IN THE DISTRICT COURT
AT BLENHEIM

I TE KŌTI-Ā-ROHE
KI TE WAIHARAKEKE

CRI-2018-006-000804
CRI-2018-006-000805
CRI-2018-006-000806
CRI-2018-006-000807

[2018] NZDC 25519

MINISTRY FOR PRIMARY INDUSTRIES
Prosecutor

v

YEALANDS ESTATE WINES LIMITED
PETER WAYNE MAURCE YEALANDS
TAMRA LEE KELLY
JEFFREY MARK FYFE
Defendants

Hearing:	13 November 2018
Appearances:	J Webber for the Prosecutor J Eaton QC for the Defendant Yealands Estate Wines Limited R Reed QC for the Defendant Peter Wayne Maurice Yealands J Rapley QC for the Defendant Tamra Lee Kelly M Corlett QC for the Defendant Jeffrey Mark Fyfe
Judgment:	11 December 2018

SENTENCING NOTES OF JUDGE W K HASTINGS

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[1] Yealands Estate Wines Limited, Jeffrey Fyfe and Tamra Kelly have pleaded guilty to a number of charges related to historic offending under the Wine Act 2003, and appear for sentence. Peter Yealands has asked for a sentence indication if he were

to plead guilty to the charges, and accepts the agreed summary of facts for the purpose of the indication. As the offending and, in Peter Yealands' case, the alleged offending, are interrelated, the sentence indication reasoning is included in these sentencing notes. [Peter Yealands accepted the sentence indication before sentencing began].

[2] Yealands Estate Wines Limited (YEWL) has pleaded guilty to five charges of making a material omission in wine records, and five charges of making a false statement in export eligibility approval applications, contrary to s 97(1)(a) of the Wine Act 2003 which provides as follows:

> **97 Offences involving deception**
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> A person commits an offence who, with intent to deceive and for the purpose of obtaining any material benefit or avoiding any material detriment,—
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> (a) makes any false or misleading statement or any material omission in any communication, application, record, or return for the purpose of this Act, or destroys, cancels, conceals, alters, obliterates, or fails to provide any document, record, return, or information required to be kept or communicated under this Act;

[3] As a body corporate, YEWL's state of mind is established under s 107 of the Wine Act 2003 by showing that a director, employee, or agent of the body corporate, acting within the scope of that person's actual or apparent authority, had that state of mind. Under s 97(3)(a), the maximum penalty for each of these offences when committed by a body corporate is a $500,000 fine. The notional maximum fine available for YEWL is therefore $5,000,000.

[4] If he accepts this sentence indication, Peter Yealands will plead guilty to five charges of making a material omission in wine records, and five charges of making a false statement in export eligibility approval applications, contrary to s 97(1)(a) of the Wine Act 2003. In addition, he has been charged under s 108(b) of the Wine Act 2003 as a director of YEWL at the time of the offending. Section 108(b) provides that:

> **108 Liability of directors and managers of companies**
>
> Where a body corporate is convicted of an offence under this Act, every director and every person concerned in the management of the body corporate is also guilty of alike offence if it is proved that—
> …

> (b) the director or person knew that the offence was to be or was being committed, and failed to take all reasonable steps to prevent or stop it.

[5] Under s 97(3)(b), the maximum penalty for each of these offences when committed by an individual is five years' imprisonment and a $100,000 fine. The notional maximum fine available for Peter Yealands is therefore $1,000,000.

[6] Jeffrey Fyfe has pleaded guilty to five charges of making a material omission in wine records, and five charges of making a false statement in export eligibility approval applications, contrary to s 97(1)(a) of the Wine Act 2003. Under s 97(3)(b), the maximum penalty for each of these offences when committed by an individual is five years' imprisonment and a $100,000 fine. The notional maximum fine available for Jeffrey Fyfe is therefore $1,000,000.

[7] Finally, Tamra Kelly has pleaded guilty to four charges of making a material omission in wine records, and five charges of making a false statement in export eligibility approval applications, contrary to s 97(1)(a) of the Wine Act 2003. Under s 97(3)(b), the maximum penalty for each of these offences when committed by an individual is five years' imprisonment and a $100,000 fine. The notional maximum fine available for Tamra Kelly is therefore $900,000.

Facts

[8] Sentencing proceeds on the basis of the agreed summary of facts. It is important that the offending is accurately described and put into context.

[9] This offending involves concealing the fact that sucrose from cane sugar was added after fermentation to wine which was intended for export to the European Union. This offending took place on particular dates between May 2013 and December 2015. Although the addition of sucrose to wine is not prohibited in many jurisdictions including New Zealand, and is permitted before and during fermentation in the European Union (EU), it is not an approved oenological practice in the European Union after fermentation. Any exporter wanting to export wine to the European Union must declare in an export eligibility approval application to the Wine Export

Certification Service (WECS) that the wine has been made only in accordance with oenological practices permitted by the Wine Overseas Market Access Requirements European Union Notice.

[10] In New Zealand, the Wine Act 2003 and the Wine (Specifications) Notice 2006 impose documentation and record keeping requirements on New Zealand wine makers. All inputs into the winemaking process must be traceable. Therefore, if sucrose were added to any particular wine, it had to be recorded under New Zealand law, and if it was added post-fermentation, it would not be eligible for export to the European Union.

[11] One corporation and three individuals associated with that corporation have been charged. Peter Yealands was the sole director of YEWL in 2013 and 2014. In July 2015 approximately 85% of Yealands Wine Group Limited (the owner of YEWL) was sold to Marlborough Lines Limited. It is now entirely owned by Marlborough Lines Limited. At the time of the offending, one of Peter Yealands' responsibilities was to work with the Chief Executive Officer of the Yealands Group to ensure that reporting to the Board was on a "no surprises" basis and to ensure that compliance with legislation and regulatory bodies was monitored. Tamra Kelly was the Chief Winemaker. She had responsibility for overseeing the entire production process including fermentation, chemical composition (acid, sugar, sulphur and sulphate), aging, blending and bottling. She also had responsibility for ensuring legal standards were met for New Zealand and export markets. Jeffrey Fyfe was appointed as Senior Winemaker in January 2012 and became General Manager of Winery Operations in January 2015. Included in his responsibilities were the coordination and control of all winery operations, oversight of all compliance relevant to production, and the production of wines as directed by the Chief Winemaker.

[12] Tamra Kelly, alone and together with Jeffrey Fyfe, made decisions about whether sugar should be added to the final blend post-fermentation. She would provide verbal instructions to Jeffrey Fyfe about how much sugar to add, and then he oversaw the day-to-day work related to the blends through to bottling. YEWL and the individual defendants knew what was required for the production and export of wine to the European Union. They were aware that the Wine Export Certification Service

would not have issued the affected wines export eligibility approvals to the European Union if they had truly declared post fermentation sugar additions.

[13] The agreed summary of facts records the mechanics of the offending and the knowledge of the offenders. One example of the offending arose from an incident in which a random wine sample taken by NZ Winegrowers (who administered the export application process under the name of the Wine Export Certification Service) returned a significantly higher residual sugar result that the tank sample originally submitted by YEWL. Jeffrey Fyfe had received an email from a staff member who was also aware of the WECS query and who confirmed that sugar had been added post fermentation and had not been recorded. In his reply to WECS and with this knowledge, Jeffrey Fyfe provided a false response and a false electronic cellar note that showed no sugar addition for this post-fermentation operation. He falsely stated that he assumed that there had been a dilution issue either from the tank not being mixed properly or dilution in the actual bottle. The electronic cellar note was also false because a search by MPI wine officers located the original paper cellar note that showed 22.75 kg of sugar was added to 9,128 litres of wine on 27 August 2013. Export documentation confirmed that 7,047 litres of this wine was exported to the European Union on 4 September 2013.

[14] The agreed summary of facts records another occasion when a staff member told Jeffrey Fyfe that he was uneasy with the addition of sugar to wine after fermentation had ended. Jeffrey Fyfe told him words to the effect that he was "worrying about things that he shouldn't worry about". This staff member then had a meeting with Peter Yealands. He told Peter Yealands about the instructions to add sugar post-fermentation, and that he considered this to be bad practice. Peter Yealands took no steps to act on the concerns raised with him. Another staff member expressed concern in the middle of 2013 to both Tamra Kelly and Jeffrey Fyfe about the addition of post fermentation sugar to wines destined for the European Union. They told her to trust them as her bosses, that the risk was theirs not hers, and not to bring the matter up again.

[15] Sometimes sugar was added directly to the wine post-fermentation. On other occasions, base wine to which cane sugar had been previously added was blended with

wine post-fermentation. Both methods resulted in the addition of cane sugar post-fermentation. Audits were conducted on the electronic winemaking record keeping system. To conceal the addition of cane sugar post-fermentation, cellar notes had to be falsified or voided from the electronic system. There are numerous examples in the agreed summary of facts. On one occasion, no hard copy of a cellar note recording an instruction to add sugar post-fermentation was prepared or retained. Some electronic cellar notes recorded the addition of grape juice concentrate (GJC) which is a permitted oenological practice, but white correction tape was applied to the hard copy versions recording that sugar was added. On another occasion, a hard copy of a cellar note recorded the addition of 3.1 tonnes of sugar on 2 July 2014, but the status of the wine had been changed to read "FER" for fermenting, when in fact the wine was not fermenting. On yet another occasion, MPI was supplied with photographs showing an instruction to add sugar at a rate of 0.5 g/l, but no record of these sugar additions was kept in the electronic system. Then, export eligibility applications were made stating that that wine complied with European Union market access requirements when it did not.

[16] The Ministry for Primary Industries allocated the affected wine into six groups. There are some differences between YEWL's and MPI's calculations. I have used the figures that I assessed as the most accurate, but when in doubt, I used figures most favourable to YEWL. The differences are not sufficiently great to alter the sentence. Wine 1 had 22.75 kg of sugar added to 9,128 litres of wine of which 7,047 litres was exported to the European Union. Wine 2.1 had 6,000 kg of sugar added via a blend of base wines to 700,000 litres of wine, none of which was exported to the EU. Wine 2.2 had 1,000 kg of sugar added directly to 350,000 litres of wine, of which 216,000 litres was exported to the EU. Wine 2.3 had 2,000 kg of sugar added directly to 700,000 litres of wine of which 600,000 litres was exported to the EU. Wine 2.4 had 134 kg of sugar added via a base blend to 600,000 litres of wine of 504,000 litres was exported to the EU. Wine 3 had 216 kg of sugar added directly to 23,450 litres of wine of which 23,190 litres was exported to the EU. Wine 4.1 had 280 kg of sugar added directly to 560,000 litres of wine, all of which was exported to the EU. Wine 4.2 had 1,500 kg of sugar added via base wine to 1,000,000 litres of wine, of which 832,326 litres was exported to the EU. Wine 5 had 302.4 kg of sugar added directly to 19,900 litres of wine, all of which was exported to the EU. Wine 6 is essentially 96,220 litres of left

over Wine 4 blended into 700,000 litres of Wine 6, of which 169,938 litres was exported to the EU.

[17] Mr Eaton QC has submitted that adding base wine that was previously sweetened is a less culpable activity than adding cane sugar directly because the base wine was sweetened before it was known to which wine, or when, it would be added. I am not convinced that such a distinction should be made. The base wine was sweetened for the sole purpose of adding it to balance the sweetness and acidity of subsequently produced wine. This is the same reason sugar was added directly.

[18] The defence have provided a number of affidavits which provide some helpful context. One of these is from Michael Wentworth, the Chief Operating Officer with Yealands Wine Group. It is apparent from his affidavit of 7 November 2018 that these charges cover approximately 0.5% of the export certificates obtained by Yealands during the period of the offending. Simon Garforth, the Chief Executive Officer of Yealands Wine Group since February 2017, has also provided an affidavit, dated 5 September 2018. In his affidavit, he states that Yealands produced 52.5 million litres of wine during the period covered by these charges. That means that approximately 7.5% of the wine produced by Yealands in this period is covered by these charges. Mr Garforth also states that in 2015 Yealands installed a grape juice concentrate machine in order to produce its own grape juice concentrate. He states that all wines that are to be sweetened post fermentation are now only sweetened using grape juice concentrate or high residual sugar wines no matter what the market destination or legal requirement. As a result, he states that "[n]ow, there can be no breach even accidental of the EU requirement as all of the wines that we produce are produced to the EU standards, although this is neither operationally or financially beneficial."

[19] In his affidavit dated 5 November 2018, Peter Radich, the Chair of Yealands Wine Group Limited, explains the history of Yealands and the particular circumstances that gave rise to this offending. He states that the quick growth of Yealands outpaced the development of systems that would have ensured better compliance with legal requirements. The senior management team was insufficiently experienced in managing such a rapidly growing company and did not know enough about overseas market access requirements. Most of this offending took place in the immediate

aftermath of the 2013 earthquakes which necessarily diverted attention and "brought about unnatural pressures." Mr Radich also states that the turnover of Yealands at the time of this offending was in the range of $100 million per annum. Cost savings from the use of sucrose instead of grape juice concentrate "would have been inconsequential." In his view, it was a combination of operational convenience, at times under pressure, and a failure to understand the significance of breaching the overseas market access requirements, that were the drivers of this offending.

Sentence

[20] The sentence imposed must denounce the conduct in which the defendants were involved. It must deter these defendants and others from the same, or similar, offending. It must hold these defendants accountable for the harm they have caused to the community. The sentence must also be the least restrictive sentence that is appropriate in the circumstances in terms of s 8(g) of the Sentencing Act 2010. The least restrictive sentence in the context of this offending is a fine. "Appropriate in the circumstances" in the context of a fine for regulatory offending means that the sentence must be the least restrictive sentence that has "bite"; it would not be appropriate to interpret that provision of the Sentencing Act to require a fine at "licence fee" level. The circumstances of fineable regulatory offences, particularly those offences created by legislation with specific objects or purposes related to the regulated field, make fines that "bite" appropriate to recognise those specific objects. It is therefore also important to bear in mind the objects of the Wine Act, particularly those set out in s 3(c) and (d):

> 3. The objects of this Act are to –
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> …
>
> (c) facilitate the entry of wine into overseas markets by providing the controls and mechanisms needed to give and safeguard official assurances issued for the purpose of enabling entry into those markets:
>
> (d) enable the setting of export eligibility requirements to safeguard the reputation of New Zealand wine in overseas markets:
>
> …

[21] These provisions emphasise the integrity of official assurances to overseas markets that New Zealand wine is eligible for entry to those markets. They also emphasise the need to safeguard the reputation of New Zealand wine in overseas markets. The sentence imposed on these defendants therefore must also provide overseas markets with accurate information about the nature and scale of this offending, and it must provide them with confidence that any offending that undermines the integrity of those official assurances will be met with a stern but proportionate response. Such a response will also benefit the reputation of the New Zealand wine industry as a whole in the long run because overseas markets will become aware from the sentence imposed in this case that any allegation of non-compliant activity will be taken seriously, investigated and if found to exist, punished appropriately.

[22] I turn now to establish a starting point by assessing the aggravating and mitigating features of the offending. I allocate the charges into two groups: the charges relating to false statements in the export eligibility approval applications; and the charges relating to material omissions in winemaking records.

[23] The false statement in export eligibility application charges cover wines 2, 3, 4, 5 and 6. The prosecution has suggested that these charges could be ranked in order of relative seriousness by taking the percentage of the total volume of affected wine that each of wines 2, 3, 4, 5 and 6 contributes to. Wine 4 is 66% of the total volume of affected wine; wine 2 is 24%; wine 6 is 10%; wine 5 is 0.003%; and wine 3 is 0.003%. The material omission charges concern records relating to a total of 6,624,368 litres of wine, which include the 3,772,919 litres of wine exported that are the subject of the false statement in export eligibility application charges.

[24] To my mind, the volume of affected wine is one factor that must be weighed in the balance, but it is not the only, or even the most significant, factor. At their heart, both sets of charges concern deceptive conduct. It is the culpability derived from that deceptive conduct that is the most important factor to be assessed. The culpability of individuals is assessed by what they did and what they knew. A company's actions and knowledge however are derived from the individuals who govern and operate it. Peter Yealands was the sole director and ultimate shareholder of YEWL throughout

most of this offending. Mr Eaton QC has submitted that there is therefore an inevitable doubling up of sentencing if fines are imposed on both Peter Yealands and the company. Mr Eaton QC submitted that it is more appropriate to take a global starting point assessed against the maximum penalty for the individual defendants, and then to fix an appropriate level of fine in terms of assessed degree of culpability. With respect to YEWL, Mr Eaton QC has asked for a conviction and discharge, with the fine that would otherwise be imposed donated to a charity. He submits that the prosecution and conviction are, in themselves, a sufficient deterrent.

[25] With respect to Peter Yealands, Ms Reed QC has asked me to consider how s 108 of the Wine Act should be construed in light of the Court of Appeal's interpretation of s 246 of the Fisheries Act 1996 in *D'Esposito v Ministry for Primary Industries*[1]. Section 246 of the Fisheries Act provides that:

> **246 Liability of directors and managers**
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> (1) If a body corporate commits an offence against this Act, every director, and every person concerned in the management of the body corporate, also commits an offence if it is proved that—
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> (a) the act or omission that constituted the offence took place with the director's or person's authority, permission, or consent; or
>
> (b) the director or person knew or should have known that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.

[26] Ms Reed QC submitted that there is a sufficient difference in wording between s 108 of the Wine Act and s 246 of the Fisheries Act to warrant an interpretation of s 108 that makes s 108 more akin to a deemed liability provision, subject to proving knowledge, than s 246 is. As such, Ms Reed QC submitted that deemed liability connotes less culpability.

[27] There are differences in the wording of each provision, but I am not convinced that a comparison of the wording provides much enlightenment. Unlike s 246, s 108 requires the company to be convicted of an offence. The company has pleaded guilty and convictions have been entered. The section then states that every director "is also

[1] *D'Esposito v Ministry for Primary Industries* [2018] NZAR 9.

guilty of a like offence" if the director knew that an offence was to be committed and failed to take all reasonable steps to stop it. The word "also" is used in both provisions, but in s 246 the director also "commits an offence" whereas the director in s 108 is also "guilty of a like offence" which, being "like", must take on the characteristics of the offence committed by the company. This suggests that s 108 creates a separate offence, albeit one "like" the offence committed by the company, and which requires a separate assessment of culpability and consideration of sentence. In this case, both the prosecution and Ms Reed QC are agreed that Peter Yealands' offending is "downstream" of the company's, and takes the form of knowledge that offences were being committed, but without knowledge of the details of the specific offences, the constitution of each wine or the records kept about each wine. His culpability lies failing to take all reasonable steps to stop the activity he knew about. As such, it is a crime of omission and both the prosecution and Ms Reed QC accept that his culpability can be assessed lower than that of his individual co-defendants.

[28] Having come to the conclusion that s 108 creates a separate offence, I do not think it is double counting to sentence the company and Peter Yealands as its director. Nor do I think a conviction and discharge for the company is appropriate. Not only would such a sentence be insufficient to achieve the purposes of denunciation, deterrence and accountability, it would not serve justice if the individuals were fined and the company was not. The individuals were at all times serving the company, and the company must be seen to be held responsible in a way that reassures overseas markets and protects the reputation of the New Zealand wine industry. A conviction and discharge would not achieve those objects of the Wine Act.

[29] I turn to assess culpability and identify the following aggravating features of this offending.

Premeditation and duration

[30] First, I accept that the offending did not take place continuously from May 2013 to December 2015, that it involved about 7.5% of the wine exported in that period, that it involved only wine exported to the EU, and that it concerned approximately 0.5% of the export eligibility certificates obtained in that period. I also

accept that the company grew quickly and that some attention was diverted to addressing earthquake damage. I accept that this contributed to Tamra Kelly and Jeffrey Fyfe feeling that they were under pressure to maintain production. This may explain some of the context in which the offending occurred, but it does not excuse it. Notwithstanding the context within which the offending occurred, there was a moderate to high degree of premeditation with respect to the offending itself. It was a conscious decision to add cane sugar post-fermentation. Once that decision was taken, another decision had to be made to falsely declare that only EU-approved oenological practices had been used to make the wine. Then another decision had to be taken to alter or void winemaking records to prevent auditors discovering the offending. The offending by YEWL, Jeffrey Fyfe and Tamra Kelly involved active and conscious deception. They knew the EU requirements, and actively concealed their breaches of them. Peter Yealands' offending, by way of contrast, was somewhat less culpable because it was the result of failing to take reasonable steps to prevent the deception when he knew it was occurring during this period, and when, as the director of YEWL, he could have stopped it. He knew generally that sugar was added to some wine destined for the EU, but he did not know which wines or how much sugar, he did not know about or actively participate in creating material omissions in particular winemaking records or in making false statements in particular export eligibility approval applications. He, nevertheless, with the knowledge he had, failed to take reasonable steps to prevent the offending, by, for example, issuing counter-instructions to prohibit the addition of cane sugar post-fermentation to wine destined for the EU.

Material benefit

[31] Second, I accept that there was not a great deal of financial advantage to be gained by this offending. The affected wine would not have been able to be exported to and sold in the EU but for the false statements in the associated export eligibility approval applications and material omissions in the winekeeping records. It could however have been sold into other markets. Turning to what was concealed, at the time of the addition of cane sugar post-fermentation to wine destined for the EU, YEWL's annual turnover was approximately $100 million. The financial advantage, around $200,000, that was gained by using cane sugar instead of grape juice concentrate was minor in that context. There is nevertheless a value to convenience.

The agreed summary of facts refers to "meeting market expectations, increasing efficiency and reducing costs". Mr Garforth states that the practice of adding sugar to wine is focussed on marketing to consumer demand and taste, and that the process of keeping wines destined for different countries with different access rules is complex. This offending cut through some of that complexity. It was of value to the company, but to a relatively low extent.

Risk to reputation

[32] Third, there is a significant risk to reputation. I accept Mr Eaton QC's submission that any breach of export eligibility requirements inevitably gives rise to such risk, and that how the resulting harm affects reputation will be largely a matter of how the market reacts to this sentence. Jeffrey Clarke, General Counsel and General Manager Advocacy of New Zealand Winegrowers, has provided a statement dated 30 October 2018 which sets out the value of this reputation. In short, he states that "it is the premium reputation of our wine that allows it to be sold at a high enough price to make the industry viable." He states that consumer purchases of wine are mostly discretionary, and purchasing decisions can be influenced by subtle factors. He states that there is a risk of reputational damage affecting people other than the defendants.

[33] Implicit in these submissions is an acceptance of three kinds of reputational interest. This offending, limited in its scope to these particular charges, will affect YEWL and the individual defendants. The precise scope and historic nature of the offending will become public knowledge, and it will be for YEWL and the individual defendants to manage the consequences. The second reputational interest at stake is that of the New Zealand wine industry as a whole. This is the first sentencing under the Wine Act since it was passed in 2003. The agreed summary of facts states that wine grapes are New Zealand's largest horticultural crop. The export value of wine to the New Zealand economy now stands at $1.3 billion per annum. The actions of YEWL have the potential to affect the reputation of the whole New Zealand wine industry, but those effects can be mitigated to some extent by accurately stating the extent and nature of the offending. The third reputational interest is to the New Zealand government as the regulating authority. Effective regulation requires the ability to audit the regulated practices. Effective audits require accurate record keeping.

Inaccurate records compromise the ability of the regulating authority to audit effectively, which erodes confidence in the integrity of both the regulator, and those who are regulated. The response to this offending will affect the ongoing reputation of YEWL specifically, the New Zealand wine industry generally, and the perception overseas that New Zealand takes non-compliance with export eligibility requirements seriously. As Mr Clarke states, these convictions and sentences will demonstrate to overseas markets that the New Zealand regulatory system for wine is working.

Quantity of wine

[34] Fourth, the volume of wine affected was substantial. As indicated above, inaccurate records were maintained in relation to 6.6 million litres of wine, of which nearly 3.8 million litres was exported to the EU, or about 7.5% of the total amount of wine exported during the period covered by the charges.

[35] There are mitigating features of the offending.

No risk to human health

[36] First, at no stage was there ever any risk to human health as a result of this offending. Although the Wine Act creates offences involving endangerment of human health in s 98 which carry the same maximum penalties as these offences, there can be little doubt that the absence of risk to human health in the present offending must be seen as a mitigating factor.

An accepted practice elsewhere

[37] Second, as indicated above, the addition of cane sugar post-fermentation is a widespread practice that is approved in many markets, including New Zealand, Australia and the USA. Its prohibition in the EU, although well-known, is peculiar to the EU.

Limited in scope

[38] Third, this offending does not involve making false claims of vintage, region or variety. Such offending is viewed more seriously than this offending. This offending is limited in scope to deceiving authorities about the addition of sugar post-fermentation to wine destined for the EU in 2013, 2014 and 2015.

[39] I have been referred to a number of judgments for guidance as to the appropriate starting point. As this is the first sentencing under the Wine Act, I have not found them particularly helpful. *MPI v Fonterra Ltd*[2] concerned failures to comply with regulatory obligations that ran the risk of dairy products being contaminated with botulism. There is no risk to human health in this case. The offending in *Fonterra* was the result of a single event, whereas this case concerns multiple events. The offending in *Fonterra* resulted from carelessness rather than any sort of deliberate decision-making as was the case here. The Court in *Fonterra* considered a starting point of 75% of the maximum penalty on each charge was warranted.

[40] Similarly, *MPI v Bay Cuisine*[3] concerned omissions to declare positive listeria results in meat products with intent to deceive. Again, there was a risk to health not present in this case, but on the other hand there was no export of the meat so there was no risk to reputation to the extent present in this case. A starting point of 50% of the maximum penalty was held to be appropriate for both the company and the individuals.

[41] *MPI v McPherson*[4] concerned the forgery of laboratory analysis certificates on seven occasions that falsely claimed that testing for salmonella had occurred when it had not, so that seafood products could be exported to Russia. Unlike Peter Yealands, the defendant was personally involved in creating the forgeries. The offending in the present case however spanned a greater period of time. Although there was a potential risk to health that is not present in this case, *McPherson* is of some assistance because

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[2] *MPI v Fonterra Ltd*, DC Wellington, CRI 2014-085-002986, 4 April 2014.
[3] *MPI v Bay Cuisine Limited, Mackie and Wise* [2015] NZDC 13590.
[4] *MPI v McPherson*, DC Nelson, CRI-2016-042-001510, 4 July 2017.

it concerns deception to enable access to an overseas market. A starting point of 6% of the maximum penalty on each charge was adopted.

[42] Two cases under the Fair Trading Act have been referred to me. *Commerce Commission v GlaxoSmithKline (NZ) Limited*[5] concerned a misrepresentation, over four years, of the amount of Vitamin C in Ribena. A global starting point of $325,000 was adopted. *Commerce Commission v Reckitt Benckiser (New Zealand Limited*[6] concerned four supposedly targeted Nurofen pain relief products. The benefit to the company was calculated to be approximately $1,000,000, and a global starting point of $1,650,000 was adopted. In neither case was there an issue around product safety, and in both cases consumers were misled about the supposed benefits of the product. I agree with Ms Reed QC that the Commerce Commission cases can be distinguished because there is no suggestion that consumers were misled about the quality or benefits of the wine in this case. They were, however, entitled to assurance that the wine complied with EU access requirements.

[43] Taking into account the aggravating and mitigating features of this offending, placed in its appropriate context, as well as guidance from the cases discussed above, I take a global starting point of 20% of the maximum penalty for each of the export eligibility charges to be appropriate recognition of the culpability of YEWL, Jeffrey Fyfe and Tamra Kelly. Peter Yealands' culpability is reflected in a lower starting point. I assign the following starting points to each defendant for each group of charges.

[44] For YEWL, a starting point of a $500,000 fine on the export eligibility charges is 20% of the maximum penalty for those charges. This reflects the seriousness of the offending and achieves the principles of deterrence and denunciation by imposing a penalty with bite. To this, I add a $100,000 fine for the false record keeping charges. This brings me to a total starting point of $600,000 for YEWL, which is 12% of the notional maximum penalty of $5,000,000 on all charges.

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[5] *Commerce Commission v GlaxoSmithKline (NZ) Limited*, DC Auckland, CRI-2006-004-503913, 27 March 2007.

[6] *Commerce Commission v Reckitt Benckiser (New Zealand) Limited* [2017] NZDC 1956.

[45] I see no need to adjust this starting point for totality, and no reason not to apply the same formula to each of the individual defendants. For Jeffrey Fyfe, a starting point of $100,000 on the export eligibility charges is 20% of the maximum penalty for individuals on those charges. I would add to this a fine of $20,000 for the false record keeping charges. This brings me to a total starting point of $120,000 for Jeffrey Fyfe, which is 12% of the notional maximum penalty of $1,000,000 he faces on all charges. For Tamra Kelly, a starting point of $100,000 on the export eligibility charges is 20% of the maximum penalty for individuals on those charges. I would add to this a fine of $9,000 for the false record keeping charges. This brings me to a total starting point of $109,000, or, once again, 12% of the notional maximum penalty of $900,000 she faces on all charges.

[46] Turning to Peter Yealands, I accept that his culpability is less than those who directly participated in the offending. He was however in a position of greater influence within the company. Given that position, he had the ability to stop the offending and there must have been a greater expectation that he would. I would therefore reduce his starting point to 8% of the notional maximum penalty of $1,000,000, which is $80,000, allocating $65,000 to the export eligibility charges and $15,000 to the false record keeping charges.

[47] I turn now to mitigating features relating to the offenders. There are no aggravating features.

Good character

[48] All of the defendants were of good character before this offending. None have any criminal convictions. It is fair to say that all defendants have devoted their careers to, and are passionate about, winemaking.

[49] Turning first to YEWL, the discount for previous good character must take into account the fact that this offending took place on occasions throughout a two and half year period. Since the offending happened, the ownership of the company has changed. The present board played no part in the offending. Nevertheless, the company is a distinct entity and is the same legal person that committed the offending.

Within this context, YEWL has made significant contributions to the wine industry and the community. In his further affidavit dated 13 November 2018, Simon Garforth, Chief Executive Officer, sets out the "disproportionately high" number of awards Yealands wines have won since it started in 2008. Michael Wentworth, Chief Operating Officer, states in his affidavit of 7 November 2018, that the company has approximately 185 permanent employees and has contributed significantly to the Marlborough economy and community. He states that Yealands has also won accolades for its commitment to sustainability. In his first affidavit, Mr Garforth describes the visibility of Yealands wines, and their associated advertising, contributing to a positive image of Yealands wines, New Zealand wines, and New Zealand itself, overseas. He describes a random visit with Peter Yealands to a wine shop in a European city. The reputation of Yealands wine was such that the shopowner immediately recognised Peter Yealands, pointed to photographs of Marlborough in his shop, and said Yealands wines were very well received by his customers. Mr Radich describes how the company transformed land with limited productive potential into high yield vineyards that brought large returns from offshore back to New Zealand.

[50] YEWL has improved its systems to reduce the risk of similar offending in the future. Mr Garforth states that YEWL has purchased a grape juice concentrate machine to make its own grape juice concentrate, eliminating the possibility that EU market access requirements will be breached. He also states YEWL has accepted all of PricewaterhouseCoopers recommendations following a comprehensive audit of YEWL's systems. Staff also now undergo intensive training courses to ensure they are aware of their legal obligations.

[51] Peter Yealands has supplied a number of letters of reference attesting to the contribution he has made to the Marlborough economy and community over the years. He has also written a letter setting out his background and contribution to the development of new industries. Others attest to his work ethic and commitment to family and community. I have no doubt that his fall from grace is hard felt. I have no doubt that he wants to put things right, and to a great extent, it is the putting right that counts.

[52] Jeffrey Fyfe has also supplied letters of reference. They attest to his offending as being "totally out of character", that he is a talented winemaker, and that working at Yealands was his dream job. Mr Corlett QC submits that "what can be taken from this is that it was some of the very traits that contribute to Mr Fyfe's good character (hard work, dedication to a growing business, personal loyalty to the owner Mr Yealands) that led to a 'moral blind spot' – a willingness to cut corners, and compromise on regulatory compliance in order to ensure the success of the business."

[53] Tamra Kelly is a professional winemaker by occupation. Mr Rapley QC submits that she is widely respected in the New Zealand wine industry and overseas. He submits that "she is a community focussed person and has been active most recently in supporting women winemakers overseas." Tamra Kelly has also supplied a number of letters of reference attesting to her good character and community involvement. Mr Rapley QC submits that "Ms Kelly is not the type of person who will appear before court ever again."

[54] The good character of the defendants signifies a greater fall from grace, and potential harm to reputation in a specialist industry, than would otherwise be the case. It would be artificial to compare and weigh the previous good character of each defendant. Comparing and contrasting the good works of each defendant is not a useful exercise in circumstances where there can be little doubt about the contribution each has made to the community. There is an intrinsic value to good character that exists independently of how that good character manifests itself in individual defendants.

[55] Taking all of these matters into account, a discount of 15% for good character is appropriate for all defendants.

Remorse

[56] I have no doubt that the remorse expressed by all of the defendants is genuine. Remorse warrants a further discount of 5%.

Guilty pleas

[57] All defendants are entitled to a discount of 25% for their guilty pleas. Their pleas have saved the state the cost of a prosecution and witnesses the burden of having to give evidence. They also demonstrate that the defendants have taken responsibility for what they have done and their wish to move on in a manner that ensures this does not happen again.

[58] In determining the amount of the fine, s 40 of the Sentencing Act 2002 requires the Court to take into account the financial capacity of the offender. This could increase or decrease the fine. Before doing that, I will record the amounts to be considered after taking into account starting points and mitigating features of each defendant.

[59] The 45% discount for good character, remorse and plea, applied to YEWL produces a fine of $330,000; for Jeffrey Fyfe, a fine of $66,000; for Tamra Kelly, a fine of $55,950; and for Peter Yealands, a fine of $44,000.

[60] Mr Corlett QC submitted that the only way Jeffrey Fyfe can pay a fine is to borrow or mortgage his house. He has lost his job at Yealands and is trying to start a business in the wine industry. A fine will have a significant impact on him and his family. He will need to borrow to meet a fine and to finance his business.

[61] Mr Rapley QC submitted that Tamra Kelly is in a similar situation. She and her husband have invested their life savings to set up their own wine business. They have loans, a mortgage, two small children and will also have to borrow to pay a fine.

[62] Ms Reed QC submitted that Mr Yealands' means should not be used to portray greater culpability than is warranted. I agree with her submission, and have already taken into account his lower culpability in setting the starting point. I also take into account the fact that at the age of 70, his future earning power is unlikely to be as enduring as that of Jeffrey Fyfe or Tamra Kelly.

[63] In his affidavit of 5 September 2018, Mr Garforth, the Chief Executive Officer, states that YEWL expects its profit this year to be approximately $20 million. A fine of $330,000 represents less than 2% of that profit. Applying s 40 and the need for fines to have bite, I would adjust the fine upwards with respect to YEWL's offending.

[64] Adjusting the fines by taking into account the financial capacity of each of the defendants as required by s 40, I reach the following end point fines on all charges:

YEWL:	$400,000
Jeffrey Fyfe:	$35,000
Tamra Kelly:	$35,000
Peter Yealands:	$30,000
TOTAL:	$500,000

W K Hastings
District Court Judge