

**IN THE DISTRICT COURT  
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE  
KI TĀMAKI MAKĀURAU**

**CRI-2025-004-007547  
[2026] NZDC 10711**

**COMMERCE COMMISSION**

v

**CITYFITNESS GROUP LIMITED**

Hearing: 30 April 2026

Appearances: Mr Barry and Ms Kazmierow for the Prosecutor  
Mr Every-Palmer KC and Ms Fitzgibbon for the Defendant

Judgment: 5 June 2026

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**RESERVED SENTENCING NOTES OF JUDGE DAVID J CLARK**

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**Introduction**

[1] CityFitness Group Ltd (CityFitness) has pleaded guilty to eight representative charges brought under section 11 of the Fair Trading Act 1986 (FTA).<sup>1</sup> The charges relate to conduct of CityFitness between 21 December 2023 and 30 April 2025 (the charge period).

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<sup>1</sup> CityFitness was initially charged under s 13 of the FTA (false or misleading representations), with the s 11 (liable to mislead) charges laid in the alternative. The s 13 charges were withdrawn by leave.

[2] Each charge carries a maximum available penalty of \$600,000 under s 40(1)(b) of the FTA. This judgment deals with the sentencing of CityFitness on these charges.

[3] An agreed summary of facts is attached to this judgment, but I provide a brief summary of the background which led to the charges being laid.

### **Background**

[4] CityFitness was incorporated in 2000 and opened its first gym in 2002. It now operates as the largest gym business in New Zealand, across 60 plus individual gyms with approximately 225,000 members. It has an estimated 40 per cent share of the national gym membership market and its 2024 annual revenue exceeded \$106 million whilst its 2025 annual revenue exceeded \$120 million. It employs over 350 full time equivalent staff.

[5] CityFitness offers three membership tiers — Basic, Black, and Premium. As at 21 December 2023, the breakdown of that membership can be illustrated in the following chart:<sup>2</sup>

<b>Membership Type</b>	<b>Weekly Headline Price</b>	<b>Proportion of Memberships</b>
Basic	\$6.99	49 per cent
Black	\$13.99	43 per cent
Premium	\$16.99 (later increased to \$17.99 from 1 February 2024)	8 per cent

[6] Most of its members pay the membership weekly<sup>3</sup> with the balance opting to pay monthly, annually or through separate arrangements with CityFitness.

[7] The methods of payment of the membership fees vary. Between 21 December 2023 and 30 June 2024, most members (96.95 per cent) paid by direct debit with the

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<sup>2</sup> Adopted from Mr Barry's submissions.

<sup>3</sup> 77.3 per cent.

balance paying by credit card. However, of the new members who joined during the charge period, 27 per cent paid by credit or debit card, with the balance paying by direct debit. A total of 187,850 new members joined CityFitness during the charge period.

### *The transaction fee*

[8] In 2023, CityFitness reviewed its membership pricing and decided to introduce a three per cent fee across all membership types for new members who joined from 21 December 2023. The three per cent fee was described as a “transaction fee”. It applied on all payments which new members made, irrespective of the type of membership tier the new member had engaged with.

[9] Despite being titled a “transaction fee”, the fee was introduced to pass on increased business costs and was not directly related to the actual cost of processing payment transactions.<sup>4</sup> This meant the headline weekly prices advertised by CityFitness were not obtainable by new members, because the transaction fee was always added to the membership payments.

[10] The imposition of the transaction fee saw price increases across all membership tiers ranging from \$0.21 to \$0.54 per week.

[11] Existing members who had signed up prior to the charging period were also subjected to price increases. Their fees were raised by three per cent from 15 February 2024.

[12] Invoices were issued to new members which broke down the fee charges by the headline advertised membership tier fee plus the three per cent fee. The fee however was described in the invoice as “Payment Authority Fees”.

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<sup>4</sup> It is however accepted there is a cost incurred by CityFitness for the payments made by its members. The amount depends on the method of payment. During the charge period the cost varied if paid by a credit card but averaged around \$0.41 per transaction. For a direct debit the cost was fixed at \$0.05 per transaction.

*The Commission investigates*

[13] The Commerce Commission (the Commission) commenced its investigation in May 2024. It had received a series of complaints from members from January 2024.<sup>5</sup> The focus of the Commission's investigation was on whether the three per cent fee was a genuine "transaction fee", as well as whether the advertised headline weekly fee was unobtainable because of the transaction fee.

[14] CityFitness cooperated with the Commission throughout its investigation. A senior executive confirmed in interviews with the Commission that:

- (a) The decision to impose the transaction fee was done after a "year long process" where a review of its operating costs and inflation had impacted upon its business and how best to implement a membership price increase.
- (b) That CityFitness was "... looking not just to try and recoup the cost of credit card transactions but just looking at the overall cost of doing business over [the previous] 10 year period and looking to pass those costs on to members, but not the processing fee relating to credit cards".

[15] In interviews the following statements were recorded from the CityFitness senior executive:

... the 3% was just meant to be, our processes around it was how can we keep the cost as low as possible. We looked at increases to the headline price but from a marketing perspective going to \$7.21 just didn't seem to make sense. We didn't want to increase it as much to \$7.99 or even higher than we thought was fair and reasonable. So we just landed on the 3% [as] a way to account for the increased cost of doing business across the board and believe 3% after 10 years is fair and reasonable.

...

Existing members, it didn't matter because we're not prospecting for them. It was a 3% change, so they're paying \$6.99 now, it goes to \$7.21, happy days. But here we are, externally, we're promoting to new members, we wanted to retain \$6.99, marketing perspective but still having \$7.21 net yield through a separate identifiable fee.

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<sup>5</sup> 22 members laid a form of complaint between January 2024 to October 2024.

[16] The senior executive also confirmed “the 3% was not related to the cost of doing the transaction, it was just to pass on the minimal amount of increase to our members.”

### **Charges are Laid**

[17] As a result of its investigation, the Commission concluded CityFitness breached s 11 of the FTA<sup>6</sup> by engaging in conduct that was liable to mislead the public as to the nature or characteristics of services. Eight representative charges were laid, all within the charging period of 21 December 2023 through to 30 April 2025. Four charges related to what is described as the “unobtainable pricing representations”, and the other four related to what is described as the “transaction fee representations”.

#### *The unobtainable pricing representations*

[18] The Commission says that CityFitness made advertising representations during the charging period as to its headline membership pricing which were unobtainable because of the additional three per cent transaction fee.

[19] Following the introduction of the transaction fee, CityFitness advertising continued only to reference the headline membership fee without mentioning the transaction fee. An example was the CityFitness landing page of its website.<sup>7</sup> Other examples were on its different social media platforms such as Meta (Facebook, Instagram) and Google.<sup>8</sup>

[20] By May 2024 new advertising did disclose the transaction fee, but older advertising which did not remained in circulation. None of the advertisements however disclosed a single priced membership cost.<sup>9</sup>

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<sup>6</sup> Section 11 of the FTA provides in full:

**11 Misleading conduct in relation to services**

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

<sup>7</sup> At 5.2 of the Agreed Summary of Facts.

<sup>8</sup> Schedule 1.

<sup>9</sup> Schedule 2.

[21] Reference to the transaction fee was also unclear in CityFitness' advertising and/or during the process of joining as a member. Although the headline price was prominently displayed, the transaction fee was not. An example was the joining process, which referred to the transaction fee by way of an asterisk, then referred to in the fine print as a three per cent transaction fee applying to all transactions.<sup>10</sup>

[22] It was accepted by the Commission, however, that there is no evidence to suggest a new member would not have been aware of the transaction fee at the point that they would have signed up with CityFitness.

#### *The transaction fee representations*

[23] The second category of charges are the transaction fee representations, also labelled as "Payment Authority Fees". The Commission says the transaction fee was neither a transaction fee related to the membership, nor was it a Payment Authority Fee.

[24] Instead, as accepted by CityFitness itself, it was a fee to cover the increasing overhead costs which it had incurred in the past 10 years and not the actual cost of each individual transaction.

#### **Conduct of CityFitness from 1 May 2025**

[25] From 1 May 2025, for new members, CityFitness removed the three per cent fee, increased membership rates by \$1 and introduced a 2.2 per cent credit card surcharge for certain payments. As an example, the headline price for the weekly basic membership is now \$7.99 per month.

[26] There were no changes for members who joined before 21 December 2023 (who had already been subject to the three per cent increase in fees). For those who joined between 21 December 2023 and 1 May 2025, their weekly membership rates increased by three per cent, equivalent to their previous weekly rates, with the three per cent fee incorporated.

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<sup>10</sup> Schedule 3.

## Issues on Sentencing

[27] Notwithstanding the agreed summary of facts, significant differences arise over the start and end points on sentencing.

[28] For the Commission, Mr Barry submits the starting point should be between \$1.75 to \$2 million dollars. After appropriate discounting, that should be reduced by 35 per cent to a range between \$1.1375 to \$1.3 million. That range should then be increased by 20 per cent on grounds of financial capacity, in reliance on *Commerce Commission v Steel & Tube Holdings Ltd.*<sup>11</sup> This uplift is to ensure the fine “serves its purpose”,<sup>12</sup> which includes, the purposes of accountability, denunciation and deterrence.

[29] Mr Every-Palmer KC submits the starting and end points of the Commission are an overreach.

[30] Instead, he submits the starting point should be in the range of \$600,000 and \$700,000 and then, once the agreed global discount of 35 per cent is applied, the end sentence would be between \$390,000 to \$455,000. Furthermore, he submits an uplift for financial capacity is not justified in this case. Even if an uplift is to be applied, it should be well below the 20 per cent sought by the Commission.

[31] The stark difference in starting points arises because of the differing views over CityFitness’ conduct leading up to the imposition of the transaction fee and throughout the charge period as to when the transaction fee was removed.

[32] The Commission says the conduct of CityFitness in relation to the unobtainable pricing representations was highly careless moving to reckless when CityFitness failed to immediately respond to the Commission’s concerns in July 2024. In relation to the transaction fee representations, the Commission says the conduct was deliberate, deceitful and intentional. This led to the pricing having an adverse impact on its

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<sup>11</sup> *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549, (2020) 15 TCLR 743 [*Steel & Tube*].

<sup>12</sup> At [103].

members, in that its members were deceived into thinking (initially at least) the pricing of the membership would be the headline price, which was in fact never obtainable.

[33] In contrast, Mr Every Palmer KC submits any assessment of the state of mind of CityFitness executives as to the pricing decisions to deliberately deceive its members cannot be determined from the agreed summary of facts, or reasonably be inferred from the summary. In simple terms there is no evidential foundation which supports such findings. The only evidence available is a clear admission CityFitness was concerned about inflationary pressures on its costs, and that no cost increases had been made in 10 years. That position needed to be balanced against the desire to maintain low costs in the market.

[34] The result was a “well intentioned” yet “flawed” process of increasing its pricing through the transaction fee, which it has accepted was liable to mislead customers. However, in accepting this position, it did not accept (and continues not to accept) it engaged in conduct, which was misleading and deceptive conduct, which led to the s 13 FTA charges being withdrawn. In relation to these charges, it also refutes it ever acted dishonestly.

[35] Based on the above brief summaries of the arguments (I return in more detail to the arguments below) the issues to be determined are:

- (a) Was the conduct of CityFitness careless and/or reckless and/or deliberate and wilful?
- (b) Based on the finding of the type of conduct, what is the appropriate starting point based on sentencing principles?
- (c) What discounts (in terms of percentages) is CityFitness entitled to?
- (d) Is an uplift justified on financial capacity grounds? If so, to what level?

## Sentencing Principles

[36] Before I consider the parties' arguments in more detail, I turn to consider the relevant sentencing principles.<sup>13</sup> The following points can be taken from the authorities:

- (a) "Customary sentencing methodology applies"<sup>14</sup> beginning with a consideration of the purposes of the FTA as set out in s 1A. In short, the FTA seeks to contribute towards a trading environment where consumers are protected, where businesses can compete effectively, and both consumers and businesses can participate confidently.<sup>15</sup>
- (b) To achieve these purposes the FTA (in these circumstances) prohibits unfair conduct and ensures full disclosure of consumer information in relation to the services which are provided.<sup>16</sup>
- (c) Relevant to the enforcement of the objectives and purposes set out in s 1A of the FTA are the purposes and principles of the Sentencing Act 2002 (SA). A key aspect of the SA principles is the denunciation and deterrence of the proven offences which are before the Court.<sup>17</sup>
- (d) Sentencing for offending under the FTA does not proceed by the application of rigid bands, mechanical formulas or tariffs. Instead, the Court starts at a point within the statutory cap by assessing the overall seriousness of the conduct, and whether such conduct was careless, reckless, and/or deliberate.

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<sup>13</sup> Counsel are broadly in agreement with these principles.

<sup>14</sup> *Steel & Tube*, above n 11, at [91].

<sup>15</sup> Fair Trading Act 1986, s 1A(1).

<sup>16</sup> Section 1A(2).

<sup>17</sup> See for example *Commerce Commission v Auckland Academy of Learning Ltd* [2017] NZDC 27148 at [54]-[55]; *Commerce Commission v Jetstar Airways Pty Limited* [2025] NZDC 18366 at [29]; and *Commerce Commission New Zealand v HelloFresh New Zealand Limited* [2025] NZDC 25736 at [34].

- (e) In making this assessment, the Court will consider factors such as:<sup>18</sup> the nature of the goods or services provided; whether the offending was isolated or systemic; the importance, falsity and dissemination of the untrue statement(s); the magnitude and duration of the misrepresentation; the state of mind of any servants or agents whose conduct is attributed to the defendant, and 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.<sup>19</sup>
- (f) The Court then considers matters personal to the offender, such as prior history, guilty pleas, cooperation, remediation, future compliance steps, and financial circumstances.<sup>20</sup>
- (g) Where s 11 FTA offending has occurred, especially by large corporates, the need for deterrence is a key consideration.<sup>21</sup> In providing deterrence to a company, the main level is a financial penalty. The fine which is imposed should reflect a financial penalty which deters future conduct of the offender and others who may offend in similar circumstances and should undermine any profitability of the offending (otherwise it could be regarded as a modest license fee to offend or as the cost of doing business).<sup>22</sup>
- (h) In multiple-charge cases, where there are similar misleading fee pricing representations, the Court may adopt a global approach and ask whether the conduct is really one course of conduct, several distinct episodes, or separate categories of wrongdoing. The choice affects whether the

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<sup>18</sup> These factors are of course not a prescriptive list.

<sup>19</sup> *Steel & Tube*, above n 11, at [91]; and *Commerce Commission v NZME Advisory Ltd* [2023] NZHC 3425.

<sup>20</sup> *Steel & Tube*, above n 11, at [92].

<sup>21</sup> *Commerce Commission v Go Healthy New Zealand Ltd v GO Healthy New Zealand Ltd* [2019] DCR 312 (DC) at [30]; and *Commerce Commission v Vodafone New Zealand Ltd* [2023] NZCCLR 30 (HC).

<sup>22</sup> *Commerce Commission v Auckland Academy of Learning Ltd*, above n 17, at [54]-[55]; *Commerce Commission v Jetstar Airways Pty Limited*, above n 17, at [29]; and *Commerce Commission New Zealand v HelloFresh New Zealand Limited*, above n 17, at [34].

Court adopts a single global starting point, separate starting points for different groups of charges, or nominal per-charge starting points later reconciled through totality. The Court must, however, avoid a cumulative result that is disproportionate to the overall wrongdoing.

- (i) Whilst comparable authorities may be of assistance and provide some guidance in terms of penalties, any such reliance requires caution. Earlier cases must be viewed in light of statutory change, inflation, the need for consistency and a general change in sentencing policies where increased levels of fines are being imposed.<sup>23</sup>
- (j) Ultimately the sentencing exercise is an evaluative judgment of all of the factors set out above based on the particular circumstances of the case.

## **The Arguments**

### *The Commission*

[37] Mr Barry’s submissions address seven factors which he describes as “key culpability factors”. Each of these aggravating factors are relevant to the Commission’s position that CityFitness’ conduct in relation to the unobtainable price representations were highly careless moving to reckless, whilst for the transaction fee representations were deliberate and intentional. The culpability factors are: the scale of offending; falsity of representations and extent of departure from the truth; importance of representations; state of mind; seniority of employees; delay in taking corrective action; and harm and commercial gain.

[38] I summarise the arguments in relation to each of the factors as follows:<sup>24</sup>

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<sup>23</sup> *Commerce Commission v NZME Advisory Limited*, above n 19, at [35]–[36]; *Commerce Commission v Vodafone New Zealand Ltd*, above n 21, at [279]; *Commerce Commission v Milkio Foods Ltd* [2024] DCR 431 (DC) at [47] [*Milkio Foods*]; *Commerce Commission v Beau Ideal Limited* [2024] NZDC 29578 at [92]–[94]; *Commerce Commission v Two Degrees Mobile Limited* [2025] DCR 38 (DC) at [35]; *Commerce Commission v Bed Bath and Beyond* [2024] NZDC 32079 at [62]; *Commerce Commission v Now Trading Limited* [2025] DCR 337 (DC) at [13]–[16]; *Commerce Commission v The Warehouse Limited* [2026] NZDC 5776 at [48].

<sup>24</sup> I have summarised the conduct predominately collectively, although Mr Barry’s submissions

### *Scale of offending*

- (a) The offending was significant due to the sustained nature and length of the charging period, the type of advertising used<sup>25</sup> as well as the number of customers who were affected. The offending period lasted for 16 months, and even though 187,850 new members signed up during this period, the impact of the advertising on all potential customers cannot just be limited to those customers who did sign up. Advertising appeared across digital and social media and generated 15 million impressions, two million unique views, and 70,000 clicks in a typical month.
- (b) Customers were affected throughout the “journey” of signing up, drawn in by the low headline prices. The transaction fee was either not disclosed or inadequately disclosed given the full membership price was never shown as a single total dollar amount, and invoices continued to present the fee separately as “Payment Authority Fees.”

### *Falsity of representations*

- (c) The Commission says the advertised weekly headline prices were not only misleading but were false. This is because the prices could never be obtained given the unavoidable transaction fee would always apply. Also the fee was not incorporated into, or displayed as, a single total price. Furthermore, the Commission says the “transaction fee” label was wholly false because of CityFitness’ admission the fee was not tied to transaction processing costs but was instead intended to pass on increased operating costs and preserve headline prices that looked more attractive from a marketing perspective.

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analysed the conduct both collectively and individually in relation to the two separate charging categories.

<sup>25</sup> Mr Barry described it as “bait advertising” a “deceptive” marketing device designed to attract customers by advertising low pricing initially only for that pricing to increase at the point sale: see *Commerce Commission v Ticketek New Zealand Ltd* [2007] DCR 910 (DC) at [54]-[55].

### *Importance of representations*

- (d) The representations concerned price, which the Commission argues is a central component to consumer decision-making.

### *State of mind*

- (e) The Commission submits the conduct which led to the setting of the unobtainable price representations was initially highly careless, and became reckless once CityFitness was put on notice of the Commission's concerns in July 2024 but continued the conduct. By contrast, it says the transaction fee representations were deliberate and intentional because the three per cent fee labelled as a "transaction fee/Payment Authority Fee" was developed through a year-long senior management process and chosen in a way that conveyed a false impression while attempting to preserve a marketing advantage.

### *Seniority of employees*

- (f) The decision to impose the transaction fee was developed and undertaken by senior employees and then approved by the Chief Financial Officer and Chief Operating Officer. It was not conduct which was isolated and undertaken by lower-level staff. Again then, the conduct was deliberate and intentional.

### *Delay in taking corrective action*

- (g) The Commission also argues CityFitness delayed in taking corrective action. CityFitness was notified on 12 July 2024 that it was being investigated but it continued to advertise the unobtainable price and transaction fee until approximately March 2025, only removing the transaction fee from advertising on 1 May 2025. Mr Barry says this failure moved CityFitness' conduct from highly careless to reckless.

### *Harm and commercial gain*

- (h) The Commission says the conduct gave CityFitness a competitive advantage by advertising lower prices which were never obtainable which deprived consumers of a fully informed choice and concealed the true nature of the fee. It says the imposition of the fee was not a case of being a hidden fee but one of a deceptive fee. This is because even when there was disclosure a transaction fee was being imposed, customers were still being misled about the true nature of the fee.
- (i) The Commission also emphasises CityFitness did not refund members who paid the transaction fee and retained the benefit of the offending. It says CityFitness confirmed 125,214 customers paid the fee, generating \$1,592,714 in revenue<sup>26</sup> during the charge period. Any penalty then (as a deterrent) should at least eliminate the illegitimate gain which has occurred. Mr Barry submits this refusal to refund is conduct which moves the position from highly careless to reckless.

### *CityFitness*

[39] Mr Every-Palmer's submissions were helpfully supported by a brief synopsis which formed the basis of his argument during the hearing.

[40] Addressing the culpability factors identified by the Commission, his main submission is there is no evidence which supports any finding that CityFitness acted highly carelessly, recklessly, deliberately or dishonestly.

[41] The only deliberate action of CityFitness was its concern over inflationary pressures and that no increases in the memberships had been made for 10 years to cover the operational cost increases. It also wanted to maintain a headline fee which reflected a fee which was "\$X.99" for marketing purposes. CityFitness felt \$7.99 was an increase which was too high in the circumstances and a straight three per cent increased headline fee would look unusual.

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<sup>26</sup> The Commission accepts this is not a gross profit amount.

[42] To meet these concerns CityFitness made the decision to increase its membership fees through the transaction fee which would be addition to the original headline price. While CityFitness accepts this conduct was misleading, and in breach of s 11 of the FTA, it was done in good faith, but somewhat naively rather than dishonestly with the intention to deceive. At worst, the conduct could be described as careless.

[43] Mr Every-Palmer also points out what he describes are the “unusual” aspects of this case. They include:

- (a) The decision to charge only the three per cent fee deprived CityFitness of income when, had they immediately increased the fee to \$7.99 from the outset, they would have received a far greater income than what they did during the charging period. Somewhat ironically, the \$7.99 fee has not impacted the rate of sign up which has occurred since the charging period.<sup>27</sup>
- (b) New members were still prepared to sign up even when they knew a three per cent transaction fee was going to be charged. It follows then there is no evidence of “harm”, nor evidence of any members being actively misled. Any harm would have been transitory because the three per cent fee was prominent by the time of sign up.
- (c) Not all advertising referred to the transaction fee, such as the website landing page and some digital advertising.

[44] Mr Every-Palmer is also critical of the Commission’s labelling of CityFitness’ conduct when it submits there is no evidence to do so.

[45] Words such as “lied”, “ongoing dishonesty”, “[c]alculated and cynical”, “lured” customers, and “[falsity] at the highest level” are all recorded throughout Mr Barry’s submissions. None of the express admissions made by the CityFitness employees justify the description and labelling of the conduct in the manner expressed,

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<sup>27</sup> Affidavit of Holly Trowland dated 26 February 2026.

yet it is done to allege CityFitness intended to deceive. The Commission must discharge the criminal burden<sup>28</sup> to establish such evidence does exist to reach the threshold of deceptive conduct having occurred. It is submitted the Commission has failed to do so. The labelling of the conduct by using the words it has does not change the actual conduct which has occurred.

[46] Mr Every-Palmer also disputes that CityFitness' conduct moved to a level which could be considered "reckless" during the charging period. Concerns were raised by the Commission in July 2024 and CityFitness willingly engaged with the investigation. It did so because it believed it had always acted in good faith and did not believe any customers had suffered any losses.

[47] During the investigation CityFitness accepted its conduct did mislead customers but any allegations of delay in reaching this point are rejected. This is because it was entitled to undertake its own investigation, and to receive advice. It rejects any express criticism now of its conduct during the charging period for these reasons but also because the Commission is fully aware of other details relating to its (extensive) engagement with the Commission during the investigation which are not before the Court.

### **Discussion**

[48] As a starting point I agree with counsel that the treatment of the charges should be done on a global basis, adjusted in the end for totality. To do so I return to the issues set out above.

*Was the conduct of CityFitness careless and/or reckless and/or deliberate and wilful?*

[49] In terms of the falsity and importance of the representations, the seniority of employees and state of mind factors, there is sufficient evidence in my view – based on the transcripts of the interviews – to conclude deliberate decisions were made by senior executives to increase the membership fees in order to cover the increasing operating costs CityFitness had been incurring for several years. These operating costs

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<sup>28</sup> Sentencing Act 2002, s 24; and *Milkie Foods*, above n 23, at [21].

were internal costs it was incurring in terms of running its business as opposed to external costs imposed on CityFitness by others.

[50] Whilst there cannot be any criticism of CityFitness increasing its membership fees to cover these costs, it is the manner in which it did so which causes concerns as far as s 11 FTA conduct is concerned. Instead of simply increasing its headline fees, which would have included an operating cost component, CityFitness created a mechanism to achieve this increase through the transaction fee. However, by doing so, this effectively disguised the fee increase as something it was not.

[51] The evidence from the senior employee(s) confirmed CityFitness did not want to have a fee which reflected a straight increase of three per cent because it would be an unusual figure. At the same time, it did not want to lift the fee to \$7.99 per week because that could be perceived as an unjustified increase. However, in choosing to label the fee as a transaction fee to achieve the price increase, CityFitness made deliberate and intentional decisions which had the effect of misleading potential members in terms of what they would be paying as a membership fee.

[52] In reaching this finding I reject CityFitness' submission that the creation of the transaction fee and its implementation was simply "flawed", or that it came from "genuine mistakes". Such submissions suggest naivety on the part of CityFitness, where the consequences of what was being created were not fully considered. In my view the opposite has occurred. CityFitness needed an increase to cover the increasing operating costs but rather than fully disclosing this to its members, it chose to achieve this through a mechanism which was patently false in terms of its true purposes.<sup>29</sup>

[53] I reach these conclusions by also accepting the Commission's submissions that to get to the point where the transaction fee was imposed followed a lengthy process was not "one-off" or otherwise hasty decision made by lower-level employees.

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<sup>29</sup> I am guided by the approach in *Commerce Commission v Air New Zealand Ltd* [2006] DCR 90, (2005) 11 TCLR 478 (DC) [*Air New Zealand*] at [31], where Judge Thorburn stated:

"It is my conclusion that in principle a headline price that does not include an external expense would not be false. On the other hand a headline price that does not include an operating (internal) expense and seeks to separate it out is likely to be false on the "untrue, erroneous and incorrect" test."

Instead, the evidence of “senior employee(s)”<sup>30</sup> was that the matter was considered over a year and then approved by the Chief Operating Officer and Chief Financial Officer of CityFitness. Clearly then the decision to use the labels of “transaction fee” and “Payment Authority Fee” were approved at the highest levels where the concerns were more focused on marketing and competition outcomes, rather than protecting consumers by making full and frank disclosures as to why membership fees needed to be increased.

[54] In terms of the scale of the offending, to some extent this can be quantified by the 187,850 members who joined during the charging period, and the 125,214 members who actually paid the transaction fee. The Commission argues these numbers do not truly capture the scale given the wide dissemination of the digital advertising and social media interaction which occurred.<sup>31</sup> In other words, many in the public domain may have been impacted by the misleading representations other than those people who did sign up.

[55] My view of these numbers, actual or estimated, is that the scale is significant. It is clear the advertising reached well beyond those members who did join. I accept then the scale of the advertising is an aggravating feature.

[56] Finally, I turn to the delay in taking corrective action and the harm and commercial gain. Whilst the charging period was 16 months, CityFitness was not informed of the Commission’s interest in the transaction fee until July 2024. The Commission submits CityFitness failed to do anything about the transaction fee until April 2025, some nine months later. This included CityFitness failing to change the advertising and/or making refunds to its members.

[57] By May 2025, CityFitness had changed its advertising but had failed to make any refunds and continues to refuse to do so. It does so on the basis it was always acting in good faith and the income it did receive was income it would have received if it had simply raised the membership fee to \$7.99. Indeed, it says somewhat

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<sup>30</sup> For privacy purposes the actual status of the employees was not disclosed to the Court other than the fact they were “senior”.

<sup>31</sup> See above at para [37(a)].

ironically it is now receiving more income because it has had to raise the fee higher than it originally intended. Furthermore, it questions whether any real harm has been caused.

[58] Mr Every-Palmer says there is no evidence which proves any member has suffered any harm. He submits what perhaps can be inferred is that during the sign-up journey, when members became aware a transaction fee was going to be charged, they knew and decided to join anyway. That conduct does not suggest any harm at all but a deliberate decision to join irrespective of the transaction fee.

[59] While I accept many members did join during the charging period, I do not consider these numbers reflect or equate to a position no harm was caused. I reach this conclusion for two reasons.

[60] First, a member would have been attracted to the headline price. It was late in the piece before they became aware the headline price was not the only price they would be paying. To get to that point they were misled when they should not have been.

[61] Second, members who did sign up paid a membership fee different to what was advertised. Even though they are paying a higher price now, they should have been told that from the outset. As a result, the higher price, even if on an individual basis may not have been overly significant, still amounts to harm.

[62] In summary then, in assessing all of the culpability factors, I agree with the Commission that the conduct, in relation to the unobtained price representations, was highly careless moving to reckless. In relation to the transaction fee representations, I also agree the decisions which were made were deliberate, intentional and wilful.

[63] CityFitness understood what it was doing by imposing the transaction fee in the manner that it did. It was no accident the transaction fee was imposed. CityFitness disregarded the rights and interests of potential members in preference to looking after its own commercial interests. A falsehood was created to do this. CityFitness needed

to incorporate the increased costs into one headline membership price and not attempt to do it by referencing a non-existent transaction fee through an asterisk.

*Based on the finding of the type of conduct, what is the appropriate starting point based on sentencing principles?*

[64] I turn to the starting point. Clearly, given my findings above, a higher starting point than that suggested by CityFitness is justified.

[65] Although the authorities emphasise each case is determined on its own merits, comparator cases are a useful start, and also provide consistency and transparency in sentencing.<sup>32</sup>

[66] Both Mr Barry and Mr Every-Palmer submit the *Commerce Commission v Air New Zealand Ltd* case is a close factual comparator, although almost 20 years has now elapsed, and the Court was dealing at the time with a penalty cap of \$100,000 per charge.<sup>33</sup>

[67] Nonetheless, Mr Barry submits both *Air New Zealand* and this case involve fees for internal costs that were not included in the headline price, resulting in findings of falsity; both involve widely disseminated representations through advertising campaigns leading to a significant number of consumers being impacted by the conduct; and both disclose the full price to customers only close to or at the point of sale.

[68] Mr Barry submits however certain aggravating features are present in this case which were absent in *Air New Zealand*. This includes the involvement of senior employees and management in the implement of the transaction fee; the finding by the Court that *Air New Zealand* failed to “fairly disclose”, rather than a “failure to disclose” at all.<sup>34</sup> Accordingly, Mr Barry submits these factors make CityFitness’ conduct more serious than *Air New Zealand*’s.

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<sup>32</sup> *Commerce Commission v HelloFresh New Zealand Limited*, above n 17, at [74].

<sup>33</sup> *Air New Zealand*, above n 29.

<sup>34</sup> *Air New Zealand*’s advertising disclosed the existence of the additional fees whereas some of CityFitness advertising made no mention of the transaction fee and at no stage was it ever incorporated into the weekly fee.

[69] Mr Every-Palmer rejects the Commission’s analysis leading to the result that CityFitness conduct is more serious than Air New Zealand’s. He suggests the Commission’s analysis ignores the “time and effort” which was required as a result of Air New Zealand’s advertising for consumers to understand what exactly they were being charged for. In contrast, the transaction fee was clearly revealed to customers before the point of sale, and many customers still chose to sign up. He says then the Commission has failed to analyse the “actual nature of the harm caused to consumers”, and questions what harm has actually occurred here.

[70] Both counsel, notwithstanding the factual similarities with *Air New Zealand*, accept it might have limited value in this context. They then, unsurprisingly, and for differing reasons look to more recent authorities for guidance, with Mr Barry relying on those authorities with higher starting points and Mr Every-Palmer on lower starting points.

[71] Mr Barry submits the cases of *Commerce Commission v Jetstar Airways Pty Limited* and *Commerce Commission v Kiwibank Ltd* are comparable cases based on the seriousness of the conduct,<sup>35</sup> although he accepts the nature of the conduct in these cases is different from the present case. He suggests, however, based on the assessment of the seriousness of offending in these cases, if *Air New Zealand* was determined today, the starting points adopted in these cases<sup>36</sup> would be applied. Both these cases involved several aggravating features.

[72] In *Jetstar* the offending period was over two years, with the Court finding Jetstar had acted recklessly as its own materials and documents – including its call centre agents failed to properly respond to compensation requests for cancelled flights.

[73] In *Kiwibank* although the conduct (making misleading representations to its customers about their rights under loan agreements) was only found to be careless and not deliberate or wilfully misleading of its customers, the Court held a higher starting point was justified based on the duration of the offending,<sup>37</sup> the number of customers

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<sup>35</sup> *Commerce Commission v Jetstar Airways Pty Limited*, above n 17; and *Commerce Commission v Kiwibank Ltd* [2024] DCR 832 (DC) [*Kiwibank*].

<sup>36</sup> \$2.5 million and \$2.3 million respectively.

<sup>37</sup> 15 years, although not all offending came within the statutory limitation period.

impacted and the extent of the financial harm caused,<sup>38</sup> and the number of systemic issues that were involved,<sup>39</sup>

[74] Mr Barry also relies on *Commerce Commission v Milkio Foods Ltd*<sup>40</sup> as a case which he submits has similar factual features but where the offending was on a smaller scale.<sup>41</sup> The starting point was \$700,000 notwithstanding the smaller scale involved in the offending.

[75] Mr Every-Palmer submits the following recent cases are relevant comparator cases: *Milkio Foods*, which is similar in nature but more serious than the present case;<sup>42</sup> *Commerce Commission v Strandbags Proprietary Ltd*, which again he considers to be more serious;<sup>43</sup> *Commerce Commission v Two Degrees Mobile Limited* which he considers CityFitness' conduct to be moderately more serious than;<sup>44</sup> and *Commerce Commission v HelloFresh* which he submits Cityfitness' conduct was far less serious than.<sup>45</sup> The range of starting points for these cases was between \$500,000 to \$1.3 million.

[76] In my view, to get to the appropriate starting point I return to CityFitness' senior management decision to address increasing costs through the transaction fee. As I have said, it was a deliberate and intentional decision. As the Court of Appeal said in *Steel & Tube*.<sup>46</sup>

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

[77] The decision to impose the transaction fee was clearly wilful and deliberate. There was an intent by CityFitness to mislead or deceive potential members by not

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<sup>38</sup> 1,847 customers and \$183,104 in overcharges.

<sup>39</sup> Failings in five different areas.

<sup>40</sup> *Milkio Foods*, above n 23.

<sup>41</sup> 16 charges were brought where Milkio made false or misleading representations over the place of origin of its ghee products, and the use of the "Fernmark" label. Over a two year period it claimed all of its products were sourced from within New Zealand when they were not.

<sup>42</sup> *Milkio Foods*, above n 23.

<sup>43</sup> *Commerce Commission v Strandbags Proprietary Limited* [2022] NZDC 23352 [*Strandbags*].

<sup>44</sup> *Commerce Commission v Two Degrees Mobile Limited*, above n 21.

<sup>45</sup> *Commerce Commission v HelloFresh*, above n 17.

<sup>46</sup> *Steel & Tube*, above n 11, at [115].

disclosing the true nature of the transaction fee and disguising this fact. Although, as I have already noted, there is nothing wrong with a business protecting itself against high inflationary costs, it must do so in a manner which is responsible, coherent with market practice, and consistent with FTA principles.<sup>47</sup>

[78] I next consider all of the culpability factors and the seriousness of the conduct in relation to the comparator cases I have mentioned. Finally, I consider the need for consistency between cases, the need for deterrence, and the observation that perhaps the District Court has been setting fines which are “too low”.<sup>48</sup> All of these factors lead to the point the starting point must be higher than the range of cases relied on by CityFitness.

[79] In saying this however, I do not consider the seriousness of the conduct to be at the same level as what occurred in *Jetstar* or *Kiwibank*, notwithstanding my finding of reckless conduct in this case. I do so because in both *Jetstar* and *Kiwibank* the degree of the seriousness of the conduct,<sup>49</sup> as well as the starting points, were broadly agreed by the parties.

[80] I assess then the starting point to be \$1.5 million. I reach this figure based on the seriousness of the conduct of CityFitness but also bearing in mind the submissions of Mr Every-Palmer about the level of information members did have immediately prior to signing up. I accept members knew they would be charged the transaction fee. But it was still being falsely represented as a transaction fee rather than an increase in base price. It is the process of how they got to the point of sign-up which is where CityFitness can be justifiably criticised. This is because the first consideration under the FTA, and s 11 in particular, is that consumers need to be protected by being able to make fully informed decisions. This should be throughout the process (including the outset) and not just at the end when perhaps many of the members were already committed to joining.

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<sup>47</sup> See for example the commentary of Judge Ryan in *Strandbags*, above n 43, at [140]–[141].

<sup>48</sup> *Commerce Commission v Crackerjack Ltd* [2024] DCR 37 (DC) at [75]; referring *Commerce Commission v NZME Advisory Ltd*, above n 19, at [35]–[38].

<sup>49</sup> Although in *Kiwibank* there was disagreement as to how the conduct should be described.

[81] I also reach this starting point because it is roughly a mid-point between the highest point of the range of cases relied on by Mr Every-Palmer (*Strandbags* at \$1.2 million) and the suggested starting point of Mr Barry (between \$1.75 to \$2 million). Mr Barry submits this upper range is, in part, an adjusted view of the starting point which may be adopted if the *Air New Zealand* case was decided today. I am unsure if I agree with this assessment given the 20-year difference, with such comparisons and adjustments being more an academic exercise rather than something the Court can usefully use as any form of guide.

[82] In my view, standing back and assessing all factors together, the \$1.5 million starting point reflects the degree of seriousness of the conduct, especially considering I have found the conduct to ultimately be reckless, deliberate, intentional and wilful. This places the starting point above *Strandbags* because across all charges, the conduct was overall, more serious.<sup>50</sup>

[83] Finally, in reaching the starting point, I have not ignored the Commission's criticism CityFitness failed to take any immediate action to remove the advertising from July 2024 or that it has failed to refund the transaction fee to its customers. Mr Every-Palmer has referred to discussions (some open, some without prejudice) which occurred and says it is now quite unfair for CityFitness to be now criticised when it was attempting to work constructively with the Commission.

[84] It is a little difficult to deal with these submissions without further information. What I am left with is nine months of continuing unlawful advertising with revenue of \$1,592,714 being received during this period. Irrespective of what CityFitness was doing during the nine-month period, it was always open to it to take down the advertising when it did not. It was also always open to it to refund the revenue it received from the transaction fee, but again, it has not. These actions suggest to me a company who is looking at its commercial position rather than its obligations under the FTA. Again, these are reasons why the starting point is at \$1.5 million.

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<sup>50</sup> Judge Ryan was dealing with seven representative charges, where she found four types of behavior had occurred with differing states of mind (ranging from careless to wilful and deliberate).

*What discounts (in terms of percentages) is CityFitness entitled to?*

[85] No disagreement exists between the parties as to discounts based on mitigating factors of an early guilty plea, co-operation and previous good character. 25 per cent is agreed for the early guilty plea and 10 per cent for co-operation and previous good character.

*Is an uplift justified on financial capacity grounds? If so to what level?*

[86] The Commission seeks an uplift of 25 per cent to the fine, in order to “ensure it serves its purpose” of accountability, denunciation and deterrence.<sup>51</sup> The Commission accepts that whilst the fine should remain proportionate to the offending, it must still deliver a “sting” to the offender such that it serves as a personal deterrent.<sup>52</sup>

[87] Mr Every-Palmer submits no uplift should occur. CityFitness’ original suggested range of between \$390,000 to \$455,000 is submitted to be sufficient to deliver the “sting” required. Furthermore, Mr Every-Palmer submits if an uplift is applied, it should be far less than the 20 per cent suggested as this percentage “is out of step with the authorities”.<sup>53</sup> He suggests an uplift in the vicinity of five to 10 per cent is more appropriate.

[88] Counsel have provided a list of authorities in their respective submissions, comparing turnovers with the starting points and uplifts if they have occurred. Ultimately, I have not found these authorities useful. As the High Court in *Vodafone* recognised, little consistency can be gleaned from the case law in terms of what an appropriate (if any) uplift should be.

[89] What is consistent is the theme the exercise is an “evaluative” one assessing all of the circumstances of the particular case. In saying this I do take guidance from *Steel & Tube* where the Court observed “it is good practice to determine the amount that would be payable but for the offender’s means, then adjust down or up as

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<sup>51</sup> *Steel & Tube*, above n 11.

<sup>52</sup> *Steel & Tube*, above n 11, at [103]; *Commerce Commission v Vodafone New Zealand Ltd*, above n 21, at [287].

<sup>53</sup> Mr Every-Palmer’s submissions, para 121.

appropriate”.<sup>54</sup> I note also that I am required under s 40(1) of the Sentencing Act 2002 to take into account the financial capacity of the offender.

[90] CityFitness has an annual turnover of \$120 million as of 2025. It is not an insignificant company. However, being “wealthy”<sup>55</sup> is not in itself an aggravating factor;<sup>56</sup> rather, it may justify an uplift in the fine to ensure the deterrent purpose is served.

[91] With the 35 per cent discount, the amount of the fine is reduced to a nominal figure of \$975,000. I do not consider this sum to be appropriate given all of the circumstances of the offending. I also do not consider it delivers the appropriate “sting” given the financial capacity of CityFitness. In these circumstances, I impose an uplift of slightly under 15 percent for rounding purposes only (see below).

### **Conclusion**

[92] The starting point is \$1.5 million.

[93] The discounts total 35 per cent which equal \$525,000 reducing the starting point to \$975,000 as the nominal fine.

[94] I add an uplift of slightly under 15 per cent for financial capacity reasons.

[95] The end fine if 15 per cent is added to the nominal sum would be \$1,121,250. For rounding purposes, I reduce this sum to \$1,120,000 as the end fine.

[96] I impose this fine across Charges 1 to 4 (the unobtainable pricing representations) equally at \$130,000 per charge (\$520,000 total) to reflect the highly careless conduct moving to reckless conduct.

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<sup>54</sup> *Steel & Tube*, above n 11, at [105].

<sup>55</sup> I add the fact that although its turnover is significant there is no evidence of its gross or net profits.

<sup>56</sup> *Steel & Tube*, above n 11 at [103].

[97] I impose the balance of the fine across Charges 5 to 8 (the transaction fee representations) equally at \$150,000 per charge (\$600,000 total) to reflect the deliberate and intentional conduct.

Signed at Auckland this 5<sup>th</sup> day of June 2026 at 4:00 am/pm

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Judge D J Clark  
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe  
Date of authentication | Rā motuhēhēnga: 05/06/2026

City Fitness Google advertisement<sup>11</sup>



LIFESTYLE | APRIL 1, 2024

## Heartbreak High: It's the start of a new term at Hartley High, and there's a new hottie in the classroom

School's back!



Photo  
Helen Vuok

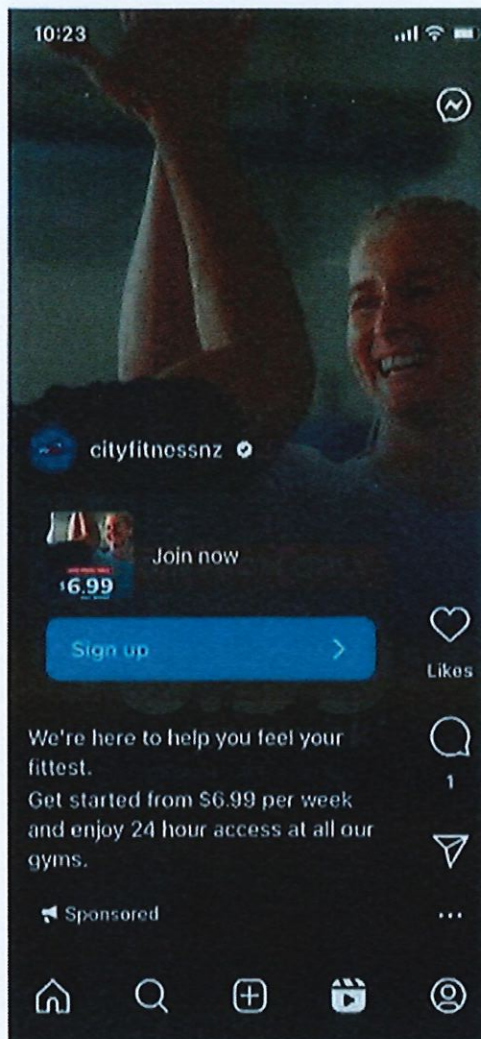


Sign up for our  
newsletter

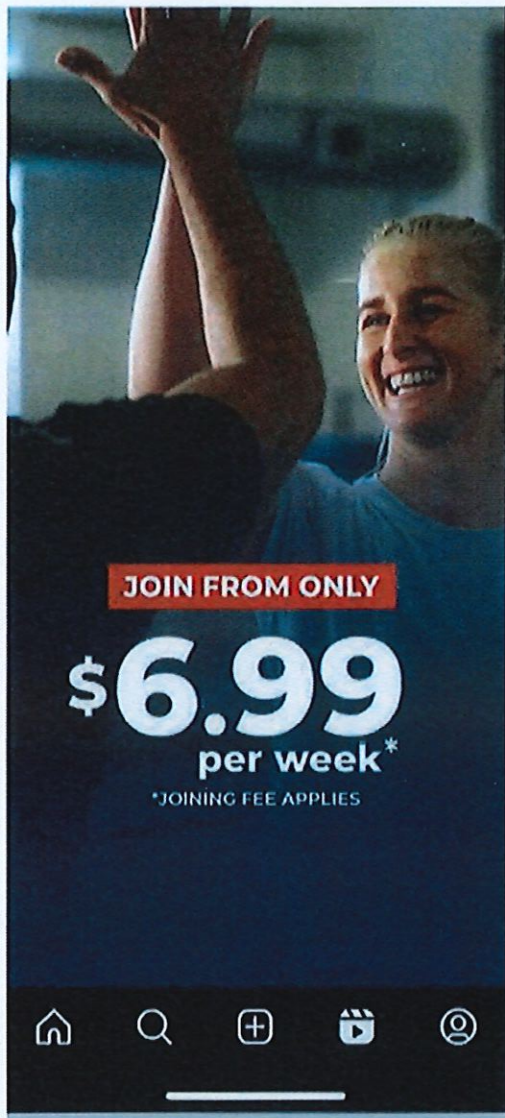
<sup>11</sup> Active on 19 November 2024 (CC.CF.0204).

<sup>12</sup> Active on 18 April 2024 (CC.CF.0012). Advertisement displayed on nowtolove.com.au.

CityFitness Instagram advertisement<sup>13</sup>



<sup>13</sup> Active on 18 April 2024 (CC.CF.0010).



City Fitness Google/Meta advertisement<sup>15</sup>



*cityfitness*

**Memberships from  
\$6.99 per week\***

\*Joining fee and transaction fee applies.

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<sup>15</sup> Active from May 2024.

## Appendix B – disclosure of transaction fee

CityFitness membership joining page<sup>14</sup>

**cityfitness** WHY US? MEMBERSHIPS CLASSES TRAINING LOCATIONS **JOIN TODAY**

## SELECT THE PERFECT MEMBERSHIP FOR YOU

With a membership at CityFitness, you have access to inhaled services and amenities that all help you achieve your goals. We believe that you should get to choose the membership that works best for your needs without all the sales pressure. A section of our popular membership options are now available to buy online. We hope you take the next step on the path to living a healthier, happier life.

Exercise is proven to reduce stress/anxiety, increase energy, aid in weight loss, and improve overall health.

MEMBER BENEFITS	BASIC MEMBERSHIP \$6.99 Per Week <small>Includes 1000 Credits</small>	BLACK MEMBERSHIP \$13.99 Per Week <small>Plus</small>	PREMIUM MEMBERSHIP \$17.99 Per Week <small>Plus</small>
Access to Home Club	✓	✓	✓
Unlimited 24 Hour 24/7 Access	✓	✓	✓
Free 10000 Credits	✓	✓	✓
Access to all Club Locations	✓	✓	✓
Flexibility to Cancel Anytime	✓	✓	✓
Family Access*	✓	✓	✓
Free Guest Access	✓	✓	✓
Access to Group Fitness Studios	✓	✓	✓
Use of Massage Chairs	✓	✓	✓
Free Gym Bag	✓	✓	✓
Access to HIIT	✓	✓	✓
Access to Recovery Rooms	✓	✓	✓
Unlimited Premium WiFi	✓	✓	✓
Access to Abundance Yoga Studios	✓	✓	✓
	<b>JOIN NOW</b> \$6.99 Per Week	<b>JOIN NOW</b> \$13.99 Per Week	<b>JOIN NOW</b> \$17.99 Per Week

\*This restriction on the amount of family members. See terms & conditions for details. A weekly billing cycle for all memberships. For more information, PLEASE CHECK FIRST.

<sup>14</sup> Active between 21 December 2023 and approximately 11 March 2025.

## CityFitness sign-up process: membership details and payment information pages

Membership Payment Details	
Membership Type	\$17.99 per week, No Commit
Start Date	Tue, 11-Jun-24
Recurring Billing	\$20.56 first payment on Wed, 12-Jun-24 <ul style="list-style-type: none"> <li>• \$17.99 - Membership</li> <li>• \$2.57 - Prorated Membership</li> </ul> \$17.99 thereafter every Week

### Payment Details

Please note a 3% transaction fee will apply to all transactions.

Please select how you will pay for your recurring memberships.

Payment Method  
 Bank Account  Credit Card

Account Number\*

XX	XXXX	XXXXXXXX	X	XXX
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Bank Name

Branch

Accountholder Name\*

I confirm I have sole authority over the bank account nominated above.  
 (I.E. Sole authority is defined as any one person who is a nominated account signatory that can operate the account alone as per the account mandate instructions)

If you do not have sole authority over the nominated bank account, please complete a Direct Debit Authority



### Confirm Membership Details

\$17.99 per week. No Commit.

Start: 11/06/2024. Payment of \$17.99 every week starting 12/06/2024.

Please note a 3% transaction fee will apply to all transactions.

Health and other risks:

Our staff and contractors are not medically trained and cannot assess whether you can exercise without hiding your health, safety or comfort. You promise to notify us in writing if you have any risk injury, illness, disability or other condition that means you shouldn't be using the Club's facilities, and this includes any, infections, or contagious illness, and not use the Club's facilities if you suffer from any injury, illness, disability or other condition which might cause additional injury or exacerbate your condition or pose a health risk to staff or others in the Club.

You specifically acknowledge that it would be prudent for you to undertake a medical examination prior to joining to avoid inadvertent injuries or pressure on your body, but we leave this entirely at your discretion to do so.

I Agree to the waiver [Click here to download Special Waiver for Other Sports Use](#)

I Agree to the Terms and Conditions [Click here to download Terms and Conditions](#)

[Continue to confirm](#)

If you do not wish to continue, [click here to go back to the membership options](#)

## Summary of Facts

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Commerce Commission  
(Prosecutor)

v

CityFitness Group Ltd  
(Defendant)

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Charges 1 - 8:

Offence:

Engaging in conduct that is liable to mislead the public as to the nature or characteristics of services

Act/Section:

Sections 11 and 40(1) of the Fair Trading Act 1986

Maximum penalty:

\$600,000 fine  
(Representative)

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### 1. Introduction

- 1.1 The defendant, CityFitness Group Ltd (City Fitness), operates the largest gym business in New Zealand, servicing approximately 40% of all New Zealand gym memberships and generating annual revenue in the vicinity of \$100 million. It faces 8 charges under s 11 of the Fair Trading Act 1986 (FTA), which arise from City Fitness engaging in conduct that was liable to mislead the public as to the price of its gym memberships and about the nature of a "transaction fee" applied to weekly membership fees. All charges relate to conduct between 21 December 2023 and 30 April 2025 (Charge Period).
- 1.2 From 21 December 2023, City Fitness introduced a 3% fee that applied to all new members who joined from that date across all tiers of memberships offered by City Fitness (3% Fee). City Fitness called the 3% Fee a "transaction fee", which was payable in addition to the headline weekly prices. Customers had visibility of the additional 3% Fee at the point of signing up to City Fitness.
- 1.3 The effect of the 3% Fee was that the headline weekly membership prices advertised by City Fitness on its website were unobtainable because an unavoidable additional charge of 3% would be added to all membership payments. (the Unobtainable Pricing Representations).
- 1.4 For the Unobtainable Pricing Representations City Fitness faces 4 representative charges under s 11 of the FTA for engaging in conduct that was liable to mislead the public as to the nature or characteristics of a service, being the price of its gym memberships.
- 1.5 Despite being called a "transaction fee", and being marketed this way through the sign up process, the 3% Fee was not related to any specific costs from a member's weekly credit card or direct debit transaction. Rather, the 3% Fee was a way for City Fitness to increase prices without changing its headline weekly membership prices.
- 1.6 By its guilty pleas, City Fitness accepts that its use of the "transaction fee" label was liable to mislead the public that the fee was used solely to recover the actual processing costs of the particular transaction, when it was not (the Transaction Fee Representations). City Fitness makes this admission without any concession as to whether any individual consumer was in fact misled.

1.7 For the misleading Transaction Fee Representations, City Fitness also faces 4 representative charges under s 11 of the FTA for engaging in conduct that was liable to mislead the public as to the nature or characteristics of a service, being the price of its gym memberships.

1.8 A Schedule of charges is set out at the end of this summary of facts.

## 2 City Fitness' business and structure

### Company structure and size

2.1 City Fitness was incorporated on 23 June 2000 and opened its first club in 2002. It owns all 58 City Fitness branded gyms in New Zealand and, as at August 2024, employs 364 full-time equivalent staff.

2.2 According to City Fitness, it is New Zealand's market leading gym business, with approximately 225,000 members. This amounts to approximately 40% of the gym-population in New Zealand. City Fitness' revenue in FY 2024 was \$106.461 million.

### Gym memberships offered

2.3 City Fitness operates a low cost pricing model with three membership tiers. At all relevant times up until 21 December 2023, City Fitness had the following headline weekly prices for its three membership tiers:

Membership type	Weekly headline price	Proportion of memberships <sup>1</sup>
Basic	\$6.99	49%
Black	\$13.99	43%
Premium	\$16.99 (increased to \$17.99 from 1 February 2024)	8%

2.4 The benefits of each membership type differ in various respects, including whether there is a minimum term, whether the membership grants access to all City Fitness gyms, and whether members have access to group fitness classes. All tiers typically carried with them a one-off joining fee.

2.5 City Fitness allows members to pay its memberships by various instalment options. Most customers pay weekly (77.3%), with others paying by monthly (6.4%), annually (2.9%) or by another payment structure (13.4%).<sup>2</sup> Between 21 December 2023 and 30 June 2024, most customers paid by direct debit (96.9%) with a small percentage paying by credit or debit card (3.1%). However, of the new members that joined between 23 December 2023 and 30 April 2025, 27% opted to pay by credit or debit card, with the remainder (73%) paying by direct debit.

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<sup>1</sup> Approximately, as at June 2024.

<sup>2</sup> Based on figures between 21 December 2023 and 30 June 2024.

### 3 The Commission's Investigation into City Fitness

- 3.1 The Commission opened its investigation into City Fitness in May 2024 following a series of concerns it began receiving in January 2024 from customers who found it impossible to avoid paying the 3% Fee. Between January and October 2024, the Commission received a total of 22 customer concerns about this issue.
- 3.2 The Commission's investigation focused on City Fitness' advertising of a headline weekly fee that was not an actual obtainable price due to the existence of the 3% Fee, as well as the description of the 3% Fee as a "transaction fee".
- 3.3 City Fitness cooperated with the Commission's investigation, responding to voluntary information requests and participating in a voluntary interview attended by senior City Fitness executives. Details of City Fitness' response are contained throughout this summary of facts.

### 4 Introduction of the 3% Fee

#### During the Charge Period

- 4.1 In 2023, City Fitness decided to review its membership fees. This review led to the introduction of the 3% Fee as a price component payable in addition to the weekly headline price. A Senior Executive explained the rationale for the 3% Fee by stating that City Fitness was "looking not just to try and recoup the cost of credit card transactions but just looking at the overall cost of doing business over [the previous] 10 year period and looking to pass those costs onto members, but not the processing fee related to credit cards".
- 4.2 He further explained:

We looked at increases to the headline price but from a marketing perspective, going to \$7.21 just didn't seem to make sense. We didn't want to increase it as much to \$7.99 or even higher than we thought it was fair and reasonable. So we landed on the 3% as a way to account for the increased cost of doing business across the board and believe 3% after 10 years is fair and reasonable.
- 4.3 That Executive also confirmed that "the 3% was not related to the cost of doing the transaction, it was just to pass on the minimal amount of increase to our members".
- 4.4 The 3% Fee was formally introduced on 21 December 2023 and applied to all new members who joined after that date. Between 23 December 2023 and 30 April 2025, 187,850 new members signed up for City Fitness memberships. This 3% fee was an additional charge to the advertised headline weekly prices to each of the membership tiers. There was no way of avoiding the 3% Fee. By the time customers reached the point of choosing to sign up to City Fitness, they had visibility of the fact that the 3% Fee was payable in addition to the headline price. By its guilty pleas, City Fitness accepts that this did not serve to cure the breaches of s 11 arising from the Unobtainable Pricing Representations, but the parties will make submissions at sentencing as to the mitigating impact of the visibility of the 3% Fee by the time consumers signed up to City Fitness.

4.5 Excluding the joining fee, the new weekly membership prices following the implementation of the 3% Fee were as follows:

Membership tier	Advertised weekly headline price	Total weekly charge (3% fee added)	\$ Increase per week	Total yearly increase
Basic	\$6.99	\$7.20	\$0.21	\$10.92
Black <sup>3</sup>	\$13.99	\$14.41	\$0.42	\$21.84
Premium (until 1 Feb 2024)	\$16.99	\$17.50	\$0.51	\$26.52
Premium (from 1 Feb 2024)	\$17.99	\$18.53	\$0.54	\$28.08

4.6 For existing members who had joined prior to 21 December 2023, City Fitness increased the price of its membership fees by 3% on 15 February 2024 to align with the price paid by new members because of the 3% Fee.

4.7 For new members, the weekly invoice that they received separately listed the 3% Fee as "Payment Authority Fees":

The screenshot shows an invoice with the following details:

- Invoice Details:** 12-1-2731795
- Date:** Wed, 19-Mar-25
- Balance:** \$0.00

Item	Quantity	Value	Discount	Net
Premium Membership - Non Commit	1	\$17.99	\$0.00	\$17.99
<small>© Premium Membership - Non Commit © Tue, 11-Jun-24 12:00 am</small>				
Payment Authority Fees	1	\$0.54	\$0.00	\$0.54
Total Incl Tax				\$18.53
Payments				\$18.53
Balance				\$0.00

At the bottom of the screenshot, there is a button labeled "Email Invoice".

4.8 There was no variation in the 3% Fee for monthly and annual payments. In other words, the application of the 3% Fee did not vary with the number of payment transactions a customer was required to make under the terms of their contract.

4.9 The cost to City Fitness for each transaction depended on method of payment. The cost to City Fitness for credit card varied, but between 1 May 2024 and 30 April 2025 was 41c (GST inclusive) on average per transaction.<sup>4</sup> The cost to City Fitness for direct debit did not vary and between 21 December 2023 and 30 April 2025 was 5c per transaction. As noted above, of the new members that joined between 23 December 2023 and 30 April 2025, 27% opted to pay by credit or debit card, with the remainder (73%) paying by direct debit.

#### Changes on 1 May 2025

4.10 City Fitness made various changes to its membership pricing from 1 May 2025. These changes included:

- (a) For new members:
  - (i) The removal of the 3% Fee for new members;

<sup>3</sup> Referred to as Black Card after the March 2025 website update.

<sup>4</sup> This fee varied.

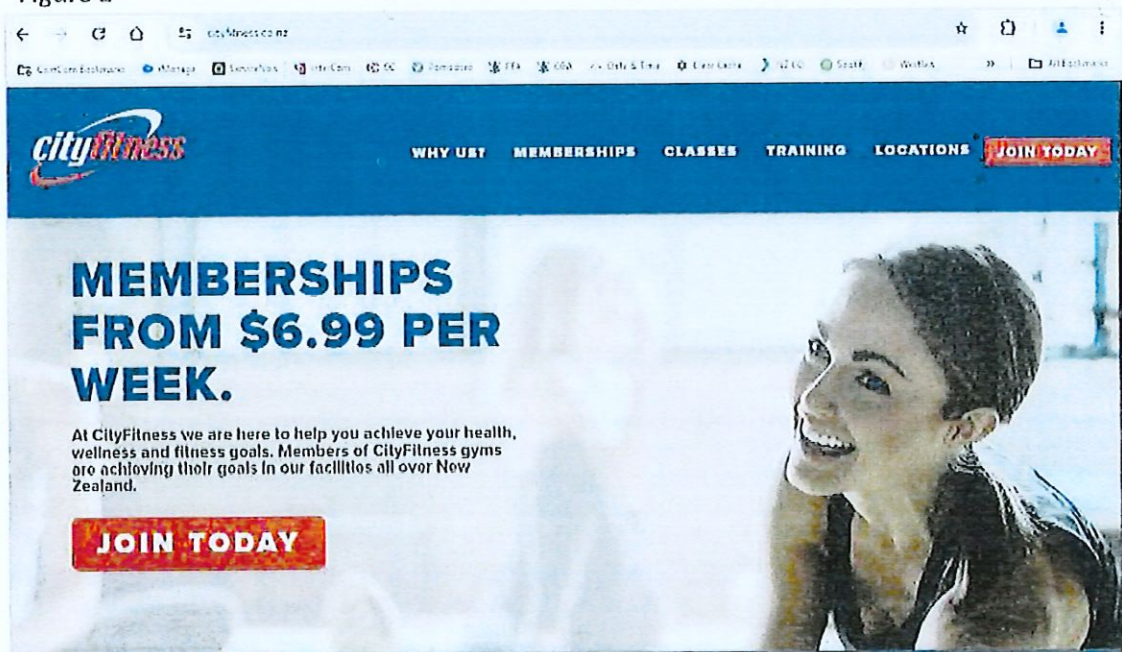
- (ii) The introduction of new weekly membership rates, which are \$1 more expensive at each membership tier; and
  - (iii) The introduction of a 2.2% credit card surcharge for new members which City Fitness advised only applies to those members who pay by credit or debit card and which passes through the merchant fees and a per transaction gateway fee incurred by City Fitness.
- (b) For existing members:
- (i) No changes for members who joined before 21 December 2023;<sup>5</sup> and
  - (ii) For those who joined between 21 December 2023 and 1 May 2025, their weekly membership rates increased by 3%, equivalent to their previous weekly rate<sup>6</sup> with the 3% Fee incorporated.

## 5 Unobtainable Pricing Representations

### Representations

- 5.1 Following the introduction of the 3% Fee, the old headline rates of City Fitness gym memberships no longer existed and it was impossible for a prospective new member to pay those rates. All rates now included the additional 3% Fee, which could not be avoided.
- 5.2 Despite the introduction of the additional 3% Fee, City Fitness' marketing continued to represent the headline weekly price of its gym membership without reference to the 3% Fee. Some of City Fitness' marketing made reference to the additional transaction fee but some did not. Those representations were broadly disseminated on various platforms throughout the Charge Period. For example, on the landing page of its website (www.cityfitness.co.nz):<sup>7</sup>

Figure 1



<sup>5</sup> Who had already been subject to the 3% increase in fees on 15 February 2024 as outlined at [4.7].  
<sup>6</sup> For premium members who had joined from 1 February 2024, this was the now increased rate of \$17.99.  
<sup>7</sup> Active on 11 March 2025 (CC.CF.0365).

- 5.3 Similar representations were also made on its pricing help page, terms and conditions page, and gym locations pages of its Website as well as through Meta (including Facebook and Instagram) and Google digital advertisements. As at 18 April 2024, the City Fitness Instagram page had approximately 13,900 followers, and its Facebook page had approximately 50,000 followers. City Fitness also advertised on billboards and in store.
- 5.4 Digital advertising through Google and Meta was conducted in a dynamic manner. A library of advertisements created by City Fitness was made available. Google and Meta would then publish advertisements from this library, selecting these based on levels of consumer interest and engagement. If advertisements were out of date or no longer correct, City Fitness was responsible for removing them from the library.
- 5.5 By July 2024, City Fitness had introduced new advertisements which indicated that a “transaction fee” applied.<sup>8</sup> However, there were some instances where the older advertisements which remained in circulation were displayed after this period and did not reference the transaction fee. This resulted in some advertising being displayed to the public that did not disclose the existence of the 3% Fee.
- 5.6 In addition, none of the digital advertising displayed as one total dollar figure the full price of membership, inclusive of the 3% Fee. During any given month, City Fitness’ advertisements across Google and Meta attracted 15,000,000 impressions, two million unique views, and 70,000 clicks.
- 5.7 Examples of these representations are set out at Appendix A.
- 5.8 The representations made by City Fitness of its weekly membership prices were liable to mislead as the headline prices were never obtainable. They did not state the actual full cost of membership as a singular total dollar figure, including the unavoidable 3% Fee. Rather, the headline price was advertised, either with reference to an additional transaction fee being added (which was often unquantified) or in some cases, with no reference to the transaction fee at all.

#### Disclosure of the 3% Fee

- 5.9 During the Charge Period customers who viewed City Fitness advertising could visit the membership page of the City Fitness website in order to sign up for membership. If they did visit that page, the Unobtainable Pricing Representations were repeated.<sup>9</sup> Customers could only be alerted to the existence of the 3% Fee by an asterisk in fine print at the bottom of that web page that included the following text: “3% transaction fee applies on all memberships” (see Appendix B). The disclosures made by City Fitness on this page were insufficiently proximate or prominent to correct the Unobtainable Price Representations, which were liable to mislead.
- 5.10 Consumers who continued with the joining process on City Fitness’ website would eventually see the 3% Fee more prominently disclosed via text “Please note a 3% transaction fee will apply to all transactions.” (See Appendix B). Further, there is no evidence that any customer was misled about the existence of the additional 3% Fee by the time the customer reached the point of choosing to sign up to City Fitness. However, the headline rate would always be displayed exclusive of the 3% Fee.

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<sup>8</sup> Across all promotional advertisements, for example its billboards, digital advertising, Meta, Google, and its Website.

<sup>9</sup> In that the price listed was exclusive of the 3% fee.

## 6 Transaction Fee Representations

6.1 As noted above, when the 3% Fee was disclosed to new members, it was described by City Fitness as a "transaction fee". When disclosed on invoices to new members, the 3% Fee was labelled as "Payment Authority Fees".

6.2 Despite being labelled in this way, City Fitness denied that the 3% Fee was tied to the costs incurred by City Fitness for processing the payment of membership fees, stating at interview:

I think the 3% was taken as a quantum to pass on increased cost of doing business. I think to [counsel's] point when this was referenced this way, payroll costs increased making up a number, [City Fitness executive] you might be able to say it, you know, 10% - 12% over these years, cleaning costs increased this, so it was like oh well this is kind of the general increasing cost of doing the transactions, that was how we came to that answer. But the fundamental answer is the 3% was not related to the cost of doing the transaction, it was just to pass on the minimal amount of increase to our members.

6.3 City Fitness stated the 3% Fee was implemented to raise revenue at a rate they felt was fair and reasonable to account for the increased cost of doing business, but while retaining the advertising advantage of "X.99" headline prices. City Fitness representatives explained that it was felt a 3% Fee attached to all memberships was the fairest way to pass on increased costs equitably across the membership, rather than a flat fee, which would mean Basic members paid proportionately more than Black Card and Premium members. It stated at interview:

Again yeah, the 3% was just meant to be, our processes around it was how can we keep the cost as low as possible. We looked at increases to headline price but from a marketing perspective going to 7.21 just didn't seem to make sense. We didn't want to increase it as much to 7.99 or even higher than we thought was fair and reasonable. So we just landed on the 3% a way to account for the increased cost of doing business across the board and believe 3% after 10 years is fair and reasonable.

[...]

Existing members, it didn't matter because we're not prospecting for them. It was a 3% change, so they're paying \$6.99 now, it goes to \$7.21, happy days. But here we are, externally, we're promoting to new members, we wanted to retain \$6.99, marketing perspective but still having \$7.21 net yield through a separate identifiable fee.

6.4 The Transaction Fee Representations were therefore liable to mislead. However, there is no evidence that any customer would not have signed up to City Fitness if any misunderstanding as to the purpose of the 3% Fee had been corrected.

## 7 City Fitness' position

7.1 City Fitness' rationale for implementing the 3% Fee has been set out above. In addition, City Fitness advised the Commission during the investigation:

- (a) The 3% Fee was never intended to represent a payment processing fee or surcharge being passed through to members.
- (b) As the 3% Fee was broadly speaking introduced to cover increased costs, including in relation to transacting with members, City Fitness considered it was legitimate to

include it as a separately itemised fee (as is the case with the joining fee, which broadly reflects the cost to City Fitness of signing up a new member).

- (c) City Fitness did not consider having separate fees to be unusual or misleading.
- (d) It did not believe the concerns received by the Commission suggested that the complainants were misled as to the total price they ultimately had to pay. None of the concerns received by the Commission involved City Fitness customers complaining they had not understood that the 3% Fee applied when they joined. Most of the concerns were about the fact that the 3% Fee could not be avoided, that the 3% Fee was an unreasonable surcharge to recover transaction processing costs, or the fact that the 3% Fee was advertised separately (or not at all), rather than being included in the total headline price, which gave the impression prices had not increased when they had.

7.2 City Fitness ultimately made changes to its membership pricing to address the Commission's concerns (as set out above). Those changes took effect from 1 May 2025. The Commission first notified City Fitness that it was investigating its membership pricing and the 3% Fee in July 2024, and its letter stated that the Commission was investigating "whether inclusion of City Fitness' 3% fee on membership transactions misleads consumers about: the final amount they can expect to pay for a membership, and the purpose of the 3% fee." It requested that City Fitness voluntarily provide information and documents (which it did).

## 8 Detriment and gain

8.1 The Unobtainable Pricing and Transaction Fee Representations benefited City Fitness and may have been to the detriment of consumers and competing businesses. In particular:

- (a) Consumers have a legitimate expectation that claims made by retailers and service providers will be accurate. Some consumers may have had the mistaken belief that the weekly price of City Fitness membership was the headline advertised price. However, by the point of sale, the 3% Fee was visible to prospective customers. All consumers have the right to prices advertised being obtainable. Hidden fees and costs undermine consumers' abilities to make decisions on the comparative value of options in the market
- (b) City Fitness was able to enjoy the commercial benefits of advertising low prices of \$6.99 per week for gym membership whilst passing costs on to consumers through its 3% "transaction fee".
- (c) City Fitness' conduct may have provided it a form of competitive advantage over rival gyms by the headline price advertised giving the appearance that its weekly pricing was more competitive than it actually was.
- (d) With respect to City Fitness customers specifically, a significant number of consumers were affected by the 3% Fee:
  - (i) Between 21 December 2023 and 30 April 2025, there were a total of 182,010 new members. Of those, 125,214 paid the 3% Fee (with the remainder cancelling their contracts). In all, City Fitness generated \$1,592,714 in revenue from these individuals from the 3% Fee.
  - (ii) Some of these consumers may have been willing to sign up for membership on the basis that they were paying a fee to cover City Fitness' costs incurred

as a result of each payment transaction, when in reality the fee was designed to generate revenue in order to recover the overall increased costs of doing business.

## 9 Previous convictions

9.1 City Fitness does not have any previous convictions. However, the Commission has previously engaged with City Fitness regarding potential breaches of ss 11 and 13 of the FTA as follows:

- (a) Sending Information Provided To Trader (IPTT) letters in September 2020, December 2020, and September 2022 and a Compliance Advice Letter in January 2015 regarding cancellation terms and practices; and
- (b) Sending a Compliance Advice Letter in August 2017 regarding compliance with the unfair contract terms provisions of the FTA, again relating to cancellation terms.

## Schedule of charges

Charge	Charge provision	Representation	Charge Period
1	Section 11	Unobtainable Pricing	21/12/23 – 30/4/24
2	Section 11	Unobtainable Pricing	1/5/24 – 31/8/24
3	Section 11	Unobtainable Pricing	1/9/24 – 31/12/24
4	Section 11	Unobtainable Pricing	1/1/25 – 30/4/25
5	Section 11	Transaction Fee	21/12/23 – 30/4/24
6	Section 11	Transaction Fee	1/5/24 – 31/8/24
7	Section 11	Transaction Fee	1/9/24 – 31/12/24
8	Section 11	Transaction Fee	1/1/25 – 30/4/25