IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2021-004-003776
[2022] NZDC 23352

COMMERCE COMMISSION
Prosecutor

v

STRANDBAGS PROPRIETARY LIMITED
Defendant

Hearing:	11 November 2022
Appearances:	S Hunter KC and J Barry for the Prosecutor K McDonald KC and S Bisley for the Defendant
Judgment:	11 November 2022

NOTES OF JUDGE C M RYAN ON SENTENCING

Introduction.

[1] Strandbags Pty Limited is for sentence today, having pleaded guilty to the following seven representative charges:

(a) Between 1 July 2018 and 1 April 2019, it engaged in conduct liable to mislead the public as to the pricing of products including luggage items, bags, wallets, and backpacks (known as repeated/cumulative discounting). The maximum penalty is $600,000.

(b) Between the same time periods, again it engaged in conduct liable to mislead the public as to the pricing of goods (known as extended discounting). The maximum penalty is the same.

(c) Between 1 July 2019 and 1 April 2019, it engaged in conduct liable to mislead the public as to the price of goods (known as providing an immediate discount). The maximum penalty is the same.

(d) Between 14 January and 19 March 2019, it again engaged in conduct liable to mislead the public as to the pricing of goods (price inflation), the maximum penalty again being $600,000.

(e) Between 2 April 2019 and 1 January 2020, it again engaged in conduct liable to mislead the public as to the price of goods (repeated/cumulative discounting), the maximum penalty being the same.

(f) Again, between 2 April 2019 and 1 January 2020 it engaged in the same conduct (extended discounting). The maximum penalty is the same.

(g) Between the same time periods namely 2 April 2019 and 1 January 2020, it engaged in the same offending (immediate discount) with the same maximum penalty.

[2] The parties have conferred and reached agreement on a summary of facts. That summary is important because of its recording of some of the admissions made. Today there are two key issues for sentence:

(a) To what extent was Strandbags Pty Limited offending deliberately and wilfully, as opposed to carelessly or recklessly?

(b) Adopting the standard sentencing methodology, what should be the starting point?

[3] There is no dispute between the parties as to discounts from the starting point once fixed: a 25 per cent discount, which is the maximum available at law for guilty pleas, and a further 10 per cent discount for co-operation with the Commerce Commission ("the Commission") and the steps subsequently taken.

Agreed Facts.

[4] Strandbags Pty Limited ("Strandbags") is a retailer of handbags, wallets, luggage, backpacks, business bags, umbrellas and similar items, both in Australia and New Zealand. In New Zealand, it markets and sells products through a chain of formerly 28 but now 26 stores. It also markets and sells online.

[5] In the three time periods specified in the charging documents, some of which overlap, namely the price inflation three-month time period and the earlier charges, the charges relate to the steps taken by Strandbags to advertise and promote its products. It sells its own branded products. It also sells some third-party branded products. It markets itself as the largest handbags and travel retailer in the southern hemisphere. It is managed by its head office in New South Wales.

[6] The Commission submits that there is a great deal of uniformity in Strandbags' operations in both Australia and New Zealand. The same promotions are typically run across New Zealand and Australia, including online, at the same time.

[7] After receiving a complaint and a copy of an internal memorandum from Strandbags' head office, the Commission commenced an investigation focusing on an 18-month period between 1 July 2018 and January 2020 ("the charge period").

[8] There have been some submissions about conduct by Strandbags after the end of that charge period, but I am focusing on the charges and the charge period so do not intend to consider anything outside those charges and outside that period, except obviously the guilty pleas and the matters attracting the further 10 per cent discount which, as I have said, are matters of agreement.

[9] During the charge period, Strandbags advertised products through in-store signage, online, and through email promotions to its customers or those who had

signed up to email newsletters. It advertised products using two comparison prices: was "X" price/now "Y", or strikethrough pricing, where the former price had a line through it with a new price below it, or it made discount percentage claims for example "50 per cent off". The advertising campaigns were planned by Strandbags senior management and were designed to increase consumer purchases and boost Strandbags' revenue and profits.

[10] In promoting many of its products for sale, Strandbags engaged in the four different types of conduct which are contained in the seven charges:

(a) The first is immediate discounting, which was advertising by comparison to a claimed original or ticket price that in fact had never been previously charged.

(b) The second is extended discounting which involved lengthy periods in which products were offered at discounted prices and comparatively short periods in which products were offered at their original ticket price. The effect of the extended discounting was that Strandbags was advertising a discount by reference to a ticket price which was not the usual price.

(c) Third was price inflation which was inflating the prices of products prior to discounting, in order to give consumers the impression that they would be making a saving if they purchased the products.

(d) Finally, repeated/cumulative discounting involved using repeated discounts referencing out of date, original, or ticket prices.

[11] Each of those four forms of conduct was reinforced by Strandbags' use of extensive sale and promotional signage in store, on its website, and in promotional emails. These all reinforced the idea that products were available at discounted or on special prices for a more limited time than was actually the case.

[12] Each type of conduct was liable to mislead the public as to the price of the products to which the practices applied, by representing that the prices were special or significantly discounted when they were not. By doing so, Strandbags attracted potential customers based on a misleading impression as to the value that its prices represented and the savings customers could make on them.

[13] The charges were structured to represent the different types of illegitimate pricing practices engaged by Strandbags over the 18 months of the charge period. These were split into two nine-month periods for three types of offending conduct, namely the immediate discounting, the extending discounting, and repeated/cumulative discounting, and one three-month period for the price inflation conduct. As I have mentioned, the price inflation overlapped with the first three charges involving repeated/cumulative discounting, extending discounting, and immediate discounting.

[14] Strandbags, as I have also mentioned, marketed and priced its products during the charge period as decided by its head office. During the charge period, the Strandbags merchandise planning director was responsible for signing off product discounts for both New Zealand and Australia. Ultimately, he was interviewed by the Commission.

[15] When investigating Strandbags' practices after the complaint, which appears to have been by a whistle-blower or somebody who was familiar with in-house proceedings, the Commission focused its investigation on an analysis of 98 product types marketed during the 18 months of the charge period.

[16] The data sample was selected on the basis that it was representative of Strandbags' pricing practices both in store and online. The sample comprised the top 10 selling products from each of Strandbags' six product categories, 37 products selected at random by the Commission, and eight of the products mentioned in the memorandum given to the Commission by the whistle-blower.

[17] That memorandum was dated 9 January 2019. It came from Strandbags' head office and was directed to all store and regional managers, requiring them to

implement a pricing practice in relation to Marikai blazers or small handbags. The stores were directed to increase the original ticket prices on the Marikai blazers so that the items could be reduced in price soon afterwards and Strandbags could advertise the products at a claimed discount. This is otherwise known as price inflation.

[18] The Commission issued a request to Strandbags to provide information in relation to its advertising and marketing strategy in New Zealand, its discounting practices, and information relating to specific products identified by the Commission. Strandbags provided three voluntary written responses. There is no dispute that Strandbags co-operated fully with the Commerce Commission's investigation.

[19] Commission staff also visited Strandbags stores on multiple occasions in which they took photographs of the store and sale signage. Some Commission staff also signed up to Strandbags' emails and received copies of the emails going from Strandbags to their extensive bank of online customers.

[20] As I have mentioned, there was a voluntary interview conducted with two employees of Strandbags on 3 September 2020.

[21] The summary of facts specifies the misleading conduct as follows: Strandbags sold close to 10,000 stock-keeping units or SKUs, and 856,000 units or individual products. 73 per cent of the SKUs sold and 80 per cent of the individual products sold were Strandbags' own brand of products.

[22] Strandbags also conducted numerous sales and discount promotions generally, averaging three at any given time. It routinely advertised products at a discount. The 98 products from the data sample advertised discounting for multiple periods across the charge period and usually by reference to a ticket price which was not the usual price. When Strandbags advertised products at a discount using comparison pricing, it continued to refer to the original ticket price, regardless of whether or not that ticket price had been recently charged.

[23] The discount methods used by Strandbags relied on various forms of comparison pricing. It compared higher original ticket prices with lower discounted

prices. The strikethroughs, the "was/now", and the percentage discounts were the primary type of advertising or reference pricing used.

[24] The advertising implied that the products were being offered at a significantly discounted or special price and that consumers would make substantial savings by buying goods at the discounted prices. Strandbags commonly used a combination of more than one of these comparison pricing techniques to advise each product at a discount from a claimed ticket price.

[25] This was liable to mislead the public because:

(a) Firstly, some products were immediately offered for sale at a discounted price but had never been offered at the claimed and higher ticket price.

(b) Secondly, extended discounting meant that the ticket price for many products was not the usual price at which the products were sold.

(c) Thirdly, the price of other products was inflated prior to discounting.

(d) Finally, repeated discounts were referenced to out-of-date ticket prices at which the item had not been sold at for a very long period of time.

[26] Strandbags' general sales advertising ensured that each type of discounting occurred in each product category. It was the common practice of Strandbags to advertise products using prominent "sale" and promotion signs displayed in shop windows in-store and online. The use of repeated sale advertising reinforced the message that here was an opportunity to buy products at discounted or special prices for a limited time. It was a call to action to avoid missing out.

[27] Strandbags confirmed that there were at least two promotions running at any time and sometimes as many as six. Their calendar for promotions was prepared and circulated by head office.

[28] There were more than 230,000 subscribers to the Strandbags email newsletter. They were regular recipients of emails from Strandbags advertising discounts and promoting sales. Commission staff who had signed up to email newsletter received in December 2019, for example, 15 separate promotional emails from Strandbags advertising discounts and sales. Aside from in-store advertising, Strandbags accepted that email was the key platform for any advertising it conducted. Its email newsletters would include details about any relevant sales at the time.

[29] During the charge period, Strandbags offered a number of new products to consumers immediately at a discounted price with reference to an original ticket price. The Commission's investigation revealed that original ticket price had never been charged. Some of those products therefore had never been sold at the higher ticket price. Other products were only offered at the ticket price after first having been sold at the discounted price in circumstances where it had not been made clear that the discount of new stock was merely an introductory offer.

[30] Of the 26 newly introduced products in the charge period, 18 products (or 69 per cent) were immediately discounted without ever having been sold at the ticket price. This conduct was obviously liable to mislead the public, because a comparison to a ticket price that has never been charged provides an illusory impression of value and savings.

[31] In other words, contrary to the "was" assertion in the "was/now" promotions, the items had never been offered at the "was" price. This factual assertion was false and created the impression that the prices being advertised were significantly discounted or that there were special prices on offer, when in fact the products were being sold at their initial or original price.

[32] When asked in interview why Strandbags did not simply make the discounted price the ticket price, Strandbags employees stated that it would not do so because promotions make a huge difference to competitiveness. They are necessary to compete against other retailers who also offer discount promotions. People are drawn to promotions. It therefore considered that promotions were necessary to maintain competitiveness in the market.

[33] Having products on sale for lengthy periods at a purported discount or special price (namely extended discounting) was the most prevalent conduct in which Strandbags engaged during the charge period. While only two of the seven charges relate to extended discounting, the amount of extended discounting over this period is emphasised by the Commission.

[34] Strandbags told the Commission that its policy was to establish the ticket price of its goods by selling them at that price for a minimum of 14 days, before then placing an item or items on sale. There was no set limit on how long a product could be on sale once discounted. Strandbags said that its practice was to conduct further price establishments every 26 weeks.

[35] The summary of facts records that this meant practically or in practice, that:

(a) Firstly, items with 14 days at their ticket price could be placed on sale for as long as six months before any further price establishment occurred, a ratio of 1:13.

(b) Secondly, in a 12-month period, an item could spend a total of one month at the ticket price and 11 months at a discounted price.

[36] In fact, Strandbags frequently did not follow this price establishment policy. Investigation by the Commission revealed that, for example, a butterfly backpack offered for sale during the charge period was sold at the discounted price for a total of 478 consecutive days out of 531 days. That is 90 per cent of the time, with no price establishment for over a year. Another product, the black Flylite Brock satchel was discounted for 510 out of 542 days, namely 92 per cent of the time, with 286 units sold at the discounted price and only six at the ticket price.

[37] More broadly, the Commission's analysis of the data sample indicated that:

(a) Firstly, the majority of the 98 sample products were on sale for more than 50 per cent of the time.

(b) Secondly, for products with more than three months of data, namely 87 products, 72 per cent were discounted more often than they were at full price.

(c) Thirdly, of the 98 products in total, 59 were discounted for a period of at least two months consecutively, 34 were discounted for a period of at least three months consecutively, 22 were discounted for a period of at least four months consecutively, and 11 were discounted for a period of at least six months consecutively.

(d) Finally, certain categories of products were persistently on sale, including backpacks (discounted 84 per cent of the time), business bags (85 per cent of the time), women's wallets (64 per cent of the time), and women's handbags (66 per cent of the time).

[38] This conduct was liable to mislead the public because many of the products in the data sample were sold infrequently and for short periods at the ticket price, so that the ticket price could not be considered the usual price. What was represented to be the discount or special price was in fact the usual or ordinary price.

[39] Comparison with the ticket price was therefore not meaningful because it did not show savings or value for consumers. However, it gave the impression that the goods were being offered at a significantly discounted or special price. They were not. It was misleading.

[40] There is no "bright-line" test for how long or often product must be offered at the ticket price for that price to be considered genuine. This is a matter which both counsel have raised in submissions today. Despite there being no bright-line test, Strandbags admitted that when it offered products at a discounted price for periods longer than the previously ticketed or previously promoted and marked down price without adequate disclosure, this conduct was liable to mislead the public.

[41] Strandbags was telling the public it was offering a special lower price. Routinely offering goods at that lower price without adequate disclosure about that

process meant that the offer was not in fact a special one. The lower price instead became the usual price.

[42] The Commerce Commission's analysis of the data sample shows that Strandbags used the discounted price extensively and for substantial periods materially longer than the time period during which the product was sold at the original ticket price. Such conduct was liable to mislead consumers as to the extent of the savings they would be making in purchasing the products at the discounted price.

[43] Strandbags employees acknowledged at the interview that this pricing practice meant that products were more often sold at discount, a practice they explained was common in the market.

[44] The memorandum from the buying and planning department to all store and regional managers on 9 January 2019 directed them to instigate price inflation. The memorandum included the price of 14 affected SKUs, with the current retail price and the "new price." It was signed by the handbag's buying department.

[45] Strandbags provided the Commerce Commission with pricing data in respect of eight of the 14 SKU's identified in the memorandum. This showed that:

(a) Firstly, that on 14 January 2019 the price of all eight SKU's was increased. Seven were increased by $10, that is from starting points of either $29, $39, or $49, the others were increased by $5 from $29.99.

(b) Secondly, on 24 January 2019 all eight SKUs were decreased in price from a newly inflated price by 25 per cent.

(c) Thirdly, the sale lasted until 19 March 2019.

[46] Strandbags' conduct in issuing and implementing the memorandum was liable to mislead the public because Strandbags instructed its stores to increase the price of products for the purpose of enabling it to then reduce the price and create an illusionary discount. Again, the ticket price advertised was not the usual price. This created a false perception of the value of the items and the savings that could be obtained.

It meant that the products were not being offered at the significantly discounted or special prices as represented.

[47] Strandbags also discounted the prices of some of its products repeatedly or cumulatively while still referring to the ticket price even when the goods had been sold for longer periods at the previous discount yet with the original ticket price being used for comparison. The Commerce Commission's analysis showed that out of 98 products, 86 had repeated or cumulative discounts applied during the charge period. These referenced the original ticket price as the comparison price.

[48] This original ticket price was frequently out of date such that it could not properly be considered the usual price. For example, a Wish backpack was offered during the charge period with a ticket price of $109. The product was in fact sold between July 2018 and November 2018 at a discounted price of $82, with the exception of a 10-day period in which it was returned to the ticket price. In November it was further discounted $65, where it stayed for 12 months. Throughout this time the discounted product referenced a ticket price of $109.

[49] Another example is a Lanza Roam bag offered during the charge period with a ticket price of $299. During the charge period, its price had fluctuated between $107, $109 and $119. Eventually it was discounted to $79. Within the charge period, the product was sold at the ticket price for two weeks, yet $299 was used as the comparison price.

[50] A Colorado panel zip backpack was offered during the charge period. Its ticket price was $249. In July 2019 it was discounted to $187 dollars. It was then discounted again to $159 in August 2019 and $119 in January 2020. At no point was the price raised again after each discount, yet $249 was always used as the comparison price.

[51] Such conduct was liable to mislead the public into thinking a greater saving was on offer than was really the case. In each of the examples, the ticket price was not the usual price for the products. Rather, Strandbags was referencing out-of-date prices which had not been recently charged. In doing so, it created a misleading

impression that the prices being offered were at a greater discount or special price than was in fact the case.

[52] I return to the fact that there are seven representative charges. Each refers to different types of conduct over the charge period of 18 months. The summary of facts specifies that the effect of the four types of conduct was that many of the 98 products in the data sample were on sale for much of the charge period. This is contrary to the very nature of a discounted "sale". I will come back to this.

[53] While there are many different types of sales, all sales imply that a lower price than usual is being charged for the goods or the services that are being marketed as on sale. The products in the data sample were representative of Strandbags' practices across all its products.

[54] Strandbags' use of sale and promotional pricing was integral to its business model. In short, it is how the company made its money. In oral submissions today the Commission placed great emphasis on that point. I will return to it.

[55] The summary of facts records that the senior management knew about the pricing practices because they were the ones controlling then and signing them off. Through its senior management team, Strandbags knew that the advertised discounts were aimed at increasing company sales and profits. They knew that the advertised ticket prices were not the usual selling prices of the product and therefore that the representative discounts were not genuine.

[56] Some indicators of this knowledge are as follows:

(a) The planning of a market calendar of what sales and promotions would be run for the forthcoming year. This enabled the company to maximise sales opportunities. The marketing calendar was approved by Strandbags' marketing director.

(b) The pricing team and head office continually monitored product prices, and the popularity of items in store and also online. Naturally, it did so

to maximise gross products while managing its inventory. It used a computer application to help determine a level of markdowns as well as review by staff. Markdowns were set on the basis of historical sales, inventory, and the overall performance of their products.

(c) Each product's performance was kept under regular review.

(d) The merchandise planning director had final signoff on all markdown decisions across New Zealand and Australia.

(e) The memorandum instructing staff to increase the price of Marikai blazers to enable the advertising of a subsequent discount was issued by Strandbags' head office.

(f) Strandbags' board of directors met quarterly and received management accounts and had weekly access to sale figures. Through these processes, the board had the full visibility of sales and business performance. As above, specific marketing activities were the responsibility of senior management.

[57] The summary of facts refers to some of the comments made by the merchandise planning director at the voluntary interview on 3 September 2020. He described Strandbags' practices as "Retail 101 to be honest." He said every member of the public buys on promotion. He also said it made a huge difference to competitiveness. If other retailers were running promotions of 25 per cent or 30 per cent discounts, people would be drawn to such promotions. He said that if Strandbags were not running such promotions, and just retailed items at the same price, they would be at a competitive disadvantage.

[58] He said to the Commerce Commission: "I don't know any retailer that in our market in our category is doing that." When asked whether Strandbags sold more products at a discounted price than at the ticket price, he replied: "It would be reasonable to expect that when you offer somebody 25 per cent off as opposed to

nothing, then you will sell more with 25 per cent off than you would not offering that level of discount."

[59] When it was put to him that Strandbags could simply set ticket prices at their 40 or 50 per cent discount, Strandbags said: "I do not think we would be competitive in the marketplace, that's why we don't do it."

[60] Strandbags sold a higher volume of product and earned more revenue and overall profit when it advertised products at a discount. The Commission analysed a data sample from Strandbags which indicated that for the 98 products:

(a) Firstly, the company generated significantly more revenue from discounted sales for five out of the six product categories.

(b) Secondly, five of Strandbags' six product categories sold more units at discounted prices.

(c) Thirdly, among Strandbags products in the data sample including the top selling products, approximately 70 per cent of revenue was earned from products sold at a discount.

[61] Strandbags provided information to the Commission in relation to its total revenue and gross profit over the financial years 2018, 2019, and 2020.

[62] Its revenue and products increased year on year between 2018 and 2020. The more stock it was able to sell, the more leverage it had with suppliers to obtain better pricing, which it could use to increase its margins. An article dated 12 September 2019 from the *Australian Financial Review* about the Australian and New Zealand's group performance reported that Strandbags was forecast to deliver its sixth consecutive year of sales growth, that its online sales had risen 50 per cent in the last year and now accounted for five per cent of sales.

[63] About 64 per cent of customers search online but most customers still go in stores to handle handbags and check locks and wheels on luggage. While other

retailers were closing or shrinking stores, Strandbags was doubling or tripling the size of its stores to expand its range of international, national, and private label brands.

[64] The summary of facts turns to the detriment to consumers. It refers to the fact that there is no directly applicable New Zealand or Australasian research but the UK Office of Fair Trading (UKOFT) published a research paper in December 2010 analysing the effect of pricing practices on consumer behaviour. The research showed that price framing and the use of comparative pricing can encourage consumers to make purchases they may not otherwise have made because it increases consumers' perceptions of the value of the product and the incurred saving.

[65] I accept that the research paper is now 12 years old and it comes from a different place with a different cultural mix and with people with different backgrounds. The world has changed considerably in the last 12 years when it comes to purchasing, particularly online, but there are some things from that research that can also be drawn by logical inferences. Of course, comparative or discount pricing creates an anchor which consumers use as a starting point for estimating the real value of the product. Of course it reduces the extent to which consumers shop around and compare prices.

[66] Consumers are not always discerning. The majority of them do not compare different prices for luggage, wallets, and so on across different retailers. Accordingly, consumers are more likely to make shopping errors by overvaluing the offer in front of them, purchasing too much of the product, or paying too much. Comparative or discount pricing is effective at drawing consumers to a specific trader or brand.

[67] To that I would add that if the value or quality of the item is attractive, a combination of good prices, handsome discounts, and good quality goods will attract people to return. Even when people do not believe the offer is genuine, just over half still buy the product from the trader. It may have a greater impact if the purchases are of an infrequent item with which consumers are less familiar.

[68] Participants' understanding of the presentation of influences, as the UK Advertising Standards Authority (ASA) says, tends to be limited regardless of gender,

age or socioeconomic factors. Consumers expect reference pricing to be accurately presented and fair to the consumer. However, they are unlikely to look behind that pricing themselves.

[69] In particular, a reputable brand, a well-known retailer, and good quality products will attract people who expect, and in fact assume, that the products will be sold at an appropriate price and the process will be fair. Consumers' perception of a product value increases in linear fashion as the reference price increases.

[70] This Court does not need references and research to establish those points. I can draw the logical inference that for most people, the higher the price of a product the more that price is equated with value. If there is a drop from a high price to a lower price, the customer still expects and assumes that the product has value and that they are getting a really good deal.

[71] Misleading comparison prices accordingly lead to real consumer harm. Offers expressed to be time limited as part of the sale create a feeling of scarcity about the products, increase the perceptions of the value of the offer, and make a person more likely to purchase a particular product irrespective of whether the offer is genuine or not.

[72] Strandbags' conduct in this case involved many of the features discussed in the research. Its pricing practices incentivised customers to purchase from its purported sales and therefore increase profits. Of course, increasing profits must be the intention of most retailers. That is not wrong or illegal. It is the process in this case of maximising those profits that is illegal

[73] Had consumers known that the advertised savings were not genuine and were available for large parts of the year, it may have made them more circumspect. They may have not bought the items. They may have looked around. They may have even bought from Strandbags' competitors.

[74] Strandbags' expert evidence is that the websites and stores or luggage retailers demonstrate that luggage and bag trends for the types of products issued evolve rapidly

with fashion-like attributes including the style, colour, and material. There is a cycle of planned obsolescence from retailers with a regular flow of new models replacing older models, often with only cosmetic differences. Inventory management can be challenging for retailers as previous models are often perceived as dated as soon as the new models are launched.

[75] It is common practice in the luggage retail market in New Zealand to discount older or discontinued items to speed the sale of old stock. Retailers at the low-price end of the New Zealand market frequently promote and emphasize pricing and discounts more so than retailers at the higher end.

[76] As of 31 August 2021, there were on the Yellow Pages, 197 reviews of Strandbags across 21 locations in New Zealand. There were only four negative reactions and 119 positive reactions. A typical New Zealand Strandbags store receives an average 4.5-star rating on a five-star scale with no location rated below four stars.

[77] Strandbags' conduct also gives rise to an unfair advantage over competitors who do not employ misleading practices around pricing discounts. This in turn creates a clear potential for frustration of effective competition in this market.

[78] During the voluntary interview, Strandbags' merchandise planning director told the Commission that despite being the largest handbag and travel retailer in the southern hemisphere it needed to sell products by claiming a discount to be competitive against other retailers. He told the Commission:

> We're looking at our online competitors and then all of those we're looking at, you know, at what the different prices and recognising that when it is a 25 per cent off, is that a price point is going to sell volume. And we, so it is not plucked out of the sky, it is – we're in a commercial marketplace, in a competitive marketplace… and that influences our ticket price.

[79] The summary of facts also records Strandbags' response to the Commission's investigation. I accept that Strandbags was first notified on 17 January 2020 that the Commission had opened an investigation into the company's pricing practices. Its CFO and merchandise planning director attended the voluntary interview on 3 September the same year.

[80] When the Commission set out its concerns and showed the pricing patterns, it asked the CFO and merchandise planning director for their responses. They explained that Strandbags is a promotionally driven business. They said that people would always expect to visit Strandbags and find an offer. Every store is supposed to work in the same way. The ticket price is the normal selling price "when we're not on promotion… if we're doing 25 per cent off handbags, then it's 25 per cent off the ticket price."

[81] The pricing principles that Strandbags employed online and in store were consistent over the 18-month period. There had been no changes to the approach of how they dealt with full price or markdown by way of controls to ensure compliance with the Fair Trading Act 1986 ("the FTA"). Their executive team tried, they said, to act commercially and not to mislead customers. If something goes wrong, stores are encouraged to sell a product to the customers at the price they expect. Strandbags had no further or specific policies or plans in place to ensure compliance with the FTA.

[82] Strandbags was not clear on the law concerning the length of the period for which products could be discounted. That is an issue that Ms McDonald KC has raised with me today.

[83] On 7 December 2020, the Commission sent Strandbags an urgent "stop now letter" advising that the Commission would be prosecuting Strandbags.

[84] Strandbags has no prior convictions. It was warned by the Commission twice in 2009 for pricing misrepresentations. Ms McDonald has submitted in written and oral submissions that these warnings in 2009 were for different matters. I accept that.

[85] In 2017 the Commission published an open letter to New Zealand retailers providing guidance on product pricing conduct. It warned them it would take enforcement action against retailers breaching the law. Strandbags received that letter.

[86] The open letter advised retailers that pricing and discounting practices was a current focus area for the Commission. It referred to the decision of *Commerce Commission v Bike Retail Group Ltd* in relation to misleading discounts, sales, and

price promotions, concerning pricing practices including continual promotional pricing and was/now discounts.[1] Retailers were warned about offering items at a lower price when in reality those items have never been sold or do not normally sell at the price advertised as the previous price.

Submissions on sentence.

[87] I now move on to the sentencing submissions and begin with those of the Commission. The practices by Strandbags, the Commission submits, were calculated to create the illusion of value to consumers by inflating the sense of savings that a consumer would be making when purchasing a product. The Commission submits that the practice permeated Strandbags' entire business model, all at the direction of senior management. It urges me to impose a deterrent penalty. In its words, the penalty "must serve as more than a licence fee for such behaviour".[2]

[88] The Commission submits a starting point towards the top end of a range between $1.3 million and $1.5 million, with a discount of 25 per cent for guilty pleas and a discount of up to 10 per cent for Strandbags' cooperation with the Commission's investigation and its lack of previous convictions.

[89] The Commission invites me to consider the statutory and regulatory contexts of the FTA, which is consumer protection legislation. One of its purposes is to contribute to a trading environment in which the interests of consumers are protected and in which consumers and businesses can participate confidently.

[90] One of the key provisions is s 10 of the FTA which prohibits any person in trade from engaging in conduct liable to mislead the public as to the price of the goods. The Commission refers to the change in legislation in 2014 when the penalty, a maximum fine of $200,000, was increased to $600,000. The Commission submits that this was a deliberate policy to align the FTA regime more closely with that in Australia, which has substantially greater penalties. This was noted in *Commerce Commission v Steel & Tube Holdings Ltd*.[3]

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[1] *Commerce Commission v Bike Retail Group Ltd* [2017] NZDC 2670 ("*Bike Barn*").
[2] Commerce Commission submissions dated 27 October 2022, para 1.2.
[3] *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549.

[91] We have had some discussion today about the meaning of the phrase "the need to more closely align the regime with that in Australia" particularly after the Court of Appeal in *Steel & Tube* found that such need to align was not because the previous fine regime was not working. In other words, it was not a case of Parliament's saying, "Things are not working so we need to increase the deterrent factor by tripling the penalty."

[92] Nonetheless, Australia does have significantly greater penalties. The increase was indeed to align New Zealand with Australia. I agree that an inference can be drawn that it is important that deterrent fines reflect the need to protect the consumer and ensure compliance with the FTA and that one way to achieve this is to increase the maximum penalty.

[93] I move on to s 40 of the FTA. Both the Commission and Strandbags in very helpful written submissions discuss the application of s 40(2) of the FTA and both agree it does not apply in the current case.

[94] Section 40 provides as follows:

> **40 Contraventions of provisions of Parts 1 to 4A an offence**
>
> (1) Every person who contravenes a provision of Part 1 (except sections 9, 14(2), 23, or 24), Part 3, or Part 4 commits an offence and is liable on conviction,—
>
> (a) in the case of an individual, to a fine not exceeding $200,000; and
>
> (b) in the case of a body corporate, to a fine not exceeding $600,000.
>
> (1A) Every person who contravenes section 24 commits an offence and is liable on conviction to a fine not exceeding $600,000.
>
> (1B) Every person who contravenes a provision of Part 2 or Part 4A commits an offence and is liable on conviction,—
>
> (a) in the case of an individual, to a fine not exceeding $10,000; and
>
> (b) in the case of a body corporate, to a fine not exceeding $30,000.

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

[95] As the Commission emphasises, the charge period spanned 18 months and . different offences were committed within those 18 months. The Commission submits that it would be inconsistent with the rationale behind s 40(2), given the purposes of the FTA for that subsection to apply. I agree: I am not barred from imposing a fine greater than $600,000 and that is what I will be doing today.

[96] The Commission emphasises deterrence and denouncement as the most important sentencing principles in this case. It argues that in the competitive market in which consumer shopping habits are heavily impacted and affected by time-limited sales and pricing promotions, the marketing techniques deployed by retailers must not mislead.

[97] It also submits that the need for deterrent penalties particularly in cases concerning large traders is well recognised for FTA offending. The Commission refers to *Commerce Commission v Auckland Academy of Learning Ltd* in which the District Court held:[4]

> A company does not have a conscience… In the vast majority of cases, the company exists as a device to make profit. There is nothing wrong with that. But in providing deterrence to a company, the main lever is a financial penalty at a level that will both deter the current defendant and others like it, from breaching their obligations. That approach is reflected in the high maximum penalties that are provided for breaches of the Fair Trading Act and as in seen in cases that have addressed breaches of those sections.

[98] The Court of Appeal in *Commerce Commission v Steel & Tube Holdings Ltd* held that "[i]n a commercial setting a penalty will sufficiently deter if it eliminates the offender's profit."[5]

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[4] *Commerce Commission v Auckland Academy of Learning Ltd* [2017] NZDC 27148, at [55].
[5] *Commerce Commission v Steel & Tube Holdings Ltd* above, n 3 at [100].

[99] The Court added:[6] "A wealthy defendant's means cannot be characterised as an aggravating factor in themselves. Rather, they may justify increasing a fine to ensure it serves its purpose." Quite clearly, large corporate entities falling foul of the law, particularly if the offending is wilful and deliberate, can expect to receive significant deterrent penalties.

[100] As the Commission submits and I accept, there is no tariff decision. The most helpful case in relation to fixing a starting point is, as the Commission submits, *Commerce Commission v Steel & Tube* because it identified a number of factors by which culpability can be measured and to which both the Commission and the defendant refer.[7] The starting point adopted in *Steel & Tube* of course represents the high watermark of such cases, with a fine of $1.56 million. In my view, the offending in the present case falls short of that.

[101] Nonetheless, as I have said, the *Steel & Tube* factors are important and both the Commission and Strandbags discuss them in their submissions. At this point, I consider it more useful to compare and contrast each set of submissions on the factors, rather than list the Commission's analysis of the factors then later list Strandbags' analysis.

***Steel & Tube* factors**

[102] The first factor is the **nature and use of the goods**. The Commission submits that Strandbags sold and continues to sell a variety of travel, business, and everyday bags as well as wallets and purses. Its six product categories comprise handbags, men's wallets, women's wallets, backpacks, business bags and luggage. These are standard discretionary consumer goods, but they are not produced frequently.

[103] It is difficult therefore for consumers to generate their own sense of the appropriate value of the products sold by Strandbags. People do not go into Strandbags every day of the week to purchase wallets, handbags or luggage, for example. They may purchase such items on a special occasion, perhaps as a gift for

[6] Above, n 3 at [103].
[7] See above, n.3.

somebody else or prior to travel or because the last item has become worn or damaged and they need a new one or they may walk past and see all the inviting discount sales and think, "Oh yes, I need a wallet."

[104] The Commission emphasises that 73 per cent of the SKUs on offer during the charge period and 80 per cent of the units sold were Strandbags' own brand of products. That makes a direct comparison to other products in the market more difficult. However, the Commission submits, and I agree, that this is only a mildly aggravating factor in the assessment of Strandbags' culpability in the present case.

[105] Defence counsel, on the other hand, describes the nature of the goods in the present case as akin to fashion purchases, generally within the purchasing ability of most consumers although there are of course high-end products sold by Strandbags as well. Strandbags distinguishes such items from goods that are important to consumers, for example a mobile phone. I would add that wallets, purses and umbrellas are probably important to consumers as well.

[106] However, Strandbags submits that such items are not important for safety reasons, which was one of the issues in *Steel & Tube* in which safety was clearly important to the consumers of such products. Strandbags' items are not important for energy efficiency and health, nor high value goods, it submits (although some of Strandbags products as I say are high value), or for a vulnerable group of consumers as in *Budget Loans Ltd v Commerce Commission*.[8]

[107] As her Honour Judge Jelaš noted in the case of the *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd,* vulnerable people are unwell and need to buy products because they are unwell.[9] Most people do not purchase Nurofen products because they are well. They may be purchased possibly for a rainy day or to complete a first aid or medical kit, but in many cases whānau go in or send someone into the store, supermarket or pharmacy to purchase the items because they or their whanau are not feeling well. That was the vulnerability that she emphasised, together with the need to have properly highlighted medical products.

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[8] *Budget Loans Ltd v Commerce Commission* [2018] NZHC 3442.
[9] *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd* [2017] DCR 431; [2017] NZDC 1956.

[108] Defence counsel therefore makes a distinction in both written and oral submissions between Strandbags' goods and those for vulnerable or unwell consumers or for health and safety in which case, the nature of the goods in the latter case is more likely to contribute to a higher fine. Ms McDonald KC submitted that clearly the Court of Appeal had those cases in mind. It said that its factors are not mandatory nor its list comprehensive, but it still mentioned the nature of the products.

[109] I accept defence counsel's submissions that there are differences in the nature and use of the goods in the different cases. In cases in which the nature and quality of the goods link to health, safety, vulnerability and similar issues, the Court is going to give that factor more of an emphasis than a generally discretionary accessory as in this case. Either way, the Court should consider the nature of the goods, either to assess it as an important factor in the calculation of the fine, or to say that it is a less significant factor in the determination of the fine.

[110] In short, in my view, the nature of the goods is important and should be considered in each case. In some cases, it will be a factor of greater importance than others. I find that it is less significant in this case than in *Steel & Tube* or *Reckitt Benckiser.*

[111] The next factor is **the nature of the representations, their importance and the extent of the falsity.** Turning to the importance of the representations, the Commission submits, rightly and logically in my view, that price is a key characteristic of consumer goods. It is likely to be a critical factor in many purchasing decisions. I accept that, as Strandbags argues, it is not the only factor. For some people it is not a factor at all, but the reality is that for most people, price is important. If one is looking for a good quality item and there is a significant discount offered, that is clearly attractive.

[112] The representations made, the Commerce Commission submits, were of central importance to consumers. I accept that the representations as to price in the present cases constitute a significant aggravating factor because the representations were central to the purchasing decisions.

[113] The Commission submits the representations were either outright false, for example the price inflation and immediate discounting, or misleading, which of course is the statutory standard that consumers were unaware that they were misled.

[114] The defence argue that apart from price inflation, the rest of the offending was not wilful and deliberate. It was at best careless. That is a point to which I will return when I consider the company's mind. I accept that representations as to price are important in this market. That is obvious.

[115] Turning to the extent of the falsity, the Commission strongly submits that the price inflation and immediate discounting involved "blatant and deliberate falsity." The defendant bridles at such words. Perhaps a more neutral description of the price inflation and immediate discounting as wilful and deliberate makes the same point.

[116] In respect of the extended and repeated discounting, the Commission acknowledges that it may sometimes be hard to draw that bright line mentioned in the summary of facts, but maintains that Strandbags' conduct went well over that line, whether it is a blurry or clear line.

[117] In oral submissions today, Mr Hunter KC submitted that by analogy, there is a prescription against driving badly, for example recklessly or dangerously, even at 40-50 kilometres per hour or 30 near a school, and if you are driving in such a manner at 100 it is clearly unreasonable. Even if there is no exact place where one draws the bright line, be it 30 or 50 kms ph, the bad driving at 100 kms ph is unreasonable.

[118] Ms McDonald provides a counter-example. What say there is no prescription because there is no guideline from the Court or legislation or the Commission about any bright line? The general requirement is simply to drive reasonably. Is driving at 100 kilometres per hour unreasonable? In my view, it might be, depending on the circumstances.

[119] She strongly argues that the price inflation and immediate discounting were more limited. The price inflation, which Strandbags acknowledges in its guilty plea and acceptance of the summary of facts, was clearly wilful and deliberate, lasted three

months. As for the other offending, she argues that while Strandbags has pleaded guilty, that does not mean that the other behaviour was anything more than careless, possibly even reckless.

[120] Furthermore, as was said repeatedly by the employees when interviewed, they believed they were acting in accordance with market practice. The repeated refrain was "Retail 101". In other words, Strandbags were not acting illegally in a calculated way. Price inflation was not a deliberate ploy to gouge the consumer. They thought that everyone was doing it, they should be able to do it, and there were not adequate guidelines.

[121] The Commission counters with the fact that in relation to the extended discounting, a majority of sample products were on sale more than 50 per cent of the time over many months. How, asks the Commission, could anyone possibly say they thought that was right? Certain categories of products were persistently on sale, in some cases more than 90 per cent of the time.

[122] There could be no other reason for doing so than to fool the customer into believing that these were deals. The customer did not realise the truth behind the extended or cumulative discounting, or even when the ticket was available (a very long time ago.) The customer was not told how long the "sales" had been going, how long the items had been at that price, and how much earlier the "higher price" had been displayed.

[123] The extent of the falsity was an important area of disagreement between the two parties. Some of the products, for example, the butterfly backpack and the Flylite Brock satchel, were on "sale" for a long time. The Commerce Commission says I should find that is very obviously wilful behaviour.

[124] Defence counsel argue that it cannot be. Before I can make any such a finding, there has to be proof or evidence or something from which I can draw the logical inference of wilfulness. I have to be careful, if I find that the price inflation and immediate discounting involved wilful behaviour, of leaping from that to the conclusion that all the behaviour was wilful, because that would be to forget that each

charge (although occurring at a similar time) needs to be viewed both in its fullness and in the complexity of this case.

[125] The next factor is **the extent, duration and systematic nature of the conduct**. There is no dispute that the time over which the charges span is 18 months. It is impermissible, Ms McDonald argues, to have regard to the conduct outside the charge period. The Commerce Commission argues, however, that behaviour outside the charge period provides insight into Strandbags' mind and its wilfulness. Ms McDonald submits that this "requires the Court to speculate, without evidence, as to the nature of that conduct."[10] I agree. I have made it very clear that I am looking simply at the behaviour inside the charge period.

[126] I accept that Strandbags' use of sale and promotional pricing was integral to its business model and how the company made its money. That is in the summary of facts.. It was at the heart of Strandbags' business model and the way it made profit.

[127] The next factor is the **dissemination** of the representations. The Commission submits that the misleading representations in all four ways were made across the 28 stores, on the website, and in emails to more than 230,000 subscribers. Strandbags counters by saying that it was less extensive than in *Bike Barn*[11], *Commerce Commission v Trustpower Ltd* and *Commerce Commission v Vodafone NZ Ltd* .[12] The time period in *Bike Barn* was 2 years whereas it was 18 months in the present case. There is not, in my view, a significant difference in time.

[128] There was some debate between counsel as to the nature of the disseminations. The dissemination in *Bike Barn*[13] was targeted, intense, pervasive, and prolonged. Here there was almost permanent advertising across Strandbags' stores, storefronts, on its websites and in its emails. There probably is little to distinguish them, except that there was a more traditional way of advertising in *Bike Barn* and a more modern

[10] Defence submissions, para 4.28.
[11] Above, n.1.
[12] *Commerce Commission v Trustpower Ltd* [2016] NZDC 18850; and *Commerce Commission v Vodafone NZ Ltd* [2022] NZDC 6695.
[13] Above, n.1.

use of technology by Strandbags. I accept the Commission's submissions that the misleading statements were widely disseminated.

[129] Turning to the cost and nature of dissemination, I accept that the use of online marketing and emails rather than print, simply reflects changing times. *Bike Barn* back in 2017 would have spent much more on promotion than Strandbags because online and email are cheap. As long as a company has an internet provider, possibly with an appropriate discount for usage, and an appropriate platform, it can drop thousands of emails to customers with their personalised names and a personal greeting in a way that is relatively cheap. Other than the cost, which has been greatly reduced by technology and its easy accessibility to the homes and phones of many more customers, I accept that there is little difference in the two cases.

[130] The next factor is **the company's state of mind**. There is no dispute that the decisions leading to the offending were made at the top. They were not made by rogue individuals or shop assistants or store or regional managers thinking that they would be clever and increase their profits by cutting corners. These were directions straight from head office.

[131] The Commission points to its two prior warnings to Strandbags in 2009, first, for pricing misrepresentation in relation to a half-price sale sign and secondly, in relation to misleading price allegations because it had increased the ticket price of a product prior to sale. As I have mentioned, I am persuaded by Ms McDonald's submissions that the details of each cases and the nature of the warning was different. However, the Commission's point is that this should have put Strandbags on notice that firstly, the Commission wads watching and secondly, it needed to have systems in place to ensure compliance.

[132] Then in 2017, the Commission published an open letter to retailers providing guidance as to pricing conduct and warning that it would take enforcement action. .. Ms McDonald is right that the letter to retailers in 2017 was couched in fairly broad terms, but it specifically referred to *Bike Barn*[14] so it should have been another warning.

[14] Above, n.1.

[133] As stated in the summary of facts, to which Strandbags pleaded guilty, the head office knew that the misrepresentative discounts were not genuine. The conduct can fairly be described, the Commission says, as wilful and the price inflation and the immediate discounting were "outright false."

[134] Strandbags' position is that the price inflation was deliberate, but the rest was careless because the company believed it was acting in accordance with market practice. Prior communications were not relevant because they were different. Strandbags intended to act lawfully and its failure to do so was careless rather than intentional. Ms McDonald defined wilful behaviour as acting with a specific intent to mislead or deceive in the relevant respect.

[135] Strandbags submits that it developed a price establishment policy to ensure that it was acting lawfully. It believed it was acting in accordance with market practice and asks me to ignore what it calls inflammatory language in the Commission's submissions. It argues that its practices were not calculated to create the illusion of value to consumers: there is no proof of that. Inferences, they argue, must be accurately arise from agreed facts and must meet the appropriate standard of proof which has not happened in this case.

[136] The Commerce Commission says that the immediate discounting involved clearly false representations as stated in the summary of facts.[15] The summary of facts also states that Strandbags knew that its broader conduct of repeated discounting represented discounts that were not genuine.

[137] The Commerce Commission strongly submits that the two incidents in 2009, the 2017 letter and the *Bike Barn* decision, to which the 2017 letter referred should have put the senior management of Strandbags on notice, and should have led them to to regularly check compliance. They could have established something like a committee to do so.

[138] The issue of state of mind is important in this case so I turn to the four types of behaviour that form the seven charges and make findings accordingly:

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[15] See para 5.11.

(a) Firstly, the price inflation was clearly deliberate and wilful.

(b) Secondly, with respect to the immediate discounting, Strandbags knew that the prices had not been changed when the advertising said that they had. I am driven to the conclusion that immediate discounting was also wilful and deliberate, not careless.

(c) The extended discounting is more difficult and both parties have acknowledged that. The 14 days on the ticket, discounting for a limited time, sometimes popping back into a ticket and then not, suggests that head office must have known this was misleading, they deliberately misled the customer, and they did so to obtain a benefit to be ahead of the other retailers and to induce their customers. I have a suspicion that is so. A suspicion is not enough. Ms McDonald is right that there is no evidence that when the extended discounting was being applied, the defendant deliberately acted against the FTA because it suited them, it gave them a profit and "everyone else is doing it so why can't we?".

The Court of Appeal held in *Steel & Tube*[16];

> The compliance failures were accordingly intentional, but as we have explained above offending should be considered "wilful" or "deliberate" when the offender acted with a specific intent to mislead or deceive in the relevant respect.

So, I am suspicious that Strandbags was doing this deliberately and was wilful, but there is not enough. That they were not following their own policy, and not taking the appropriate steps to make sure they were acting lawfully for both the extended discounting and the repeated and cumulative discounts is a matter of concern. They were at least careless and close to reckless in their offending behaviour.

To be reckless, of course, a defendant must recognise that there is real possibility that the consequence or outcome could occur and that,

[16] Above, n.3 at [115]

> having regard to that possibility, the defendant's actions were unreasonable, that is, there were actions that a reasonable and prudent person would not have taken. There is no doubt that the actions Strandbags took were unreasonable and impudent, motivated by profit and the desire to be ahead of the crowd, so to speak. Ms McDonald's submissions leave me uncertain as to what Strandbags recognised and turned its mind to. Carelessness with respect to one's consumers is still a matter relevant to sentence.

[139] I find that the price inflation and immediate discount were clearly deliberate and wilful. The behaviour reaches the same calculated level as in *Bike Barn*. I do not have sufficient information before me to draw the same conclusion for the extended discounting and the repeated/cumulative discounting. There was significant carelessness in both of those but there is not enough, in my view, to reach the standard of wilful and deliberate.

[140] So, when it comes to the minds of the defendant, I accept that the significant motivation was to make a profit. That is true for most retailers. There is nothing wrong with that. However, Strandbags was less concerned about its consumers, both their loyal customer base and new or brief customers than it should have been as a responsible sand FTA-conscious retailer. It was more interested in doing what it could to stave off rivals and to keep bringing customers to its door. That was its primary motivation and in doing so it indulged in illegal conduct, in some cases deliberately and in some carelessly.

[141] I accept that while Strandbags did not take steps immediately to rectify that, it has done that now because the Commission says there has been nothing that would warrant any concern in the last 16 months. Nonetheless Strandbags should have been more careful to ensure that what it was doing was coherent with market practice and must always have an eye to the FTA which is there to protect its consumers.

[142] The next factor is **compliance culture and systems.** There were none. After the 2009 warnings, even if different, and the 2017 letter, there could be few, if any, excuses for that. If is going to tout itself as being the largest handbag and travel retailer

in the southern hemisphere then as the Commission says, it should have systems in place to meet its legal obligations under the FTA. I agree that its behaviour fell well short of what is required by the Act. It did not even adhere to its own policy at times. At the same time, it has acknowledged that by pleading guilty.

[143] The next factor is **the impact on consumers and other traders**. There may be some arguments about the extent to which I can take on board research from other countries at other times and with different cultures and backgrounds, but it does not require rocket science to work out that this sort of behaviour adversely affects consumers and obtains an unfair advantage over competitors. The summary of facts, which, I remind myself, both sides accept, says as much.

[144] It gives rise to an unfair advantage over competitors who do not employ misleading practices around pricing discounts. In particular, it gives an unfair advantage to those who are complying with the FTA.

[145] Both parties disagree on customer reviews and how important they are. At the end of the day, consumers do not know what they do not know. Customers who did not know what was going on of course would give good reviews because the product is good. There is no dispute about the quality of Strandbags' products and that people are attracted because of the quality and variety. However, price is clearly an incentive. Strandbags and all retailers know that, otherwise they would not have discounts and sales and competitive prices. Price is clearly important. If you are not abiding by the FTA and utilising your discounts illegally to obtain an advantage, then of course whether you have done it wilfully, recklessly or carelessly, it will affect consumers, competitors and the market.

[146] Next is **the commercial gain or benefit**. I accept that it cannot be crisply and clearly quantified. It never can be in such cases. Strandbags did generate substantial revenue. The investigation by the Commission did show that discounted sales did give Strandbags a benefit. The summary of facts indicates that Strandbags itself thought that its discounting practices made a huge difference to its competitiveness. Indeed, that is why it utilised them. While there can be an argument about whether there is an

available inference that the promotions that are the subject of the charges materially increased its profits, logically, they must have.

[147] If you see a sign saying, "was $100, now $50", but it was never $100 and you do not know that, of course you think you are getting a benefit. Of course, if it was $100 seven months ago and then $70 and you come into the store for the first time and see $50, you are not in the position to know its history and you think you are getting a 50 per cent discount. Of course, there is an impact. Of course, there is commercial gain or benefit.

[148] The summary of facts records that Strandbags earned more revenue and overall profit when it advertised products at a discount. The use of sale and promotional pricing was integral to its business model. It is not a matter of inference. I accept the Commission's submission that breaching the FTA was integral to Strandbags profitability, even if in all cases it did not deliberately set out to so breach.

[149] The next issue is the need for a **deterrent sentence**. I accept that there is no evidence the conduct is widespread but if it is and other people are doing it too then, deterrence is even more important. Even if it is not widespread, I accept that the commercial benefit from the offending, together with the impact on consumers and on competition in general call for a deterrent sentence.

[150] In assisting me to fix the appropriate fine for sentence, both counsel refer me to other cases. Mr Hunter reminded me today, that s 8(e) of the Sentencing Act 2002 speaks of the general desirability of consistency. Even if cases can be distinguished on the facts or on *Steel & Tube* factors[17], consistency is still an important sentencing principle. The Commission says that the *Bike Barn* case is very similar. [18]It asks for an increase of the penalty in that case, because the $1.2 million starting point included charges that pre-dated the increase to the maximum penalty in June 2014.

[151] However, I note the following remark by his Honour Judge Sharp in *Bike Barn*[19]:

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[17] Above, n.3
[18] *Bike Barn*, above, n1.
[19] *Bike Barn*, above at [15].

> …I consider that a $1.2 million overall fine is not only consistent with the aggravating aspects of the offending but also consistent with other cases that are broadly similar in terms of **the level of fines that are now appropriate given the increases which have been made to the statutory maximum penalties**. This increase occurred during the period of the offending here. [Emphasis added]

[152] So, it is possible to read this paragraph as imposing $1.2 million in terms of the level of fines now appropriate. Alternatively, it is arguable that $1.2 million was less than he may have imposed because some of the charges were at the former level and indeed statutorily he would have to have considered a lesser penalty for those..

[153] The Commerce Commission also refers to *Reckitt Benckiser* with a starting point of $1.65 million which was higher than was advocated by counsel[20]. I accept this was a case where the false labels and advertising on the Nurofen was highly careless rather than deliberate, close to reckless. Half of the charges arose from a time prior to the increase, with a four-year charge period, and it was aggravated by the medical nature of the products. Her Honour specifically referred to that twice, once the nature of the products and secondly the vulnerable people who might buy them. That comes back to the point I made earlier about the nature of the goods.

[154] In between *Reckitt Benckiser* and *Bike Barn* is *Commerce Commission v The Market.com Ltd* which involved clearly wilful conduct.[21] The "daily deals" which were not daily at all, and the stock level indicated which routinely and automatically changed to show a reduction in stock available, were not accidental. This was deliberate conduct to cause "FOMO" moments for consumers. This was more of a scarcity issue or at least an engineered scarcity issue rather than a price issue, although the FOMO price clearly played a part and it happened over three and a half years.

[155] As in this case, the charges arose from the Commission's investigation after a complaint. The Commission notes that it involved a single website rather than a chain of retail stores plus a website. The Commission says that *Bike Barn* and *The Market.com* both involved calculated offending ,but also involved charges that arose from a period where the maximum penalty was only a third.

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[20] *Reckitt Benckiser* above, n 9.
[21] *Commerce Commission v The Market.com Ltd* [2022] NZDC 171017, (2022) 16 TCLR 436.

[156] If I take that into account and if I consider that all of the offending in this case was deliberate and wilful, and I have indicated of course that I do not, the Commission argues that a higher deterrent starting point than $1.2 million is required. It describes "egregious" offending, five years after *Bike Barn*, and five years after a letter from the Commission. It argues that Strandbags had an ability to be advised, either by its lawyers and/or the Commission. It is time that retailers got the message of *Bike Barn* that they cannot dupe their customers deliberately or they are so focussed on profit that they forget the FTA. A strong message needs to be sent out.

[157] So, because this offending is integral to its business model and its business full-stop, and because Strandbags accepts that its representations were not genuine, as per the summary of facts, the Commission submits that a penalty of between $1.3 and $1.5 million should be the starting point as a message to Strandbags and a message to all those other retailers who might argue:

(a) "Everyone else is doing it so why shouldn't we?"

(b) "I do not know where the bright line is because the Commerce Commission has not put it in my lap."

(c) "I am going to ostensibly comply with the FTA by saying that I have this normal price and then reducing it."

[158] A strong deterrent message is required, says the Commission.

[159] Strandbags says that its behaviour was bad as the Commerce Commission makes out. Not all of its the behaviour was wilful and deliberate. Some was careless as I have accepted. Strandbags should have known that the promotion was misleading, but as Ms McDonald says, there is no evidence to show that it intended to mislead in all cases. I suggested that "This is Retail 101" needs to be taken out of the Strandbags' syntax but Ms McDonald submits that it has learned its lesson now.

[160] As Ms McDonald submits, Strandbags is remorseful. It has pleaded guilty. It has no prior convictions. It is prepared to pay a substantial fine but that fine needs to

be reasonable. Mr Bisley, in submissions in support of Ms McDonald cautions me about blindly following *Bike Barn* and *The Market.com* especially as there are significant factual differences.

[161] In its written submissions, Strandbags reminds me that in *Vodafone* the Court held it was not possible to determine how many customers had signed up to FiberX because they were misled. [22] That applies here as well, it submits. Simply pointing to Strandbags' overall financial performance falls well short of demonstrating commercial gain beyond reasonable doubt.

[162] Furthermore, there are mitigating features. Strandbags had adopted a policy for re-establishing prices even though it was not always followed. It did believe it was acting in accordance with the market practice. A lack of clarity as to the point at which extended discounting becomes misleading was not available to it. It has co-operated with the Commission and pleaded guilty early.

[163] Strandbags argues that the starting point should be a fine of $850,000. That is more than the starting point imposed in *Commerce Commission v Contact Energy* which involved the sale of petrol to 5300 customers and described as moderately careless.[23] In this case I have found that two of the practices were wilful and two were significantly careless, so, there is more than moderate carelessness.

[164] Strandbags points to what it sees as the analogous case of *Commerce Commission v Fujitsu General New Zealand Ltd* which involved unsubstantiated and misleading representations made about the performance of heat pumps, over a longer period of time but with a similar degree of dissemination.[24] These were careless representations verging on wilfulness. The starting point was $480,000. Strandbags argues that heat pumps are a more valuable or significant consumer good.

[165] Strandbags argues that its suggested starting point is appropriately less than the $1.2 million starting point in the *Bike Barn* case, because that involved a very extensive and calculated, in other words, intentionally misleading advertising

[22] Above, n.11.
[23] *Commerce Commission v Contact Energy* [2020] NZDC 4415.
[24] *Commerce Commission v Fujitsu General New Zealand Ltd* [2018] DCR 200; [2017] NZDC 21512.

campaign, higher value goods, and directly misleading representations made despite three earlier warnings from the Commission.

[166] The most serious charges are those relating to immediate discounting. That is where the highest tariff should be. The next most serious charge is price inflation for that was for a very short time and a limited product range. The others, although continuing over 18 months, were less serious because their effect is less clear, they are "literally true" and there was no bright-line test. I am not a fan of the phrase "literally true", things are either true or false. I simply observe that in this case, they were not true, hence the charges and the guilty pleas.

[167] Ms McDonald and Mr Bisley say that *Reckitt Benckiser* involved more serious offending. Certainly, the nature of the goods, being health products and the vulnerability of the consumers elevated that factor in the consideration of penalty. However, health products and vulnerable victims will not always mean that the offending is more serious and a higher penalty should be set. It depends, as always on context. *Commerce Commission v Spark New Zealand Trading Ltd* is not particularly helpful and I agree it is quite different.[25]

Assessment of penalty.

[168] I take all of those things into account. The offending constitutes a mixture of wilful and very careless behaviour over a period of 18 months, which misled consumers and gave Strandbags a competitive advantage although that cannot be precisely quantified. In its desire for profit, Strandbags forgot its own policies already in place and it forgot to implement procedures to comply with the FTA. In today's corporate world, with in-house and/or Commission advice readily available and after warnings, albeit in relation to other matters, the open letter and the *Bike Bar*n case, that is inexcusable.

[169] *Bike Barn* did deal with some charges prior to the change in penalty, but it was intended to reflect current trends in sentencing. It remains relevant in my view. The key *Steel & Tube* factors, in my view, are the importance of the representations, the

[25] *Commerce Commission v Spark New Zealand Trading Ltd* [2019] NZDC 7801.

extent of their falsity, the duration of the offending, the dissemination, the company's state of mind which was a mixture of wilfulness and carelessness, the absence of a compliance culture and systems, and the impact on consumers and competitors of illegally securing a competitive advantage.

[170] There was widespread dissemination in *Bike Barn* but in my view Strandbags' advertising in store, on the outside of each store, and through advertising particularly online promotions and the wave of emails pouring into people's inboxes, means that the dissemination was in this case equally, if not more, widespread at a significantly lesser cost to the retailer through the effective use of modern technology. I take that into account.

[171] This is a case where I consider that the starting point should be that of $1.2 million in *Bike Barn*. The offending in that case was completely calculated and had the matter been dealt with today, the starting point in my view would have been higher. Factors which in my view mean the starting point must be considerably higher than $800,000 are that there was wilful behaviour in three of the seven charges, Strandbags breached its own policies, and there was an unacceptable absence of FTA-compliance systems and checks.

[172] In addition, while it is impossible to quantify the profits made from the illegalities, the fact is that Strandbags was making a sizeable profit and the dissemination of its illegality was significant, meaning that as a matter of logic, it contributed to that profit in a manner that could not be described as insignificant. There was a mixture of calculated wilful behaviour and careless behaviour. In my view therefore, a higher starting point for that mixture than *Bike Barn* would be inappropriate and unfair.

[173] In addition, given the need for deterrence, the nature of the offending, and the nature of Strandbags as a significant and financially stable retailer with a strong reputation, a wide range of products and commercial ability, I consider that the starting point of $1.2 million is appropriate.

[174] For Strandbags' co-operation and lack of prior offending, I provide a discount of ten per cent or $120,000. For the guilty pleas, a discount of twenty-five per cent is appropriate and that is $300,000. The total when I deduct those discounts is $780,000. That amount is above the maximum of $600,000 for each offence, but for the reasons already given, I do not consider myself bound by s 40(2) of the FTA.

[175] There are seven charges. The charges involving the most wilfulness and deliberate behaviour are CRNS 0981, 0979, and 0977. For CRNS 0981 and 0977, I impose a fine of $120,000 each. When it comes to CRN 0979, it lasted only three months, but it involved egregious conduct so in my view $110,000 is appropriate. For the other matters involving carelessness approaching recklessness, the fine is $107,500 for each of those four offences.

[176] Those all add up to the end sentence of $780,000 by way of fine.

C M Ryan
District Court Judge