concepts submits a starting point of between \$20,000 and \$30,000 would be appropriate – less than proposed by the Commission – given the relatively small number of agreements, the low dissemination and the short offending period.

[13] Finally, Sales Concepts submits that it should not be subject to a specific deterrence because it did not make any profit from the promotion. In fact, it has suffered loss because as a result of the remedial steps it has taken, some of the consumers have received delivery of the goods without making full payment, its revenue has dropped as a result of adverse publicity and it has terminated its door-to-door sales.

[14] There are a number of principles applicable to sentencing in cases involving the Fair Trading Act. These were enunciated in *Commerce Commission v L D Nathan & Co Limited*<sup>1</sup> and expanded upon in *Commerce Commission v Ticketek New Zealand Limited*<sup>2</sup>.

[15] I refer to the relevant factors relating to this case to set a starting point.

[16] First, the objectives of the Fair Trading Act. The Act is designed to protect consumers and also to promote fair competition. Consumer protection, however, is paramount. This objective is reflected and endorsed by the significant maximum penalties which were increased by Parliament in 2003. Mobile traders sell predominantly or exclusively on credit lay-by or other deferred terms and often to those who sit in the lower socioeconomic echelon, have low incomes and poor credit histories. The price of the goods is often significantly higher than would be charged for comparable goods by mainstream retail traders.

[17] In recent years, the business practice of mobile traders has become more prominent in the complaints the Commerce Commission has received from consumers and their advocates. In 2014, the Commission opened an investigation into the mobile trading industry. The Commission identified 32 mobile traders during the project predominantly in the North Island particularly Auckland. The Commission investigated Sales Concepts as part of this project. A compliance advice was sent to Sales Concepts on 28 November 2014 providing it with advice in relation to lay-by sales and uninvited direct sales agreements.

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<sup>1</sup> *Commerce Commission v L D Nathan & Co Limited* [1992] 2 NZLR 160

<sup>2</sup> *Commerce Commission v Ticketek New Zealand Limited* [2003] DC Christchurch CRN-2009031178

[18] In August 2015, the Commission published its report setting out its findings from the investigation. The report identified systemic non-compliance with regard to traders' obligations under the Fair Trading Act and Consumer Guarantees Act, in particular, the requirement to provide adequate disclosure to consumers prior to entering into various different types of contracts with deferred payment. There was significant media publicity over the report and findings. The Commission also made mobile traders aware of the report. So the offending took place against this background and the objectives of the Act.

[19] I turn to the second factor, the need to impose deterrent penalties. I need to bear in mind the purposes and principles of sentencing when setting a starting point and in reaching an end sentence for this offending. Accountability for the harm done to victims and the wider community, denunciation and deterrence are the most important purposes for this offending. There is a common theme in many sentencing authorities for this offending that a clear message should be sent to businesses that the Fair Trading Act must have teeth. Businesses that have misleading promotional documentation and poor compliance processes and training, which potentially or actually result in customers being [mis]led, should not be permitted to gain an advantage over businesses which comply with the Fair Trading Act. This was commented on by Tipping J:

The benefits of conduct that breach the Fair Trading Act can be significant and for penalties to have the appropriate deterrent and denunciation effect, they must exceed all obtained potential gains. In addition, failure to comply with disclosure requirements must be met with appropriate deterrence because uninvited direct sales agreements are common in the mobile trader industry.

[20] I must also take into account the particular gravity of Sales Concepts' offending, including the degree of culpability and the seriousness of this offending, in comparison with other types of offending and the general desirability of consistency of sentencing to reach the appropriate sentence. Ultimately, I must impose the least restrictive outcome in all of the circumstances.

[21] The next factor I turn to is: What was the importance of any untrue statements made? While Sales Concepts accepts there was no justification for the misrepresentations made, the directors submit they were not fully aware of the

misleading statements until they were told by the Commission. Furthermore, Sales Concepts submits the representations were not made by all members of staff and those who did, made them against company policies and training. Since then, Sales Concepts has terminated these employers' contracts.

[22] In my view, the untrue statements were significant. Sales Concepts staff misrepresented to the customers that all of the items in their chosen Christmas deal bundles would be delivered by Christmas if they were up-to-date with their payments in accordance with their uninvited direct sales agreements. However, Sales Concepts only ever intended to deliver one item prior to Christmas when the consumers met their payment obligations. I consider this was the most egregious misrepresentation. I concur with the Commission that the catalogue was most likely to be understood by consumers as offering a deal to purchase goods on part payment that they would receive in time for the impending Christmas. In its most favourable light, the catalogue was ambiguous and uncertain as to what the actual position was. That ambiguity and uncertainty was exploited by some of the Sales Concepts staff who orally misrepresented the goods would be provided before Christmas. I consider the intention of customers to use the Christmas deal bundle items as Christmas presents would have been clear and obvious. It is unlikely that customers would have entered into an agreement for a Christmas deal bundle on the basis that they would not receive the majority of items until after the coming Christmas or even after the following Christmas.

[23] Some customers were told that the goods in the Christmas deal bundles were made in New Zealand when, in fact, they were made in China. The price of the Christmas deal bundles was misrepresented in two ways. First, Sales Concepts failed to disclose to some of its customers that the price of each Christmas deal bundle excluded a delivery fee that was payable. Secondly, it misled some of the customers as to the total amount payable under the uninvited direct sales agreements. Those agreements recorded a total price payable that was less than the correct total amount when the number and amount of weekly payments required was calculated.

[24] On one occasion, a customer was misrepresented about his right to orally cancel his agreement. Sales Concepts misrepresented to its customers their rights in relation to repairing or replacing goods which was contrary to the Consumer Guarantees Act and undermined the statutory rights consumers have under the Consumer Guarantees Act, matters the consumers would have been unlikely to know or question. Those statements made by Sales Concepts would have attracted potential customers and were important to secure sales. The misrepresentations mislead customers and would have been part of the customers' decisions to enter into the uninvited direct sales agreements. They could well have provided consumers with the assurance that what they were signing up for was a good deal under which they would have been receiving reliable goods in time for Christmas.

[25] Finally, Sales Concepts uninvited direct sales agreements breached disclosure requirements under the Fair Trading Act in that first, the agreements included terms that were illegibly handwritten, not expressed in plain language and not presented clearly. Secondly, some of the agreements were undated and, thirdly, some of the customers had not been orally notified of their right to cancel their agreement within five working days of receiving a copy of their agreement and how to do so. Sales Concepts had been alerted to those mandatory disclosure requirements less than 12 months prior to the offending.

[26] Sales Concepts were engaging with the more vulnerable members of our community who are less likely to be cognisant of their rights. In my view, the misrepresentations and breaches of disclosure requirements were integral to the agreements and would have significantly influenced the customers to enter into them.

[27] So I turn to the next factor: What was the degree of culpability, wilfulness or carelessness involved in the statements? Sales Concepts submits it was careless in the vetting of its employees and it did not have a sufficient and robust compliance programme in place. It submits this was the first time it had run a promotion of this type and it had never received complaints in respect of other campaigns.



[28] An important consideration is to determine whether the conduct was deliberate. In my view, Sales Concepts was at least highly careless and possibly reckless in its promotion and management of the Christmas deal bundles offer. While Sales Concepts may not have received any direct complaints, that is probably because the Commission intervened prior to the main [mis]representation coming to light – the fact that the consumers were not going to get more than one product before Christmas 2015.

[29] I cannot accept the submission that the directors were not aware of the misrepresentations. The risk of misleading representations could not have escaped company management. The company is not a large scale national or multinational. In my view, Sales Concepts directors cannot abdicate responsibility and hide behind the actions of a few purported aberrant employees. The representations were not isolated. The delivery misrepresentations and actual price misrepresentations were widespread and made by a number of salespeople and to a number of Sales Concepts customers and therefore cannot be explained away by rogue staff. Seven different sales staff at Sales Concepts were responsible for the misrepresentations which extended to different aspects of the promotion. Therefore, at least half, if not over half, of Sales Concepts staff were making misrepresentations in the course of the promotion. The promotional and contractual documentation was ambiguous and that led to a clear potential for that ambiguity to be exploited by secure sales. The contracts themselves left the timing of delivery open for determination by sales staff. This is endorsed by the customers who were told things such as, “You will get goods by Christmas,” while there was a deliberate omission as to the number of goods they were referring to.

[30] The team leaders responsible for those staff were aware the representations were being made or, in my view, were wilfully aware they were being made. At least six sales staff spoke of pressure they were under to make sales and being told by their team leaders to say “anything” in order to get a sale. Several said their team leaders knew they were lying during their conversations with customers. Several said deceptive tactics were part of their training. Other staff were told not to lie but, at the same time, “very strong words” were used by their team leaders to

achieve sales. At least some of the team leaders were aware that pressure was being applied to make sales in circumstances where consumers could ultimately be misled.

[31] I place little weight on Sales Concepts submission that its sales template had been reviewed by a law firm. It was the company's responsibility to ensure that it complied with the Fair Trading Act. If it was given poor advice, it will have its own recourse. In any event, the agreements themselves were not the only source of concern. The misleading documents were then completed by sales people, given a high degree of latitude and freedom to make representations to implement sales.

[32] Furthermore, Sales Concepts submission that its consumers were able to cancel the contracts in writing without incurring any cost is not relevant. It was in breach of the Consumers Guarantees Act. Similarly, [it is not relevant] that Sales Concepts did not make any sales via its website.

[33] So, although I have not overlooked that not all staff were using these tactics, I have gained the impression that a culture of obtaining sales with little regard to any adverse impact on the customers was facilitated and encouraged amongst the staff. It is clear the staff were under pressure to meet sales targets and the conduct was enabled by a lack of compliance procedures to prevent such conduct.

[34] I turn to the next factor: What was the extent to which the statements departed from the truth? Sales Concepts breaches were a significant departure from the standards of truthful and honest dealing prescribed by the Fair Trading Act. Sales Concepts had no intention to deliver all items regardless of whether or not the customers were up-to-date with their payments. None of the goods were made in New Zealand. The price was incorrect because it did not account for the delivery fee. It was not necessary for a cancellation request to be made in writing. The contract could be cancelled orally. The rights available to consumers under the Consumers Guarantees Act were significantly broader than Sales Concepts represented in its online terms and conditions. So, in my view, there were systemic issues and problems throughout this promotion.

[35] As I have already mentioned, the target consumer for this type of sale is often more vulnerable. I concur with the submission made by the Commission that misleading documentation combined with inadequate compliance procedures in training and a tolerance for taking advantage of consumers' potential misunderstandings contributed to those misrepresentations being made.

[36] The next factor: What was the degree of dissemination? The Christmas deal bundles promotion was run throughout the North Island over a three month period between October and December. A total of 731 uninvited direct sales agreements were entered into to purchase the Christmas deal bundles. It cannot be determined and it is not entirely clear how widespread the misrepresentations were. However, the delivery misrepresentations were made to most of the debtors spoken to.

[37] The representations relating to the rights available to consumers under the Consumer Guarantees Act was not widely disseminated as they were part of the Sales Concepts website. Each of the persons interviewed, who had entered into an agreement, had agreements which included terms that were illegibly handwritten, not expressed in plain language and not presented clearly, and were not dated. Given the number of staff known to have made representations is high, an inference can be drawn that the conduct within the company and throughout the promotion was widespread. However, as I have already mentioned, not all Sales Concepts employees made the misleading statements. Furthermore, the promotion itself was not lengthy, was not particularly widespread across the community and country and did not involve a vast number of people, particularly in comparison to other decisions referred to by the Commission, such as *R v Love Springs Ltd*<sup>3</sup> and *Commerce Commission v Youi Insurance Group Ltd*<sup>4</sup>. Furthermore, the promotion was not made through television, radio and print advertising and social media.

[38] The final factor: What was the resulting in prejudice? Sales Concepts submits there was no financial harm or financial loss to consumers once remedial steps had been taken by it. In fact, it says some customers were in a better position than what they had already contracted. It submits because of its accurate record

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<sup>3</sup> *R v Love Springs Ltd* DC Auckland CRI-2012-004-011695, 11 December 2013

<sup>4</sup> *Commerce Commission v Youi Insurance Group Ltd* [2016] NZDC 25857

keeping and small number of effected customers, it was able to respond to the Commission's investigation promptly.

[39] There was the potential for prejudice. However, it is accepted Sales Concepts consumers did not actually suffer any financial loss and the breaches were, in effect, rectified prior to Christmas 2015. In fact, it appears some consumers were placed in a better financial position after Sales Concepts undertook its remedial steps. However, I have not overlooked that it was not until the Commission intervened that the breaches were curtailed.

[40] There is no tariff decision for this type of offending. In *Commerce Commission v Tiny Terms Limited*,<sup>5</sup> His Honour Judge Collins noted there are limits to which the previous cases can go in providing assistance in sentencing. Each case needs to be determined on its own particular facts. In other words, I need to determine the appropriate starting point taking into account the specific aggravating features and the degree of these aggravating features that apply in this case.

[41] However, I have reviewed the following decisions provided by the Commission including: *Commerce Commission v Sutherland*,<sup>6</sup> *R v Love Springs Ltd*, *Commerce Commission v Smart Shop Limited*,<sup>7</sup> *Commerce Commission v Ace Marketing Ltd*,<sup>8</sup> *Commerce Commission v Flexi Buy Ltd*<sup>9</sup> and decisions provided by the defence, namely, *Commerce Commission v Frozen Yoghurt Ltd (in liq.)*<sup>10</sup> *Commerce Commission v Twenty Fifty Club Ltd*<sup>11</sup> and *Commerce Commission v Zodiac Motor Company Ltd*.<sup>12</sup>

[42] These decisions and both counsels' analysis of them have assisted me in setting an appropriate starting point for the misrepresentation charges. *Commerce Commission v Sutherland* is helpful because it involved promises about aspects of a delivery known to be incorrect. However, I have not overlooked that that case was

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<sup>5</sup> *Commerce Commission v Tiny Terms Limited* DC Auckland CRI-2012-004-011709, 24 January 2014

<sup>6</sup> *Commerce Commission v Sutherland* DC Christchurch CRI-2013-009-10152, 6 December 2013

<sup>7</sup> *R v Smart Shop Ltd* [2016] NZDC 19377

<sup>8</sup> *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165

<sup>9</sup> *Commerce Commission v Flexi Buy Ltd* [2016] NZDC 3028

<sup>10</sup> *Commerce Commission v Frozen Yoghurt Ltd (in liq.)* [2016] NZDC 19792, (2016) 14 TCLR 420

<sup>11</sup> *Commerce Commission v Twenty Fifty Club Ltd* [2016] NZDC 7242

<sup>12</sup> *Commerce Commission v Zodiac Motor Company Ltd* [2016] NZDC 25266

decided prior to the increase in penalties. Some of these decisions, such as *R v Love Springs Ltd*, *Commerce Commission v Youi Insurance Group Ltd*, *R v Smart Shop Ltd*<sup>13</sup> and *Commerce Commission v Ace Marketing Ltd* involve mobile traders and, to that extent, provide some assistance and comparison, given the particular aspects of offending.

[43] The nature of offending in *Commerce Commission v Smart Shop Limited* and *Commerce Commission v Ace Marketing Ltd* was less serious than Sales Concepts. However, *R v Love Springs Ltd*, *Commerce Commission v Smart Shop Limited* and *Commerce Commission v Ace Marketing Ltd* involved more widespread misrepresentations and the offending spanned a longer time period than the offending committed by Sales Concepts. However, again, I have not overlooked that *R v Love Springs Ltd* was also decided under the former penalty regime. Similarly, in *Commerce Commission v Frozen Yoghurt (in liq)*, although it involved misrepresentations about its product and, to that extent, was similar offending, the offending was more persistent and widespread. *Commerce Commission v Twenty Fifty Club Ltd* involved conduct by a creditor who was sentenced under the former maximum penalties and the offending in *Commerce Commission v Zodiac* was of a different type and was limited in its dissemination.

[44] There is no authority addressing appropriate penalties for uninvited direct sales agreement disclosure breaches. However, I can glean some assistance from prosecutions for similar conduct under the Fair Trading Act in decisions such as *Commerce Commission v Flexi Buy Ltd* and *Commerce Commission v Smart Shop*.

[45] Having regard to all of the factors I have discussed, the decisions I have reviewed and the purposes and principles of sentencing, I now set a starting point for the charges.

[46] In summary, the untrue statements were important and I have no doubt effected and influenced customers to enter into the agreements with Sales Concepts, the actions of Sales Concepts was grossly careless, if not reckless, and the statements departed significantly from the truth. Dissemination was not widespread to the

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extent seen in cases such as *Commerce Commission v Smart Shop* and *Commerce Commission v Love Spring Limited* and the customers ultimately were not prejudiced.

[47] I consider the starting point proposed by the Commission is higher than warranted. However, the starting point proposed by Sales Concepts is lower than appropriate. I set a starting point for charges 1 to 7 at \$215,000.

[48] Given the disclosure charges involved different considerations and offending, I consider an uplift for charges 8, 9 and 10 of \$25,000 is appropriate. I reach a total figure of \$240,000. In my view, it is an appropriate combined starting point.

[49] I turn to the mitigating factors relating to Sales Concepts. The Commission acknowledges Sales Concepts is entitled to a discount of 20 percent to reflect its co-operation with the Commission's investigation and the remedial steps it took. The Commission also acknowledges Sales Concepts is entitled to a discount of 20 percent to reflect its guilty pleas to the charges.

[50] Sales Concepts concurs with the 20 percent discount for co-operation and remedial steps taken, but submits it is entitled to the full discount of 25 percent for its guilty pleas. Sales Concepts submits several other mitigating factors need to be taken into account including the size and financial position of Sales Concepts and that its directors have no previous convictions. It urges the Court to allow the fine to be paid in instalments so that the company can remain in business.

[51] Sales Concepts submits it has suffered significant damage to its brand and business as a result of adverse publicity. That is not a matter I can take into account, certainly not in terms of providing a discount. Adverse publicity has occurred as a result of Sales Concepts breaching the Fair Trading Act and adverse publicity is part of the inevitable deterrence process.

[52] However, I agree with both the Commission and Sales Concepts there are a number of other mitigating factors warranting a discount.

[53] First, it is common ground between the Commission and the defence that Sales Concepts co-operated fully with the Commission as soon as it was advised of the investigation and the breaches. Sales Concepts provided the Commission with documentation when requested including the names and contact details of sales staff. Sales Concepts staff made available its office manager to the Commission for interview and Sales Concepts directors each attended a voluntary interview.

[54] Secondly, Sales Concepts has no previous convictions. However, I have not overlooked the company was incorporated relatively recently on 24 January 2013.

[55] Thirdly, Sales Concepts undertook a number of remedial steps and offered customers the option of cancelling their agreement and receiving a full refund or confirming their agreements. Sales Concepts calculated the estimated refunds to customers and set aside \$25,000 in a separate bank account. The two directors and office administrator contacted all 731 effected customers and executed the customer's choice of action by 31 December 2015. The refunds to customers totalled \$28,646. Sales Concepts delivered all items to the 195 Christmas deal bundles customers in advance of Christmas, who elected to affirm their agreements. Sales Concepts submits that this response would have occurred regardless of whether the Commission had taken action once it had learned of the misrepresentations. It is not possible to ascertain whether this would have been the case or not. However, the remedial steps undertaken are not in dispute and have resulted in the customers being fully recompensed.

[56] Sales Concepts have also provided an affidavit outlining the loss of revenue it has suffered as a result of terminating the promotion. A figure of about \$278,000 has been provided by Sales Concepts. As submitted by the Commission, this issue can be interpreted in two ways – one interpretation favourable to Sales Concepts, the other not so favourable. The promotion was terminated because of non-compliance. In my view, anticipated lost revenue is not a factor that should be taken into account as a mitigatory factor.

[57] Finally, Sales Concepts also took a number of steps to reduce the risk of consumer harm and improve compliance in the future. It ceased the promotion as

mentioned and no further promotional materials were disseminated by the sales representatives after 25 November. It ceased its door-to-door sales activities and the directors conducted an immediate internal investigation identifying two employees who had made misleading statements. As a result, their employment was terminated. Sales Concepts reviewed and improved its compliance programme. In addition, Sales Concepts also began providing additional training to staff in relation to their obligations under the Fair Trading Act and prepared a legal compliance programme. While this action simply puts Sales Concepts in a position of compliance, it is entitled to a discount for the other mitigatory factors I have mentioned. I consider a 20 percent discount is warranted.

[58] Finally, Sales Concepts entered guilty pleas to the charges. As prescribed by the Supreme Court in *Hessell v R*,<sup>14</sup> the credit that is given for a guilty plea must reflect all the circumstances in which the plea is entered. While I accept the Commission's case against Sales Concepts was strong, I conclude Sales Concepts is entitled to almost a full discount of 25 percent given it acknowledged responsibility for the offending promptly. The charges were laid in early September and Sales Concepts entered guilty pleas by the end of September. This obviated the need for the Commission to prepare what was likely to be a fairly lengthy trial. A discount of just under 25 percent is allowed.

[59] So on these calculations, I reach an end sentence of a fine of \$145,000.

- On charges 8, 9 and 10, \$5000 is imposed across each of these charges.
- On charges 1 to 7, \$18,570 is imposed on each of these charges.

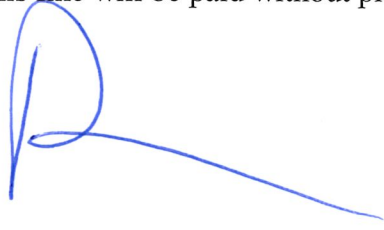
[60] Sales Concepts submits it is not in a position to meet a large penalty in one payment. It submits there is an appreciable risk it will be unable to continue as a going concern which will have significant effect on remaining staff and customers. For that reason, it is seeking that the fine be paid by way of instalments. This is not opposed by the Commission. In my view, it is appropriate having reviewed

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<sup>14</sup> *Hessell v R* [2011] 1 NZLR 607



Sales Concepts financial statements. A payment by way of instalments will ensure this fine will be paid without placing the company in financial difficulties.



P J Sinclair  
District Court Judge