

Recent supermarket case highlights importance of fixing fair trading issues quickly

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Discrepancies between advertised prices and prices charged have led to a \$78k penalty being imposed on a supermarket under the Fair Trading Act 1986 (Fair Trading Act).

The Commerce Commission's action in the case, and the resulting penalty, shows that there isn't much margin for error when making pricing claims. It also highlights the value of responding quickly to address complaints about misleading claims and pricing errors, with the penalty in the case subject to a 20% uplift due to a failure to take immediate steps to correct discrepancies when they were pointed out.

What happened?

The Commerce Commission [announced](#) on 28 October that Kennedy's Foodcentre (2003) Limited (trading as PAK'nSAVE Māngere) has been fined \$78k by the District Court for making misleading representations about the promotional price of products in breach of the Fair Trading Act. The supermarket pled guilty to six charges in relation to its display of promotional prices for numerous items (on both its website and in store) that were sold for a higher price at checkout.

The price discrepancies were identified by Commerce Commission staff who undertook a series of mystery shops at supermarkets following regular consumer complaints about supermarket pricing. The differences between the promotional prices advertised at the supermarket and the prices charged ranged from 18 cents to two dollars extra.

Importantly, where a price discrepancy between the promotional price and the price charged at checkout was identified by the Commission, the supermarket's customer service staff were immediately notified. Despite this, the price discrepancies were still in place on several subsequent occasions when Commission staff returned to the store and re-purchased the products at issue.

Key takeaways

Key takeaways from the case are:

1. Advertised prices need to be accurate – no excuses: In its submissions, the supermarket suggested that, given the nature of the supermarket business with its high volume of low value sales, regular changes in product pricing, and reliance on human involvement at the point of sale, it was unlikely that pricing discrepancies could be eliminated entirely.

This suggestion was rejected by the sentencing judge, Judge D J McNaughton, who stated that consumers are entitled to rely on an error-free pricing integrity system. It is no defence to claim that pricing system errors are somehow inherent in businesses that deal with high volume, low value products, and regular price changes.

Businesses should therefore ensure that their processes are sufficient to identify and remove price discrepancies.

2. It is irrelevant whether there was an intention to deliberately mislead customers – carelessness is sufficient: It was accepted that there was no intention to deliberately mislead customers in this case. However, the conduct was described as "repeatedly careless". The pricing discrepancies related to a number of individual items across different departments of the supermarket and some were repeated even after Commission staff had notified supermarket staff of the price discrepancies.

3. Correct price discrepancies and misleading claims immediately: The Judge in the case was critical of the failure to take immediate steps to correct discrepancies when they were pointed out to customer service staff at checkout, stating that the immediate failure to act was "inexcusable" and a significant aggravating feature. As a result, a 20% uplift was applied to the starting point of the penalty.

If customers raise price discrepancies between promotional prices and prices charged, businesses should act to address these quickly. Similarly, complaints about misleading claims should be looked into and fixed promptly if a problem is identified.

Having a process in place for addressing complaints can also help to minimise the risk. For example, the supermarket in the case said that it has put new procedures in place for reporting pricing discrepancies to managers, training staff on store policy, and improving the sign off sheet used by staff to check prices.

4. Penalties for breaches can far outweigh profits made: While the overcharging of the products at issue was not able to be precisely quantified, it was found that it could not have exceeded \$10k, and the supermarket's profits were a "fraction" of that amount.

Although the low profits were taken into account by Judge McNaughton when determining the starting point of the penalty, businesses need to be aware that penalties for breaches of the Fair Trading Act are not necessarily linked to profits made from those breaches. In fact, the penalties imposed on businesses can be significantly higher than any benefit gained, as was the case here.

5. The Commerce Commission has mystery shoppers: That person browsing your aisles right now may be one of them. We recommend treating every customer as if that's the case.

While this case acts as a reminder to all businesses of Fair Trading Act risks, it also highlights the focus on supermarkets in particular. Judge McNaughton noted in the judgment that "pricing compliance in the supermarket context has always been critically important".

We expect the scrutiny of supermarkets will continue to grow in light of the Labour Party's commitment prior to its re-election to initiate a market study into supermarkets to ensure that New Zealanders are paying a fair price for groceries (see [here](#)).

If you would like advice on how to protect your business from potential Fair Trading Act issues, please contact a member of our consumer law team.

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