

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

**Timber King Limited & NZ Steel Distributor Limited**

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## 1 Persons giving Undertakings

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- 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 Timber King Limited (Company Number 4582664)(Timber King), and NZ Steel Distributors Limited (Company Number 5626806)(NZSD), both companies incorporated in New Zealand having their registered offices at 4 Morrin Road, Mount Wellington, Auckland.
- 1.2 In these Undertakings **Undertaking Parties** means both Timber King and NZSD.

## 2 Background

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### The Undertaking Parties

- 2.1 The Undertaking Parties are distributors 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, TS10 Ductile mesh (**TS10**) being sold by the Undertaking Parties 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) the Undertaking Parties have made misleading representations that its TS10 steel mesh is "500E" grade and/or complies with the Standard; and/or
  - (b) the Undertaking Parties had reasonable grounds for representing that TS10 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 5 August 2015 the Commission received a complaint that TS10 supplied by the Undertaking Parties did not comply with the Standard. The complainant purchased TS10 from the Undertaking Parties and had the TS10 tested for compliance with the Standard. The complainant provided the Commerce Commission with a copy of the test results, which purport to show that the TS10 does not in fact comply with the requirements for grade 500E reinforcing steel mesh under the Standard.
- 2.7 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 none of the tests carried out showed an average above this value.

- 2.8 On 5 April 2016 the Commission executed a search warrant at the business premises of the Undertaking Parties, pursuant to which a number of sheets of 500E steel mesh were obtained. In addition, further samples were provided voluntarily from an off-site location. Samples from these sheets were submitted to two different testing agencies, SGS and SAI Global, in order to test for compliance with the Standard for 500E grade steel mesh.
- 2.9 The results of those tests indicated that each of the sheets of steel failed to meet the mechanical performance requirements of the Standard, and in particular, failed to meet the minimum elongation value of 10%.
- 2.10 This and other evidence gathered during the investigation raised concerns for the Commission that the Undertaking Parties may have engaged in conduct that breached the FTA and that consumers may be harmed by this conduct.
- 2.11 During the execution of the search warrant, the Undertaking Parties advised that they do not intend to sell any TS10 mesh as 500E steel mesh.
- 2.12 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.
- 2.13 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.
- 2.14 Pending introduction of MBIE's clarification, should the Undertaking Parties wish to recommence selling its imported TS10 steel mesh, it must apply a revised testing regime set out below for TS10 mesh to be returned to the market. After MBIE's clarification is introduced, the Undertaking Parties will comply with the Standard as clarified by MBIE and applicable from time to time.

### **3 Purpose of the Undertakings**

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- 3.1 These Undertakings are given by the Undertaking Parties in order to satisfy the Commission that the revised testing regime should assist the Undertaking Parties to demonstrate compliance with the Standard pending the introduction of MBIE's clarification. These undertakings (until expired) apply to all TS10 steel that the Undertaking Parties currently hold, or will receive in the future, regardless of when the steel was manufactured. For the avoidance of doubt, where we refer to TS10 in this document, we include any steel mesh represented to have the characteristics of 500E steel mesh from the same manufacturer, notwithstanding it may have a different product identification code.
- 3.2 The Commission will continue to investigate representations made in relation to steel mesh historically represented as 500E, and is not by these Undertakings prevented from investigating claims made or the compliance of TS10 mesh sold after these Undertakings.
- 3.3 The Undertaking Parties confirm their intention that they will at all times offer for sale and represent TS10 only in accordance with the Standard as prescribed by MBIE at the relevant time.

## 4 Undertakings

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- 4.1 The Undertaking Parties undertake to the Commission that they will, personally or through employees, agents or contractors:
- (a) Use an IANZ accredited laboratory to test three sheets per batch of TS10 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, the Undertaking Parties can apply the approach set out in Attachment A.
  - (c) Ensure each batch of TS10 is no larger than 1,000 sheets of steel mesh.
  - (d) Provide the test results for all tests of all batches of TS10 to the Commission, including failed test results. The test results for each batch of TS10 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 TS10 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 Parties 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 TS10 by an IANZ accredited laboratory, other than those where test results have been provided to the Commission.
  - (e) Ensure, and for any batch of TS10 held by a merchant use reasonable endeavours to ensure, that where any batch of TS10, 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 TS10 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**

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### 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 Parties 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 Parties conduct before and after these undertakings as described above.

## **6 Commencement of Undertakings**

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### 6.1 The Undertakings come into effect when:

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

## **7 Variation of the Undertakings**

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- 7.1 The Commission and the Undertaking Parties 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 Parties, and signed as accepted by the Commission.

## **8 Duration of the Undertakings**

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### 8.1 These Undertakings will continue to have effect until the earlier of:

- (a) the Commission for any reason discharging the Undertaking Parties 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**

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- 9.1 If the Undertaking Parties become aware of a breach of these Undertakings, whether advertent or inadvertent, they 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 Parties have not complied with the Undertakings, and requests the Undertaking Parties to do so, the Undertaking Parties will engage at their 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 Parties are 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 Parties at any time during the course of any criminal and/or civil proceedings for the purpose of checking compliance with the undertakings.

## **10 Miscellaneous**

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- 10.1 These Undertakings are properly executed if the Undertaking Parties sign the same copy, or separate identical copies of the execution page. Where separate copies are signed by the Undertaking Parties or the Commission, the signed copy can be the original document, or a faxed or emailed copy.
- 10.2 The Undertaking Parties 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 Timber King Limited

*[Handwritten Signature]*

Authorised signatory

WENGUI LIU

Name

In the presence of:

Witness Name: *Tow*

Witness Address: *4 Mottin Rd Panmure.*

Witness Occupation: *Office support.*

Date: *14th / 06 / 2016*

Signed by and on behalf of NZ Steel Distributors Limited

*[Handwritten Signature]*

Authorised signatory

WENGUI LIU

Name

In the presence of:

Witness Name: *Tow*

Witness Address: *4 Mottin Rd. Panmure*

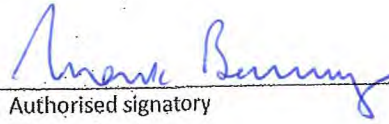
Witness Occupation: *office support.*

Date: *14th / June / 2016*

*[Handwritten mark]*

**Acceptance**

Accepted by the Commerce Commission by

  
\_\_\_\_\_  
Authorised signatory

MARK NEWMAN BERRY  
\_\_\_\_\_  
Name



*In the presence of:*

Witness Name: MARK JOHN ATWELL

Witness Address: AUCKLAND

Witness Occupation: SENIOR INVESTIGATOR

Date: 12 JULY 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.



