Fair Trading Act Penalties Amendments: Worked examples

Purpose

1. This document sets out worked examples of how changes to the Fair Trading Act's penalties regime would apply to two hypothetical breaches of the Act. The facts of each case below are fictional and illustrative only.

Example 1: Misleading promotion in a single supermarket store

2. Supermarket A is a single large retail grocery store in Auckland. It runs a promotion on 500g blocks of butter where the promotional price displayed on the shelf is $6.00, a $2.50 discount on the product's usual retail price of $8.50.
3. However, the price charged to consumers at the checkout does not account for the promotion and consumers purchasing the product are charged the full $8.50. The store runs this promotion for six months and sells 250,000 blocks of butter at this price over this time. It realizes a commercial gain of $625,000 from this breach (250,000 blocks x $2.50).
4. The Commission files one charge against Supermarket A under section 13(g) of the Fair Trading Act for false and misleading pricing.

Maximum penalty under the current penalties regime

5. Under the Fair Trading Act currently, the court would be able to impose a maximum penalty of $600,000 and a criminal conviction for this breach.

Maximum penalty under the new penalties regime

6. Under the new penalties regime, the court would be able to impose a maximum civil penalty for false and misleading pricing of the greater of:
    a. $5 million; or
    b. Three times the value of commercial gain made or loss avoided; or
    c. The value of consideration for the transaction.
7. In this case, the maximum penalty available would be $5 million. This is because this amount is greater than:
    a. Three times' Supermarket A's commercial gain from the breach – which totals $1,875,000 ($625,000 x 3); or
    b. The value of consideration in the transaction – which totals $2,125,000 (250,000 blocks x $8.50).
8. The court would be able to set a penalty of up to $5 million in this case but would have discretion, based on the facts of this case, to set a penalty under this maximum level.

Example 2: Misleading pricing across a large-scale national supermarket chain

9. Foodmart is a national retail grocery chain with 150 stores across New Zealand. Foodmart sells a can of tinned tomatoes for $1.50 each but a pricing error means that consumers are charged $2.30 at the checkout – $0.80 more than they expect to pay. This pricing error occurs in all stores and persists for 12 months, impacting 15 million transactions over this period.

10. In this example, the Commission estimates that Foodmart makes a commercial gain of $12 million in total from this pricing error (15 million transactions x $0.80). The Commission files a charge against Foodmart under section 13(g) of the Fair Trading Act for false and misleading pricing.

Maximum penalty under the current penalties regime

11. Under the Fair Trading Act currently, the court would be able to impose a maximum penalty of $600,000 and a criminal conviction for this breach.

Maximum penalty under the new penalties regime

12. Under the new regime, the court would be able to impose a maximum civil penalty for false and misleading pricing of the greater of:

    a. $5 million; or

    b. Three times the value of commercial gain made or loss avoided; or

    c. The value of consideration for the transaction.

13. In this case, the maximum penalty available would be $36 million – three times' Foodmart's commercial gain of $12 million. This is because this amount is greater than:

    a. $5 million; or

    b. The value of consideration in the transaction – which in this example is $34.5 million (15 million transactions x $2.30).

14. The court would be able to set a penalty up to $36 million in this case but would have discretion, based on the facts of the case, to set a penalty under maximum level.