IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2021-009-000415
[2021] NZDC 15954

COMMERCE COMMISSION
Prosecutor

v

NEW ZEALAND HEALTH FOOD COMPANY LIMITED
Defendant

Hearing:	3 August 2021
Appearances:	A McClintock for the Prosecutor R Raymond QC for the Defendant
Judgment:	3 August 2021

NOTES OF JUDGE D C RUTH ON SENTENCING

---

[1] The New Zealand Health Food Company Limited faces three charges laid on a representative basis. They are firstly that between 22 December 2015 and 22 December 2020 the company, which it shall forthwith be known as being a person in trade, engaged in conduct that was liable to mislead the public as to the nature, manufacturing process, and/or characteristics of goods. The particulars are set out in each of the charging documents. These are charges arising under s 10 and s 40(1) of the Fair Trading Act 1986 and as a result of an amendment to the legislation some little time ago, the maximum penalty now is one of $600,000.

[2] The first charge under CRN 0067 has particulars relating to offering for sale royal jelly products under its Kiwi Natural Health brand labels and/or other promotional marketing that created the impression that the ingredients used in the

products were from New Zealand when they were not. The relevant products included Kiwi Natural Health Regular Strength Royal Jelly 180 capsules and/or Kiwi Natural Health Regular Strength Royal Jelly 365 capsules, and/or Kiwi Natural Health Regular Strength Royal Jelly 500 capsules.

[3] The second charge under CRN 0071 charges that between 22 December 2015 and 22 December 2020, the company engaged again in conduct that was liable to mislead the public as to the nature, manufacturing process, and/or characteristics of goods. The particulars here are that the company offered for sale royal jelly products under its New Zealand Health Food brand, its labels and/or other promotional marketing that created the impression that the ingredients used in the products were from New Zealand when they were not. The relevant products for this charge include New Zealand Health Food Regular Strength Royal Jelly 365 capsules and/or New Zealand Health Food Extra Strength Royal Jelly 365 capsules. That charge again is laid on a representative basis.

[4] The third charge, also representative, alleges that between the same dates the company, having the same description as I have already indicated, offended in terms of particulars set out on that charging document, it being CRN 0069, that the company offered for sale royal jelly products under its Manuka South brand with labels and/or other promotional marketing that created the impression that the ingredients used in the products were from New Zealand when they were not.

[5] The relevant products included Manuka South Regular Strength Royal Jelly 180 capsules and/or Manuka South Extra Strength Royal Jelly 180 capsules and/or Manuka South Regular Strength Royal Jelly 365 capsules and/or Manuka South Extra Strength Royal Jelly 365 capsules. It is not disputed that guilty pleas have been entered and at an appropriately early stage.

[6] The summary of facts in relation to these charges has been agreed between the Commerce Commission and by counsel for the defendant company. The summary of facts goes to some lengths, it is indeed 29 pages long. It includes a number of representative images of the various labels for the products under consideration here today which I simply record are present, but I have no way of including them in this

record. There are also within the submissions some tables which again I will refer to, but which cannot be included as part of this judgement today. However, the summary itself it seems to me is of sufficient particularity that the failure to include those various pictorial aspects is not going to be of any material difficulty.

[7] The summary of facts says that the company marketed ingredients in supplements as being from New Zealand when in fact the royal jelly, being the only active ingredient, was sourced from China. The transformation of the royal jelly, bee secretions into royal jelly powder, in fact took place overseas and most of the other ingredients, including vegetable oil, lecithin, liquid D-Alpha Tocopherol, coconut oil, and soya oil were also sourced from overseas.

[8] The ingredients were combined into finished royal jelly capsules in New Zealand by another New Zealand based manufacturer before being purchased and bottled by the company. The marketing and representations that the ingredients and the supplements were from New Zealand were made on the product labelling, the company's website, via social media, and through other marketing channels such as email newsletters. The charge period is 22 December 2015 to 22 December 2020.

[9] The business is a Christchurch based health supplement company. It had, at the time of the summary of facts being drafted in any event, a 15 fulltime equivalent employee roster. Mr Robert Haynes is the sole director and majority shareholder of the company. The company produces and markets approximately 90 stock keeping units (SKUs) for domestic and export markets including honey products and health supplements.

[10] As indicated, the company does not manufacture the supplements but buys them as finished capsules in bulk from a manufacturer and then packs and labels them for sale. It sells its goods online, in domestic retail stores, in retail stores and overseas markets such as Japan, Singapore and China. The company's bulk suppliers of finished royal jelly capsules are two New Zealand manufacturers, that is to say NZHM and GNP. During the charge period, NZHM was the company's only supplier of royal jelly capsules.

[11] Between 1 January 2016 and 1 October 2019, the company sold a total of 53,402 units of the supplements. There was an investigation as a result of a complaint being received relating to the labelling of the company's Manuka South royal jelly products. The Commerce Commission requested and received information from the company, including copies of the product labelling. On 7 August 2020, Mr Haynes was interviewed. The general manager of the company, Sam Bailey, was also present.

[12] The Commerce Commission instructed a senior research fellow at the University of Otago to provide an expert opinion on what consumers would be likely to understand about the origin of the royal jelly used by the company in the supplements. That person was Dr Philip Gendall. He concluded that most consumers would assume the royal jelly in the supplements was obtained from New Zealand bees as a result of both explicit and implicit country of origin claims made by the company.

[13] During the charge period, the company promoted the supplements through product labelling, posts on its websites, social media, newsletters, and in respect of the Manuka South brand through in-store displays. Copies of the labels used during the charge period are in fact set out in the summary as previously alluded to. Additional promotional material is also set out as a schedule to the summary.

[14] Overall, the representations made through those advertising channels created the impression that the ingredients in the supplements were from New Zealand. That overall impression is false and/or misleading because the royal jelly was from China and not New Zealand.

[15] The majority of the secondary ingredients used as fillers in the supplements were also from overseas and that is set out in a table, one of which I referred to earlier. It says in short that the various ingredients are either from China, Indonesia, the United States of America, Canada, Samoa, Papua New Guinea, or Malaysia. The only constituent being beeswax, which acts as a suspension aid, comes from either New Zealand or China.

[16] When the Commerce Commission reviewed the company's websites in September 2019, there were no statements clarifying that the ingredients used were

not from New Zealand. Those websites were subsequently amended to include statements such as, "made in New Zealand from imported ingredients" or "made from imported ingredients" in the fine print or drop downs on the relevant product lines. The company supplied two royal jelly stock keeping units through its New Zealand Health Food brand "365 capsules regular strength" and "365 capsules extra strength".

[17] The label for this brand features two bees on a honeycomb in front of a pasture and mountain scenery. It wraps around three sides of a hexagonal plastic container and is shown in a schedule to the summary. That label was in use since 21 September 2018, an earlier version of the label and the labels used for the extra strength SKUs are also set out in the schedule to the summary with dates that each label was in use. There were only minor differences. When considered together, the features of the New Zealand Health Food labelling create the overall impression that the royal jelly and other ingredients are from New Zealand.

[18] The features that are pointed out in the summary are that on the right-hand panel, the outline of the New Zealand map with the text: "New Zealand" is present, also on the right-hand panel the statement: "The New Zealand Health Food Company is dedicated to bringing you premium quality products which have been sourced from the pristine environment that is synonymous with New Zealand." On the front panel, the brand name New Zealand Health Food and the mountain and green pasture imagery are evocative of New Zealand's South Island landscape. On the left panel the company name and website address and the company logo are placed.

[19] I interpose here to acknowledge that Mr Raymond has pointed out by reference to regulations, being the Dietary Supplements Regulations 1985, that that particular information is required as part of those regulations to be present. The position taken by the Commerce Commission is that when taken as part of the total information and presentation on the New Zealand Health Food label, there is an additional incentive, as it were, to accept that the items are indeed New Zealand made. Those are matters I will return to.

[20] The impression created by the labels, being that the royal jelly was from New Zealand rather than China, was further disseminated and/or reinforced by the

company's online advertising with website and social media posts promoting the products pictured with their labels. That is referred to in schedule 2.

[21] The second charge relates to Manuka South Royal Jelly. The brand is largely made up of manuka honey products. However, four of the SKUs in that brand are royal jelly capsules. They are 180 capsule regular strength, 180 capsule extra strength, 365 capsule regular strength, and 365 capsule extra strength. The Manuka South royal jelly range is sold at a substantially higher price point than the other two brands marketed by the company.

[22] The label in this case has a gold bee on a black background with the brand name under the bee. The label wraps around three sides of a square container. The current label for the 180 capsule regular strength product is shown in the summary of facts. One of the salient points there is the inclusion on the right-hand side of the words "100 per cent New Zealand" next to the product name Manuka South with a characterisation of a bee. That version of the label has been in use since October 2019.

[23] Earlier versions of the label as well as the labels for the three other SKUs under the Manuka South brand have some text, layout, and colouring differences. The 365 labels, both regular strength and extra strength, do not have the "100 per cent New Zealand" text that is present on the 180 capsule labels. This text was present on the 180 capsule regular strength label from 15 June 2017 and on the 180 capsule extra strength products from 26 February 2018.

[24] The summary then goes on to set out why it is that the overall impression that these were produced in New Zealand arises. The references are to the" 100 per cent New Zealand" notation, the brand name "Manuka South", manuka being strongly associated with New Zealand, and "south" when used in conjunction with manuka evokes New Zealand's South Island. The company's logo and its Christchurch business address and the reference to https://manukasouth.com website or alternatively, the www.nzhealthfood.com website on earlier versions of the 180 capsule extra and regular strength labels are all said to be contributors to that impression.

[25] It is said in the summary that the impression is false and/or misleading because again, the royal jelly was from China and not New Zealand. The majority of the secondary ingredients again were from overseas in the main. There are further examples given, which I do not intend to read out because the various written submissions and oral submissions adequately refer to them, but they are simply further examples of the proposition as to how the labels are misleading.

[26] As to Kiwi Natural Health, which is charge 3, that brand uses the Kiwi Natural Health brand on a range of products including royal jelly, deer products, green-lipped muscle products, and colostrum. The key brand icon is the silhouette of a kiwi. Kiwi Natural Health royal jelly products are sold at a similar price point to the New Zealand Health Food brand royal jelly products. The company supplied three SKUs under this brand for royal jelly products 180 capsules, 365 capsules and 500 capsules.

[27] The label wraps around three sides of a square jar for the 180 capsule and 365 capsule products. The label is placed flat on the 500 capsule pouch. The label depicted on page 8 of the summary is said to have been used since 7 March 2019. Three earlier versions of the label were used during the charge period which had minor differences in wording and layout. Likewise the labels used for the 365 capsule product, of which there were four versions, and the 500 capsule product, there were four versions, had small differences but were substantively the same as the label shown on page 8 of the summary.

[28] Again, the summary records the ways in which this was misleading, and for example, it is said the name "Kiwi Natural Health" present on the front panel of the label and repeated four times along the top of the label is significant. " Kiwi" as a word is a well-known colloquialism for a New Zealander and uniquely associated with New Zealand. Kiwi Natural Health therefore implies that the company's products sold under this brand are of New Zealand origin.

[29] There is a silhouette of a kiwi on the front of the label and that bird is endemic to New Zealand and lends weight to the brand name, adding to the impression that the ingredients were sourced from New Zealand. The text on the right-hand side panel: "Kiwi Natural Heath products are dedicated to bringing you the finest natural

supplements" and the company's logo on the left-hand side are factors which add to that impression. I have already spoken about the logo and the different ways in which that may be looked at.

[30] Again, the summary records that the overall impression is a false and/or misleading one again, because the royal jelly was from China. The summary goes on to say that that impression was further disseminated and/or reinforced by the company's online advertising with website and social media posts promoting the products pictured with their labels as indicated in the summary.

[31] The summary then turns to look at the detriments and gains arising from these misrepresentations. Firstly, it says that the misleading conduct regarding the place of origin of goods can have a number of detrimental effects. They include firstly, misleading consumers who purchase the products and undermine their ability to make decisions that reflect their preferences on issues such as quality, sustainability, and supporting local primary production and industry.

[32] Secondly, reducing trust in the words "100 per cent New Zealand" or "New Zealand made" claims being made by other businesses. Thirdly, disadvantaging competitors who take on the increased costs to produce truly made in New Zealand products or who supply imported products without the advantage of" New Zealand made" marketing. Finally, inhibiting the development of a market for genuine New Zealand products in the industry in which the claims are being made.

[33] As to gain, the summary records firstly that the practice means that the defendant enjoys the commercial benefits of having a New Zealand made brand without incurring the additional cost of using local ingredients and producing the products in New Zealand. Secondly, it might make sales that may not have been made had the place of origin been properly represented. Thirdly, this misrepresentation gains an advantage over other traders who supply imported products without engaging in misleading conduct.

[34] There is then a portion devoted to the financial information and what the company received. I think it is common ground that over the three products, the sum

is around about $1,000,000. That, as the revenue, does not necessarily reflect the actual price at which all products were sold. The summary then goes on to record certain interactions between the Commerce Commission and the company.

[35] The first matter mentioned is that in 2016, there was a co-operation agreement between the Commerce Commission and the company relating to the Commerce Commission's investigation of another health supplement supplier called Topline International Limited. Topline sold bee pollen supplements and had made representations that the bee pollen was made in New Zealand and sourced from New Zealand bees.

[36] Topline was ultimately fined $526,500 for breaches of s 10 of the Fair Trading Act by both Topline and its director. In that case, the company provided evidence to the Commerce Commission that the bee pollen in Topline's capsules was from China. under that agreement, the company was granted immunity from proceedings being initiated against it but only in relation to the actual Topline investigation.

[37] On 19 April 2012, the Commerce Commission sent a letter to Mr Haynes, as director of the company, giving compliance advice about the place of origin labelling on dietary supplements. The letter said as follows:

> The Commerce Commission is concerned about place of origin labelling on dietary supplements. Where the key active ingredient of a dietary supplement is imported and it is this key ingredient that gives the product its value, businesses need to take care not to imply the product originates in New Zealand.

[38] That advice was issued to a number of other traders as part of an awareness raising initiative about the country of origin claims in relation to royal jelly and ginkgo biloba products. The letter also noted that the active ingredients in royal jelly and ginkgo biloba are generally grown, extracted and processed into the form they take overseas prior to being encapsulated and packaged in New Zealand.

[39] The letter made it clear that any claim about the origin of those products should not create the impression that key ingredients are sourced from, or that the manufacturing process occurs in New Zealand. The letter also indicated that the

overall impression about the place of origin can be created by words, images, for example the New Zealand landscape, and/or symbols, for example a fern or a kiwi, and the Commerce Commission fact sheet regarding the country of origin representations was attached to that letter.

[40] In 2005, the Commerce Commission investigated whether the company, then known by a different name, had made misleading country of origin claims in respect of its colostrum products sold under the Kiwi Natural Health brand. No further action was ultimately taken by the Commerce Commission in that investigation. The Commerce Commission sent Mr Haynes a letter advising of the outcome and a hardcopy of the Commerce Commission FTA guidance document named "a general guide".

[41] As a result of the investigation leading to the current charges, the company director Mr Haynes, and Mr Bailey as general manager, attended a voluntary interview. In the course of that interview, Mr Haynes said firstly, the company did not take any steps to establish the provenance of the royal jelly in the supplements. Secondly, he was aware the royal jelly was unlikely to be sourced from New Zealand and that there was a high likelihood that it came from China. That was confirmed by the company when asked by the Commerce Commission.

[42] Thirdly, he was aware of two manufacturers of royal jelly in New Zealand. However, he was also aware the company would not be able to source enough royal jelly from New Zealand for commercial production. Fourthly, he said it was difficult for the company to compete with companies that could wholly produce supplements more cheaply overseas, so the company has tried to prioritise its business around products indigenous to New Zealand or which have a position of leverage from New Zealand.

[43] Fifthly, in promotions the company focuses on promoting the company's overall brand story rather than individual SKUs. Its focus is on promoting the company as being a New Zealand family owned company which is important for some customers and differentiates the company from other offshore owned competitors.

Promoting the company as New Zealand owned is the reason behind the representations such as "100 per cent New Zealand".

[44] The next item was that Manuka South was the company's most recent brand and was the company's premium product range. Next, the New Zealand - sourced manuka honey products attracted a premium price in the market. He would also expect the New Zealand royal jelly products would have a high price point and this will be because of the cost of extracting the raw ingredient.

[45] Upon the conviction of Topline, Mr Haynes said at the subsequent interview that he did not turn his mind to the company's compliance with the Fair Trading Act in relation to country of origin representations. He said he was pleased the matter was behind the company. He said then the company has given consideration to Fair Trading Act compliance.

[46] In 2019, the company had been contemplating changes to its royal jelly products, including adding the fern mark to the labelling in place of the 100 per cent New Zealand claim. At the time of the interview, that change had been actioned on one royal jelly SKU in the Manuka South brand. The company has not previously appeared before the Court.

[47] I then turn to the competing submissions. Both are in writing. Both have been extremely helpful to the Court and I further acknowledge the helpful submissions made orally in terms of explanatory points raised in those submissions. The Commerce Commission in its submissions sets out the basic facts and submits that although the offending began as careless, it did progress in the second timeframe to be reckless, if not deliberate. It says that there was a progression in the degree of culpability because of the prosecution against Topline.

[48] The Commerce Commission says that having been through that process and in particular giving evidence which must have been important to sustain the conviction and sentencing that subsequently occurred it is unreasonable for Mr Haynes to simply say that he did not turn his mind to his own company's position in relation to precisely

the same sort of activity. The Commerce Commission says at the very least the company was on notice.

[49] The Commerce Commission says that in fact, the company took a commercial risk and because of that risk to gain advantage, in the way I have set out in the summary of facts, then deterrence becomes important and that a penalty commensurate with that sentencing purpose should be imposed. In those circumstances, the submission of the Commerce Commission is that the starting point should be within the range of $600,000 to $650,000 before deductions for any favourable matters that may be raised.

[50] There are two such areas the Commerce Commission concedes. The first is a credit for the previous good character and lack of previous convictions in relation to this company which, having regard to High Court authority which need not be set out in full, is generally thought to be calculated at around 10 per cent.

[51] According to the *Hessell v R* principles in terms of the appropriate discount for guilty pleas, the Commerce Commission concedes that the full 25 per cent discount is available to the company.[1] As a result, having deducted those two discounts, the Commerce Commission says that there should be an end point in the range of $390,000 to $422,500.

[52] There is reference to a possible claim of hardship, but Mr Raymond makes it clear in his submission, which I will come to, that that is no longer an issue. The prosecution submissions also cover the matters that I have previously raised which come from the summary in relation to the interactions between the Commerce Commission and this company including the letter in 2012 and of course the interaction in 2016.

[53] The Commerce Commission then goes on to consider and makes submissions about the factors in the sentencing process which should be paramount. As to that, the Commerce Commission says that there ought to be an emphasis upon deterrence because it is well-recognised that substantial or significant financial penalties have been shown to be effective in this area. The Commerce Commission then goes on to

[1] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

look at the regulatory, statutory context here and the purposes of the Fair Trading Act which are to contribute to a trading environment where the interests of consumers are protected and in which consumers in businesses participate confidently.

[54] Section 10 of course creates the prohibition of any person in trade from engaging in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods. There was an increase, as I indicated earlier, in the maximum penalty. The only relevance of that for present purposes is that some of the cases referred to have, at least in part, been determined under the previous legislation which provided for a much lesser penalty. This is a case to which s 40 ss 2 of the Act does not apply. That is agreed between counsel.

[55] In terms of the factors that have to be looked at, one has to firstly think about the nature of the goods or services. Here, there was distribution to consumers both in New Zealand and overseas. They were, as to the Manukau South products, sold as premium range products and the price reflected that. The Commerce Commission submits that in those terms, the place of origin and representations about that are likely to be a key consideration for purchasers and create a sense of affinity for consumers. Those two propositions arise from *Commerce Commission v Topline International Limited* and from *Commerce Commission v Go Healthy New Zealand Limited*[2].

[56] The second consideration is the importance of the misleading conduct and here, the submission that is made is that natural products engage concerns about environmental standards, questions of quality, sustainability, and the support for local primary production. Products that are genuinely New Zealand by origin can attract a premium in that respect and it is submitted by the Commerce Commission that that advantage was something that the company deliberately aimed to capitalise on by reason of its marketing strategy.

[57] It was also important, says the Commerce Commission, because the supplements that are sold by the company are what are known as "credence goods"

[2] *Commerce Commission v Topline International Limited* [2017] NZDC 9221; *Commerce Commission v Go Healthy New Zealand Limited* [2019] NZDC 25295.

goods, for which the relevant misrepresentations made it difficult or impossible for consumers to evaluate themselves. As the High Court said in *Budget Loans Limited v Commerce Commission*, misleading claims of this nature are a more serious form of misrepresentation.[3]

[58] The Commerce Commission submits that this was a material departure from the truth. They have said the only active ingredient in the supplements was the royal jelly clearly from China and all bar one of the secondary ingredients, beeswax to which I earlier referred, were sourced overseas. The Commerce Commission says that this must viewed as a substantial departure from the truth of the central character of the goods.

[59] The scale of offending was significant. The Commerce Commission says this spanned five years which, on its face, is a longer period than those applying to the other cases which are important in this area, two of which have already been mentioned, they being the *Topline* and the *Go Healthy* cases. The Commerce Commission then reminds me of the amount that was sold and the total revenue.

[60] The Commerce Commission submits that the dissemination here was significant. It was conveyed via the labelling on the supplements themselves through text, images, and videos on the company's websites where the supplements were also pictured with their labels and on the company's social media accounts on Instagram and Facebook.

[61] For Manuka South, the premium brand, the impression was further disseminated through other channels such as email and newsletters and instore marketing, materials provided by the company to retailers. The company also built a Manuka South branded display unit in a duty free retail store at Auckland Airport.

[62] The Commerce Commission then points to a number of factors, much of which have already been spoken of, about reasons why I should accept that the senior management of the company either did know or ought to have been aware that misrepresentations were likely to mislead and reference is made to the various factors

[3] *Budget Loans Limited v Commerce Commission* [2018] NZHC 3442.

including the interactions between the Commerce Commission and the company earlier referred to.

[63] As to the perhaps most glaring of those factors, that is to say the state of affairs following the *Topline* prosecution and conviction, and the suggestion that Mr Haynes simply did not turn his mind to questions of compliance given how intimately he must have been involved or his company was involved with the prosecution of *Topline*. The Commerce Commission submits that this is a difficult explanation to accept. I find it quite incredible in my own view. I agree with the submission that it ought to have known that its representations were likely to mislead the public.

[64] When one goes back to the start, one wonders what was in the minds of the company and its foundation members when it first decided to market the products it now markets. Did it know that a constituent part of its product was in fact from China and if it did, why not say so? The potential purchaser, be they local or overseas markets, or, as Mr Raymond suggested, inbound persons from other countries prior to the COVID-19 pandemic, they must have been entitled in my view to be properly advised as to the nature and origin of the constituent past of the product they were considering buying.

[65] It seems to me that to not say so was at best careless but at worst, something that was done intentionally because of the advantages in a commercial sense that arose both as to the potential purchaser's state of mind and secondly, as to what it gained by way of advantage over those distributers who did abide by the rules.

[66] The Commerce Commission points to this factor as being the deprivation of real choice for potential customers to buy an alternative product and it was a breach of trust because consumers are entitled to be able to have faith in the integrity of labelling of goods of this kind. They may not have purchased this company's product had they known about the derivation of the royal jelly. It may have made no difference, but in my view, they are entitled to know.

[67] One of the Australian authorities referred to by the Commerce Commission was that of *Australian Competition and Consumer Commission (ACCC) v Reckitt*

Benckiser (Australia) Pty Ltd.[4] This, I think, warrants repetition. It has long been recognised that where a representation is made in terms apt to create a particular mental impression in the representee and is intended to do so, it may be properly inferred that it has had that effect. Such an inference may be drawn more readily where the business of the representor is to make such representations and whether a representor's business benefits from creating such an impression.

[68] The Commerce Commission goes on to make further submissions in relation to potential harm to competitors. I have by and large covered that and of course, there is the potential harm to what I think is generically called the New Zealand brand. I think there is some substance in that because it is now not unknown for there to be a case put for the fact that New Zealand products do enjoy, on the international market, something of that "clean green" imagery. Whether that is now entirely so, I do not know but I think it is fair to say that our overseas markets certainly would look with favour, I think, upon a product said to be produced here.

[69] The next points that are made by the Commerce Commission relate to the steps taken to correct misleading conduct and this is an important aspect. I have already referred to some changes made on the website, but the Commerce Commission is perhaps critical of the lengths taken or not taken to change labels on the bottles. It is clear that there was no total withdrawal of the product for relabelling, but there were stickers provided so that the offending misrepresentations could at least be hidden.

[70] It seems to me that that was always likely to be an ineffective way of dealing with it and as Mr Raymond himself says, the various retailors to whom such labels would have been sent are likely to have had New Zealand language or English language as a second language which would further complicate and affect the overall efficacy of such a step. However, it is accepted that the steps were taken. The fact that the Commerce Commission was still able to visit retailers that still had the labels without the clarifying stickers may be a matter of happenstance and I do not place too much weight on that.

---

[4] *Australian Competition and Consumer Commission (ACCC) v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25.

[71] The Commerce Commission then takes me through the various cases which have been referred to already together with one further case, being the case of *Commerce Commission v Farmland Foods Limited.*[5] Of course, all of these cases are fact specific and it is only in relation to principles that the cases are of any real assistance. However, I am not being critical, the cases and their facts and outcomes are helpful as guidelines.

[72] In the *Topline* case, a judge of this court said that the offending was blatantly misleading and knowingly untruthful and calculated to gain an unfair advantage over competitors. There, of course, I think I have to accept there was a much more substantial scale to the offending and involved a lot more money. Also, in terms of the extent and percentage of its overall return as compared with this company where the return was relatively modest and a modest part of its overall business activity.

[73] Again, the *Go Healthy New Zealand Limited* case is referred to for similar offending. That also occurred over a period of years and on that case, where there was a starting point of $500,000, the sentencing judge seems to have been influenced by the fact that there had been some steps taken including the use of qualifiers which reduced the seriousness of the conduct. That is an important case because Mr Raymond places some reliance upon it in submitting, as he does when I will come to it, his starting point and range of penalties.

[74] By way of conclusion, the Commerce Commission says that *Topline* and *Go Healthy* cases are most analogous to the present case, although it also points to the case of *Farmland Foods Limited*. That case did not relate to these supplements in the way that I have been talking about them, but other products but similar sorts of representations were present. There, the global starting point was $300,000 for three charges. The approximate gross profit there was $670.000. This was not a multinational or large scale enterprise.

[75] So far as the comparison with *Topline* and *Go Healthy* are concerned, the Commerce Commission submits that the timeframes are at least comparable, although this company was the longest of all. The representations were similar, all placing

[5] *Commerce Commission v Farmland Foods Limited* [2019] NZDC 14839.

emphasis upon the clean green New Zealand image. They are my words, not those used in the submissions. The Commerce Commission submits that the impressions conveyed were a significant departure from the truth, that in terms of a totality view taken of the conduct here, including all of the factors that I have referred to, and so the conduct of this company is properly defined as reckless.

[76] The starting point here is said to be, from the view of the Commerce Commission, $600,000 to $650,000, having regard to the cases to which it has referred me. The mitigating factors, again I have mentioned the 10 per cent for good previous character and co-operation. That seems to have been referred to by Moore J in the case of *Budget Loans Limited*, but I do not know that that is a hard and fast rule. The case does not occur to me as being a tariff case, but it seems agreed between counsel that 10 per cent for those factors is appropriate and I will not depart from that.

[77] The Commerce Commission acknowledges the co-operation during the investigation ,provided information voluntarily and attended a voluntary interview. Those are all factors within that 10 per cent. Guilty pleas will attract 25 per cent, resulting in a final fine of between $390,000 and $422,500.

[78] In terms of Mr Raymond's submissions, they are accompanied by an affidavit from Mr Bailey who also attended the interview meeting along with Mr Haynes. He is the general manager of the company. His affidavit refers to decisions already taken to remove various aspects from the labels so as to make it clear that they did not simply wait until the prosecution came along. Rather, that they were already being proactive in trying to amend any of the representations which might be regarded as incorrect.

[79] Mr Bailey deposes that around 11 October 2019, the company received the letter of instigation of the proceedings from the Commerce Commission. About a month later on 29 November, then the company determined it would provide clarity on the source of the ingredients. That in itself of course involves a one month delay. There were label changes initiated to remove "100 per cent New Zealand" from the Manuka labels which took effect from 26 February 2020.

[80] There was a review on 16 October 2020 at the annual labels and packaging review undertaken by the company and a decision was then taken to update all of the labels to show that the products were in fact made from imported ingredients. There was also in November the decision to over sticker the royal jelly products that were already on the shelves.

[81] The affidavit also makes reference, as does Mr Raymond, to the factors that pertained as a result of the pandemic and what it resulted in was a forward planning to cater for an expected 70 per cent downturn and so there was a lot going on for this company around that time. Mr Raymond says that the company was not trying to prioritise profits but was rather, almost in a state of desperation, trying against the odds to help the company survive. I think I can understand that situation.

[82] Turning then to the written submissions, Mr Raymond tells me that the summary is accepted. He makes concessions about the labelling and indicates that the approach to the sentencing exercise suggested by the Commerce Commission is not in dispute. He says though that I should bear in mind the need to arrive at the least restrictive outcome, bearing in mind though factors such as accountability, deterrence, and denunciation.

[83] He also embarks upon an analysis of the three main cases, they being *Topline*, *Go Healthy*, and *Farmland* as being informative in reaching the starting point. He says, however, that there are key distinctions and he then goes on to look at those distinctions. He agrees that in terms of the nature of the goods and the importance of the misrepresentation, that this was a situation where consumers would not themselves have been able to test the validity of any of the representations as to the source of any of the ingredients.

[84] He also agrees that the cumulative effect of the labelling is accepted by the company as giving the impression that the products were sourced from New Zealand, but it is clear that the royal jelly products were not. He refers to that as a material departure and I think that is a proper concession for him to make.

[85] As to the period over which the offending spanned, he says that in fact, the real offending at its most serious was later in the piece and says that he agrees that certainly between June 2017 and December 2020, a period of some two and a half years, the more significant misleading conduct occurred. He says that that should be taken into account when comparing the timeframes that are set out in the other cases to which reference has been made.

[86] He also emphasises that the royal jelly products are a relatively small fraction in terms of the total revenue of this company and he says that over the five financial years pre-2015 and 2019, the average total revenue was $7.21 million, at which the average revenue for the same period for the royal jelly products was about $0.201 million. That is some 2.8 per cent of the total revenue and that is referred to in Mr Bailey's affidavit.

[87] Mr Raymond suggests that the offending here is less serious than in *Topline*. There, there was an acknowledged majority of the revenue obtained as a result these impugned products and it was a much higher figure and as a proportion of the overall revenue. Again, in *Farmland* the revenue was substantially higher than the $1,000,000 revenue referred to for this company.

[88] He points out that the Commerce Commission accepts that dissemination of the misrepresentations in this case were not so great as was the case for *Go Healthy* and *Topline*. Those cases in part at least involved video advertisements which were shown on wide ranging media platforms including television. The defendant company accepts that its conduct was highly careless and that the Court might regard it as having been reckless, but he submits that that would be a proper finding directed towards the latter part of the period relating to the particulars of charge 2.

[89] Mr Raymond resists any suggestion the conduct was deliberate. He accepts that the factors pertaining to the *Topline* investigation and the participation in that of this company are likely to be seen as an aggravating feature. That is, of course, because it is difficult to resist the submission that the company must have been on notice and that although Mr Haynes may not have been told in black and white what

the specific representations that were in question were, it seems to me that that was not required.

[90] This was, as Mr Raymond reminded me, a company in existence for some 32 or so years and I do not accept that Mr Haynes needs to be led by the hand in terms of this sort of information. It seems to me that anyone in this area would be expected to know it. In any event, I think it goes further than that because Mr Haynes accepted in the course of his interview that he knew it was likely that the key ingredient was sourced overseas.

[91] Mr Raymond suggests that the misrepresentations contained within charge 1 and charge 3 and the early stages of the charge period for charge 2 may be viewed as having less opportunity to mislead the public and that carelessness would be the proper label to attribute to that aspect of the charges. He also reminds me about the Dietary Supplements Regulations 1985, and I have also referred to that in passing throughout these comments.

[92] He then deals with charge 1 and charge 3 and makes concessions about how the various aspects of the labelling would be misleading but says that there is nothing in the label that could be characterised as outright false, but I think it has to be accepted that taken as a whole, the representation was there. It may be that the conduct here is not susceptible of the more scathing remarks made in the *Topline* sentencing judgement, but certainly I regard the actions of this company this as being reckless.

[93] Mr Raymond talks about the New Zealand Health brand and the NKH products and makes proper concessions about the misleading aspect of them. He says that in relation to those two entities though, the conduct was more akin to carelessness and below the level of culpability in relation to the *Topline* and *Farmland* cases.

[94] He then deals with the Manuka, charge number 2, and he says that the only misleading material was the brand name Manuka South and the company's name, address, logo, and website. He said during the period 22 December 2015 and 16 June 2017, there was no social media or market posts that would aggravate the nature of that misrepresentation, but he does accept that this was misleading in the

context of the overall brand but submits the labelling did not contain blatant lies or falsities.

[95] He submits that the proper attribution there in that period was one of carelessness as he suggests it was for charge 1 and charge 3. He does agree however, that the culpability increased in the period June 2017 and December 2020. He sets out the various untruthful promotional material and label content in his submissions and they are all accepted by the Court as proper concessions to be made.

[96] The position as to whether or not the company had as its priority the overall brand story as opposed to the misrepresentations about the source of products may be right, but the overall impression cannot be put to one side. I have already referred to my view of the explanation given by Mr Haynes at the interview about the fact that he simply did not turn his mind to his own company's conduct post the *Topline* sentencing.

[97] There are again a number of concessions made by Mr Raymond and they relate to the fact that, of course, the royal jelly was not New Zealand produced and that a combination of various representations was misleading and that is a proper concession again. There is also acceptance that there is a value, as I earlier indicated, in a "made in New Zealand" brand and the company recognises the detrimental effect that misleading conduct of this kind can have.

[98] He also accepts that of course this type of misrepresentation has very much the potential to increase its own financial gain. On the basis of those various distinctions and points made by Mr Raymond, he agrees that while there should be a global starting point, but he says it ought to be between $500,000 and $550,000.

[99] He then takes me through the various factors that relate to this company, which can be prayed in aid of discounts. He talks of the co-operation with the investigation, the fact that there have been no previous relevant convictions, that this has been a successful business for over 30 years as a Christchurch based company employing 15 fulltime people, that although COVID-19 has had some effect on that, he submits that

this company is still a good corporate citizen and this is the company's first time in a court.

[100] Mr Raymond, in his oral submissions, also pointed out that the Commerce Commission sought from it a large amount of disclosure or information and that the company was diligent in providing all of that. He repeats the content of the affidavit as to the fact that the company was already contemplating these issues and the need to make some changes before the proceedings were instituted.

[101] Mr Raymond says that with the benefit of hindsight, of course it may be said that things could have been done better and in a more timely way but, as indicated earlier, there were other factors in play, principally of course the COVID-19 lockdown and the affect that it had, not only on this company but on many others. Mr Raymond agrees with the discounts that have been suggested. Applying them, he suggests that the end point should be a fine in the range of $325,000 to $357,000.

[102] These cases are often a matter of impression and often focus will fall in one area or another to determine the overall outcome. I make no secret of the fact that my principal concern here was the lack of action or any responsibility taken by this company in the aftermath of the *Topline* prosecution. It must have been glaringly obvious to any person with any business acumen at all, that it needed to immediately look at its own practices in relation to its marketing, its labelling, and ask itself, perhaps with the benefit of expert advice, what might need to be fixed and go about doing so rather than simply not turning his mind to those issues.

[103] My overall view is that a starting point here is for a combination of the various submissions that have been made close to what the Commerce Commission seeks, but not quite that high. I think that some downward adjustment is required because of the timelines that have been discussed in this case, particularly in regard to the shift of culpability in charge 2. My estimation of the proper starting point is one of $580,000.

[104] I would then take from that 25 per cent which is $145,000, 10 per cent as agreed for the other factors of $58,000 for a total, using the *Moses v R* sentencing

model, of $203,000.[6] When deducted from the starting point, leaves a fine of $377,000 which is a global fine, which I will simply apply unless there are any other submissions about that, equally across the three charges.

_____
Judge DC Ruth
District Court Judge

Date of authentication: 10/08/2021
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

[6] *Moses v R* [2020] NZCA 296.