

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

Steel & Tube Holdings Limited

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1 Persons giving Undertakings

- 1.1 These Undertakings are given to the Commerce Commission (**Commission**) for the purposes of s 46A of the Fair Trading Act 1986 (**FTA**) by Steel & Tube Holdings Limited (Company Number 8418), a company incorporated in New Zealand having its registered office at Level 7, 25 Victoria Street, Petone, Lower Hutt, 5012, New Zealand (**Steel & Tube**).
- 1.2 In these Undertakings **Undertaking Party** means Steel & Tube.

2 Background

Steel & Tube

- 2.1 Steel & Tube is a manufacturer and distributor of steel reinforcing for use in the construction sector.
- 2.2 In March 2016 the Commission opened an investigation into Steel & Tube SE62 specific earthquake standard steel mesh for concrete slab reinforcement (**SE62**) being sold by Steel & Tube as 500E grade steel mesh.
- 2.3 500E steel mesh (**500E**) is seismic grade steel reinforcing mesh as prescribed by AS/NZS 4671:2001 (the **Standard**).
- 2.4 In particular, the Commission is investigating whether:
- (a) Steel & Tube has made misleading representations that its SE62 steel mesh is "500E" grade and/or complies with the Standard; and/or
 - (b) Steel & Tube had reasonable grounds for representing that SE62 was "500E" grade and/or complied with the Standard, at the time those representations were made, irrespective of whether the representations were misleading.
- 2.5 The Commission is part way through its investigation into these practices.
- 2.6 The Commission has asked Steel & Tube to provide substantiation for its claims that its 500E SE62 complies with the Standard.
- 2.7 In March 2016, the Commission purchased three sheets of SE62 from a retailer. Samples from each of these sheets were submitted to two different testing agencies, SGS and SAI Global, in order to test for compliance against the mechanical properties and weld shear requirements of the Standard for 500E grade steel mesh.
- 2.8 The results of the testing were received on 1 and 4 April, and provided to Steel & Tube on 4 April. The results received by the Commission showed the product tested did not meet the requirements of the Standard. A particular area of concern highlighted was the failure indicated in every test result for "Uniform Elongation" (Agt%). The standard requires a minimum value of 10%, yet the results showed an average below this value.

The individual percentage elongation results were in many cases substantially less than the 10% required. Importantly other aspects of the testing - yield strength and yield ratio – also failed.

- 2.9 The Commission's tests alone do not establish non-compliance with the Standard. They show that the sheets of mesh tested failed the testing. There are a number of ways to meet the Standard. The Commission has raised concerns in relation to the results and has requested further information from Steel & Tube. Steel & Tube is assisting the Commission with its enquiries, and has requested additional information from the Commission in relation to the results.
- 2.10 On 6 April 2016, Steel & Tube announced that it would voluntarily stop selling its seismic steel mesh range until it has been tested and passed as compliant by an external testing agent. The Commission has also requested that Steel & Tube not commence reselling mesh until a way forward is agreed with the Commission. Steel & Tube has not sold seismic steel mesh since 6 April.
- 2.11 The Ministry of Business, Innovation and Employment (**MBIE**) is the agency responsible for developing and overseeing compliance standards for some building products and is the overarching industry regulator.
- 2.12 MBIE through its Building and Housing team is working with steel mesh suppliers and industry and technical experts to determine suitable clarifications to the Standard. The clarifications should assist compliance and avoid dispute as to compliance and the methods of demonstrating compliance. These are expected to be introduced in due course.
- 2.13 Steel & Tube wishes to recommence selling SE62 steel mesh, and is seeking clarity on the methods to demonstrate compliance. Pending introduction of MBIE's clarification, Steel & Tube will apply a testing regime that is similar to MBIE's expected clarification for SE62 mesh to be returned to the market by Steel & Tube. After MBIE's clarification is introduced, Steel & Tube will comply with the Standard as clarified by MBIE, and otherwise as is applicable from time to time.

3 Purpose of the Undertakings

- 3.1 These Undertakings are given by the Undertaking Party as an interim measure in order to satisfy the Commission that the revised testing regime should assist Steel & Tube to demonstrate compliance with the Standard pending the introduction of MBIE's clarification. These undertakings (until expired) apply to all SE62 steel mesh that Steel & Tube currently hold, or will manufacture in the future, that will be authorised for sale by Steel & Tube, regardless of when the steel was manufactured.
- 3.2 The Commission will continue to investigate past representations made in relation to steel mesh represented as 500E, and is not by these Undertakings prevented from investigating claims made or the compliance of SE62 mesh sold after these Undertakings.
- 3.3 Steel & Tube confirms its intention that upon expiry of these Undertakings it will at all times offer for sale and represent SE62 only in accordance with the Standard as clarified or prescribed by MBIE at the relevant time.

4 Undertakings

4.1 The Undertaking Party undertakes to the Commission that it will, personally or through employees, agents or contractors:

- (a) For each batch tested from 6 April 2016 to 14 April 2016, use Pacific Steel or an IANZ accredited testing laboratory to test at least four sheets per batch of SE62 product in accordance with the Standard. For each sheet tested, the minimum number of tensile tests should be 2 samples in each direction as required by the Standard (ie a minimum of 16 tensile tests in total per batch).
- (b) For each batch tested after 14 April 2016, use Pacific Steel or an IANZ accredited testing laboratory to test at least three sheets per batch of SE62 product in accordance with the Standard. For each sheet tested, the minimum number of tensile tests should be increased to 3 samples in each direction consistent with MBIE's expected clarification to the Standard (ie a minimum of 18 tensile tests in total per batch).

The results from the testing are subject to the conformance criteria in B4.1 (Batch Conformance), and to the action on non-conforming batches in B5 if applicable, consistent with clause 4 in Appendix A.

- (c) Test using the method required by the Standard. Where interpretation issues arise, Steel & Tube can apply the approach set out in Appendix A.
- (d) Ensure each batch of SE62 is no larger than 1,000 sheets of steel mesh.
- (e) Provide the test results for all tests of all production batches of SE62 to the Commission, including failed test results. For the avoidance of doubt, test results, including failed test results, for in-process testing and product trial testing do not need to be provided. The test results for each production batch of SE62 are to be:
 - (i) provided within five working days of receipt from Pacific Steel (or an IANZ accredited testing laboratory), together with any other tests on that batch of SE62 by Pacific Steel (or IANZ accredited testing laboratory) that are not already held by the Commission;
 - (ii) accompanied by a statement from a duly authorised representative of the Undertaking Party that:
 - (A) the test results attached to the statement are true and correct copies of the results from Pacific Steel (or an IANZ accredited laboratory); and
 - (B) after reasonable inquiries, the authorised representative is not aware of any other tests on that batch of SE62 by Pacific Steel (or an IANZ accredited laboratory) that have not been provided to the Commission.
- (f) Ensure, and for any batch of SE62 held by a merchant use reasonable endeavours to ensure, that where any batch of SE62 has:
 - (i) not been tested in accordance with clause 4.1; or

- (ii) after testing in accordance with clause 4.1, fails the conformance criteria in B4.1.2 of the Standard (Batch Conformance), and is subsequently re-tested and rejected as non-conforming under B5 of the Standard (Action on Non-Conforming Batches);

the entire batch must not be offered for sale, or represented, as 500E. For the avoidance of doubt, a batch of SE62 that falls within this clause 4.1(f) may be offered for sale provided it is not represented as being 500E grade.

- (g) To include the testing results from 4.1(a) above (excluding rejected batches and test results from in-process and product trial testing) in the long term quality data required to prove compliance with B6 of the Standard, and provide these results to the Commission on request.

5 Effect of the Undertakings

5.1 The Undertakings:

- (a) are Court enforceable undertakings in terms of s 46A of the FTA;
- (b) are made without admission of liability by the Undertaking Party as to its conduct pre and post these undertakings as described above; and
- (c) are made without prejudice to the Commission's ability to bring proceedings and/or seek orders from the Court in relation to the Undertaking Party's conduct before and after these Undertakings as described above.

6 Commencement of Undertakings

6.1 The Undertakings come into effect when:

- (a) the Undertakings are executed by the Undertaking Party; and
- (b) the Commission confirms its acceptance of the Undertakings.

7 Variation of the Undertakings

- 7.1 The Commission and the Undertaking Party can agree at any time to vary the Undertakings including, but not limited to, as a result of MBIE providing clarification of the Standard.
- 7.2 No variation to the Undertakings will be effective unless it is in writing, executed by the Undertaking Party, 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:

- (a) the Commission for any reason discharging the Undertaking Party from the Undertakings including, but not limited to, in the event of MBIE providing clarification of the Standard;

- (b) one year from the date of acceptance; or
- (c) the date a court (or subsequent appeal court in the event of appeal) determines that the conduct described above is not in breach of the FTA.

9 Compliance with the Undertakings

- 9.1 If the Undertaking Party becomes aware of a breach of these Undertakings, whether advertent or inadvertent, it will notify the Commission within seven days of becoming aware, giving full particulars of the breach.
- 9.2 If the Commission has a good faith basis to believe that the Undertaking Party has not complied with the Undertakings, and requests the Undertaking Party to do so, the Undertaking Party will engage at its own cost a reputable third party approved by the Commission (**Reviewer**) to conduct a review of their compliance with the Undertakings as directed by the Commission (**Compliance Audit**), and to report its findings to the Commission.
- 9.3 The Undertaking Party is to comply with all reasonable requests of the Reviewer in conducting the Compliance Audit.
- 9.4 For the avoidance of doubt, nothing in clauses 9.1 to 9.3 above prevents the Commission from directly seeking any information from the Undertaking Party at any time during the course of any criminal and/or civil proceedings for the purpose of checking compliance with the undertakings.

10 Miscellaneous

- 10.1 These Undertakings are properly executed if the Undertaking Party signs the same copy, or separate identical copies of the execution page. Where separate copies are signed by the Undertaking Party or the Commission, the signed copy can be the original document, or a faxed or emailed copy.
- 10.2 The Undertaking Party acknowledges that:
 - (a) The Commission may make the Undertakings publicly available including by publishing them on the Commission's enforcement response register on its website.
 - (b) The Commission may, from time to time, make public reference to the Undertakings including in news media statements and in the Commission's publications.
 - (c) 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.

Execution

Signed by and on behalf of Steel & Tube Holdings Limited




Authorised signatory

DAVE W TAYLOR

Name

In the presence of:

Witness Name: 
Chris Birkinshaw
Witness Address: Wellington
Witness Occupation: Commercial Business Partner

Date: 28/4/2016

Acceptance

Accepted by the Commerce Commission
by



Authorised signatory

MARK NEWMAN BEERY

Name

In the presence of:

Witness Name: MARK ATWELL
Witness Address: AUCKLAND
Witness Occupation: SENIOR INVESTIGATOR

Date: 28/4/2016

Appendix A

1. The test specimen can be of any length, and must include a welded intersection, however the gauge length for tensile tests should not include a welded intersection.
2. Mesh batches do not need to be taken from the same cast of steel to be a valid batch.
3. The Long Term Quality data should exclude all data from non-conforming batches.
4. Clause B5 of the Standard re-testing samples are required to be twice the original number of tests for the failed parameter. For the purpose of this Undertaking, this would mean a minimum of an additional 36 tests for tensile tests, results are subject to the conformance criteria in B4.1.2 of the Standard, (eg the results are averaged for A_{gt}), excluding the original test results.