IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2017-004-006083
[2018] NZDC 21579

COMMERCE COMMISSION
Prosecutor

v

STEEL & TUBE HOLDINGS LIMITED
Defendant

Hearing:	25 May 2018
Appearances:	J Dixon QC and B Thompson for the Prosecutor M Heron QC and A Matthews for the Defendant
Judgment:	23 October 2018

JUDGMENT OF JUDGE W P CATHCART ON SENTENCING

Summary

[1] Steel & Tube Holdings Limited ("Steel and Tube") pleaded guilty to 24 representative charges under the Fair Trading Act 1986 ("FTA") relating to supply of its manufactured steel mesh known as "SE62". The charges fall into two essential categories:

(a) False representations about SE62's compliance with Australian/New Zealand industry standard for reinforcing steel.

(b) False representations that SE62 had been independently tested and certified as complying with that standard.

[2] Through these widely disseminated representations, Steel and Tube assured customers its SE62 product was compliant with the standard and that it could be used in applications where an earthquake grade product was required. Steel and Tube failed to comply with the testing procedures in four separate ways, any one of which meant the product could not be described as meeting the standard. And as noted above, Steel and Tube falsely represented the steel mesh had been independently tested and certified as complying with the standard.

[3] The period of offending runs from 1 March 2012 to 5 April 2016. Relevantly during that charge period, the maximum penalty for the charges increased. Thirteen charges related to conduct from 1 March 2012 to 16 March 2014 liable to a maximum fine of $200,000 per charge. The remaining 11 charges relate to conduct from 17 June 2014 to 5 April 2016, each charge carrying a maximum penalty of $600,000.

[4] Over the charge period, Steel and Tube sold approximately 482 batches of the steel mesh. Each batch contained around1000 sheets. The estimated total number of sheets to which the charges relate is approximately 480,000.

[5] Steel and Tube is a large company. It relied on these representations of compliance with the standard and the independent testing claims as part of its marketing strategy. Steel and Tube's conduct must be treated as having an impact on the construction industry generally because compliance with the standard is critical to public confidence and safety. The nature and scale of the offending calls for a significant penalty.

[6] The parties, however, were poles apart on the fixing of the global starting-point fine. This disputed loomed large in the sentencing. That contention was contrasted with near agreement as to the percentage deduction for cognisable mitigating factors.

[7] Mr Dixon QC, for the Commission contended for a global starting-point of between $3.8 million and $4.6 million without any deduction for totality purposes.

Mr Heron QC for Steel and Tube submitted that this starting-point range would result in a fine grossly disproportionate to the admitted offending conduct.[1] He pointed out that the prosecutor's suggested end-fine range of approximately $2.7 to $3.3 million would be more than three times the highest fine ever imposed in respect of a single entity under the FTA. Mr Heron mounted a detailed challenge to the prosecutor's arguments. He argued the appropriate global starting-point range adjusted for totality is between $500,000 to $800,000.

[8] As examined below, I consider the prosecutor's global starting-point range for the offending is manifestly excessive. By the same token, I consider Steel and Tube's range as manifestly inadequate. For the reasons stated below, I find the appropriate global starting-point adjusted in obedience to the totality principle is $2.9 million. From that starting-point, I have deducted 35 percent in recognition of the significant mitigating factors in favour of Steel and Tube including its guilty pleas at the first reasonable opportunity. The end-fine is $1.885 million.

Relevant Facts

The company

[9] Steel and Tube is a longstanding New Zealand company. It was incorporated in 1953 and has been listed on the Stock Exchange since 1967. It supplies a broad range of steel products including a range processed from steel supplied by third parties, such as SE62. The steel for SE62 is made in New Zealand. Steel and Tube operate a national network of 56 branches and distribution centres. It employs approximately 1000 employees in New Zealand. Its revenue for the financial-year ending 30 June 2016 was approximately $516 million. Its underlying earnings for the same period (excluding one-offs) were $19.4 million.

[1] Defendant's sentencing submissions dated 9 April 2018 at [92].

The product

[10] SE62 steel mesh is used for reinforcing concrete in construction. It is known on the market as SE62 and is sold as being 500E grade steel mesh. 500E is a grade of steel mesh that has certain characteristics, including ductility, which provides strength and stability in the event of an earthquake. In layman's terms, ductility is the ability of the steel to stretch under stress. 500E grade mesh is used to provide reinforcement in concrete slabs for residential buildings, and suspended floors and structural walls of multi-storey buildings.

[11] Following the Canterbury Earthquake, residential buildings with concrete slab foundations that were either unreinforced or reinforced with non-ductile steel mesh were found to have performed poorly, particularly in areas where liquefaction had occurred. The Department of Building and Housing ("DBH") determined the performance of buildings in the earthquakes could have improved if they had had better foundations, including reinforced concrete slabs tied to perimeter foundations, rather than unreinforced slabs.

[12] In May 2011, the DBH introduced an amendment to the New Zealand Building Code that required steel mesh to be used in concrete slab-on-ground floors in construction in the Canterbury Region be of the "E" ductility class. The "E" in 500E stands for "Earthquake" and means the product complies with the "E" ductility class in the standard. This carried obvious long-term benefits to the Canterbury Region.

[13] In response to this Government-led initiative, Steel and Tube developed "E" ductility class steel mesh products. During the charging period, Steel and Tube's best-selling product in that range was SE62. In fact, it comprised about 50 percent of Steel and Tube's SE range.

[14] As noted earlier, the charges relate to approximately 482 batches of SE62 mesh that Steel and Tube sold between 1 March 2012 and 5 April 2016. Each batch comprising no more than 1000 sheets. The average sale price of Steel and Tube's SE62 small mesh sheets to building merchants during the charge period was $51.74 per sheet. By comparison, the average sale price of the equivalent size mesh in

Steel and Tube's non-seismic range was $43.13 per sheet. Steel and Tube sold the majority of its SE62 product to building merchants. Representations about compliance with the standard was a significant marketing factor.

[15] However, consumer confidence in the product they were purchasing was misplaced because Steel and Tube's continuous representations that SE62 complied with the relevant standard were not truthful.

The breach of the Standard

[16] The Standard specifies requirements and a standard methodology for determining the chemical composition and mechanical geometrical properties of reinforcing steel used for the reinforcement of concrete. As noted above, SE62 was marketed and sold as grade 500E. To be designated grade 500E the Standard required relevantly two things:

(a) The steel mesh must meet certain chemical, physical and mechanical requirements.

(b) The manufacturers and suppliers must follow a particular sampling and testing procedure when testing the steel mesh for compliance.

[17] Steel and Tube failed to comply with the testing requirements of the Standard in four ways.

Aging of the product

[18] The Standard requires that test pieces are aged in accordance with the Standard prior to being tested. The process involves heating and cooling the test specimen in order to simulate the changes to steel that naturally occur as it ages *in situ* following the manufacturing process. This gives a more realistic estimate of the strength and ductility the steel mesh will exhibit when in use.

[19] Steel and Tube did not age-test the pieces.

Uniform elongation of the product

[20] Uniform elongation is a measure of the ductility of steel mesh. Determining the uniform elongation involves stretching a section of the mesh to measure how far it can be strained before it no longer stretches in a uniform way. Grade 500E must have uniform elongation greater or equal to 10 percent. For seismic grade steel including SE62, the mesh must have uniform elongation of at least 10 percent when tested in accordance with the Standard. This is higher than other grades of steel mesh.

[21] Steel and Tube did not measure uniform elongation in accordance with the Standard at either its Auckland or Christchurch facilities. It took an entirely different approach to measuring uniform elongation at each facility. More about that later.

Re-testing procedures

[22] The Standard requires four samples to be taken of each batch of up to 1000 sheets. Individual test values are not used to determine whether a batch conforms to the tensile parameters required. The mean figure obtained is the significant factor. By using mean values, a batch is deemed to be non-conforming which then triggers the requirement under the Standard for further testing of additional items from the batch. That retesting involves twice as many samples as were initially taken.

[23] Steel and Tube's retesting procedure was not in compliance with the parallel procedure under the Standard.

Long-term quality evaluation of the product

[24] The Standard requires long-term quality evaluation of the steel mesh. Manufacturers such as Steel and Tube are required to collect test results and use those results to determine the long-term quality of level specified in the Standard.

[25] Steel and Tube did not carry out long-term quality evaluation.

The breadth of dissemination of the false representations

[26] Each batch of SE62 distributed by Steel and Tube during the charging period contained a tag. The majority of the batch tags included the words "seismic 500E grade mesh".

[27] Certain Steel and Tube employees were responsible for the testing of batches of SE62 mesh. Those employees prepared a batch certificate following their testing of each batch, using the results from the testing of samples from that batch. The certificates were attached to approximately 19 percent of the deliveries of SE62 mesh to Steel and Tube customers. Each certificate falsely represented that the reinforcing steel class is "500E" and noted the particular testing standard.

[28] Also, Steel and Tube described its SE62 as being "500E grade" on other documents, including invoices, packing slips and physical product brochures. On its Website, it repeatedly made compliance representations with the Standard, including the earthquake ductility class. The Website even referenced the Christchurch Earthquake as creating the need for seismic mesh products such as SE62.

[29] But the representations went further. The batch testing certificates contained a representation that the product had been independently tested by an accredited third-party testing agency, Holmes Solutions ("Holmes"). In fact, Holmes did not undertake any testing of SE62 over the charge period. Yet, each batch test certificate produced during the charging period contained the logo of Steel and Tube and the logo of Holmes. Above the Holmes' logo were the words, "Tested by" followed by a signature and then the words, "Laboratory Manager", also followed by a signature. The certificates thus gave the clear impression to the customer the product had been independently tested by an accredited third-party testing agency when that was not true.

[30] Steel and Tube made approximately 13,900 deliveries of SE62 during the charging period. About 8300 of these were to national building merchants. The remaining 5600 were to other customers, such as builders. Steel and Tube's estimate

of 2700 test certificates being provided represented about 19 percent of the deliveries made.

[31] Additionally, a document available for download on Steel and Tube's Website during the charge period contained the independent testing and certification representation. The representations being that the company's seismic mesh products, including SE62, were "independently tested and certified". All this was untrue.

The impact of failures by Steel and Tube on safety and serviceability of the mesh

[32] The breaches of the Standard produced inevitable results. None of the steel mesh Steel and Tube produced during the charge period was tested in accordance with the Standard and thus none of it could properly be described as grade 500E. Yet, Steel and Tube continuously represented otherwise to the market.

[33] However, the impact of not aging the test pieces on the ductility of the steel is likely to be negligible. Nevertheless, it is not possible to demonstrate the impact of aging on micro-alloyed steel with any degree of precision. To the extent that ductility may have been overstated, the consequence is that the steel may stretch less than intended.

[34] Also, the methods employed by Steel and Tube at its Auckland and Christchurch facilities for measuring uniform elongation were different. The method followed in Auckland may have overstated the ductility of the mesh. However, it is not possible to estimate the extent of any overstatement with any degree of precision.

[35] Also, the failure to follow the retesting procedure means the individual testing results that had a uniform elongation result below 10 percent were not included in determining whether a particular batch, as a whole, complied with the standard. This may mean that the results of a particular batch were overstated. Again, however, it is not possible to estimate the extent of any overstatement with any degree of precision.

[36] Steel and Tube failed to maintain records to conduct long-term quality testing. This means Steel and Tube were unable to determine whether the amount of variation

or dispersion of the testing result was within the boundaries set by the Standard. Thus, Steel and Tube test results may not have accurately represented the underlying entire population of the steel mesh it supplied.

Does the non-compliant product pose a risk to life?

[37] Interestingly, both Steel and Tube and the Commerce Commission rely heavily on advice from the Ministry of Business Innovation and Employment ("MBIE") as to whether the non-complaint steel mesh poses a life safety risk. MBIE is responsible for oversight of the building codes. MBIE have advised that the non-compliant steel when used in concrete slabs on the ground "does not pose a life safety risk".[2]

[38] When used in suspended floors there are more variables involved. That creates a greater difficulty in predicting how the non-compliant steel mesh will contribute to the overall structural performance of a suspended concrete floor system. Steel and Tube and the Commission nevertheless rely on MBIE advice that it is "very unlikely that it would pose a life safety risk".[3]

[39] It seems to me both parties have placed considerable reliance on that advice. And I am bound by the agreed factual matrix that the non-compliant steel does not represent a life-safety risk. The soundness of that advice must be left to the judgement of time and unexpected events.

What is the risk of the non-compliant product to loss of amenity?

[40] It is common ground that, all other things being equal, non-compliant steel mesh used in concrete slabs on the ground may carry a greater risk of loss of amenity in the event of a significant seismic event. Both parties agree it is not possible to estimate this risk with any degree of precision. But, as noted in the agreed facts, Steel and Tube provided information to the Commission indicating that the adverse

[2] Agreed Summary of Facts (ASOF) at [5.5(a)].
[3] ASOF at [5.5(b)].

impacts of installing steel mesh with ductility as low as five percent are negligible.[4] On that last point, the Commission has not presented me with a contrary narrative.

[41] I am not entitled to go behind the agreed statement of facts. But, I am entitled to draw inferences based on those primary facts. Based on the overall evidential material captured by the agreed facts, I have drawn the following inferences: the non-compliant steel carries with it a greater but imprecise risk of loss of amenity in the event of a significant seismic event; and the relevant adverse impacts of installing steel mesh with ductility as low as 5 percent is more likely to be negligible.[5]

Testing by the Commission

[42] The Commission purchased three sheets of SE62 from a retailer on 10 March 2016 and conducted its own testing through independent agencies. None of the samples tested achieved all the mechanical requirements of the Standard. The recorded values for uniform elongation were, in all cases, below the 10 percent figure required under the Standard. In the case of some samples, the results indicated that other aspects of the testing, namely the yield stress and yield ratio, also did not meet Standard requirements.

[43] The Commission repeated this exercise on 9 April 2016. Again, all of the samples failed to achieve the 10 percent uniform elongation under the Standard and some failed other requirements.

[44] The fact individual sheets chosen at random did not meet the characteristics in the Standard, does not establish that the overall population of Steel and Tube's SE62

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[4] ASOF at [5.6], Footnote 5.

[5] I undertook an extended analysis of this inferential conclusion because of the respective positions on the point taken at the hearing. Mr Heron made use of the expert report provided by Steel and Tube to the Commission the essential conclusion of which was captured by ASOF at [5.6], footnote 5. The prosecutor maintained that as a matter of law I should not go behind the ASOF but accepted I was entitled to draw inferences based on the primary facts in the ASOF.
Having conducted that inferential exercise, there is no need to go behind the ASOF. The inferential conclusions reached on the point support Steel and Tube's argument.
Accordingly, the detailed extraneous evidence I heard on the issue—whilst provisionally admitted under s 14 Evidence Act—is hereby ruled inadmissible. In reaching my findings, I ignored that evidence and the competing oral submissions relating to it.

mesh (or the particular batches to which those individual sheets relate) did not have the required characteristics. It is simply not possible now to determine that one way or the other.

[45] Also, once the Commission became involved Steel and Tube voluntarily stopped selling SE62 stock and requested that national building merchants who sell it do the same. Steel and Tube provided an undertaking on 28 April 2016 to the Commission that it had put in place an external testing regime to provide comfort that any SE62 on the New Zealand market in the future had been independently tested for compliance with the standard. Accordingly, Steel and Tube recommenced selling its SE range.

The role of Steel and Tube's former technical manager

[46] Steel and Tube provided an explanation about its testing procedures. The technical manager at Steel and Tube played a leading role ("technical manager"). He was responsible for modifying Steel and Tube's existing procedures for non-seismic steel mesh to comply with the Standard with respect to both its manufacturing and testing procedures including the SE62 product.

[47] As noted earlier, Steel and Tube manufactured SE62 at its processing sites in Auckland and Christchurch. The testing carried out at the Christchurch site was, up until March 2014, the responsibility of the technical manager. The testing carried out at the Auckland site was the responsibility of a different employee. However, the technical manager was still responsible for the designs of the steel mesh being processed at the Auckland site.

[48] The technical manager was also the Branch Manager at the Christchurch processing facility. He had approximately 12 staff reporting to him in his role as branch manager. He reported to the General Manager for Reinforcing. The technical manager was responsible for the design and technical aspects of the production of steel mesh, including testing at the Christchurch processing site.

[49] The technical manager had spent more than 20 years working in manufacturing, with particular experience in manufacturing nails and wire fencing, before being involved in the manufacture of steel mesh for a company in 1987 and then subsequently Steel and Tube. He was a member of the joint NZ/Australian committee tasked with drafting the Standard, in his capacity as a representative of the steel manufacturing industry. He also held a New Zealand Certificate in Engineering. Steel and Tube regarded him as an expert in steel mesh in the company and also nationally.

[50] When the building code regime was amended to require 500E steel mesh in certain applications, the technical manager was responsible within Steel and Tube for determining how to produce and market the SE range of steel meshes. As part of that role, he worked with a metallurgist at Pacific Steel – a steel manufacturer – to ensure the steel coil used to make the SE range of meshes had the right composition and characteristics to enable it to be processed into seismic mesh that satisfied the requirements of the Standard.

[51] Throughout 2011, Steel and Tube used the services of Holmes to carry out the testing of its new SE range and used the results from that testing to demonstrate to MBIE that its new SE range complied with the Standard. The technical manager had a professional relationship with the new managing director at Holmes who held a Master of Engineering and was a fellow member of the NZ/Australian Standard Committee. The technical manager would informally discuss issues relating to steel mesh with these professionals. However, he did not discuss any of the deviations from the Standard with these people.

[52] Steel and Tube say they relied on the technical manager to ensure compliance with the Standard. Also, given his expertise, Steel and Tube did not check what the technical manager was doing to ensure compliance. The technical manager retired in March 2014. However, before his retirement he trained up another employee ("replacement employee"). The replacement employee had worked for Steel and Tube for approximately 13 years in various roles.

[53] After he retired, the technical manager took on a consultancy role with Steel and Tube. There was an arrangement that he would make himself available to answer any queries that the replacement employee had. It is estimated there were six to eight such enquiries in relation to the steel mesh in the 18 months after he retired.

[54] Steel and Tube continued to test in accordance with the procedures that were put in place by the technical manager and they did not review or change those procedures because of his retirement.

[55] The testing staff were familiar with the procedures put in place by the technical manager and were expected to follow those procedures.

[56] The technical manager whose advice Steel and Tube was continuing to follow during the charging period, made the decision not to age-test pieces of the product. He considered that any impact of ageing on test pieces was negligible. Also, he took the view that the ageing process added significant time to the production process and it was in the circumstances, as he believed them to be, not worth doing. Significantly, the technical manager did not seek review or approval of that decision from anyone else at Steel and Tube, or advise senior management of his decision.

[57] As noted earlier, Steel and Tube did not measure uniform elongation in accordance with the Standard at either of its Christchurch or Auckland manufacturing sites. And the method used at the Christchurch site was different from that used at the Auckland site. The technical manager held the view that the process adopted in Christchurch was equivalent to that being used by the independent tester Holmes. In his eyes, this method was "better" because it gave a more accurate result. Steel and Tube were unable to explain why a different method was used in Auckland.

[58] Steel and Tube asserted that its testing staff indicated it was rare for an individual test to not achieve the 10 percent uniform elongation specification. However, Steel and Tube did not record the individual values of less than 10 percent. It thus was unable to provide proper evidence to quantify how often this occurred or whether in any particular case retesting was even required. The technical manager's explanation for values less than 10 percent not being recorded was that he saw a risk

of the office administrator mixing up results or recording incorrect information. I find that explanation beggars belief.

[59] The technical manager maintained that all advertising or specification documents for seismic mesh for Steel and Tube would come past him for approval. Also, that he held the firm view that the SE62 product had been independently tested and certified by Holmes. He considered that the statement "independently tested and certified" was a reference back to the initial development of the product through the independent tester rather than the ongoing testing, demonstrating compliance of individual batches. That explanation lacked credibility.

[60] The technical manager retested for what he regarded as "minimums and maximums" rather than "characteristics" of the product. This essentially meant that for a batch to receive a "pass", each individual uniform elongation test result needed to be above the minimum value of 10 percent rather than the mean of the individual tests to be above 10 percent.

[61] If an individual test result failed to achieve uniform elongation 10 percent, he would retest the new sheet of steel mesh with the aim to get a replacement test result above 10 percent.

[62] Also, the technical manager did not implement any form of any long-term quality evaluation as he did not think he had to and thought Steel and Tube had done enough by accumulating the numbers and having them available. But he did not have the statistical experience required to make that important decision. Rather, he thought that Steel and Tube were safe in its recording system given what he perceived to be a strict approach taken to testing results. He considered that by taking such a strict approach Steel and Tube would meet the characteristic strengths of the Standard.

The agreed context

[63] Context is everything. And here there is an agreed context in which the representations fall for consideration.[6]

[64] The technical manager made a conscious decision to deviate from the Standard in relation to its requirements for ageing. In relation to the retesting procedure, and the method for measuring uniform elongation and any long-term quality evaluation, the technical manager had not considered, or had misinterpreted, the Standard's requirements in the procedures that were adopted.

[65] Steel and Tube relied on the technical manager to ensure that its testing procedure complied with the Standard. Whilst it is accepted he had been involved with reinforcing and reinforcing mesh for a long period of time, he was not knowledgeable in statistical analysis and metallurgy. And, one aspect of the testing regime used at the Auckland site differed from the method utilised by the technical manager at the Christchurch site, the difference being inexplicable.

[66] The technical manager was not part of Steel and Tube's senior management team. His manager was. That manager did not come from a mesh-manufacturing background. As a general manager, he was not expected to have technical knowledge of the Standard. He was not in a realistic position to review or question the technical manager's work.

[67] At the time, the replacement employee entered the picture, there was no review of the testing procedures put in place by the technical manager, nor any internal or external audit of the procedures to ensure compliance with the Standard. And no product testing was carried out externally on SE62. Also, the technical manager's decision not to age the product in accordance with the Standard was not notified to, or signed off, by senior management.

[6] The reasonableness of Steel and Tube's conduct obviously remains in dispute between the parties.

[68] Steel and Tube conducted all batch testing of SE62 in-house. However, Holmes completed experimental testing (i.e., not batch testing) on approximately 145 batches of steel for Steel and Tube between 2013 and 2016.

[69] There was no audit process for Steel and Tube's testing or results. Any questions around the testing regime would go to the technical manager as the subject matter expert and not to the quality systems manager employed. The latter's role is more to confirm document existence rather than the substance of the documents. The quality systems manager therefore did not review or audit Steel and Tube's steel mesh testing procedures.

[70] There was no-one at Steel and Tube that met the description of the "laboratory manager" whose designation appeared next to the signature on the batch testing certificates. Certain staff members who had been trained by the technical manager to purportedly understand the relevant parameters for the test results, and who were in supervisory positions, signed the test certificates as "laboratory manager". But, none of the four employees involved in testing SE62 on a day-to-day basis had read the Standard before or during the charge period. Neither employee had more than a passing familiarity with the requirements of the Standard. Their role was merely to test the samples in the manner implemented by the technical manager and documented by Steel and Tube.

Application of the legal principles and purposes relevant to this sentencing

[71] Prosecutions under the FTA have developed their own analysis of aggravating and mitigating features as the driving factors in fixing the penalty. The core factors were initially analysed by the High Court in *Commerce Commission v LD Nathan Co & Ltd*.[7] In *LD Nathan*, Greig J essentially adopted the approach of Australian Courts under similar legislation upon which our FTA had been modelled. These factors largely mirror the relevant considerations in ss 7 – 9 Sentencing Act 2002. And they

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

have been consistently employed in FTA cases included in which is *Premium Alpaca Ltd v Commerce Commission*.[8]

[72] By way of summary, the relevant factors when imposing a penalty for breach of the FTA will generally include:[9]

(a) The objectives of the FTA;

(b) The importance of the untrue statement which was made or published;

(c) The degree of culpability, in the context of wilfulness or carelessness, which will generally involve a consideration of the circumstances in which the statement was made or published;

(d) The extent to which the statement departed from the truth;

(e) The extent of dissemination of the statement;

(f) The extent of prejudice or harm (if any) to consumers or other traders which resulted from the statement;

(g) The attitude of the offender in respect of remorse, co-operation with the authorities, and remedial action, in particular in respect of correction;

(h) The importance of deterrence, both particular and general;

(i) The financial circumstances of the offender;

(j) Any guilty plea(s);

(k) The previous record of the offender;

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[8] *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836.
[9] *Commerce Commission v Ticketek NZ Ltd* [2007] DCR 910.

(l) The effect of any publicity regarding the prosecution and/or the defendant's activities;

(m) Where there are two or more defendants, the relationship between them and the respective culpability of each of them (not relevant in this case); and

(n) Where there are two or more charges, the totality principle.

Overview of findings

[73] As is plain, the charges fall into two categories: the compliance representations; and the independent testing representations. In relation to the former, Mr Dixon submits a global starting-point of range of $3 million to $3.5 million; for the latter, a range between $800,000 to $1.1 million. Combined, Mr Dixon contends for a global starting-point—untouched by the totality principle—of somewhere between $3.8 million to $4.6 million. Assuming the conceded mitigating discounts are applied, Mr Dixon submits an end-fine in the range of $2.7 to $3.3 million be imposed. If so, it would be the largest ever fine delivered in an FTA prosecution to date.

[74] As noted previously, Mr Heron submits the appropriate starting-point totality-adjusted global offending is in the region of $500,000 to $800,000 before mitigating factors are applied as sought. He contends for an end-fine in the range of somewhere between $325,000 and $520,000.

[75] For the reasons which follow, I fix the starting-point fine for the category of compliance-representations at $2.4 million and for the category of independent-testing-representations at $600,000. Contrary to Mr Dixon's submission, I consider the totality principle is engaged and obedience to it requires a modest adjustment in the combined starting-points. I have therefore adopted a global starting-point fine of $2.9 million. I address the mitigating factors later.

The objectives of the FTA

[76] The purpose of the FTA is to contribute to a trading environment in which the interests of the consumers are protected, businesses compete effectively, and consumers and businesses participate confidently. Steel and Tube obtained substantial sale benefits that flowed from representations of Standard compliance without properly ensuring those claims had been, or could be, verified.

[77] Steel and Tube's conduct clearly infringed on the statutory objects to protect and promote the interests of consumers. In short, the false representations made by Steel and Tube undermined the FTA's core purposes. Questions about the soundness of the mesh remain largely unanswerable which was precisely the mischief the Standard seeks to address. And the whole purpose of the standard is to safeguard people from injury caused by structural failure; to safeguard people from loss of amenity caused by structural behaviour; and to protect other property from physical damage. Steel and Tube's conduct therefore strikes at the core foundation of the FTA.

Importance of the untrue and misleading statements

[78] The truthfulness of the representations was particularly important because consumers had to rely on them. Particularly so in the context of the history of the Christchurch Earthquake and the subsequent amendment to the building code. The representations would have been taken on trust by consumers and the untruthfulness of them must necessarily have had an impact on consumers, competitors and the general construction industry.

[79] The conduct of Steel and Tube has left consumers in a position of uncertainty about the steel mesh employed. Yet, Steel and Tube well understood the importance of the history of the Canterbury Earthquake in creating the increased demand for this very product. Its newsletters available on its Website boasted that the product range had been designed to fully comply with the law in the context of the "wakeup call" of the Canterbury earthquakes for the building and construction industry.[10]

[10] Commerce Commission's amended sentencing submissions dated 20 March 2018 at [6.11].

[80] Also, it needs to be borne in mind that the technical analysis of the mesh is clearly beyond the capacity of the average consumer using the product, even professional consumers, such as builders and building product retailers. Technical expertise is needed to determine compliance with the Standard. Consumers thus would have had no choice but to rely on the representations made by Steel and Tube. That reliance extends to the building industry. Without the ability to rely on the accuracy of claims of Standard compliance, the industry cannot properly function.

[81] Thus, a general deterrent requirement is an important part of the determination in fixing the overall starting-point fine for each to the two categories. And as contended for by the prosecutors, the need for the building industry to place reliance on manufacturers of this steel mesh was something Steel and Tube's marketing used to its commercial advantage.

[82] Having said this, I have been presented with an agreed position there is no life safety risk involved resulting from the misrepresentations. As noted earlier, both parties rely heavily on the advice of MBIE to that effect. Any comparison with FTA prosecutions where life safety risk is involved is therefore misplaced.

Degree of culpability

[83] There is a major dispute on the proper characterisation of Steel and Tube's conduct. As observed earlier, I consider it is, in the circumstances, wholly inappropriate to go behind the agreed factual matrix. This matrix is the product of an extensive and carefully negotiated process between the parties. It took more than five months of discussion to reach agreement on facts.[11]

[84] Whilst the summary of facts remains unassailable, my characterisation of Steel and Tube's conduct is a matter entirely for me. Often parties do not agree on the issue of characterisation of offending conduct even where there is an agreed factual premise. Whilst bound by the agreed facts, I am entitled to draw inferences provided

[11] Supplementary submissions of the Commerce Commission on sentence dated 18 May 2018 at [2.4].

they are grounded on the established primary facts. This principle was reaffirmed in *Pokai v R*.[12]

[85] In *Pokai,* the appellants pleaded guilty to charges including manslaughter on an agreed summary of facts. The appellants had assaulted the victim and caused his death at a beach after he was first lured to their house, believing that one of the appellants had agreed to have sex with him.[13] However, the summary of facts did not contain detail relating to the force of the assault. The Court of Appeal held it was wrong for the Judge to have concluded the assault involved the use of extreme force. The Court made it clear that in cases where counsel have reached agreement regarding the factual summary on which a guilty plea is to be entered, sentencing must proceed based on that summary.[14]

[86] The Court added:[15]

> It is also clear, however, that a sentencing Judge is entitled to draw inferences from an agreed summary of facts provided they are grounded on established primary facts.

[87] In the present case, the Commission solicitors, supported by Mr Dixon, make the unusual submission that Steel and Tube's false representations were "deliberate, knowing conduct by the company which was able to occur because senior management acted with gross negligence in failing to put in place adequate procedures and oversight."[16] The submission conflates allegations of deliberate/knowing misconduct by the corporate defendant with gross negligence by senior management within the corporation—an unusual fusion of concepts.

[88] The Commission's team of prosecutors repeatedly characterised Steel and Tube's conduct as a *deliberate* departure from the testing process in circumstances where the company *knew* it was not testing SE62 in accordance with the Standard and *knew* its compliance representations were misleading. All these

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[12] *Pokai v R* [2014] NZCA 356 at [30]-[31].
[13] *Pokai v R* at [5].
[14] *Pokai v R* at [30].
[15] *Pokai v R* at [31].
[16] Commerce Commission's amended sentencing submissions dated 20 March 2018 at [6.26].

submissions, however, rested on a false premise. It was based on the premise the knowledge of the technical manager could be sheeted home as an equivalent aggravating factor of knowledge by the company itself. This approach was based upon a misapplication of s 45 FTA. Regrettably a consideration of s 45 is necessary.

[89] Section 45 reads:

> **45 Conduct by servants or agents**
>
> (1) Where, in proceedings under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, *it is necessary to establish the state of mind of the body corporate*, it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of that person's actual or apparent authority, had that state of mind.
>
> (2) *Any conduct engaged in on behalf of a body corporate—*
>
> (a) by a director, *servant, or agent of the body corporate,* acting within the scope of that person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—
>
> *shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.*
>
> (3) Where, in a proceeding under this Part in respect of any conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of this Act applies, it is necessary to establish the state of mind of the person, it is sufficient to show that a servant or agent of the person, acting within the scope of that person's actual or apparent authority, had that state of mind.
>
> (4) Any conduct engaged in on behalf of a person other than a body corporate—
>
> (a) by a servant or agent of the person acting within the scope of that person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, given within the scope of the actual or apparent authority of the servant or agent—
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person.

> (5) *A reference in this section to the state of mind of a person* includes a reference to the *knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that intention, opinion, belief or purpose.* (Emphasis added)

[90] Section 45 is a special attribution rule for the purpose of sheeting home *liability* to the body corporate under the FTA. Relevantly, under s 45, knowledge held by the directors, servants or agents of a corporate body is attributable to the company. In *Progressive Enterprises Ltd v Commerce Commission,* Asher J affirmed the obvious that s 45 applies where it is "necessary" to prove corporate intent. *Mens rea* must be a necessary component of the relevant charge and the director, servant or agent in question must actually have the required state of mind. An aggregation of states of mind from various persons is insufficient.[17] In the present case, Steel and Tube face strict liability offences. There is arguably no necessity to establish the state of mind of Steel and Tube to sheet home liability. For that reason alone, s 45 does not apply.

[91] However, even if it does apply to the charges, Mr Dixon's use of s 45 in the sentencing was misplaced. The purpose behind s 45 is to provide a special attribution rule to extend and sheet home liability under the FTA to the corporate offender for the actions of others, for which the company would not necessarily have been liable at common law.[18] There is a world of difference between proof of the aggravating factor on sentence that the company acted knowingly or deliberately on the one part, and sheeting home liability to the company by means of the deliberate conduct of employees in the absence of direct knowledge of the board or senior management, on the other part. The whole purpose of s 45 is to ensure corporate offenders do not escape compliance with the FTA even in cases where the board or senior management has no direct knowledge of the offending conduct. It is not a mechanism that allows a prosecutor to avoid proper proof of an aggravating factor on sentence.

[92] If the Commission wants to allege that senior management or the board at Steel and Tube acted knowingly or deliberately it must prove that aggravating factor at

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[17] *Progressive Enterprises Ltd v Commerce Commission* [2008] 12 TCLR 284 [23 December 2018] at [64]-[66].

[18] Similar reasoning was adopted by the Court of Appeal in *Kuehne & Nagel International AG v Commerce Commission* [2012] 3 NZLR 187 at [33] and [40]. In *Kuehne*, the Court was considering s 90(2) Commerce Act, a similar attribution rule to s 45 FTA.

sentence. It cannot rely on s 45 to fill the gap in its evidence. And there is nothing in the agreed facts from which I can properly infer that knowledge of the technical manager's deliberate actions reached senior management or the board at Steel and Tube. But, the notion they ought to have known is an entirely different matter.

[93] I characterise the culpability of Steel and Tube as grossly negligent. That finding is irresistible. At the very least, senior management ought to have known of the large-scale non-compliance over the four-year charging period.

[94] The technical manager was not properly supervised. Steel and Tube cannot be permitted to wash their hands of taking responsibility for that negligent oversight. Even when the technical manager left Steel and Tube in March 2014 – half way during the charge period – the company did not audit or review his procedures in any way. Rather, Steel and Tube continued to rely on his processes and replaced the person that oversaw them. It was a failure to audit its own systems at a point where detection for non-compliance should have occurred. The inappropriate non-compliance was allowed to continue on the basis of the technical manager's shortcuts. After all, it was Steel and Tube's responsibility to have proper systems in place to ensure compliance with the Standard. This is particularly so given the significant revenues Steel and Tube derived from its sales of SE62 and the heavy extent of its reliance on the Standard and its marketing of that product.

[95] However, senior management staff did not know of the specifics of the testing occurring at any given time, a compelling inference drawn from the primary facts. Nevertheless, the lack of robust procedures would have been self-evident even if basic enquiries had been made. And as the manufacturer and original distributor of the product, its conduct is more culpable. This is because Steel and Tube had complete control over what testing it was conducting. It was not relying on a third party to do that testing and explain the results to it. Steel and Tube's conduct is properly characterised as grossly negligent.

[96] The same gross-negligence finding applies equally to the independent-testing misrepresentations. The presence of the Holmes' logo on the relevant batch

certificates cannot be characterised as mere inadvertent practice. I do not accept the technical manager's explanation that he mistakenly left the template that Steel and Tube had earlier asked Holmes to produce when it was conducting some testing of the SE62 in its development phase. Such an explanation does not explain the use of the words "laboratory manager" when no-one at Steel and Tube held that title. It ought to have been obvious the testing was not conducted in a laboratory. And claims of independent testing went beyond the batch certificates and were made on Steel and Tube's Website throughout the charging period. Holmes was not conducting ongoing testing with SE62 past the development phase. Also, Steel and Tube had requested a proposal from Holmes to become more involved in its certification processes in 2014. Although that proposal was provided it was not taken up by Steel and Tube. The company nonetheless continued to provide batch certificates containing the Holmes' logo throughout the period until 16 March 2016.

[97] This conduct may have initially arisen inadvertently but later became clearly grossly negligent. Steel and Tube ought to have known of this non-compliance and the fact it was not discovered within a reasonable time period galvanises the gross-negligence-finding. The fact that Steel and Tube's lack of oversight of the technical manager could allow the latter to approve the continued use of the Holmes' logo throughout the charging period was inexcusable.

[98] Whilst the inference can be drawn that the technical manager's conduct in this regard equated to a conscious choice to allow this false representation to be disseminated, there is still a gap in the evidence to suggest that senior management or the board knew of this problem. Again, s 45 FTA cannot assist the Commission and its large team of prosecutors.

[99] As is plain, I consider the overall culpability of Steel and Tube was grossly negligent. This level of culpability did not materially alter across the charging period. Both sets of representations were completely untrue. The cumulative effect of the breaches constituted substantial failures. There was a high degree of dissemination of these false representations. This was by a company with a large market share of the product in question. And the representations on the Website, for instance, must have

been viewed nationwide and possibly internationally. The prejudice to the consumers was significant. They were paying for the reassurance the product met the grade 500E standard.

[100] Uncertainty over structural integrity of this product is the main effect of the offending of this type. Consumers can no longer be confident of how this steel mesh would respond in the event of an earthquake. And, as a flow-on effect, local councils now face difficulty in relation to the issuing of compliance certificates on the basis of that mesh and on property values. But, it is the uncertainty as to the performance of the non-complying mesh in an earthquake that has the greatest issue. That factor is no longer traceable.

Does lack of knowledge by senior management make the conduct less culpable?

[101] This question arises independently of s 45 FTA. As noted earlier, I consider Mr Dixon misapplied s 45 to this sentencing. However, he did call in aid a different point captured by the Federal Court of Australia in *Director of Consumer Affairs Victoria v Alpha Flight Services*.[19] In that case, Qantas had outsourced compliance with product safety regulations to Alpha Flight Services. Qantas was prosecuted for the product's safety failures. In mitigation, it sought to argue that it was less culpable because it did not know about the failures that had occurred. The Court did not accept the argument that a lack of knowledge within senior management made Qantas substantially less culpable. The Court considered the size and substantial resources of Qantas heightened the need for effective systems to prevent such offending. It said:

> Some of the other matters to which attention was drawn on behalf of Qantas might also be thought to point to the need for a substantial penalty rather than a lower penalty. It was said for Qantas, for example, that the contravening conduct had occurred without the knowledge or involvement of any of the Qantas senior management, but that circumstance suggests that Qantas did not have systems to ensure that such contraventions would receive attention by senior management rather than that Qantas should not have a substantial penalty imposed upon it.

[19] *Director of Consumer Affairs Victoria v Alpha Flight Services* [2014] FCA 1434

[102] But, the relevance of *Alpha Flight Services* to the present case is questionable. This is because Qantas subcontracted out its compliance obligations to that third party. In that factual matrix, it would be entirely wrong to allow Qantas to hide behind its non-delegable responsibilities via a contractual device and then claim less culpability even when it did not know, or intend, to contravene the statute. In the present case, however, misuse of a contractual delegation of responsibilities to lower culpability does not arise. Thus, Mr Dixon's efforts to press into service *Alpha Flight Services* is misplaced. As per my findings above, senior management at Steel and Tube were grossly negligent in failing to pick up the substantial misrepresentations over the charging period.

A need for deterrence

[103] Mr Dixon submits there is a need for a financial fine that reflects deterrence both specific to Steel and Tube and in general. In contrast, Mr Heron submits on behalf of Steel and Tube a deterrent penalty particular to the defendant is not necessary. Mr Heron argues Steel and Tube has suffered damage already to its reputation as a result of publicity to date. Mr Heron says the investigation and prosecution by the Commission has had consequent negative publicity which in itself is a strong deterrent to Steel and Tube. In short, Mr Heron submits Steel and Tube has more than learned its lesson.

[104] Mr Dixon nevertheless contends for deterrence at both levels. In particular, he submits that large firms like Steel and Tube, with substantial resources, need large penalties to deter them and he calls in aid s 40 Sentencing Act. I deal with that submission below.

[105] Steel and Tube is a listed company with $516 million in revenue in the financial year ending 30 June 2016. Mr Dixon submits it therefore falls within the category of one of the largest corporate bodies that will come before the Court. All these contentions, however, point to a need for general deterrence rather than a need for specific deterrence aimed at Steel and Tube. And, in the end, fines must not be set at

a weak level such that big companies remain largely undeterred by non-compliance with the FTA because weak fines may have little impact on overall revenues.

[106] But, as set out in greater detail later, Steel and Tube has shown that its remedial action and attitudes indicate the investigation and prosecution has caused them to radically change their systems. Overall, therefore, I consider a fine to further deter Steel and Tube from such conduct has some but not great weight. But, I consider the need for deterrence at a general level is a principle that carries significant weight.

The financial circumstances of the defendant

[107] By dint of s 40 Sentencing Act, I am required to consider Steel and Tube's financial capacity in determining whether to increase or reduce the amount of the fine. On one end of the spectrum, it is contrary to justice to impose a fine on an offender who has no prospect of paying it or should have the fine reduced to reflect his or her real financial capacity. At the other end of the spectrum the statutory principle reflects that the means of the offender may be taken into account to increase what would otherwise have been an appropriate fine. This marks a clear departure from the common law which has always embraced the principle "it is wrong to increase a penalty merely because of an offender's wealth."[20]

[108] For Steel and Tube, the starting-point for any fine must be determined by reference to the gravity of the offending. However, it may be increased in order to ensure appropriate punishment is not diluted because of the offender's comparative wealth. Even then, there must still be some proportionality between the seriousness of the offending and the fine imposed. It cannot just reflect the means of the offender. In short, the fine imposed on Steel and Tube must be a proportionate response to all relevant factors.

[109] In this respect, I accept Mr Heron's submission that the publicity of this prosecution has already impacted on Steel and Tube, not only in terms of reputation, but in its share price. Steel and Tube's otherwise heightened brand image and

[20] *MOT v Graham* [1990] 3 NZLR 249 at p 406.

corporate identity has already suffered at the Stock Market. The reasonableness of the fine must be seen in that light.

Starting-point fine for Compliance Representations: comparative cases

[110] There was much dispute before me about an appropriate comparative case. Mr Dixon placed considerable reliance on the District Court decision in *Commerce Commission v Carter Holt Harvey.*[21] Mr Heron contends *Carter Holt* does not provide any meaningful assistance in assessing the appropriate starting-point. An examination of the case is necessary.

[111] *Carter Holt* was sentenced on 20 charges under s 10 FTA for misrepresenting that its structural timber met the relevant standard when it did not. The charge period was three years. *Carter Holt* reported net sale revenues of $177 million from the timber over that timeframe. This was in 2006. Significantly, however, a senior manager within *Carter Holt* was aware the timber being produced was not meeting the requirements of the standard. Knowing that, the company still marketed and sold the timber. *Carter Holt* therefore involved a very large company whose senior management official acted deliberately over that three-year period with substantial revenues attaching to the conduct.

[112] In *Carter Holt*, a fine of $900,000 was imposed on 20 charges allowing for a 33 percent discount (standard at the time) for early guilty pleas. When analysed that is the equivalent to a starting-point of $1.35 million in 2006. Then the charges were predominantly subject to a maximum penalty of $100,000. A small proportion (one-sixth) of the charges were subject to a maximum penalty of $200,000. The learned Judge did not articulate how it accounted for the increase in the maximum penalty from $100,000 to $200,000. And, with great respect, the decision does not provide a structured analysis of the aggravating and mitigating factors currently demanded by sentencing methodology under the FTA and Sentencing Act.

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[21] *Commerce Commission v Carter Holt Harvey*, DC Auckland, Judge Bouchier, 12 October 2006, CRI-2005-004-18578.

[113] Mr Dixon submits that what is required is a mathematical exercise to determine what *Carter Holt's* conduct would result in under the current regime of a $600,000 maximum per charge. This general mathematical assessment has been adopted by other Judges in FTA cases.

[114] In *Commerce Commission v Glaxosmithkline,* Judge Gittos doubled the starting-point applied to some but not all of the charges that were subject to the maximum penalty of $200,000 from those subjected to the maximum penalty of $900,000.[22] His Honour Judge Ronayne adopted a broadly similar approach in *Commerce Commission v Budge Collection Ltd & Sun Dong Kim.*[23] In *Budge*, Judge Ronayne increased the starting-point to reflect the three-fold increase in the maximum penalty in his totality assessment of the resulting starting-point. However, Judge Ronayne made the point this exercise is not susceptible to some sort of precise mathematical analysis. And that what is required is an overall evaluation of a defendant's culpability bearing in mind the increase in the maximum penalty. I agree. Mathematical formulas must not be used in a way that overshadows the fundamental tenet that criminal justice is focused on individual culpability.

[115] Adopting the *Budge* approach, Mr Dixon argues that if *Carter Holt* were to be sentenced entirely under the $600,000 maximum penalty the starting-point adopted would be, at least, $4.8 million.[24] The Commission's 'likely' starting point for *Carter Holt* was noted in recent FTA cases. Heavy reliance on *Carter Holt* features again in the Commission's starting-point range for the present case.

[116] But, even adopting a mathematical adjustment of the fine in *Carter Holt*, with the caveat identified above attached to it, that approach still does not confront the problem *Carter Holt* is distinguishable from Steel and Tube's offending on material points. The comparison is analysed below.

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[22] *Commerce Commission v Glaxosmithkline*, DC Auckland, Judge Gittos, CRI-2006-004-503913, 27 March 2007.
[23] *Commerce Commission v Budge Collection Ltd* [2016] NZDC 15542.
[24] Commerce Commission's Amended Sentencing Submissions dated 20 March 2018 at [8.18].

[117] At one level, there are obvious similarities in both cases. In both, representations were about a building product reaching a prescribed standard when it did not. Also, the potential consequences of both sets of false representations were generally the same. Both are very large companies. And Steel and Tube offended over a longer period, namely four years one month, a year longer than *Carter Holt.* Also, *Carter Holt* earned more revenue from sales from the offending product. *Carter Holt* reported net sales revenue of $177 million from the suspect timber over the charge period. Steel and Tube would have earned in the region of $24 million from the sale of the steel mesh SE62.

[118] However, the investigation into Carter Holt established that knowledge of the impugned representations reached the level of senior management and head office. Despite that knowledge, the head office continued to market and sell the timber for a further period of two years. One of those managers, Mr Maurice Reid, eventually pleaded guilty to 17 charges under the FTA for his part in the *Carter Holt* offending. He oversaw production of the timber which he knew was not compliant during the relevant period.[25] Knowledge of the *Reid* case came from Mr Heron and not from the prosecutors. In short, the *Carter Holt* investigation involved charges brought against not only the company but also the executive and management of the corporation.

[119] This difference in *Carter Holt* and *Reid* cases when compared to the present case is material. In the former, senior management and head office individuals engaged in deliberate misconduct. That is not the case with Steel and Tube. As made plain above, Mr Dixon misapplied s 45 FTA to attribute the technical manager's deliberate misconduct as if it were equivalent to deliberate misconduct by Steel and Tube's senior management or even its executive board. Those serious allegations remain unsubstantiated.

[120] Also, the prosecutor's submission the potential consequences of both sets of false representations were the same, namely, the potential for structural integrity issues, is somewhat inconsistent with the submission that this factor in the present case

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[25] *R v Maurice Reid* (*Carter Holt Harvey*) DC Auckland, CRI-2007-004-5790, 5 April 2017, Judge Bouchier.

has been reduced to one of uncertainty. And, no two companies are the same in size. *Carter Holt* earned more than seven times the revenue from the offending product. It had a total asset base of more than 30.5 times that of Steel and Tube.

[121] This is not to say the mathematically-adapted *Carter Holt* approach is not helpful. It remains a helpful guide but the heavy reliance placed on it by the Commission's team of prosecutors in the present case is unwarranted.

[122] For all these reasons, I reject Mr Dixon's submission that the offending in *Carter Holt* was "marginally higher" than Steel and Tube's individual culpability.

[123] The recent decisions in *Commerce Commission v Timber King* [26] and *Commerce Commission v Brilliance International Ltd* [27] are of immediate relevance. Both cases involved FTA prosecutions over trade misrepresentations relating to the same steel mesh. In *Timber King*, the court characterised the offending as grossly negligent and adopted the figure of $650,000 as the starting-point for compliance representations. In *Brilliance*, the Court characterised the offending as progressively reaching deliberate misconduct and adopted a starting point of $600,000. Both cases, however, related to offending on a much smaller scale to that by Steel and Tube. Both cases clearly demonstrate the starting-point range proposed by Steel and Tube is manifestly inadequate.

[124] Also, in reaching the starting-point, I have analysed the plethora of cases cited by Mr Heron said to assist in the assessment.[28] I have considered especially the level

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[26] *Commerce Commission v Timber King Ltd* [2018] NZDC 510

[27] *Commerce Commission v Brilliance International Ltd* [2018] NZDC 7359. This case was drawn to my attention on 5 September 2018. Both parties had filed submissions about this case in August 2018. However, the Registrar at Auckland failed to forward the respective memoranda to me at Gisborne until 5 October 2018. Upon receipt of the submissions, I reviewed my findings where relevant. This led to a delay in delivery of judgment.

[28] *Commerce Commission v Glaxosmithkline (NZ) Ltd,* DC Auckland, CRI-2006-004-503913 (27 March 2007); *Commerce Commission v Fujitsu General New Zealand Ltd* [2017] NZDC 21512; *Premium Alpaca Ltd & Ors v Commerce Commission* [2014] NZHC 1836; *Commerce Commission v Topline International Ltd & Anor* [2017] NZDC 9221; *Commerce Commission v Vodafone NZ Ltd,* DC Auckland, CRNs 09004505626, 09004505621, 09004505620, 09004505617 and 09004505731, 12 August 2011; *Commerce Commission v Trustpower Ltd* [2016] NZDC 18850; *Commerce Commission v Nezam Anwer & Anor* [2016] 14 TCLR 533; *Commerce Commission v Reckitt Benckiser (NZ) Ltd* (2017) 14 TCLR 535; *Commerce Commission v Bike Retail Group Ltd* (2017) TCLR 545*; Commerce Commission v Youi Insurance Group Ltd* [2016] NZDC 25857.

of fines reached in each case and compared it to the one sought by the prosecutor here, as Mr Heron urged me to do.

[125] Of those cases, Mr Heron contends *Commerce Commission v Glaxosmithkline*[29] and *Commerce Commission v Fujitsu*[30] are the most comparable. The lack-of-knowledge element at the high levels of the respective company is a comparable factor. But, the maximum fines available in *Glaxosmithkline* make it less relevant. There are other distinguishing features between both cases and the present one. In the end, the offending in both cases is simply dwarfed by Steel and Tube's scale of offending. And as already noted, *Timber King* and *Brilliance* are of more immediate relevance to the task.

[126] Fixing a starting-point is not an exact science. An approximation based on a principled approach is necessary. In the end, balancing all the above relevant considerations, I find the appropriate global starting-point fine for Steel and Tube's Standard-compliance representations is $2.4 million.

Starting-point for the Independent Testing representations: comparative cases

[127] These representations constitute sufficiently discrete offending conduct which calls for a separate starting-point fine. This is because the offending would still exist even if Steel and Tube had complied with the Standard in all material respects.

[128] The market claim behind the representations is that an independent tester has verified the product's compliance which was not true. That is serious misconduct. But the true gravity of this offending is made worse because SE62 never met the Standard during the charging period. The independent testing representations added a false sense of assurance to the already misleading compliance representations; that makes the conduct worse. I thus consider there is some factual overlap between the two categories of charges, the consequence of which leads me later to modestly adjust the global starting-point for totality purposes.

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[29] *Commerce Commission v Glaxosmithkline,* DC Auckland, CRI 2006-004-503913, 27 March 2007.
[30] *Commerce Commission v Fujitsu General NZ Ltd* [2017] NZDC 21512.

[129] *Brilliance* and *Timber King* represent analogous cases in dealing directly with the independent testing representations concerning SE62. In *Timber King*, a starting point of $60,000 was adopted. The Judge considered that the independent testing misrepresentation about SE62 was a one-off occurrence but was nevertheless "nothing short of fraudulent" and characterised the offending, on the part of the directors, as "at least negligent".[31] In *Brilliance*, the offending was over the much longer period of four years with a self-evidently greater impact on customers. Also, the sole director carried on the offending when she knew the representations were false. All these considerations led the judge to adopt a starting point of $200,000.

[130] There are other cases in which corporate offenders used fake certificates such as in *Commerce Commission v Wild Nature NZ Ltd & Sung Ho Park.*[32] In *Wild Nature,* the products were endorsed and approved in the certificates by non-existent entities. The director of the company was directly involved in creating the fake documents.

[131] Mr Dixon also referred me to *Commerce Commission v Day & Jones*[33] and *Commerce Commission v Frozen Yoghurt Ltd (in liquidation).*[34] I have considered those cases and the others cited to me. In *Frozen Yoghurt*, the corporate offender had made two misleading representations central to the sale of their core product. First, the product had certain health products when it did not. Second, the product was yoghurt when it was not.[35] A starting-point range of between $250,000 to $300,000 was considered appropriate.

[132] Based on these comparative cases, Mr Dixon submits the independent testing representation requires a global starting-point range of between $800,000 to $1.1 million. This starting-point is said to be less than that adopted in the *Nurofen* case; roughly three times in *Frozen Yoghurt* and substantially higher on any analysis in the starting-point in *Day.*

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[31] *Commerce Commission v Timber King Ltd [2018] NZDC 510* at [96].
[32] *Commerce Commission v Wild Nature NZ Ltd & Sung Ho Park* DC Auckland, CRI-2012-063-3511, 12 December 2014.
[33] *Commerce Commission v Day & Jones* DC Christchurch, Judge Farish, CRI-2010-009-4417, 1 September 2010.
[34] *Commerce Commission v Frozen Yoghurt Ltd (in liq)* [2016] NZDC 19792.
[35] *Commerce Commission v Frozen Yoghurt Ltd (in liq)* [2016] NZDC 19792 at [2].

[133] Again, however, the prosecutor wrongly attributes that Steel and Tube "knew" it was not independently testing SE62 in accordance with the Standard. For the reasons noted earlier, that knowledge cannot be sheeted home to senior management personnel let alone the board.

[134] In the end, *Timber King* and *Brilliance* provide a better guide. Steel and Tube's conduct must be considered grossly negligent over the entire charging period. The representation that its product was independently tested and confirmed as grade 500E is likely to have given consumers greater confidence of earthquake safety. It added an important layer of assurance to the already misleading compliance representations. And Steel and Tube's offending was on a much larger scale than the criminality in *Timber King* and *Brilliance*.

[135] For all the above reasons, I consider the appropriate starting-point for this discrete offending is $600,000.

Combined starting-point and application of totality principle

[136] Section 40(2) FTA is not engaged. Under s 40(2), where there are multiple contraventions of the same provisions of the FTA, that are "of the same or a substantially similar nature and occurred at or about the same time", the aggregate amount of any fines imposed shall not exceed the amount of the maximum fine that may be imposed in respect of a conviction for a single offence. This provision cannot be ignored but it clearly has no direct application to the present case. Steel and Tube's offending occurred over a period of four years and involved differing conduct. I am thus not restricted by the rule that the aggregate amount of fines imposed must not exceed the amount of the maximum fine. But the totality principle is a different matter.

[137] At one level, both sets of representations constitute two distinct types of conduct. This must be the case because if Steel and Tube had complied with the Standard, the offending relating to the independent testing representations remains. But, as noted above, the true gravity of the latter representations is inextricably linked to the compliance representations. It is that overlap which calls for the application of the totality principle.

[138] However, Mr Dixon contends that whilst I am obliged to consider the totality principle, I should not make an adjustment for it in this case. A prosecutor's submission that the totality principle is inapplicable to a sentencing requires scrutiny. After all, the totality principle is a fundamental tenet of sentencing law.[36] A final sentence must reflect totality of the criminality. The principle is designed to ensure a defendant does not receive a sentence that is out of all proportion to the overall gravity of the offending.

[139] I immediately acknowledge that the Commission's approach to the non-application of the totality principle was adopted in *Timber King* and *Brilliance.* But I am not bound by those decisions. Also, it is not apparent to me the defendants in those cases challenged the Commission's stance.

[140] Here, the independent testing representations added a significant false layer to already misleading compliance representations. As is plain from my comments, the level of gravity of this conduct rests in part on the non-compliance representations. For that reason, the two sets of representations cannot be treated as wholly distinct conduct. The extent of overlap, however, is a matter of degree. I recognise any reduction in penalties on a totality basis that fails to give adequate recognition to the need for general deterrence for this overall offending is not appropriate. However, in my view, it is wrong to suggest that the application of a long-established principle of sentencing does not apply here. Moreover, application of the totality approach does not preclude the Commission from using this decision in future cases.

[141] In the end, I have reached the view that there must be a meaningful but modest adjustment in the global fine in obedience to the totality principle. I reached the view the global combined starting-point should be reduced to $2.9 million.

Mitigating factors

[142] The contest over the relevant starting point stands in sharp contrast to the almost agreed position over the percentage discount available for cognisable

[36] *R v Xie* [2007] 2 NZLR 240 at [16].

mitigating factors. In short, the Commission contends for a reduction of 30 percent from the global starting-point fine. Mr Heron advocates a reduction of 35 percent. I consider Mr Heron's position accurately reflects the level of mitigation.

The attitude of Steel and Tube in respect of remorse, co-operation with the Commission and remedial action.

[143] It is common ground that as soon as Steel and Tube senior management became aware of the Holmes' logo being present on their batch test certificates they investigated the matter. They then promptly acknowledged the mistake publicly and removed the logo from the certificates and apologised in writing to Holmes. I infer that senior management at Steel and Tube are acutely remorseful for the company's conduct and are sorry that it may have misled consumers or caused them to worry about potential safety issues. There is nothing to suggest this remorse is anything but genuine.

[144] And, Steel and Tube have taken significant remedial steps. Steel and Tube voluntarily quarantined all 500E grade mesh from the market on 5 April 2016. It then entered enforceable undertakings with the Commission on 28 April 2016. It engaged independent laboratories to conduct the testing certification; it invested in new software to record, store and produce test certificates and monitor and report on long-term quality data for the steel mesh; provided additional training to increase the number of employees who are proficient in the Standard; hired an additional quality manager with over 20 years' international experience in quality control and management to review and complete afresh Steel and Tube's systems to ensure compliance with the Standard; and nominated a member of the quality team to be appointed to the joint AS/NZ Standards committee that is reviewing the reinforcing Standards. I am told that this nomination was successful.

[145] Also, Steel and Tube voluntarily stopped selling SE62 stock and requested that national building merchants who sell it do the same. Steel and Tube provided an undertaking on 28 April 2016 to the Commission that it had put in place an external

testing regime to provide comfort that any SE62 on the New Zealand market in the future had been independently tested for compliance with the Standard.

[146] Steel and Tube have no previous convictions under the FTA.

[147] Finally, in the circumstances, Steel and Tube should receive a guilty plea discount of 25 percent. The Commission accepts the pleas were entered at the first reasonable opportunity in the context of a substantial investigation.

End fine

[148] A reduction of 35 percent from a global starting-point of $2.9 million produces an end fine of **$1.885 million.** This fine will be allocated to each of the 24 charges in a way the reflects an accurate breakdown of the respective categories of offending and the applicable maximum penalty. Court Costs of $130 are imposed on each of the 24 charges.

[149] The Registrar at the Auckland Court has not provided me with the respective CRN numbers. I thus direct the Commission's solicitors to file a brief memorandum setting out those details including the relevant date range of the charge. That memorandum is to be filed within seven days. To assist the Commission's lawyers, I have in mind completing a schedule much along that issued in *Brilliance* at [119].

[150] Finally, all suppression orders to date are now vacated.

W P Cathcart
District Court Judge