IN THE DISTRICT COURT
AT NORTH SHORE

I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA

CRI-2023-044-001761
[2024] NZDC 10425

COMMERCE COMMISSION
Prosecutor

v

CRACKERJACK LIMITED
Defendant

Hearing: 31 January 2024

Appearances: J Barry for the Prosecutor
E McGill for the Defendant

Judgment: 13 May 2024

RESERVED JUDGMENT OF JUDGE A M FITZGIBBON

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[1] The defendant Crackerjack Limited ("Crackerjack") appears for sentencing, having pleaded guilty to 18 charges under the Fair Trading Act 1986 ("FTA"):

(a) sixteen charges relate to individual children's garments it supplied that did not comply with the applicable product safety standard relating to the labelling of fire hazards (the "Product Safety Offending"); and

(b) two charges relate to individual garments it supplied which did not comply with the consumer information standard regarding fibre content labelling (the "Consumer Information Offending").

[2] Each of the charges relating to product safety carry a maximum fine of $600,000[1]. Each of the charges relating to consumer information carry a maximum fine of $30,000.[2]

The defendant – Crackerjack Limited

[3] Crackerjack is a discount retail chain with 14 stores throughout the North Island. It supplies a range of goods including kitchenware, garden supplies, giftware, seasonal goods such as Christmas toys and clothing. It has been trading since 2015 and has not previously been prosecuted for breaching the FTA. Greg, Joanne and Peter Inger are directors of Crackerjack.

[4] An affidavit by Greg Inger has been provided to address Crackerjack's financial position. In 2021, Crackerjack's total revenue was [redacted]. In 2022, Crackerjack's total revenue was [redacted].

Agreed summary of facts (SOF)

[5] A summary of facts has been agreed between the parties and this is attached as Appendix A. The key facts follow.

Legislation

Product Safety Standard

[6] The relevant Product Safety Standard is the Australian/New Zealand Standard AS/NZ 1249:2014 'Children's nightwear and limited daywear having reduced fire hazard', which is adopted under the Product Safety Standards (Children's Nightwear & Limited Daywear Having Reduced Fire Hazard) Regulations 2016, ("Product Safety Standard"). The purpose of this Product Safety Standard is to prevent or reduce the risk of burn injures to children in New Zealand.

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[1] Fair Trading Act 1986, ss 30(1) and 40(1).
[2] Fair Trading Act 1986, ss 28(1) and 40(1B).

[7] Under the Product Safety Standard, garments are categorised by the risk associated with their design and the flammability of the fabric. Categories one, two, and three have a reduced fire risk. Category four garments have a higher fire risk. To comply with the Product Safety Standard, a garment must fall into one of the four categories, and each of the four categories are required to have specified fire danger labels with prescribed wording, image and colours affixed to them. Garments that are outside of the scope of the four categories are considered to have a very high flammability rating and are prohibited from sale altogether. Garments will breach the Product Safety Standard if they do not have a fire hazard label in the correct format affixed to the garment, or if there is no label at all.

[8] Under s 30(1) of the FTA, if a mandatory Product Safety Standard applies, a person must not supply, or offer to supply, or advertise those goods unless the Product Safety Standard is complied with.

Consumer Information Standard

[9] The relevant Consumer Information Standard ("Consumer Information Standard") is the Australian/New Zealand Standard AS/NZS 2622:1996 'Textile Products – Fibre Content Labelling', which is adopted under the Consumer Information Standards (Fibre Content Labelling) Regulations 2000.

[10] The Fibre Content Labelling Information Standard, ("Fibre Content Labelling Standard") applies to goods made from natural or synthetic textiles. Products subject to the Fibre Content Labelling Standard are required to have permanent labels affixed to them which provide accurate information relating to the fibre content of the product. This helps consumers make informed choices about the goods they are purchasing and to ensure that consumers can correctly use and care for the goods.

[11] The Fibre Content Labelling Standard is issued pursuant to s 27 of the FTA. Pursuant to s 28(1) of the FTA, if a Consumer Information Standard applies, a person must not supply, or offer to supply, or advertise those goods unless the Consumer Information Standard is complied with.

Commerce Commissioner's investigation

[12] On 30 May 2022, Commerce Commission (the Commission) staff purchased 20 garments from Crackerjack's Napier store during a round of routine inspections. Sixteen of the garments purchased were subject to the Product Safety Standard. All garments purchased were subject to the Fibre Content Labelling Standard. The garments were sent to the New Zealand Wool Testing Authority ("NZWTA") for assessment.

[13] In summary, the results of the testing showed the following Product Safety Standard breaches for all sixteen of the items:

(a) Five garments were labelled "flame resistant";

(b) Four garments were labelled "not flame resistant";

(c) One was labelled "this garment is not flame resistant"; and

(d) The remaining six garments had no labelling at all.

[14] Consumer Information Standard breaches included two of the 20 garments failing to comply with the Fibre Content Labelling Standard, as they used the word "Spandex" instead of the permitted word "Elastane".

[15] Summaries of the product safety standard breaches and failures to comply with the Fibre Content Labelling standard are attached as appendices to the SOF in Appendix A.

Product recall

[16] Between 10 and 12 April 2022, Crackerjack imported 2,880 units of children's sleepwear. 266 sleepwear units were sold. Crackerjack advises that they import mixed containers of different clothing products from wholesalers purchasing stock from major US retailers. The clothing is mixed throughout these containers, and garments are often "one of a kind". The products are sorted in the US and placed into generic

group barcodes for sale in New Zealand. Crackerjack advises that it cannot therefore track specific garments because of the way stock is purchased and sorted. Because of this, Crackerjack records provided to the Commission do not show how many of the 2,880 units were in the same product lines as the garments that are the subject of these charges, or how many non-compliant units were offered for supply.

[17] It is agreed that after being contacted by the Commission on 30 May 2022, Crackerjack took appropriate steps to withdraw all children's sleepwear from supply and undertook a recall for all children's sleepwear sold from March to June 2022. As of 18 April 2023, 26 items of children's nightwear were returned to Crackerjack. Based on Crackerjack's records of the recall, Crackerjack was not able to identify whether any of the garment types subject to the charges were part of the 26 items of returned children's nightwear.

Crackerjack's statement

[18] The Commission interviewed one of Crackerjack's directors, Greg Inger, on 12 April 2023. Mr Inger told the Commission that:

(a) Crackerjack had no knowledge of either the Product Safety Standard or the Fibre Content Labelling Standard, and had no copies of either document;

(b) The garments were not assessed for compliance against either standard, and no checks were made with the overseas suppliers to ensure compliance;

(c) Mr Inger stated that he has the responsibility of ensuring compliance of goods supplied by its stores and he generally relies upon local and Australian based suppliers for legally compliant goods. He stated that these suppliers, generally supply well established retailers such as The Warehouse and K Mart, and he believed they should have a good understanding of the legal requirements of goods being supplied to New Zealand;

(d) This was the first time Crackerjack had sourced children's sleepwear to supply in its stores, and Crackerjack had sourced the garments directly from 'Midtenn' and arranged for 'Uncle Bills' to ship them to New Zealand on its behalf;

(e) As a result of the Commission's investigation Crackerjack has undertaken a review of their entire clothing stock to assess compliance and it has instigated compliance checks to be carried out; and

(f) Mr Inger stated that Crackerjack now has copies of the Product Safety Standard and all the applicable Consumer Information standards for clothing.

[19] Crackerjack has not previously been prosecuted for breaching the FTA.

Submissions

[20] Submissions were filed by the Commission on 19 September 2023 with supplementary submissions on 24 January 2024. Crackerjack's submissions were filed on 26 September 2023 with supplementary submissions on 26 January 2024. The supplementary submissions were filed by both parties following the release on 29 November 2023 by the High Court of its decision *Commerce Commission v NZME Advisory Limited.*[3]

[21] Counsel for both parties also gave oral submissions at the hearing on 31 January 2024.

Commission submissions – summary

[22] As a result of *NZME*, the Commission reconsidered its original position in relation to Crackerjack's sentencing. The Commission submitted in its supplementary submissions that a significant adjustment to its original starting point was warranted.

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[3] *Commerce Commission v NZME Advisory Ltd* [2023] NZHC 3425.

[23] Accordingly, the Commission submits that the appropriate starting point is:

(a) $200,000 - $240,000 for the Product Safety Offending; and

(b) $5,000 - $10,000 for the Consumer Information Offending.

[24] The Commission submits that a discount of 10 per cent is appropriate for Crackerjack's cooperation and lack of previous convictions, and that Crackerjack is entitled to a 35 per cent guilty plea discount. The global discount for mitigating factors is therefore per cent. The Commission submits an uplift of 25 per cent of the starting point is appropriate, to ensure that the fine "stings", given Crackerjack's size and financial resources.

[25] This would result in an end fine in the range of $184,500 to $225,000.

[26] Although this is a steep fine when compared with other similar cases, the Commission submits that this approach is supported by the recent High Court decision in *NZME.* In that case, the Commission submits, Andrew J considered that the District Court has been constrained by its own decisions in determining appropriate sentences under the FTA. The Commission submits that the High Court has sent a message that sentencing levels are too low. The Commission submits that the *NZME* serves as a "circuit breaker" providing the District Court the freedom, or indeed a directive, to increase the fines imposed for this type of offending.

[27] The Commission submits in terms of setting an appropriate starting point, $200,000 - $240,000 represents between 30 and 40 per cent of the maximum penalty available for a single charge. In *NZME,* Andrew J commented that a starting point of "at least" 50 per cent was required for cases involving actual harm. Given there was no actual harm in this case, it is submitted by the Commission that 30 – 40 per cent of the maximum available penalty of $600,000 is appropriate.

Defence submissions – summary

[28] Counsel for Crackerjack submits, having reviewed *NZME* and the issue of inflation, that the appropriate starting point is:

(a) $110,000 - $120,000 for the Product Safety Offending.

[29] This is based on the starting point of $80,000-$90,000 for the Product Safety Offending plus $5000 for Consumer Information Offending as originally submitted, with an adjustment for inflation.

[30] Counsel agrees that a 10 per cent discount is appropriate for cooperation, ensuring future compliance and previous good character, and that Crackerjack is entitled to a 25 per cent guilty plea discount. Counsel opposes a 25 per cent uplift to reflect Crackerjack's financial resources.

[31] Counsel submits this results in an appropriate end fine of between $71,500 to $78,000.

[32] Counsel for Crackerjack submits the Court must put the current offending into perspective. This was a one-off sale of 16 units in breach. The fine must be proportionate to the offending. The Commission is speculating that there were probably more than sixteen items which were not compliant and there is no evidence of this before the Court. Such a submission, counsel says, is overlooking the burden of proof. The Commission could have investigated other Crackerjack shops but did not do so. There may or may not have been other items in breach.

[33] Counsel submits the cases of *Commerce Commission v The 123 Mart Ltd,*[4] *Commerce Commission v NZ Sale*[5] and *Commerce Commission v Goodwear Limited*[6] are the most comparable in terms of starting point. Counsel accepts that, based on *NZME*, inflation is to be factored in; however, an uplift to the starting point to reflect Crackerjack's size and turnover is not appropriate and would result in a fine double those imposed for similar cases. Such an outcome would be unfair.

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[4] *Commerce Commission v The 123 Mart Limited* [2017] NZDC 2386.
[5] *Commerce Commission v NZ Sale Limited* [2018] NZDC 20513.
[6] *Commerce Commission v Goodwear Limited* [2018] NZDC 25014.

Culpability factors

[34] Both the Commission and Crackerjack have referred the Court to the relevant factors for sentencing in FTA prosecutions as set out in *Commerce Commission v LD Nathan & Co Limited*,[7] affirmed by the Court of Appeal in *Commerce Commission v Steel & Tube Holdings Ltd.*[8]

[35] The Commission (in its original submissions) and defence counsel have both provided their summaries of the considerations listed in *Steel & Tube*, as follows.

The objectives of the Act

[36] The Commission submits that the purpose of the Product Safety Standard is to prevent, or reduce the risk of injury; specifically, the risk of burn injuries to children. The Product Safety Standard adopted in 2016, is the most recent in a long history of product safety standards relating to the safety of children's nightwear; with legislative requirements for the sale of children's nightwear being in place in some form since 1977. Fire danger labels are designed to provide caregivers with information aimed at reducing the risk of death and injury from fire. Without this information, caregivers may not appreciate the risks associated with the nightwear and fail to take steps to reduce the risks to which children are exposed when wearing it. The penalty imposed in cases under the Product Safety Standard should reflect the seriousness of fire risks to children, along with the limited capacity of consumers/caregivers to appreciate or protect themselves from fire risks.

[37] In relation to the Consumer Information Offending, the Commission submits that Crackerjack's offending meant that consumers were not provided with accurate information regarding the fibre content of goods, and were therefore hindered in their ability to make informed purchasing, use and care decisions.

[38] Defence counsel acknowledges that the Product Safety offending undermined the FTA's objective to promote safety in respect of goods and services. The Consumer

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[7] *Commerce Commission v LD Nathan & Co Limited* [1990] NZLR 160 (HC).
[8] *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549.

Information Offending meant that consumers were not accurately informed about the fibre content of their purchases.

The degree of willfulness or carelessness

[39] The Commission submits that the offending was highly careless, resulting from a complete failure in Crackerjack's systems and demonstrated by the fact that multiple non-compliant product lines were sold. This was not an isolated mistake in which one product line slipped through the cracks of an otherwise well-functioning compliance system. Despite being in trade since 2015, Crackerjack has no compliance system in place for children's nightwear. The Commission submits that Crackerjack had no knowledge of the Product Safety Standard or the Fibre Content Labelling Standard and had no copies of either document. The children's sleepwear sold was not assessed against either standard and no checks were made with the overseas suppliers to ensure compliance. It was particularly egregious that six of the garments sold had no fire labels at all.

[40] Further, the Commission submits that where a trader is larger and has more resources at their disposal, there are stronger expectations that the trader ought to have dedicated adequate time, resources, and management attention to ensuring compliance.[9] Crackerjack is a large company with 240 staff with a turnover of [redacted] in the past year. It would have been able to implement a compliance system but it did not do so due to ignorance of the applicable standards.

[41] Defence counsel accepts that Crackerjack's conduct was careless. Crackerjack was not aware of the product safety and consumer information standards, and it should have done more to ensure compliance and to protect the public. However, Crackerjack says the conduct was not deliberate, it has cooperated with the Commission's investigation and has learned its lesson.

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[9] Citing *123 Mart*, above n 4, at [25](viii).

Nature and Extent of offending

[42] The Commission submits that the true extent of the risk is unknown due to the way Crackerjack imports products (in bulk without differentiating between product lines), and its resulting failure to keep records of the number of units sold in each product line. This failure means that it cannot avail itself of a submission that the items of nightwear it supplied is materially less than those in other recent prosecutions. It would be wrong for Crackerjack to be advantaged by its failure to keep proper records. The Commission submits that while the low number of units supplied for analysis must be a consideration, the Court can place weight on there being more reliable metrics to assess the seriousness of Crackerjack's offending: the Commission investigators purchased only a sample of the nightwear for sale and there was far more available for sale. Given Crackerjack's lack of awareness of the Safety Standard, it can be inferred this offending would likely have continued for all children's sleepwear but for the Commission's intervention.

[43] The extent of Crackerjack's offending is best shown by the number of product lines in issue, rather than the number of individual products sold: the offending involved 16 different non-compliant product lines. This can be seen as aggravating in its own right, first because this increases the probability that a prospective consumer will be drawn to at least one defective product, and second, the number of defective product lines demonstrates the extent of Crackerjack's system failures.

[44] Counsel for Crackerjack submits that the Commission seeks to extrapolate the 16 items to more widespread offending on the assumption that because more items of children's nightwear were available for sale, there were likely to be more items in breach. It is submitted that there is no evidence of this. It was open to the Commission to undertake further enquiries by purchasing more items for testing from other Crackerjack stores in New Zealand but it chose not to. In response to the Commission's submission that it would be wrong for Crackerjack to be advantaged through failing to keep records, Defence counsel submits that Crackerjack has not been charged with failure to keep records. It would be wrong for the Commission to attempt to extend the offending when there is no proof of any further breaches.

Risk of harm to consumers

[45] In respect of the Product Safety Standard offending, the Commission submits that the prejudice to consumers arose from the exposure to the risk of harm, rather than a manifestation of that risk. Each garment still in use creates a risk of harm to vulnerable consumers (young children). In respect of the Consumer Information Offending, the Commission submits that consumers may have been prejudiced by the offending given that they were not able to make informed purchasing decisions. Consumers may have also dealt with garments in ways which would have reduced their durability or longevity.

[46] Defence counsel submits that there is no evidence of actual or specific harm or prejudice arising from Crackerjack's offending, although it is accepted that there was a potential for harm.

The need to impose deterrent penalties

[47] The Commission submits that product safety cases give rise to a strong need for general and specific deterrence. Specific deterrence is necessary to ensure that Crackerjack ensures it has the correct compliance systems in place in future. General deterrence is required to ensure that traders comply with the required standards.[10] Notably, an analysis of all similar prosecutions bar one have been set at less than the 25 per cent maximum penalty for a single offence. Given the rise in prosecutions for product safety offending, these low penalty levels have not provided a sufficient deterrent to traders. The Commission submits that the penalties for breaching mandatory standards must be meaningfully higher than the cost of complying with them. Without robust fines, traders may make the economically rational decision not to invest in compliance. The Commission says its submissions are supported by the recent High Court decision of *NZME.*

[48] Defence counsel submits that if the Commission considered that insufficient penalties had been imposed in similar cases, it could have appealed. The principle of consistency requires the court to sentence Crackerjack in a similar manner, rather than

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[10] *Commerce Commission v 2 Boys Trading Limited* [2019] NZDC 22557 at [30].

to impose a sterner penalty. Crackerjack has referred to comparator cases cited in the Commission's original submissions and state those cases support a consistent starting point for sentencing. They are as follows:

(a) *Goodwear Limited.*[11]

(b) *123 Mart.*[12]

(c) *NZ Sale.*[13]

[49] With regard to *NZME,* defence counsel submits that at para [76] Andrew J made the point that it was "...the unique and serious conduct, together with the need to take into account inflation, that supported such a high starting point" in that case. Counsel submits that Crackerjack has adjusted its starting point for inflation in this case, but the offending does not involve the same "unique and serious conduct" as in *NZME.*

[50] Defence counsel submits that *NZME* is the first New Zealand product safety case where actual harm has resulted. The harm was very serious and could have been fatal if treatment had been delayed. Those factors put the case into a totally different category to the current case. *NZME* also involved more items sold (213 units) over a year-long period of offending. Therefore, *NZME* is in a more serious category than the current case. The submission was also made that *NZME* did not purport to be a guideline judgment for sentencing purposes. Defence counsel reiterated the point that the current offending needed to be put into perspective by the court. This was a one-off sale of 16 units in breach.

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[11] Above n 6.
[12] Above n 4.
[13] Above n 5.

Setting a starting point

Product Safety Standard offending

[51] The Commission submits that a starting point in the vicinity of 30 – 40 per cent of the available maximum penalty is appropriate in light of the absence of actual harm and considering Crackerjack's carelessness. This equates to $200,000 to $240,000.

[52] Defence counsel relies on its original submissions in terms of sentencing /culpability factors for the offending. The offending in *123 Mart* defence counsel submits, was significantly more extensive than Crackerjack's, as more units were in breach of the Safety Standard, and the breaches occurred over a longer period. 123 Mart also continued to supply children's sleepwear after the charges had been laid. Defence counsel emphasises that *NZ Sale* involved 73 units sold, and *Goodwear* involved at least 800 products sold in breach of the FTA. Defence counsel submits that as the number of items supplied by Crackerjack was lower than in these similar cases, its overall culpability is lower. However, defence accepts that the level of fine must be more than a mere licensing fee, and that the size of the company is relevant to this assessment. Having reviewed *NZME,* Defence counsel acknowledges the starting point of $80,000- $90,000 it originally submitted to be appropriate, requires an increase to reflect inflation.

Consumer Information offending

[53] The Commission submits that an uplift of $5,000 to $10,000 is appropriate for the Consumer Information offending.

[54] Defence counsel submits that an uplift of $5,000 should be adopted for the Consumer Information offending.

Mitigating features

[55] It is agreed that a 10 per cent discount is appropriate for Crackerjack's mitigating features, namely that:

(a) Crackerjack has fully cooperated and assisted with the Commission's investigation;

(b) Crackerjack has no previous convictions;

(c) Crackerjack withdrew all children's sleepwear from supply after being contacted by the Commission and has undertaken a recall for children's sleepwear sold between March to June 2022; and

(d) Crackerjack has undertaken a review of all the clothing they stock in order to assess compliance.

Guilty plea

[56] It is agreed that Crackerjack entered guilty pleas at the earliest practicable opportunity and is therefore entitled to a 25 per cent discount.

Uplift for financial resources

[57] The Commission submits that a fine must be a deterrent in relation to Crackerjack's size. Citing *Steel & Tube* the Commission submits that a defendant's means may justify an increased fine, "to ensure it serves its purpose".[14] Citing *Vodafone* and *NZME* the Commission emphasises that a fine must "sting" from the offender's perspective in order to serve its deterrent purpose.[15] It is submitted that a 25 per cent uplift to the starting point is proportionate to the offending, and will ensure a 'sting' given Crackerjack's size and financial resources.

[58] In its supplementary submissions, the Commission states that an analysis of the appendix of cases in *NZME* illustrates that Crackerjack is one of the largest, if not the largest, company to be prosecuted for product safety offending.

[59] Defence counsel objects to this, emphasising that Crackerjack's size has already been taken into account when setting the starting point. Given the limited

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[14] *Steel & Tube Holdings,* above n 8, at [49].
[15] *Commerce Commission* v *Vodafone New Zealand Limited* [2023] NZHC 2149 at [287].

numbers of items in breach, the starting point would have been much lower were Crackerjack a smaller company. Counsel submits that *Vodafone* is not authority for every case being uplifted: *Vodafone* was an outlier in that it had such significant financial resources that an increase in fine was required, and it had a history of breaching the FTA which meant that a greater level of specific deterrence was required. It is submitted that while Crackerjack has a large annual turnover, its net profitability 'paints a different picture' such that a fine in the region of $55,000 to $63,000 will certainly 'sting'.

Approach to sentencing

[60] There is no tariff judgment for this type of offending in New Zealand. However, there are a number of cases which are of assistance to the court.

[61] The Court of Appeal in *Steel & Tube Holdings Limited* set out the approach to sentencing in FTA cases as follows:[16]

> ...Sentencing should begin with the objects of the Fair Trading Act, which pursues a trading environment in which consumer interests are protected, businesses compete effectively, and consumers and businesses participate confidently. To those ends it promotes fair conduct in trade and the safety of goods and services and prohibits certain unfair conduct and practices.
>
> Customary sentencing methodology applies. Factors affecting seriousness and culpability of the offending may include: the nature of the good or service and the use to which it is put; the importance, falsity and dissemination of the untrue statement; the extent and duration of any trading relying on it; whether the offending was isolated or systematic; the state of mind of any servants or agents whose conduct is attributed to the defendant; the seniority of those people; any compliance systems and culture and the reasons why they failed; any harm done to consumers and other traders; and any commercial gain or benefit to the defendant
>
> Factors affecting the circumstances of the offender include: any past history of infringement; guilty pleas; co-operation with the authorities; any compensation or reparation paid; commitment to future compliance and any steps taken to ensure it. The court may also make some allowance for other tangible consequences of the offending that the defendant may face. By tangible we mean to exclude public opprobrium that is an ordinary 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

[16] *Steel & Tube Holdings*, above n 8, at [90]-[92].

considerations applicable, such as totality and the treatment of like offenders, will also be taken into account.

Purposes and principles of sentencing

[62] Deterrence, accountability and denunciation are particularly relevant purposes of sentencing Crackerjack.

[63] The Court must also be guided by the general desirability of consistency with similar sentences in similar cases.

Culpability factors

The objectives of the Act

[64] The FTA pursues a trading environment in which consumer interests are protected, businesses compete effectively, and consumers and businesses participate confidently.[17] To those ends it promotes fair conduct and practices in trade and the safety of goods and services. Certain unfair conduct and practices in relation to trade are prohibited.[18] The purpose of the Product Safety Standard is to prevent or reduce the risk of burn injuries to children, and the purpose of the labelling standard is to ensure consumers are able to make informed decisions about their purchasing choices, and that they are able to appropriately use and care for their goods. These objectives have been undermined by Crackerjack's conduct.

The degree of willfulness or carelessness

[65] Crackerjack's conduct was highly careless. The lack of a compliance system for children's nightwear and the lack of knowledge of applicable safety standards is extremely concerning. Especially, when considering Crackerjack's size and resources. Crackerjack's turnover in 2022 amounted to [redacted]. This is considerably more than in *123 Mart* and *NZ Sale*, two cases referred to by Crackerjack as appropriate

[17] Fair Trading Act 1986, s 1A.
[18] *Steel & Tube Holdings Ltd*, above n8, at [90].

comparator cases. Both judgments are dated October 2017 and September 2018 respectively.

Extent of offending

[66] The period of offending occurred over a period of just over one year. During that time 266 units of children's nightwear were sold. Of those units, 26 were returned during the product recall. Approximately 240 nightwear items are still out in the community, posing safety risks to children.

[67] Crackerjack imported its children's nightwear in bulk without having any awareness of the Product Safety Standards prior to selling the nightwear. The Commission purchased a sample of these items, all of which were in breach of the Safety Standard. It is likely therefore that a majority of the children's nightwear sold by Crackerjack was in breach. This may be, as Crackerjack submits, 'extrapolating' the 16 items to more widespread offending. However, this appears reasonable considering Crackerjack's stated lack of awareness of the existence of the Product Safety Standard.

[68] In *Commerce Commission v Goodview Trading NZ Limited*, the defendant companies were importers and distributors of consumer products, including children's toys.[19] Goodview faced two charges for supplying and offering to supply 446 units of a defective toy instrument set; Joint Future faced six charges for supplying 1296 units of a defective toy piano, 1244 units of a defective toy rabbit, and 1040 units of a defective toy trike; and Ebenzer faced two charges for supplying 80 units of a defective toy instrument set and 36 units of a defective toy piano. While the number of items supplied was clear, Judge Field made the following observations, which are relevant to the present issue:

> [54] Every defective product made available for sale carries with it a latent risk of harm to consumers. This risk persists regardless of where the trader is situated within the supply chain but crystallises at the point when the goods are sold to an end-consumer. In this sense, each and every supply of a defective product can be regarded as a serious breach of the FTA.

[19] *Commerce Commission v Goodview Trading NZ Ltd* [2019] NZDC 3795.

> [55] The existence of multiple Offending Toys … can also be seen as an aggravating feature in its own right, for two reasons. First, offering to supply multiple defective product lines increases the prospect that a consumer will be drawn to purchase at least one defective product. Second, and as noted above, the number of defective product lines demonstrates the extent of the systemic failures in Joint Future and Ebenezer's purchasing and compliance processes.

[69] These comments clarify that each of the 16 individual items Crackerjack offered to supply in breach of the FTA represents serious offending capable of a maximum $600,000 fine. This is aggravated by the fact that the items came from 16 different product lines, which demonstrates the systemic failure of Crackerjack's purchasing and compliance processes.

[70] Crackerjack had the resources to implement a robust safety compliance system, but instead chose not to do so. This resulted in Crackerjack deriving a financial benefit from its ignorance of the law.

[71] The extent of the Product Labelling offending is low. Only two products were found to be in breach of the fibre content label standard.

Risk of harm to consumers

[72] In respect of the Product Safety offending, I note Judge Ronayne's statement in *123 Mart* that "the lack of harm is not the measure, because that is … fortuitous."[20] The potential for harm to vulnerable young children is self-evident.

[73] The Consumer Information offending does not give rise to a significant risk or prejudice to consumers. As noted, the two products sampled were in breach of the Consumer Information Standard because the labels referred to spandex rather than elastane. Spandex is a brand name for elastane and as such it is unlikely that consumers would have been significantly prejudiced by the label, or that they would have made different use and care decisions relating to their purchases, as a result of the labelling.

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[20] *123 Mart Ltd*, above n4, at [25](vi).

The need to impose deterrent penalties

[74] Both specific and general deterrence is required. Against a turnover of [redacted], a fine must be seen as more than a 'licensing fee' for the offending.[21]

Product Safety Standard offending starting point

[75] The principle of consistency between similar cases is an important consideration for the court.[22] The Commission submits that the recent decision *NZME* sets a new tone for FTA prosecutions. I concur. The essence of *NZME* is that fines for FTA offending have been set too low. The following comments by Andrew J in *NZME* suggest that a new tone has been set and this is relevant in the current case when setting an appropriate starting point.

[76] In *NZME,* Andrew J referred to the available product safety sentencing decisions since the maximum penalty increased to $600,000, in 2014. His Honour noted:[23]

> There are 27 decisions... All of the decisions are at District Court level, with the consequent effect that sentencing practice in the product safety arena has been set without any specific appellate consideration. "...the prosecutions mostly involve small to moderate sized traders but with some notable exceptions..." The starting points ...bar one, have been set at less than 25% of the maximum penalty for a single offence. The total end fine has only ever exceeded $100,000 on three occasions.

[77] Justice Andrew made comments on the effects of inflation and sentencing levels agreeing with a submission by the Commission that "cases should bear in mind the effects of inflation over time and that penalty levels must rise over time to maintain the same deterrent effect."[24]

[78] Justice Andrew also stated:

> [37] ...far from increasing over time, analysis of the relevant cases indicates that penalties have remained somewhat stagnant. If anything, they

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[21] *123 Mart*, above n4, [25](vii).
[22] Sentencing Act 2002, s 8(e).
[23] At [35].
[24] At [36].

> may have gone backwards since the largest fine imposed by the District Court in *Commerce Commission v The 123Mart Ltd.*
>
> [38] The various District Court decisions … tend to support the Commission's submission that the District Court has felt somewhat constrained by its own decisions in determining appropriate sentences under the FTA.

A comparison of Crackerjack's conduct with that of GrabOne in *NZME*

[79] A comparison of Crackerjack's conduct with that of GrabOne in NZME is a useful exercise for the current case.

(a) In *NZME*, actual harm eventuated which is a significantly aggravating feature of the offending. In contrast, there was only a risk of harm by consequence of Crackerjack's offending. The lack of harm was fortuitous.

(b) The extent of offending was slightly lower in *NZME*. It supplied 213 units of the non-compliant magnet sets to 159 customers, whereas Crackerjack supplied 260 units.

(c) Upon receiving communication about the safety issue, GrabOne immediately withdrew the products from sale, commenced a voluntary recall of the products, and requested confirmation of compliance documentation from the supplier. Customers were contacted directly through email, phone calls, and pre-paid courier bags were sent for customers to return the Magnets Sets and, in some instances, staff carried out door knocking to contact consumers. This is clearly a very significant effort to have the non-compliant products returned, and indeed it is not clear what further actions could be taken.

(d) Crackerjack, on the other hand, undertook a product recall which resulted in the return of 26 items. The recall clearly did not have a significant effect, and it is likely that Crackerjack could have undertaken further efforts to have the unsafe products returned.

(e) Andrew J stated that the term " 'highly careless' overstates the degree of NZME's culpability"; however, the nature and degree of carelessness was significant because the product safety compliance process was not much of a process at all, as it failed to provide a mechanism to stop the supply of dangerous goods. Crackerjack's culpability on the other hand, was highly careless, and in fact there was no process or mechanism in place whatsoever to ensure compliance with the relevant product safety standard.

(f) While NZME was not a 'repeat offender', the company was on notice of the importance of regulatory compliance and ensuring their systems were robust and adequate. Crackerjack, on the other hand, is a first-time offender.

(g) The listing of the Magnet Sets on GrabOne's website indicated that they could "be used as an educational tool for children". Andrew J found that the vulnerable nature of the target market reinforces the need for vigilance and care. Similarly, the items supplied by Crackerjack were made for children and as such vigilance in ensuring product safety compliance was required.

(h) GrabOne's turnover levels were $7 million to $9 million over the relevant period. Crackerjack's turnover is significantly higher, [redacted].

[80] NZME's starting point was set at $300,000, which took into account the company's financial resources. This amounted to half of the maximum penalty for one charge for this type of offending.

[81] In light of the comparisons between NZME and Crackerjack's conduct, a lower starting point is appropriate in this case, primarily because no actual harm eventuated as a result of Crackerjack's non-compliance. In addition to the comments referred to above by Andrews J in *NZME,* I take into account the following comments made by him in paras [61], [62] and [63] when reaching a starting point:

> [61] ...I accept in principle the Commission's submission that even in cases where the offending was not wilful or deliberate, deterrence remains necessary to incentivise investment into systems and processes that ensure compliance. That investment is expensive. In the context of competitive markets like retail, especially retail of goods that ultimately find their way into the hands of children, it is important that companies are incentivised to invest in compliance with the law.
>
> [62] I also agree that a defendant's resources do have a direct bearing on the corresponding expectations for having in place a robust compliance system...
>
> [63] ...GrabOne...was well resourced and that is of relevance to the failure of its compliance system...The financial resources of GrabOne were an important and mandatory element in the sentencing process.

[82] I consider a starting point of $200,000 to be appropriate.

Product labelling offending starting point

[83] As mentioned, the product labelling offending is not significantly serious. However, such offending exemplifies Crackerjack's carelessness and disregard for compliance with the FTA and it must be met with a deterrent penalty.

[84] In *Goodwear* the Consumer Information Offending involved breaches in relation to the care labelling standard, the fibre content label standard, and the country-of-origin label standard.[25] A starting point fine of $20,000 was adopted in that case.

[85] In *123 Mart* a $20,000 starting fine was also adopted where the care labelling breach related to the care, origin and content of the item.[26]

[86] In *Commerce Commission v Merric Apparel (NZ) Ltd* the defendant company faced 11 charges of failing to label the fibre content of clothing, 10 charges of failure to label the care instructions of clothing, and six charges of failing to label the country of origin of clothing.[27] Judge Hole considered a total fine in the vicinity of $11,000 to be appropriate for the failure to provide adequate labelling.

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[25] *Goodwear Limited*, above n 6.
[26] *123 Mart*, above n 4.
[27] *Commerce Commission v Merric Apparel (NZ) Ltd* DC Manukau CRN5092504544, 4 November 2005.

[87] Crackerjack's product labelling offending is significantly less serious than in these comparator cases. A starting point of $5,000 is appropriate.

Mitigating features

[88] A discount of 10 per cent to acknowledge Crackerjack's cooperation, lack of prior criminal offending, and efforts to prevent future offending is appropriate.

Guilty plea

[89] Crackerjack is entitled to a 25 per cent guilty plea discount.[28]

End fine

[90] From a starting point of $205,000, a discount of 35 per cent results in an end sentence of $133,250.

Adjustment for financial resources

[91] Section 40(2) of the Sentencing Act provides that the court may increase or reduce a fine, depending on the financial capacity of the offender.

[92] In *Steel & Tube*, the Court of Appeal observed that it was good practice to determine the amount that would be payable but for the offender's means, then adjust down or up as appropriate at the second stage of the sentencing analysis.[29] Having calculated the end sentence, the Judge must then step back and inquire whether it is correct in all the circumstances. The fine should retain proportionality to the offending.

[93] In *Vodafone,* Moore J applied a 25 per cent uplift to reflect Vodafone's financial means and to ensure the fine served its deterrent purpose by having a 'sting'.[30] Moore J stated that the level of uplift to be applied is an evaluative exercise requiring judgment having regard to all the circumstances.[31]

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[28] *Hessell v R* [2010] NZSC 135.
[29] *Steel & Tube*, above n 8, at [105].
[30] *Commerce Commission v Vodafone New Zealand Limited*, above n 15, at [323].
[31] At [290].

[94] It is unlikely that a fine of $133,250 would have a deterrent 'sting' on Crackerjack. I consider an uplift of 20 percent is appropriate. This level of uplift takes into account Crackerjack's size, turnover and profitability. It ensures the fine has a deterrent effect in line with the purposes of sentencing in the Sentencing Act 2002 and reflects the purposes of the FTA.

Result

[95] The starting point for the fine is $205,000. Discounted by 35 percent plus a 20 percent means uplift (overall 15 percent discount) results in an end sentence of $174,250 for all charges.

[96] An end fine of $174,250 is appropriate and proportionate in all the circumstances.

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Judge AM Fitzgibbon
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 13/05/2024

APPENDIX A
Caption Summary
Commerce Commission v **Crackerjack Limited**
(Prosecutor) (Defendant)

Charges 1-16: supplied goods that did not comply with the product safety standard in respect of goods relating to a matter specified in section 29(1) of the Fair Trading Act 1986.

Act: Sections 30(1) and 40(1) of the Fair Trading Act 1986
Penalty: **$600,000** per charge

Charges 17-18: supplied goods that did not comply with the consumer information standard in respect of goods relating to a matter specified in section 27(1A) of the Fair Trading Act 1986.

Act: Sections 28(1) and 40(1B) of the Fair Trading Act 1986
Penalty: **$30,000** per charge[1]

Summary of Facts

1 Introduction

1.1 The defendant, Crackerjack Limited (**Crackerjack**), faces 18 charges under the Fair Trading Act 1986 (**FTA**) relating to children's clothing items it supplied on or about 30 May 2022 (the **Charge Period**).

1.2 Crackerjack faces charges relating to 16 different children's garments as follows:

(a) sixteen charges relating to individual garments it supplied which did not comply with the applicable product safety standard relating to labelling of fire hazards; and

(b) two charges relating to individual garments it supplied which did not comply with the consumer information standard regarding fibre content labelling.

2 Defendant

2.1 Crackerjack is a discount retail chain which supplies goods such as kitchenware, garden supplies, giftware, confectionary, seasonal goods (for example toys at Christmas), health & beauty, clothing, outdoor goods and cleaning products. It is a family owned business that has been trading since 2015. It has three directors, Greg Inger, Joanne Inger and Peter Inger.

2.2 It operates 14 stores throughout the North Island and employs approximately 240 staff. It has a distribution centre based in Otara and its head office is within its Glenfield store at 75C Porana Road, Hillcrest, Auckland.

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

3 Relevant legislation

Product safety standard

3.1 The relevant product safety standard is the Australian/New Zealand Standard *AS/NZS 1249:2014 Children's nightwear and limited daywear having reduced fire hazard*, as adopted under the Product Safety Standards (Children's Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2016 (the **Product Safety Standard**).

3.2 The purpose of the Product Safety Standard is to prevent, or reduce the risk of, injury; specifically the risk of burn injuries to children. The Product Safety Standard adopted in 2016 is the most recent in a long history of product safety standards relating to the safety of children's nightwear; with legislative requirements for the sale of children's nightwear being in place in some form since 1977.

3.3 The Product Safety Standard specifies design, flammability performance and fire hazard labelling requirements for children's nightwear garments, together with some daywear or underwear items that may be commonly used as nightwear. The scope of the Product Safety Standard includes garments that fall within a prescribed range of sizes and prescribed categories of garment.

3.4 Garments are categorised by the risk associated with their design and the flammability of the fabric. Categories one, two and three are generally considered to have a reduced fire risk and category four garments have a higher fire risk.

3.5 To comply with the Product Safety Standard, a garment must fall into one of the four flammability categories. Garments in each of the four categories are required to have specified fire danger labels, with prescribed wording, image and colours, affixed to them and category four garments are required to have a more prominent 'high fire danger' fire warning, to reflect the fact that they have a higher flammability risk. Garments that are within scope of the Product Safety Standard, but do not fall into any of the four categories, are considered to have a very high flammability rating, and are prohibited from sale altogether.

3.6 Garments will breach the Product Safety Standard if they do not have a fire hazard label in the correct format, or if they do not have any label at all.

3.7 Pursuant to s 30(1) of the FTA, if a mandatory product safety standard applies, a person must not supply, offer to supply or advertise to supply goods unless that person complies with that product safety standard.

Consumer information standards

3.8 The relevant consumer information standard is the Australian/New Zealand Standard *AS/NZS 2622:1996 Textile Products – Fibre Content Labelling*, adopted under the Consumer Information Standards (Fibre Content Labelling) Regulations 2000 (and with the variations set out in Schedule 2 of those Regulations) (**Fibre Content Labelling Standard**).

3.9 The Fibre Content Labelling Standard applies to goods made from natural or synthetic textiles. Products which are subject to the Fibre Content Labelling Standard are required to have permanent labels affixed to them which provide accurate information relating to the fibre content of the product. This is important to help consumers make informed choices about the goods they are purchasing and ensure that consumers can correctly use and care for these goods.

3.10 The Fibre Content Labelling Standard is issued pursuant to s 27 of the FTA.

3.11 Pursuant to s 28(1) of the FTA, if a consumer information standard applies, a person must not supply, offer to supply or advertise to supply goods unless that person complies with that consumer information standard.

4 Commission's Investigation

4.1 On 30 May 2022, Commission staff purchased 20 garments from Crackerjack's Napier store during a round of routine inspections in the Hawkes Bay region. Images of each of the garments are attached as **Schedule 1**. As a result of those purchases, the Commission opened an investigation into Crackerjack's compliance with the Product Safety Standard and the Fibre Content Labelling Standard.

4.2 The Commission sent all 20 garments to the New Zealand Wool Testing Authority (**NZWTA**) for assessment under either the Product Safety Standard, the Fibre Content Labelling Standard, or both.

4.3 All 20 garments purchased were subject to the Fibre Content Labelling Standard. NZWTA assessed whether the garments were subject to the Product Safety Standard, and whether they contained the necessary labelling required under the Product Safety Standard and the Fibre Content Labelling Standard.

4.4 Sixteen of the garments purchased were subject to the Product Safety Standard, and as such were required to have a fire hazard label. The remaining four were not, as they were of a size and/or had characteristics that meant that they were not within the scope of the Product Safety Standard.

5 Product Safety Standard breaches

5.1 Of the 16 garments that required a fire warning label under the Product Safety Standard, testing by NZWTA determined that all 16 garments failed to comply with the labelling requirements.

5.2 Two garments were made of fabrics with a higher fire risk, and as such were required to have the more prominent 'high fire danger' warning label. Those two garments had no fire hazard labelling at all.

5.3 The table attached as **Schedule 2** summarises the label required for each garment under the Product Safety Standard, and the content of the non-compliant label.

5.4 In summary, the results showed that the garments had the following labelling that was not compliant with the Product Safety Standard:

(a) Five were labelled "Flame resistant";

(b) Four were labelled as "Not flame resistant";

(c) One was labelled as "This garment is not flame resistant"; and

(d) The remaining six garments had no labelling at all.

5.5 Crackerjack faces a total of sixteen charges relating to the breaches of the Product Safety Standard for the individual garments purchased by the Commission's investigators.

6 Consumer Information Standard breaches

6.1 NZWTA reviewed the labels of all 20 garments for compliance with the Fibre Content Labelling Standard.

6.2 The results showed that two of the 20 garments reviewed failed to comply with the Fibre Content Labelling Standard. The table attached as **Schedule 3** summarises these failures.

6.3 In summary, the results showed two garments failed to comply with the Fibre Content Labelling Standard as the word "Spandex" was used instead of the permitted word "Elastane".

6.4 Crackerjack faces two charges relating to breaches of the Fibre Content Labelling Standard for the individual garments purchased by the Commission's investigators.

7 Product recall

7.1 Between 10 and 12 April 2022, Crackerjack imported 2,880 units of children's sleepwear.

7.2 Crackerjack advise that they import mixed containers of different clothing products from wholesalers purchasing stock from major USA retailers. There are many different types of clothing mixed throughout these containers and often garments are "one of a kind". The products are then sorted in the USA and New Zealand and placed into generic group barcodes for sale in New Zealand. Crackerjack advises it cannot therefore track specific garments because of the way they purchase and sort the stock.

7.3 Because of this, Crackerjack's records provided to the Commission do not (and as advised above are unable to) show how many of the 2,880 units were in the same product lines as the garments that are the subject of these charges and how many of these units were offered for supply.

7.4 Out of the 2,880 units of children's sleepwear, Crackerjack sold 266 units. Crackerjack's records provided to the Commission do not (and as advised above are unable to) show how many of the 266 units sold were in the same product lines as the garments that are the subject of these charges.

7.5 After being contacted by the Commission on 30 May 2022 regarding the non-compliant garments, Crackerjack:

(a) Took appropriate steps to withdraw all children's sleepwear from supply; and

(b) Undertook a recall for all children's sleepwear sold from March to June 2022.

7.6 As of 18 April 2023, 26 items of children's nightwear were returned to Crackerjack following the recall action it undertook. Based on the records of the recall provided by Crackerjack, we are unable to identify whether any of the garment types that are subject to the charges were part of the 26 items of children's nightwear that were returned.

8 Defendant's statement

8.1 The Commission interviewed one of the Directors of Crackerjack, Greg Inger, on 12April 2023. Mr Inger told the Commission that:

(a) Crackerjack had no knowledge of the Product Safety Standard and Fibre Content Labelling Standard and had no copies of either document;

(b) The garments were not assessed for compliance against the Product Safety Standard and Fibre Content Labelling Standard in New Zealand and no checks were made with the overseas suppliers to ensure compliance;

(c) Mr Inger stated he has the responsibility of ensuring the compliance of goods supplied from its stores and he generally relies upon local and Australian based suppliers for legally compliant goods. Mr Inger advised that these suppliers, generally supply well established retailers such as the Warehouse and Kmart, and believed they should have a good understanding of the legal requirements of goods being supplied in New Zealand;

(d) This was the first time Crackerjack had sourced children's sleepwear to supply in its stores and Crackerjack had sourced the garments directly from Midtenn and arranged for Uncle Bills to ship them to New Zealand on its behalf;

(e) As a result of the Commission's investigation Crackerjack has undertaken a review of all the clothing, they stock to assess compliance, and has instigated compliance checks to be carried out; and

(f) Mr Inger advised that Crackerjack now has copies of the Product Safety Standard and all the applicable Consumer Information standards for clothing.

9 Defendant's history

9.1 Crackerjack has not previously been prosecuted for breaching the FTA.