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In Consumer Protection We Trust? Re-Thinking the Legal Framework for Country of Origin Cases

Shmuel I. Becher

Jessica C. Lai

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In Consumer Protection We Trust? Re-thinking the Legal Framework for Country of Origin Cases

SHMUEL I. BECHER*
JESSICA C. LAI**

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* © 2018 Shmuel I. Becher. Associate Professor, Victoria University of Wellington—Victoria Business School. LL.M., J.S.D. (Yale University).

** © 2018 Jessica C. Lai. Senior Lecturer, Victoria University of Wellington—Victoria Business School. LL.M. Hons., M.Sc. (Victoria University of Wellington), Dr. iur. (University of Lucerne). We thank our colleagues Jonathan Barret and Kate Tokeley for their important comments on an earlier draft, William Briton for able research assistance, and Victoria Business School for financial support.

I. INTRODUCTION

Markets are becoming more complicated in an ever faster changing world. At the same time, new findings pertaining to human behavior and consumer markets constantly challenge traditional legal and policy assumptions.¹ More specifically, social science offers a myriad of insights into the ways trust, identity, ideology, and preferences interact and impact one another.²

A sensible consumer law policy requires an interdisciplinary and holistic approach.³ Recent scholarship has acknowledged this need while proposing novel perspectives that enrich academic discourse and development of consumer law policy. Along these lines, a growing body of literature examines how notions such as identity and trust affect consumer behavior and how the law should respond to these phenomena.⁴

However, this body of literature is in its infancy and is therefore underdeveloped. This Article bridges some of this gap, proposing a fresh and multi-dimensional approach. While focusing on country of origin cases, it demonstrates how incorporating behavioral, economic, and social insights may yield a superior legal regime. Notably, an agenda that considers how sellers can manipulate consumers' trust is applicable to the development of consumer law more generally.

Country of Origin statements have been regulated by consumer law for some time now. In the United States, Section 5 of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices."⁵ According to the Federal Trade Commission (FTC), "a *Made in USA* claim, like any other objective advertising claim, must be truthful and substantiated."⁶ Indeed, the FTC tags all its documents relating to false "Made in the USA"

1. See generally, e.g., EYAL ZAMIR & DORON TEICHMAN, *BEHAVIORAL LAW AND ECONOMICS* (2018).

2. For a review of different types of human interactions and an examination of whether and how the notion of trust should impact legal regulation, see generally Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001); Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717 (2006).

3. This is valid in various contexts. For concrete proposals with respect to the design of consumer protection laws see generally, for example, Shmuel I. Becher, *Unintended Consequences and the Design of Consumer Protection Legislation*, 93 TUL. L. REV. (forthcoming 2018).

4. See generally, e.g., Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863 (2018); Justin Sevier & Kelli Alces Williams, *Consumers, Seller-Advisors, and the Psychology of Trust*, 59 BOS. C.L. REV. 931 (2018).

5. 15 U.S.C. § 45 (2018).

6. FED. TRADE COMM'N, *COMPLYING WITH MADE IN USA STANDARD 22* (1998), <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf> [<https://perma.cc/GV5S-SN2E>].

claims and there have been 179 entries—with 140 enforcement measures—since 1999.⁷ At the time of writing, the most recent of these was from March 26, 2018, for mattresses labeled “Designed and Assembled in the USA,” which had in fact been imported—already complete—from China.⁸

Interestingly, recent years have seen a steady growth in consumer law cases concerning country of origin.⁹ For instance, for the years 1999, 2000, and 2001 the FTC reports thirteen Made in USA related matters overall.¹⁰ Yet, for the years 2015, 2016, and 2017, eighty-two cases were reported,¹¹ reflecting an increase of more than fivefold. Simultaneously, there has been a significant increase in the penalties imposed. Given the increase in overall cases, a stricter policy makes perfect sense. Country of origin claims may

7. See *Made in the USA*, FED. TRADE COMMISSION, <https://www.ftc.gov/consumer-protection/made-usa> [<https://perma.cc/E9GZ-3DJK>].

8. Lesley Fair, *Mattress Sellers Stick Buyers with Misleading “USA” Claim*, FED. TRADE COMMISSION (Mar. 26, 2018, 11:16 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2018/03/mattress-sellers-stick-buyers-misleading-usa-claim-0> [<https://perma.cc/Y6XF-H7ZR>]; see *Nectar Brand LLC*, FED. TRADE COMMISSION (Mar. 20, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/182-3038/nectar-brand-llc> [<https://perma.cc/S6UB-B2CZ>].

9. This is in line with the focus of numerous consumer organizations, in the United States and beyond, on credence qualities. See, e.g., DEP’T OF JUSTICE, CONSUMER AFFAIRS VICT., *CREDENCE ATTRIBUTES: MAKING HONESTY THE BEST POLICY* 4 (2010), <https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/credence-attributes-making-honesty-the-best-policy-2010.pdf> [<https://perma.cc/GS7W-3EPV>]; *Commission Releases 2017/18 Priorities*, COM. COMMISSION N.Z. (July 20, 2017), <http://www.comcom.govt.nz/the-commission/media-centre/media-releases/2017/commission-releases-201718-priorities/> [<https://perma.cc/UTJ2-765T>] (“In our consumer area we will focus on . . . credence claims. . . . When it comes to credence, it is difficult for consumers to verify claims made about a product, and therefore easy for them to be misled. In particular, we will be paying attention to food products and country of origin claims.”); *Commission’s Alpaca Case Brings Total Fines to \$1.5 Million*, COM. COMMISSION N.Z. (May 23, 2017), <http://www.comcom.govt.nz/the-commission/media-centre/media-releases/2017/commissions-alpaca-case-brings-total-fines-to-1.5-million/> [<https://perma.cc/B6H9-D8PP>] [hereinafter *Alpaca Case*]; Timothy J. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy*, FED. TRADE COMMISSION (Aug. 19, 2003), <https://www.ftc.gov/public-statements/2003/08/federal-trade-commission-and-future-development-us-consumer-protection> [<https://perma.cc/2N6Z-PLC6>].

10. According to the FTC’s registry, there were eight Made in USA related matters in 1999, one in 2000, and four in 2001. *Made in USA Matters*, FTC, https://www.ftc.gov/tips-advice/business-center/legal-resources?field_consumer_protection_topics_tid=234&field_date_value%5Bmax%5D%5Bdate%5D=&field_date_value%5Bmin%5D%5Bdate%5D=&field_industry_tid=All&sort_by=field_date_value&title=&type=All [<https://perma.cc/3BSB-9XQF>].

11. There were twenty-eight such matters in 2015, thirty in 2016, and twenty-four in 2017. *Id.*

signal quality or carry ethical–ideological approval.¹² Yet, such claims relate to credence qualities, which are characteristics that cannot be verified by consumers. Furthermore, detecting such claims and initiating litigation based on misleading ones, is rather challenging and costly.¹³ Thus, traders have a strong profit-incentive to exploit consumers’ trust by making misleading country of origin claims. As the data show, the FTC indeed encounters more and more of these cases.

Mislabeled country of origin is by no means an issue reserved to the United States. This has been a source of concern in multiple jurisdictions, including Canada,¹⁴ Australia,¹⁵ and elsewhere. Along these lines, in recent years the New Zealand Commerce Commission—which serves an analogous function to FTC—has prioritized the policing and prosecution of misleading or deceptive conduct regarding country of origin.¹⁶ Remarkably, the mislabeling has occurred disproportionately vis-à-vis products for tourists.¹⁷

Tourists form a consumer group that is particularly vulnerable to misleading behavior. For starters, tourists frequently suffer from language, legal, and cultural gaps. Moreover, cognitive biases may lead tourists to willingly spend greater amounts of money on something associated with their holiday. For instance, the behavioral phenomenon dubbed “mental accounting” suggests people have different “accounts” for different spending purposes.¹⁸ This can result in people being more willing to use money from one account—for example, money that is linked to prize winning, gifts, or vacations—while being less willing to consume money associated with other accounts—for example, money that is related to one’s savings.¹⁹ Another important

12. Cf. Christine Parker, Rachel Carey & Gyorgy Scrinis, *The Consumer Labelling Turn in Farmed Animal Welfare Politics: From the Margins of Animal Advocacy to Mainstream Supermarket Shelves*, in *ALTERNATIVE FOOD POLITICS: FROM THE MARGINS TO THE MAINSTREAM* (Michelle Phillipov & Katherine Kirkwood eds., forthcoming 2018).

13. Jessica Palmer, *Access to Justice for Consumers*, in *CONSUMER LAW IN NEW ZEALAND* 495, 496–99 (Kate Tokeley ed., 2d ed. 2014) (discussing barriers to justice in the context of consumers).

14. See generally, e.g., COMPETITION BUREAU CAN., “PRODUCT OF CANADA” AND “MADE IN CANADA” CLAIMS (2009), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03169.html [https://perma.cc/5656-SNT5].

15. See, e.g., *Country of Origin Claims*, AUSTRALIAN COMPETITION & CONSUMER COMMISSION, www.accc.gov.au/business/advertising-promoting-your-business/country-of-origin-claims [https://perma.cc/LF7C-TX2N].

16. *Commission Releases 2017/18 Priorities*, supra note 9.

17. For a partial, illustrative list of cases, see *infra* Appendix A.

18. Richard H. Thaler, *Mental Accounting and Consumer Choice*, 27 *MARKETING SCI.* 15, 15 (2008).

19. See generally *id.*

cognitive bias is the “focusing illusion.”²⁰ According to this illusion, when people focus their attention on a specific decision they are likely to over-value its importance.²¹

Shifting the focus, New Zealand enjoys a relatively high level of trust.²² Furthermore, there is a premium attached to *New Zealand*, resulting from its *clean and green* image.²³ Following this line of reasoning, deterring firms from engaging in misleading or deceptive behavior vis-à-vis tourists is a rather complex challenge. Yet, the legal literature neglects to address the unique characteristics of consumers who are also tourists.

A recent string of New Zealand cases provides an exceptional opportunity to revisit this topic. Statements regarding country of origin are important for consumers, traders, and society. Such claims also affect the notion of trust, which is an important sociological concept that interacts with markets and the law. High trust is correlated with healthier and wealthier societies. Trust may be threatened when people with diverse backgrounds interact, such as when local firms transact with tourists.

As we demonstrate below, courts are not employing the right framework and considerations for advancing consumer law in country of origin cases. This, we believe, is true in other consumer law cases as well. Following this logic, Part II of this Article systematically and critically examines recent “*Made in New Zealand*” country of origin cases. Section A contrasts various cases and points out the erratic nature of the fines imposed. Thereafter, Section B demonstrates why these fines do not lead to economic deterrence, leaving firms with a profit-incentive to misbehave. Next, Section C examines how country of origin cases may negatively impact social trust and how this should be factored into the legal framework of such cases. Subsequently, Section D explores some other context-dependent characteristics that courts should consider when assessing country of origin cases.

20. See, e.g., David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 PSYCHOL. SCI. 340, 340 (1998).

21. *Id.*

22. See MINISTRY SOC. DEV., THE SOCIAL REPORT 2016, at 234–37 (2016), <http://socialreport.msd.govt.nz/documents/2016/msd-the-social-report-2016.pdf> [<https://perma.cc/UVT5-T7ZA>].

23. Florian Kaefer, *Origins and Meaning of ‘Clean, Green’ New Zealand*, PLACE AND BRAND OBSERVER (Sept. 13, 2016), <https://placebrandobserver.com/country-reputation-origins-clean-green-new-zealand/> [<https://perma.cc/CN6Q-4JCD>].

II. COUNTRY OF ORIGIN: TOWARDS A HOLISTIC CONSUMER LAW PERSPECTIVE

At the time of writing, the latest of these Made in New Zealand' cases was embodied in *Commerce Commission v. Topline International, Ltd.*²⁴ This decision related to Topline's "NatureBee Potential Bee Pollen" product, which was labeled as being made in New Zealand.²⁵ In fact, the bee pollen was sourced from China, was turned into potentiated bee pollen in China, and was encapsulated in China.²⁶ After being imported into New Zealand, it was then bottled and labeled.²⁷ As part of this process, Topline used the well-known "New Zealand Made" label, with the red kiwi in a blue and red triangle.²⁸ It also promoted its product by emphasizing the various advantages that New Zealand made bee pollen has.²⁹ In May 2017, the District Court at Auckland fined Topline \$405,000 and its director \$121,500 for misleading consumers under section 10 of the Fair Trading Act 1986 (FTA)—a total of \$526,500.³⁰

These figures, no doubt, reflect the courts' increasing willingness to impose high fines in consumer law cases.³¹ In May 2016, one year prior to *Topline*, Nangong, Ltd. and its owner were convicted of fourteen false claims charges.³² In this case, the false claims were that duvets contained alpaca wool and were made in New Zealand. The defendants were fined \$109,200—\$91,000 and \$18,200, respectively.

In comparison, the fine imposed in *Topline*—\$526,500—represents the next step for country of origin cases. Such a relatively hefty fine serves to deter non-compliance with consumer law. Considerable media attention, which the *Topline* case and a string of alpaca-related cases received,³³ might

24. *Commerce Comm'n v. Topline Int'l, Ltd.* [2017] NZDC 9221 (N.Z.).

25. *Id.* at [17].

26. *Id.* at [14].

27. *Id.* at [14–15].

28. *Id.* at [18].

29. *Id.* at [21].

30. *Id.* at [1], [39]. For a detailed discussion see *infra* Section II. Maximum penalty amounts are detailed in section 40 of the FTA. Unless otherwise stipulated, amounts are in New Zealand dollars.

31. For an additional case from 2017 that illustrates courts' willingness to impose high fines in consumer law cases, see *Commerce Comm'n v. Reckitt Benckiser (N.Z.), Ltd.* [2017] NZDC 1956 at [55].

32. *Commerce Comm'n v. Hou* [2016] NZDC 9291 (N.Z.).

33. *E.g., Alpaca Case, supra* note 9; *False Bee Pollen Claims Result in Fines*, N.Z. L. SOC'Y (May 19, 2017), <https://www.lawsociety.org.nz/news-and-communications/latest-news/news/false-bee-pollen-claims-result-in-fines> [<https://perma.cc/S6NP-ZY9C>]; "Made in New Zealand" Bee Pollen was Chinese, COM. COMMISSION N.Z. (May 19, 2017), <http://www.comcom.govt.nz/the-commission/media-centre/media-releases/2017/made-in-new-zealand-bee-pollen-was-chinese/> [<https://perma.cc/628L-PVGA>]; Holly Ryan, *\$520k*

additionally increase awareness of the expected norms of behavior. Overall, high fines, accompanied by significant publicity, serve as behavioral regulators that make the risks associated with dishonest behavior more vivid and reduce traders' incentives to misbehave.³⁴

Despite the imposition of increasingly larger fines,³⁵ we submit that penalties are not imposed consistently and are insufficient to meet their purpose. In the following Section, we inquire into some of the characteristics of the country of origin decisions. We argue that penalties might be ill-suited to achieve their main goals.

A. The Erratic Nature of Determining Fines

We begin our analysis with an examination of the fines in relation to the FTA. Section 40(2) of the FTA states that the aggregate fine imposed cannot exceed the maximum penalty for a single charge, if “contraventions are of the same or a substantially similar nature and occurred at or about the same time.”³⁶ Very few cases mention this section in their sentencing decisions. However, it appears New Zealand courts generally aggregate behavior and presume that this limit applies.

For example, in *Commerce Commission v. Chen*, the court noted the maximum sentence per charge for a company was \$200,000,³⁷ but then set the starting point for twelve charges—for conduct that took place over twenty months—at \$200,000.³⁸ Indeed, upon our review of case law, we found only two specific discussions regarding the limit. In *Commerce Commission v. Mi Woollies, Ltd.*,³⁹ the court stated that the provision regarding the aggregate fine

Fine for ‘NZ-made’ Pollen Claims, N.Z. HERALD (May 19, 2017, 10:53 AM), http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11859047 [<https://perma.cc/B3A4-937C>].

34. Media coverage makes risks more readily available in people's minds, thus leading to risk over-estimation. The term “availability cascades” suggests that people perceive risks as more serious when a relevant incident is “readily called to mind or ‘available.’” CASS R. SUNSTEIN, *BEHAVIORAL ANALYSIS OF LAW* 14 (1997).

35. See *infra* Appendix A.

36. Fair Trading Act 1986, subs 40(2) (N.Z.).

37. *Commerce Comm'n v. Chen* DC Auckland CRI 2012-004-019312, 28 March 2013 at [10] (N.Z.).

38. *Id.* at [26].

39. *Commerce Comm'n v. Mi Woollies, Ltd.* DC Christchurch CRI 2012-009-009069, 31 July 2013 (N.Z.). Judge MacAskill noted “[t]he defendant is liable to a fine not exceeding \$200,000 for each offense,” but did not explain why the maximum applied to the case at hand. *Id.* at [5].

does “not control the maximum fines that can be imposed on the s[ection] 10 charges because they did not occur ‘at or about the same time,’” as the conduct that occurred between April 2009 and August 2011.⁴⁰

In *Commerce Commission v. Zenith Corp., Ltd.*, a case predominantly about misleading health claims regarding the product “Body Enhancer,”⁴¹ the Court adopted the Federal Court of Australia (FCA) decision, *Ducret v Colourshot Proprietary, Ltd.*⁴² The FCA interpreted the Australian equivalent to FTA section 40(2)⁴³ as meaning that acts committed at a two-month interval could not have reasonably occurred at about the same time.⁴⁴ Instead, the acts must take place within “at most” three days to have occurred at around the same time.⁴⁵ In terms of whether the contraventions are of “the same or a substantially similar nature,” the court in *Zenith* noted the “extent and membership of the target audience” of the representations is relevant, but it is possible that representations in different media are the same or substantially similar in nature.⁴⁶ *Zenith* was upheld on appeal.⁴⁷

Let us contrast this with *Topline*, where the court did not apply section 40(2).⁴⁸ *Topline* and its director each faced twenty-two charges under section 10 of the FTA pertaining to the period of May 2011 to June 2015.⁴⁹ In June 2014, Parliament increased the maximum penalties under the FTA, reflecting Parliament’s intent to more severely punish certain misleading and deceptive conduct.⁵⁰ Twelve of the offenses in *Topline* were subject to the previous maximum penalty, while the other ten were subject to the new maximum.⁵¹ As detailed in Table 1 below, the potential maximum penalty in this case was no less than \$11,120,000—\$8.4 million for *Topline* and \$2.72 million for its director.

40. *Id.* at [6]. This case pertained to FTA, subsection 13(j). *Id.*

41. *Commerce Comm’n v. Zenith Corp.* [2006] DCR 757 at [1] (N.Z.).

42. *Id.* at [79] (adopting *Ducret v Colourshot Proprietary, Ltd* [1981] 35 ALR 503 (Austl.)).

43. *Trade Practices Act 1974* (Cth) s 79(2) (Austl.).

44. *Ducret v Colourshot Proprietary, Ltd* [1981] 35 ALR 503 (Austl.).

45. *Id.*

46. *Zenith*, DCR 757 at [82].

47. *Zenith Corp. v. Commerce Comm’n* [2008] NZHC at [213]–[219] (N.Z.).

48. *Commerce Comm’n v. Topline Int’l, Ltd.* [2017] NZDC 9221 (N.Z.).

49. *Id.* at [3].

50. See *Commerce Comm’n v. Hou* [2016] NZDC 9291 at [26] (N.Z.). In this decision, the court penalized the company more for a pre-change charge—\$63,000—than it did for a post-change charge—\$28,000. *Id.* at [33]–[34]. It is unclear why. The opposite was true for the charges against the owner. *Id.* at [35]–[36].

51. *Topline*, NZDC 9221 at [37].

TABLE 1
MAXIMUM PENALTIES

	CORPORATIONS		INDIVIDUALS	
	Previous max. penalty	Current max. penalty	Previous max. penalty	Current max. penalty
	200,000	600,000	60,000	200,000
Number of charges	12	10	12	10
Fine exposure	2,400,000	6,000,000	720,000	2,000,000
Exposure per entity	2,400,000 + 6,000,000 = 8,400,000		720,000 + 2,000,000 = 2,720,000	
Total fine exposure	8,400,000 + 2,720,000 = 11,120,000			

As the offenses in *Topline* occurred over four years, the different charges surely cannot have occurred “at or about the same time.”⁵² Furthermore, the representations varied significantly, raising a strong argument that they were not “of the same or a substantially similar nature.”⁵³ Yet, as noted, it seems that the court applied FTA section 40(2).⁵⁴

After stating the need to evaluate all surrounding circumstances,⁵⁵ the judge then declared that “in [his] view, the appropriate starting point for sentencing” is a fine of \$600,000 for *Topline* and a fine of \$180,000 for its director.⁵⁶ This is despite the fact that the court, in considering the particular circumstances of the case at hand, emphasized various aggravating factors: the “scale of the offending,” the significant period of time, the number of consumers involved, and the fact “that consumers . . . cannot check the quality and source of the product themselves.”⁵⁷ The court also

52. Fair Trading Act 1986, subs 40(2) (N.Z.).

53. *Id.*

54. *See Topline*, NZDC 9221 at [37]. The court does not explicitly state that it applied s 40(2). *Id.*; *see infra* Table 2.

55. *Topline*, NZDC 9221 at [38].

56. *Id.* at [39].

57. *Id.* at [27].

noted the “blatant,” untrue nature of the statements.⁵⁸ It then remarked on the fact that by using Chinese pollen Topline saved about \$684,000, which resulted in unfair competition.⁵⁹ The court further mentioned the “potential biosecurity risk[s]”⁶⁰ and the breach of trust.⁶¹ Moreover, the court considered the potential damage to the “MADE IN NEW ZEALAND” brand, as well as to other exporters—including increased scrutiny of New Zealand products overseas.⁶²

The court also considered three mitigating factors.⁶³ First, the defendants cooperated with the Commerce Commission.⁶⁴ Second, the defendants did not have “previous convictions.”⁶⁵ These two mitigating factors were grouped together to provide a 10% discount.⁶⁶ Third, “[e]arly guilty pleas were entered,” and the defendants apologized and removed the misleading information.⁶⁷ A 25% discount was allowed for the “early guilty plea.”⁶⁸ As a result, fines were set at \$405,000 for Topline and \$121,500 for its director.⁶⁹ Table 2 reflects the way the Court broke down the fines.

58. *Id.* at [28].

59. *Id.* at [29].

60. *Id.* at [30].

61. *Id.* at [31].

62. *Id.*

63. *Id.* at [33].

64. *Id.*

65. *Id.* A lack of prior convictions is generally considered a mitigating factor. *See Commerce Comm’n v. Budget Warehouse, Ltd.* [2017] NZDC 14223 at [19] (N.Z.); *Commerce Comm’n v. Bike Retail Grp., Ltd.* [2017] NZDC 2670 at [17] (N.Z.). *But see Commerce Comm’n v. Mi Woollies, Ltd.* DC Christchurch CRI 2012-009-009069, 31 July 2013 at [31] (N.Z.) (opining that this was “not a mitigating factor,” but rather “the absence of an aggravating factor”).

66. *See Topline*, NZDC 9221 at [39].

67. *Id.* at [33].

68. *Id.* at [39].

69. *Id.*

TABLE 2
ACTUAL PENALTIES

	TOPLINE		DIRECTOR	
Maximum penalty per charge	200,000	600,000	60,000	200,000
Actual penalty per charge	8,750	30,000	3458.33	8,000
Actual penalty in %	4.38%	5%	5.76%	4%
Number of charges	12	10	12	10
Fine imposed	105,000	300,000	41,500	80,000
Fine imposed per entity	105,000 + 300,000 = 405,000		41,500 + 80,000 = 121,500	
Percentage of fine imposed	405,000/8,400,000 = 4.82%		121,500/2,720,000 = 4.47%	
Total fine imposed	405,000 + 121,500 = 526,500			

The court did not provide any further explanation as to the amount of the imposed fines.⁷⁰ Despite finding the conduct at issue particularly odious, the court applied less than 5% of the maximum penalty.⁷¹ While the court translated the mitigating factors to concrete discount figures—10% and 25%—it did not give the aggravating factors any numerical significance.⁷²

On top of that, courts apply discounts in a seemingly incoherent way. Courts either apply the discounts sequentially, cumulatively, or globally. For example, in *Topline*, the court applied discounts sequentially: the 10% discount for cooperation and no previous convictions was applied to the

70. See generally *id.*

71. See *id.* at [39].

72. See *id.*

starting point sum of \$600,000 for Topline and \$180,000 for the director; the 25% discount for early guilty pleas was not applied to the principal amount but to the 10% discounted amount.⁷³ The court made the following calculation: $\$600,000 - 10\% = \$540,000$ and then $\$540,000 - 25\% = \$405,000$.⁷⁴ This is not uncommon.⁷⁵ However, it is arguably illogical to apply the two discounts in two distinct phases, as both pertain to the same issue and behavior.

The cumulative approach involves adding the discounts and applying them to the principal. For example, if the court in *Topline* had applied the two discounts to the original amount, the calculation would have been $600,000 - (10\% + 25\%) = 390,000$; that is, \$15,000 less. The cumulative approach is also not uncommon. In *Hou* (the alpaca-related decision regarding Nangong, Ltd.), the court applied a 25% discount for the guilty plea and a 5% discount for the absence of prior convictions and cooperation, equating to 30% off the starting point.⁷⁶

In contrast, sometimes courts will simply state that all the mitigating factors are worth a certain numerical discount combined, without giving any percentage or method of calculation.⁷⁷ We have dubbed this “a global approach.” In rarer cases, it is wholly unclear how ultimate penalties are determined.⁷⁸

Furthermore, our concerns are exacerbated by the incoherent and unsystematic ways courts regard other factors, such as the defendant’s

73. *Id.*

74. *See id.*

75. For calculations under the FTA, see *Commerce Comm’n v. Budget Warehouse, Ltd.* [2017] NZDC 14223 at [19], [23] (N.Z.); *Commerce Comm’n v. Budget Collection, Ltd.* [2016] NZDC 15542 at [42], [44]–[45] (N.Z.); *Commerce Comm’n v. Mi Woollies, Ltd.* DC Christchurch CRI 2012-009-009069, 31 July 2013 at [40]–[46] (N.Z.). For a discussion of discounts under the Credit Contracts and Consumer Finance Act 2003, see generally *Commerce Comm’n v. Acute Fin., Ltd.* [2017] NZDC 13866 (N.Z.); *Commerce Comm’n v. Best Buy, Ltd.* [2017] NZDC 13575 (N.Z.). For an example of where the court deducted two discounts sequentially under the Health and Safety at Work Act, see generally *Worksafe N.Z. v. Budget Plastics, (N.Z.) Ltd.* [2017] NZDC 17395.

76. *Commerce Comm’n v. Hou* [2016] NZDC 9291 at [33] (N.Z.); *see also Commerce Comm’n v. Bike Retail Grp., Ltd.* [2017] NZDC 2670 at [16]–[21] (N.Z.); *Commerce Comm’n v. Reckitt Benckiser (N.Z.), Ltd.* [2017] NZDC 1956 at [52]–[55] (applying the two discounts to the original amount, although not in an implicit and arithmetically accurate way); *Commerce Comm’n v. Chen* DC Auckland CRI 2012-004-019312, 28 March 2013 at [10] (N.Z.).

77. *Commerce Comm’n v. Anwer* [2016] NZDC 25266 at [8] (N.Z.). In a sentencing decision for FTA section 13, Judge Field held that cooperation and a guilty plea represented a \$45,000 reduction—of \$105,000—without giving any percentages or method of calculation. *Id.*; *see also Commerce Comm’n v. Trustpower, Ltd.* [2016] NZDC 18850 at [14]–[16] (N.Z.).

78. *See R v. Princess Wool Co.* [2017] NZDC 12227 at [22]–[26] (N.Z.). The numbers and percentages given do not match up.

financial position and ability to pay, when determining a penalty. In some cases, courts are willing to factor in the ability to pay when determining the penalty.⁷⁹ In *Commerce Commission v. Best Buy Ltd.*, the court gave a 5% discount, as the defendant could show a deterioration in the volume of sales.⁸⁰ In *Commerce Commission v. Frozen Yoghurt Ltd.*, the defendants had gone into liquidation.⁸¹ The court noted that the business had functioned through franchises.⁸² Thus, to ensure that unsecured creditors were not unfairly affected, the court reduced the overall fine by approximately 77%, from \$300,000 down to \$70,000.⁸³ In contrast, in *Commerce Commission v. Hyeon Co.*, the court found it irrelevant that a defendant had ceased trading and fined the company and its director \$105,000 and \$24,500 respectively for FTA section 10 violations.⁸⁴ Yet, in other cases, there appears to be some room to argue “double accounting” when the director is also a shareholder or there are two directors charged.⁸⁵

In spite of the abovementioned criticisms, one should not be overly surprised by the inconsistency in penalties. One study found that although juries tend to agree in their moral judgments, they nevertheless provided “erratic” monetary awards.⁸⁶ That is, the *translation* or quantification of

79. For instance, in *Mi Woollies*, the court showed readiness to consider the defendant’s financial position and ability to pay any fine imposed, but this was not raised as a consideration. *Mi Woollies*, DC Christchurch CRI 2012-009-009069 at [27]; *see also Bike Retail Grp.*, NZDC 2670 at [18] (“Obviously, the level of penalty [\$800,000] that has to be imposed is significant and will be a burden to the company. That burden is not too great for the company to bear and I have made the enquiries as to the level of fines being within the means of the company. I am assured that they are.”).

80. *Best Buy Ltd.*, NZDC 13575 at [25]. The court was unwilling to give a larger discount, as the company was still in trade. *Id.*

81. *Commerce Comm’n v. Frozen Yoghurt Ltd.* [2016] NZDC 19792 at [24] (N.Z.).

82. *Id.* at [25].

83. *Id.* at [26]–[29].

84. *Commerce Comm’n v. Hyeon Co.* DC Rotorua CRI-2012-063-004546, 6 August 2013 at [26], *aff’d*, [2014] NZHC 1836 (N.Z.); *see also Mobile Trader Fined Despite Being Liquidated*, COM. COMMISSION N.Z. (Feb. 7, 2018), <http://www.comcom.govt.nz/the-commission/media-centre/media-releases/2018/mobile-trader-fined-despite-being-liquidated/> [<https://perma.cc/8HUN-AS8N>] (reporting Appenture Marketing Limited was fined \$114,000 for eighteen charges under the FTA, and six charges under the Credit Contracts and Consumer Finance Act 2003, despite having gone into liquidation, for deterrence and because conviction could result in some return of funds to consumers).

85. *See Premium Alpaca*, NZHC 1836 at [37]; *Commerce Comm’n v. Chen* DC Auckland CRI 2012-004-019312, 28 March 2013 at [23] (N.Z.).

86. Daniel Kahneman, David Schkade & Cass R. Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49, 49 (1998).

moral judgement into financial awards yields unpredictable results. As one court noted, no “formula or method of calculation or any other tool or template to guide the Court” exists.⁸⁷ Rather, sentencing is an “evaluative exercise” dependent on the exact facts at hand.⁸⁸ But this “evaluative exercise” is highly subjective.⁸⁹

We are not saying the courts should have imposed the maximum penalty in cases such as *Topline* or that there is a *one size fits all* formula to be applied in all cases. We are, however, concerned with how the starting point is decided and the discounts applied. The analysis reveals a confusing and inconsistent legal landscape, which is hard to explain or justify. Unfortunately, these concerns are intensified by some other aspects, such as lack of economic deterrence, to which we now turn.

B. Lack of Economic Deterrence

Our next claim is that fines imposed for breaches of the FTA do not provide the necessary deterrence effect.⁹⁰ As noted in *Topline*, “[d]eterrence must be a principal sentencing factor and consequences need to be imposed to discourage commercially unethical behaviour.”⁹¹ This aligns with the Sentencing Act of 2002.⁹² Nonetheless, it is doubtful that the fines actually deter such behavior. Let us take a closer look at the financial findings in some of the country of origin decisions.

Determining the profit gained from misleading or deceptive conduct might not always be feasible. The court might not have enough information.⁹³ This was not the case in *Topline*.⁹⁴ To begin with, the court noted that *Topline*

would not have had a business without the pollen imported from China. The pollen from China was also cheaper. It is estimated that by using the Chinese based pollen instead of the unavailable New Zealand pollen the defendants made

87. *Commerce Comm’n v. Mi Woollies, Ltd.* DC Christchurch CRI 2012-009-009069, 31 July 2013 at [14] (N.Z.).

88. *Id.*; see also *Commerce Comm’n v. Budge Collection, Ltd.* [2016] NZDC 15542 at [41].

89. See *Mi Woollies*, DC Christchurch CRI 2012-009-009069 at [14].

90. For a discussion on penalties under section 40 of the FTA and a survey of the relevant factors in determining fines—including those cases where more substantial fines should be imposed—see Debra Wilson, *Consumer Information*, in CONSUMER LAW IN NEW ZEALAND, *supra* note 13 at 125, 166 nn.220–23; see also *Commerce Comm’n v. Bike Retail Grp., Ltd.* [2017] NZDC 2670 at [18] (N.Z.).

91. *Commerce Comm’n v. Topline Int’l, Ltd.* [2017] NZDC 9221 at [26] (N.Z.).

92. See Sentencing Act 2002, ss 7–8 (N.Z.).

93. See, e.g., *Commerce Comm’n v. Hou* [2016] NZDC 9291 at [24] (N.Z.).

94. See generally *Topline*, NZDC 9221.

a saving of \$683,857.61 on what the pollen would have cost if it could have been sourced in New Zealand.⁹⁵

From a deterrence perspective, then, imposing a \$526,500 fine makes no economic sense. If a business can save approximately \$684,000 by behaving illegally, a \$526,500 fine still leaves businesses with an improper *ex ante* incentive to breach the law. Given the prevalence of under-enforcement in consumer markets and the fact that businesses are generally risk neutral, the fine in such cases should be considerably higher. In fundamental economic terms, the expected value of a breach must not be positive. Without offsetting the economic incentive to behave unethically, the fine cannot realize its objective and be economically efficient.

Another financial fact noted in the court's opinion furthers our suspicion toward the effectiveness of the fine. The judge stated that "NatureBee is Topline's flagship product and accounts for the majority of its revenue of between \$3.4 million and \$4.9 million annually."⁹⁶ In other words, during the four years that Topline made untrue representations, the company's revenue was approximately \$16 million. Recall that Chinese pollen was central to Topline's business. With no evidence to the contrary, it should be questionable whether a fine that captures about 3% of the trader's revenue suffices.

This is not a problem specific to *Topline*. Other cases also indicate that the starting point is not determined in relation to the defendant's gain. Instead, the courts adopt a totality principle, where the overall criminality is evaluated and a proportionate penalty is imposed.⁹⁷ That is, the starting point for fines in consumer law is essentially calculated with reference to how unscrupulous the defendant's behavior is compared to other cases. In this context courts consider how widespread, long, misleading, deceptive, and purposeful the conduct at stake was. Courts also consider the vulnerability of the target consumer and the defendant's reaction to dealings with the Commerce Commission's warnings and compliance letters. The courts then scale accordingly.⁹⁸

95. *Id.* at [29].

96. *Id.* at [10].

97. *Commerce Comm'n v. Hyeon Co.* DC Rotorua CRI-2012-063-004546, 6 August 2013 at [25], *aff'd*, [2014] NZHC 1836 (N.Z.).

98. See generally, e.g., *Commerce Comm'n v. Acute Fin., Ltd.* [2017] NZDC 13866 (N.Z.); *Commerce Comm'n v. Best Buy, Ltd.* [2017] NZDC 13575 (N.Z.); *Commerce Comm'n v. Bike Retail Grp., Ltd.* [2017] NZDC 2670 (N.Z.); *Commerce Comm'n v. Budget Warehouse, Ltd.* [2017] NZDC 14223 (N.Z.); *Commerce Comm'n v. Fujitsu Gen.*

Consider, for instance, *Mi Woollies*, a case dealing with sheepskin footwear labeled “UGG New Zealand” and “New Zealand Owned & Operated.”⁹⁹ In fact, the footwear was made in China from predominantly Australian sheepskin.¹⁰⁰ Judge MacAskill noted:

In cases of this kind the courts have, at least on occasions, acted on the “principle” that it is appropriate that fines imposed should neutralise the profits gained so as to discourage unlawful conduct and that a premium should be added for deterrence. However, this may be simplistic and unjust and does not appear to sit comfortable with the provisions of the Sentencing Act 2002.¹⁰¹

The court had stated that the gross profit made from sales of the misleadingly labeled footwear was \$375,000.¹⁰² However, the court declined to “neutralise” any profit made.¹⁰³ As discussed above, the court emphasized that there is no one formula or method to calculate penalties, as sentencing can only be done on a case-by-case basis.¹⁰⁴ The court then fined *Mi Woollies* \$63,000.¹⁰⁵

The penalty in *Commerce Commission v. BGV International, Ltd.* was similarly dubiously low.¹⁰⁶ The defendant—among other things—sold alpaca rugs labeled “made in New Zealand” although they were from Peru.¹⁰⁷ BGV received approximately \$3.2 million in sales and income over the period of offending.¹⁰⁸ Sales of the offending alpaca rugs constituted “46 percent of the total sales value”—or \$1,472,000.¹⁰⁹ The defendant sold the rugs for between \$2,000 and \$4,000; their retail value was between \$1,000 and \$1,600.¹¹⁰ Even if we presume the smallest mark-up, \$2,000 – \$1,600 = \$400, this is 20%, which is \$294,400 of the revenue received for the offending rugs. The \$22,000 penalty imposed is less than 10% of this.

N.Z., Ltd. [2017] NZDC 21512 (N.Z.); *R v. Princess Wool Co.* [2017] NZDC 12227 (N.Z.); *Commerce Comm’n v. Trustpower, Ltd.* [2016] NZDC 18850 (N.Z.); *Commerce Comm’n v. Hou* [2016] NZDC 9291(N.Z.); *Commerce Comm’n v. L D Nathan & Co.* [1990] 2 NZLR 160 (N.Z.); *Commerce Comm’n v. Mi Woollies, Ltd.* DC Christchurch CRI 2012-009-009069, 31 July 2013 at [30]–[36] (N.Z.).

99. *Mi Woollies*, DC Christchurch CRI 2012-009-009069 at [8].

100. *Id.* at [16].

101. *Id.* at [29].

102. *Id.* at [9].

103. *Id.* at [29] (“[T]he Court has no information about the net profitability of the defendant with respect to this product line or generally.”).

104. *Id.* at [14]; *see also Commerce Comm’n v. Budge Collection, Ltd.* [2016] NZDC 15542 at [41] (N.Z.).

105. *Mi Woollies*, DC Christchurch CRI 2012-009-009069 at [44].

106. *See Commerce Comm’n v. BGV Int’l, Ltd.* DC Auckland CRI-2012-004-017226, 23 October 2014 at [26] (N.Z.).

107. *Id.* at [1].

108. *Id.* at [10].

109. *Id.*

110. *Id.* at [12].

There are other examples,¹¹¹ and it is rare to find a decision where the penalty is higher than the estimated gain.¹¹²

Arguably, lower penalties might be justified because the defendants in these cases suffered—in addition to the fine imposed—from negative reputation, embarrassment, and shaming. After all, *Topline* and *Mi Woollies* are criminal cases. Criminal procedures in and of themselves represent some deterrence. Certainly, courts might legitimately factor these components into their analyses.¹¹³

However, later cases rejected similar claims. In *Hou*, the defendant sought to have a discharge without conviction on the basis of the cultural shame associated with a criminal conviction, especially in the Chinese community.¹¹⁴ However, the court declined this request due to the indication from Parliament—by increasing maximum penalties—that such offending is

111. See generally, e.g., *Premium Alpaca Ltd. v. Commerce Comm'n* [2014] NZHC 1836 (N.Z.); *Commerce Comm'n v. Wild Nature NZ Ltd.* DC Auckland CRI-2012-063-003511, 12 December 2014; *Commerce Comm'n v. Chen* DC Auckland CRI 2012-004-019312, 28 March 2013 (N.Z.). The court in *Chen* noted that over the twenty-month period in which the charges fell, the two defendant companies had made almost \$6 million in revenue. *Id.* at [9]. Despite the “large degree of willfulness,” the penalty for the mislabeled rugs—plus other misleading and deceptive conduct—of \$259,000 for the two companies and their directors seems quite insufficient. *Id.* at [10], [26]–[29]. See also *Wild Nature Sentencing Concludes Souvenir Company Prosecutions for Misleading Tourists—Total Fines Imposed Reach \$1 Million*, COM. COMMISSION N.Z. (Dec. 12, 2014), <http://www.comcom.govt.nz/the-commission/media-centre/media-releases/2014/wild-nature-sentencing-concludes-souvenir-company-prosecutions-for-misleading-tourists-total-fines-imposed-reach-1-million/> [https://perma.cc/MHF3-X9GE].

112. In another alpaca case, the unlawful gain was estimated to be \$21,400, but the overall penalties against the company and the director were \$57,000 and \$14,250, respectively, totaling \$71,250. *Commerce Comm'n v. Budge Collection, Ltd.* [2016] NZDC 15542 at [14], [17], [44]–[46] (N.Z.). The court was concerned with the wilfulness and brazen nature of the director’s behaviour, as the Commerce Commission had warned the director, sent a compliance letter, and provided him with FTA education materials. *Id.* at [29]. In *Commerce Commission v. Hou*, the gain was said to be around \$39,000 over a longer period than the charge period, but the company and director were penalized \$91,000 and \$18,200, respectively, totalling \$109,200. *Commerce Comm'n v. Hou* [2016] NZDC 9291 at [29], [33]–[36] (N.Z.). The misrepresentations were considered to be wilful, “deliberate[,] and systematic.” *Id.* at [19].

113. In 2013, prior to the increase in maximum penalties, the court in *Mi Woollies* noted that the defendant did not argue it might suffer financially as a result of adverse publicity resulting from the prosecution. *Commerce Comm'n v. Mi Woollies, Ltd.* DC Christchurch CRI 2012-009-009069, 31 July 2013 at [28] (N.Z.). One could interpret this as a signal of the court’s potential willingness to consider the effects of bad publicity in determining the penalty.

114. *Hou*, NZDC 9291 at [5], [10].

“to be taken seriously.”¹¹⁵ Along these lines, in the 2017 *Best Buy* case, pertaining to Credit Contracts and Consumer Finance Act 2003, the court was unwilling to reduce the penalty in light of the bad publicity the defendant had received.¹¹⁶ The court noted that bad publicity arising from prosecution is “a consequence of the criminal offending and to allow the defendant a discount for the normal consequences of its offending would seem illogical.”¹¹⁷ Given these cases, it is implausible to justify recent low penalties by reference to the negative reputation and bad publicity from which defendants suffer.

C. Trust and Credence Qualities

There are additional considerations that support imposing higher fines in country of origin cases. First, such claims affect consumer trust and enforcement resources. This section focuses on that aspect.

Trust is a fundamental component in modern societies. It is a general quality, closely related to well-being, notions about community, income, growth, and health.¹¹⁸ Consumer trust in the marketplace is everywhere and is essential for the proper functioning of markets.¹¹⁹ Hence, trust benefits consumers, traders, and markets more generally.

Globalization processes, which connect numerous people from different cultures, further emphasize the importance of trust.¹²⁰ For globalized markets to flourish, consumers need to trust governments, financial institutions, overseas producers, international and foreign traders, unfamiliar market players, and intermediate bodies and agencies. Thin trust—which is relevant in the context of unfamiliar parties that employ reputation and norms—is mostly relevant for globalized markets. It is a useful tool that allows one to “extend the radius of trust beyond the horizon of first-hand experience.”¹²¹ At the same time, trust becomes more fragile as the interaction between the various players takes place in a more diverse and varied setting.

115. *Id.* at [15].

116. *Commerce Comm'n v. Best Buy, Ltd.* [2017] NZDC 13575 at [24] (N.Z.).

117. *Id.*

118. *Cf.* MAREK KOHN, TRUST: SELF-INTEREST AND THE COMMON GOOD 133 (2008) (“Trust is desirable in itself. . . . Trust is to be sought for its own sake, and because it keeps good company.”); Eric M. Uslaner, *Producing and Consuming Trust*, 115 POL. SCI. Q. 569, 575–81 (2000) (discussing trust’s consequences).

119. Here we do not refer to trust among friends, neighbors, or family members— “[b]onding social capital”—but to trust more broadly—“bridging . . . social capital.” ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 23 (2000). For an accessible economic review of how trust impacts transactions, see Niko Matouschek, *Trust in Transactions: An Economist’s Perspective*, KELLOGG SCH. MGMT., <http://www.kellogg.northwestern.edu/trust-project/videos/matouschek-ep-1.aspx> [https://perma.cc/MA8T-ZPTN].

120. *Cf.* KOHN, *supra* note 118, at 85–86, 131.

121. *Id.* at 90 (citing PUTNAM, *supra* note 119, at 136).

Unfortunately, diversity and heterogeneity can easily lower trust—especially in the short-run.¹²²

Trust is embedded in country of origin statements,¹²³ which have multiple dimensions. Yet, trust and country of origin cases do not get the attention they deserve. From an economic perspective, trust reduces transaction costs by minimizing the need to take precautions against opportunism.¹²⁴ When parties trust one another, the need to examine the other parties' claims and statements is reduced.¹²⁵ Indeed, consumer law intends to promote trust and confidence in markets.¹²⁶

Where consumers can trust sellers' statements regarding country of origin, such statements may convey important information. First and foremost, country of origin statements may serve as a signal of quality.¹²⁷ For instance, consider German cars, Belgium chocolate, Swiss watches, French wines, and

122. Numerous studies point this out. See, e.g., KOHN, *supra* note 118, at 94 (“High ethnic diversity is associated with low social trust in report from the United States, Australia, Sweden, Canada, and Britain.”); Robert D. Putnam, E Pluribus Unum: *Diversity and Community in the Twenty-first Century: The 2006 Johan Skytte Prize Lecture*, 30 SCANDINAVIAN POL. STUD. 137, 137 (2007). But see generally Maria Abascal & Delia Baldassarri, *Love Thy Neighbor? Ethnoracial Diversity and Trust Reexamined*, 121 AM. J. SOC. 722 (2015) (finding ethnic diversity negatively predicts trust only for whites); Tom van der Meer & Jochem Tolsma, *Ethnic Diversity and Its Effects on Social Cohesion*, 40 ANN. REV. SOC. 459 (2014) (finding that ethnic diversity has limited social negative consequences).

123. See, e.g., KOHN, *supra* note 118, at 10 (“[O]f all the actions that trust is considered with, few are more critical than the act of telling the truth.”).

124. See, e.g., Gimun Kim & Hoonyoung Koo, *The Causal Relationship Between Risk and Trust in the Online Marketplace: A Bidirectional Perspective*, 55 COMPUTERS HUM. BEHAV. 1020, 1025 (2015) (“[T]rust continues to reduce perceived risk over time The end result is that buyers trust to the point that their intention to engage in transactions is decisively enhanced, and perceived risk begins to encourage purchase behavior rather than discouraging buyers from engaging in transactions.”); Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q.J. ECON. 1251, 1252 (1997) (“Individuals in higher-trust societies spend less to protect themselves from being exploited in economic transactions.”); Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 ECON. J. 295, 296 (2001) (“Because trust reduces the cost of transactions ([that is,] less time is spent investigating one’s broker), high trust societies produce more output than low trust societies.”).

125. Or as Putnam puts it, “[h]onesty and trust lubricate the inevitable frictions of social life.” PUTNAM, *supra* note 119, at 118.

126. See, e.g., Fair Trading Act 1986, s 2, sch 3, cl 1A(1) (N.Z.).

127. See generally, e.g., Philip Kotler & David Gertner, *Country as Brand, Product, and Beyond: A Place Marketing and Brand Management Perspective*, 9 BRAND MGMT. 249 (2002).

Canadian maple syrup. In these examples, country of origin may convey quality to consumers.¹²⁸

Furthermore, country of origin may imply ideological or ethical values which consumers may likewise value. For instance, consumers may value Swiss or New Zealand products, which are associated with a clean environment and eco-friendly production. In this example, many consumers may purchase locally made products to support local businesses and the nation's economy. At the same time, the ideological signal may contain a different aspect. For instance, some consumers may wish to refrain from purchasing goods manufactured in countries that do not respect human or workers' rights.¹²⁹ Consumers in one country may wish to refrain from purchasing goods produced in a rival country. For instance, Iranian and North Korean citizens might be reluctant to purchase goods made in or associated with the United States.¹³⁰ Some Jewish consumers may avoid German products, and Australians may have boycotted French products to protest France's nuclear testing in the South Pacific.¹³¹ Either way, country of origin statements can represent more than merely dry facts. As people grow richer and become more sophisticated, their search for identity markers increases.¹³² Country of origin information can serve this purpose and promote overall well-being.

Most Western consumer markets are characterized by minimal transaction costs. Consumers know the price is set and that their interests are protected by a valuable and relatively effective legal bureaucracy.¹³³ But if consumers learn they cannot trust sellers' statements, the consequences are far-reaching. To begin with, consumers will take more precautions and may participate less in the market.¹³⁴ Producers, at the same time, will have to invest more resources to convince consumers that their statements are genuine.¹³⁵

128. See *id.* at 258 ("A great deal of empirical research has attested that country images are important extrinsic clues in product evaluations.").

129. See generally P.H. Howard & P. Allen, *Consumer Willingness to Pay for Domestic 'Fair Trade': Evidence from the United States*, 23 RENEWABLE AGRIC. & FOOD SYSTEMS 235 (2008) (finding consumers were willing to pay significantly more for goods produced in ethical ways).

130. See, e.g., *Iran Labels 227 US-Made Goods for Boycott*, PRESSTV (Dec. 14, 2015, 11:42 AM), <http://www.presstv.com/Detail/2015/12/14/441689/Iran-US-goods-boycott-sanctions> [<https://perma.cc/8YTK-2RCC>].

131. Kotler & Gertner, *supra* note 127, at 253.

132. Cf. Sarah Dadush, *Identity Harm*, U. COLO. L. REV. (forthcoming 2018).

133. See generally KOHN, *supra* note 118, at 25–26.

134. See, e.g., Kim & Koo, *supra* note 124, at 1020, 1025.

135. See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1747–50, 1757 (2001) ("Trust permits transactions to go forward on the basis of a hand shake rather than a complex formal contract; it reduces the need to expend resources . . .").

But, more generally, recall that trust is a societal value.¹³⁶ Social trust sustains social networks and social capital. This, in turn, may encourage economic growth¹³⁷ and promote quality of life.¹³⁸ Trust is an approach to life and is critical to many positive outcomes. Societies characterized by trust allow individuals to remove excessive guards in various walks of life, including many that go extensively beyond country of origin statements. A trusting environment allows people to not feel the need to continually scrutinize everything and everyone. When one trusts others, preparing for all eventualities becomes less essential. As Kohn puts it, people who trust others are optimistic, happier, tolerant and “welcome dealing with strangers as opportunities rather than threats.”¹³⁹ Against this background it is easy to see why eroding consumers’ trust may negatively affect society at large.¹⁴⁰

The trust dimension in country of origin statements becomes even more dominant once we think about the nature of these statements. Economists divide product attributes into three main categories.¹⁴¹ First are search qualities that can be discovered before purchasing a good, including the price of a commodity or the texture of a clothing item.¹⁴² Second are experience qualities that can be discovered only after purchase,¹⁴³ such as the taste of cereal in a box or the smell of cologne on one’s body. Third

136. See, e.g., KOHN, *supra* note 118, at 121 (“[G]eneralized trust describes something that is at the heart of a good society . . .”).

137. See, e.g., Knack & Keefer, *supra* note 124 (presenting evidence that trust and civic norms impact measurable economic performance); see also Yann Algan & Pierre Cahuc, *Inherited Trust and Growth*, 100 AM. ECON. REV. 2060, 2074 (2010). According to the authors’ approximation, African countries will experience a five-fold increase in GDP should they enjoy the same level of inherited social attitudes as Sweden. *Id.*

138. See, e.g., Esteban Ortiz-Ospina & Max Roser, *Trust*, OUR WORLD DATA (2017), <https://ourworldindata.org/trust> [<https://perma.cc/4PF9-KLYU>] (“Trust is a fundamental element of social capital—a key contributor to sustaining well-being outcomes, including economic development.”).

139. KOHN, *supra* note 118, at 123 (referring to Eric Uslaner’s findings).

140. As Mill explained 170 years ago, “[t]he advantage to mankind of being able to trust one another, penetrates into every crevice and cranny of human life: the economical is perhaps the smallest part of it, yet even this is incalculable.” 1 JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 150 (5th London ed. 1920) (1848).

141. *Search, Experience, and Credence Attributes*, THEORYBIZ.COM, <http://theorybiz.com/implementing-value-pricing/how-people-buy/584-search-experience-and-credence-attributes.html> [<https://perma.cc/GE2Z-JN45>].

142. *Id.*

143. *Id.*

are credence qualities that even frequent use cannot always fully reveal,¹⁴⁴ such as the quality of legal services, whether free-range eggs are indeed free-range,¹⁴⁵ the country of origin of food,¹⁴⁶ or the long-term health benefits of consuming bee pollen. Most consumers, as unsophisticated one-shot players, are not likely to discover this third category of attributes.

Country of origin claims are credence qualities¹⁴⁷ and are therefore of rising concern for consumer law proponents.¹⁴⁸ Predictably, consumers care about such claims and are influenced by them. Made in New Zealand claims are appealing to domestic buyers, tourists, and overseas consumers. It comes as no surprise, then, that the Commerce Commission is dedicating significant efforts to fight misleading claims regarding country of origin.¹⁴⁹ This is per section 10 of the FTA, as well section 13(j), which specifically deals with “false or misleading representation[s] concerning the place of origin of goods or services.”¹⁵⁰ Moreover, the Consumers’ Right to Know (Country of Origin of Food) Bill was introduced into Parliament in December 2016. This Bill aims to make country of origin labels for food mandatory.¹⁵¹ The regulation is important because language itself dramatically “increase[s] the potential for deception.”¹⁵² As Kohn opines, “[w]ords are cheap signals that slash the cost of manipulating others.”¹⁵³

On the one hand, the country of origin may embody quality and ethical dimensions, and traders would not bother to utilize such claims were they not beneficial.¹⁵⁴ These claims are valuable because “a premium is attached”

144. See generally Asher Wolinsky, *Competition in Markets for Credence Goods*, 151 J. INSTITUTIONAL & THEORETICAL ECON. 117 (1995) (explaining market functioning as it relates to credence goods); Uwe Dulleck & Rudolf Kerschbamer, *On Doctors, Mechanics and Computer Specialists: The Economics of Credence Goods*, 44 J. ECON. LITERATURE 5 (2006).

145. *Commission Charges “Free Range” Egg Farmer*, COM. COMMISSION N.Z. (Aug. 30, 2018), <https://comcom.govt.nz/news-and-media/media-releases/2018/commission-charges-free-range-egg-farmer> [<https://perma.cc/2UZ6-NJ8U>].

146. See Consumers’ Right to Know (Country of Origin of Food) Bill 2016, (231-1), cl 4 (N.Z.).

147. See *Commerce Comm’n v. Hou* [2016] NZDC 9291 at [13] (N.Z.); see also *Commerce Comm’n v. Mi Woollies Ltd.* DC Christchurch CRI 2012-009-009069, 31 July 2013 at [23] (N.Z.).

148. See generally, e.g., CONSUMER AFF. VICT., *supra* note 9.

149. *Commission Releases 2017/18 Priorities*, *supra* note 9.

150. *Commerce Comm’n v. Mi Woollies Ltd.* DC Christchurch CRI 2012-009-009069, 31 July 2013 at [2] (N.Z.); see also *Commerce Comm’n v. Chen* DC Auckland CRI 2012-004-019312, 28 March 2013 at [2] (N.Z.).

151. The Bill made it through its First Reading in April 2017 and is with the Select Committee. See generally Consumers’ Right to Know (Country of Origin of Food) Bill 2016 (231-1), cl 4 (N.Z.).

152. KOHN, *supra* note 118, at 40.

153. *Id.*

154. See *Commerce Comm’n v. Topline Int’l, Ltd.* [2017] NZDC 9221 at [29] (N.Z.).

to goods that are labeled in such ways.¹⁵⁵ On the other hand, policing credence quality claims such as country of origin is challenging and requires many resources.¹⁵⁶ Moreover, trust can be hard to build but easy to ruin and extremely challenging to restore.

Law in general and consumer law in particular have an important part in this puzzle. If we want to promote trust and social capital, people should be able to trust the law. Consumers should be protected when trusting a firm's statement; especially statements that relate to credence qualities. Most importantly in our context, individuals should be able to rely on contracts and contractual representations. They should be able to trust authorities to penalize those who exploit trust and undermine it.¹⁵⁷ Where people believe that the legal framework deters sellers from misbehaving, they are more likely to trust unknown sellers.¹⁵⁸ Finally, consumers should be able to trust that commensurate punishments are imposed on those who break the rules and undermine the system.

In conclusion, higher fines in country of origin cases may be required to offset the strong economic incentive traders have to behave unethically and exploit consumers' trust. They may also be justified given the high monitoring costs, on the one hand, and the potential broader harm to society that such dishonest statements entail, on the other. Trust and trustworthiness, both in terms of interpersonal trust and confidence in the government, are of significant value.¹⁵⁹ Sellers should not be allowed to opportunistically undermine such values. Simply put, consumers should be able to trust the legal system to penalize opportunistic behaviors that erode trust and harm society.

155. *Chen*, DC Auckland CRI 2012-004-019312 at [16].

156. The court in *Chen* noted that the Commerce Commission only executed search warrants on the defendants because consumers complained to Tourism New Zealand. *Id.* at [19].

157. For a similar point in a different context, see Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U.L. REV. 1717, 1760–61 (2006) ("Where consumer protections exist, they enable consumers to rest assured that the terms of their contracts will comply with minimum standards of reasonableness.") (footnote omitted).

158. *Cf.* KOHN, *supra* note 118, at 113 (noting that people seem to trust strangers around them in public because surveillance cameras deter people from misbehaving).

159. *See* OECD, *SOCIETY AT A GLANCE 2016*, at 128 (2016).

D. Industry, Tourism, and Other Aggravating Factors

Another aspect that may be worth considering in such cases is the industry in which the misleading or deceptive claims are made. While courts at times consider some of these aspects, such consideration seems to be partial and haphazard. Accounting for the industry or market in which the defendant operates in a more systematic way may contribute to a more holistic analysis. This Section highlights three specific facets: (1) sensitivity to unscrupulous behavior; (2) health related claims and scientific language; and (3) association and New Zealand tourism. While these do not constitute an exclusive list, they provide an important starting point for expanding the legal analysis. They also help to structure the evaluative component of such cases,¹⁶⁰ making them more predictable, justified, and coherent.

1. Sensitivity to Unscrupulous Behavior

The “premium” that comes with using the *New Zealand* label results in the tourism industry being relatively sensitive to misconduct. This is particularly true with products that tourists associate with New Zealand. There is an awareness that misleading or deceptive labeling can harm tourism and, thus, the economy.¹⁶¹ The string of alpaca and merino cases illustrate this,¹⁶² as does *Topline*.¹⁶³

Let us focus on *Topline*, which involved the bee product industry¹⁶⁴ and as such provides various interesting and valuable points. The honey and bee products industry is a fast-growing, innovative, and science-based industry. In recent years, there has been an exceptional rise in the popularity of honey and bee products.¹⁶⁵ In New Zealand, the beekeeping industry’s estimated worth is \$5 billion.¹⁶⁶ During the 2015/2016 season, there were more than 800,000 registered hives and an annual estimated honey crop of approximately 20,000.¹⁶⁷

160. Recall the “evaluative exercise” discussed *supra* text accompanying note 88.

161. See, e.g., *Chen*, DC Auckland CRI-2012-004-019312 at [13].

162. The Commerce Commission appears to be targeting misleading behavior with respect to alpaca products in the tourist market. See *Alpaca Case*, *supra* note 9. The violations stemmed from false country of origin claims or mislabeling wool content. *Id.*

163. See *Commerce Comm’n v. Topline Int’l, Ltd.* [2017] NZDC 9221 (N.Z.).

164. *Id.*

165. See Ian Harman, *Catch the Buzz—Global Honey Industry Set to Expand at a Compound Annual Growth Rate of 2.6%*, BEE CULTURE (May 24, 2018), <https://www.bee-culture.com/catch-the-buzz-global-honey-industry-set-to-expand-at-a-compound-annual-growth-rate-of-2-6/> [<https://perma.cc/CYS4-U6RX>].

166. *About*, APICULTURE N.Z., <https://apinz.org.nz/about/> [<https://perma.cc/RAM2-26EU>].

167. *Id.*

Bee products have been scientifically researched for a wide range of uses.¹⁶⁸ In line with this research, firms that market such products claim that bee products may increase energy, reduce stress, improve sleep quality and skin condition, and enhance immunity and performance.¹⁶⁹ Moreover, bee products are often portrayed as a “natural source of nutrients, vitamins and minerals,” with the potential of promoting health, strength, mental stamina, endurance, and well-being.¹⁷⁰ Producers can benefit from the clean imagery of New Zealand, making said products even more appealing. Unsurprisingly, then, some of New Zealand’s bee products—especially mānuka honey¹⁷¹—have been praised and endorsed by international stars and celebrities.¹⁷²

Unfortunately, the booming industry and the substantial amounts of money involved also make this market more susceptible to—or alluring for—unethical and illegal activity. Unscrupulous, motivated actors have been involved in hive theft, vandalism, adulteration, and bee poisoning.¹⁷³ Likewise, the

168. See, e.g., Jan W Dobrowolski et al., *Antibacterial, Antifungal, Antiamoebic, Antiinflammatory and Antipyretic Studies on Propolis Bee Products*, 35 J. ETHNOPHARMACOLOGY 77, 81–82 (1991); INT’L BEE RES. ASS’N, www.ibrabee.org.uk [https://perma.cc/7G2A-95MR]; *Bee World*, TAYLOR & FRANCIS ONLINE, www.tandfonline.com/toc/tbee20/current.

169. See, e.g., Angela, RNCP, *Bee Pollen Energy*, POLLENBUZZ, https://www.bee-pollen-buzz.com/bee-pollen-energy.html [https://perma.cc/532T-4RMK].

170. *Bee Pollen Facts*, SWEETREE, https://www.sweetreehoney.co.nz/More+Info/Bee+Pollen+Facts.html [https://perma.cc/R9SZ-AJNK].

171. See *Mānuka Honey*, MINISTRY FOR PRIMARY INDUSTRIES, https://www.mpi.govt.nz/growing-and-harvesting/honey-and-bees/manuka-honey/.

172. These include well-known stars, such as Britney Spears, Kim Kardashian, and Novak Djokovic. See Nina Burton, *Australia Stung by Manuka Honey Trademark*, NEWSHUB (Aug. 27, 2016), http://www.newshub.co.nz/home/new-zealand/2016/08/australia-stung-by-manuka-honey-trademark.html [https://perma.cc/NT3M-XMGG]; Gerard Hutching, *‘The Great Manuka Honey Swindle’ Under the Spotlight Again in the UK*, NZFARMER (Aug. 21 2016, 5:00 AM), https://www.stuff.co.nz/business/farming/83372041/the-great-manuka-honey-swindle-under-the-spotlight-again-in-the-uk; Kirsty Wynn & Jonathan Milne, *The Land of Bad Milk and Fake Honey*, SUNSHINE COAST DAILY (Aug. 25, 2013, 8:37 AM), https://www.sunshinecoastdaily.com.au/news/land-bad-milk-and-fake-honey/1996676/.

173. Alan Harman, *Manuka Honey Thefts in New Zealand*, BEE CULTURE (Sept. 26, 2016), http://www.beeclture.com/manuka-honey-thefts-in-new-zealand/ [https://perma.cc/ZS7W-C34V]. For media coverage, see, for example, *Big Reward Offered as Bee Colonies Stolen*, RADIO N.Z. NEWS (July 25, 2016, 5:24 PM), https://www.radionz.co.nz/news/country/309412/big-reward-offered-as-bee-colonies-stolen [https://perma.cc/LVG3-TFK3]; *Hawke’s Bay Honey Company Stung by Theft*, RADIO N.Z. NEWS (Sept. 2, 2017, 1:02 PM), https://www.radionz.co.nz/news/national/338552/hawke-s-bay-honey-company-stung-by-theft [https://perma.cc/A3Z9-5WNT]; Eleanor Ainge Roy, *Honey Wars: Crime and Killings in New Zealand’s Booming Manuka Industry*, GUARDIAN (Nov. 4, 2016, 1:36 PM), https://www.

temptation to market and sell honey products as New Zealand made, or as mānuka,¹⁷⁴ has solid economic grounds. The amounts involved, and the unique nature of this market, may further justify attentive consumer protection and, thus, high fines.

Cases like *Topline*¹⁷⁵ should be placed in a wider context, one in which traders strive to strengthen consumers' trust and confidence. Ensuring that products are known for their authenticity and integrity is essential for the sector's reputation and growth.¹⁷⁶ Fresh stains on the reputation of mānuka honey still echo in consumers' minds.¹⁷⁷ To restore and preserve consumers' trust it is pertinent to keep this industry free of dishonest traders. As noted in *Wild Nature*—an alpaca case—“[t]here is a need for accountability which has to sheet home the responsibility to protect an industry which is of major importance nationally.”¹⁷⁸

2. Health Related Claims and Scientific Language

Certain industries are particularly sensitive due to the health-related claims that traders in the market make.¹⁷⁹ For example, in 2016, a case was brought pertaining to ice cream that was marketed as “Frozen Yoghurt” and over which health benefits were claimed.¹⁸⁰ In sentencing, the court referred to the defendants' conduct as “a cynical attempt to take advantage of consumers

theguardian.com/world/2016/nov/04/manuka-honey-wars-new-zealand-crime-booming-industry-poisoning-beatings [https://perma.cc/5MC6-5RPC].

174. See *Moore v. Trader Joe's Co.*, No. 4:18-cv-04418 (N.D. Cal. filed July 20, 2018) (alleging the defendant's labelling of their honey product as “100% New Zealand Manuka Honey” constitutes misleading practices in marketing, advertising, labelling, and promotion).

175. See *Commerce Comm'n v. Topline Int'l, Ltd.* [2017] NZDC 9221 (N.Z.).

176. See *Membership Benefits*, APICULTURE N.Z., https://apinz.org.nz/membership-benefits/ [https://perma.cc/U8SW-NAUQ]. As a result, attempts are being made to allow consumers to check provenance. One example is with Quick Response (QR) Codes. See Justine Murray, *Kai Ora Honey—People Over Profit*, RADIO N.Z. (Feb. 11, 2018, 6:06 PM), https://www.radionz.co.nz/national/programmes/teahikaa/audio/2018631318/kai-ora-honey-people-over-profit [https://perma.cc/XQZ4-APMF]. Another example is a certification trademark (Trademark No 1025914—open for public inspection at the time of writing). A third example is at the governmental level, with a scientific definition of “mānuka” for export products, including four chemical compounds and one DNA marker (*Mānuka Honey*, MINISTRY FOR PRIMARY INDUSTRIES (Feb. 5, 2018), www.mpi.govt.nz).

177. This results from the matter receiving considerable media coverage. See, e.g., Rob Stock, *Manuka Industry Unites in Face of Honey 'Double Whammy'*, STUFF (Feb. 12, 2017, 5:00 PM), https://www.stuff.co.nz/business/89229598/manuka-industry-unites-in-face-of-honey-double-whammy.

178. *Commerce Comm'n v. Wild Nature NZ Ltd.* DC Auckland CRI-2012-063-003511, 12 December 2014 at [3].

179. This sensitivity has not gone unnoticed. See generally Natural Health and Supplementary Products Bill 2011 (324-2) (N.Z.).

180. See generally *Commerce Comm'n v. Frozen Yoghurt Ltd.* [2016] NZDC 19792 (N.Z.).

desire to make healthier food choices,”¹⁸¹ as yoghurt is perceived to have health benefits, whereas ice cream is considered unhealthy. Health related claims, though not necessarily associated with country of origin statements, are often yet another type of credence quality that consumers need to be able to trust. Because promises of increased health and improved well-being are powerful ways to promote products, special scrutiny seems warranted in such cases.

Health related claims are widespread. In the context of country of origin cases, recall *Topline* claims, which implied that consumption of bee products is likely to improve one’s well-being.¹⁸² Bee pollen is considered to be rich in protein and is “consumed for its nutrient benefits.”¹⁸³ *Topline*—as well as other traders—claim that potentiation turns the bee pollen into a superior product, making it “more digestible for humans.”¹⁸⁴ As the Court noted, “*Topline* marketed *NatureBee* as a superior bee pollen supplement due to its ‘potentiated’ quality.”¹⁸⁵ For instance, for more than three years *Topline*’s website communicated to consumers its aspiration “to make [a] premium New Zealand made health food product for the whole family.”¹⁸⁶

In addition, *Topline*’s advertising and health claims were accompanied by scientific language, aimed at supporting some of its claims.¹⁸⁷ *Topline* stated that “New Zealand bee pollen is the best quality you can buy, and with *our unique proprietary method of cracking open the hard cells*, *NatureBee* Potentiated pollen is *more bio-available* than any pollen in the world.”¹⁸⁸ Scientific language leads people to believe that the product described is a good product.¹⁸⁹ People are more easily influenced by scientific jargon making such statements more persuasive. This, once again, highlights the necessity for a vigilant and strict approach to misleading labeling.

181. *Id.* at [4].

182. *See generally* *Commerce Comm’n v. Topline Int’l, Ltd.* [2017] NZDC 9221 (N.Z.).

183. *Id.* at [13].

184. *Id.*

185. *Id.* at [12].

186. *Id.* at [20].

187. *See id.* at [22].

188. *Id.* (emphasis added).

189. *See, e.g.*, CHRISTOPHER F. CHABRIS & DANIEL J. SIMONS, *THE INVISIBLE GORILLA AND OTHER WAYS OUR INTUITIONS DECEIVE US* 140–42 (2010).

3. Association and Tourism

Misleading or deceptive labeling that states or implies that something is made in New Zealand is typically used to associate the product with nature and a clean environment—yet another type of credence attribute. Relating products to nature and a clean environment can be an influential marketing strategy, as it may portray products as more desirable while promoting consumers' trust.¹⁹⁰ Moreover, misleading consumers in such cases is tempting.

For example, in *Mi Woollies*, the label stated that New Zealand's "purest water and air on earth, ensuring the clean green fields yield only the finest raw materials for Mi Woollies natural products."¹⁹¹ The court stated that this was a calculated and blatant attempt to mislead consumers.¹⁹² The defendant took "advantage of the premium attached to New Zealand made products," particularly in the tourist market, which allowed the defendant "to sell its products when it otherwise might not have sold them."¹⁹³

Similarly, Topline's website promoted its products: "Made from 100% natural ingredients, the bee pollen we use is harvested by those who know it best, the hardworking bees of New Zealand's pristine wilderness."¹⁹⁴ Topline also asserted that "New Zealand's clean, green and sustainable environment is home to the best quality, wild sourced, raw, potentiated bee pollen available."¹⁹⁵ Likewise, in a screened infomercial, Topline's director affirmed that "our pollen is collected from the wilderness of New Zealand's pristine South Island, hundreds of miles away from any people, any civilization, away from spraying, away from fertilisers . . . so we know that it is the most pure, clean environment that the pollen's coming from."¹⁹⁶

Overall, defendants in country of origin cases take advantage of consumers' trust and exploit their preference for scientifically proven, healthy, and environmentally friendly products. In particular, such cases portray traders falsely and cynically linking their products to a clean, green image. This is another possible aggravating factor, and it provides another legitimate rationale for inflicting high penalties.

190. *Commerce Comm'n v. Hou* [2016] NZDC 9291 at [13], [18] (N.Z.). For further discussion on the way "country as brand" may attract tourists see, for example, Kotler & Gertner, *supra* note 127, at 255–56.

191. *Commerce Comm'n v. Mi Woollies, Ltd.* DC Christchurch CRI 2012-009-009069, 31 July 2013 at [8] (N.Z.).

192. *Id.* at [18].

193. *Id.*

194. *Commerce Comm'n v. Topline Int'l, Ltd.* [2017] NZDC 9221 at [20] (N.Z.).

195. *Id.*

196. *Id.* at [23].

Skepticism towards environmental claims has already led some countries to introduce green guides aimed at minimizing “greenwashing.” For example, the FTC issued “Guides for the Use of Environmental Marketing Claims.”¹⁹⁷ Courts ought to step in and supplement these efforts in an open-minded way.

III. CONCLUSION

Policymakers seek to balance protecting consumers’ interests on the one hand and refraining from excessively intervening and regulating markets on the other. Naturally, consumer law focuses on prohibiting unfair behavior and promoting fair conduct and practices. Easier said than done.

Country of origin and other credence cases illustrate that there is often more to consumer law cases than initially meets the eye. As markets become more complex and fast-changing, the need to develop consumer law and bring—and keep—it up-to-speed becomes increasingly important.¹⁹⁸ We hope that by offering a multi-dimensional perspective on the penalties imposed in country of origin cases, this Article contributes to that end.

197. Guide for the Use of Environmental Marketing Claims, 16 C.F.R § 260 (2012); FED. TRADE COMM’N, THE GREEN GUIDES (2012), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf> [<https://perma.cc/9NSF-S445>].

198. For a recent illustration, see Samuel Becher, Hongzhi Hao & Jessica Lai, *How Better Tests and Legal Deterrence Could Clean Up the Sticky Mess Left Behind by Fake Honey Row*, CONVERSATION (Sept. 17, 2018), https://theconversation.com/how-better-tests-and-legal-deterrence-could-clean-up-the-sticky-mess-left-behind-by-fake-honey-row-102973#comment_1723625 [<https://perma.cc/65B3-SWUD>].

IV. APPENDIX A

NEW ZEALAND COUNTRY OF ORIGIN CASES UNDER THE
FAIR TRADING ACT OF 1986

YEAR ¹⁹⁹	CASE NAME	CONDUCT AND OUTCOME
1988	<i>Farmers Trading Co. v. Commerce Commission</i> ²⁰⁰	Goods labeled “Made in New Zealand” when they were made in China. <ul style="list-style-type: none"> • Charged under FTA, section 13(j): convicted. • Penalty: \$26,000. • Conviction upheld on appeal to the High Court.
1990	<i>Commerce Commission v. Parrs (New Zealand) Souvenirs Ltd.</i> ²⁰¹	Defendant placed “New Zealand” sticker over “made in Taiwan” on 100 “sheep noise” souvenirs. <ul style="list-style-type: none"> • Charged under FTA ss 10(1), 13(j). • Held: dismissed.
1990	<i>Marcol Manufacturers, Ltd. v. Commerce Commission</i> ²⁰²	Leather jackets made in Korea represented as being made in Christchurch, New Zealand. Upon import they had a “Made in Korea” label, which were removed and replaced with Marcol Christchurch New Zealand or Marcol Christchurch. <ul style="list-style-type: none"> • Charged under FTA, section 13(j): convicted. • Conviction upheld on appeal to the High Court.

199. This is the year the case was filed rather than the year a decision was handed down or published.

200. *Farmers Trading Co. Ltd. v. Commerce Comm’n* (1988) 2 TCLR 370 (HC) at 1, 6.

201. See generally *Commerce Comm’n v. Parrs (N.Z.) Souvenirs, Ltd.* (1990) 3 TCLR 431 (DC).

202. *Marcol Mfrs. Ltd v. Commerce Comm’n* [1991] 2 NZLR 502 (HC) at 510–12.

2004	<i>Commerce Commission v. Brownlie Bros.</i> ²⁰³	<p>Misleading consumers into believing that “Simply Squeezed” and “Supreme Orange Juice” only comprised of squeezed New Zealand and/or Australian orange juice when a proportion of the juice was concentrate imported from Brazil.</p> <ul style="list-style-type: none"> • Two charges under FTA section 10: convicted. • Penalty: \$35,000.
2007	<i>Commerce Commission v. Knight Business Furniture, Ltd.</i> ²⁰⁴	<p>Office chairs built in New Zealand using components manufactured in Taiwan, China and Italy; components built to defendant’s specifications. Chairs were advertised as “NZ Made” with a brochure with the silver fern—a famous symbol of New Zealand. Held to be built in New Zealand, but not made in New Zealand.</p> <ul style="list-style-type: none"> • Four charges under FTA section 10: dismissed. • Four charges under FTA section 13(j): convicted. • Penalty: \$5,000.
2010	<i>Commerce Commission v. Prokiwi Int’l, Ltd.</i> ²⁰⁵	<p>Packaging soap and skincare products with New Zealand symbols, “New Zealand” in a manner similar to the well-known “Buy New Zealand Made” trade mark, with the red kiwi in a blue</p>

203. *Commerce Comm’n v. Brownlie Bros.* [2005] DCR 219 at [4], [18].

204. *Commerce Comm’n v. Knight Bus. Furniture, Ltd.* DC New Plymouth CRN 06043500833-40, 14 September 2007 at [2]–[3], [86].

205. *See generally Commerce Comm’n v. Prokiwi Int’l Ltd.* DC Christchurch CRI-2010-009-009397, 9 August 2010 (N.Z.).

		<p>and red triangle. Goods were made from Chinese or Asian ingredients and imported into New Zealand.</p> <ul style="list-style-type: none"> • Seventeen charges under FTA section 10: convicted. • Penalty: \$48,000.
2012	<i>Commerce Commission v. Mi Woollies</i> ²⁰⁶	<p>Footwear labeled “UGG New Zealand” and “New Zealand Owned & Operated,” when they were made in China and made predominantly from Australian sheepskin.</p> <ul style="list-style-type: none"> • Five charges under FTA section 10: convicted. • Five charges under FTA section 13(j): convicted. • Penalty: \$63,000.
2012	<i>Commerce Commission v. Wild Nature NZ, Ltd.</i> ²⁰⁷	<p>Sold “New Zealand Made” Alpaca rugs that were from Peru, and duvets labeled as containing exclusively or predominantly alpaca or merino wool fibre, when the alpaca fibres were only a small part of the duvet mix and the merino duvets had no merino.</p> <ul style="list-style-type: none"> • Company–thirty-seven charges under the FTA: convicted. • Director–thirty charges under the FTA: convicted. • Company Penalty: \$243,444. • Director Penalty: \$25,000. • Total Penalty: \$268,444.
2013	<i>Commerce Commission v. Chen</i> ²⁰⁸	<p>Top Sky Holdings labeled alpaca rugs as being made in New</p>

206. *Commerce Comm’n v. Mi Woollies, Ltd.* DC Christchurch CRI 2012-009-009069, 31 July 2013 at [3], [8], [44]–[45] (N.Z.).

207. *Commerce Comm’n v. Wild Nature NZ Ltd.* DC Auckland CRI-2012-063-003511, 12 December 2014 at [7], [13], [33]–[37].

208. *Commerce Comm’n v. Chen* DC Auckland CRI 2012-004-019312, 28 March 2013 at [4], [7], [26]–[29] (N.Z.).

		<p>Zealand when in fact they were imported from Peru. Top Sky Holdings and Kiwi Wool label led duvets as being predominantly containing alpaca fibers, when they did not, or containing merino wool when they did not. Twenty-month period and the defendants made millions of dollars.</p> <ul style="list-style-type: none"> • Top Sky Holdings—ten charges under the FTA section 10; two charges under the FTA section 13(j): convicted. • Haidong Chen (Director of Top Sky Holdings)—ten charges under the FTA section 10: convicted. • Kiwi Wool Ltd.—eighteen charges under the FTA section 13(j): convicted. • Jinming Chen (Director of Kiwi Wool)—eighteen charges under the FTA section 13(j): convicted. • Haidong Chen (Shareholder of Kiwi Wool)—eighteen charges under the FTA section 13(j): convicted. • Penalties: <table border="1" data-bbox="850 1132 1224 1393"> <tr> <td data-bbox="850 1132 1068 1199">Top Sky Holdings</td> <td data-bbox="1068 1132 1224 1199">\$140,000</td> </tr> <tr> <td data-bbox="850 1199 1068 1360">Haidong Chen (Director of Top Sky Holdings and Shareholder of Kiwi Wool)</td> <td data-bbox="1068 1199 1224 1360">\$24,500</td> </tr> <tr> <td data-bbox="850 1360 1068 1393">Kiwi Wool Ltd.</td> <td data-bbox="1068 1360 1224 1393">\$ 84,000</td> </tr> </table>	Top Sky Holdings	\$140,000	Haidong Chen (Director of Top Sky Holdings and Shareholder of Kiwi Wool)	\$24,500	Kiwi Wool Ltd.	\$ 84,000
Top Sky Holdings	\$140,000							
Haidong Chen (Director of Top Sky Holdings and Shareholder of Kiwi Wool)	\$24,500							
Kiwi Wool Ltd.	\$ 84,000							

		<table border="1"> <tr> <td>Jinming Chen (Director of Kiwi Wool)</td> <td>\$10,500</td> </tr> </table> <ul style="list-style-type: none"> • Total Penalty: \$259,000. 	Jinming Chen (Director of Kiwi Wool)	\$10,500												
Jinming Chen (Director of Kiwi Wool)	\$10,500															
2014	<i>Premium Alpaca, Ltd. v. Commerce Commission</i> ²⁰⁹	<p>Alpaca rugs labeled and sold as being made in New Zealand when in fact they were imported from Peru. False claims by two of the companies were also made about duvets being 100% alpaca or merino wool or southdown, when they were not. Twenty-month period and the defendants made millions of dollars.</p> <ul style="list-style-type: none"> • One hundred and ninety representative charges made under FTA ss 10 and 13(j): convicted. • Penalties: <table border="1"> <tr> <td>Hyeon Company, Ltd. (importer)</td> <td>\$105,000</td> </tr> <tr> <td>Duvet 2000, Ltd. (retailer)</td> <td>\$200,000</td> </tr> <tr> <td>Han Young Chae (director of Hyeon and Duvet 2000)</td> <td>\$ 24,500</td> </tr> <tr> <td>JM Wool, Ltd. (retailer)</td> <td>\$182,000</td> </tr> <tr> <td>Jong Myung Lee (director of JM Wool, Ltd.)</td> <td>\$ 21,000</td> </tr> <tr> <td>Premium Alpaca New Zealand, Ltd. (importer)</td> <td>\$ 56,000</td> </tr> <tr> <td>Yun Duk Jung (director of Premium Alpaca</td> <td>\$ 6,700</td> </tr> </table>	Hyeon Company, Ltd. (importer)	\$105,000	Duvet 2000, Ltd. (retailer)	\$200,000	Han Young Chae (director of Hyeon and Duvet 2000)	\$ 24,500	JM Wool, Ltd. (retailer)	\$182,000	Jong Myung Lee (director of JM Wool, Ltd.)	\$ 21,000	Premium Alpaca New Zealand, Ltd. (importer)	\$ 56,000	Yun Duk Jung (director of Premium Alpaca	\$ 6,700
Hyeon Company, Ltd. (importer)	\$105,000															
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Premium Alpaca New Zealand, Ltd. (importer)	\$ 56,000															
Yun Duk Jung (director of Premium Alpaca	\$ 6,700															

209. *Premium Alpaca Ltd. v. Commerce Comm'n* [2014] NZHC 1836 at [5], [15], [20], [34]–[39] (N.Z.).

		<table border="1"> <tr> <td>New Zealand, Ltd.)</td> <td></td> </tr> <tr> <td>Bo Sun Yoo (director of Premium Alpaca New Zealand, Ltd.)</td> <td>\$ 6,700</td> </tr> </table> <ul style="list-style-type: none"> • Total Penalty: \$601,900. • Conviction upheld on appeal to the High Court. 	New Zealand, Ltd.)		Bo Sun Yoo (director of Premium Alpaca New Zealand, Ltd.)	\$ 6,700
New Zealand, Ltd.)						
Bo Sun Yoo (director of Premium Alpaca New Zealand, Ltd.)	\$ 6,700					
2014	<i>Commerce Commission v. BGV Int'l, Ltd.</i> ²¹⁰	<p>Defendant sold alpaca rugs from Peru as New Zealand made, between January 2010 and August 2011.</p> <ul style="list-style-type: none"> • Ten charges under FTA section 10: convicted. • Penalty: \$22,000. 				
2016	<i>Commerce Commission v. Hou</i> ²¹¹	<p>Packaged, labeled and sold duvets as “alpaca” and “made in New Zealand,” when there was either no or little alpaca content and the duvets were made in China. From January 2014 to September 2014.</p> <ul style="list-style-type: none"> • Company: seven charges under FTA section 13(a) and three charges under FTA s 13(j)—six under old limit, four under new limit: convicted. • Company Penalty: \$63,000 + \$28,000 = \$91,000. • Director—one charge under FTA section 13(a) and three charges under FTA s 13(j)—two under 				

210. *Commerce Comm'n v. BGV Int'l, Ltd.* DC Auckland CRI-2012-004-017226, 23 October 2014 at [1] and [26] (N.Z.).

211. *Commerce Comm'n v. Hou* [2016] NZDC 9291 at [25], [33]–[36] (N.Z.).

		<p>old limit, two under new limit: convicted.</p> <ul style="list-style-type: none"> • Director Penalty: \$5,600 + \$12,600 = \$18,200. • Total Penalty: \$109,200.
2016	<i>Commerce Commission v. Budge Collection Ltd.</i> ²¹²	<p>Imported duvets from China and repacked them as “made in New Zealand” and “alpaca,” when neither was true. Around five-and-a-half months of offending under the old limit and nine-and-a-half months of offending under the new limit.</p> <ul style="list-style-type: none"> • Company—four charges under FTA section 13(a): convicted. • Company Penalty: \$63,000+\$28,000 = \$57,000. • Director—four charges under FTA section 13(a): convicted. • Director Penalty: \$5,600 + \$12,600 = \$14,250. • Total Penalty: \$71,250.
2016	<i>Commerce Commission v. New Zealand Nutritional</i> ²¹³	<p>Goats’ milk tablets—from January 2008 to September 2013—and goats’ milk powder—from August 2012 to October 2012—were labeled as “New Zealand Made.” The powder was also labeled with “100% NZ made & proud of it.” The goat’s milk powder was sourced from Spain and the Netherlands.</p> <ul style="list-style-type: none"> • Charged under FTA ss 9–10, 13(j). • Declaration of contravention.

212. *Commerce Comm’n v. Budge Collection, Ltd.* [2016] NZDC 15542 at [4], [7], [36] (N.Z.).

213. *Commerce Comm’n v. N.Z. Nutritional (2004) Ltd* [2016] NZHC 832 at [1], [12], [67].

2017	<i>Commerce Commission v. Topline Int'l, Ltd.</i> ²¹⁴	<p>“NatureBee Potentiated Bee Pollen” product was labelled as being made in New Zealand. The bee pollen was sourced from China, was turned into potentiated bee pollen in China and was encapsulated in China. After being imported into New Zealand, it was then bottled and labeled. As part of this process, Topline used the well-known “New Zealand Made” blue and red triangle trade mark.</p> <ul style="list-style-type: none"> • Company—twenty-two charges under FTA section 10—twelve under old limit, ten under new limit: convicted. • Company Penalty: \$105,000 + \$300,000 = \$405,000. • Director—twenty-two charges under FTA section 10—twelve under old limit, ten under new limit: convicted. • Director Penalty: \$41,500 + \$80,00 = \$121,500. • Total Penalty: \$526,500.
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214. *Commerce Comm'n v. Topline Int'l, Ltd.* [2017] NZDC 9221 at [2], [40]–[41] (N.Z.).

