

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-004-010387
[2018] NZDC 7359**

COMMERCE COMMISSION
Prosecutor

v

BRILLIANCE INTERNATIONAL LIMITED
Defendant

Hearing: 25 May 2018

Appearances: A McClintock and M Moon for the Prosecutor
R Coltman and D Mahon for the Defendant

Judgment: 16 August 2018

RESERVED JUDGMENT OF JUDGE R G RONAYNE
[On sentence]

Introduction

[1] The defendant is for sentence having pleaded guilty at the first reasonable opportunity to 20 representative charges made under the Fair Trading Act 1986 (“FTA”) relating to the supply of steel reinforcing mesh known as “147E”, which was sold as “500E grade”.

[2] The charges fall into two categories:

- (a) Representations that were liable to mislead the public, made on the defendant’s website and on product tags attached to the sheets of mesh, that it was 500E grade and complied with the standard for steel

reinforcing materials AS/NZS 4671:2001 (“the Standard”) when such representations were wrong.

- (b) False and misleading misrepresentations made on the defendant’s website, that the mesh had been “independently tested” by SGS New Zealand (“SGS”) an independent building product testing laboratory.

[3] The charges cover a period from 30 September 2012 to around June 2016. From 17 June 2014, the maximum applicable penalty increased from \$200,000 for each charge to \$600,000.

[4] In brief, the defendant assured customers that its 147E product was compliant with the standard and thus able to be used in applications where an earthquake grade product was required. It did so knowing that it had not complied with the testing procedures the Standard requires in order for the mesh to be described as grade 500E. The defendant had not complied with testing procedures in five separate ways. Any one failure meant that 147E could not be described as meeting the Standard for grade 500E.

[5] Furthermore, the defendant also represented that the grade 500E mesh had been “independently tested” as complying with the Standard when this was not true.

[6] The defendant relied heavily on compliance with the Standard and independent testing claims in its marketing. These claims were widely disseminated.

Facts

The defendant

[7] The defendant was incorporated in New Zealand on 15 March 2006 with one director, Guanghui (Ellen) Wu. For a majority of the time covered by the charges until 4 May 2016, Ms Wu held 100 percent of the shares in the defendant company. On that date, her shareholding was transferred to G W Group Limited of which she is also a director and shareholder.

[8] The defendant imported 147E steel mesh from Pingyuan Zhongde Taixing Industry and Trade Co Limited in China (“PZT”). The defendant was also heavily involved in setting up the testing procedures used by PZT. The defendant began supplying 147E to the public in approximately February 2012.

The product

[9] The product that is the subject of the charges is the type of steel mesh used for reinforcing concrete in construction. It is known as 147E and is sold as being 500E grade steel mesh. It is manufactured from wire of around 6.5 millimetre diameter and each sheet is approximately 5,160 millimetres by 2,235 millimetres in size.

[10] 500E is a particular grade of steel mesh which has certain characteristics, including, in particular, ductility, which provides strength and stability to buildings in the event of an earthquake. Ductility, in layman’s terms, is the ability of the steel to stretch under stress. This grade of steel is used to provide reinforcement in concrete slabs for residential buildings and in suspended floors and structural walls of multi-storied buildings.

[11] In order to be deemed to comply with the Building Code, steel mesh used in certain applications must comply with the requirements of the “E” ductility class set out in the Standard. The Standard provides for three ductility classes “L” (low), “N” (normal) and “E” (earthquake). Thus “E” in 500E stands for “earthquake” and means that the product complies with the E ductility class in the Standard. Steel mesh used for structural applications in New Zealand is required to be of the “E” ductility class. Ductility is determined by measures of “uniform elongation” and the ratio of “tensile strength” to “yield stress”.

[12] In order to be described as “500E”, steel mesh must comply with the chemical/mechanical requirements for that grade set out in the standard, and be manufactured in accordance with the sampling and testing requirements in the Standard.

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

[14] As a result, in May 2011, the DBH introduced an amendment to the Acceptable Solution B1/AS1 for New Zealand Building Code clause B1 Structure to require that steel mesh used in concrete slab-on-ground floors, designed and constructed in accordance with Acceptable Solution B1/AS1, in the Canterbury region be of the “E” ductility class. The requirement was extended to the rest of New Zealand in August 2011. A consultation period then followed with industry on the amendments. The consultation document contained the following statements regarding the reasons for the amendment:

[T]he performance of buildings in the Canterbury earthquakes demonstrated that unreinforced concrete slabs performed poorly. Ground shaking resulted in extensive cracking and differential settlement of many of these slabs.

The reinforcement mesh provides crack control, some flexural capacity to allow the slab to span local weak spots, and provides some resistance against differential settlement by dowel action. Without mesh, a crack in an unreinforced slab is likely to widen and spread, and differential settlement can occur, resulting in loss of amenity.

[...] The tying of the perimeter foundation reinforcement to the slab reinforcement provides a more robust composite foundation/floor. It limits movement and mitigates damage between these elements...

[15] In addition to the problems observed in respect of concrete slab foundations in residential buildings, the Canterbury Earthquake Royal Commission also found problems relating to the reliance on non-ductile steel mesh in certain suspended floor constructions, noting:

Non-ductile mesh was widely used as reinforcement in the in situ concrete topping on floors containing precast units. This mesh has been found to fail at crack widths in the order of 2mm in width, which in some cases results in a major loss of the ability of the floors to perform as diaphragms.

[16] In response to these changes, the New Zealand steel industry (including the defendant) developed “E” ductility class steel mesh products.

[17] The charges faced by the defendant relate to 35 batches of 147E steel mesh, or up to 56,125 sheets, which were imported, promoted, and supplied by the defendant. This is the entirety of the 147E 500E grade steel mesh imported and promoted by the defendant.

[18] The average sale price of the defendant’s 147E mesh sheets to building merchants during the Charge Period was \$55 per sheet. By comparison, the average sale price of mesh downgraded from 147E to a lesser grade “500L”, was \$48 per sheet. “500L” is reinforcing steel in the defendant’s non-seismic range.

The failures

The Standard

ISO 15630-2

[19] The Standard specifies requirements for (and the testing methodology for determining) the chemical composition and the mechanical and geometrical properties of 500E grade reinforcing steel used for the reinforcement of concrete in the form of machine-welded mesh (among other forms).

[20] The Standard requires that:

- (a) Particular types of steel mesh have specified chemical, mechanical and dimensional properties; and
- (b) The testing of steel and steel mesh measures the mechanical and dimensional requirements and follows particular sampling and testing procedures.

[21] In order to be designated “500E” grade, steel mesh must meet certain requirements when tested in accordance with the Standard. These include:

- (a) Uniform elongation (a measure of the mesh's ductility) of greater than or equal to 10 percent; and
- (b) Yield stress of greater than 500MPa and less than 600MPa,

[22] The requirement to have uniform elongation of greater than or equal to 10 percent is specific to "500E" grade steel. The purpose of specifying an increased level of uniform elongation for 500E grade steel compared to other steel products (for example 500L grade steel which is required to have uniform elongation of greater than or equal to 1.5 percent) is to enable the steel to better perform in the event of an earthquake as it is able to stretch more without fracturing.

Ageing

[23] The Standard requires test pieces be "aged". Ageing is defined to mean heating of test specimens to $100 \pm 10^{\circ}$ C for a specified period and then cooling the specimen to room temperature. While various factors can influence the extent to which ageing may impact on the ductility of steel, it is generally accepted that in the case of 500E grade steel that is not micro-alloyed, not ageing the test pieces may lead to them producing higher test results for ductility than they will ultimately exhibit in use, and in the case of 500E grade micro-alloyed steel, the impact of not ageing the test pieces is likely to be negligible. However, it is not possible to demonstrate these impacts of ageing on micro-alloyed steel with any degree of precision. There has been some confusion in the industry regarding the benefits of ageing.

Batch testing

[24] The Standard requires that batches of mesh are to be tested from batch sizes no larger than 1,000 sheets. These tests involve testing the mechanical requirements, including uniform elongation.

Long-term quality evaluation

[25] Long term quality evaluation is required and considered important because batch testing uses only a small sample set from each batch. Thus, long-term quality evaluation, where there has been considerable variation in batch testing results, is an essential statistical method of providing a broader picture of the underlying characteristics of the sampled populations.

Test certificates

[26] Test certificates must be produced and provide a minimum amount of specified information including at least:

- (a) A reference to ISO 15630-2:2010;
- (b) The identification of the test piece;
- (c) The free length of the test piece;
- (d) The type of test and the relevant test results;
- (e) The relevant product Standard when applicable; and
- (f) Any complementary useful information concerning the test piece test equipment and procedure.

The defendant's failures to comply with the Standard

[27] The defendant failed to comply with the testing requirements of the Standard in five ways:

- (a) **Ageing:** From October 2015 onwards the defendant did not age test pieces. This was a deliberate choice by the employee responsible for setting up the testing procedure.

- (b) **Batch size:** The defendant's batches were larger than 1,000 sheets, in breach of the Standard.
- (c) **Testing Samples:** The defendant's testing procedure of testing six pieces of mesh and choosing any four results for inclusion on the test certificate did not comply with the testing procedure under the Standard.
- (d) **Long-term quality evaluation:** The defendant did not comply with the long-term quality requirements of the Standard. It did not compile and calculate long-term quality data at all.
- (e) **Certificates:** The defendant's testing certificates did not contain all the information required by the Standard under ISO 15630-2.

[28] In addition, as to uniform elongation, the defendant's test procedure did not mention that a mean value of 10 percent was required for elongation, and subsequently PZT subsequent test certificates did not include a reference to the mean value. The Commission's test results showed failures to meet the uniform elongation in the Standard.

[29] The result of these failures (or, indeed, any one of them) is that none of the defendant's steel mesh during the charge period was tested by PZT in accordance with the requirements of the Standard. The defendant had samples for 10 batches tested by SGS. Of those 10 batches, three received passed results.

[30] Further, because ageing test pieces is intended to mimic the qualities the steel is likely to exhibit when it ages in situ while in use, the failure to age means that ductility of the test pieces is likely to be overstated in test results if the steel is not aged. The consequence of overstating ductility is that the steel may stretch less than anticipated in the event of an earthquake, causing the building elements into which it is incorporated to perform not as well as they would have if the steel mesh was compliant.

[31] The Ministry of Business, Innovation and Employment (“MBIE”), which is responsible for oversight of the building code (previously overseen by DBH), has advised that:

- (a) When used in concrete slabs on the ground, non-compliant steel mesh does not pose a “life-safety” risk.
- (b) When used in suspended floors, there are more variables that create greater difficulty in predicting how non-compliant steel mesh will contribute to the overall structural performance of a suspended concrete floor system, but it is nevertheless very unlikely that it would pose a life-safety risk.

[32] When compared to compliant 500E mesh, non-compliant steel mesh used in concrete slabs on the ground may carry a greater risk of loss of amenity in the event of a significant seismic event. In 2011, the ductility level for concrete floor slabs was increased to a minimum elongation of 10 percent. Before then, mesh in concrete slabs generally had an elongation of about two percent. The Commission’s investigations cover the period from mid-2012 onwards. The test results of the defendant’s 147E purchased by the Commission average around 8.9 percent. These homes will still be more resilient than the many thousands of homes built prior to 2011.

Commerce Commission investigation

[33] After receiving complaints in early August 2015, the Commission asked the defendant on multiple occasions between September 2015 and May 2017 to substantiate its claims that 147E was compliant with the Standard and that it had been independently tested. The defendant was not able to substantiate all of its claims.

[34] In January 2016, the Commission purchased three randomly selected sheets of 147E from a retailer. Samples were submitted to two different testing agencies and none of the samples tested met the mechanical requirements of the Standard. In particular, the recorded values for elongation were in all cases below the 10 percent required under the Standard.

[35] The Commission asked SGS to provide details of all testing it had conducted for the defendant.

[36] From June 2013 to April 2014, SGS tested 10 batches of completed 147E mesh. Three of those batches complied with the Standard. The remaining seven batches failed. At least one of the failed batches was subsequently sold as 500E mesh. Since then, all testing was conducted by PZT only and by no other party. However, the defendant did use SGS to test the raw wire material that was used to manufacture 147E mesh. All wire used by the defendant was of a 500E grade. The Standard requires testing of mesh samples, not the wire used to create mesh.

Non-compliant testing procedure

[37] The defendant used PZT in China to do the testing of their 147E product. On or about 11 October 2012, PZT commenced testing for the defendant.

[38] The defendant provided to PZT, in Mandarin:

- (a) A copy of the Standard; and
- (b) A test procedure document drafted by Ms Wu.

[39] The testing procedure was:

- (a) Used by PZT when testing mesh samples;
- (b) Not checked by any third party at any time; and
- (c) Deficient and did not incorporate all of the requirements of the Standard for testing and sampling 500E steel mesh.

[40] As the procedure was in Mandarin, the Commission had the test procedure translated and compared it with the requirements of the Standard.

[41] The test procedure departed from the Standard in the following ways:

- (a) Since July 2015, the procedure provided to PZT made no reference to the ageing process as required by the Standard. Ms Wu had specifically directed PZT to not age the product. From July 2015, test specimens were not aged.
- (b) The compliance criteria for yield stress was incomplete, noting only the lower, not upper, limits, and with no reference to a secondary option for compliance as required by the Standard.
- (c) The test procedure did not mention the need to test for 10 percent elongation as required by the Standard. However, all test certificates recorded the test results for elongation.
- (d) The testing procedure provided that six pieces of mesh from each batch (ie six tensile tests, which comprised three separate longitudinal and three separate transversal wires) should be tested and any four results chosen for inclusion in test certificates, discarding the other two samples.
- (e) In relation to long term quality data, while the defendant said it “recorded all test results” and “monitored for trends in quality”, it did not keep a written record of this, as required. The long-term quality data requirements of the Standard were therefore not met.
- (f) The testing certificates did not contain all of the information required by ISO 15630-2, namely, they did not include:
 - (i) references that testing had been conducted in accordance with ISO 15630-2, the relevant test method Standard; and
 - (ii) the free length of the test pieces.

[42] The defendant’s sampling and testing procedures accordingly failed to comply with the Standard (the Non-Compliant Testing).

[43] The defendant created and provided the template of the test certificate to PZT.

Knowledge

[44] As a result of the seven failed test results received from SGS in mid-2013, the defendant was aware that its steel had failed to pass product testing for at least those seven batches.

[45] From July 2015, the defendant, through Ms Wu, knew that PTZ's testing was not compliant with the Standard, as Ms Wu had requested that PZT not age the product before testing and she authored the testing procedure and, amongst other things, knew:

- (a) The Standard required ageing of test specimens;
- (b) Ms Wu had told PZT not to age it; and
- (c) PZT did not age it, as per Ms Wu's request.

[46] The defendant therefore knew, or ought to have known, from July 2015, when making the representations, that its steel mesh did not comply with the Standard in respect of ageing and, accordingly, that the statements about compliance were false or misleading in at least this respect.

[47] On 29 February 2016, the Commission wrote a "Stop Now Letter" to the defendant, requesting that it immediately stop representing 147E as 500E grade steel complying with the Standard.

[48] On 16 May 2016, Ms Wu signed undertakings to the Commission regarding the future testing of 147E mesh in order to give the Commission comfort over the defendant's future compliance with the Standard.

[49] The defendant was slow in responding to statutory notice requirements for information. However, the defendant did co-operate with the Commission's investigation and prosecution.

Conduct that was liable to mislead

Compliance representations on product tags and website (Charges 1-11 – s 10 Fair Trading Act 1986)

[50] Charges 1-11 relate to the defendant's conduct in making misrepresentations in different media that were liable to mislead the public, in that they conveyed that 147E steel mesh was 500E grade and that it complied with the Standard, when it did not.

[51] Throughout the Charge Period, the defendant made representations on its website and product tags attached to each sheet of steel mesh to the effect that 147E steel mesh complied with the Standard (the "Compliance Representations").

Website

[52] From no later than 30 July 2012 until at least 19 August 2015, the "Home" entitled webpage on the defendant's website stated:

Brilliance Steel Quality Assurance

At Brilliance Steel we pride ourselves on having top quality reinforcing steel available that meets all the strict requirements of the AS/NZS 4671:2001 code of compliance.

Brilliance Steel also has a new economical Ductile grade 500E mesh (147E Ductile Mesh) to service the New Zealand market and will meet the new earthquake building standards and regulations.

This representation created the impression that the defendant's 147E ductile mesh product had been manufactured and tested in accordance with the Standard and more, particularly, was 500E grade steel.

[53] From no later than 8 February 2013 until at least 21 January 2016, the "Products" entitled webpage on the defendant's website stated:

Feature Product

147E DUCTILE MESH

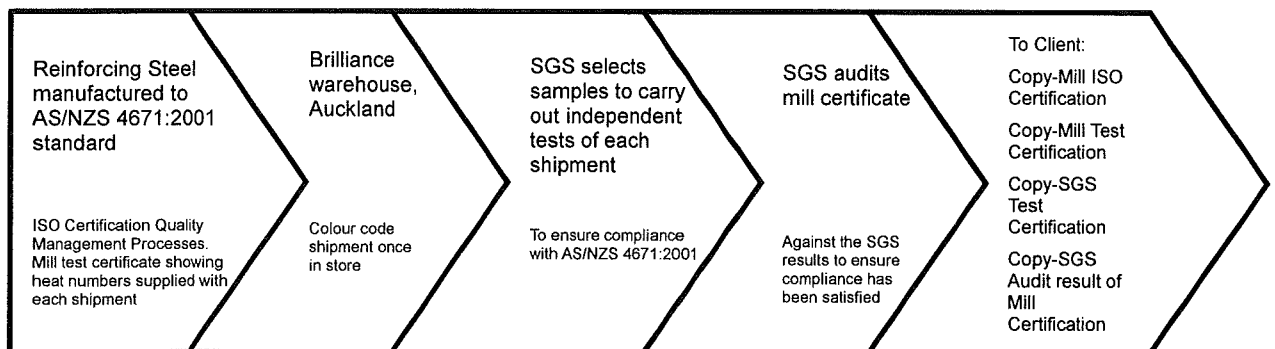
Designed to meet Department of Building & Housing (DBH) new B1 Compliance Standard with equivalent mass 2.27kg/m² Designed to meet ductility minimum 10% (in accordance with Reinforcing Bar to G500E MA) and minimum Yield Strength of 500MPa.

Mesh tested after manufacture to guarantee compliance also independently tested to AS/NZS 4671:2001 G500E.

Again, the representation created the impression that the defendant's 147E ductile mesh complied with the Standard and, more particularly, that it was 500E grade, as defined in the Standard.

[54] From no later than 30 July 2012 until at least 21 January 2016, the "Specification" entitled webpage on the defendant's website stated:

Brilliance Steel AS/NZS 4671:2001 compliance process



Brilliance Steel also has a new economical Ductile 500E mesh to service the New Zealand market and will meet the new earthquake building standard and regulations.

Being an importer of reinforcing it is absolutely imperative that we provide definitive and comprehensive proof that Brilliance Steel's products meet all applicable NZ standards of compliance. All reinforcing bar is stamped for product identification and traceability with heat and batch numbers. All reinforcing steel is independently tested before it is released into the New Zealand market. Copies of test results are available upon client request.

This representation also indicated that the defendant's reinforcing steel products, which included the 147E steel mesh, complied with the Standard.

[55] Self-evidently, the foregoing representations were liable to mislead the public because the testing was non-compliant.

Product tags

[56] Product tags attached to each sheet of 147E steel mesh refer to “AS/NZS4671:2001”, “G500E Ductile” and “147E Mesh”.

[57] Because of the non-compliant testing, the representations made on the product tags were liable to mislead the public.

Misrepresentations as to testing (Charges 12-20): s 13(e) Fair Trading Act 1986

[58] From no later than 8 February 2013 until at least 21 January 2016, the “Product” entitled webpage on Brilliance’s website stated that “mesh tested after manufacture to guarantee compliance also independently tested to AS/NZS 4671:2001 G500E”. This conveyed that the product was independently tested after the manufacturing process.

[59] From no later than 30 July 2012 until at least 21 January 2016, the “Specification” entitled webpage on the defendant’s website had a flowchart (see para 54 above) which stated that “SGS selects samples to carry out independent tests for each shipment”. Also, underneath the flowchart, it was stated that “all reinforcing steel is independently tested before it is released into the New Zealand market. Copies of test results are available upon client request”. This representation indicated that the defendant engaged SGS to independently test each batch of reinforcing steel products before they went on sale. In fact, between September 2012 and April 2014, SGS only tested 10 mesh samples from unique batches on 147E steel mesh, as opposed to all batches and after April 2014 the defendant did not independently test any of its 147E steel mesh. All testing of the finished 147E steel mesh had been internally conducted by PZT.

MBIE clarification

[60] MBIE, after consultation with the industry, published a consultation paper on 19 August 2016 which post-dates the charge period relating to the defendant. As a result of the MBIE consultation process, some amendments were made which came into force on 4 November 2016 which, among other things, provided:

- The accrediting of testing laboratories;
- Increasing the minimum frequency of tensile tests;
- Adding clarification to the measurement of minimum elongation for individual test samples regarding tensile parameters.

Submissions

[61] Detailed and comprehensive written and oral submissions have been made. I have considered all submissions carefully. The following represents a summary only.

Prosecutor's position

[62] The nature of the representations makes the offending particularly serious. Misrepresentations about construction materials properly sit alongside health claims as the most serious type of misrepresentations. The defendant heavily marketed both its compliance with the Standard and the claim of independent testing. It did so over a number of years.

[63] For this type of offending, deterrence and denunciation are critical purposes for sentencing.

[64] An appropriate starting point for the representations relating to standard compliance is in the range of a fine of \$550,000 to \$650,000.

[65] The independent testing representations are distinct conduct and in themselves serious. A separate starting point in the range of a fine of \$200,000 to \$250,000 is appropriate.

[66] A discount of up to 10 percent is appropriate for the defendant for mitigating features and up to 25 percent for guilty pleas.

[67] In supplementary submissions by way of response to the defendant's submissions, the prosecutor submits that the *Timber King* decision supports the starting points submitted.¹

Defendant's submissions

[68] The defendant's offending resulted from poor due diligence on third party representations made to the defendant about the product it had imported from July 2015 onwards and the defendant's misguided attempts to "solve" a perceived issue with steel mesh that had started to become an issue in the market.

[69] There have been no acts of fraudulent or false test certificates (unlike such a certificate used in *Timber King*), but rather, the defendant made representations about its steel mesh product in two separate ways:

- (a) First, that its product was of the 500E grade, based largely on information it received from its manufacturer; and
- (b) Second, that its product had been independently tested.

[70] As to a starting point, the defendant submitted that a starting point of a fine in the range of \$450,000 to \$550,000 is appropriate and reflective of:

- (a) The defendant's overall culpability;
- (b) The circumstances of the defendant's offending including:

¹ *Commerce Commission v Timber King Ltd and NZ Steel Distributor Ltd* [2018] NZDC 510.

- (i) the defendant's position as an importer of steel mesh from an overseas manufacturer; and
 - (ii) the commercial and contractual relationships the defendant had with its manufacturer and SGS; and
 - (iii) the information the defendant had available to it at the time of the offending; and
 - (iv) the steel mesh industry as a whole.
- (c) The defendant's comparable position in relation to other steel mesh manufacturers and importers before the Court.

[71] The defendant submits that a discount of 40 percent is appropriate to reflect:

- (a) The defendant's early guilty pleas;
- (b) Its full co-operation;
- (c) Its remorse;
- (d) Its prior clean record.

[72] The defendant thus submits that the end point the Court should reach would be a fine in the region of between \$270,000 and \$330,000.

Aggravating features

[73] The context in which aggravating and mitigating features are to be identified is explained in *Commerce Commission v LD Nathan and Co Ltd*.² The features largely mirror the relevant considerations in ss 7-9 of the Sentencing Act 2002. This approach has been accepted on a number of occasions.³

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

³ For example, in *Premium Alpaca Ltd and Commerce Commission* [2014] NZHC 1836.

[74] The aggravating features to be considered are:

- (a) The extent to which the conduct of the defendant strikes at the heart of the FTA;
- (b) The extent to which the defendant's conduct undermines the objectives of the Standard;
- (c) The degree to which the compliance representations were important;
- (d) The degree to which the independent testing representations were also important;
- (e) The defendant's culpability;
- (f) The degree of departure from the truth;
- (g) The extent of dissemination of the representations;
- (h) The resulting prejudice to consumers;
- (i) Any unfair competitive advantage arising from the defendant's conduct;
- (j) The degree to which the defendant's conduct undermined confidence in the industry;
- (k) The need for deterrence.

[75] I have carefully considered the competing arguments submitted by the parties.

The extent to which the conduct strikes at the heart of the objectives of the FTA.

[76] The purpose of the FTA is to contribute to a trading environment in which the interests of consumers are protected and businesses compete effectively and participants take part in an industry confidently.

[77] Here the defendant, I am satisfied, enjoyed sales benefits flowing from apparent standard compliance without in fact complying. Furthermore, the

representations made by the defendant regarding independent testing, in all probability, created an impression of confidence in the earthquake resistant properties of the product. That was plainly a misplaced confidence because only a small proportion had been independently tested with the results largely unfavourable. Thus, it is clear that the defendant's representations undermined the core purposes of the FTA.

The degree to which the defendant's conduct undermined the objectives of the Standard

[78] It is self-evident that Standards are fundamentally important. The defendant's conduct in offering 147E for sale as grade 500E plainly undermined the New Zealand Building Code and the objectives of Standards in general. Objectives of the New Zealand Building Code are, amongst other things, to safeguard people from injury caused by structural failure, safeguard people from loss of amenity caused by structural behaviour and to protect other property from physical damage.

[79] No records show where the steel mesh, sold during the period covered by the charges, went or how much of it has been embedded into foundations, floors and walls. Thus, the soundness of the mesh actually sold cannot be assessed. The Court can confidently conclude that the mesh must have been embedded into foundations, floors and walls because it is the higher priced product designed for just those applications.

[80] I conclude that the defendant's conduct has seriously undermined the objectives of the Standard.

The importance of the compliance representations

[81] I accept the prosecutor's submissions that there are three key reasons why the representations that 147E was grade 500E were important to consumers. The three contextual reasons why the representations were important to consumers are:

New Zealand's recent earthquakes and the subsequent amendments to Acceptable Solution

B1/AS1:

- (a) The fact and effect of the Canterbury earthquakes is ubiquitous knowledge in New Zealand. Within the industry, amendments to the Acceptable Solution B1/AS1 resulting from the earthquakes is or certainly ought to have been ubiquitous knowledge within the building industry. It is thus particularly serious to have misrepresented Standard compliance (to earthquake standard) for a construction product. The industry, including the defendant, responded to the demand for an increased emphasis on steel mesh with the highest level of resilience and the defendant, in particular, responded as a means of remaining competitive.
- (b) The defendant understood the importance of proper testing being conducted before releasing product with a claim that it was grade 500E into the market. This is illustrated by what it said on its website. (See para [52] above.)
- (c) It becomes quite self-evident that claiming Standard compliance was important and required careful verification before using such a claim to market such products.

The importance given the need for consumers to rely on representations as to Standard compliance

- (a) Because the Standard is technical and because the defendant signed an enforceable undertaking requiring it to use an IANZ accredited laboratory to test three sheets per batch, technical expertise is plainly needed to determine compliance with the Standard. In that light, and a need for accuracy of representations as to Standard compliance and the impossibility of being able to detect the quality of product at the time of purchase by mere visual inspection, consumers must, therefore, rely entirely on representations made about it. It also follows that analysis of the mesh is clearly beyond the capacity of the average consumer using the product, including professional consumers such as

builders and building product retailers. Furthermore, testing is by batch sample which destroys the sample tested.

- (b) A wide range of industry participants, such as engineers, architects, builders, inspectors, consumers and councils have to rely on representations as to compliance with relevant Standards. A proper functioning of the industry is utterly dependent on such reliance. The defendant itself said on its website:

Being an importer of reinforcing it is absolutely imperative that we provide definitive and comprehensive proof that Brilliance Steel's products meet all applicable NZ Standards of compliance.

Importance due to the impact of the use of non-compliant steel mesh on consumers and the industry

- (a) The use of non-compliance steel mesh has a range of actual and potential consequences for consumers, for competitors, and for the reputation of the industry itself. This aspect is dealt with further where resulting prejudice to consumers and benefit to the defendant is addressed. However, because of the particular importance of the representations, the defendant's conduct is highly culpable because its behaviour has left consumers in a position of uncertainty because it cannot now be known whether all of the 147E complied. This position of uncertainty is what the FTA and the Standard seek to avoid.

The independent testing representations were important

[82] In the same way as the compliance representations, the independent testing representations were important in that they purported to provide consumers with additional assurance as to Standard compliance. It is particularly aggravating that the defendant used the name of an independent tester, SGS, when that tester had only tested mesh samples taken from 10 batches, seven of which failed. Taking advantage of claims of independence and using the name of an independent testing facility and

thus wrongly reassuring consumers, has to be properly reflected in the resulting penalty for such conduct.

The defendant's culpability

[83] The defendant received from SGS in mid-2013 seven failed test results and thus was aware that its product had failed to pass testing for at least those batches.

[84] From July 2015, the defendant knew that PZT's testing was not compliant with the Standard. That is so because Ms Wu had requested that PZT not age the product before testing.

[85] The defendant was careless as to the truth of compliance representations that it made until approximately April 2014.

[86] From approximately April 2014, when it ceased any SGS testing, the defendant was reckless as to the truth of its compliance representations, knowing that its steel mesh had predominately failed such testing and therefore was likely non-compliant.

[87] From July 2015, when the defendant changed the testing procedure, its compliance representations were made knowing that the testing procedure did not comply with the Standard.

[88] So, with the knowledge that it had, the defendant deliberately and consciously departed from the Standard and thus knew or ought to have known that its compliance representations were false.

[89] The defendant had specifically introduced 147E to comply with the Acceptable Solution's requirement to use grade 500E as a means of addressing issues arising from the Christchurch earthquakes. The need for the defendant to ensure that its product had been properly tested was, in those circumstances, self-evident.

[90] The defendant made the independent testing representations knowing that, from April 2014, it was not independently testing each batch of mesh, that the mesh

was likely non-compliant and from July 2015, knowing that its testing procedure did not comply with the Standard.

[91] As to the independent testing representations, the defendant, between September 2012 and April 2014, knew that SGS only tested 10 mesh samples from unique batches of 147E instead of samples from all batches. The results were predominately fail results.

[92] After April 2014, the defendant did not independently test any of its 147E steel mesh, and all testing of the finished 147E steel mesh had been internally conducted by PZT. Notwithstanding this, the defendant continued to make representations on its website in multiple places that independent testing was being done.

[93] Between September 2014 and April 2015, the defendant had wire samples, in other words raw material it used prior to manufacture, tested by SGS for 16 unique batches. Nevertheless, the representations made by the defendant were that the finished products were independently tested when that was not so.

[94] Failed test results render the independent testing representations as serious as if the defendant had not independently tested at all. The failed test results, rather than causing concern for the defendant, did not prevent the defendant using independent testing representations to reassure the public in a manner contrary to the truth.

Degree of departure from the truth

[95] While it can be said that any deviation from the truth is a complete departure from the truth, the approach needs to be more nuanced than that. Nevertheless, parts of the testing procedure were not complied with and, thus, representations that the mesh complied with the Standard were entirely untrue. I accept the submission of the prosecutor that there is a cumulative effect of the various failures amounting to substantial non-compliance.

[96] The independent testing representations were a complete departure from the truth.

Dissemination

[97] There was a significant level of dissemination of the untrue statements. The charges themselves relate to up to 56,125 sheets of mesh over approximately a four-year period. Self-evidently, the website representations could be viewed nationwide whereas the compliance representations made on product tags would reassure individual consumers.

Resulting prejudice to consumers and benefits to the defendant

[98] Consumers received a product that could not properly be described as 500E, but at a price that reflected compliance with the Standard and external testing. Uncertainty over structural integrity is the primary effect of the offending.

[99] Consumers have paid for a product which was supposed to have had certain characteristics and cannot now be sure that that is so. This lack of confidence relates to how the mesh will respond in the event of an earthquake.

[100] MBIE, which oversees compliance with the Building Code, has provided advice to the prosecutor that the impact of the use of non-compliant steel mesh in concrete slabs on the ground is a loss of amenity through, for example, cracking of concrete in a building as opposed to raising any issue of "life safety". On the other hand, if the steel mesh has been used in suspended floors and walls, more variables arise creating greater difficulty in predicting how non-compliant steel mesh will perform in the event of an earthquake, but it is said to be very unlikely that it would pose a life safety risk.

[101] Plainly, consumers can be taken to have made a significant investment in their homes and other buildings and thus concerns arising from uncertainty as to how the buildings will perform in an earthquake can be assumed to be high.

Providing an unfair competitive advantage

[102] Because of the cost of following prescribed testing processes and accurate labelling, there is likely to be a disadvantage to competitors arising from the defendant's behaviour.

Undermining confidence in the industry

[103] The defendant's behaviour lessened confidence in the steel mesh industry as a whole.

Need for deterrence

[104] Both specific and general deterrence is important here. This Court's approach to deterrence in this case needs to be tempered to a small degree by some confusion in the industry. This is, however, only a relatively minor aspect because it is quite apparent that not all industry participants were confused and there is no evidence that non-compliance was industry wide.

Starting point: compliance representations

[105] I have borne carefully in mind submissions made by the prosecutor and the defendant with regard to a comparison between the present case and the culpability of the defendant on one hand, and on the other the culpability of the defendants in the recent *Timber King* decision.⁴

[106] In the *Timber King* decision compliance representations were made. The first defendant Timber King (the steel mesh retailer) faced five charges and the second defendant NZ Steel Distributor (the steel mesh importer) faced two charges.

[107] The pertinent facts from the *Timber King* decision are as follows:

⁴ *Supra*.

- (a) Six charges related to representations about compliance of the steel mesh with the Standard:
- (i) the first batch totalled 614 sheets and had not met the Standard's testing requirements for ratio, uniform elongation and weld shear strength. It also failed to meet the physical and mechanical requirements of the Standard including uniform elongation. It failed the uniform elongation by a considerable margin;
 - (ii) the second batch of mesh totalling 1,970 sheets failed the uniform elongation test, but by a smaller margin;
 - (iii) there were other failures in the testing process;
 - (iv) the only step the defendants had taken towards compliance in relation to the first batch of mesh was to tell the mesh producer that it needed to comply with the Standard. Further steps were taken in relation to the second batch, including having the mesh tested by a third party. However, the test certificate provided by that third party revealed the testing was not in accordance with the Standard. Nevertheless, the defendants put the product on the market;
 - (v) one charge related to a misrepresentation that the mesh had been independently tested. The defendant, Timber King, issued a fabricated test certificate on one occasion for one customer;
 - (vi) the charge period covered nine months;
 - (vii) the representations were made on batch tags, invoices and receipts and on the fabricated certificate.

[108] The Court adopted a starting point of \$600,000 for the compliance representations and, independently, a starting point of \$60,000 was adopted for the independent testing representation. By way of comparison in this case:

- (a) The defendant faces 20 charges spanning a period of just under four years. Half of the charges are subject to the now superseded \$200,000 maximum penalty and the remaining to the \$600,000 maximum penalty.
 - (i) the defendants' offending involves 35 batches totalling 56,125 sheets of steel mesh;
 - (ii) only 10 of the 35 batches of 147E were in fact independently tested despite representations that all of the mesh was independently tested and compliant with the Standard. Seven of those 10 batches failed testing and three passed. At least one of the failed batches was subsequently sold as 500E;
 - (iii) the defendants' failures to comply with the Standard can be summarised thus:
 - (1) a deliberate decision not to age the steel mesh made by the defendants' director and sole shareholder;
 - (2) batch sizes were too large;
 - (3) a completely different process for batch testing than that required by the Standard;
 - (4) the failure to keep long-term quality data at all;
 - (5) test certificates that omitted mandatory information.
- (b) The Commission tested the defendants' product. The results were all below the Standard, averaging approximately 8.9 percent uniform

elongation. While that does not establish that the overall population of the mesh, the subject of the charges, did not have the required characteristics, the point is that this cannot now be determined because of the defendants' failures. The testing conducted by SGS showed that some of the mesh was non-compliant. The Commission's testing raised the possibility of additional non-compliance which cannot now be confirmed. By comparison, the position in the *Timber King* decision was that the first of the two batches was non-compliant and the position in relation to the second was unable to be determined.

- (c) In the *Timber King* decision, the Court characterised the conduct of the defendants in making compliance representations as "grossly negligent". This defendant's behaviour in this case was wide-ranging and, from July 2015 onward, deliberate. From that time, the defendant acknowledges that it made a deliberate decision to depart from the Standard with respect to the ageing process. While this was not necessarily a deliberate decision to breach the FTA, it was a deliberate decision not to comply with the Standard.
- (d) The defendant's behaviour with regard to compliance representations is more serious than the defendants' behaviour in the *Timber King* decision.

[109] In summary, I take into account that the defendant's offending spanned the lower and higher statutory maximum penalties, the defendant's high level of knowledge regarding the lack of truth, particularly from July 2015 onward, that the defendant's conduct related to important matters involving earthquake Standards and the defendant's relative size to that of the likes of Carter Holt. I adopt a starting point of \$600,000.

Starting point: independent testing representations

[110] The defendant provided false assurances regarding independent testing representations knowing that it had received predominately failed results from SGS, thus making this behaviour serious also.

[111] A separate starting point is warranted for the independent testing representations because this is discreet behaviour. The representations provide additional assurance over and above mere compliance representations. Quite plainly, such public assurances are designed to give consumers greater confidence regarding earthquake safety and the so-called independence of the testing must have been for the purpose of adding an important layer of assurance.

[112] Timber King's independent testing representation was a one-off occurrence, but involved a fabricated certificate and was thus, albeit one-off, serious. It was also and quite obviously plainly deliberate. The company in *Timber King* endeavoured to distance itself from what was said to be an independent initiative of an employee. Nevertheless, the Court considered Timber King's behaviour "at least negligent". That led then to the starting point of \$60,000 in that case.

[113] The defendant's independent testing representations in this case appeared in its website in different places over approximately four years. It was thus more widespread offending with the impact self-evidently far greater than the impact of one fabricated certificate requested by one customer who had already bought product in the *Timber King* decision. Moreover, the defendant made the representations of independent testing knowing that the majority of the steel mesh batches it had independently tested had in fact failed.

[114] In light of the foregoing, I adopt a starting point of \$200,000 for the independent testing representations.

Combined starting point

[115] I do not see any need to reduce the combined starting points of \$800,000 to reflect totality. The combined starting point of \$800,000 appropriately reflects the

overall culpability of the defendant and the different conduct involved in the compliance representations and independent testing representations.

Mitigating factors relating to the defendant

[116] There being no aggravating factors personal to the defendant, I identify the mitigating factors as follows:

- (a) Although initially slow in responding to statutory notice requirements for information, the defendant did otherwise fully co-operate with the Commission's investigation and the defendant attended, through a representative, to voluntary interviews and thus assisted in an investigation of some complexity;
- (b) The defendant complied with a "stop now letter". Furthermore, the defendant issued a statement on its website regarding the Commission's investigation;
- (c) While the defendant provided undertakings regarding future testing of 147E mesh, this is not strictly a mitigating factor. It is merely an undertaking to comply with legal requirements.

[117] Case law suggests that a range of five to 10 percent discount for co-operation has routinely been provided.⁵ A 10 percent discount is appropriate here. Thus, the nominal total penalty reduces to \$720,000.

[118] It is appropriate in the circumstances that a discount of 25 percent be provided to the defendant for its guilty pleas entered at the first reasonable opportunity. Thus, a further reduction of \$180,000 brings the total fine to \$540,000.

Conclusion

[119] In the result, the fines and costs imposed are as follows:

⁵ *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836.

Compliance Representations				
Charge	Maximum Penalty	Date Range	Fine	Court Costs
1	\$200,000	07/10/12-30/11/12	\$16,000	\$130
2	\$200,000	01/12/12-31/03/12	\$16,000	\$130
3	\$200,000	01/04/13-31/07/13	\$16,000	\$130
4	\$200,000	01/08/13-30/11/13	\$16,000	\$130
5	\$200,000	01/12/13-28/02/14	\$16,000	\$130
6	\$200,000	01/03/14-16/06/14	\$16,000	\$130
7	\$600,000	17/06/14-30/09/14	\$40,000	\$130
8	\$600,000	01/10/14-31/01/15	\$40,000	\$130
9	\$600,000	01/02/15-31/05/15	\$40,000	\$130
10	\$600,000	01/06/15-30/09/15	\$69,000	\$130
11	\$600,000	01/10/15-21/01/16	\$120,000	\$130
Independent Testing Representations				
12	\$200,000	08/12/13-30/06/13	\$5,000	\$130
13	\$200,000	01/07/13-31/10/13	\$5,000	\$130
14	\$200,000	01/11/13-28/02/14	\$5,000	\$130
15	\$200,000	01/03/13-16/06/14	\$5,000	\$130
16	\$600,000	17/06/14-30/09/14	\$15,000	\$130
17	\$600,000	01/10/14-31/01/15	\$15,000	\$130
18	\$600,000	01/02/15-31/05/15	\$15,000	\$130
19	\$600,000	01/06/15-30/09/15	\$20,000	\$130
20	\$600,000	01/10/15-21/01/16	\$50,000	\$130


 R G Ronayne
 District Court Judge