

Undertakings to the Commerce Commission under s 46A of the Fair Trading Act 1986

OZSale Pty Ltd

NZ Sale Limited

Undertakings to the Commerce Commission under s 46A of the Fair Trading Act 1986

1. Person(s) giving the undertakings

1.1 These court enforceable undertakings (**Undertakings**) are given to the Commerce Commission (**Commission**) for the purposes of s 46A of the Fair Trading Act 1986 (**FTA**) by:

1.1.1 OZSale Pty Ltd (**OZSale**), a company incorporated in Australia, having its registered office at Suite 2, Level 2, 122 – 126 Old Pittwater Rd, Brookvale, NSW, 2100; and

1.1.2 NZ Sale Limited (**NZ Sale**), a company incorporated in New Zealand having its registered office at 25 Barrys Point Road, Takapuna, Auckland, 0622, New Zealand.

(together the "**Companies**").

1.2 The Companies agree to these undertakings which commence on the date the Undertakings:

1.2.3 are executed by the Companies; and

1.2.4 the Commission confirms its acceptance of the Undertakings.

(the "**Effective Date**")

2. Investigation background

2.1 These undertakings follow investigations by the Commission into representations made on the website www.nzsale.co.nz (**the Website**) regarding:

2.1.1 the authenticity of some Beats headphones for sale;

2.1.2 the strikethrough prices of some of the goods it sold; and

2.1.3 'children's nightwear' sold that did not comply with the mandatory safety standards for children's nightwear (**Safety Standard**).¹

2.2 The Companies are subsidiaries of MySale Group Plc (**MySale**), a company registered in Jersey whose shares are listed on the AIM exchange in London. MySale, together with its subsidiaries, is referred to in this Undertaking as the MySale Group.

¹ Children's Nightwear and Limited Daywear Having Reduced Fire Hazard Regulations 2016 declare clauses of AS/NZS ISO AS/NZS 1249:2014 to be product safety standard for Children's nightwear and Limited Daywear supplied in New Zealand.

- 2.3 The Companies operate an end of season / end of line discount flash sale marketplace, selling clothing and other household goods on the Website and a physical retail store in New Zealand. OZSale operates the Website and, at the relevant times, NZ Sale operated a physical store in New Zealand. NZ Sale is a wholly owned subsidiary of OZSale.
- 2.4 In MySale’s annual report for the year ending 30 June 2019, the group announced a change in its business model, and a move away from acquiring and selling stock itself towards an “inventory light marketplace” platform that allows third party suppliers to sell their inventory to its Australian and New Zealand customer base. Suppliers and retailers based internationally can use the MySale Group’s marketplace platform to sell and offload stock that is out of season in the Northern hemisphere to New Zealand and Australian consumers.
- 2.5 Most inventory sold comes from third party sellers, including consignment stock, but the Companies also use the platform to sell stock that has been returned by customers that it may take ownership of and Identity Direct product.²
- 2.6 In 2019, OZSale estimated that it had 700,000 Stock Keeping Units (SKUs) available for purchase on the Website at any one time, with approximately 70,000-100,000 new SKUs uploaded daily. Its turnover for sales associated with the Website in 2019 was approximately \$43 million.
- 2.7 OZSale’s overall turnover in 2019 was \$208 million.

Headphones

- 2.8 Between 2 September 2016 and 20 May 2018, OZSale ran 30 separate sales³ on the Website for ‘Beats headphones’ supplied by Azod Australia Pty Ltd,⁴ selling 3,689 Beats headphones (via drop-ship) during this period.⁵
- 2.8.1 Following several complaints from consumers who had purchased the headphones, the Commission purchased multiple pairs of Beats headphones from the Website operated by OZSale. The headphones the Commission purchased were confirmed as counterfeit by Apple, the proprietor of the Beats brand.

² Identity Direct product is owned by OzSale and is personalised for the customer.

³ NZ Sale sells end of season or end of line stock on the Website through ‘flash sales.’ Typically, NZ Sale repeatedly runs sales for the products it lists for periods of between 4-6 days.

⁴ Prior to running a sale on the Website, OZSale requires its suppliers to sign a contract and warrant that the information it provides OZSale is accurate and the products supplied are genuine.

⁵ When advertising the headphones for sale, OZSale’s website included photos of authentic Beats products and representations such as:

- “Beats by Dre;”
- “These are brand new-unboxed, unused earphones not in original retail packaging;” and
- “About Beats by Dre: Beats Electronics comprises the Beats by Dre family of premium earphones, headphones and speakers. Through world class offerings, Beats has brought the energy, emotion and excitement of playback in the recording studio to the consumer’s listening experience, introducing a generation to the possibilities of premium sound entertainment.”

- 2.8.2 In the Commission's view, by using images which bore the Beats branding and advertising the products as 'Beats by Dre' when they were counterfeit, OZSale is likely to have misled consumers as to the kind and quality of headphones it was selling, in breach of section 13(a) of the FTA.

Strikethrough pricing

- 2.9 Between June 2018 and September 2019, OZSale sold many of its products on the Website with reference to a strikethrough comparative price claim alongside its retail price.
- 2.9.1 During its investigation, the Commission asked OZSale to provide the information and/or documents upon which it relied to substantiate the strikethrough prices of 39 of its products.
- 2.9.2 OZSale confirmed that it was ordinarily advised of the price charged elsewhere by the supplier and that it was customary for the supplier to supply a spreadsheet which listed the products for sale, descriptors of the product itself and the recommended retail prices (RRP) for the product.⁶ Additionally, it confirmed that it did not have processes in place to verify the information (provided by the supplier) nor did it ordinarily retain the records provided by them.
- 2.9.3 In the Commission's view, by advertising at least 39 products for sale with reference to a strikethrough price provided by its supplier and not having the processes and policies in place to verify the supplied information (nor keep records of it), OZSale is likely to have breached section 12A of the FTA by making unsubstantiated representations about the previous sale price, or the recommended retail price of the products. Unsubstantiated representations as to price may also be false or misleading in breach of section 13(g) of the FTA if represented savings are not clear, accurate and unambiguous.

Nightwear

- 2.10 Between August 2017 and April 2019, OZSale sold 61 non-compliant 'Peanut Shell Baby Sleepbags' (the **Sleepbags**) and 52 items of non-compliant children's 'Sweet & Soft' branded nightwear⁷ (**Nightwear**). The items were not compliant with the Safety Standard because:
- 2.10.1 The Nightwear did not have any fire risk labels attached as required by the Safety Standard.
- 2.10.2 The Sleepbags did not have red high fire risk labels required by the New Zealand Safety Standard. Fire warning labels suitable for the American market

⁶ Prior to running a sale on the Website, OZSale requires its suppliers to sign a contract and warrant that the information it provides OZSale is accurate and the products it supplies are genuine.

⁷ Sweet & Soft pyjamas, Sweet & Soft cardigan sets, Sweet & Soft bath robes, and Sweet & Soft pants

were present on the Sleepbags, but they were not in the format prescribed for high fire risk garments sold in New Zealand.⁸

2.10.3 It is an offence contrary to s 30(1) of the FTA to sell or offer to sell children's nightwear which is not labelled in accordance with the Safety Standard, either because the fire safety labelling is absent or is not in the prescribed format. In the Commission's view, by selling non-compliant Sleepbags and Nightwear, OZSale is likely to have breached s 30(1) of the FTA.

Conclusion

- 2.11 The Companies acknowledge the Commission's views at paragraphs [2.8.2], [2.9.3] and [2.10.3] above.
- 2.12 The Companies have cooperated with the Commission's investigation and have taken steps to address the Commission's concerns by:
- 2.12.1 recalling potentially counterfeit Beats headphones;
 - 2.12.2 recalling non-compliant Nightwear and Sleepbags;
 - 2.12.3 altering its pricing policies and verification processes; and
 - 2.12.4 giving better guidance to consumers explaining the meaning of strikethrough prices displayed on the Website and in store.
- 2.13 The Commission has concluded after following the practices and criteria outlined in the Commission's Competition and Consumer Investigation Guidelines and Enforcement Response Guidelines, that it is in the public interest to resolve these investigations by way of undertakings provided by the Companies.

3. Purpose of the Undertakings

- 3.1 These Undertakings are given by the Companies to:
- 3.1.1 Ensure that they each have sufficiently robust processes in place to verify and confirm the following information before listing products on the Website and selling in NZ Sale's retail stores:
 - 3.1.1.1 the authenticity of products;
 - 3.1.1.2 the safety of products in compliance with mandatory safety standards;
 - 3.1.1.3 that accurate pricing is used when selling each product to ensure that customers are not misled; and
 - 3.1.1.4 any comparison price used when offering products for sale.

⁸ The label read "WARNING: KEEP ALL FLAME AND HEAT SOURCES AWAY FROM THIS SLEEPING BAG FABRIC," rather than "WARNING: HIGH FIRE DANGER KEEP AWAY FROM HEAT AND FLAME"

- 3.1.2 Ensure that information relating to strikethrough pricing adequately explains what the strikethrough price displayed represents in a clear and transparent, prominent and proximate manner.
- 3.1.3 Formalise the recall of Beats headphones, non-compliant Sleepbags and Nightwear which were sold to New Zealand consumers and initiated by OZSale.
- 3.1.4 Resolve the Commission's concerns arising from the investigations.

4. Undertakings

- 4.1 The Companies each undertake, from the Effective Date of these Undertakings, to do the following:

The development of a compliance program with reporting requirements

- 4.1.1 Within 3 months of the Effective Date establish and implement a Compliance Program designed to:
 - 4.1.1.1 increase awareness among staff of, and minimise the risk of the Companies breaching their obligations under sections 12A, 13(a) and 30(1) of the FTA;
 - 4.1.1.2 ensure awareness among staff of the responsibilities and obligations in relation to the requirements of sections 12A, 13(a) and 30(1) of the FTA; and
 - 4.1.1.3 ensure compliance by the Companies with the undertakings provided to the Commission at 4.1.4 to 4.1.13 below.
- 4.1.2 Each maintain and continue to implement the Compliance Program for a period of at least 3 years from the Effective Date.
- 4.1.3 Each provide to the Commission, at their own expense, a copy of the Compliance Program.

In relation to the use of strikethrough pricing

- 4.1.4 Ensure that the source and nature of any strikethrough price represented is explained to consumers (for example, including that some prices may be sourced from overseas).
- 4.1.5 Explain to consumers what any strikethrough price represents in a clear and transparent, prominent and proximate way on the Website.
- 4.1.6 Ensure that the Companies have reasonable grounds for making the statements at 4.1.5 by requiring suppliers to provide evidence to support the prices supplied and any discounts represented.
- 4.1.7 Ensure that the Companies have processes in place to audit the pricing information its suppliers provide.

- 4.1.8 Ensure that the Companies have processes in place to deter the provision of false or misleading pricing information by its suppliers.

In relation to its verification processes for products (authenticity and safety)

- 4.1.9 Engage a suitably qualified professional to advise in relation to appropriate quality assurance processes and personnel.
- 4.1.10 Ensure there is a documented compliance process developed in consultation with the quality assurance professional for assessing and verifying whether products are authentic or not which includes guidelines for staff to assist them in deciding what is sufficient verification (i.e. the level of enquiry to be made).
- 4.1.11 Provide to all suppliers and sellers who list products on the Website from the date of this Undertaking with an instructional document which sets out the Companies' product authenticity expectations.
- 4.1.12 Maintain a register which records any verification steps undertaken by the Companies for the products sold on its Website during the term of this Undertaking.
- 4.1.13 Ensure that there is a documented compliance process for assessing whether or not products comply with safety standards which includes:
- 4.1.13.1 A document (for suppliers, sellers and staff) which explains all the mandatory safety standards⁹ that may apply to the wide range of goods which the Companies retail or list for sale in New Zealand.
- 4.1.13.2 A consistent system to verify that products comply with safety standards comprising:
- 4.1.13.2.1 A routine assessment of a random sample of each supplier's products.
- 4.1.13.2.2 A warranty in the Companies' supplier agreement that the goods comply with all relevant New Zealand consumer product safety standards made or declared under the FTA.

Product recalls

- 4.1.14 Within one month of the Effective Date, provide the Commission with a report confirming:

⁹ Including:

- Product Safety Standards (Children's Toys) Regulations 2005
- Product Safety Standards (Children's Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2016
- Product Safety Standards (Baby Walkers) Regulations 2001
- Product Safety Standards (Pedal Bicycles) Regulations 2000
- Product Safety Standards (Household Cots) Regulations 2005

- 4.1.14.1 the total number of consumers that were sent recall notices relating to the Nightwear, Sleepbags and counterfeit Beats headphones;
- 4.1.14.2 the number of products returned by category (e.g Nightwear, Sleepbags and counterfeit Beats headphones separately);
- 4.1.14.3 the total number of consumers who contacted the Companies about the recall notices or requested a refund in relation to the Nightwear, Sleepbags and counterfeit Beats headphones; and
- 4.1.14.4 the total number and value of refunds actioned.

5. Effect of the Undertakings

- 5.1 The Undertakings are:
 - 5.1.1 court enforceable undertakings in terms of s 46A of the FTA;
 - 5.1.2 made in acknowledgement of the Commission's views set out in paragraphs [2.8.2], [2.9.3] and [2.10.3]; and
 - 5.1.3 governed by New Zealand Law and are subject to the exclusive jurisdiction of the New Zealand Courts.

6. Commencement of Undertakings

- 6.1 The Undertakings come into effect on the Effective Date which is the date the Undertakings:
 - 6.1.1 are executed by the Companies; and
 - 6.1.2 the Commission confirms its acceptance of the Undertakings.

7. Variation of the Undertakings

- 7.1 The Commission and the Companies can agree at any time to vary the Undertakings.
- 7.2 No variation to the Undertakings will be effective unless it is in writing, executed by the Companies, and signed as accepted by the Commission.

8. Duration of the Undertakings

- 8.1 These Undertakings will continue to have effect until the earlier of:
 - 8.1.1 five years from the Effective Date; or
 - 8.1.2 the Commission agrees to discharge both the Companies from the Undertakings.

9. Compliance with the Undertakings

- 9.1 If either of the Companies become aware of it breaching these Undertakings, whether advertent or inadvertent, it will notify the Commission within fourteen (14) days of becoming aware, giving full particulars of the breach.
- 9.2 The Companies are to comply with all reasonable requests of the Commission in establishing whether there is compliance with the Undertakings.
- 9.3 For the avoidance of doubt, nothing in paragraphs [9.1] and [9.2] above prevents the Commission from directly seeking any information from the Companies at any time including during the course of any criminal and/or civil proceedings for the purpose of monitoring compliance with the Undertakings.
- 9.4 The Companies agree to procure that all subsidiary companies in respect of which they have legal control comply with these Undertakings.

10. Miscellaneous

- 10.1 These Undertakings are properly executed if the Companies sign the same copy, or separate identical copies, of the execution page. Where separate copies are signed on behalf of the Companies and the Commission, the signed copy can be the original document or emailed copy.
- 10.2 The Companies acknowledge that:
 - 10.2.1 The Commission may make the Undertakings publicly available including by publishing them on the Commission's enforcement response register on its website.
 - 10.2.2 The Commission may, from time to time, make public reference to the Undertakings including in news media statements and in the Commission's publications.
 - 10.2.3 Nothing in the Undertakings is intended to restrict the right of the Commission, or the right of any other person, to take action under the FTA or under any other statute or law.

11. Execution

Signed by and on behalf of **OZSale Limited**



Authorised signatory

CARL JACKSON

Name

In the presence of:

Witness Name:

Witness Address:

Witness Occupation:

Date:

TERRI EVES

20 GIBBS ST, MANLY VALE 2093

COMPLIANCE OFFICER

TERRI EVES

Witness signature

Signed by and on behalf of **NZ Sale Limited**



Authorised signatory

CARL JACKSON

Name

In the presence of:

Witness Name:

Witness Address:

Witness Occupation:

Date:

TERRI EVES

20 GIBBS ST MANLY VALE, 2093

COMPLIANCE OFFICER

TERRI EVES

Witness signature

Acceptance

Accepted by the **Commerce Commission** by



Authorised signatory

Anna Rawlings, Chair

Name

In the presence of:

Witness Name:—

Witness Address:

Witness Occupation:

Date: 24 November 2021

Witness signature