

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

Brilliance Steel 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 Brilliance Steel Limited (Company Number 3333191), a company incorporated in New Zealand having its registered office at 18-20 Allens Road, East Tamaki, Manukau, Auckland (**Brilliance**).
- 1.2 In these Undertakings **Undertaking Party** means Brilliance.

2 Background

Brilliance

- 2.1 Brilliance is a distributor of steel reinforcing for use in the construction sector.
- 2.2 From September 2015 the Commission has been investigating complaints about sales of a specific earthquake standard steel mesh for concrete slab reinforcement, 147E Ductile mesh (**147E**) being sold by Brilliance 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) Brilliance has made misleading representations that its 147E steel mesh is "500E" grade and/or complies with the Standard; and/or
 - (b) Brilliance had reasonable grounds for representing that 147E 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 On 20 January 2016 the Commission purchased three sheets of Brilliance 147E steel mesh. Samples from each of these sheets were submitted to two different testing agencies, Holmes Consulting and SAI Global, in order to test for compliance with the Standard for 500E grade steel mesh.
- 2.7 The results of those tests indicated that each of the sheets of steel failed to meet the mechanical performance requirements of the Standard. A particular area of concern highlighted was the failures indicated in test results for "Uniform Elongation" (Agt%). The Standard requires an average minimum elongation value of 10%, yet only one of the six tests carried out for the Commission showed an average above this value.
- 2.8 This and other evidence gathered during the investigation raised concerns for the Commission that Brilliance may have engaged in conduct that breached the FTA and that consumers may be harmed by this conduct.

- 2.9 On 29 February 2016 the Commission sent a “Stop Now” letter to Brilliance, asking it to immediately stop representing that its product was “500E” grade steel, as defined in the Standard (the **Stop Now letter**) pending further investigation by the Commission.
- 2.10 Brilliance has complied with that request.
- 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 to 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 Brilliance wishes to recommence selling 147E steel mesh and it wishes the Commission to rescind its Stop Now letter. Pending introduction of MBIE’s clarification, Brilliance has agreed to apply a revised testing regime for 147E mesh to be returned to the market by Brilliance. After MBIE’s clarification is introduced, Brilliance will comply with the Standard as clarified by MBIE and applicable from time to time.

3 Purpose of the Undertakings

- 3.1 These Undertakings are given by the Undertaking Party in order to satisfy the Commission that the revised testing regime should assist Brilliance to demonstrate compliance with the Standard pending the introduction of MBIE’s clarification. These undertakings (until expired) apply to all 147E steel that Brilliance currently hold, or will receive in the future, regardless of when the steel was manufactured. Accordingly, by accepting these Undertakings the Commission rescinds its Stop Now letter.
- 3.2 The Commission will continue to investigate representations made in relation to steel mesh represented as 500E prior to the issue of the Stop Now letter, and is not by these Undertakings prevented from investigating claims made or the compliance of 147E mesh sold after these Undertakings.
- 3.3 Brilliance confirms its intention that it will at all times offer for sale and represent 147E only in accordance with the Standard as 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) Use an IANZ accredited laboratory to test three sheets per batch of 147E product in accordance with the approach set out at **Attachment A** (specifically, 6 tests per sheet.) 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. For the avoidance of doubt, B5 re-testing samples are required to be twice the original number of tests for the failed parameter. For the purpose of this Undertaking, this means a minimum of an additional 36 tests for tensile tests. Results are then subject to the conformance criteria in B4.1.2 of the Standard.

- (b) Test using the method required by the Standard. Where interpretation issues arise, Brilliance can apply the approach set out in Attachment A.
- (c) Ensure each batch of 147E is no larger than 1,000 sheets of steel mesh.
- (d) Provide the test results for all tests of all batches of 147E to the Commission, including failed test results. The test results for each batch of 147E are to be:
 - (i) provided within five working days of receipt from the IANZ accredited laboratory, together with any other tests on that batch of 147E by an IANZ accredited 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; and
 - (B) after reasonable inquiries, the authorised representative declarant is not aware of any tests on that batch of 147E by an IANZ accredited laboratory, other than those where test results have been provided to the Commission.
- (e) Ensure, and for any batch of 147E held by a merchant use reasonable endeavours to ensure, that where any batch of 147E, has:
 - (i) not been tested in accordance with clause 4.1 above; or
 - (ii) after testing in accordance with clause 4.1 above, 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 is not offered for sale, or represented, as 500E. For the avoidance of doubt, a batch of 147E that falls within this clause 4.1(e) may be offered for sale provided it is not represented as being 500E grade.
- (f) Include the testing results from clause 4.1(a) above (excluding rejected batches) 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 with 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 paragraphs 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

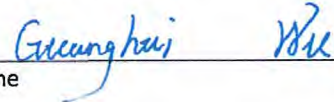
- 10.1 These Undertakings are properly executed if the Undertaking Party signs the same copy, or separate identical copies of the execution page. Where separate copies are signed by the Undertaking Party or the Commission, the signed copy can be the original document, or a faxed or emailed copy.
- 10.2 The Undertaking Party acknowledge 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 Brilliance Steel Limited



Authorised signatory



Name

In the presence of: 
Witness Name: *Alan Faalavaau*
Witness Address: *18 Allens Road, East Tamaki*
Witness Occupation: *Manager*
Date: *16/5/2016*

Acceptance

Accepted by the **Commerce Commission** by

Mark Benning
Authorised signatory

MARK NEWMAN BERRY
Name

In the presence of:

69 Walker
Witness Name: COLLEEN JEAN WALKER

Witness Address: 109 WELLINGTON STREET, FREEMANS BAY, AUCKLAND 101

Witness Occupation: OFFICE SUPPORT

Date: 18/5/16

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.

