

**IN THE DISTRICT COURT
AT AUCKLAND**

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

**CRI-2024-004-010305
[2026] NZDC 5776**

COMMERCE COMMISSION

v

THE WAREHOUSE LIMITED

Hearing: 20 November 2025
Appearances: J Barry and S Murphy for the Commission
J Dixon KC and M Fee for the Defendant
Judgment: 19 March 2026

RESERVED JUDGMENT OF JUDGE S J LANCE

[1] The Warehouse Limited has pleaded guilty to nine representative charges of supplying, offering to supply, and or advertising to supply goods that did not comply with the prescribed product safety standard, contrary to ss 31 and 41 of the Fair Trading Act 1986 (FTA). This related to a range of three toys that presented a potential choking risk to small children.

[2] The maximum penalty for each charge is \$600,000.

[3] The agreed summary of facts will be attached to this sentencing at Appendix A. However, a synopsis is set out below.

Synopsis

[4] This synopsis is extracted from the prosecution's submissions.

2 Summary of offending

2.1 The core aspects of the offending are summarised below.

The company

2.2 The Warehouse has been operating since 1982 and has 85 retail stores across New Zealand, as well as a website. It is one of New Zealand's largest toy retailers and department stores. Toy sales made up between 6.7 and 7.5 per cent of its total sales between 2020 and 2023.

2.3 The Warehouse is a large company of substantial means. It reported an operating profit (EBIT pre-NZ IFRA16) of \$1.3 million, with a reported net loss after tax of \$2.8 million. However, its sales figures are indicative of the resources at its disposal: these were up 1.4% to \$1.8 billion (against \$1.79 billion in the 2024 financial year and \$1.89 billion for the 2023 financial year).

The Toys

2.4 The toys which are the subject of this offending were three variants of the "Roo Crew Take-Apart-Vehicle" toy (**Toys**): the race car, train, and plane variants.

2.5 The Warehouse sold 12,411 of the Toys at a typical sale price of \$5 per item, generating a total gross sale of \$49,122.

2.6 The sales continued over a 26-month period, from 14 March 2021 to 26 May 2023.

The legislative context

2.7 The Product Safety Standards (Children's Toys) Regulations 2005 apply to toys manufactured, designed, labelled, or marketed for use by children up to and including 36 months. It is enough for the Regulations to be engaged if any one of these criterion are met. Such toys must then meet identified safety specifications related to their mechanical and physical properties, which are set by reference to an Australian/New Zealand Standard (**Standard**).

2.8 It is a breach of s 30(1) of the FTA to supply, offer to supply, or advertise to supply toys to which these Regulations apply that do not meet the Standard.

2.9 The Standard sets out "reasonably foreseeable abuse" tests, which are designed to simulate situations in which damage can occur to a toy as a result of reasonably foreseeable abuse in the hands of a child. In this case, the relevant risk is that of choking on a small part of the toy.

- 2.10 Any small parts which are removable components, or are liberated during testing, are tested to see whether they fit inside a prescribed small parts cylinder without compression and in any orientation. The small parts cylinder is used to simulate the throat of a child aged 36 months and under, to determine if a toy and its parts present a choking and/or asphyxiation hazard.

The Commission’s Investigation

- 2.11 On 18 May 2023, the Commission purchased six units of the Toys (two race cars, two trains, and two planes) from The Warehouse’s retail store on Lincoln Road, Henderson, Auckland.
- 2.12 Each variant bore an information tag which relevantly included that the product was a “take-apart vehicle for ages 3+”; a photograph of a woman and a baby or toddler (under 36 months old) in nappies playing with the Toys, with at least one of the Toys partially dismantled with the tools that are part of the Toy and small parts displayed next to it; and a bold warning containing a triangle with an exclamation mark and the words “WARNING: CHOKING HAZARD – Small parts. Not for children under 3 years.”
- 2.13 Notwithstanding the warning, the Toys were labelled and/or marketed for use by children aged 36 months or under; and were displayed in an aisle with other toys suitable for children aged five and under.
- 2.14 The Commission sent a unit of each variant for testing. Each unit failed the “small parts” test because it had removable components that fit entirely into the small parts cylinder.
- 2.15 The parts which failed the test were as follows:
- (a) **Train:** 10 parts, all of which were screws;
 - (b) **Race car:** 16 parts, including nine screws, four wheel axles, two front wheels, and the rear bumper, and
 - (c) **Plane:** nine parts, including seven screws and two wheel axles.
- 2.16 The Toys presented a choking risk as a child aged under 36 months may have been able to remove at least some of the small parts by hand.

The Warehouse’s response

- 2.17 On 18 May 2023 (the day of the test purchase), the Commission notified the store manager that the Toys may breach the Standard. Immediate action was taken to remove the Toys from sale.
- 2.18 The Warehouse subsequently issued a product recall of the Toys. As at 30 September 2024, only 52 of the 12,411 Toys sold had been recalled.
- 2.19 The Warehouse cooperated with the Commission’s investigation, including through the voluntary provision of a written response to

information sought in March 2024 and by a representative attending a voluntary interview in June 2024 (albeit that the Commission considers some of the responses were not as prompt and helpful as they could have been).

- 2.20 The Warehouse has also entered enforceable undertakings with the Commission as part of a resolution of the charges that the Commission seeks leave to withdraw.

Synopsis of submissions

- [5] The Commerce Commission note:¹

The 2023 High Court decision of *Commerce Commission v NZME Advisory Ltd* (NZME) “set a new tone for FTA prosecutions”, acknowledging that fines for FTA offending had been set too low.² That case reviewed all 27 product safety decisions that had come before Court since the maximum penalty increased to \$600,000 in 2014. The Court noted that the “starting points [in those 27 cases]...bar one, have been set at less than 25% of the maximum penalty for a single offence”, and that most involved small to medium sized traders.³ Justice Andrew considered the District Court may have “felt somewhat constrained by its own decisions in determining appropriate sentences under the FTA” and that “penalty levels must rise over time to maintain the same deterrent effect”.⁴ That methodology has since been adopted in *Crackerjack* and other cases.⁵

- [6] The Commerce Commission submit the appropriate sentence should be structured as follows:

- (a) A global starting point of \$400,000 to \$450,000;
- (b) Discounts totalling 30 per cent for guilty pleas and other mitigating factors; and
- (c) An uplift of 25 per cent to account for The Warehouse’s financial capacity.

- [7] That would result in an end fine of between \$380,000 and \$427,500.

¹ Commerce Commission’s Sentencing Submissions at 6.1 (p 9).

² *Commerce Commission v NZME Advisory Ltd* [2023] NZHC 3425.

³ At [35].

⁴ At [36].

⁵ *Commerce Commission v Bed Bath and Beyond* [2024] NZDC 32079 at [62].

[8] The Warehouse submit:

- (a) A global starting point between \$200,000 and \$250,000;
- (b) Discounts for mitigating factors including:
 - (i) 25 per cent for any guilty pleas;
 - (ii) 10 per cent for co-operation with the Commission's investigation;
 - (iii) five to 10 per cent for previous good corporate character; and
 - (iv) five to 10 per cent for enforceable undertakings it has provided to the Commission.

[9] That would result in an end fine between \$100,000 and \$125,000.

[10] The cases noted and identified in the submissions set out the factors to be considered in assessing the level of fines.

[11] The legal principles were identified by the High Court in *Commerce Commission v LD Nathan & Co Ltd*.⁶ That case provides guidance as to the general sentencing principles and factors to be considered. Those factors include taking into account the objectives of the Act. These are the degree of culpability of the offender in the context of wilful or careless offending; the extent of prejudice or harm caused to customers; the attitude of the defendant in respect of remorse; co-operation with the authorities and remedial action; the importance of deterrents; guilty plea; the offending company's previous record; and the effect of any publicity regarding the prosecution.

[12] The Court of Appeal in *Commerce Commission v Steel & Tube Holdings Ltd* held that while the *LD Nathan* case provide a helpful checklist of considerations, that

⁶ *Commerce Commission v LD Nathan & Co Ltd* [1990] 2 NZLR 160 (HC).

list is not exhaustive and in any case, some of the listed considerations may not arise or may require closer analysis.⁷

[13] The Court provided a non-exhaustive list of other factors affecting seriousness and culpability including:

- the nature of the goods or services provided;
- the use to which they were put;
- whether the offending was isolated or systematic;
- the state of mind of any employees or agents whose conduct attributed to the defendant; the seniority of those people;
- the compliance systems and culture of the offending entity and the reasons why they failed;
- any harm done to customers and other traders; and
- any commercial gain or benefit to the defendant.

[14] The purposes and principles of sentencing as set out in the Sentencing Act 2002 remain mandatory considerations for the Court.

Stage 1 – Starting point

The nature of the goods supplied, labelling and potential for harm.

[15] Authorities provided in support of the parties' submissions as to starting point are listed later.

[16] There are a number of recent cases which provide assistance. Firstly, *Commerce Commission v Bed Bath and Beyond Ltd (BBB)* where BBB pleaded guilty to five representative charges, three involving the supply of goods and breach of

⁷ *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549.

unsafe goods notice, and two involving the supply of goods notice, two involving the supply of goods which were not compliant with an applicable product safety standard.⁸ The first three charges involved the sale of hot water bottles. They had brief instructions stamped into the bottles' neck, but the instructions did not meet the detailed requirements of the standard. Over a seven-month period, 23,801 hot water bottles were sold.

[17] The second two charges related to the fire hazard labelling on children's pyjamas. Over a seven-month period a total of 3,573 offending pyjama sets had been sold. A starting point of \$250,000 was adopted for the offending involving the non-compliant hot water bottles and the \$130,000 for the offending involving non-compliant children's pyjamas with an adjusted overall starting point of \$320,000. In that case reductions were made to reflect BBB's early guilty plea, cooperation and absence of previous convictions. An uplift of 15 per cent was imposed to take into account the company's financial capacity.

[18] In *Commerce Commission v Crackerjack Ltd*, Crackerjack operated a discount retail chain with 14 stores throughout the North Island.⁹ They pleaded guilty to 18 charges under the FTA. Sixteen of those charges concerned Crackerjack's non-compliance with fire hazard labelling requirements. Crackerjack sold 266 units of children's nightwear over a period of just over one year. The 16 pyjama product lines required labels indicating a caution/warning that the product should be kept away from heat and flame. None of the 16 products had the designated labels and four had no labels at all. In that case, a starting point of \$205,000 was imposed. After mitigation the Court uplifted the end sentence by 20 per cent to ensure it "would have a deterrent sting", taking into account Crackerjack's size and profitability.

[19] In *Commerce Commission v NZME Advisory Ltd* the defendant pleaded guilty to a representative charge involving supplying, offering to supply, advertising products for supply in contravention of an unsafe goods notice. The products were unsafe magnetic puzzle sets. NZME had sold 213 products to 159 customers over an 11-month period. An 11-year-old child swallowed one of the magnets and required

⁸ *Commerce Commission v Bed Bath and Beyond* [2024] NZDC 32079.

⁹ *Commerce Commission v Crackerjack* [2024] NZDC 10425.

emergency life saving surgery. That incident is a significant distinguishing feature of this case.

[20] A starting point of \$300,000 was adopted on a prosecution appeal which took into account the company's resources. The Court considered the degree of carelessness as "significant" as the product safety compliance process had totally failed to provide a mechanism to stop the supply of per se dangerous goods.

[21] I accept The Warehouse submission that this is not a case where the product could not legally be sold at all. It is less serious than cases where the trader sold a product that was not permitted to be sold (as was the position in *NZME*).

[22] The product here is a toy which appears to be suitable for children aged 36 months and over, but not younger children. The product itself is not said to be intrinsically unsafe.

[23] The toys presented a choking hazard to children and babies under 36 months because there were a number of non-compliant removable small pieces attached to each toy (between nine and 16 individual parts).

[24] The Commerce Commission submit that a child aged 36 months and under may have been able to remove at least some of these pieces by hand and that once dismantled every small part presented a choking risk.

[25] A photograph of the labelling on the toys is attached as Appendix B. I have seen and examined the toy itself and the packaging. The labels do note that the toys are only suitable for children aged three years and above. The label also warns of a choking risk.

[26] However, there is also an image of a baby and adult on the label.

[27] The Commerce Commission submits that notwithstanding the warnings, the prominent photograph of the baby playing with the toy, including parts that had been dismantled, conveyed the clear overall impression that the toys were for use by children and babies aged 36 months and under. In those circumstances the effects of

the warning label were substantially undermined because the appearance on the photo was so obvious and prominent.

[28] The Commerce Commission also note that the toys were inherently dangerous because they had small parts. The toys were in effect “faulty” because of the way they were sold.

[29] The Warehouse has accepted that the overall impression conveyed to consumers from the photograph of the adult woman and child playing with the toys was that it was suitable for children aged younger than 36 months. They call the case one of “mislabelling”.

[30] The Warehouse note many toys have small parts, for example, virtually every single set of Lego would fall into that category. They say toys are permitted to have small parts but must be labelled appropriately.

[31] I have been provided with several other “comparative cases”.¹⁰ Of course, all cases need to be assessed on their own facts.

[32] However, the case of *Commerce Commission v SDL Trading Ltd* does have a number of similarities to the present case.¹¹ In that instance SDL sold a toy which was a baby doll in a bathtub containing small items such as a soap dish, a duck and a fish. They sold 4,704 units over three years. The toys bore a label with a photo of a child under three years old which conveyed the impression that the toy was suitable for children of that age. There were also warnings on the label that said the toy was unsuitable for children under three. So, a similar factual scenario to this case. There,

¹⁰ *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549; *Commerce Commission v The 123 Mart* [2017] NZDC 23286; *Commerce Commission v Brand Developers Ltd* [2015] NZDC 21374; *Commerce Commission v Kiwise Ltd and GT Mall Ltd* [2005] NZDC 2431; *Commerce Commission v Allen Trading 1972 Ltd* [2025] NZDC 17147; *Commerce Commission v Vodafone NZ Ltd* [2023] NZHC 2149; *Commerce Commission v Two Degrees Mobile Ltd* [2025] NZDC 2446; *Commerce Commission v SDL Trading Ltd* [2018] NZDC 6626; *Commerce Commission v Quick Dollar Ltd* [2021] NZDC 10894; *Commerce Commission v Good View Trading NZ Ltd* [2019] NZDC 3795; *Commerce Commission v Geneva Distributors Ltd* [2023] NZDC 23291; *Commerce Commission v Beau Ideal Ltd* [2024] NZDC 29578; *Commerce Commission v The Quick Dollar Ltd* [2021] NZDC 10894; and *Commerce Commission v Goodview Trading NZ Ltd* [2019] NZDC 3795.

¹¹ *Commerce Commission v SDL Trading Ltd* [2018] NZDC 6626.

the Court, in assessing the fine, held that the warnings on the back of the label did make a difference. I hold a similar view.

[33] I accept the labels on the toys themselves and on the box, noting the toys were only suitable for children aged three plus and in capital letters “WARNING: CHOKING HAZARD – Small parts” does mitigate the conduct. It must do so. The Commission’s approach is to suggest the warnings should in essence be ignored when assessing culpability – I disagree.

The extent and duration of the offending

[34] The Warehouse supplied 12,411 toys over a 26-month period.

[35] That is a significant number of items over a relatively lengthy duration which taken together is an aggravating feature of the offending. The more toys sold the greater the potential risk.

[36] However, neither the Commission or The Warehouse have been made aware of any injuries or incidents arising from the sale of the toys. Nor have any complaints been received by The Warehouse. There is no evidence of any physical harm. The concern here is the potential for harm.

[37] The Warehouse accepts that the mislabelling created an enhanced risk of harm. However, given the prominent warnings and the nature of the product itself, it is The Warehouse’s position that it is unlikely that a purchaser would have bought the toys for a child aged under 36 months. The “purchaser”, no doubt being an adult, would read and understand the warning labels.

[38] I accept this submission by the defence and therefore although the number of toys sold was significant, as was the duration, the potential for risk was reduced.

The “carelessness of the offending”

[39] The Commission accept that The Warehouse has a product safety compliance programme that for the most part “is reasonably robust”. The offending here followed

from the exercise of poor judgment by its quality assurance team. The Commission say that the product had a label and an infant on the front, notwithstanding the labels to the contrary, it was plainly marketed for use by children aged 36 months and under. Accordingly, the Commission say this was careless, and was exacerbated by the inability of The Warehouse to detect the issue with the toys at any stage over the 26 month offending period.

[40] Moreover, the Commission suggests that The Warehouse's financial circumstances, market placement and experience as one of New Zealand's largest toy retailers means that there is a higher expectation to have processes in place to swiftly and promptly correct bad judgment calls.

[41] On the other hand, The Warehouse maintain this was "isolated offending that arose due to an error of judgement by the buyer of the toys with respect to the message that might be conveyed by a photo, against a background of clear and prominent warnings." The inconsistencies were overlooked, notwithstanding otherwise robust processes in place within The Warehouse at the time. The Board and senior management of The Warehouse were unaware of the offending. The toys had been certified as suitable for children aged over three years by a reputable testing agency.

[42] The Warehouse submit that the buyer who was experienced and familiar with the applicable standards relating to age determination, simply took a different view of the label, which The Warehouse now accepts.

[43] Accordingly, The Warehouse submit that this makes the conduct inadvertent (a mitigating feature) or at worse careless (a neutral factor). The Warehouse note that they have never been prosecuted for a product safety issue relating to toys and that the Commission has no record of any previous product safety issues for toys sold by The Warehouse.

[44] The Warehouse push back against the suggestion that they should be continually reviewing decisions made in this regard – even where no complaints have been received.

[45] Having assessed the facts as to the offending and how it arose, I conclude that the company was careless. I agree with the submissions and authorities that a defendant's resources do have a direct bearing on the corresponding expectation for a robust compliance and "checking" system.

Commercial gain or benefit to the defendant

[46] It is not disputed that The Warehouse generated gross revenue of \$49,122 from the sales. However, the profit was likely minimal. I consider this is a neutral factor.

Starting point

[47] Having canvassed the factors affecting seriousness and culpability, I am now obliged to set a starting point. A balance needs to be struck.

[48] In my view, the starting point that the Commission seek is too high in the circumstances of this case. I say that because I consider the warning labels do mitigate culpability and as noted, despite the large number of toys sold, there has been no apparent harm. This lends support to the submission by The Warehouse that buyers of the toys would read and understand the labels and warnings. In terms of sentencing purposes and principles, I do not consider, in all the circumstances, the offending to be particularly serious of its type. But I bear in mind the direction that "fines for FTA offending had been set too low".

[49] I accept that The Warehouse is a large and financially robust organisation. Expectation for adherence to the law and responsibility follows. There were a large number of toys sold. The Warehouse, themselves, did not pick up on the error.

[50] Taking all these factors into account and given the reasonably lengthy period of time over which the toys were sold, I assess the appropriate starting point to be a fine of \$300,000.

Stage 2 – Mitigating factors

Guilty plea

[51] The Commission accepts that The Warehouse pleaded guilty at a relatively early stage following resolution discussions and are entitled to a discount of 25 per cent.

Cooperation and good character

[52] On this factor, there is disagreement between the parties. The Commission cite the High Court decision of *Premium Alpaca Ltd v Commerce Commission* and *Budget Loans Ltd v Commerce Commission* as authority for the proposition that “discounts somewhere between five and 10 per cent can be given for cooperation and previous good character”. A cumulative discount of 10 per cent for all such mitigating factors is to be regarded as being “at the high end indicated in cases of this sort”.¹²

[53] The Commission noted in submissions that although The Warehouse cooperated with the Commission’s investigations through the voluntary provision of information and attendance at an interview, the Commission expressed some reservations as to the promptness and helpfulness of some of the responses.

[54] The Warehouse disagrees with the suggestion that they were not as prompt and helpful as they could have been and notes that the agreed summary of facts does not record the basis for this assertion. The Warehouse submits the following actions indicate cooperation and acting as a responsible retailer:

- Immediately withdrawing the toys from sale upon notification of a potential issue to the store manager prior to receiving formal notification of this from the Commission.

¹² *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836; *Budget Loans Ltd v Commerce Commission* [2018] NZHC 3442.

- Responding to several written requests for information from the Commission.
- Ensuring that the buyer intended an interview with the Commission on a voluntary basis.

[55] The Commission also submits that although The Warehouse has a “limited proven offence history”, there has been previous engagement between The Warehouse and the Commission with warning and compliance advice letters.

[56] The Warehouse rejects the Commission’s reliance on its miscellaneous warning letters as being relevant to the potential discount for “previous good character”.

[57] I acknowledge there have been different approaches taken to this factor in mitigation.

[58] I intend to give an overall discount of 10 per cent for cooperation and previous good character in line with the authorities submitted by the Commission.

Enforceable undertakings

[59] The Warehouse sought a further five to 10 per cent discount for providing enforceable undertakings whereby they have agreed to:

- Cease to supply the toys unless they are first tested and comply with the standard under the regulations.
- Not knowingly supply a toy that is either manufactured, designed, labelled or marketed for use as a plaything by children up to and including 36 months of age or over and which is not compliant with the standard being tested against it.
- Further, agreed to enhance their procedures around age-grading of toys.

[60] I accept the Commissions submission in this respect that those undertakings were provided as part of a resolution where the Commission agreed to withdraw some charges. Accordingly, the provision of the undertakings is not available as a separate and discrete discount. It does not appear any authority is cited for such a proposition.

Stage 3 – Aggravating features

Financial capacity

[61] The Commerce Commission submits that a 25 per cent uplift would then be required to account for The Warehouse’s size and financial resources. The proposal is that this would go some way to ensure the penalty has the necessary “sting” while remaining proportionate to the offending. The Commission cites cases such as *Jet Star* and *Fibre X* as examples where the Court imposed a 25 per cent uplift for large entities.¹³ For completeness, other cases cited are: *Crackerjack*, where a 20 per cent uplift applied; and *BBB*, where a 15 per cent uplift applied.¹⁴

[62] In contrast, The Warehouse maintains that a further uplift is not required because The Warehouse’s size and resources were considered in setting the starting point. They cite *NZME* as authority where the High Court held it was not necessary to impose an additional uplift to reflect financial resources when it had been “sufficiently taken into account in setting the starting point.”¹⁵

[63] The Warehouse notes in accordance with *Two Degrees Mobile* that an uplift would be disproportionate where it was “a first offender”.¹⁶ Next, The Warehouse say that where the conduct is not deliberate, deterrence is of less relevance. They had the appropriate systems in place and have undertaken to improve them. When considering the need for the penalty to “sting”, The Warehouse refers to *Steel & Tube* which held

¹³ *Commerce Commission v Jet Star Airways Pty Ltd* [2025] NZDC 18366; *Commerce Commission v Vodafone New Zealand* [2023] NZHC 2149 (Fibre X).

¹⁴ *Commerce Commission v Crackerjack*, above n 9; and *Commerce Commission v Bed Bath and Beyond*, above n 5.

¹⁵ *Commerce Commission v NZME Advisory Ltd*, above n 2.

¹⁶ *Commerce Commission v Two Degrees Mobile Ltd* [2025] NZDC 2446.

that the defendant's means relates to its profitability.¹⁷ Here in the most recent financial year, The Warehouse made a loss of \$12.2 million.

[64] The Commission submit that the summary of facts records The Warehouse expects its profit for the 53 weeks to 3 August 2025 to be in the range of a \$5 million profit to \$5 million loss and since then reported a net loss after tax of \$2.8 million. The Commission note that the authorities have tended to focus on turnover rather than profit figures. The reason for this, is that turnover gives a better indication of the overall size of the entity and its resources relative to its profit in any given year. The Warehouse's significant sales figures were up 1.4 per cent to \$1.8 billion.

[65] So, again there are competing considerations. I consider an uplift is appropriate given the size of The Warehouse and its sales of over a billion dollars. The uplift will be 20 per cent.

Conclusion

[66] The starting point is a fine of \$300,000.

[67] The discounts total 35 per cent which equal \$105,000, leaving a nominal fine of \$195,000.

[68] From that I add an uplift of 20 per cent – \$39,000 which means an end fine of \$234,000.

Judge SJ Lance

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 19/03/2026

¹⁷ *Commerce Commission v Steel & Tube*, above n 7, at [148]-[149].