IN THE DISTRICT COURT
AT DUNEDIN

I TE KŌTI-Ā-ROHE
KI ŌTEPOTI

CRI-2016-012-001466
[2020] NZDC 10193

COMMERCE COMMISSION
Prosecutor

v

GATE SOLUTIONS LIMITED
(FORMERLEY TRADING AS SILBERHORN LTD)
First Defendant

AND

IAN ALLAN CARLINE
Second Defendant

Hearing:	13, 14, 15, 16, 17, 20, 21, 22 August 2019 and 16 September 2019
Appearances:	J C L Dixon QC and I M Brookie for the Prosecutor J M Ablett-Kerr QC and B J Nettleton for the Defendants
Judgment:	5 June 2020

RESERVED JUDGMENT OF JUDGE K J PHILLIPS
Under the Fair Trading Act 1986

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Introduction

[1] This is a three-part judgment, preceded by an introduction. The first part relates to the disputed facts which I was required to make findings on following the parties being unable to come to an agreement.

[2] The second part addresses the discharge without conviction applications made in respect of both defendants.

[3] The third part addresses the remainder of the sentences for the charges.

Background

[4] The prosecution taken by the Commerce Commission against each of the defendants began when the Commerce Commission filed charging documents in relation to each defendant with the District Court at Wellington for first appearance hearing on 27 October 2015. The charges then preferred against each of the defendants was a charge laid under s 47J(1)(a) of the Fair Trading Act 1986 (the "FTA") and s 66(1)(b) and (c) of the Crimes Act 1961. The first defendant was charged that without reasonable excuse it failed to comply with a notice under s 47G of the FTA. The second defendant was charged as a party to the alleged offending by the first defendant, by allegedly aiding and abetting in the failure to comply.

[5] Those charges against each defendant were followed by the filing of a large number of charging documents against each defendant with first appearance hearing in the District Court at Dunedin on the 21 June 2016. These charges alleged offending by each defendant under ss 10, 13, and 40(1)(a) and (b) of the FTA. All charges against the defendants were denied and pleas of not guilty were entered.

[6] The prosecution pathway of the charges has been protracted due to a large number of issues that arose during the course of the prosecution. Pre-trial issues included interim name suppression, disclosure arguments, admissibility of evidence, and an application to dismiss the charges based on procedural issues was made. Applications and supporting materials were filed considered, argued, and either agreed by the parties or decided by the Court following hearings. With two very busy Senior

Counsel involved along with very full Court schedules, the progress towards getting a hearing date suitable to all was admittedly slow. Finally, an eight week Judge Alone Trial was set down to begin on 30 October 2017.

Guilty pleas

[7] On the 31 October 2017, following discussions and negotiations between counsel, the first defendant pleaded guilty to 26 charges relating to breaches of s 10 of the FTA and pleaded guilty to the charge of failing to comply with the notice issued to it under s 47G of the FTA; the second defendant pleaded guilty to one charge, being the charge that he aided and abetted the first defendant in its failure to comply with the notice under s 47G of the FTA.

[8] These guilty pleas had been entered to these particular charges on the basis of what the Court understood to be an agreed summary of facts, which had been discussed between counsel and signed off by Mr Carline on behalf of himself and the first defendant. The remaining charges against each defendant were to be withdrawn. My Minute of the hearing that then followed describes that some amendments were made to the some of the charges pleaded to (the amendments in the main relating to the specified dates over which the admitted offending had occurred) and that Ms Ablett-Kerr for the defence, wanted a delayed sentencing date as she wished to have some scientific evidence available for her submissions at sentencing. No other concession or conditions were made by either counsel at that time.

Charges and Sentencing

[9] A Sentencing Hearing was set down for 27 February 2018. The defendants were to appear for sentencing on the basis that they faced the following charges, under the FTA:

(a) Gateway Solutions Ltd (which had formerly traded as "Silberhorn Ltd") having pleaded guilty to 26 representative charges for breaches of s 10 of the FTA between March 2011 and August 2015 ("the offending period").

(b) Mr Carline and Silberhorn/Gateway Solutions Ltd – having pleaded guilty to one charge each under s 47J of the FTA. (In Mr Carline's case as a party under s 66(1)(b) of the Crimes Act 1961.)

[10] The maximum penalty in relation to beaches of s 10 of the Act increased from $200,000 to $600,000 on 17 June 2014.[1] Fifteen of the charges that the company had pleaded guilty to, related to conduct before the increase in penalty, 11 relating to conduct straddling the period before and after the increase.

[11] In relation to the charges under s 47J of the Act, the maximum penalty for the offence in relation to companies is $30,000, and for individual $10,000.

[12] Section 10 of the Act prohibits misleading conduct relating to goods and provides as follows:

> **10 Misleading conduct in relation to goods**
>
> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

[13] The s 47J charges relates to the defendants' failure to comply with a notice issued by the Commerce Commission under s 47G of the Act for the production of certain documents and information during the course of the investigation. The defendant Mr Carline was charged as a party to Silberhorn's offending.

Findings of Fact

The Agreed Summary of Facts

[14] The summary of facts that counsel had agreed, and that Mr Carline had signed off on relating to the defendant Gateway Solutions Ltd ("Agreed Summary of Facts"), alleges that the company at relevant times was involved in the production, marketing and sale of dietary supplements made from deer velvet.[2] Deer velvet being derived

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1 Section 40 of the FTA sets out the offences for contravening Part 1, 3 or 4 of the Act, s 10 is within Part 1.

2 Agreed Summary of Facts s 10 Offending, 1 November 2017 [Agreed Summary of Facts]. Attached to this judgment.

from the bone and cartilage development of deer antlers and the deer velvet product being marketed as aiding various health conditions and joint mobility.

[15] The charges relate to representations and conduct by the defendant company regarding the amount of deer velvet and carob contained in several of the products produced by the company in the period March 2011 – August 2015. The deer velvet was sold in capsules in a number of variants:

(a) Sir Bob Charles Sportsvel x 100 capsules bottle – 250mgs;

(b) Sir Bob Charles Sportsvel x 180 capsule bottle – 250mgs;

(c) Deer Velvet capsules x 80 capsules bottle – 250mgs;

(d) Sir Bob Charles Sportsvel Red pack x 30 capsules – 300mgs; and

(e) Sir Bob Charles Sportsvel Black pack x 50 capsules – 300mgs.

[16] The product was marketed by the defendant as a product that would "support strength, activity and joint mobility" and in relation to its quality and superiority, the product contained the message "New Zealand (deer) velvet is some of the finest quality by world standards, South Island velvet is the best of the best."

[17] The deer velvet was not directly manufactured by the defendant company as that work was contracted to independent manufacturers who made the products subject to the specifications that they were given by the first defendant. The manufacturers being responsible for blending the ingredients, encapsulating the ingredients into capsule form, and packaging the capsules into containers, in accordance with specifications and instructions provided by the defendant. The defendant company was responsible for labelling, marketing, and distributing the product.

[18] The summary of facts states that in 22 separate incidences the defendant instructed the contract manufacturers to produce the capsules for these products using a lesser amount of deer velvet powder concentrate in each capsule that was then

represented on labels subsequently applied to the containers of these products.[3] To make up the shortage of deer velvet, the defendant instructed the manufacturers to include more carob in each capsule. Carob is an inert substance which is used as a manufacturing aid.

[19] The summary of facts stated that labels on the various products were liable to mislead the public (including the information through the website that was used to market the products) in that it was stated on the label that each capsule:[4]

> contained either 250mg or 300mg of deer velvet when in fact each capsule contained between 30mg to 100mg less deer velvet than that. A reduction of between 12 and 33.3 percent. Half of the batches i.e. 12 of the 22 were in the range of 12 percent.

[20] The summary of facts stated that reducing the amount of the active ingredient and incorrectly labelling the products was liable to mislead consumers into buying the products under a mistaken belief that each capsule contained a higher concentration of deer velvet that they did in fact contain.[5] As a result, the conduct generated an unlawful profit. The retailers of the product and the consumers of the capsules had no means to determine the true composition of the products.

[21] When the charges were filed, a number of charges were laid representatively for each batch charging offending under s 10 of the FTA. The charge period for each batch is from the date of production until the expiry of the use by date, some two years after manufacture. The matter was further complicated by a change in the limitation period from three years reasonable discoverability test to a five year from the date of the breach test. The Commerce Commission in laying the various charges therefore, provided for conduct before and after 1 July 2013, being the date of the change in the limitation period.

Disputed facts

[22] At the scheduled Sentencing Hearing on 27 February 2018, it quickly became apparent to the Court that the defendants disputed several facts contained in the

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3 Agreed Summary of Facts at [8].
4 Agreed Summary of Facts at [9].
5 Agreed Summary of Facts at [10].

summary of facts, and the inferences that the Commerce Commission submitted could be drawn from facts detailed in the summary. As a result, it became apparent to me that there was no other way to deal with the disputed sentencing issues, than to hold a disputed facts hearing. That was set down to commence in the week commencing Monday 13 August 2018. The Court directed that counsel were to meet and attempt to identify the issues in dispute.

[23] An unsigned joint memorandum intituled "Joint Memorandum regarding Disputed Facts" dated 27 February 2018 ("Disputed Facts Memorandum"), was filed with the Court. That document noted the disputed issues as being:[6]

(a) At paragraph [1.2] – that the defence did not accept and thus it was disputed that Mr Carline knew the various batches of product had less deer velvet than was specified on the labels of the product and on the website; and the defendants denied that Mr Carline or the company had acted deliberately. It was the defendants' position that the conduct complained about arose from a miscommunication or corporate negligence. The Commission did not accept this as being true.

(b) At paragraph [1.4] – Mr Carline believed at all relevant times that due to a change in the way deer velvet was being processed the product was twice as effective as it had been previously. The Commission did not accept that Mr Carline held that belief or that such a belief was justified or correct.

Issues then stated to be arising from that were:

- Whether in 2010 the company had a new processing technique for the deer velvet?

- Whether Mr Carline held the belief that the product was then twice as effective as it was previously?

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6 Joint Memorandum regarding Disputed Facts, 27 February 2018 [Disputed Facts Memorandum].

- And if he did hold that belief, on what basis did he hold it.

(c) The memorandum stated that defendants relied on a report described as the "Haines Report" in relation to the new processing method and that the product the customers received was at least "as good if not better than" that the labelled weight of deer velvet as previously processed.

(d) That the defendant's claim that deer velvet sales amounted to one quarter to one third of the company's revenue during the relevant period was disputed by the Commerce Commission.

(e) The Commission said the representations were disseminated nationwide, which was disputed.

(f) That the Commerce Commission's actions in its investigation were perceived by Mr Carline to be carried out in a biased manner, which impacted the way he responded to the s 47G notice. The defence argued that this unfair conduct mitigated the failure to comply with the notice.

(g) Further, the defence said that the Commission went outside the terms of the warrant that was executed at the defendant Mr Carline's Waiuku address by searching children's rooms and personal items, and by failing to return removed items.

(h) The Commission did not accept that it had treated Mr Carline unfairly or that it was biased against him or that its officers had gone outside the terms of the search warrant, or that any such conduct by the commission in any way mitigated the offending by the defendant Mr Carline.

[24] That document was later followed by a memorandum by Ms Ablett-Kerr wherein she submits in relation to paragraph [1.2] of the Disputed Facts Memorandum that:[7]

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7 Memorandum of Ms Ablett-Kerr, 8 May 2018, at [3].

> For the avoidance of doubt the defendants do not accept that matters relating to either the knowledge or otherwise of Mr Carline and/or whether his or the company's conduct was a deliberate intention to deceive of mislead was at any stage an agreed fact in the respective summary of facts put forward and the defendants do not accept that it its open for the prosecutor to introduce the matters as detailed above at para [1.2] of the memorandum that the defendant Mr Carline knew that the product contained less than was specified and that he and/or the company did that deliberately.

[25] What then followed was a disputed facts hearing. The estimation of time for that hearing was three days but, in the end, eight days were required to hear all the evidence called by both sides. During the course of the hearing, the defendants counsel sought disclosure of reports prepared for the Commerce Commission to assist the Commission in preparing its position on the Haines Report. I gave a decision after hearing arguments on that issue, holding that the material was validly withheld from disclosure. The disputed facts hearing was completed, and the matter was then set down for a sentencing hearing.

[26] The defendants filed a notice of appeal against my ruling; that appeal was heard in the High Court at Dunedin on 19 November 2018, with Nation J's decision being released on 23 November 2018.[8] The defendants filed a Notice of Appeal against Nation J's decision with the Court of Appeal.

[27] Finally, when the Court of Appeal notice of appeal was not taken further, the parties were given a date for the Sentencing Hearing in the District Court before me. Due to various commitments of counsel, Court availability, and Judicial availability it did not take place until the 16 September 2019, when submissions were heard by me and my decision on matters and factual issues and on sentencing was reserved.

Layout of Disputed Facts

[28] The disputed facts, with reference to the Disputed Facts Memorandum, are laid out in the following way:

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8 *Gateway Solutions Limited and Carline v Commerce Commission* [2018] NZHC 3049.

a) *Preliminary Issue – Knowledge and Deliberate Action*. Can the Commerce Commission introduce as a matter in dispute the defendants' knowledge and deliberate action?

b) *Disputed Fact 1 – Knowledge and deliberate action*. Did Mr Carline know there was less deer velvet than advertised in the capsules; did Silberhorn or Mr Carline deliberately act to ensure less deer velvet than advertised was in the capsules?

c) *Disputed Fact 2 – Deliberate Intention to Deceive or Mislead.* Was the conduct of the defendant company and its officers a deliberate intention to deceive of mislead?

d) *Disputed Fact 3 – Harm to Consumers.* Was harm occasioned to consumers by virtue of the mislabelling?

e) *Disputed Fact 4 – Level of Sales of Deer Velvet Product*. What was the level of sales of the deer velvet products over the offending period?

f) *Disputed Fact 5 – Conduct of the Prosecutor in its Investigation.*

Preliminary Issue – Knowledge and Deliberate Action

[29] Can the Commerce Commission introduce as a matter in dispute that the defendants (the company and Mr Carline) knew that the various batches of product had less deer velvet than what was specified on the labelling attached to the product; and that he and/or the company had done this deliberately?

[30] Ms Ablett-Kerr on behalf of the defendants put as an initial issue for determination, that the prosecution:

(a) had filed a summary of facts that did not allege a deliberate intention to mislead;

(b) had "acknowledged" that the defendants' position was that the deer velvet was a "superior product";

(c) having charged the second defendant with charges in which there would have been a requirement to prove an intention to mislead, and then withdrawing such charges against the second defendant, Mr Carline, the Commission's position was that the defendant did not have an intention to mislead; and

(d) that it is not "open for the prosecution to allege an intention to mislead on the part of Mr Carline."

[31] Ms Ablett-Kerr's argument was that the summary of facts was accepted and produced after a two and a half day discussion between counsel; the summary of facts being accepted by the defendants, the prosecution then indicated that it would withdraw the charges faced by Mr Carline relating to the charges the company would plead guilty to which were duplicates in respect of Mr Carline charging him as a party. This left him facing the charge of failing to provide the information required in the terms of s 47J of the FTA. Mr Carline pleaded guilty to that charge. These charges that he had faced required proof of *mens rea* i.e. Ms Ablett-Kerr says the proof of an intention on the part of Mr Carline to intentionally act in a way that mislead the public. Those charges were withdrawn.

[32] Ms Ablett-Kerr submits that in the terms of the Criminal Procedure Act 2011 (the "CPA") and the Criminal Procedure Rules 2012 (the "CPR"), the duty was on the parties to give consideration to the summary of facts; once the defendant identified the facts in dispute, then there must be an attempt to resolve those factual issues. If they are not resolved, then an indication is sought under s 24(2) of the Sentencing Act 2002 (the "SA").

[33] Section 24 of the Sentencing Act provides that:

24 Proof of facts

(1) In determining a sentence or other disposition of the case, a court—

(a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and

(b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.

(2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,

(a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:

(b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial:

(c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false:

(d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:

(e) either party may cross-examine any witness called by the other party.

(3) For the purposes of this section,

aggravating fact means any fact that—

(a) the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence; and

(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case

mitigating fact means any fact that—

(a) the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and

(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case.

[34] In the terms of her argument, s 24(2) is most relevant in this case. Particularly s24(2)(c) – that it is for the prosecution to prove beyond a reasonable doubt the existence of any disputed aggravating fact and to negate beyond a reasonable doubt any disputed mitigating fact raised by the defence. The offender has to prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the defence or the offender's part in the offence.

[35] The argument then put forward by her is that the prosecution is not entitled to allege any intention to mislead, because it had withdrawn the aiding and abetting allegations it had laid against Mr Carline. The Court (i.e. myself as the sentencing Judge) is not therefore entitled to draw inferences in relation to the question of any such intention from the summary of facts. Ms Ablett-Kerr argued that the Court was estopped from drawing any such inference from the summary of facts. Ms Ablett-Kerr says that the issue arises because here the prosecution wishes to allege something more than what was in the summary of facts and she relies on the provisions of s 24 of the SA as set out above.

[36] Her submission is that the prosecution is estopped from arguing the existence of any intention as part of the sentencing of the defendant company, as it would be contrary to the provisions of the CPR and the SA when looked at in combination, and contrary to the fundamental principle, that a defendant before pleading must know what the allegation is that he/she/it faces. Her submission as I understand it was that the Court was estopped from drawing reasonable inferences from the accepted facts in the Summary.

[37] Mr Dixon for the Commerce Commission submitted that the position taken by defence counsel was wrong and that where the prosecution elected not to proceed against one defendant, it can still make a submission for the drawing of such inferences against another defendant. Mr Dixon submitted that Mr Carline was a director of the first defendant and that in any event the witness, Ms Hewitt, was also a director and her actions can be attributed to the company. The submission is made that based upon the summary of facts that the company did know of the offending. In relation to *mens rea* in the terms of a s 13 FTA offence where a person is charged under s 66 of the Crimes Act 1961 as a party (as Mr Carline originally was), the *mens rea* is knowledge

of the falsity of the representation, not the intention to deceive customers. The position argued by the prosecution was that it needed to prove that the representations made were false, and that he, Mr Carline, had encouraged or assisted the company; intentionally helped the company to make the false representation. There is an agreed summary of facts and the Court in the submission of Mr Dixon, can draw inferences from that summary.

[38] The prosecution argument is that the offending occurred as a result of directions given by Mr Carline to the various manufacturers, with the knowledge that the labels were not accurate. And as a result, the offending was deliberate and done with knowledge over a lengthy four year period. Mr Dixon submitted that Mr Carline had admitted in his evidence that he was aware the labels on the product were incorrect. Mr Dixon noted that the Disputed Facts Memorandum stated:[9]

> The defendants accept that the 22 batches of product had less deer velvet (DV) (by weight) in them than was specified on their labels (and on the website) They further accept that Ms Hewitt know that, and that her knowledge can be inferred to the company.

[39] The submission made is that the defendants (plural) accepted that the batches of product had less deer velvet by weight than what was specified on the labels and on the website. It is accepted that the former office manager and a director of the first defendant knew that; her knowledge can be attributed to the company. The prosecution argues therefore it is established that it was deliberate conduct on the part of the company. The aggravating factor that is submitted by the prosecution is that if the principal person, "Mr Carline, the main owner", directed that action by the first defendant company, that would aggravate the situation.

[40] Mr Dixon submitted that the offending was sustained and deliberate which can clearly be inferred from the matters detailed in the agreed summary of facts, in conjunction with the evidence received from witnesses at the disputed facts hearing, including Mr Carline. Further, he submits that the evidence before the Court confirms that the offending occurred at the direction of Mr Carline, in relation to the product formulations, the labelling, and the marketing.

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9 Disputed Facts Memorandum at [1.1].

[41] The evidence that the prosecution submits as relevant is that the company reduced the amount of deer velvet in certain batches deliberately, and applied labels to the product that it knew overstated the amount of deer velveting the capsules. That not only Ms Hewitt's evidence and her knowledge, but the evidence from Mr Carline establishes the conduct was intentional, as he admitted in his evidence that he knew about mis-labelling because he directed it to happen. The evidence also included evidence from Ms Hewitt that Mr Carline was in charge of all aspects of the business including the formulation of all batches of products, the labelling and marketing. Mr Carline's evidence was that he had made decisions and issued instructions as to how much deer velvet was to go into the capsules, and that he did so in the knowledge that the labels attached to products specified a higher quantity of deer velvet.

[42] Letters from Mr Carline to the Commerce Commission were relevant in that he moved from arguing that the allegations were without substance to the position that the deer velvet products had been subject to fraud, blaming the contract manufacturer. The prosecution suggests the inference can be drawn from that evidence is that he was aware of the legal consequences if Silberhorn was found to have diluted the products with carob.

[43] Mr Dixon in his submissions to the Court noted that: no steps had been taken by the company or Mr Carline to advise consumers of the lower quantity of product in the capsules, or to recall any affected products or to warn consumers; the mislabelling enabled the defendant to reduce some of its import costs; and that Mr Carline knew the labels were not accurate yet directed that the product be underfilled in the knowledge that its labels continued to overstate the amount of deer velvet powder.

[44] The prosecution's response to the defendants' submission is that it is always appropriate for a prosecutor to submit to the Court that it should draw appropriate inferences from established facts either set out in an agreed summary of facts and /or from proven facts after a hearing. The submission being made that upon the agreed summary of facts that is before the Court, the Court can and should draw the inference that the conduct was deliberate. That the conduct was intentional can be attributed to senior management knowing that the product was labelled as containing capsules with

a certain weight of deer velvet powder, where in fact there were directions being given to manufacturers to produce the capsules with less deer velvet than was specified on the label; i.e. deliberate actions.

[45] The prosecution seeks that the Court determines the disputed facts on the evidence given before the Court and on the strength of the submissions made in the two agreed summary of facts that have been accepted by Mr Carline.

[46] The point being made by Ms Ablett-Kerr in relation to the Court dealing with the disputed facts issues pursuant to the terms of the provisions of s 24 of the SA and the CPR must be accepted as correct. However, that does not, in my view, establish a basis for her argument in relation to the drawing of inferences as having any validity.

[47] In this particular case, the summary of facts was accepted and signed off by Mr Carline on behalf of himself and the company. The summary of facts details specifics in relation to actions of the company in respect to the deer velvet product. The detailed summary specifically discusses: the background relating to the manufacture of the deer velvet product; the instructions given by the first defendant company for the production of the product; and the instructions given by the first defendant company for the actual amount of deer velvet that was to go in each capsule. The summary of facts sets out and details the way in which the first defendant company acted in respect of the production of labels for the bottles/packets that the product was to be placed in. The specifications and detail on the label were completed by the first defendant company. The representations contained on the packaging by the labels were put there by and through the actions of the first defendant company. The agreed summary details specific acts on behalf of the company in relation to the product i.e. the deer velvet. Not only in relation to its manufacture but also as regards to its packaging, its labelling and its distribution. There is no doubt in my mind that the company acting as it did, did so under and by the actions by its principal 'actors' i.e. Mr Carline and Ms Hewitt.

[48] The prosecution invites me to draw inferences from the established facts as regards to the nature of the conduct, i.e. as to whether or not it was deliberate or by inadvertence or company negligence.

[49] The defence say that because it was not specifically stated in the summary of facts I, as the sentencing Judge, am not entitled to infer from the agreed facts whether the first defendant company acted deliberately, when assessing the culpability of the defendant. I emphasise that the defendant that I am discussing is the first defendant company. Mr Carline is the "alter-ego" of that company.

The Law

[50] As is often quoted the leading authority in relation to the drawing of inferences is the authority of the House of Lords in *Caswell v Powell Duffryn Associated Collieries Limited*.[10] The relevant reference in that authority is the decision of Lord Wright, where His Lordship said:[11]

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.
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> In the present case there are, I think, certain known facts which enable some inferences to be drawn. And beyond that point the method of inference stops and what is suggested is conjecture.

[51] The New Zealand Court of Appeal in *R v Kinghorn* said:[12]

> [19] Before we review the Judge's approach, we comment on the process relating to drawing inferences, and the law relating to a killing in the course of another crime.
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> [20] The methodology involved in drawing an inference has never been better put than by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd:*

[52] The quote which I have stated above is then given.

[53] The Court goes on to say as follows:[13]

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10 *Caswell v Powell Duffryn Associated Collieries Limited* 1940 AC 152 (HL).
11 At 169-170.
12 *R v Kinghorn* [2014] NZCA 168 at [19] and [20].
13 At [21] and [22].

> [21] The drawing of an inference is itself an exercise in fact finding. It is frequently strongly contested. To deal with such a critical contested fact at a sentencing hearing, rather than a disputed facts hearing, is inappropriate. It raises a danger that the usual criminal law safeguards will not be met. And routinely a judge may have to form his or her own impression of a witness or witnesses. An inference turns on all the available evidence.
>
> [22] We would not wish to inhibit the use of "partial" agreed statements of fact being advanced to sentencing judges. But as a matter of process truly contested facts are for a hearing. Whether the inference contended for by the Crown was to be drawn was central to this case.

[54] Finally, the Court of Appeal in the case of *Pokai v R* in discussing inferences said:[14]

> [30] In developing this argument, counsel for Ms Black sought to rely upon factual material that did not form part of the summary of facts. This included material that counsel had received from the police during the disclosure process. We do not propose to have regard to that material for present purposes. This Court has made it clear in cases such as *R v Apostolakis* and *R v Whiunui* that, in cases where counsel have reached agreement regarding the factual summary on which a guilty plea is to be entered, sentencing must proceed on the basis of that summary. Any appeal against sentence must similarly be decided having regard to the facts contained the summary.
>
> [31] 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.

[55] The Court in making the clear statement at paragraph [31] had recourse to both the *Kinghorn* and *Caswell* cases.

[56] In the case of *Commerce Commission v Steel and Tube Holdings Limited* Duffy J was dealing with appeals by both the Commission and the defendant company on the quantum of the fines imposed by the District Court.[15] The sentencing had proceeded on an agreed summary of facts. Some of the charges faced by the company were laid under s 10 of the FTA and other charges were laid under s 13 of the FTA. That decision will be discussed later in this decision, in relation to the sentencing process but I note Her Honours comments at paragraph [73], in relation to the acts of a managing director being the acts of the company. More importantly for my present

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14 *Pokai v R* [2014] NZCA 346 at [30] and [31].
15 *Commerce Commission v Steel and Tube Holdings Limited* [2019] NZHC 2098.

purposes Her Honour had no difficulty in using the inference drawing process to find that the technical manager of the company had "knowingly allowed" something to occur which to Her Honour suggested "intentional and deliberate conduct on his part."

[57] In this case, we have an "agreed" summary of facts signed off by Mr Carline the second defendant on behalf of himself and the first defendant company. Some of the matters detailed in that summary have has been the subject of dispute really from the time that the summary was agreed to by defence counsel and Mr Carline and the aborted first sentencing hearing. At that first sentencing hearing, sentencing could not take place as there was clear dispute in relation to the overall culpability, responsibility and position of the first defendant company and Mr Carline. As a result, I directed that a disputed facts hearing was to be held. It duly took place and evidence was given heard on the disputed culpability issues (together with other disputed issues). *Kinghorn* gives the Court clear mandate for this to occur.

[58] In all the circumstances of this case, I have no doubt at all that I am entitled at sentencing to draw inferences from those facts within the summary of facts that are not disputed and bring such matters into account in the sentencing process together with my findings on the evidence I heard at the disputed facts hearing.

[59] I acknowledge the submissions in relation to the methodology to be used by the Court in relation to the contested facts. I intend to traverse those disputed facts and make findings on that evidence. I accept however, for the purposes of answering the point raised by Ms Ablett-Kerr, that the prosecution is entitled to invite the Court to draw inferences from the summary of facts. As part of arriving at the factual basis for my sentencing I am entitled to draw inferences form established or agreed facts, including whether or not the actions by the first defendant company were deliberate, and on the other matters that are at issue.

Disputed Fact 1 – Knowledge

[60] In the Disputed Facts Memorandum the disputed issue is that, in relation to the batches of product in question having less deer velvet by weight in them than was specified on their labels and on the website:[16]

> [1.2] The defendants do not accept (and it is disputed):
>
> a) Mr Carline knew this; or
>
> b) That he or the company did this deliberately

[61] In that memorandum it is stated that the defendants (plural) accept that Ms Hewitt knew that, and that her knowledge can be inferred to the company.[17]

[62] In her memorandum, Ms Ablett-Kerr clarifies the defendants' position in stating:[18]

> [3] For the avoidance of doubt, the defendants do not accept that matters relating to either the knowledge or otherwise of Mr Carline and/or whether his or the company's conduct was a deliberate intention to deceive or mislead, was at any stage an agreed fact in the respective summary of facts put forward.
>
> [4] Further the defendants do not accept that it is open for the prosecutor to introduce the matters outlined in [1.2] as issues in dispute. The defendants reserve this point.

[63] I note that Ms Ablett-Kerr had not signed the joint memorandum of agreed facts. However, Mr Carline signed an agreed summary of facts dated 1 November 2017 which is in relation to the s 10 FTA charges and the s 47J(1)(a) FTA charges. As I understand the submission made by the Commerce Commission, it is that the signature was placed on the document both as a director of the defendant company and also in his personal capacity.[19] I attach to this decision a copy of the signed and dated fact summary.

[64] The Commerce Commission submits the remaining "live" disputed facts are as follows:[20]

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16 Disputed Facts Memorandum at [1.2].
17 At [1.1].
18 Defence memorandum, 8 May 2018, at [3] and [4].
19 Commerce Commission sentencing submissions in reply, 10 September 2019, at [2.1].
20 Commerce Commission submissions regarding Disputed Facts,12 September 2018.

2.1(a) Issue 1: The 27 February joint memorandum sets out the first key dispute, whether the conduct was deliberate by the company;

[1.2] The defendants do not accept (and it is disputed):

a) Mr Carline knew this; or

b) That he or the company did this deliberately.

[1.3] The defendants say that the conduct arose from a mis-communication or corporate negligence. The Commission disputes this.

[65] The submission goes on to say the contest between the parties was therefore about whether the mis-labelling was intentional and whether Mr Carline had knowledge of the mis-labelling. The defendants say that the offending was not deliberate and arose out of "corporate negligence" or a mis-communication.

[66] The Commission's case is that the offending occurred as a result of directions made by Mr Carline with the knowledge that the labels were not accurate. In that sense, the Commerce Commission considers that the offending was clearly deliberate and done with knowledge over a lengthy four year period. Mr Carline admitted in his evidence that he was aware the labels were incorrect.

[67] In the defence submissions Ms Ablett-Kerr describes the joint memorandum regarding disputed facts as "… a tentative, but non-binding, joint memorandum…"[21]

[68] Further, Ms Ablett-Kerr says that the prosecution is "overstating" the position relating to the joint February memorandum.[22] She goes on to say that at the time of the February memorandum, the issue of knowledge was something that further instructions had to be taken on, and that the prosecution had not advised the Court of this issue.[23]

[69] Ms Ablett-Kerr submits is that it was not open for the Court to hold a disputed facts hearing into the issue of whether the mis-labelling of deer velvet products was

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21 Defence submissions following disputed facts hearing and s106 application, 3 September 2019, at [17].

22 Defence submissions following disputed facts hearing and s106 application, 3 September 2019, at [18].

23 At [20].

an intentional act to "short-change" the public.[24] The argument is that the company and Mr Carline believed that the consumers were getting an end product "as good if not better that what had previously been on the market". Ms Ablett-Kerr points to the provisions of s 24 of the SA and notes that it is for the prosecution to prove beyond reasonable doubt any disputed aggravating fact, and to negate beyond reasonable doubt any disputed mitigating fact raised by the defence.

[70] The defence submission notes that is for the prosecution to establish and prove that the defendant company had the alleged intention; and that the belief of Mr Carline is submitted to be "firmly and genuinely held" by him.[25]

[71] I have earlier in this decision made it clear that in my view, as the sentencing Judge, I can draw inferences from an agreed summary of facts and in this case, I find that it is appropriate for me to do so.

[72] I consider that the issue for me to decide in relation to issue 1, is most clearly detailed in the prosecution submissions regarding disputed facts, and is:[26]

> That the offending occurred as a result of directions made by Mr Carline with the knowledge that the labels were not accurate. In that sense the Commission considers that the offending was clearly deliberate and done with knowledge over a lengthy three period. Mr Carline admitted that he was aware that the labels were incorrect.

[73] In the circumstances, that the joint memorandum regarding disputed facts is not accepted by the defence, I consider that I should look at the issue with the first step being to decide whether the fact that the batches of product containing less deer velvet by weight than was specified on the labels occurred as a result of directions made by Mr Carline with the knowledge that the labels were not accurate. I keep in mind that as that is a disputed fact, it is for the prosecution to prove the fact beyond reasonable doubt.

[74] My starting position is the Agreed Summary of Facts, signed by the second defendant Mr Carline.

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24 At [23].
25 At [31].
26 Commerce Commission submissions, 3 September 2018.

[75] Paragraph [8] of that document in relation to the s 10 charges, states:[27]

> [8] In 22 instances the defendant instructed their contract manufacturers to produce the capsules for these products using a lesser amount of deer velvet powder concentrate in each capsule than was represented on the labels subsequently applied to the containers of these products. To make up for the shortfall of deer velvet the defendant instructed their manufacturers to include more carob (a manufacturing aide) in each capsule.

[76] In the same document under the heading "Manufacturing Records" it is stated:[28]

> [25] The information obtained confirmed that the defendants had specified the amount of deer velvet to be put into each capsule for certain orders/batches. Instructions from the defendant also made it clear that carob manufacturing aide would be used, which was significantly cheaper than deer velvet. Where the amount of deer velvet was to be less for a particular order, the defendant instructed the manufacturer to use additional carob.
>
> [26] All three contract manufacturers confirmed that they blended the capsules in accordance with the defendant's specifications for the duration of the offending. The contract manufacturers had no responsibility for the product labelling of the products. The defendant undertook this task itself.

[77] And under the heading "Misleading conduct and representations – labelling on deer velvet product":[29]

> [34] There are 22 batches of affected deer velvet products which are listed in appendix A. For each of these batches, the defendant represented on its products/packaging that each capsule contained a higher amount of deer velvet that it actually did.
>
> [36] The label/packaging also represented that each capsule "may" contain "traces" of carob, which the defendant understood was required by food safety regulations, when in fact, the products contained significantly more than traces – sometimes up to almost half of the total composition.
>
> [36] Furthermore the defendant represented on its packaging for its 300mg products that each capsule contained "100%" deer velvet powder when, in fact, each capsule contained deer velvet and carob.

[78] Further at [37.3] under a heading "Dispatch and invoicing":

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27 Agreed Summary of Facts at [8].
28 Agreed Summary of Facts at [25]-[26].
29 Agreed Summary of Facts at [34]-[36].

> Dispatch and Invoicing:
>
> The product was then packaged and sent to the defendant's Dee St, Invercargill address for labelling and subsequent sale. An invoice was supplied to the defendant for payment.

[79] Ms Hewitt's evidence in chief was that although she was a director of the first defendant company, she did not make business decisions on its behalf as the first defendant was managed by the second defendant, Mr Carline.[30] Further in relation to the preparation of the batches of capsules, Ms Hewitt's evidence was that she would discuss with Mr Carline how many capsules were going to be made and how much deer velvet powder was going to be used in the capsules. The deer velvet powder would then be sent to the manufacturers. She said that it was Mr Carline who decided on how much deer velvet powder was to be put in each capsule of each batch.[31]

[80] In relation to the labelling of the containers that the capsules were in, Ms Hewitt's evidence was that there would be a discussion between her and Mr Carline as to what "he wanted on them" (i.e. on the labels).[32] She then went on to say that what the labels said about the amount of deer velvet in the product would be a decision made jointly "well we'd make it together". She was clear that Mr Carline was very involved in the running of the first defendant's business and she related to the Court about the concerns the company had as to the content of the deer velvet powder following Mr Carline's purchase of the company in 2003. She said as a result, Mr Carline took more control over the deer velvet powder himself so that he knew what was going into the capsules.

[81] Ms Hewitt, in answer to a question from the prosecuting counsel, said that Mr Carline was in charge of determining the contents of the capsules by telling her how much powder he wanted put in the deer velvet products.[33] She said that the decisions about specification were always made with Mr Carline's knowledge whether he was overseas or not.[34]

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30 NOE, page 45, line 26.
31 NOE, page 57, line 21.
32 NOE, page 58 – 59.
33 NOE, page 60.
34 NOE, page 61, line 4.

[82] Importantly, her evidence was that she raised her concerns about the labelling with Mr Carline:[35]

> Q: Then what do you recall about the conversation you had with him about this?
>
> A: Specifically I can't recall that conversation but during that time when this was happening, when they, when he was changing the quantities in the capsules we did have several conversations about – because I wasn't very happy with that because the labels were not correct and I did say to him on a number of times that we're to get it sorted, you know
>
> Q: Yes, and what did he say?
>
> A: Well he was going to get it sorted but I think he also felt like the new process that he was doing he was making a better quality deer velvet and we didn't need so much. It was like a concentrate so this is what he would say to me was that you know that we and they were only …….
>
> [36] A: And we were putting less than the 250mg on the label and then believed that the product was a better a better product and that you didn't need as much of it, rather like a concentrate so and he tried it, he took it and said you know that it worked well and so although I wasn't happy with it not matching up to the labels you know I went ahead with making the capsules for his, you know what he wanted but at the same time I said, "we need to get the labels sorted" and we had lots of discussions over the labelling….

[83] Ms Hewitt went on to say:[37]

> A: I just said that I shouldn't be doing this, you know that it should, we shouldn't be putting labels on them that weren't correct, yeah.
>
> Q: And his response?
>
> A: Was what I, what I said before that you know that, that the, what we're putting in is a concentrate and it will, you know people will get the same benefits, you don't need as much.

[84] Under cross-examination Ms Hewitt agreed with Ms Ablett-Kerr that Mr Carline's primary interest was the quality of the deer velvet and accepted the proposition put to her by counsel that, "he had a passion about the deer velvet."[38] She was aware that he was taking it himself for his own health conditions.

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35 NOE, page 70.
36 NOE, page 71, from line 19
37 NOE, page 73.
38 NOE, page 90.

[85] As part of her evidence under cross-examination Ms Hewitt, said to Ms Ablett-Kerr that she could talk to Mr Carline about the issues relating to the labels, and she repeated that she wasn't comfortable with the fact that the company was not putting as much powder into the capsules, but agreed that she could raise the issue with him.[39] She confirmed that Mr Carline "made up his mind what went into the capsules not me", and confirmed that Mr Carline was her boss and she did as she was told.[40] Ms Hewitt told Ms Ablett-Kerr that she had to accept Mr Carline's explanation for why he thought there was less powder needed because Mr Carline was her boss. She went onto say that she was aware Mr Carline's was trying various methods to improve the quality of the deer velvet powder, and that he had developed a cryogenic process and that his desire was to ensure that the product got better; so that it was a top quality product. In answer to a question from Ms Ablett-Kerr she said:[41]

> Q: Would you accept that in fact Ian Carline is a man that thinks he is quite capable of producing the best deer velvet product?
>
> A: Yes
>
> Q: In New Zealand?
>
> A: mhm.

And she confirmed that she had no doubts that Mr Carline believed that his product was superior.

[86] In re-examination, Ms Hewitt confirmed to Mr Brookie that she had not told the MPI auditing about the 22 batches and the mis-labelling.[42] And when asked about her expressed belief that Mr Carline did not want her to talk about it with MPI the following questions and answers are recorded:

> Q: Can you just expand for us on how you to came to believe that, that Mr Carline didn't want you to talk to them about it?
>
> A: Because we had, we would have had, we had a discussion about the audits and if that was to come up, you know, just not to bring that up in the audit, yeah.
>
> Q: And if that was to come up, what do you mean by that specifically?

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39 NOE, page 107.
40 NOE, page 111, line 12.
41 NOE, page 115, from line 25.
42 NOE, page 134.

A: Well just not to discuss it in the audit with, with them.

From myself – the Court:

Q: Discuss what?

A: The capsules that were underfilled.

[87] Overall, Ms Hewitt's evidence was given, in my view, truthfully and honestly. I accept she had difficulties in recalling actual detail, which is only to be expected given the time lapse. But her evidence overall, in my view was credible. Accepting that she has an ongoing relationship with Mr Carline, I find that she answered questions truthfully and to the best of her ability to recall.

[88] Ms Ablett-Kerr in her written submissions following the disputed facts hearing submits that Ms Hewitt "thought" that Mr Carline did not want her to raise the issue with the MPI Auditors. When one reads the full discussion that took place as from the notes of evidence, I am satisfied from Ms Hewitt's evidence that she had discussed the matter with Mr Carline and was told that if the issue was to come up during the MPI audits she was not to bring it up with the auditor i.e. that the capsules were underfilled.[43] Whilst I accept that Mr Hewitt was a director of the company and the manager of the Invercargill operations, it is also clear to me on her evidence that Mr Carline was the person controlling the company, and was the decision maker in relation to the deer velvet powder, it's manufacturing, its encapsulation, it's labelling and its distribution.

[89] Ms Ablett-Kerr's submission was that Ms Hewitt's evidence was that she knew more about the regulatory side of the business although she and Mr Carline would talk about things. I note that Ms Hewitt did say that there would be discussions between her and Mr Carline and decisions were made about how much powder was to be used and how many capsules where going to be made. She would then send the purchase order through with the specifications.[44] However, when asked whether there was any time that she made a decision about a specification or a product run without Mr Carline's knowledge, she said that there was never such an occasion.[45] I accept

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43 NOE, page 134.
44 NOE, page 261.
45 NOE, page 60-61.

that Ms Hewitt agreed that Mr Carline was intent on improving the quality of the deer velvet powder.

[90] The evidence of the second defendant Mr Carline, on this disputed fact issue as to knowledge and deliberate actions, was primarily under cross-examination. However, I note from his evidence in chief the Mr Carline said that at no time had he put pressure on Ms Hewitt in any way, and that she was responsible for any issues relating to MPI's audits. He said that he had not told her that she was not to raise the issue relating to the underfilling of the capsules with MPI. I note that Ms Ablett-Kerr asked him:[46]

> Q: Did you tell her that she should not raise it with MPI?
>
> A: At no point did a I say that, no its –

[91] I have read through Ms Ablett-Kerr's cross examination of Ms Hewitt (particularly at pages 113 and 114 of the NOE) and it appears that Mr Carline's denial of ever having said that to Ms Hewitt was not put to Ms Hewitt.

[92] Throughout his evidence, both in chief and under cross-examination, Mr Carline was intent on giving evidence on the "new" process and the improvement that resulted in the efficacy of the end product as a result. However, when asked by Mr Dixon:[47]

> Q: So Mr Carline, lets break it down into two questions. My first question is, were you aware? And the second question might be, why you did that? Let's come to the why you did that in a moment, if you could just answer the question of where you aware?
>
> A: I was aware, yes.
>
> Q: And you were the person in fact who was in charge of making the decisions around the manufacturing specifications in terms of how much deer velvet was going to go into the property. Is that correct?
>
> A: Yeah, I did not fill out, the order forms or have really anything to do with that but the instruction to build the product would be my work.
>
> Q: And you gave that instruction knowing that the labels specified something different, something more?

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46 NOE, page 61.
47 NOE, page 434, from line 5.

A: Yeah, that is correct, but can I expand on that or?

Q: Certainly.

A: What we are selling is activity and that activity is what we are actually selling that it is measured in the way it is in the powder form, is quite misleading and I would say compromising to someone's health.

Q: Now as I understand it you consider that it was legitimate for you to lower the amount of deer velvet in the product because your deer velvet was of a higher quality?

A: Well the processing was different and the outcome was different.

Q: Your deer velvet powder was more potent than it had been before?

A: Oh yes.

Q: And that was as you understand it as a result of your cryogenic process?

A: That is correct.

Q: In your affidavit you described it as being twice as effective?

A: I would say that we could probably use half as much and have a similar effect. I also cut back the recommended dose rate on the bottles. That coupled with the 10% reduction in the amount that's in there gave us good results.

[93] And he then went on to say:[48]

Q: Well the issue is that you've concluded that the product is twice as good as it had been before, correct?

A: I personally have –

Q: Right

A: Made that assessment, yes

…[49]

Q: But the fact is that for all of those 22 batches over that three year period you were specifying to your manufacturers to put in less deer velvet than was specified on the labels, correct?

A: Less, less deer velvet well deer velvet – I think it is described as actually deer velvet on the label, but it is actually deer velvet powder so.

And

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[48] NOE, page 442, from line 1.
[49] NOE, page 454, from line 23.

…[50]

Q: So I just want to stick with the company in the proposition that I want to confirm with you is that the company was specifying less deer velvet powder for the 22 batches that we have in the summary of facts than was shown on the label. You accept that don't you?

A: Your question l?

Q: You accept that that's the case?

A: Or that documentation shows that, yes.

And

…[51]

Q: The weight of the deer velvet powder you knew that the weight that you had specified to your manufacturers was less than the weight that you specified on label?

A: Less, less weight, but more activity.

[94] Mr Carline was a difficult witness to keep on track on the issues and the questions that were being put to him. He was given some leeway in relation to his answers but in the end, in relation to the first disputed fact the concessions he made during the course of his evidence were clearly in line with the matters detailed in the Agreed Summary of Facts. He did not give any evidence that the mis-labelling was a result of corporate negligence or miscommunication between himself and Ms Hewitt. Rather, he put it squarely and clearly on the basis that the labelling was maintained, as it was a better product was being put in the capsules, as a result of the advances that he saw had been made in the deer velvet powders efficacy.

[95] I am satisfied on the evidence and with reference to the process set out at s 24 SA that the prosecution has proven beyond reasonable doubt that Mr Carline did know that the 22 batches of product had less deer velvet in them than was specified on the labels.[52]

[96] Specifically, I note in para [1.1] of the Disputed Facts Memorandum the words "by weight" have been included. I accept that the prosecution has established to the

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50 NOE, page 455, from line 25.
51 NOE, page 457, from line 14.
52 Disputed Facts Memorandum at [1.2].

required standard of proof, Mr Carline had knowledge that the capsules contained less deer velvet by *weight* than was specified on the product containers.

[97] Further, I have been made sure on the evidence that I heard, that Mr Carline gave the directions as to the amounts to be put in the capsules relating to each batch of deer velvet product via Ms Hewitt. It was proven on the evidence to my satisfaction and beyond reasonable doubt, that on the basis of such directions the offending occurred. Mr Carline admitted and accepted that he had the knowledge that the labels were not accurate. I find that Mr Carline had specific knowledge of the labels that the company was using, and that he had been told by Ms Hewitt about the issues relating to the labelling.

Disputed Fact 2 – Deliberate Intention to Deceive or Mislead

[98] Was this established conduct on the part of the company and its officers a deliberate intention to deceive or mislead?

[99] Mr Carline's evidence was that he had put in place cryogenic steps in the initial treatment of the deer antlers, removing any necessity for the antlers at the early stage of the process to have heat applied to remove the hair from the antler itself. The process involved putting the deer antler down to a temperature of minus one hundred degrees. The blood within the deer antler then becomes solid, as does the collagen. The hair is then removed. The deer antler is washed in ethanol to remove any bacteria and then the deer antler is allowed to return to a minus twenty degrees temperature. The velvet, after having been trimmed, is then sent to the manufacturer. By this time the antler is in four – six inch pieces, so that it can be handled by the manufacturer's machinery. It is shredded to a fingernail size, remaining in its frozen state and in a sterile environment, it is fed into a dryer, (a freeze dryer or tumbler dryer) and heated to approximately fifty to sixty degrees.

[100] The evidence before me was that primarily the product in question was dried in a rotary dryer, Mr Carline's evidence was that it was not significant which method

of drying was used. The deer velvet is dried and allowed to come back to room temperature and is then milled into a powder.[53]

[101] His evidence was that he had tested the effectiveness of the powder on himself:[54]

> Question from the Court
>
> Q: So can we have an answer to the question? Upon what basis was the assessment done?
>
> A: It is the effectiveness on myself sir as a guinea pig.

And that he had read and discussed issues relating to the efficacy of deer velvet with two Chinese specialists. One a Specialist in deer velvet and the other a medical person. He had a nose bleed after taking a certain amount of the product and he made assessments accordingly.

[102] Mr Carline described the use of the term "traces of carob" on the labels of the product as an "historic inclusion" on the label, and that it was put there to advise people that carob might be included in each capsule. He did not believe he had any requirement to identify how much carob was in each capsule – that he only had to mention the active ingredients. The mention of carob was no more, in his view, than a health warning. He accepted that carob was used to match the density volume that the capsule was to be filled at and to allow the powder to flow.

[103] Under cross-examination Mr Carline was questioned about his belief:[55]

> Q: Now as I understand it you consider that it was legitimate for you lower the amount of deer velvet in the product because your deer velvet was of a higher quality?
>
> A: Well the processing was different and the, the outcome was different.
>
> Q: Your deer velvet powder was more potent that it had been before?
>
> A: Oh yes.

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53 NOE, page 360-383.
54 NOE, page 396.
55 NOE, page 434.

Q: And that was as you understood it as a result of your cryogenic process?

A: That is correct.

Q: In your affidavit you described it as being twice as effective.

A: I would say that we could probably use half as much and have a similar effect. I also cut back the recommended dose rate on the bottles. That coupled with the 10% reduction in the amount that is in there gave us good results.

Q: Well lets come back to the dose rate. Let's just stick with it being twice as effective. You reached that conclusion as ai understand it based upon tests you can conducted on yourself?

A: Absolutely, yes.

Q: And did as I understand you correctly that you effectively tested it until you got a nose bleed and then you dialled back or buttoned back the amount that you took?

A: I took the same amount as we were using previously and the result after a week was, was the nose bleed so I mean the nose bleeds are not serious, it is just that when you blow your nose you see blood which was a concern and after, I was the only one doing that at the time and then after that, I got a number of friends who lives have been changed by the product and I would consult them as well.

Q: Would you accept that that was an unscientific process?

A: It is empirical and that is quite common with natural products.

Q: Would you accept that that was an unscientific process?

A: I would, I would say it is of the science of the day it, its up there. When you are leading in what you do there, there is no one to follow.

[104] Following on from that evidence, Mr Carline did not agree with Mr Dixon when it was put to him that that the testing of the new process was "woefully inadequate" or "unscientific." He explained the cryogenic process as yielding more available "actives" because the product was exposed to heat for a lot less time and thus the lipids were not damaged.[56]

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56 NOE, page 436 et seq.

[105] Mr Carline made it clear that he did not agree that he and the first defendant company had accepted that "we were misleading" or that the labels were misleading.[57] He said:[58]

> I understand that I've pleaded guilty to a technical charge that the label does not describe the product in terms of the Commissions description of deer velvet.

[106] Mr Carline's evidence overall however, was consistent in relation to his holding a belief that the cryogenic process used at the start of the manufacturing of the deer velvet powder, was one which increased the efficacy of his product. Although he did not dispute that he had directed the manufacturers to put a quantity of deer velvet powder into the capsules less than was stated on the labels as being in each capsule; his position was that the powder that was put in each capsule was more effective than the previous powder the first defendant company had been using. Therefore, in his view, the product that was being sold was, to sum it up, "value for money." Despite Mr Dixon's best attempts, Mr Carline did not waiver from that position.

[107] One of the delaying factors in the progressing of this case towards finality overall, was the obtaining of a report from Dr Stephen Haines. This was the report that Ms Ablett-Kerr was waiting for so that she could put it forward as part of her sentencing submissions as mentioned earlier in this decision. The primary objective of Dr Haines' research and report was "to compare the compositions of Silberhorn's freeze-dried deer velvet powder to powder produced by three other deer velvet processers."[59]

[108] Dr Haines in his evidence described the cryogenic process:[60]

> I understand, I have learnt more details of it during this hearing but as I understand at the time I undertook this project it was using very low temperatures, solid carbon dioxide temperatures to initially freeze the antler and facilitate the removal of hair and the maceration which then resulted in much faster drying.

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57 NOE, page 451.
58 NOE, page 455, from line 12.
59 Doctor Haines' Report at [2].
60 NOE, page 571, from line 15.

[109] In his evidence at the disputed fact hearing, Dr Haines in discussing the Silberhorn cryogenic process, stated that the process was ideally suited for producing extract type products i.e. to concentrate the components of the deer velvet in soluble form:[61]

> …where you want to concentrate the components of the deer velvet in soluble form that can be formulated with other food components or particularly into ready to consume sort of products that are becoming very very important in Korea and China, so you want to be able to pull out the components of deer velvet in soluble form to make use of them in those sorts of products and the Silberhorn process certainly would suit that sort of use.

[110] He considered other deer velvet products produced by other companies and his evidence was that their extraction yields were "lower" because of the heat treatment process.

[111] When conducting the analysis that he did, he understood that the deer powder that had been given to him by Mr Carline had been produced by what he understood was a normal cryogenic process i.e. the product being subjected to very cold temperatures from the inception of the process.

[112] When it was suggested to him that he had believed the powder that he had used as his base for the comparison had come from Silberhorn, was powder that had been subject to this normal cryogenic process – very cold temperatures, dehairing, cutting up, and freeze-drying – he believed that he was then told that the evidence before the Court was that the powder being used for the offence period (in relation to the first defendant 2011 – 2015) was not freeze-dried, but had been dried in a rotary vacuum tumbler for 18 hours at sixty degrees. Dr Haines agreed that the powder then would be a different product to the freeze-dried material that he had analysed.[62]

[113] In further elaboration Dr Haines said:[63]

> To my mind the cryogenic process to me actually encompass that whole process in terms of right from when the, the hair was taken off under the very low temperatures thru the freeze-drying that was what I really understood the true, the full cryogenic process to be.

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61 NOE, page 592.
62 NOE, page 595, line 7.
63 NOE, page 599, from line 21.

[114] When it was then explained to him the process that the powder, relevant to the case before the Court had been subjected to, had the cryogenic process for the de-hairing, but it was then dried in rotary vacuum tumble dryer, he accepted that it was a different powder to the one had used. He accepted that he had not done any testing on powder that had been subjected to 18 hours in a rotary tumble dryer at sixty degrees.

[115] Under cross-examination Dr Haines confirmed that a known side effect of taking too much deer velvet powder was that it could cause nose bleeds. A lowering of blood pressure could also occur.[64] He said:[65]

> …deer velvet just enhances the natural body processes and basically tends to normalise them so if somebody has too high a blood pressure then it will tend to lower it...

[116] Dr Haines had earlier in his evidence given as an expert, told the Court that:[66]

> That particular rather strange method of testing a product is actually the traditional Chinese method for setting the dose rate for patients. In traditional Chinese medicine the regime that the velvet is taken is quite different to say an encapsulated product in the west where we take it daily and recommended dose of perhaps a gram. In China the deer velvet is prescribed along with other medicinal herbs and its typically given for short periods in much higher doses, nine grams a day would be a typical sort of dose but different people react differently to deer velvet. In fact oriental medical doctors will assess a patient and they just will not give velvet to some patients who they feel over a hot disposition or variety and they will only give it to patients who are cold that is because deer velvet they view as building up yang or the sort of health energy life force if you like but the way that, for the people that they will give deer velvet too there is still going to be variation in the dose that the person can tolerate with their prescription and what they will do is give sufficient often to, might observe a nose bleed and they will back the dose off from that high dose to establish the dose for a particular patient, so it is not, in, Western society it sounds very strange but in Eastern, Asian medicine it is not an uncommon phenomenon.
>
> Q: So you get the nose bleed and in the Eastern word then you move backwards lessen the dosage?
>
> A: Reduce, reduce the dose level, yes.

[117] Dr Haines also confirmed his objective in completing his research, "his task" as being:[67]

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64 NOE, page 610, from line 25.
65 NOE, page 611, from line 27.
66 NOE, page 591, from line 10.
67 NOE, page 24.

> to look (at) the effect of the processing technology on the deer velvet composition before it went into any sort of capsule.

[118] In my view, Dr Haines' Report and his evidence overall, must be assessed on the actual product or substance that he was testing, which on the evidence I accept, was produced by a different method as to the final drying process from the process that the material that Dr Haines had subjected to his testing. I also need to be mindful, as pointed out to me by Ms Ablett-Kerr, of the comments made by Nation J in the appeal, I particularly note that His Honour said in that decision:[68]

> To the extent Dr Haines' analysis and the conclusions he reached are before the Court, they remain unchallenged. The sentencing Judge has to proceed with sentencing on the basis that, if and to what extent those findings are relevant, they must be accepted as correct.

[119] What they do, is give some substance to what Mr Carline said in his evidence. I note that Dr Haines was not examined on his evidence about Oriental Medicine and testing of substances including deer velvet, which may give some basis to the evidence of Mr Carline about his nose bleed. Dr Haines' evidence gives a basis for the defence argument that the cryogenic process used for the de-hairing of the velvet enabled the maintenance of protein level and other ingredients in the first defendant's deer velvet powder which was not available to other products. I do not accept that it supports Mr Carline's evidence that his new process resulted in the deer velvet powder in the capsules of product that are the subject of this prosecution being twice as effective as the first defendant's earlier product.[69] Dr Haines' evidence was not about improved efficacy of the deer velvet powder.

[120] Dr Haines' evidence emphasised the care that the Oriental Medical Practitioner would take in assessing a patient and the patient's tolerance to deer velvet before giving the patient a prescription for deer velvet. It, on his evidence, was not just an arbitrary process of assessment on a nose bleed occurring so then reduce the amount of deer velvet powder. Which is my view of how Mr Carline described his assessment of the "new product" in his evidence. I take note of the evidence that Mr Carline during the period in question, varied the amount of the deer velvet powder that was to

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68 *Gateway Solutions Limited and* Carline *v Commerce* Commission [2018] NZHC 3049 at [48]; and Defence counsel's submissions dated 3 September 2019 at [42].

69 Mr Carline's affidavit, 23 February 2018, at [19].

go into different batches of the product. I find that overall, there was a lack of consistency in the various amounts of the powder that Mr Carline directed was to go in to the various batches which indicates to me a "guesswork approach" on his part when giving such directions.

[121] I refer again back to the issues in dispute. I keep in my mind who bears the burden of proof and to what standard i.e. the prosecution. In the Disputed Facts Memorandum, it is stated as a relevant referral to the Court:

> [1.4] The defendants further say that throughout the charge period Mr Carline believed that due to a change in the way the DV was processed (in late 2010) the product was twice as effective as it was previously. The Commission does not accept that Mr Carline had this belief or that such a belief was justified or correct.
>
> [1.5] The issues that arise from this are:
>
> a) Whether as from 2010, Silberhorn had a new DV processing technique;
>
> b) Whether Mr Carline in fact held that belief;
>
> c) And, if so on what basis.
>
> [1.6] The defendants rely on the Haines report;
>
> a) For the proposition that Silberhorn's processing method results in less damage to the proteins that are the major components of deer velvet, compared to the methods used by the three other manufacturers tested by AgResearch; and
>
> b) Therefore for the submission that the product that customers received was at least as good if not better than the labelled weight of the deer velvet as previously processed.

[122] It was put to the Court by defence counsel that Dr Haines' Report (and of course his evidence) was a validation of Mr Carline's belief and not the origination of it.[70] I do not accept "the Haines Report" upon Dr Haines' evidence as validation of Mr Carline's belief, but only as an underlying support of part of Mr Carline's evidence. Mr Carline's evidence was that the cryogenic process and the deer velvet powder derived from that process, was a product described, at different stages in the evidence, as "twice as good", "as good if not better" and in other similar ways. I do

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[70] Defence submissions dated, 3 September 2019, at [34].

not see that the terminology is important other than having regard to the amounts of deer velvet powders that were actually put inside the capsules.

[123] The question is whether or not the prosecution can prove beyond reasonable doubt Mr Carline did not believe the deer velvet product, when produced in using the cryogenic method, had a significantly increased level of efficacy.

[124] In my view, there were major difficulties for the prosecution in attempting to establish that Mr Carline did not hold such beliefs when he has repeatedly stated it on oath that he holds them. The real issue in my mind, is whether holding such belief on his part was justified or correct.

[125] The position that is expressed in the prosecution's submissions is that:[71]

(a) Silberhorn had described its product as "top quality";

(b) That Mr Carline did not refer to this new process in his correspondence with the Commission;

(c) Other correspondence from the defendant company made no mention of the cryogenic process (Ms Hewitt's evidence would tend to suggest that she was not fully conversant with the new process);

(d) That consumers had never been told of the improved process (or indeed that the amounts of deer velvet in each capsule had been reduced for what was stated on the label);

(e) Further criticism is made about the test Mr Carline said that he conducted with himself of taking the product and getting a nose bleed;

(f) That no evidence was given as to the amount of product taken or any other steps taken beyond taking the substance himself and observing its effects; and

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[71] Prosecution submission dated, 3 September 2019, at [2.29].

(g) The prosecution also points to the inconsistencies in the actual amounts that were put in the various batches of product.

[126] I accept as I have previously recorded, that a good deal of these submissions are in accord with my findings.

[127] Note is made in the prosecution submissions that Mr Carline in his evidence under cross-examination appeared to associate all this to Mr Lee's alleged fraud and that the product results were varying and "all over the place." I do not place reliance on this submission as it does not appear to me to be relevant to the disputed fact in question.

[128] Further it has been submitted that Mr Carline's belief, if in fact he did hold such a belief, is irrelevant to the question of harm. With respect to the prosecution, that is a totally different disputed fact. In relation to the offending itself, it is submitted that it needs to be a reasonable belief in the circumstances. The Commission is disputing that he held the belief at all. Again, it is a disputed fact issue that I am considering at this stage and that is an issue that s 24 of the SA applies to.

[129] The matters detailed in paragraph [2.35] onwards in the prosecution submissions relate to whether or not the Court should reject Mr Carline's evidence regarding the deposed belief not being held by him at all.[72] The points raised by the prosecution relate to the first defendant company not having told its consumers about the change in quality; the variations in specification across the 22 batches in question; no documentation detailing the process seems to have existed; and that it was not raised by Mr Carline during the investigation. Those submissions seem to me to be putting the burden of proof upon Mr Carline. I note that Mr Carline was not subject to interview by the Commerce Commission. Mr Carline had no requirement at law to raise the belief he says he held.

[130] Paragraph [2.36] of the prosecution submissions suggests that the basis that Mr Carline used, i.e. the "nose bleed", is implausible in relation to the product. Dr Haines' evidence appears to contradict that submission.

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72 Prosecution submission, 3 September 2019, at [2.35].

[131] I answer the disputed facts questions in the following ways:

1) The Commission has not established in the terms of section 24 of the SA beyond reasonable doubt the negation of whether as from 2010 Silberhorn had a new deer velvet processing technique. Indeed, overall when I have regard to Mr Carline's evidence and Dr Haines' Report and his evidence, I cannot find proven beyond reasonable fact that the cryogenic process was not in place, or that Mr Carline did not hold the belief in the product he says he held. However, I find that this particular cryogenic process related to one part of the overall process in the manufacturing of the deer velvet powder.

2) Having had regard to all of the evidence, the cryogenic process was a process which enabled the company to produce its deer velvet powder without having it subjected to heat at the stage where the hair was removed from the deer antlers. Therefore, the possible loss of some of the active components of deer velvet powder was prevented. I also note in relation to the overall importance of Mr Carline's belief, that this process and its impact on the deer velvet powder end product, had not been brought to the attention of any of the regulators including MPI, nor were the commercial marketers of the product advised as to the process.

3) The allegedly improved product in the capsules was less than the labels stated.

[132] Those facts must also be taken into account together with the very arbitrary directions being given by Mr Carline on behalf of the first defendant company to the producers of the powder as regards to the amount of deer velvet powder to be included in the various batches of capsules.

[133] I cannot as part of my findings on this issue discuss whether the product *was* "as least as good if not better" than the label weight of each capsule of deer velvet powder this is assessed under the following heading. I consider that the disputed fact

as per paragraph [1.4] of the Disputed Facts Memorandum has been answered at this stage – the prosecution has been unable to show that either defendant acted with an intention to mislead or deceive.

Disputed Fact 3 – Harm to Consumers

[134] Was harm occasioned to consumers by virtue of the mislabelling?

[135] The position of the prosecution on this issue is:[73]

> [2.20] The starting point is that consumers did not receive the amount of active ingredient that they were paying for and thought they were getting. This occurred in the absence of any communication from the defendant company as to the supposed increase in quality of the product. That falsity is the basis for Commission's submission that consumers were harmed in this case.
>
> [2.21] The primary disputed fact issue in this context is therefore, whether there is any evidence to support the defence proposition that the deer velvet used in the 22 batches was twice as good as it was previously.

[136] In the defence submissions on the issues in dispute, the first defendant company and the second defendant put separate argument to the Court:[74]

> [7.2] The first defendant says that it believed that the weight of the deer velvet powder that it had ordered to be encapsulated was the equal to, or, superior in value to that which had been encapsulated prior to 2010.

[137] In relation to the second defendant:[75]

> [7.3] The second defendant faces no charges in relation to mislabelling and his involvement is only relevant to issue 1 as a witness. It is neither relevant nor in dispute that he would have had general knowledge of the labels that the company was using.

[138] I note that it is recorded under this paragraph heading that:[76]

> [7.4] The prosecution disputes the fact that the first defendant believed that deer velvet powder encapsulated was the equal of or superior to the pre-2010 deer velvet powder.

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73 Prosecution submissions, 12 September 2018, at [2.20] and [2.21].
74 Defence submissions,10 August 2018, at [7.2].
75 At [7.3].
76 Defence submissions,10 August 2018, at [7.4].

[139] In the agreed summary of facts paragraph [25] (as previously quoted) relates to this disputed fact issue. In that paragraph it has been accepted that the amount of deer velvet put into each capsule for certain orders was specified by the defendant(s), i.e. the company; and included instructions as to the use of a carob manufacturing aid. In cases where the amount of deer velvet per capsule was to be less for any order, there was an instruction from the defendant to use additional carob.

[140] The product specifications given to the contract manufacturer was described in the agreed summary of facts at paragraph [37.1] "as the recipe for the capsule themselves." The example given from paragraph [38] of the Agreed Summary of Facts relates to the purchase order 913000. The specification there was that each capsule was to contain 220mgs deer velvet powder and up to 220mg of carob. The specification went on to say that each bottle was to contain 100 capsules and was to be manufactured in accordance with those specifications by Genesis (a contract manufacturer).

[141] It was duly produced and sent to the defendant company between 18 October and 3 December 2013. Batch stickers and product labels were applied by the defendant company, before the product was made available to sale to consumers. The labelling on the product applied by the defendant company, was that each capsule contained 250mgs of deer velvet, not the 220mgs that was detailed in the purchase order and product specification. The label for the product also stated; "may contain traces of carob". Appendix A of the summary of facts sets out a similar scenario in relation to the other batches of product.

[142] The issue as to Mr Carline's belief has been discussed in the above paragraphs of this decision. In relation to his evidence that the product was "twice as good" and the defence contention that the product was the "equal to, or superior in value" to that which had been earlier encapsulated based on the "nose bleed" test has been discussed. There was no evidence as to the product description given by Mr Carline in his evidence, nor as to the contention in [7.2] of the defence submissions as to "it being equal to or superior in value" other than that test. The Haines Report is not evidence as to efficacy of the deer velvet powder. It is evidence as to the product of Silberhorn

having a comparatively higher concentration of proteins etc, than other competing products.

[143] The evidence before me on this disputed facts issue that I accept, establishes that:

(a) Some of the batches reporting to contain 250mgs of deer velvet were filled to 118mgs. The remaining 14 batches were filled to 200mgs;

(b) Two batches reporting to contain 300mgs were filled to 200mgs; and

(c) That batches 2 and 3 on the same purchase order had instructions to manufacture a 180mgs batch and a 220mgs batch from the same Aroma deer velvet source.

[144] The simple argument put is that any consumer of the above detailed products would have correctly thought from the advertising and the labelling of the product being purchased that he or she was receiving a certain amount of the deer velvet component in each of the capsules in the container. The consumer may react to that by purchasing the product accordingly.

[145] The argument for the defence is that Silberhorn had produced and sold a superior product in which the active ingredients were significantly enhanced, and that thus the consumer did not receive less value for their money but received the enhanced product.[77] The defence rejects the prosecution submission that the reduction in the deer velvet was simply to deliberately mislead the public for unlawful profit. With respect to Ms Ablett-Kerr, the issue as to why the misleading occurred is not the disputed fact issue. The issue before the Court for resolution is whether or not the consumer suffered harm by purchasing a product which advertised itself as containing more deer velvet powder than what each capsule actually did, that being further aggravated by the conflicting amounts of deer velvet powder that was being placed upon the defendant's instructions, inside various batches of capsules and the amounts of carob.

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[77] Defence counsel's submission on sentencing at [9].

[146] The prosecution question that the lower amounts of deer velvet powder in the capsules were the result of the product being twice as good. The capsule contents were not simply reduced by half, on the basis that the deer velvet powder was "twice as good" or "equal to or superior in value" as to the amounts inserted to what was originally being put in the capsules. I accept that there is no evidential basis for the argument that the reductions in amount directly related to any actual established improvements. The prosecution submissions are to this point. It is submitted that there is no evidence of any kind to confirm that the affected product was as described by Mr Carline i.e. twice as good as product produced prior to the new process. It is submitted that consumers got less product than what they had paid for. That this was done repeatedly and deliberately because the labels were not accurately stating the amount of deer velvet powder in each capsule and that was known to the company. This state of affairs existed for a period of approximately four years, across multiple batches and products.

[147] The Commission submits in relation to Dr Haines' evidence, and the conclusion that there was less damage to the proteins in the Silberhorn powder through the process as he understood what a cryogenic process to be i.e. including freeze-drying. Dr Haines evidence and Report does not support Mr Carline's belief. The nature of the way in which the deer velvet powder product was supplied to Dr Haines; the task that he was instructed to undertake; what he understood was the way in which the cryogenic processed product had been processed (until he was subject to cross-examination); what the Silberhorn product had in fact undergone as he understood the situation and the tumble drying of the deer velvet powder to the temperatures as discussed in the evidence before the Court, resulted in Dr Haines having reported on a different product than what was being sold by the first defendant company.

[148] The prosecution notes that Dr Haines was not testing powder from 2009 against the current powder. The efficacy of the Silberhorn product was outside the scope of this study. The prosecution relies on the evidence from Mr Winters about the Aroma processes, and the examination of processing events via the documentation and the evidence of Mr Lourie. The submission by the prosecution is that the Haines Report, was not available at the time that Mr Carline was directing suppliers to put less deer velvet in the capsules and directing the mislabelling on the product containers.

[149] Contrary to those contentions, the defence position is that consumers were not paying for an amount of powder, but for a substance with benefits as they understood them to be. The defence argument therefore is that the amount of powder is not the issue. It is the contents of the powder which is the important question. The defence rely on Mr Carline's evidence and his belief. Ms Ablett-Kerr repeats that that the position of the defence is that the product is as good if not better.

[150] With due respect to that defence submission it does not seem, in my view, to at all explain the reason why Mr Carline was giving directions to the product manufacturers to put a lesser amount than what had been stated and described on the product as being contained in each capsule.[78] Again, with respect to the submissions made about Dr Haines' Report, the proposition is subject to the criticism of what Dr Haines was testing as the Silberhorn product i.e. was it the product that was being delivered by the suppliers during the period that is the subject of these charges.[79]

[151] The question that needs to be considered is whether the "new process" product had more active ingredients, as is submitted by the defence, or whether overall the situation is one as put by the prosecution i.e. that there was less deer velvet powder being put in the capsules and no one was the wiser other than the defendant company via Mr Carline and the producers of the capsules.

[152] Again, in considering the issue as I am required to by s 24 of the SA, it is a question of whether the disputed issue is a disputed aggravating fact, or a disputed mitigating fact (or even perhaps a disputed mitigating fact not related to the nature of the offence or to the offenders' part in the offence).[80] My view, it is a mix of both aggravation and mitigation and upon reflection is a fact being asserted by the prosecution on the basis that what the first defendant company did was harmful to the consumer to a high degree and therefore would justify a greater penalty (as defined in s 24(3)(a)).

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78 Defence submissions at [37].
79 Defence submissions at [38].
80 Sentencing Act 2002, s 24(2)(c) and (d).

[153] I have held that Mr Carline did hold a belief but all the relevant evidence that is before the Court in relation to the basis of such a belief, in my decision, does not at all establish that the new process resulted in a product that was "superior" or that by its very nature the lesser weight of it put in the capsules to be encapsulated in each batch was the equal to the efficacy of the amount of deer velvet that had been put in each capsule prior to 2010.

[154] I find that although Mr Carline held such beliefs, when I consider the question of harm to consumers, the belief that he held about the product and the level that he held it, is not supported or established on the other evidence that I accept. In making that finding it is my view that the Haines Report and Dr Haines' evidence does not assist Mr Carline as regard to the level of his belief in the "new" product. There were variations in specifications without any valid basis being put forward, for example the amount of deer velvet powder not being reduced by half and the various variations of specifications as per the schedule attached to the summary of facts.

[155] I am further assisted in making the finding that I have in the fact that Silberhorn did not at any time market the product: on its revised "efficacy" by advising consumers or the market about the uplift in the quality of the product; or that as a result of the new process there was less powder but a better product in each capsule; or that the amounts of carob were much more than a "trace." I find the disputed mitigating fact, has been negated by the prosecution through the cross-examination evidence of both Mr Carline and Dr Haines.

[156] Accordingly, in relation to the disputed fact issue, I find that the prosecutor has negated beyond a reasonable doubt, the argument that the quality of the product had changed to the extent that the lesser amounts of deer velvet powder ordered to be encapsulated was the "equal to or superior in value" to that which had been encapsulated prior to 2010. I make the point that it is the reasonableness of the belief that has been negated, rather than the fact that Mr Carline held such a belief.

Disputed Fact 4 – Level of Sales of Deer Velvet Product

[157] The Commerce Commission argues that the sales of deer velvet by the defendant company amounted to close to half of the company's revenue during the relevant period. The defendant company argues that this proportion of sales was actually between one quarter and one third of the company's revenue.[81]

[158] The prosecution relies on the evidence given in relation to the Profit and Loss Reports for the defendant company for the financial years ending March 2012 and March 2015. I refer to the evidence of Investigator Lourie at page 197 in that regard.

[159] The defence submission notes that Mr Lourie is not a Forensic Accountant, and Ms Ablett-Kerr argued that Mr Lourie had given evidence that he had taken one year of the first defendants financial reports and uplifted generalised figures. She submitted that the percentage of deer velvet sales does not equate to profit. The defence submitted that there should have been a full financial analysis and accountants report, commissioned by the prosecutor to determine the actual profits specific to the relevant charge period.

[160] The defence are correct that it is for the prosecution to prove the disputed fact issue beyond reasonable doubt.

[161] The starting point again is the Disputed Facts Memorandum which says no more than at [1.8]:

> the defendants claim that deer velvet sales amounted to one quarter to one third of the company's revenue during the relevant periods. The Commission disputes this.

[162] The summary of facts signed off by Mr Carline in relation to the company discusses unlawful commercial gain,[82] the first defendants accounts and states:[83]

> [57] Annual accounts for the defendant for the period ending 30 June 2014 reveal that the defendant had an annual revenue of $2,585,489 upon which it made an annual gross profit of $1,554,486 from the sale of all of its products,

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81 Defence submissions, 3 September 2019, at [53].
82 Agreed Summary of Facts at [51] – [58].
83 Agreed Summary of Facts at [57].

> including the deer velvet products which are the subject of these proceedings. (That was after cost of sale but excluding expenses and tax).
>
> [58] Between the periods ending 30 June 2010 and 2014, the value of the defendant's net assets doubled from $666,427 to $1,244,575.

[163] The prosecution notes the argument from the defendant concerning the sales revenue from deer velvet and the returns there from, but states there is evidence that such sales formed approximately half of the company's revenue. The prosecution submits that the disputed fact is of secondary importance overall, given that the potential 'retail value' of the deer velvet powder that that was saved by Silberhorn by offending in the manner described was agreed to be in the region of $1.2 million.[84]

[164] The submission is made that Mr Lourie in his evidence produced two Profit and Loss reports one for the year March 2012 and one for the year March 2015. Mr Lourie told me in his evidence that he was the principal investigator.[85] His evidence in chief, was that he had obtained and examined Exhibit 76 of the Documentary Folder – being the Profit and Loss period for the defendant company to 30 June 2012. He said:[86]

> Q: And what's of interest to you, if anything, about this document?
>
> A: In terms of the revenue directly beneath that title was deer velvet with a stated figure for the year activity of $1,483,681.43 and then the total revenue is $2,990,071.00
>
> Q: Now it has been suggested by the defendants that the revenue of deer velvet products for Silberhorn was more like a quarter to a third of all revenue. What would you say about that in relation to this document?
>
> A: In relation to this document it appears to be closer to fifty percent.[87]

[165] Mr Lourie was then given Exhibit 77 (from the same folder). He evidence was:

> Q: Next document please, tab 11 Mr Lourie, we have another Profit and Loss this time for the period ended 30 June 2015 again for Silberhorn Ltd?
>
> A: Yes

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84 Prosecution submissions at [2.50].
85 NOE page 197.
86 NOE page 197, from line 4.
87 Exhibit 76.

Q: And the document reference 09.0469?

A: Yes

Q: And what do you have to say about this issue of deer velvet revenue please?

A: Similar to the previous profit and loss statement. This time deer velvet is listed with the figure for the year activity of $924,437.93 and the total revenue for that period is listed at $1,941,419.71, and again that is close to fifty percent.

[166] From my reading of the notes of evidence, and from my recollection, he was not cross-examined on that evidence.

[167] I do not accept the statement made in the defence submissions on the disputed facts hearing, that Mr Lourie only had one year of the first defendant's financial reports.[88] In my view, he does not need to be a forensic accountant to give the evidence that he did. I accept that his evidence is in relation to percentage of deer velvet sales and that does not equate to profit. I do not understand that the issue of profit from that revenue is part of the disputed fact issue from the information that is available to me, and the details given by counsel. The prosecution notes that Mr Carline did not provide any evidence to contradict Mr Lourie. It is also noted that Mr Carline during the course of his evidence, discussed a "lower margin" on deer velvet and that there were offers (discounted prices/sales) made to the consumers at large which impacted upon the results.

[168] In respect of this disputed fact, I find that the evidence that I accept establishes beyond any reasonable doubt that deer velvet sales by Silberhorn on a gross sales basis amounted to close to fifty percent of the gross turnover of the first defendant company.

Disputed Fact 5 – Conduct of the Prosecution in its Investigation

[169] The Disputed Facts Memorandum details the allegation by the defendants that:[89]

> the Commission should have approached its investigation differently, and that as a result of the manner in which the Commission conducted its contact with

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88 Defence Submissions, 3 September 2019, at [53].
89 Disputed Facts Memorandum at [1.10].

> him and others, Mr Carline perceived that the Commission was biased and that this impacted the way he responded to the s 47G notice'. It is submitted in the memorandum that the defendants say this unfair conduct mitigates the failure to comply with the notice.

[170] It is also alleged that the Commission's approach to the investigation was such that it "went outside of the terms of the warrant," in relation to the search of Mr Carline's property at Waiuku by "searching childrens rooms and personals items and removing items from the address that were not listed on the list of seized exhibits and which have not been returned."[90]

[171] The position of the Commission on this issue is that it does not accept this claim by the defence. It denies that it treated Mr Carline unfairly or that it was biased or that it went outside the terms of the warrant or that any of its conduct mitigates the offending by both defendants.

[172] In its memorandum in relation to the disputed facts hearing[91] the Commission not only rejects the allegations of bias or unfairness in relation to its investigation of the defendants, but also submits that even if that view was held by Mr Carline then any such beliefs would not be able to be qualified as a mitigating factor under s 24(3) of the Sentencing Act.[92] In any event, if they could qualify as a mitigating factor, they were not honestly held and/or wholly implausible or manifestly false on the overall evidence.

[173] The position of the defendant following the disputed facts hearing, in Ms Ablett-Kerr's submissions is that:[93]

(a) The Commerce Commission had the ability to issue a Desist Order to protect the public from being further harmed and in the present case no such order was made;

(The powers of the Commission in this respect that the Commission once did have no longer exist, as they have been taken out of the

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90 At [1.11].
91 Dated 10/8/2018 at [3.16].
92 At [3.16(b)].
93 Defence submissions, 3 September 2019.

relevant legislation. No such order could have been issued by the Commission.)

(b) The defence submit that there were significant issues relating to the origin of the complaint that the Commission should have considered. A civil dispute between Mr Carline, the first defendant company and a Mr Colin Lee and his Company Nuvita was the subject of evidence during the course of the disputed facts hearing;

(c) The defence position is that a civil proceeding taken by Silberhorn and Mr Carline was successful against Mr Lee and a substantial sum was ordered to be paid by Lee/Nuvita to the defendants. As a result, it is submitted, Mr Carline felt aggrieved because of having suffered significant loss and then having to face the Commerce Commission investigation "instigated by the fraudulent part;"

(As I considered the evidence I heard, it was a situation of where the Commerce Commission had a complaint made to it by Mr Lee and then investigated it, not an investigation instigated by Mr Lee. The other point that I note is that upon the pleas entered by the first defendant the complaint had some considerable substance.)

(d) That a more sensitive approach to the victim of the "complainant" would be expected;

(e) That Investigator Lourie finding that Mr Carline to be hostile and suspicious is accepted by the defence but submitted that is not surprising. The allegation of his being "borderline racist" is rejected by the defendant. The defence case is that a more sensitive approach reflecting the recognition of the loss that the first defendant company and Mr Carline had suffered at the hands of the person making the complaint might have brought about a different response from the defendant.

(f) The defence submits Mr Carline heard of rumours circulating about the investigation before being apprised himself of the investigation. This upset Mr Carline and was supported, it is submitted by Ms Hewitt;

(g) The defence complains that Mr Lourie had been in contact with other people before approaching the defendant, which made it inevitable that rumours would have started to generate.

(h) It was accepted in the submission that the correspondence became "increasingly volatile." Mr Carline had been required to provide documentation that the Commerce Commission already had from the complainant;

(i) The Commerce Commission did not take the step of requesting an interview of Mr Carline. There was no 'person to person' interaction between Mr Carline and Mr Lourie other than a telephone call from Mr Lourie to Mr Carline;

(j) The search warrant was seen as an invasion of his family home, and thus caused him distress; and

(k) The criticism of him by the Commission in its submissions was unfair and that it became impossible because of the development of what has been termed a "deep divide" for any constructive outcome to be achieved. It is submitted that a more sensitive communication might have resolved this a long time ago, (as it put in the submission), and that it was not one sided.

[174] The position of the Commerce Commission on this issue is that, when one has regards to the overall correspondence that has been produced during the course of the disputed facts hearing and the evidence it is clear that the Commission's investigation was not unfair or biased. The Commission questions Mr Carline's attitude from the outset. It is described in submissions as "hostile, suspicious and borderline racist." The letters from Mr Carline to the Commission were described by Mr Lourie as being

aggressive, unhelpful and uncooperative. Mr Lourie's evidence was that he ran the investigation fairly. The Commission notes in its submission Mr Lourie was not questioned as to whether the investigation he conducted for the Commission was unfair or biased; Mr Carline accused the complainant Mr Lee of being dishonest and diluting the first defendant company's deer velvet products but did not provide any documentation to the Commission to enable that claim to be checked against the veracity of Mr Lee's claims. Mr Carline took the stance that the Commission did not need to obtain copies of requested documents from Silberhorn when the Commission already had the documents as they had come from Mr Lee.

[175] The Commerce Commission submits that the only evidence given by Mr Carline in respect of this perception of bias and unfairness is contained in the Notes of Evidence at page 355. Mr Carline when asked about his perception of the investigation by the Commission responded that the complainant and the motive for the complaints, was such that there was no doubt about its origin. He accepted that the complaint was genuine, he again put it on the basis that it was a complaint by Mr Lee, a person who had caused him major loss.

[176] The Commerce Commission says no evidence was given by Mr Carline in relation to items he had claimed were taken from his home during the execution of the search warrant process at the Waiuku house

[177] In all, the submission of the Commerce Commission is that the argument put by Mr Carline, in relation to the conduct of the Commission, is part of what is described as "an obstructive smoke screen in relation to the earlier misconduct by Mr Lee" and an attempt to distract the commission from its investigation as Mr Carline was aware the allegations regarding the mislabelling of the deer velvet product containers were true. It is submitted that the allegations of unfairness or bias are not established on the evidence and neither was there any evidence that Mr Carline held an honest belief that there was such bias and unfairness.

[178] The Commission submits that it dealt with Mr Carline in a measured and fair way and that the seeking of, and the execution of, the search warrants was an inevitable

response to Mr Carlines obstructive behaviour taking into account the nature of the evidence that the Commission held.

[179] The disputed issue relating to conduct of the Commission's investigation of the first defendant company and Mr Carline, it is put before the Court as a mitigating factor. It is an issue directly related to the nature of the offence that Mr Carline has pleaded guilty to, in regard to him being a party to the first defendant's failure to comply with the s 47G FTA notice. It is an issue that relates to Mr Carline's part in that offending and therefore falls within the provisions of s 24(2)(c) of the SA. It is a disputed fact which the Commission must negate beyond a reasonable doubt.

[180] Mr Lourie's evidence and the exhibits that he produced in relation to his contact and communications with the first defendant company and with Mr Carline, were in my overall view and assessment considered and reasonable. I note that Mr Lourie had a difficult task when communicating with Mr Carline, who when I have regards to his correspondence, had taken an attitude that the Commission was investigating a complaint without a basis in fact, and that the complaint was being driven by Mr Lee. Mr Carline adopted such an attitude to the Commission, in my view of all of the evidence, really from the outset of any dealings or communications with and to the Commission. Partly, his belief founded an attitude on his part which was suspicious and hostile to the Commission generally, but particularly to Mr Lourie. Overall my view of Mr Carline's correspondence with the Commerce Commission was that he was being entirely unhelpful and uncooperative with it.

[181] Mr Lourie found Mr Carline and his personality difficult to deal with. Mr Carline was particularly questioned about his comment in a letter that he sent to the Commerce Commission on 1 October 2014 for the attention of Mr Lourie.[94] In that letter Mr Carline considered the actions of the Commerce Commission to be a clear abuse of process and suggested that the gathering information process of the Commission was not balanced, fair or transparent. He suggested to the Commission that it obtain records from the complainant Mr Lee as he suggested that more carob

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94 Documentary Exhibit Folder exhibit 11.

had been added to batches of deer velvet in a significant way, which was a very strong indication of fraud.

[182] His letter ended with the following:[95]

> Being duped by the complainant is unfortunate for both the Commerce Commission and myself; Colin Gregory Lee is an accomplished fraudster and thief. The industry I am in is a very small industry; alone with the death treats the whisper within the industry is that Colin Gregory Lee has Nga Puhi insiders within the Commerce Commission that are conspiring to undermine our brand and reputation.

[183] This was discussed with him by Ms Ablett-Kerr in her examination in chief.[96] What is important overall is Mr Carline's views. When being examined, he was asked:[97]

> Q: Now at that stage in October of 2014, what was your perception of the of the Commerce Commission's investigation.
>
> A: Well we can see by the evidence that there was no doubt about who the complainant was and the motive for the complaint. I, I voiced that I think in the first contact with Mr Lourie
>
> Q: And so why did you repeat the words that came from somebody else in that context?
>
> A: Well it's the truth.
>
> Question from the Court:
>
> Q: Ok so you say that it is the truth. There were Nga Puhi insiders within the Commerce Commission conspiring to undermine your brand?
>
> A: Yeah there was –
>
> Interruption by Ms Ablett-Kerr
>
> Q: Well Sir perhaps in fairness it does say that Colin Lee and Nga Puhi.
>
> Question from the Court:
>
> Q: That Colin Lee has Ngai Puhi insiders within the Commerce Commission who are conspiring to undermine your brand?
>
> A: Yes that is Colin.
>
> Q: And you are saying that is true?

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95 Mr Carline's letter to the Commerce Commission, 1 October 2014.
96 NOE, page 353.
97 NOE, page 355.

A: That is true.

[184] Mr Carline accepts that people could take offence:[98]

> Q: I am going to go now to that comment of course you will understand absent of some other information would be seen as racial overtones?
>
> A: I can quite imagine there would be people chasing –
>
> Q: Can you speak up?
>
> A: There would be, I can quite understand people taking offence.
>
> Q: Did you intend it to have racial overtones?
>
> A: Absolutely not. I mean two of my children are registered Māori voters. My wife is of Māori decent from Northland so there is no question my grandchildren are part Peruvian so there is you know there is no racial bias on my part Sir.

[185] What the letter and the evidence establishes is that Mr Carline's attitude to the Commerce Commission was unhelpful and he was making claims in his communications in relation to the investigation that did not have a factual basis.[99] Mr Lourie describes the tone of the correspondence as "aggressive, unhelpful, uncooperative".[100] Although he found the reference to Nga Puhi insiders offensive it did not affect how he conducted the investigation.[101]

[186] Mr Carline however said in his in his affidavit:[102]

> I am sure that this background contributed to my guarded responses to the Commission when they wrote to me over the section 46G request. My interactions with the Commerce Commission were extremely difficult and clouded by an approach to me that I felt was aggressive and unnecessarily combative.

[187] Mr Carline in his affidavit is referring to the background as being the issues with Mr Lee. He again suggested his view of the search warrant:[103]

> Without going into the extensive details of the breakdown of any potential relationship with the Commission, I feel that I must express my deep upset at

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98 NOE, page 355-356.
99 Exhibit 11.
100 NOE, page 155.
101 NOE, page 264.
102 Mr Carline's affidavit dated, 23 February 2018, at [26].
103 Mr Carline's affidavit at [27].

> the way in which the search warrant was exercised at my family's home address where "armed" Police accompanied the Commission and the Customs staff who threaten to cut through any locks and search the whole house including my childrens bedrooms and their personal items. They removed items that we still cannot locate. The whole family was deeply distressed by the search.

[188] In his evidence before me Mr Carline discussed the investigation and his perception of it as I have already described by again relating who the complainant was and the motive for the complaint.[104] He did not give evidence in relation to items he claimed had been taken from his family home. Against all of that, he accepted in his evidence that the complaint that was made by Mr Lee was genuine.

[189] A point that the Commerce Commission makes that I consider to be valid, is that he would have known the complaints were genuine at the time when he was making the various accusations and taking his particular attitude in his various responses to the Commission. He did not comply with the notice issued under s 47G.

[190] I find that the response of the Commerce Commission to take the steps to it did in obtaining and executing the search warrants based on the evidence the Commission held at the time, was an appropriate reaction to Mr Carline and the first defendant's non-compliance with the notices.

[191] In considering all the evidence that I heard over the eight day disputed facts hearing and the detailed submissions from Counsel both in writing and orally, I find it established beyond reasonable doubt that the conduct of the Commerce Commission in its overall investigation of the complaint that had been made to it was both fair and appropriate at all times. The conduct and the contact by the Commission and its staff with, by, and to Mr Carline was carried out professionally and appropriately by Mr Lourie and the others involved. The information contained within the various exhibits, being the correspondence that has been produced, has been carefully considered by me. I have also taken into account the evidence at the hearing when such documentation was put to various witnesses. I am satisfied on the totality of the evidence beyond reasonable doubt that there was not any bias on the part of the

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[104] NOE, page 355.

Commerce Commission in relation to the conduct of its investigation on the complaint made to it in respect of both the defendants.

[192] Rather I find as established on the evidence, that Mr Carline decided at the outset to take a certain attitude in response to the Commission's investigation. This attitude primarily originated from his realisation that the complaint had been made by Mr Lee and that both he and his company would, if all the requested information was made available to the Commission, have difficulties in relation to the underfilling of the deer velvet capsules. He was quite prepared, in my view, to take steps in the way and in the manner he did, to either delay or even if possible to negate the impact of the Commission's investigation. For the sake of completeness, it is no answer to a request for the supply of information in such circumstances or to a s 47G of the FTA notice to say that the Commission already had the information from another source. Neither, in my view, is the taking of that stance in any way mitigating of the non-compliance by either the first defendant company or Mr Carline.

[193] I therefore hold that there is no basis for the defence to argue mitigation of the s 47G notice offending for Mr Carline, or the defendant company, on the basis that the Commission's investigation was conducted in an unfair or biased manner.

Applications for discharge without conviction

[194] The next stage of this decision is to consider and decide upon the two applications filed on behalf of each defendant seeking that each of the first and second defendants be discharged without conviction. The notices of application filed on behalf of each defendant gives as the grounds for the applications under s 106 of the Sentencing Act 2002, is that the direct or indirect consequences of convictions being entered against each defendant, are out of all proportion to the gravity of the offending.

Defence Submissions

[195] In support of the applications, submissions were made by defence and an affidavit from the defendant was filed. In her submissions Ms Ablett-Kerr argues that the entering of a conviction against the first defendant company, would have the potential to cause serious damage to the brand of Silberhorn, and that the

circumstances of the case do not justify this consequence.[105] The submissions made by Ms Ablett-Kerr was that: the guilty pleas by the first defendant company were entered on the basis that the offences where ones of strict liability; that there was therefore no *mens rea* involved; and that the conduct was not, as is alleged by the Commerce Commission, deliberate and intentional. Further it is submitted that the offending related to organisational errors and failure in terms of labelling and that there has been no disadvantage to the consumer as the deer velvet component of the product was superior. In making that submission the defence relies on the Haines Report.

[196] The submission is that the gravity of the offending in respect to the first defendant company is low, but the consequences are severe, affecting not only its deer velvet product, but the various other products produced by the company; and that those consequences are out of all proportion to the seriousness or gravity of the offending. Ms Ablett-Kerr relied on affidavits supplied to the Court at the time an application was made for an order granting interim name suppression of the defendants.

[197] In relation to the defendant Mr Carline, the submission is made that he is a person of good character without any prior convictions and that as a family man he has worked hard; has provided gainful employment and opportunities for many people; has served his local communities; assisted in the character development of young people; has been an innovator and a developer of products benefiting the consumer. He holds a firearms licence under the Arms Act 1983 and it is submitted that the entering of a conviction could lead to the suspension or revocation of his firearms licence. Mr Carline, it is submitted, has taken pride in his good name and works and the imposition of a conviction would create a stigma. Another argument put forward is that Mr Carline's regular overseas travel overseas is likely to be questioned if he is convicted and he potentially could have difficulties in entering the United States and would have to make applications for visas; he would also have difficulty entering Canada and Hong Kong.

[198] In the submissions she filed on the disputed facts hearing, Ms Ablett-Kerr notes that the decision of the Court on the disputed facts relating to the question of intention

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[105] Defence submissions dated, 25 February 2018.

would be crucial to both the defendant company and Mr Carline.[106] She accepts that if the prosecution prove beyond reasonable doubt a deliberate intention to deceive the public and "to short-change them" existed the applications would have less merit.

Prosecution Submissions

[199] The prosecution filed a notice of opposition to the applications for discharges.[107] The Commission submits that the gravity of the offending overall is high; that the consequences claimed are unproven or not unusual for this type of offending; and that the direct or indirect consequences of conviction are not out of all proportion to the gravity of the offending. The Commerce Commission at the outset relied on the evidence and statements made by Mr Lourie and Ms Hewitt.

[200] It is the Commerce Commission's submission that in relation to the company, the offending was of a large scale; was deliberate; continued for some four years and generated unlawful profit; deceived customers who had no way of knowing the true position.[108] The Commission sums up its description of the first defendant company's offending as serious.

[201] The Commission argues that the defendants have not presented evidence in relation to the claimed consequences to the level that is be required in the circumstances of the offending, i.e. "severe consequences in order to outweigh the seriousness of the offending" and submits that the evidence put before the Court is no more than what would be the ordinary consequences for this type of offending with its scale and nature. The submissions note that as per the agreed summary of facts, Silberhorn divested all its assets and rights to the Silberhorn trademark to a related company in March 2015. In respect of the defence submission that the defendant company has already sustained "significant damage," the prosecution responds by submitting that there is no evidential basis relating to any of such damage and nothing that would distinguish it from consequences that normally flow from this type of offending.[109] The concerns that may have initially existed regarding 'brand damage'

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106 Defence submissions following disputed facts hearing, 23 September 2019.
107 Notice of opposition to discharged, 26 February 2018.
108 Commerce Commission sentencing submissions in reply, 10 September 2018.
109 Defence submissions at [84].

were considerably diminished when guilty pleas were entered and when interim name suppression orders lapsed.

[202] In relation to Mr Carline it is noted that he pleaded guilty and thus accepted that he had intentionally helped Silberhorn's failure to comply with the s 47G without reasonable excuse. There has already been discussion in this decision of the correspondence between Mr Carline and the Commerce Commission; the misleading statements that he made; the allegations that were made by him, and his confrontational attitude and remarks which Counsel describe as "offensive."

[203] Further there had been documents subject to the compulsory notice removed from the Invercargill office of the defendant company and were found in Mr Carline's home in Waiuku. The submission is made that Mr Carline knew at the time when all this was occurring, that there had been mislabelling of the company's product, and that the documents that were in the Waiuku house would provide evidence of this fact. In relation to the offending as detailed in the accepted and agreed summary of facts in relation to the s 47J offending, the prosecution refers to the statement form that summary that the conduct "materially hindered the Commission's investigation."

[204] In relation to Mr Carline's affidavit it is submitted that it does not raise consequences other than him being concerned about his 'ability.' It is submitted that there has been no evidence adduced to substantiate such concerns, and that lack of material included not only, any further affidavit evidence or anything said at the disputed facts hearing. The position of the prosecution is that a conviction on this kind of charge is unlikely to prevent him travelling to the suggested destinations. Consequences of some harm to his reputation is something that is not sufficient to outweigh the seriousness of the offending.

[205] Reference is made by the Commission to *Commerce Commission v Shukla* with particular emphasis is placed on the Courts comments from paragraph [24] onwards.[110] That is to say that the Court in its assessment can take in to account a director defendant's involvement in associated companies offending in determining whether

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[110] *Commerce Commission v Shukla* HC Auckland CRI-2007-404-000229, 21 November 2007 from [24].

to grant the director a discharge. The Commerce Commission also notes the late guilty pleas; the lack of remorse; and the overall defence position on the evidence inquiry that has been conducted throughout the processing of this case.

[206] In its more detailed written submissions dated September 2018,[111] the Commerce Commission notes that the authorities are correctly stated by the defence, but also brings to the Court's attention the authority previously mentioned in *Shukla* and also the decision in *Edwards v R*; placing particular emphasis on what is said in that decision about Court expectations in relation to arguments based on travel consequences upon the entry of the conviction.[112]

[207] In relation to the company, the Commerce Commission submits the application has no merit – deliberate offending; substantial failure to comply with the notice; offending involving 22 batches over approximately four years; nationwide representations and sales; a large amount of deer velvet powder being available for resale; the offending being aggravated by the s 47G offence as perpetrated by the co-defendant Mr Carline; that the position then adopted was obstructive, unreasonable and abusive; and was an attempt to distract the Commission from its investigation into offending that the company, through its directors knew it had committed; that brand damage is an inevitable consequence of a FTA established offence.[113]

[208] In relation to Mr Carline, it is submitted that this was a serious offence of its kind in relation to s 46G offending – that Mr Carline knew the company had mislabelled products because he had directed that to occur; he adopted an obstructive and hindering position of the investigation; the plea to the s 47J breach was as a party to the offending by the company and thus, he admitted that he knew at the time his conduct would bring about the company's failure to comply with the notice; and although he claimed that the first defendant company had a difficult task in complying, the search warrant of his home at Waiuku established he had a box of the material which included information relating to the 22 batches.

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111 Prosecution submissions, 3 September 2018.
112 *Edward v R* [2015] NZCA 583.
113 Prosecution submission, 3 September 2018, from [3.19].

[209] It is further submitted by the Commerce Commission that the evidence presented in terms of travel consequences is inadequate particularly in light of the ruling in *Edwards*. No details were given as to what travel was required from Mr Carline and in what circumstances; there is no evidence establishing why Mr Carline cannot make a visa application the normal way to be able to enter the USA. The Commerce Commission submits that a breach of the FTA would not, in all probability, affect his assessment as a fit and proper person for the obtaining of a firearms licence.

[210] In paraphrasing the submissions that Mr Brookie made, at the hearing on 16 September 2019, it was a summation of the normal evidential basis that the Court must consider when considering such an application, including in this case in Mr Brookie's submission, the Court should take into account that it was persistent offending; that the capsules contained a health supplement product being ingested by people; that the offending could not be suggested on the evidence to be any form of "corporate negligence;" that Mr Carline (and Ms Hewitt) were the "guiding mind and essential owner;" and Mr Carline knew full well what they were doing and what was happening; that the plea of guilty entered was at a late stage, but was a plea that in relation to Mr Carline accepted that he assisted the company in its actions and admissions and its non-compliance.

[211] Mr Brookie submitted that it was "in the context where the defendant was well aware of what provision of the information would mean for the company". Mr Brookie noted that Mr Carline's attitudes during the course of his evidence was more defiant than contrite i.e. differentiating between the weight of the active ingredient and its "activity" and he considering that the charges that the first defendant company had pleaded guilty to were technical.

[212] Mr Brookie pointed out that the application for permanent name suppression had been abandoned and the interim order for name suppression had lapsed, with the company name being published and the details of the pleas entered, any brand damage that was sustained was sustained as a result of those factors and that there was no evidence before the court that a conviction being entered would take the brand damage issue to a higher level.

[213] Ms Ablett-Kerr in her oral submissions in support of the application, adopted the arguments as I have detailed in her written submissions. As one would expect from Ms Ablett-Kerr, professionally, she noted that the outcome of the applications was somewhat dependant on the decision of the Court on the disputed facts issues and that if the prosecution had proved to the Court beyond reasonable doubt the allegation that it was wilful offending, "with the purpose of gaining a profit" then the applications would not "get off the ground."

[214] I make the point that the disputed facts issues which had been decided against the position argued by the defence, was that the mislabelling was intentional; that Mr Carline had knowledge of the mislabelling having occurred; and that the mislabelling was done deliberately; and that is was not corporate negligence or miscommunication. As stated in the Commission's argument supported by the findings of the Court, the offending was clearly deliberate and carried out with knowledge over a four year period. It is therefore able to be described as "wilful" to that extent, but it certainly was not an issue that it was with the "purpose of gaining a profit." That was never part of the Commission's case.

[215] In relation to the Haines' evidence, Ms Ablett-Kerr argues that the prosecution did not put it to Mr Carline that the powder was not produced during the relevant period. The submission is made by Ms Ablett-Kerr that the provisions of s 92 of the Evidence Act 2006, had not been complied with. I do not accept that submission. Mr Carline had not said in his evidence in chief that the powder he supplied to Mr Haines was powder produced during the relevant time. There was no evidence from him on that issue that the prosecution was then obliged to contradict him on. Ms Ablett-Kerr submitted that the prosecution had not examined Mr Carline on where and what powder he had supplied from Silberhorn to Dr Haines for the purposes of his analysis.

Discussion

[216] My review of the evidence was that when Mr Dixon was questioning Dr Haines (a defence witness) he asked Dr Haines as to what his understanding was:[114]

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[114] NOE, page 594, from line 21.

Q: And you understood that the Silberhorn powder that Mr Carline had given you was subject to what you have described as a normal cryogenic process?

A: Yes.

Q: Where it had been subject to very cold temperatures and de-haired?

A: Yes.

Q: And then subsequently had been cut and freeze-dried?

A: Yes.

Q: Now we have heard evidence that during the relevant period for us 2011-2013 the powder that was used for almost all of the period was not freeze-dried?

A: Right.

Q: It was dried in a rotary vacuum tumbler for eighteen hours at sixty degrees, ok?

A: Right.

Q: So would you accept if that is right then the powder Mr Carline asked you to test was a different powder to what was in use for most of the relevant period?

A: If the powder in that period was tumbled dried then certainly that is a different product to the freeze-dried material I analysed here.

[217] Dr Haines goes on to elaborates on what the cryogenic process was:[115]

A: To my mind the cryogenic process to me actually encompassed that whole process in terms of right from when the, the hair was taken off under the very low temperatures through the freeze-drying that was what I understood the true, the full cryogenic process to be.

[218] At the end of that examination, Dr Haines accepted that it was a different powder to the one that he had described during the course of his evidence and the analysis.

[219] The earlier evidence that Mr Dixon was relying on came from the evidence of Benjamin Simpson Winters. He was at all times relevant to the prosecution through

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115 NOE, page 599, from line 21.

his company "Aroma", engaged in drying and milling of the deer velvet for Silberhorn. He described the process:[116]

> So from there we would mince these particular deer antlers in a frozen form for our designated mincer so that then would further reduce the into small pieces prior to drying. We would then load the frozen deer pieces into our rotary vacuum tumbler and that is where we dry it or reduce the moisture content from the deer velvet. The method of drying is a rotary vacuum tumbler method where we use, the deer velvet is dried under vacuum. This drying process runs for approximately 18 hours and the drying temperature is around about 60 degrees.

[220] In my view, that differing process had a major impact overall upon the importance of the Haines' evidence and Report. I keep in mind as well, that the Haines' Report is not addressing the efficacy of the product, rather the fact that its proteins and other structures had not been damaged by heat.

[221] I therefore hold that the prosecution did not have to cross-examine Mr Carline as it was submitted they did. Mr Carline's evidence did not raise the issue. Mr Winters' evidence and Dr Haines' cross-examination put the issue before me. In my view, s 92 of the Evidence Act does not apply.

[222] In relation to the question of travel, Ms Ablett-Kerr submitted that the immigration process if Mr Carline was convicted, would be a complex and time consuming one, without any guarantee of success at the end. She again discussed his good character; his work for the community over many years; his genuine interest in the development of products and programmes and put before me the references and the affidavits made at the time of the hearing of the defence application for an interim order for suppression of the defendant's name. Further she mentioned his reliability, his honesty and his contribution to the community. A conviction entered against the company would add "very significant damage to that which it has already suffered."

[223] It was her submission that a s 106 discharge conveys an appropriate response to the degree of culpability of the defendants and would be consistent with various warning letters that the Commerce Commission had sent to other persons and parties, in relation to FTA offending. Copies of warning letters were put before me for my

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116 NOE, page 29.

consideration and the submission made was that there is an expectation in society that people will be treated equally. She submitted that the actual obstruction was not significant because the Commerce Commission already had a lot of the information.

[224] On this issue the question whether or not a person is charged is for the enforcement authority not for the Court (*Fisher v Police,*[117] *Madden v Police,*[118] *Dowle v Police*[119]). This deference to prosecutorial discretion has been questioned in other cases such as *Masson v Police.*[120] It is a factor that can be taken into account but must be looked at in the overall factual context of each case

[225] The application for discharge without conviction is under s 106 of the Sentencing Act. In considering the provisions of that section, s 107 is the starting point.[121]

> **107 Guidance for discharge without conviction**
>
> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[226] Necessarily this section requires a balancing exercise to be conducted by the Court when considering whether or not to exercise the s 106 discretion. Clearly, s 107 considerations are prerequisite or as is described in some cases a "gateway" to deciding whether or not to discharge a defendant under s 106.

[227] The submission is made that a discharge should be granted to each defendant on the basis that their offending was not deliberate and that the product in the capsules was of a composition level where the consumers purchasing the product were receiving "as good if not better" than what had previously been on the market. Even though there was less deer velvet, there was more value in the deer velvet that was previously. The defence categorise the company's offending as low level, and as the company having a low level of culpability. In relation to the offending for which Mr Carline and the company face, being the non-compliance with the notice to

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117 *Fisher v Police* HC Auckland AP147/90.
118 *Madden v Police* HC Auckland AP47/94.
119 *Dowle v Police* HC Wellington 333/94.
120 *Masson v Police* HC Christchurch A61/01, 26 July 2001.
121 Sentencing Act 2002.

disclose, it is put on the basis that the gravity of the offending is low, when one has regards to the surrounding circumstances. The culpability of both defendants is such that the consequences of entering convictions on both the company and Mr Carline would be out of all proportion of the gravity of the offending.

[228] The prosecution's position in respect of this application is that the offending is towards the more serious end of the categories of this type of offending. In the end, the level of offending means convictions being entered is not out of all proportion to the consequences of the convictions because in the submission of the prosecution, in the submitted consequences are not established.

[229] The facts surrounding the offending, for the purposes of the discharge applications, are that the first defendant company pleaded guilty to 26 representative charges for breaches of s 10 of the FTA between March 2011 and August 2015. The maximum penalty for each offence on the 18 June 2014 was increased to $600,000. Fifteen of the charges pleaded to the company relate to conduct before that increase in penalty when the maximum penalty was $200,000. Eleven relate to conduct that straddled the period and after the increase.

[230] The company and Mr Carline face one charge each under s47J of the FTA where the maximum penalty is $30,000 for companies and $10,000 for individuals.

[231] Section 10 of the FTA prohibits misleading conduct relating to goods and provides:[122]

> **10 Misleading conduct in relation to goods**
>
> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

[232] Section 47J of the FTA and the charges thereunder relate to the defendant's failures to comply with the Commission Notice issued under s 47G of the FTA, for each of them to produce certain documents and information during the course of the

[122] Fair Trading Act 1986, section 10.

investigation. Mr Carline is charged as a party and has pleaded guilty to the company's offending in this regard.

[233] Attached to this decision is the detailed summary of facts but I also refer to my digest of that summary based on the shortened version put to the Court by the prosecution in submissions dated 20 February 2018. I have reviewed the basic facts in earlier paragraphs of this decision. As part of my findings in this case, I have found that the mislabelling of the products were deliberate acts on the part of the defendant company and that hidden from consumers was that the capsules contained a lesser amount of powder than what was stated to be in each capsule as was detailed on the labels, attached to the container they were in. Similar representations were made in the marketing and selling of deer velvet products through the company's website.

[234] It is submitted by the Commission that this was deliberate offending over a sustained period of time, involving over 11 million affected capsules, and was done in the knowledge that the customers had no way of discovering the reality and with the result of significant potential commercial gain.

[235] During the course of resolving the disputed facts the issue as regards to whether the acts were deliberate and intentional, or whether it was through negligence or miscommunication, was resolved by me in a finding that the actions were deliberate actions. However, I also found that the defendant held a belief that the product he was producing was a superior powder (because of a change in a step in the preparation of the deer velvet). I also found as part of this decision, that his belief, albeit not supported by scientific research or by any objective analysis, was a belief that he had through his own use of the deer velvet powder, and what I described as the "bleeding nose" result.

[236] It has to also be acknowledged as important on deciding these applications, that other than Mr Carline and his co-director Ms Hewitt, and the manufacturers of the capsules, no one else was informed of the change of the amount of product going into the capsules during the relevant periods of the offending.

[237] Secondly important overall, I note the produced deer velvet capsules, whether of a superior kind or not, were being changed in a very loose and unscientific way; in that amounts of deer velvet powder in some capsules was greater or less than in others, albeit that all of the capsules contained less that what was being stated on the labelling of the product. I acknowledge the first defendant company's offending is somewhat mitigated by the fact that its controlling director, Mr Carline held the belief that he did.

[238] In relation to the failure to comply with the s 47G notice, upon the Commerce Commission commencing its investigation it sought information from the company's directors including Mr Carline, who assumed responsibility for all of the communications with the Commission during the investigation. Mr Carline directed the responses by the company and his own responses to the request for information. Upon making requests for voluntary disclosure of information and receiving only a small amount of the documents requested by 11 September 2014, the Commerce Commission issued a compulsory notice under s 47G requiring the production of certain documents and information. That was served on the company. The Commission granted extensions to the deadline for the supply of the requested information and sent reminders. The Commission's view in the end, was that the defendants, that is the company and Mr Carline, had not compliantly and comprehensively answered the compulsory notice, and that Mr Carline in the view of the Commission was being obstructive and, in his communications, hostile to and with the Commission.

[239] A search warrant was issued and executed on the 8 October 2015, at the Silberhorn premises in Invercargill and the residential addresses associated with Mr Carline. This was a year after the Section 47J notice had been issued which itself had followed the original information requests and extensive correspondence between Mr Carline and the Commission.

[240] Prior to the obtaining of the search warrants, the Commission had compulsory interviewed the Silberhorn's Office Manager and co-director, Ms Hewitt. During the course of that interview she indicated that certain documents relating to the questioned batches and a laptop had been removed from the first defendant company's premises. The resulting search located and allowed the seizure of a significant number of

documents within the scope of the notice that had not been available to the Commission. A number of those items were found in Auckland. The Commission formed the view, that Mr Carline as director and majority shareholder in the defendant company, was attempting to obstruct and frustrate the investigation.

[241] I have, when completing my analysis, in terms of the s 107 of the Sentencing Act, used the findings that I made during the course of this decision on the matters that were the subject of dispute.

Approach

[242] There are three Court of Appeal decision that I have considered in reaching my decision on these applications. These are cases that provide guidance on the approach and detail the factors I need to consider in deciding the applications. The three cases are *R v Hughes*,[123] *Blythe v R*,[124] and *Z v R*.[125] Although there were differences in what factors were taken into account and at what stage, all cases upheld the three step approach when considering the disproportionality test set out in s 107, before considering whether to exercise the discretion to discharge.

[243] I acknowledge that Ms Ablett-Kerr in her submissions clearly set out the pathway that the Court needed to follow. I adopt the approach taken by the Court of Appeal in *Z v R* were the Court said:[126]

> For our part, we consider that there is much to be said for the approach adopted by the Divisional Court in *A(CA747/2010)*. That is: when considering the gravity of the offence, the court should consider all the aggravating and mitigating factors relating to the offending and the offender; the court should then identify the direct and indirect consequences of conviction for the offender and consider whether those consequences are out of all proportion to the gravity of the offence; if the court determines that they are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge (although, as this Court said in *Blythe*, it will be a rare case where a court will refuse to grant a discharge in such circumstances).

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123 *R v Hughes* [2008] NZCA 546.
124 *Blythe v R* [2011] NZCA 190.
125 *Z (CA447/12) v R* [2012] NZCA 599.
126 At [27].

[244] In addressing the three steps, I start with identifying the gravity of the offending in its particular factual context. Under the *Z v R*, ruling aggravating and mitigating factors as detailed in ss 9 and 9A of the Sentencing Act, are obviously relevant to the gravity of the offence, together with of ss 7, 8 and 9. Guilty pleas, expressions of remorse, the victim's perspective and the Court's assessment of how likely it is that the offender will reoffend, are to be considered. The task is to look at the gravity of the offence in light of the proportionality test under s 107 of Act. Factors to be considered are those identifying the gravity of offence, and those surrounding the nature of the offence, the circumstances of the commission of the offence, and the aggravating and mitigating factors of the offender and the offence and, matters occurring after the offence.

Gravity of the Offending

[245] Upon my reading of the agreed summary of facts, the discussion in this decision relating to the matters that were at dispute, factors surrounding the gravity of the offence and the inherent seriousness of the offence, include: this was offending over a number of years by a company that was marketing a particular product, as having value to the consumer and which advised the amount of the product that the consumer should take at one time on the product label. The offending, that is, the putting of specifications to the contract manufacturers of varying amounts of deer velvet into the capsule, but always less than the amount specified on the labelling, was persistent. For the purposes of the purposes of the case, it involved 22 batches of product. The ingredient in the product that was vital was the deer velvet powder. The powder itself in the analysis conducted by Dr Haines contained a number of active ingredients. The amount that a person could safely take at any one time, was never the subject of prior analysis before the actions were undertaken by the defendant company at the direction of Mr Carline.

[246] I am satisfied, when having regards to the facts that I have found in the matters discussed that both the company and Mr Carline were well aware of what they were doing, and therefore knew in the end, that the product they were advertising after putting specific labels on, was not the product so described. It contained varying amounts of deer velvet. It appears upon the evidence overall, that neither the company

nor Mr Carline were ever sure as to the actual amount of deer velvet powder that was being put in to the various batches of product by its contract manufacturers.

[247] This cannot be described in any way as being corporate negligence or mismanagement or just "overlooking." As I have found it was not offending at the lower end of the spectrum, but intentional and deliberate in the definition of those words as expressed above i.e. that the company vis-à-vis Mr Carline, were aware of the instructions given and specified to the manufacturers as to the amount of deer velvet to be put into each capsule.

[248] Further, I am satisfied, that the first defendant company through Mr Carline was well aware of what was being stated on the label that the product contained. The specific factors that I have regard to increase the gravity of the offence are particularly that, the company through Mr Carline were always aware, through the years of the offending and the number of batches, of what they were actually putting out into the marketplace; as against what they were saying in the company's advertising of what each capsule contained.

[249] In relation to the failure to disclose the information, I consider the factors there are the nature and content of the communications between Mr Carline and Commission; the umbrage that he was expressing about the investigation when he knew and must have known at the times he was making the various comments (and the tone of his letters establishes his views) that the complaint had a very strong basis in truth. It appears to me that the non-disclosure of information, was on with the knowledge that disclosure of the information would bring the offending clearly out into the public arena.

[250] In relation to the aggravating factors relating to the company. Again, this must be look at in the light of Mr Carline as the guiding light of the company. His overall attitude was one showing an entitlement to do what he was doing, through the company and its products. There was no suggestion that he in anyway resiled from the position that what the first defendant had done company was right. In his view, technical labelling issues. That of course is somewhat mitigated by the belief that he held about the product. I accept the submissions that have been made that he took a

particular interest in the development of the product and believed that this cryogenic process used in the de-hairing of the antlers was important in preserving the active ingredients of the powder. I do not accept that he was being motivated by financial gain, but rather he was entirely "one-sided" by the belief he had in his product.

[251] The further matter that I note, that Mr Carline took a particular attitude to the investigation because of earlier matters involving a Mr Lee and the problems Mr Lee and his company had occasioned to the defendant company. The submission that is made to me in that regard, is that his perception on the part of Mr Lee played, contributed to his failure to comply with the request for information. With due respect to that submission, he used the Lee issue overall as part of his delaying tactics because Mr Carline knew at the times he was saying all this about Mr Lee, he knew that the complainant had a truthful basis in fact and was reluctant to acknowledge that he had actually done what was being alleged against him. This is not "Lee driven" offending in my view.

[252] I consider the Haines Report, but do not accept that it gives a basis, even retrospectively, for justification of the company's actions or indeed to establish a reason for Mr Carline's belief. It would have been of considerable significance in the preparation of the Haines' Report and Dr Haines' evidence, for the product that he was instructed to compare, to be the product off the shelf, in relation to the period at issue in these charges. At the time that Dr Haines was instructed that period was clearly stated in the prosecution documents and could easily behave been made known to Dr Haines by Mr Carline. In the end, I accept the evidence that Dr Haines in reality had not been asked to test the 2009 powder against the relevant powder from during the offending period. In my finding on the evidence Dr Haines held a mistaken view of what he was testing and the process it had undergone. In reality the Haines Report is of little assistance to me on these applications.

[253] In making the analysis that I need to do, I rely on my earlier finding that this was deliberate offending and that there was a lowering of the amount of deer velvet that was to be encapsulated. There was obstruction, unreasonable conduct and response and a total failure to comply with the information requested of the company

and Mr Carline. Mr Carline knew as he directed the company in its obstructive approach.

[254] In making an assessment as regards to the offending overall and assessing it in the terms and the nature of the offending itself, and the provisions of the FTA, I consider that the offending and the gravity of the offending overall is at least a moderately serious level.

Consequences of Convictions

[255] The next step is to identify the direct and indirect consequences of a conviction.

[256] I accept that it is not necessary for the identified consequences to be inevitably or probably occur. It is sufficient that the Court comes to judicial decision that there is a real and appreciable risk that such consequences would occur. I note the comments by Wylie J in *Cook v Police* where he said:[127]

> The words "is satisfied" in s 107 mean that the Court is required to make up its mind on reasonable grounds. It does not require proof beyond reasonable doubt. Further, the Court does not need to be satisfied that "the identified directions and consequences would inevitably or probably occur". It is sufficient if the Court is satisfied that there is "real and appreciable risk that such consequences will occur". Having considered the circumstances and the affidavit filed by Mr Cook, I accept that there is a real and appreciable risk that his employment prospects are likely to be adversely affected if the conviction remains on his record.

[257] The same Wylie J in *Barker v R* said that the words "real" and "appreciable" note something of substance and not something fanciful or something that may never happen.[128]

[258] In *Police v M*, Allan J in the High Court observed:[129]

> [60] Ms M's case for a discharge was that she had an offer for employment in England (which by inference she wished to accept), and that if she did not get a discharge, then her prospects of obtaining the position would be ruined. But there was absolutely nothing to support that contention. There was no website information as to United Kingdom entry requirements, no evidence as

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127 *Cook v Police* [2014] NZHC 282 at [26].
128 *Barker v R* [2014] NZHC 435.
129 *Police v M* [2013] NZAR 861 at [60].

> to the applicable English law regarding entry, no affidavit evidence of any description. As Fogarty J has pointed out in *Gasson*, affidavit evidence is not imperative, but it is routine. In my view, there ought to have been some documentary material confirming the employment offer and Ms M's need to go to the United Kingdom, and also providing detail of UK entry requirements in respect of persons who have a drink-driving conviction.
>
> [61] Judges sitting in busy list or sentencing Courts in the District Court have an unenviable task. The sheer volume of work renders it impracticable to require or consider copious written material. But in a case like this, some evidence or supporting information is to be expected in order that the Judge may exercise his or her jurisdiction under s 106 properly.

[259] Here, one of the issues raised as being a matter to be taken into account in the impact of a conviction, is the question of the defendant's travel. He says in his affidavit that:[130]

> [36] I am now semi-retired, but continue to travel both for business and personal reasons. I am mortified at the thought that I should, after many years of making a significant contribution to our society in my commitment to beneficial developments in two industries, be the subject of a conviction where my intentions were only good.
>
> [37] Also, I travel to North America, Australia and the United Kingdom and to Hong Kong in relation to Emu P Oil. I am concerned that a criminal conviction will create some real difficulty for such travel.

[260] There is no other evidence put, other than an argument from counsel that the obtaining of visas would be delay, and of concern, and could result in him not being able to obtain entry to the United States of America and Canada. Nothing else is provided by way of immigration evidence

[261] In the case of *Edwards v R,* the Court was considering an application, primarily based for discharge upon the defendant, Mr Edwards' ability to travel to the United States for work purposes and to visit his sister who lives in Canada.[131] Affidavit evidence was supplied to the Court relating to his need for travel. However, the evidence of travel restrictions was unsatisfactory. There had been a reference to Canada Immigration and Refuge Protection Act 2001; and to ss 1182 and 1183 of the US Criminal Code. The Court in its decision said:[132]

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130 From [36].
131 *Edwards v R* [2015] NZCA 583.
132 At [22].

> [22] … But again, there is nothing to confirm that there is no alternative way in which he can enter that country, perhaps after a period of time, and no discretion that can be exercised in his favour.
>
> [23] It is perhaps as well to say something about the evidence that an applicant ought to adduce if he or she is to invoke foreign law and practice in support of a discharge.
>
> [24] The court must be "satisfied" that the consequences of conviction are out of all proportion to the gravity of the offence. It is settled law that an applicant for a discharge need only point to a real and appreciable risk that adverse consequences will ensue. That standard recognises that the court is being asked to predict what will happen in the future. So, for example, Mr Edwards need only point to a real and appreciable possibility that he will need to travel overseas for work.
>
> [25] It does not follow, however, that a court will permit an applicant to speculate about matters of present fact, in which we include any existing travel restrictions that are said to preclude travel. Proof of these matters may require expert evidence if they are not agreed and cannot be established in any other way.
>
> [26] It seems to us, speaking generally, that a court will ordinarily expect to be satisfied that under the law and practice of the jurisdiction concerned:
>
> (1) the conviction must be disclosed but, assuming a discharge is given, the fact that the offence was committed need not be; and
>
> (2) in consequence of the conviction, the applicant is prima facie inadmissible, and for how long; and
>
> (3) there is no alternative entry process available or that, if there is, such process is unreasonably difficult and uncertain in all the circumstances.
>
> [27] If all of these things can be established, a sentencing court must further be satisfied that the offence is not so serious that it would be wrong to allow the applicant to present himself or herself to foreign immigration authorities without disclosing it.

[262] Also relevant to my assessment on this application is the decision of Justice Baragwanath in *Commerce Commission v Shukla*.[133] The Court was dealing with an Appeal lodged by the Commerce Commission following the District Court's decision to grant a discharge without conviction on the defendant Mr Shukla, on six charges of breaching s 10 of the FTA. Mr Shukla's company, 230 Marua Limited, had pleaded guilty to some of the charges and had been fined, but Shukla had been discharged without conviction. The Appeal was by way of case stated on the issue of the

[133] *Commerce Commission v Shukla*, above n 110.

discharge. In the decision, Baragwanath J accepted the description of the District Court Judge in relation to the offending as being 'in the moderate range' and noted that the offending took place over two years and in that particular instance was performed for gain. The District Court considered that to be material. Justice Baragwanath noted that Mr Shukla's conduct was attributed to the company and the fine placed on the company, in the view of the Judge, would have been that same as what would have imposed by Mr Shukla if he was not trading as a limited liability company.[134] The offending relating to representations as to leather lounge suits and the price for which they sold elsewhere, and that the suits were subject to sale prices when they were not. There was a widespread advertising campaign, national, regional newspapers etc. and a promotion on the company's website. Overall, the Court described the offending as "significant not menial".[135]

[263] The Court under the heading of Consequences of Conviction said:[136]

> [24] In considering s 107 it is unnecessary to consider whether the requirement of s 24(2)(d) of the Sentencing Act — that the offender must prove on the balance of probabilities the existence of any disputed mitigating fact — has technical application, perhaps by analogy, to future prospects of adverse consequences. I must simply make an assessment under s 107 of their size and character, as is conventional in law when appraising the future: *Mallett v McMonagle* [1970] AC 166, 174 per Lord Diplock.
>
> [25] The expert evidence of Mr Ryken establishes a real likelihood only of nuisance to Mr Shukla of having to explain his convictions to foreign immigration authorities. No problem is suggested in Asia where he currently goes on business, although I accept that he may well wish to extend his operation to states which are more exacting. I also accept that it will be irritating for Mr Shukla to have to go through the process of applying for visas even to visit close family across the Tasman.
>
> [26] But it is the purpose of a sentence to sting and in a case such as the present to serve as deterrent. While the fines against the company were substantial there was good reason to ensure that Mr Shukla's penalty was not limited to the reduced performance of his company.

(It is noted that the fine imposed in that case was pursuant to the maximum fine existing at the time.)

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134 At [22].
135 At [23].
136 At [24].

[264] The issue in relation to travel in my view here, is raised by Mr Carline but there is no supporting evidence or detail in relation to it. In reality, I do not consider it an actual consequence of a conviction being entered into. There is nothing that I can use as proof of that fact.

[265] It is also submitted that the company being convicted would have its brand significantly damaged. Ms Ablett-Kerr refers to affidavits filed in support of the initial interim order for suppression of name. These affidavits included affidavits by Dr Anthony Garry. He is an expert in marketing, but his affidavit dated 8 September 2016, is discussing matters relating to reputational damage and consequences of publication of transgressors names by negative inferences being drawn about the brand and the company, i.e. damage to reputation and negative effects on sales, prices, purchase intentions, etc. It is noted that Dr Garry states:[137]

> As highlighted, brand reputations are fragile because they are founded on consumers perceptions of trust.

[266] He goes on to say:[138]

> Evidence suggests that in cases where litigation is underway, culpability has not been established, media reports will have a detrimental effect on brand reputation. The ambiguity inherit in these types of situations will lead customers and potential customers to draw their own conclusions regarding who is to blame and consequently to assign responsibility.
>
> What Mr Garry is referring to is the problem a yet to plead defendant has if the case receives early publicity. In this case the full and admitted /decided facts will be available.

[267] The affidavit of Gregory Mark Lay notes that Mr Lay is the accountant for the defendant company and Mr Carline.[139] It notes the issue of adverse publicity impacting negatively on revenue to the detriment of the defendants. It is noted that there is a "goodwill" of some significance built up over many years, and that the Silberhorn company has a number of various products, and a number of contractors.

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137 Dr Garry's affidavit, 8 October 2016, at [20].
138 At [21].
139 Affidavit of Gregory Mark Lay, 9 December 2015.

[268] Finally, there is the affidavit of Edward Allen Morry who is an expert in the field of marketing and sales.[140] He discusses the value of a company brand, image and reputation. The Silberhorn brand recognition is described by him as "extremely high built up from its strong aggressive advertising and marketing over the past ten years". He emphases in his affidavit a need to "protect brand value."

[269] I acknowledge those matters in relation to the company and its brand. However, the position in relation to the company, at this point in time, is that it has not continued with its application for a permanent order for suppression of name. It has pleaded guilty to charges under the FTA. The facts will speak for themselves. I have found it is moderately serious offending. Impact upon the brand will have in my view already occurred.

[270] I note Mr Carline's comments about the company, its background and development as contained in his affidavit. I take that into account.[141]

[271] However, my view overall, in this situation is that any brand harm has been occasioned by the established deceptive conduct. The telling point is that the company, through Mr Carline, was well aware of the deception and continued along the same pathway for a period of four years or thereabouts, with 22 batches of product.

[272] I note further that in many of the authorities that it is possible for a wide variety for conviction related consequences to be taken into account, even general consequences that would flow from any conviction. I further take into account that neither the company nor Mr Carline has any prior convictions. I note the years that the company has been involved in the processing and selling of deer velvet capsules. Mr Carline's background, and his community involvement as a person of good character and his work in the past for community organisations, which is lost by a conviction being entered. This is based on various references that are before me.

[273] However, the evidence of serious consequences other than those consequences that normally flow from a conviction is very restricted. I consider the proven

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140 Affidavit of Edward Allan Morry, 12 September 2016.
141 Mr Carline's affidavit,23 February 2018, at [38].

consequences to both defendants are difficulties (giving that word its widest possible meaning) in travel; loss of good name and brand impact. I assess such consequences at a low level.

[274] The final point that mention is the issue raised by Ms Ablett-Kerr that Mr Carline is the holder of a Firearms License. In her submission a conviction could lead to the suspension and/or revocation of his firearms license.[142] That being based on the proposition that the police in their discretion might hold the belief that the conviction deems him to be no longer a fit and proper person despite the actual nature of the offending.

[275] With all due respect to the submission I do not accept that the conviction of Mr Carline on the charge that he faces, will have any impact on his ability to have his firearms licence renewed. It is not a matter that, in my view, relates to whether he is a fit and proper person to hold such a license.

Proportionality

[276] I must now assess whether those consequences be out of all proportion to the gravity of the offending. I consider under this heading whether the direct and indirect consequences of a conviction would be out of all proportion to that gravity and that, in the terms of *Blythe*, is a question of comparison.[143]

[277] In the terms of ss 106 and 107 of the Sentencing Act, I must not grant a discharge unless I am satisfied (that is, that I make up my mind) that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence. In making that assessment, I note there is no onus on the defendant to establish that the disproportionality test has been met. It is a matter for the Court to exercise judgement on and when exercising my judgement, I have taken into account all the relevant evidence and information; the copious evidence given at the disputed facts hearing; and the detailed written and oral submissions from both the prosecution and the defence. I have also taken into account, that the pleas that were entered to the

[142] Defence submissions dated 25/2/2018 at [97].
[143] At [32].

charges were entered late. There does not appear on the part of Mr Carline to be any question of remorse for the offending. There has been a dispute in reality about every matter of moment in relation to the question of both the company's and his own culpability in relation to these charges.

Outcome

[278] My overall assessment therefore in answer to the third question is that the established consequences are of a level which could not be held to be out of all proportion to the overall gravity of the offending following my assessment of the circumstances of both the defendant company and Mr Carline and the other relevant issues in the terms of ss 7, 8 and 9 of the Sentencing Act.

[279] The final test is whether not the residual discretion under s 106 vested in me should be exercised in favour of the defendants' applications.

[280] Albeit that the Court of Appeal in *Blythe* held that; only if the disproportionality test in s 107 has been met can the Court proceed to consider exercising its discretion to discharge without conviction under s 106, I do have a residual discretion.[144] It is a discretion in the terms of reading of s 106(1) which does not say that the Court must discharge the offender without conviction where s 107 is satisfied. Nor does s 107 say that. What s 107 does make clear is that an offender must not be discharged unless the disproportionality test in that section is met.[145]

[281] I have held that the disproportionality test, as I have detailed, has not been met in these circumstances. In any event, even if it had, I would not have been prepared to discharge either defendant without conviction, after taking in to account all the matters that I have discussed and considered. I note as particularly significant in this regard, the persistence of the conduct, the nature of it, i.e. that it would have been impossible for "Joe Blogs" a prospective consumer to have realised the lesser amount of deer velvet powder in the capsules he was consuming; and overall the response by company, vis-à-vis Mr Carline, when the issues of underfilling the capsules was

144 *Blythe* at [12].
145 *Blythe* at [13].

raised. I have taken into account the public interest and that I do not consider that this is offending of a minor or lower kind, at all.

[282] The application for discharge without conviction, for both the defendant company and the defendant Mr Carline are refused.

Sentencing

Prosecution Submissions

[283] The Commission's submissions in relation to starting point for the sentencing of the First defendant is a fine on the s 10 FTA charges between $350,000 and $400,000 on a global basis and on the s 47J charge $25,000. The Commission submits a late guilty plea entitles the defendant to a five to ten per cent credit only. It is submitted that the end result for the company should be a fine between $337,500.00 and $403,750.00.

[284] In relation to Mr Carline the Commission submits the starting point for the fine should be $8,000; with an allowance for the guilty plea of between five to ten per cent.

[285] In considering the various submissions made to me by both counsel I keep in mind what Tipping J said:[146]

> The Fair Trading Act when it comes to vitamin pills must be administered with a healthy degree of common sense.

The FTA represents in the Commission's submission the facilitation of consumer welfare together with the management of effective competition.

[286] In its breakdown of the charges that the company and Mr Carline face, the Commission notes that the company faces 26 charges in total, which are representative. They are under s 10 of the FTA for the period between March 2011 to August 2015. Fifteen charges relate to conduct up to the 17 June 2014 – where the maximum fine was $200,000. The remaining 11 charges relate to conduct both before

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146 *Megavitamin Laboratories (New Zealand) Ltd v Commerce Commission* (1995) NZBLC 103,834, (1995) 6 TCLR 231.

and after the increase in penalties following the 17 June 2014, when the maximum fine went to $600,000.

[287] The Commission in its submissions to the Court noted that 22 representative charges faced by the first defendant relate to the composition of the deer velvet powder in each of 22 batches of product. The charge period for each of the charges is from the approximate date of the manufacture of that particular batch of powder to the batch expiry date. For example the first batch was manufactured in March 2011 with an expiry date of August 2015 (3 years, 9 months on). "Sportsvel" was sold in bottles of 100 capsules at $52.00. "Sportsvel Black pack" was sold in bottles of 50 capsules at $40.00. The product was marketed as supporting strength in joints and activity and assisting in joint mobility. The specifications given to the contract manufacturers by the first defendant for each of the batches relating to the charges were that less deer velvet powder was to be put into the capsules but significantly more carob. The capsules in question as a result contained between 30 mgs to 100 mgs less deer velvet powder than what was being stated on the labels of the container in which the product was being sold. One particular product was advertised as containing 100% deer velvet was found to contain in the various batches between 66% to 86% deer velvet powder.

[288] Emphasis was placed by the Commission on the principles and purposes of sentencing with particular emphasis on deterrence as the product was for consumption by the customer and where and for which various health claims were made. The Commission places weight when discussing sentencing principles and purposes in relation to the potential to cause harm; to hold the defendants accountable; and to promote a sense of responsibility.

[289] The Commission refers to the *Mega Vitamin Laboratories* case, which related to the time when the maximum penalty was $100,0000, where Tipping J said:[147]

> I do not resile from the comment which I made in *Lanes Appliance Centre Ltd v Commerce Commission* (1989) 3 T.C.L.R. 374 that it is important the Act be seen to have some teeth. I only observe that in general terms the teeth should be sharper when the falsity is deliberate.

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147 *Megmr leemin Laboratories (New Zealand) Ltd v Commerce Commission* (1995) NZBLC 103,834, (1995) 6 TCLR 231.

[290] And reference is also made to the authority of *Commerce Commission v L D Nathan and Co Ltd. and lists t*he sentencing factors highlighted in that case:[148]

(a) The objectives of the FTA

(b) The importance of any untrue statement

(c) The degree of wilfulness or carelessness in making the statement

(d) The extent to which the statements in question depart from the truth

(e) The degree of dissemination

(f) The resulting prejudice to consumers

(g) Whether any and if so what efforts have been made to correct the statements

(h) The need to impose deterrent penalties. (The Commission makes the point that in 2013 the maximum penalties for offending under s 10 of the FTA were tripled).

[291] The Commission discusses the authority of Duffy J comments in *Commerce Commission v Steel and Tube Holdings Ltd* where Her Honour said: [149]

> [92] The offences here are strict liability offences. However, the states of mind that generally accompany such offending will influence its gravity as either aggravating or mitigating factors. The three ascending categories of mental states with Tipping J identified in *Commerce Commission v Noel Leaming Ltd* provide helpful guidance. In general, the acts of commission or omission that constitute a strict liability offence will be done inadvertently, carelessly or deliberately. Inadvertence will be a mitigating factor, whereas, deliberate conduct will be an aggravating factor. Careless conduct will sit in between; being viewed as either neutral or aggravating depending on the degree of carelessness involved. Thus, in broad general terms a starting point for inadvertent misrepresentations might be up to 33.3 per cent of the maximum fine, careless misrepresentation might be between 33.3 per cent and 66.7 per cent of the maximum fine and deliberate misrepresentation from 66.7

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148 *Commerce Commission v L D Nathan and Co Ltd* (1990) 2 NZLR 160 at 165; citing *Gardam v Splendid Enterprises Pty Ltd* (1987) ATPR 40-779, at p 48,502.

149 *Commerce Commission v Steel and Tube Holdings Limited* [2019] NZHC 2098 at [92].

> per cent upwards. There may also be room for some overlap between these bands. For example, gross carelessness may fit somewhere between the second and third bands. Recklessness may also fit in this area. Further adjustment of the chosen starting point will then be required to accommodate other aggravating and mitigating features of the offending.

[292] Quite simply the prosecution argument is that the volume of the active ingredient in each capsule did not contain the specified volume as was stated on the containers label. The label on the container overstated the amount of the deer velvet powder in each capsule by amounts varying between 12 percent to 33 per cent. As a result the purchasing consumers were paying for a quantity of deer velvet powder that they were promised but did not receive in the submission as it had been deliberately misrepresented on the label affixed to the container. The Commission submits that the consumer was unaware that the product being purchased was of a less quantity that what was being advertised. The Commission noted that there had been separate orders specification for each batch of products, and that the company had made no effort to rectify the representation at all.

[293] Counsel for the Commission referred to the decisions of *Commerce Commission v Reckitt Benckiser*[150] and *Commerce Commission v The Warehouse*.[151] The importance of the labelling and packaging of products was stressed by Judge Jelas in the *Reckitt Benckiser* case when describing it as requiring a high level of care and a high level of trust. That case was dealing with pharmaceutical products and here the Commission submits that health supplements such as deer velvet powder are of a like kind. *Commerce Commission v GlaxoSmithKline New Zealand Ltd* (a decision of District Court Judge Gittos) is also argued to be on point.[152]

[294] The prosecution case is that the offending involved deliberate actions by the senior management/directors of the company who knew the product was labelled as containing capsules with a certain weight of deer velvet. The first defendant's director Mr Carline, assisted by director Ms Hewitt, instructed its contract manufacturers to

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150 *Commerce Commission v Reckitt Benckiser New Zealand Ltd* [2017] NZDC 1956.

151 *Commerce Commission v The Warehouse Limited* DC Auckland CRI-2008-004-11407, 27 February 2009.

152 *Commerce Commission v GlaxoSmithKline New Zealand Ltd* DC Auckland CRI-2006-004-503913, 27 March 2007.

put a lesser weight of deer velvet powder into each of the capsules than was stated on the label.

[295] In the terms of the *LD Nathan* decision, the Commission submits that the Court has to make a decision as to whether the offending was inadvertent, careless or deliberate. Using the *Steel and Tube Holdings Ltd* case the Commission notes the defence position that Mr Carline held a genuine belief that the deer velvet product was "good if not better". Mr Dixon for the Commission submitted that both directors of the first defendant knew of the mislabelling, and that Mr Carline's belief that the quality of the powder was improved is not a relevant sentencing consideration as it is quite simply accepted in the agreed summary of facts before the Court that Ms Hewitt knew; her knowledge can be inferred to the company as was particularly accepted by Ms Ablett-Kerr on behalf of the defendant during the course of the hearing. Mr Carline, acting as a director of the defendant company also knew, because he was giving the specific instructions to the manufacturers, by way of the first defendants specifications. It is submitted that it is clear from the summary that he knew what he was doing. Mr Dixon submits that in Mr Carlines evidence he attempted to justify his actions by arguing that the deer velvet contained more protein, and on the basis of that, his actions were both "knowing and deliberate". By having regard to the summary of facts, it is submitted that both knowledge and deliberate actions on the part of Mr Carline is made clear. This submission relies on the combination of the following facts: the differing amounts powder to was be put in each of the various batches that were the subject of specification by Mr Carline; that there never any no advertising or communication to the consumer about the nature of the "cryogenic process" and the claim of an improved powder as it is described by Mr Carline; and neither the process nor the change in powder was ever mentioned to the Commission until very late in the overall prosecution process. The addition of more carob was inserted to cover up the actual position as to the amount of deer velvet powder in each capsule. Further in relation to the issue of "knowledge", the Commission submits it is important that the Court to take note that labels were continued to be ordered showing more amounts of deer velvet as in each capsule than the actual specifications for each of the various batches were instructing the manufacturers to put into each capsule. Counsel for the Commission submits that Mr Carline's 'belief" is not a relevant factor in respect of

the issue as to his deliberate conduct, and indeed, supports the argument that his actions were deliberate

[296] The Commission submits that the court can infer from the overall evidence the potential harm caused by such deliberate actions. Unwitting consumers were being exposed (on Mr Carlines evidence) to a scientifically untested product; the consumer did not get as much deer velvet as then consumer had paid for; and the evidence of nosebleeds (which has been discussed earlier). The Court is asked to also take into account that there were 22 batches over approximately four years; and as noted in the summary of facts a reduction in the costs incurred by the First defendant and the possible generation of unlawful profits.

[297] The Commission submits that the "Haines report" and Dr Haines evidence can be put to one side as Dr Haines tested a different powder which did not contain any carob filler and he did not test the efficacy of the powder. In relation to Dr Haines' evidence the Commission's position is that neither the report nor the evidence supports an argument that the deer velvet product was superior in that Dr Haines tested a different powder that what was being sold by the first defendant; it had been heat dried and that Dr Haines accepted that would affect the overall position. The submission is made that most of the powder was different to what Dr Haines tested and there had been no test made of the earlier product, that is, the product previously sold as against the product then being put in the capsules. The product tested by Dr Haines was product in its purest form, without filler, and not the powder plus carob that was being sold. He could not give an opinion regarding the efficacy of the product, although he could say there had been less damage to the protein.

[298] Mr Dixon submitted on the basis of the *Steel and Tube* authority and the detailed percentages in relation to inadvertent offending; careless offending; and deliberate offending that level of knowledge is an important factor in fixing the starting point. He submits the first defendants' actions as deliberate conduct on that basis. He refers to paragraph [46] et seq of Duffy J's decision in *Steel and Tube* where Her Honour discusses the lower Courts assessment of the level of that company's culpability by considering whether the actions of the technical manager of the defendant company could correctly be described as "a conscious decision to deviate".

Mr Dixon submits that in this case that there has been such a decision made which directly relates to the level of culpability of the company.

[299] In *Steel and Tube* the assessment of the Judge at first instance included His Honour having regard to the actual state of mind of the Board of Directors in the conclusions he reached. In the High Court in *Steel and Tube,* Duffy J assessed that the Director's "blind reliance" amounted to gross negligence, rather than deliberate action.[153]

[300] In relation to the s 47 offending the Commission submits that this offending was a deliberate attempt on the part of both defendants to obstruct and frustrate the Commerce Commission investigation It was deliberate and calculated both in relation to its action over the period (or inaction would be a better description) and the withholding of documents.

[301] It is the Commission's submission that the statements on the product containers relating to the volume of the deer velvet are central to the overall positioning of the fine within the deliberate offending band. It is the Commerce Commission's case that the statements are clearly false, because the product bottles claimed a certain amount of product per capsule which they did not contain in fact; and as has been previously stated the amount varied between 12% to 33% less than what was claimed. Counsel for the Commission submits that consumers are still not aware that they paid for a quantity of deer velvet which was not actually contained within the product. It is submitted that there were serious public health risks; food adulteration is always looked upon seriously and this can damage the market as a whole. It is noted there is a general inability for the consumer to evaluate the credence of the labelling claims; on the degree of wilfulness, the commission submits it was wilful and deliberate as clear instructions were given to manufacturers of what they were to do, and the labelling and the website continued to advertise the amounts as stated on the labels in the knowledge that it was not correct; the products were marketed nationwide, over four and half year period; a separate decision was made by the directors of the company on each batch; the company retailed the products over the period for

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153 *Commerce Commission v Steel & Tube Holdings Limited* [2019] NZHC 2098 at [54].

approximately $5,000,000 and saved approximately $1,200,000 in deer velvet that it could use in other batches, and the company made no efforts to correct the position.

[302] Counsel for the Commission considered a number of authorities in arriving at the starting point that Mr Dixon argued for.

[303] The starting point selected by Judge Ronayne in *Commerce Commission v Budge Collection Ltd*:[154]

> It is self- evident that the Court must reflect Parliament's intention in the approximate threefold increase in penalties although to do so does not require a simple multiplication of what might otherwise have been the starting point under the previous regime. Nevertheless, on any analysis, a substantial increase to sentencing levels is called for to reflect Parliament's clear intention.

[304] Other authorities discussed were;

(i) *Commerce Commission v Topline International Ltd,*[155] *and*

(ii) *Commerce Commission v Frozen Yoghurt Ltd*.[156]

[305] In its discussion on *Topline* the Commission noted that the charge in that case related to the question of imported honey being described as coming from New Zealand. It described honey as a "credence good" – and it is argued by the Commerce Commission to be similar to deer velvet in that regard. The Court noted that one of the FTA's purposes is:[157]

> To ensure that consumers know what product they are buying because they cannot check the quality and source of the product themselves.

[306] And:[158]

> Deterrence must be a principal sentencing factor and consequences need to be imposed to discourage commercially unethical behaviour.

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154 *Commerce Commission v Budge Collection Ltd* [2016] NZDC 15542 at [38].
155 *Commerce Commission v Topline International Ltd* [2017] NZDC 9221.
156 *Commerce Commission v Frozen Yoghurt Ltd (in liq)* [2016] NZDC 19792, (2016) 14 TCLR 420.
157 *Topline*, above n 155, at [27].
158 At [26].

[307] In *Frozen Yoghurt* there was a finding that the conduct in relation to the matter was a significant departure from the truth when the claim was made that it was yoghurt, when it was not.

[308] In *Commerce Commission v Reckitt Benckiser New Zealand Ltd,* (which related to packaging and advertising and where the finding was that the conduct was grossly misleading and highly careless) the Court said:[159]

> A consumer is entitled to accurate packaging and marketing of products; particularly products a consumer is more likely to purchase when unwell and in a vulnerable state.

[309] In *Commerce Commission v The Warehouse Ltd* there was deliberate conduct in a deviation from the actual percentages of goose and duck down in duvet inners.[160] The starting point imposed in that case was sixty percent of the maximum $200,000 fine – a fine of $120,000. Mr Dixon submitted that in this case the admitted actions are more serious and that the actions were deliberate from the outset and over a longer duration and the profit that had been obtained from it was far greater.

[310] In *Commerce Commission v GlaxoSmithKline New Zealand Ltd* (the "Ribena case") the Ribena drink was found to not contain any measurable quantity of vitamin C. The inadvertence of the advertising to the contrary was due to inadequate testing procedures; the company had made significant efforts to remedy the situation when it came to light.[161] The fine starting point was $325,000.

[311] Commerce Commission v Campbell had a starting point of $225,000 for deliberate conduct in sustained offending.[162]

[312] Mr Dixon submitted that the *Topline* decision was the most comparable; both company were small to mid-size New Zealand companies; deliberate representations which were untrue were being made and knowingly untrue, related to ingestible products over a four year period (the same here) and the culpability in *Topline* was

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159 *Commerce Commission v Reckitt Benckiser New Zealand Ltd* (2017) NZDC 1956 at [24].
160 *Commerce Commission v The Warehouse Limited* District Court Auckland, CRI-2008-004-11407.
161 *Commerce Commission v GlaxoSmithKline New Zealand Ltd* DC Auckland CRI-2006-004-503913, 27 March 2007.
162 *Commerce Commission v Campbell* [2017] NZDC 22290.

high. The *Frozen Yoghurt* case was less serious. In relation to *Reckitt Benckiser* not deliberate but the fines (and the profits) were higher.

[313] In regards the starting point for the s 47 offending, the Commission notes the following authorities. In *R v Love Springs Ltd,* the charge related to probative evidence being withheld initially. The Court set a starting point of $20,000 with a discount of 25 per cent in the circumstances, including a guilty plea of fifteen per cent, and end fine of $15,000.[163] In *Commerce Commission v Twenty Fifty Club*, the company and its directors were charged.[164] The director of the defendant company had been belligerent in his communications and unable to accept the fact of the investigation and the prosecution, was given multiple chances; the Court considered the company should be fined towards the "upper end", and the starting point was $15,000, in relation to each charge under ss 47J and 98 of the Commerce Act 1986. With a totality assessment this was reduced to $10,000, the director was fined $5,000 on each charge. In *Commerce Commission v Koppers Arch Wood Protection New Zealand Ltd*, a s 98 notice under the Commerce Act was breached. There was an agreed position very close to the maximum of the offending relating to patently false statements made as to where the relevant documents were that had been hidden.[165] In *Commerce Commission v Aerolineas Argentinas SA Limited*, it was held not to be a serious failure to withhold but not accepted that it was a simple administrative oversight. The starting point was just over half the maximum penalty at $16,000.[166]

[314] The Commission submits that in this case with it particular set of circumstances that:

(a) The offending was intentional;

(b) Was designed to obstruct and hinder the investigation;

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163 *R v Love Springs Ltd* DC Auckland CRI-2012-004-11695, 11 December 2013.
164 *Commerce Commission v Twenty Fifty Club Ltd* [2016] NZDC 7242.
165 *Commerce Commission v Koppers Arch Wood Protection New Zealand Ltd* [2009] NZCCLR 1.
166 *Commerce Commission v Aerolineas Argentinas SA* DC Auckland CRI-2008-004--11467, 21 January 2009.

(c) A higher starting point than *Love Springs* and *Twenty Fifty Club* but is comparable to *Koppers Arch Wood Protection*;

(d) Even careless breaches attract starting points towards the middle of the range; and

(e) A starting point for the company in the region of $25,000 is appropriate.

[315] In relation to Mr Carline it is submitted that there is a high level of seriousness in his admitted offending and the starting point should be $8,000. The only mitigating factor that the Commerce Commission suggests could be claimed is a reduced guilty plea discount between five per cent to ten per cent, albeit that the pleas were not entered until the morning of the trial, and that he faced a strong case against him; no remorse and a general uncooperative attitude.

[316] Overall in respect of Mr Carline, it is submitted by the Commission that:

(a) His "belief" was unreasonable, and he continued to order labels containing the incorrect statements as to the amount of deer velvet within the product;

(b) It is submitted that there was "harm" through unscientifically tested powder being sold to unsuspecting consumer who were not in fact getting as much deer velvet powder as they would have understood they were purchasing and consuming;

(c) A higher charge was being demanded for a product said to contain "pure" deer velvet, when it was not that in fact that level of product;

(d) That it was over a four and ½ year period straddling the increase in penalties and the global starting point of $350,000 - $400,000 is called for:

(e) In relation to the Lee argument raised by Mr Carline, Counsel notes that two other contract manufacturers did not have any such argument and they were instructed to put less powder in their capsules;

(f) The capsules bottles were advertised as containing "traces of carob" when in fact it could contain up to 100 mgs of carob;

(g) Eleven million capsules sold, all with knowledge that consumers had no way of checking the correct position;

(h) Mr Carline was in charge of the communications with the commission requests for information which was not supplied; notices issued; not complied with for over one year, then the search warrant issued. It is submitted he maintained his obstructive and hostile attitude and claims that Mr Lee had "insiders" in the Commerce Commission being one of his claims: and

(i) As a result of the issue of the Search Warrants a significant number of documents were found.

[317] The overall position put to the Court by the Commerce Commission was that on the authorities a starting point of $350,000 to $400,000 represented an appropriate level of penalty taking into account the nature of the offending.

Submissions of Counsel for the Defendants on Sentence.[167]

[318] The defence position is that the defendants through Mr Carline never had any intention to mislead the public in relation to the first defendant's deer velvet products. I have made a finding on this point.[168]

[319] The submission is that the first defendant produced and sold a superior product wherein the active ingredients were significantly enhanced and that therefore, the consumer received no less in value of money but received an enhanced product. It is

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167 Submissions of counsel for the Defendants on Sentence, 25 February 2018.
168 See finding on Disputed Fact 3 at [156].

accepted that the labelling "should have been refined", but the defence rejects the Commission's submission that the First defendant reduced the milligrams of deer velvet within its products simply to deliberately mislead the public for unlawful profit.

[320] In relation to the s 47J offences, whilst the summary of facts is accepted the defence submits:

(a) The manner in which the Commission interacted with Mr Carline provided a breakdown in any working relationship;

(b) Rumour mongering of the investigation prior to the First defendant being advised of it led Mr Carline to believe that someone at the Commerce Commission had breached confidentially;

(c) The Commission refused to identify the complainant; that Mr Lee is an individual seeking 'revenge 'for the earlier legal action and that this fed into Mr Carline's "sense of injustice" and his belief that the investigation was biased;

(d) Specific details of the complaint that had been made were not made known to the defendants;

(e) The Commerce Commission already held the material they were asking for as they had obtained it from Mr Lee;

(f) The First defendant has been in business for 40 years producing other products but including the production of deer velvet supplements. It is the submission of the defence that deer velvet produces one quarter to one third of the revenue of the company;[169]

(g) That the new cryogenic process enhanced the availability of the active ingredients which became "commercially viable around 2010";

[169] See finding on issue 4 at [168].

(h) That Mr Carline believed the deer velvet was twice as effective as the earlier product and therefore one would require half as much product for the same effect; and

(i) The arguments between Silberhorn/Mr Carline on one side and Nuvita/ Mr Lee on the other side, and the resulting civil litigation and its result were relevant to the s 47 offending by both defendants.

[321] Other submissions made by Ms Ablett-Kerr on the factual issues are that the defendants were first approached by the Commission on 23 May 2014, and Mr Carline was aware of rumours that were circulating by that time; in May the Commission wrote to the defendant seeking information and after that the Commission and Mr Carline relationship became a tense and non-productive communication process. In paragraph [27] of her written submissions Ms Ablett-Kerr argues that the interview of Ms Hewitt and her statement to the Commission on 21 September 2015 and copies of her emails to Mr Lee provide the basis of much of the prosecution case; no similar interview was arranged or asked for with Mr Carline.

[322] Counsel for the defendants argue that the guilty pleas entered were entered not on the basis that there was any intention to mislead, but only on the basis that charges were strict liability charges and the labelling was incorrect. It is important that no such conditions in respect of the guilty pleas was made to me when the pleas were entered by Counsel on behalf of the first defendant.

Scientific Research

[323] Ms Ablett-Kerr submitted that the Haines Report provides a scientific basis and support for Mr Carline's belief that his new deer velvet process allowed his product to have more active ingredients than the company's previous systems of product manufacture. In support of this, it is submitted:

(a) The new process is described as a "novel" processing method, granting benefits to the powder so produced when compared with other methods of manufacturing i.e. less damage to the proteins;

(b) That tests could have been conducted to ascertain the quality of, and the active ingredients within, the deer velvet powder and that milligrams calculations are described as a "crude and poor tool for the measurement of deer velvet;"

(c) That carob is a recognised manufacturing aid. It is acknowledged in the defence submissions that some people have allergic reactions to carob. The label advises that carob may be present, as a matter of health and safety, but was not intended to convey a measurement. It was certainly not a "deliberate act of commercial deception;"

(d) That in relation to the product containing 66% to 88% deer velvet when the label represented 100% deer velvet that the disclosure alleges that 12 out of the 22 batches which are the subject of charges, contained 88% deer velvet and only two batches contained the lowest figure of 66.7%;

(e) That Silberhorn (the first defendant) stands by its claim that the deer velvet powder component of the product i.e. 88% was pure deer velvet as opposed with being mixed with deer blood, as in the case of other deer velvet products;[170]

(f) That the prosecution, in regard to the various labels on the products intended to mislead claims capsules said to contain 250mg or 300mg of deer velvet were containing between 30mg to 100mgs less deer velvet than that. It is submitted half of the 22 batches were in the range of 12%;

(g) That for the 300mg product 100% deer velvet powder and the claim that it did not the submission is made that the deer velvet powder supplied by Silberhorn was free from additives unlike some of the other company's deer velvet powder analysis in the Haines' Report which contained filler;

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[170] Note the Agreed Summary of Facts at [9].

(h) That it is acknowledged the directors have overall responsibility for the labelling and compliance but that the offending is submitted to be technical failures on the part of the company to adequately label the products. There was no intention to mislead; no harm has been occasioned to the customer/consumer who received at least the equal to but more likely an improved product.

Principles, Purposes and Gravity

[324] Ms Ablett-Kerr refers the Court to ss 7, 8 and 9 of the SA as important, particularly s 8:[171]

(a) The gravity of the offending;

(b) The seriousness of the offence;

(c) Consistency; and

(d) Circumstances of the offender.

[325] And submits that:

(a) The offending was not intentional and not intended for financial gain;[172]

(b) There is no evidence that the consumer received a product with less active ingredients. It is submitted that the gravity of the offending and the degree of culpability is very low;

(c) The seriousness of the case is low, as it is a 'fines only offence', albeit that the maximum fine is high;

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171 It would appear that they are the principles in *LD Nathan* and *Steel and Tube.*
172 See finding on issue at [250].

(d) Consistency in sentencing in cases of similar circumstances is important but here the circumstances are unique, in that the consumer has not been harmed or disadvantaged as they have in other cases;

(e) Defence Counsel submits that the Commission has visited issues of harm and disadvantage in other cases where warning letters were sent to offending companies such as Manuka House New Zealand Ltd; Air Foam Wall Insulation Ltd; Tegal; and Inghams and the submission is made at paragraph [52.8] that there is a general desirability of consistency with appropriate sentencing levels and then "other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances";[173]

(f) The Court must, in the terms of s 8(h), take into account any particular circumstances of the offender;

(g) The defence takes argument with the summary of facts and the submissions made by the Commission in its sentencing submissions. Particularly the defence submits that there was not a complete departure from the truth and the Commission's submissions in relation to the untruthful nature of the statements, the degree of wilfulness or carelessness, the degree of dissemination, the prejudice to consumers are described as being "without foundation and with a misconceived view of what has occurred". The defence submit it was not wilful or deliberate offending and was not intended to short-change the consumer;

(h) Argument is taken on dissemination being nationwide. Only those who went to the website or chose to read the fine print on the bottle would have been misled; and

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[173] Defence submissions on Sentencing at [52.8].

(i) Paragraph [56] of the summary of facts is said to be misrepresented by the Commission where the Commission argues that $1.2 million worth of deer velvet was able to be used for other products.

[326] I note that Paragraph [56] of the summary of facts says:

> The mislabelling enabled the defendant to reduce some of its input costs. In addition, the conduct meant that there was additional deer velvet powder potentially available to produce additional product for retail sales. The potential sales from the additional available product, were to be utilised by the defendant, having amounted to approximately $1.2 million.

[327] In its original submissions the prosecutor submitted that Silberhorn thereby saved $1.2 million worth of deer velvet powder, which it was able to use to produce subsequent batches of deer velvet capsules.[174] This is described as a misleading description of paragraph [56]:

> It is submitted in paragraph [61] that the defendants immediately corrected their labels when the error was pointed out to them; (I do not accept that submission correctly reflects the evidence of Ms Hewitt who said she spoke to Mr Carline about the labels stating more deer velvet powder than what was being put into the capsules and that he had told her that the product was a better quality deer velvet and that 'we didn't need as much'. NOE page 70 line 16 onwards.) The Commission did not take any steps to require the First defendant company to withdraw the product or to stop using the labels;

Guilty plea credit

[328] The guilty plea was tendered after the Commission indicated the ss 10 and 13 allegations against Mr Carline were to be withdrawn. The guilty plea by Mr Carline to the s 47 offending had its own very distinct background. The defence submit a discount of 20 per cent for the guilty should be given as pleas could not be entered until the Commission indicated to the Court that the ss 10 and 13 charges against Mr Carline were to be withdrawn. It saved eight weeks of trial.

[329] The regulator (MPI) had not raised any issues about labelling. In these circumstances I do not see how MPI could be aware of the issues that are the background to this prosecution.

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174 At [5.20].

The s 47 charges

[330] The Commerce Commission claims that Mr Carline was obstructive and hostile. Mr Carline who accepted the responsibility to answer the request of the Commission says that the Commission failed to act in good faith and was biased: the reasons for this claim are said to be:

(a) The Commission refused to tell Mr Carline who the original complainant was;

(b) The Commission did not provide specifics to Mr Carline about the allegations;

(c) The Commission requested a large amount of documentation that it already had;

(d) The Commission failed to invite Mr Carline to sit down with the investigator at the earliest opportunity; and

(e) The Commission staff did not treat Mr Carline with courtesy and respect.

As to penalty

[331] It is submitted the penalty sought is unrealistic and unsupported by the circumstances of the case as this case is patently less serious than other cases; and there is clear and reliable evidence to support the belief by the first defendant and Mr Carline that they were providing a better product for the consumer and did not cause harm to the consumer.[175]

[332] There are a number of submissions being made by the defence which are against what has been accepted in the what I understood to be an agreed summary of facts.[176] The defence position is put as:

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175 See ruling on this issue at [156].
176 Submissions of counsel for the Defendants on Sentence, 25 February 2018.

> [12] The essence of the submissions filed on behalf of the defendants was that, while they accepted that the labelling should have been refined, they rejected the submission that the reduction in the milligrams of deer velvet the product was intended to mislead the public nor was it intended to achieve an unlawful profit.

[333] And:

> [13] The defendants' position is that they generally believed that the deer velvet powder contained in their product had been improved by the cryogenic process that Mr Carline had been working on over a substantial of time.

[334] The submissions then contain an explanation as to why the Court then held an extensive disputed facts hearing where Counsel for the two opposing parties could not agree on what facts are in fact disputed.

[335] The wording of the charges themselves needs to be considered, that is that the company engaged in conduct that "was liable to mislead the public as to the nature or characteristics of goods".[177] The Commission's position is that the offending was clearly deliberate and done with knowledge as it was clear on the evidence that Mr Carline had knowledge of the labels not being accurate. Counsel for the Commission submits (which is in accordance with the Courts factual findings) the mislabelling occurred knowingly and was deliberate, in that the First defendant through Mr Carline knew that the labels were not accurate because the product manufacturers had been specifically directed to underfill the capsules.

[336] Mr Carline continues to deny the labelling was intended to mislead or that the consumer would have been short-changed.[178] The submission is made that consumers of deer velvet product are not paying for an amount of powder but paying for "a substance with perceived health benefits". Ms Ablett-Kerr argues that the Haines' Report is a "validation" of the belief held by Mr Carline not the "origination" of it.[179] Ms Ablett-Kerr submits that the disputed fact was in reality "does the new process result in a product having more active ingredients."

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177 Fair Trading Act 186, section 10.
178 See findings on this issue.
179 Defence submissions at [34] – see findings.

[337] The defence argue in these submissions that there should have been a full financial analysis, and that the witness who gave evidence as regards to the amount of deer velvet revenue was not a forensic accountant. In my view there was no need for such a forensic analysis as I have earlier found.

[338] Ms Ablett-Kerr accepts that Mr Lourie for the Commission found Mr Carline to be hostile and suspicious. That is described as being "not surprising" but any suggestion of racism on the part of Mr Carline is rejected. It is suggested that a more "sensitive" approach could have brought a different response. There is also the issue of rumours circulating and being advised of this by one of the people he was using to promote the product. There is no evidence before me on this or attributing that to the Commission.

[339] In Ms Ablett-Kerr's oral submissions at the hearing on the 16 September 2019 she, stated that the defendant Mr Carline is a man who has stood on his principles; reminded the Court that the ordinary law in relation to sentencing is that which applies in all cases; questioned whether there was a need to have a disputed facts hearing; that the prosecution wishes the Court to accept that knowledge equals wilfulness, knowledge equals intention; and that is where the dispute is, the approach taken by the defence is that there was no intention to mislead. She submitted that equating knowledge with intention is a 'dangerous thing' because knowledge does not equate with the intention the prosecution allege, i.e. an intention to commit an act for the purposes of deceiving the customer (the charges do not and need not allege an intention to deceive).

[340] In relation to the issue raised in submissions that the first time Mr Carline talked about the 'new process' was the 23 February 2018. It is accepted that the defence indicated that there was an argument to be made at sentencing on the basis of a process and that material would be supplied in due course. The trial date was adjourned. The defence position is that the prosecution was aware of this new process from the time Mr Lourie spoke with Mr Lee in 2014. The defence deny that Mr Carline held back information about the new process until February 2018.

[341] Where persons (often directors) are charged with being a party to an FTA offence under s 66 of the Crimes Act 1961 and the relevant FTA provision, the offence will require proof of mens rea despite the substantive FTA offence being of strict liability when charged individually.[180] This mens rea requirement, means knowledge of the falsity of the representation. The prosecution would not have had to prove that there was an intention to deceive customers. The prosecution would have had to prove that Mr Carline knew, and he encouraged or assisted the company, intentionally helped the company make the false representation. I do not accept Ms Ablett-Kerr's submission that the intention put by the prosecution was an intention to mislead the public for the purposes of obtaining an unjust reward or financial benefit, or where she described it as being "that's exactly what we are dealing with here."[181] The defence argument is that what happened was an error and as a result there is low culpability, but high consequences.

[342] Referring to the *Megavitamin Laboratories* case, (particularly page 18) and Tipping J comments about vitamin Ms Ablett-Kerr argues that it was a pharmaceutical product that was being dealt with in the *Nurofen* and *Maxiclear* cases, but that deer velvet is a different kind of product. That what it does have in it or does not have, its use or whether it performs what its manufacturer says it performs does is not the issue. It is a strict liability offence. In terms of the weight of the product in each capsule it was different from what was stated on the label. But the prosecution does not have to prove the product has been wilfully mis-described with the intention of gaining an illegal profit. The difference in this case she submits is that the mislabelling was done carelessly and inadvertently, not wilfully. I have earlier made factual findings that the actions by the and on behalf of the first defendant were not careless or inadvertent but were deliberate.

[343] I accept that Mr Carline passionately believed in the deer velvet product. Ms Hewitt gave evidence in support of that. She was aware that he had developed this cryogenic process and that he wanted to produce a top quality product. Ms Ablett-Kerr brings to account in her submissions, the evidence of Parsons and Dr Haines, and

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180 *Commerce Commission v Steel & Tube Holdings Ltd* [2019] NZHC 2098 at [72]; see *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 6 TCLR 231 (HC) at 245; see also *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836.

181 Defence submissions page 85, line 12.

submits this passion is relevant to his motivation, the reason why he did what he did. Mr Carline in his evidence talked about the history of what occurred and while the defence accepts he was "unhelpful", and that he "didn't do what he should have done, and that there is no remorse" the Court should have regard to all his evidence[182] and note that Mr Carline says he did not instruct counsel in the matter until much later in the investigation .[183] Ms Ablett-Kerr submits that although cooperation was important and that it had not happened the telephone conversation with Mr Lourie, Mr Carline was reasonable before it very quickly got worse. He had been told by one of his endorsers about the rumours circulating and there was some foundation to the rumours. He had been subjected to an established fraud, of nearly $500,000 from the person who had made the complaint which he considered was revenge. It is submitted that he had nothing to hide as he was doing "right by the consumer." It is submitted he was a man who was passionate about his product who had suffered a significant loss and he reacted accordingly. (The submission overlooks the evidence which I accept that establishes that at the time he was not complying with the requests for the information he knew that the substance of the complaint was true.)

[344] In relation to Mr Carlines evidence about Māori insiders in the Commission's investigation and that he accepted he believed that Mr Lee and Ngā Puhi insiders within the Commerce Commission were conspiring to undermine his brand, Ms Ablett-Kerr submitted that this is part of what was going into this man's mind at the time he was being asked, i.e. to deal with the fact he had been defrauded; dealing with the Commission's inquiry over the brand that he was passionate about. Ms Ablett-Kerr stressed Mr Carline is a man who does a lot for his community, who has developed other businesses. She submits he not intend to make any racial overtones and there was no racial bias on his part.

[345] The documentation was not taken away from Invercargill in order to hinder or to delay, or to conceal. It is submitted he had been aware of the investigation since the 23 May 2014, some eighteen months earlier. There was no attempt made to destroy the documents. It is submitted that the information is only a "replica" of what the Commerce Commission already had, and consistent with the behaviour of the

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182 NOE, page 441.
183 NOE, page 432 onwards.

company the documentations was there on display which included retained product samples. He did not hide anything; all the records were kept.

[346] Ms Ablett-Kerr refers in her sentencing submissions to Tipping J in the *Megavitamin Laboratories* and the *mens rea* and three stage process. My earlier findings on Mr Carline vis-a-vis the first defendant having acted deliberately answer the argument. Mr Carline evidence under cross-examination is put to the Court, where Mr Carline said that: [184]

> A: …the point that I am making is that is that it's a disputed labelling rather than, rather than anything else.
>
> Q: But you've accepted the company has accepted that its conduct was liable to mislead, you understand that?
>
> A: I haven't accepted that no. I am not aware that I accepted we were misleading.

[347] The submission is made that the case for the prosecution is "fundamentally flawed" because the consumers of the deer velvet product are not paying for an amount of powder, they are paying for a substance with "perceived health benefits". They are paying for active ingredients. Mr Carline's evidence was that he was producing a product that had better active ingredients and that's what they were paying for.

[348] Ms Ablett-Kerr submits that Dr Haines Report validates that belief, it did not originate the belief. I have discussed and made findings earlier on the Haines report and Dr Haines' evidence. I do not repeat it at this stage other than to say I have taken Ms Ablett-Kerr's submissions in this regard into my considerations as to the appropriate level of penalty.

[349] Ms Ablett-Kerr made a submission that Mr Lourie is not a forensic accountant and had only taken one year of the company's financial reports and some generalised figures. (In fact he had taken two years of financial reports into account.) She criticises the prosecution for not having conducted an analysis of the accounts but in the end it is a matter for me to decide upon the evidence that I do have.

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[184] NOE, page 447.

[350] The starting point submitted by the prosecution of $350,000 - $400,000 is submitted to be unrealistic. Ms Ablett-Kerr discusses the case of *Commerce Commission v Farmland Foods Ltd* where the gross profit was $670,000 and the imposed penalty was $180,000 being a quarter of the gross profit.[185] In that case, a gross profit $670,000 with a fine of 25 per cent seemed about correct in Ms Ablett-Kerr's submission. Mr Dixon for the Commission notes that in that case the actions of the defendant were held to be highly careless rather than deliberate and over a period of three years. Mr Dixon submits that in this present case the retail value is approximately $5,000,000 with the excess deer velvet potentially available for sale having an approximate value of $1,200,000.

Penalty Decision – s 40 Fair Trading Act Charges

[351] I agree with District Court Judge Rowe in *Farmland Foods* that culpability needs to be assessed by reference to the actual offending and its blameworthiness. The blameworthiness can be categorised as careless, reckless or deliberate. The FTA has as some of its purposes:[186]

> … a trading environment in which the interests of the consumer is protected; businesses compete effectively, and consumers and businesses can participate confidently. … provides for the disclosure of consumer information relating to the supply of goods and services and the promotion of safety in respect of goods and services.

[352] I accept that the FTA is consumer focussed and requires "accurate in-trade representation". I acknowledge and accept the Commission's submission that the actions constituting the offending in this case, impacted on consumers and on competitors (to a certain extent) in that the consumer and the competitor were unable to question or test the claims made in the labels on the product containers. Indeed the revised product on the defence argument - the result of the "nose bleed test" was put on the market without proper research having first been conducted and without any advice to consumers of the change in product amount per capsule or the alleged efficacy advance.

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185 *Commerce Commission v Farmland Foods Ltd* [2019] NZDC 14839.
186 At [23].

[353] I do not accept that the established actions by and on behalf on the first defendant were as a result of omission, carelessness or inadvertence or Company negligence. Rather I have found that the actions by Company officers upon which the capsules did not contain the amount of deer velvet product that was stated on the label that each capsule did contain were deliberate and continued on for approximately four years. I hold that upon any assessment the label wording and the lesser amount of product were "liable to mislead the public as to the nature or characteristics of the goods" within each container. I also hold that was clearly within the knowledge of the first defendant through its directors Mr Carline and Ms Hewitt.

[354] The level of the fine to be imposed is to be considered under the relevant sections of the Sentencing Act 2002 (SA) – ss7,8,9, and in accordance with the factors detailed in *Commerce Commission v L D Nathan &Co Ltd*.[187]

The importance of the misleading representations

[355] The untrue representations of the volume of deer velvet powder in each capsule related directly to the consumers decision to purchase the product at the price being asked. The purchaser had decided to purchase a product that detailed the amount of the active health benefit ingredient. The product so selected and purchased/paid for did not contain the specified amount. As per the Agreed Summary of Facts the amount of variance was between 25% and 33%. I am satisfied on all of the evidence I heard and, on the summary, that this represents a serious deficiency in the actual amount of product being supplied to the consumer.

The level of blameworthiness

[356] The Commission submits that the overall conduct of the first defendant was both wilful and deliberate with definitive instructions being given to the manufacturers as to the amount of product that was to be put in each capsule and when doing this – when giving such specifications the first defendant through its Directors – knew that the labels would state that a larger amount of powder was actually in each capsule.

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[187] *Commerce Commission v L D Nathan &Co Ltd* (1990 2 NZLR 160); see [289] above.

[357] The defence argues that the mislabelling was not done deliberately and was a result of inadvertence or negligence of the first defendants management. I have held that the actions in underfilling of the capsules were deliberate acts. I have however also held that Mr Carline held a belief that as a result of a new process of treating the deer velvet his product was improved. When I have regard to Mr Carline's belief not having any proper scientific research assessment; the change in the amount of product to be put in each batch being on the evidence that I accept widely fluctuating between batches; that there was no publicity given to the change in the product or the lesser amounts being put in the various capsules, I find that the level of blameworthiness can be assessed at a moderate level.

The degree of dissemination

[358] I find that the deer velvet capsules were marketed throughout New Zealand and over a period of approximately four years. Sales were assisted to a marked degree by the use of the first defendants' website. Dissemination in my view was wide.

Prejudice to consumers

[359] The Commission submits that the batches of product so affected had a retail value of $5million and some $1.2 million value of deer powder was then left available to the first defendant for resale.

[360] The defence argue that the consumer was not prejudiced as the lesser amount of the revised product was at least as efficacious as what the previous product was with the larger amount. That argument by the defence ignores the fact that by the first defendant's deliberate actions the consumer was misled as to what was being purchased – both as to quantity/quality (which this case is all about) and on the defendant's position as to quality. I find that the deliberate conduct by the first defendant clearly undermined the above stated purposes of the FTA and therefore the consumer was prejudiced.

Impossibility of detection

[361] The amounts of deer velvet product stated to be in each capsule would necessarily have to be accepted by the consumer. The consumer (the trade competitor) had no way of checking the accuracy of the amount of powder claimed to be in each capsule.

[362] In this respect I take note of the comments of Moore J in *Budget Loans Ltd v Commerce Commission*.[188]

Deterrence

[363] This is submitted as a primary aim when assessing the quantum of a fine to be imposed on sentencing. It should, it is submitted by the prosecution, "to the extent possible exceed the possible gains" and that "the case gives rise to a need for both specific and general deterrence." Mention is made of it being a "whistle blower" case relating to otherwise undetectable offending. I have taken due note of the various submissions on this issue.

[364] I must also take into account when assessing the appropriate level of starting point that the deer velvet product is a health supplement and as such various authorities have discussed "public importance" (*Megavitamin* case); "high level of care" and "high level of trust" (*Reckitt Benckiser* case).

[365] In assessing the above *LG Nathan* factors, I place greater emphasis on the nature and deliberate conduct; the level of blameworthiness; the degree of departure from the FTA principles protected by that legislation; specific and general deterrence and the degree of harm which is difficult to assess in qualitative terms

[366] I again note Duffy J's comments in *Steel and Tube*.[189]

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188 *Budget Loans Ltd v Commerce Commission* 2018 NZHC 3442.
189 See [292] above.

Outcome

[367] I note that I have found this conduct to be deliberate and therefore in the terms of Steel and Tube a starting point of 66.7% of the maximum fine of $600,000.00 is appropriate. However, in my view there are matters which are somewhat unique to this case. Of particular importance to a starting point assessment is the belief that Mr Carline held. While I have held it is a belief he held which was not scientifically proven as has been argued by Ms Ablett -Kerr it goes in my view to some extent in mitigation of his repeated and deliberate actions. I find that he was not doing what he did over the period of four years to make windfall profits. Rather if that happened it was as a consequence rather than as a reason. I take due notice of the lack of proof that the unused deer velvet product was actually used to make such windfall profits. I accept that the commission has suspicion but not hard proof.

[368] After making such allowances that I can I consider an appropriate level of fine as a starting point is 40 per cent of the maximum; that is the sum of $240,000. I assess the fine on a global basis over all the s 10 FTA charges. There are many precedents for this approach to setting starting points where the complained of actions have been deliberate acts. On that basis there is no need for any totality assessment.

[369] The company has no prior convictions. The first defendant has been in business for many years and I take judicial notice of the company having operated in Invercargill for that lengthy period of time and I accept it has earned its unblemished reputation. I allow 10 percent credit as recognition of its previously unblemished reputation.

[370] The first defendant has not shown any remorse for its established breaches; has not taken any remedial steps as regards to the consumer or to the deer velvet industry; and did not cooperate with the investigation. Accordingly there are no other mitigating factors.

[371] With the 10 percent allowed for good character, the end starting point prior to any credit for late guilty pleas is $216,000.

[372] Guilty pleas were entered at the commencement of a trial which was expected to take some 6 to 8 weeks of court time. Such hearing time was avoided by the pleas but was followed by a disputed facts hearing where the arguments raised by the defendants were in the main not upheld. The Commission suggests a credit of between 5 percent to 10 percent for the late pleas. I consider such suggestion to be at the top of the available credit range for the guilty plea. I allow 10 percent guilty plea credit. A global penalty of $194,400. I then look at the established offending overall having regard to the factors I have discussed and the evidence findings I have made. I am of the view that the overall fine/penalty of $194,400 is the least restrictive penalty that is appropriate in this case.

[373] In respect therefore of each of the 26 representative charges for breaches of s 10 of the FTA the company is convicted and is fined the sum of $7,476.93 together with Court costs on each Charging Document of $130.00

Penalty Decision - 47J Fair Trading Act

[374] In relation to this offending the first and second defendants face charges under s 47J of the FTA. That is a failure to comply with a Notice issued under s 47G of the FTA to produce certain documents and information during the course of the investigation. The second defendant is charged as a party to the first defendants offending. The first defendant faces a maximum penalty of $30,000; the second defendant a maximum of $10,000.

[375] The Commission's case is that a request for relevant information and documentation was made in writing to the first defendant on the 26 May 2014. Most of the requested information and documentation was not supplied. On 11 September 2014 the Commission issued a s 47G Notice requiring the first defendant to provide the detailed information and documentation by the 2 October 2014. The Notice was marked for the attention of the second defendant. The Notice was signed for by a member of the first defendant's staff on 12 September 2014.

[376] Mr Carline acknowledged receipt of the Notice on 1 October 2014 but made allegations about the investigation and failed to provide the required information and documentation. On the 18 December 2014 the Commission advised the defendants

that they were at the risk of prosecution and asked for the required information to be supplied by 18 January 2015. Only limited information was supplied on 12 January 2015 and further communications to the defendants on the 13 February 2015 and 28 April 2015 did not have the desired result. Mr Carline disputed the failure to comply and said some of the documents had been lost in a server crash and raised other matters. Following the filing of charges Search Warrants were obtained and as a result of the searches then conducted were found at the first defendants business premises in Invercargill and at the second defendants home address at Waiuku.

[377] The defendants' Counsel submitted, despite the Accepted Fact Summary, the various issue detailed in paragraph [330](1)-(5) of this decision give the full background to this offending by the defendants. Whether the Commission had obtained some of the requested information from other sources or that specific details of the complaint were not made known to the defendant, is in my view irrelevant to the duty the FTA puts upon persons in these defendants' shoes under s 47G.

[378] In my view, the evidence and the various exhibited copies of correspondence between the Commission and the defendants quite frankly makes it very clear that the defendants through Mr Carline had decided to take the path of ignoring the requests and the Notice requiring the production of certain information that they had been requested to supply on a number of earlier occasions. The inference that is open for the Court to draw is that Mr Carline realised what the provision of the required information would mean. I have already discussed the issues relating to the allegations of bias and other attitudes of the Commission to Mr Carline and have held that the Commission through its staff members did not act in a manner towards Mr Carline as was alleged. Mr Carline in my decision was the person who took the particular "anti" attitude throughout the investigation. Not the other way round.

[379] In all my assessment of culpability in relation to these two charges is that it was the second defendant Mr Carline who was in reality solely responsible for the deliberate failure of the first defendant to comply with the s 47G Notice. He did so in full knowledge that a prosecution might very well follow. I do not accept that his

alleged "sense of injustice" or his belief in a "biased investigation" has a base in factual reality.

[380] I consider his culpability is at the very high end of such offending. The starting point for his fine is $9,000. There are no personal aggravating circumstances. In personal mitigation I accept he can claim for his previous good character and I note his background in the community. I allow 15 per cent i.e. the sum of $1,350. Again, the plea was let but he did plead guilty prior to trial. I allow a further 10 percent for the plea. Mr Carline the second defendant is convicted and fined the sum of $6,885.

[381] In relation to the first defendant while I accept it is a separate entity to the second defendant he was at all relevant times to the s 47J charge personally controlling and deciding the way in which the Commissions' request for information was actioned (or not actioned). While I accept that the company could be separately fined I am concerned to ensure that there is no double counting of the penalty. To impose the suggested penalty on the first defendant when it is the second defendant who is solely responsible and who was the driving force and mind of the first defendant, would in my view be wrong. The First defendant is convicted and discharged upon payment of Court costs of $130.00

Costs

[382] Finally, the question of a costs order has been raised and I indicated that I would deal with that application after releasing my primary decision. My initial view is that costs should lie where they fall. If a costs order is sought, then I direct that submissions are to be filed within 10 working days of the release of this decision. I will deal with any such application on the papers.

_____
Judge KJ Phillips
District Court Judge

Date of authentication: 05/06/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

Caption Summary

Commerce Commission (Prosecutor)	v	**Gateway Solutions Limited (formerly known as Silberhorn Limited)** (Defendant)

Gateway Solutions Limited

Gateway Solutions Limited, being in trade, engaged in conduct that was liable to mislead the public as to the nature or characteristics of goods.

Act	Sections 10 and 40(1) of the Fair Trading Act 1986
Penalty:	$200,000 fine for conduct before 17/6/14; $600,000 fine for conduct after 17/6/14

x 22 batches of product

(Representative charges)

Gateway Solutions Limited, being in trade, engaged in conduct that was liable to mislead the public as to the nature or characteristics of goods **(website charges).**

Act	Sections 10 and 40(1) of the Fair Trading Act 1986
Penalty:	$200,000 fine for conduct before 17/6/14; $600,000 fine for conduct after 17/6/14

x 4 products

(Representative charges)

Summary of Facts

Introduction

1. The defendant is a New Zealand company that was, until recently, involved in the production, marketing and sale of health and dietary supplements. Ian Allan Carline is a director and 75% shareholder of the defendant.

2. During the charge period, the defendant produced a range of dietary supplements made from deer velvet. Deer velvet is derived from the growing bone and cartilage that develops into deer antlers, and is marketed as aiding a variety of health conditions as well as supporting joint mobility.

3. The charges in this case arise from the defendant's representations and related conduct regarding the amount of deer velvet and carob contained in several of the defendant's deer velvet products produced between March

2011 and December 2013.

Deer Velvet products

4. Between 2011 and 2015, the defendant sold deer velvet capsules in a number of variants, including in particular a product called Sir Bob Charles SPORTSVEL x 100, which bore the name of golfer, Sir Bob Charles.

5. The defendant marketed its deer velvet product would "*support strength, activity and joint mobility"* and as a quality and superior product with the message "*New Zealand [deer] velvet is some of the finest quality by world standards, South Island velvet is the best of the best.*"[190]

6. The defendant did not directly manufacture its deer velvet range - instead it contracted with independent manufacturers to make the products on its behalf to specifications. The contract manufacturers were responsible for blending the ingredients, encapsulating the ingredients into capsule form, and then packaging the capsules into containers in accordance with specifications and instructions provided by the defendant. The defendant was then responsible for labelling, marketing and distributing the product.

7. The relevant products were:

    7.1. Sir Bob Charles SPORTSVEL x 100 capsule bottle - 250 mg.

    7.2. Sir Bob Charles SPORTSVEL x 180 capsule bottle - 250 mg.

    7.3. Deer Velvet Capsules x 80 capsule bottle- 250 mg.

    7.4. Sir Bob Charles SPORTSVEL Red Pack x 30 capsules- 300 mg.

    7.5. Sir Bob Charles SPORTSVEL Black Pack x 50 capsules - 300 mg.

8. In 22 instances the defendant instructed their contract manufacturers to produce the capsules for these products using a lesser amount of deer velvet powder concentrate in each capsule than was represented on the labels subsequently applied to the containers of these products. To make up for the shortfall of deer velvet, the defendant instructed their manufacturers to include

[190] Taken from Product Info section of the defendant's website.

more carob (a manufacturing aide) in each capsule.

9. Thus, the labels on these products (and the website through which they were marketed) were liable to mislead the public that each capsule:

    9.1. contained either 250 mg or 300 mg of deer velvet, when, in fact, each capsule contained between 30 mg to 100 mg less deer velvet than that (a reduction of between 12 and 33.3%) - just over half (12 of 22) of the batches were in the range of 12%.

    9.2. (for the 300 mg product) comprised *"100%"* deer velvet powder, when it did not.

10. Reducing the amount of active ingredient and incorrectly labelling the products was liable to mislead consumers into buying the products under the mistaken belief that they contained a higher concentrate of deer velvet than they did. This conduct generated an unlawful profit.

11. Retailers and consumers had no means to determine the true composition of the products.

Charges

12. The charges for the products are charged on a per batch basis for the 22 batches of affected product. The charge period is from the date of production until the expiry of the "use by" date (approximately two years after manufacture).

13. There is one representative charge for each batch under s 10 of the Fair Trading Act 1986 (the **Act**).

14. In addition, there are four charges (one for each product) for representations on the website, under s 10 of the Act.

15. During the period of the charges, there have been two law changes that affect the charges in this case.

16. First, from 1 July 2013 the limitation period changed from a 3-year reasonable discoverability test to a 5-year from date of the breach test.[191]

[191] Refer to s 25 of the Criminal Procedure Act 2011 for the current limitation period test, and s 40(3) of the Fair Trading Act 1986 for the pre-1 July 2013 test.

The Commission does not consider that this impacts the charges, but out of an abundance of caution, has provided for conduct before, and after, 1 July 2013.

17. Second, the offending conduct straddles the increase in maximum penalty under the Act, which took effect on 17 June 2014. The maximum penalty for a body corporate increased on that date from $200,000 to $600,000, and the maximum penalty for an individual increased from $60,000 to $200,000. The Commission has, therefore, provided for separate charges for conduct before and after 17 June 2014.

The defendant

18. The defendant, Gateway Solutions Limited (Company No 1405127), formerly known as Silberhorn Limited, is a New Zealand company incorporated on 2 October 2003. Its registered office is at 68 Lowe Street, Invercargill.

19. Until around March 2015, it was a manufacturer, marketer and seller of dietary supplements and health products, including deer velvet, manuka honey, collagen, bee pollen, vitamins, marine and emu oil. The defendant sold the majority of its products directly to the public via mail order, telephone and through its website, as well as from its premises.[192] It also wholesaled a small proportion of the products to online and physical retailers.

20. The defendant divested its assets, including the rights to the "Silberhorn" trademarks, to a related company, without consideration, in March 2015.[193]

21. Then, on 22 December 2015, after the Commission had filed charges against the defendant under s 47J of the Act, and several days after a court hearing to determine name suppression issues, the defendant's name was changed to Gateway Solutions Limited.

The Commission's investigation

22. On 18 February 2014, the Commerce Commission received a complaint

[192] Susan Hewitt (the defendant's office manager) advised during compulsory interview with the Commission on 21 September 2015 that around 85 or 90% of the defendant's products were sold to consumers direct, with the balance sold to retailers.

[193] The Silberhorn brand was assigned on or about 5 August 2015. The defendant's annual accounts for the year ending 30 June 2014 reveal that the company had total assets of $1,723,739 at that time, prior to the assignment.

alleging that the defendant had overstated the deer velvet content of its deer velvet capsules on its product labelling.

23. As a result, the Commission commenced an investigation into the allegations to determine whether the defendant and/or its directors, agents, or employees, had breached the Act.

Manufacturing records

24. The Commission obtained purchase orders, manufacturing records, and, in some cases, packing slips and invoices relating to the defendant's orders for deer velvet capsules from the following three contract manufacturers, which the defendant had used to make its deer velvet products:

    24.1. Nuvita Manufacturing and Development Limited (**Nuvita**);

    24.2. Genesis Biolaboratory Limited (**Genesis**); and

    24.3. Vitalabs NZ Limited[5] (**Vitalab**).[194]

25. The information obtained confirmed that the defendant had specified the amount of deer velvet to be put into each capsule for certain orders/batches. Instructions from the defendant also made it clear that carob manufacturing aide would be used, which was significantly cheaper than deer velvet. Where the amount of deer velvet per capsule was to be less for a particular order, the defendant instructed the manufacturers to use additional carob.

26. All three contract manufacturers confirmed that they blended the capsules in accordance with the defendant's specifications for the duration of the offending. The contract manufacturers had no responsibility for the product labelling of the products.[195] The defendant undertook this task itself

Test purchases

27. Test purchases carried out by Commission investigators during 2014 confirmed that the defendant's product labels overstated to consumers the deer velvet content in the capsules.

[194] Formerly CM Solutions Limited, trading as Vitalab

[195] Other than marking the batch number with a small sticker on the bottom enabling the product to be traced.

Labels

28. Records obtained from printing companies that supplied the defendant with product labels or packaging during the relevant period show that the deer velvet amount for those products was stated to be either 250 mg or 300 mg. Products that were packaged at 300 mg included the additional representation *"100%"* deer velvet powder.

29. Records obtained by the Commission from label and packaging suppliers over the relevant period showed that even though the defendant was manufacturing deer velvet products to a lower specification, it continued to order labels and packaging at the higher specification.

Website

30. Snapshots of the defendant's website over the relevant period show that it was advertising deer velvet products that are the subject of these charges with the composition as shown on the labels. It was not advertising any such products matching the specifications it was giving to its contract manufacturers.

Search warrant

31. Commission staff executed three search warrants on 8 October 2015 at the defendant's business premises at 299 Dee Street, Invercargill and its registered office at 68 Lowe Street, Invercargill, and at a family's residential address at 81 Hyland Place, Waiuku.

32. During execution of the search warrants, many documents that the Commission had been seeking were found - including some at the Waiuku address. During the searches, documents pertaining to the complaint were seized, including purchase orders, manufacturing records and retention samples relating to the questioned batches.

Misleading conduct and representations - labelling on deer velvet product

33. Company documents and e-mails obtained during the search warrants confirm that the defendant was mislabeling its deer velvet products for the relevant period.

34. There are 22 batches of affected deer velvet products which are listed in **Appendix A.** For each of these batches, the defendant represented on its product labels / packaging that each capsule contained a higher amount of deer velvet than it actually did.

35. The labels / packaging also represented that each capsule "may" contain "traces" of carob, which the defendant understood was required by food safety regulations, when, in fact, the products contained significantly more than "traces" - sometimes up to almost half of the total composition.

36. Furthermore, the defendant represented on its packaging for its 300 mg products that each capsule contained *"100%"* deer velvet powder when, in fact, each capsule contained deer velvet and carob.

37. In general terms, the process by which each batch was ordered by the defendant was:

    37.1. Purchase Order: The defendant sent a written Purchase Order to the contract manufacturer specifying the type and quantity of product to be manufactured and the amount of deer velvet to be included in each capsule. The Purchase Order was accompanied by Product Specifications generated by the defendant that effectively acted as the recipe for the capsules themselves. The product specifications contemplated the use of a significant amount of carob as a manufacturing aide.

    37.2. Product Manufacture: The contract manufacturer would then blend and encapsulate the ingredients and put the capsules into unlabeled bottles or blister packs, in accordance with the specification. The manufacturer was also tasked with applying a sticker onto the product bearing the batch number and an expiry date that was, in most cases, two years {to the month) after the manufacture date. Each contract manufacturer created its own internal records relating to the manufacture of each order, including batch numbers and, in some cases reconciliations of raw materials used that was then supplied to the defendant, if required.

    37.3. Dispatch and invoicing: The product was then packaged and sent to the defendant's Dee Street, Invercargill address for labelling and

subsequent sale. An invoice was supplied to the defendant for payment.

Example Batch: Product Order 913000 I Batch number B02813 (100s and 80s)

38. Although there are differences among the various orders and batches, the following example of an order that was manufactured by Genesis provides an illustration of the process.

39. On 9 September 2013, the defendant sent purchase order number 913000 to Genesis for 250kg of deer velvet powder, of which 230kg was to be made into 220mg deer velvet capsules.

40. An associated email sent on the same day clarified that 80,000 of the capsules were to be bottled into 80 capsules per bottle and the remainder into 100 capsules per bottle.

41. The first product specification that was attached to the email had the heading “Deer Velvet 220mg.” The same document stated that the ingredients of each capsule were:

    41.1. 220mg deer velvet powder only; and

    41.2. up to 220 mg of carob as a filler, if used.

42. The second product specification that was attached to the email stated that each bottle was to contain 100 capsules, and each capsule was to contain 220 mg of deer velvet powder. The same document stated that the ingredients of each capsule were:

    42.1. deer velvet powder; and

    42.2. up to 220 mg of carob as a filler, if used (with an average fill of 100 mg "depending on the density of the powder.")

43. Genesis manufactured the capsules in accordance with the order and product specifications. Genesis allocated batch number "02813" to the order.

44. Between 18 October 2013 and 3 December 2013, Genesis sent the completed order back to the defendant. These dispatches comprised 1,115,520 capsules across the two products supplied (x80 capsules and x 100 capsules). The

defendant then applied batch stickers and product labels to the bottles, before making the product available for sale to consumers a short time later.

45. The defendant retained a bottle of labelled product (x 100 capsules) as a sample of this batch at its premises. The Commission seized this, and other retention samples, from the defendant during execution of the search warrants. The labelling on the product stated that each capsule contained 250 mg of deer velvet, not the 220 mg that was set out in the purchase order, email and product specification. It also stated that the product "may contain traces of carob." The sticker on the base of the retention sample recorded the Genesis batch number 02813, and the expiry date of "10/2015."

Other batches

46. The remaining batches that are the subject of charges are set out in the table at Appendix A.

Misleading conduct - website

47. The defendant operated a website with the domain name www.silberhorn.co.nz, which was used to market and sell its deer velvet products.

48. The Commission used the Wayback internet archive service to obtain historic snapshots of the website between August 2011 and May 2014.

49. The website included representations as to the deer velvet amount contained within the following products:

    49.1. Sir Bob Charles SPORTSVEL x 100 capsule bottle - 250 mg per capsule.

    49.2. Sir Bob Charles SPORTSVEL x 180 capsule bottle - 250 mg per capsule.

    49.3. Sir Bob Charles SPORTSVEL Red Pack x 30 capsules - 300 mg per capsule.

    49.4. Sir Bob Charles SPORTSVEL Black Pack x SO capsules - 300 mg per capsule.

50. However, at the time that each of the website representations were made, the defendant was manufacturing and selling batches of these products that contained less deer velvet than the amounts stated on the website. The defendant's manufacturing records show that they were not making deer velvet product at the specification the product was being sold at.

Unlawful commercial gain

Cost of Deer Velvet and Carob

51. The affected batches translate to over 120,000 bottles/packs of product, and over 11 million capsules.

52. During the relevant period, the retail value of the Sir Bob Charles Sportsvel deer velvet product (x 100 capsules) on the silberhorn.co.nz website was $52.00 per unit. During the same period, the Sportsvel Black Pack (x 50 capsules), was advertised on the Silberhorn.co.nz website at $40 per unit.

53. The retail value of the affected product is estimated to be over $5 million.

54. Carob retails at approximately $6.95 per kilogram, whereas deer velvet retails at approximately $95 per kilogram, plus GST.[196]

54. By using some carob instead of deer velvet, the defendant saved approximately 500kg[197] of deer velvet powder, which it was then able to use to manufacture more capsules and generate additional profit.

Unlawful Profit

55. The mislabelling enabled the defendant to reduce some of its input costs. In addition, the conduct meant that there was additional deer velvet powder potentially available to produce additional products for retail sale. The potential sales from the additional available product, were it to be utilised by the defendant, could have amounted to approximately $1.2 million.

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[196] Tina Law "Velvet even dearer as NZ matches Russian prices" www.stuff.co.nz 29 March 2014.

[197] HRS entered into a memorandum of understanding with a deer velvet supplier on 17 April 2013, in which it agreed to purchase between 4,000 kg and 5,500 kg of deer velvet at $95 per kilogram. Taking a nominal price for deer velvet of $95 per kg, this meant a cost of goods saving for the defendant of approximately $47,500.

The defendant's accounts

56. Annual accounts for the defendant for the period ending 30 June 2014 reveal that the defendant had an annual revenue of $2,585,489, upon which it made an annual gross profit of $1,554,486 from sales of all of its products, including the deer velvet products that are the subject of these proceedings.[198]

57. Between the periods ending 30 June 2010 and 2014, the value of the defendant's net assets doubled from $666,427 to $1,244,575.

Defendant's history

58. The defendant has not previously received a warning or been prosecuted for breaches of the Commerce Act 1986, Credit Contracts and Consumer Finance Act 2003 or the Act.

[198] After cost of sales, but excluding expenses and tax

Appendix 1 – 13 October 2017

Manufacturer	Purchase Order	Batch #	Date of order	Name of product	# of capsules per bottles/ cartons	Manufacturing specification requested by Silberhorn	Label specification as represented to consumers	# of bottles / cartons	# of capsules per batch
Nuvita	PO495317	B11373	3 / 03/ 2011	SBC Deer Velvet x 100	100	220 mg	250 mg	6,650	665000
Nuvita	PO495336	B11384	18/04/ 2011	SBC Deer Velvet x 180	180	180 mg	250 mg	853	153540
Nuvita	PO495336	B11385	18 / 04/ 2011	Deer Velvet x 80	80	200 mg	250 mg	7,758	620640
Nuvita	PO495349	B11410	23/ 05/ 2011	SBC Deer Velvet x 100	100	200 mg	250 mg	6,520	652000
Nuvita	PO495403	B11419	13/ 06/ 2011	SBC Deer Velvet x 180	180	180 mg	250 mg	1,517	273060
Nuvita	PO495417	B11437	14/ 07/ 2011	Deer Velvet x 80	80	180 mg	250 mg	1,500	120000
Nuvita	PO495417	B11438	14/07/2011	SBC Deer Velvet x 100	100	180 mg	250 mg	9,019	901900
Nuvita	PO495425	B11452A	9/ 08/2011	Red Pack x 30	10	200 mg	300mg	14618 blister packs (spread over x30 and x50)	146180
Nuvita	PO495425	B11452B	9/08/ 2011	Black Pack x 50	10	200 mg	300 mg	As above	As above
Nuvita	PO19725	B11484	11/10/2011	SBC Deer Velvet x 100	100	180 mg	250 mg	10,945	1094500
Nuvita	PO19741	B11525	2/02/2012	SBC Deer Velvet x 100	100	180 mg	250 mg	12,000	1200000
Nuvita	PO914184	B11639	3/12/2012	SBC Deer Velvet x 100	100	220 mg	250 mg	7,478	747800
Nuvita	PO914184	B11640	3/12/2012	Deer Velvet x 80	80	220 mg	250 mg	1,000	80000
Nuvita	PO914194	B11672	7/02/2012	SBC Deer Velvet x 100	100	220 mg	250 mg	5,886	588600
Nuvita	PO913054	B11692	13/03/2013	SBC Deer Velvet x 100	100	220 mg	250 mg	7,200	720000
Nuvita	PO913054	B11719	13/03/2013	SBC Deer Velvet x 100	100	220 mg	250 mg	3,225	322500
Nuvita	PO913073	B11730	7/06/2013	Deer Velvet x 80	80	220 mg	250 mg	500	40000
Nuvita	PO913073	B11731	7/06/2013	SBC Deer Velvet x 100	100	220 mg	250 mg	3807	380700
Nuvita	PO913081	B11744	12/07/2013	SBC Deer Velvet x 100	100	220 mg	250 mg	5,769	576900
Genesis	PO913100	B02813	9/09/2013	SBC Deer Velvet x 100	100	220 mg	250 mg	1,115,520 capsules (spread over x80 and x100)	1,115,520
Genesis	PO913100	B02813	9/09/2013	Deer Velvet x 80	80	220 mg	250 mg	As above	As above
Vitalab	PO560468	508	13/11/2013	SBC Deer Velvet x 100	100	220 mg	250 mg	6409	640900
								Total number of capsules	**11039740**

Caption Summary

Commerce Commission (Prosecutor)	v	**Gateway Solutions Limited** (First Defendant)
		Ian Allan Carline (Second Defendant)

Charge 1	Gateway Solutions Limited has without reasonable excuse, failed to comply with a notice under s 47G of the Fair Trading Act 1986.	
	Act	Section 47J(1)(a) of the Fair Trading Act 1986
	Penalty:	$30,000 fine
Charge 2	Ian Allan Carline aided and/or abetted Gateway Solutions Limited, to fail, without reasonable excuse, to comply with a notice under s 47G of the Fair Trading Act 1986.	
	Act	Sections 66(1)(b) and (c) of the Crimes Act 1961and s 47J(1)(a) of the Fair Trading Act 1986
	Penalty:	$10,000 fine

Summary of Facts

Introduction

1 The charges in this case relate to the failure of the defendant company, assisted by the defendant individual, to comply with a notice issued by the Commerce Commission requiring the company to provide certain documents and information.

The defendants

2 The first defendant, Gateway Solutions limited (formerly known as Silberhorn limited (**Silberhorn**)) is a New Zealand company incorporated on 2 October 2003. Its principal place of business is at 299 Dee Street, Invercargill. Until recently, it was a manufacturer, marketer and distributor of dietary supplements, including capsules containing deer velvet.

3 The second defendant, Ian Allan Carline, is the sole director and 75% shareholder of Silberhorn. Mr Carline has been a director of Silberhorn since 2 October 2003. His family's residential address is at 81 Hyland Place, Waiuku, 2681.

The Commission's investigation

4 On 18 February 2014, the Commerce Commission received a complaint alleging that Silberhorn had overstated the deer velvet content of its deer velvet capsules on its product labels. As a result, the Commission commenced an investigation into the allegations to determine whether Silberhorn and/or its directors, agents, or employees, including Mr Carline, had breached the Fair Trading Act 1986 (the **Act**).

5 The Commission's investigation seeks to establish whether Silberhorn has overstated the deer velvet content in its products, and thereby breached ss 9, 10 and 13(a) of the Act, including by:

(a) making false or misleading representations that its deer velvet products are of a particular kind, standard, quality, grade, quantity, composition (s 13(a) of the Act);

(b) falsely labelling deer velvet capsules it sells to consumers as containing more deer velvet than they actually do (ss 9, 10 and 13(a) of the Act);

(c) stating on its labels that the capsules "may contain traces of carob" (a "filler") when in reality each capsule contains between 28% and 48% carob (ss 9, 10 and 13(a) of the Act); and

(d) otherwise engaging in conduct in trade that is misleading or deceptive or liable to mislead the public as to the composition of ingredients in its deer velvet product range, including through publication on its website (ss 9 and/or 10 of the Act).

6 That investigation is ongoing and covers the period from January 2011 to September 2014.

7 As part of that investigation, the Commission has learnt that:

(a) On 19 February 2015, Mr Carline's son, Rodger Carline, incorporated a new company, Pacific Biotech limited, which appears to have received the assets of Silberhorn, and now appears to trade, manufacture and sell dietary supplements under the “Silberhorn” brand from the same address.

(b) Transfer of the assets and the Silberhorn trade mark appears to have taken place in or around March/ April 2015, and occurred after Silberhorn was served with the Notice and was informed of the Commission's investigation, as described below.

Request for Information - Notice

8 As part of its investigation, the Commission sought relevant information and documentation from Silberhorn:

(a) On 26 May 2014, Commission staff wrote to Silberhorn (marked for the attention of Mr Carline) seeking voluntary disclosure of the company's production records and other information. Silberhorn failed to provide most of the information and documents in response to this request.

(b) As a result, on 11 September 2014, the Commission used its statutory powers to issue a notice under s 47G(1)(a) and (b) of the Act to Silberhorn (the **Notice**) requiring it to provide certain information and documents primarily relating to Silberhorn's production, labelling, and sales to the Commission's Wellington office by 2 October 2014. The Notice was marked for the attention of Mr Carline. It was served with an explanatory letter by post to Silberhorn's business address at 299 Dee Street, Invercargill. Confirmation from Courier Post indicates that the Notice was delivered and signed for by a member of Silberhorn's staff at 4.17pm on 12 September 2014. The Notice was also sent by e-mail to Mr Carline's e-mail address.

(c) On 1 October 2014, Mr Carline (as CEO of Silberhorn) wrote to the Commission acknowledging receipt of the Notice. In his letter he made various allegations concerning the Commission's investigation but failed to provide some of the key documents and information requested by the deadline, namely the production records.

(d) On 18 December 2014, the Commission sent Silberhorn (to the attention of Mr Carline) a letter advising that the company had failed to comply with the Notice and was at risk of prosecution. Silberhorn was invited to reconsider its position and to provide the requested information by 18 January 2015.

(e) Again, Silberhorn failed to properly comply with the Notice. Mr Carline wrote to the Commission on 12 January 2015 providing only limited information. The Commission sent further letters to Silberhorn (again, to Mr Carline's attention) on 13 February 2015 and 28 April 2015 reiterating the Commission's view that Silberhorn had failed to comply with the Notice and encouraging Silberhorn to provide some of the requested information.

(f) On 9 March and 10 June 2015, Mr Carline sent further letters disputing the Commission's view that Silberhorn had failed to comply with the Notice, providing only limited further information. Mr Carline

raised a number of other matters. In his letter dated 10 June 2015, he alleged for the first time that some of the documents requested were lost in a server crash. The Commission does not consider that any of the reasons provided by Mr Carline constitute a reasonable excuse for non- compliance.

9 To date, Silberhorn still has not complied with the Notice. This has materially hindered the Commission's investigation into the underlying allegations of breach of the Act.

Other investigatory steps

10 On 21 September 2015, the Commission utilised powers under s 47G(1)(c) of the Act and undertook a compulsory interview of Silberhorn's office manager, Susan Hewitt. Whilst giving evidence under oath during interview, Mrs Hewitt confirmed the existence and location of documents the Commission had been seeking. She advised that Mr Carline had visited Silberhorn's offices in or around March/April 2015 and removed some key documents and a laptop containing key documents from Silberhorn's offices back to his family's residential address in Waiuku. The laptop was subsequently returned to Invercargill before the search warrant was executed.

11 Since filing the charges, Commission staff executed search warrants on 8 October 2015 at Silberhorn's business premises at 299 Dee Street Invercargill and its registered office at 68 Lowe Street Invercargill, and at Mr Carline's family's residential address at 81 Hyland Place, Waiuku.

12 Whilst executing these search warrants, the Commission found numerous documents at Silberhorn's business premises and the Hyland Place address that fell within the scope of the information sought in the Notice, some of which had been withheld contrary to the Notice.

13 The discovery of these documents during execution of the search warrants evidences Silberhorn and Mr Carline's non-compliance with the Notice. Mr Carline as Silberhorn's current sole director assumed responsibility for responding to the Commission's Notice, and gave a number of reasons as to why he was unable to do so. Some of the key documents requested were found at the Hyland Place address during the search warrant, having been moved from Silberhorn's premises. The laptop referred to in [10] was found at the Dee St premises.

Conduct

Charge 1

14 Silberhorn without reasonable excuse, failed to comply with a Notice dated 11 September 2014, which required compliance by 2 October 2014 at the offices

of the Commission at 44 The Terrace Wellington and breached s 47J(1)(a) of the Act.

Charge 2

15 Mr Carline aided and/or abetted Silberhorn, to fail, without reasonable excuse, to comply with a Notice to Silberhorn dated 11 September 2014, which required compliance by 2 October 2014 at the offices of the Commerce Commission at 44 The Terrace Wellington and breached ss 66(1)(b) and (c) of the Crimes Act 1961ands 47J(1)(a) of the Act.

Defendants' history

15 Neither Silberhorn nor Mr Carline have previously received a warning or been prosecuted for breaches of the Commerce Act 1986, Credit Contracts and Consumer Finance Act 2003 or the Act.