

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth)

By

Zen Sensation Pty Ltd (ACN 147 387 255).

1. Person giving the Undertaking

- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Zen Sensation Pty Ltd ACN 147 387 255 (**Zen**), for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**).

2. Background

- 2.1 Zen was an importer and wholesaler of TS branded cigarettes. Between October 2013 and July 2015, Zen imported and supplied 33.5 million cigarettes across four variants, TS Gold, TS Silver, TS Red and TS Blue. The TS cigarettes were manufactured by a company based in Asia, under Zen's instructions. Zen stopped importing and supplying cigarettes in 2015, and does not currently intend to enter that market again.
The Reduced Fire Risk Cigarettes mandatory safety standard and the Australian Consumer Law
- 2.2 Since 2010, cigarettes imported or supplied in Australia must comply with the *Trade Practices (Consumer Product Safety Standard) (Reduced Fire Risk Cigarettes) Regulations 2008* (**RFR Standard**), which is a safety standard for the purposes of the Australian Consumer Law (**ACL**).
- 2.3 Prior to the introduction of the RFR Standard, discarded cigarettes and related products started over 4500 fires each year in Australia¹, and fires attributed to cigarettes killed an average of 14 people annually². The risk of cigarettes starting fires is greatly reduced if those cigarettes comply with the RFR Standard.
- 2.4 To comply with the RFR Standard, cigarettes are manufactured in such a way that, when lit and left unattended, they go out by themselves. This is often done by using Low Ignition Propensity (**LIP**) paper to manufacture them. Testing for compliance with the RFR Standard is done by lighting sample cigarettes in laboratory conditions and observing whether they burn along their full length. The RFR Standard states that such testing must be done in accordance with *Australian Standard AS4830-2007 Determination of the extinction propensity of cigarettes* (**AS4830**).
- 2.5 The RFR Standard also states that the words "AUSTRALIAN FIRE RISK STANDARD COMPLIANT. USE CARE IN DISPOSAL" (**compliance statement**) must appear on all retail cigarette packets.
- 2.6 The ACL prohibits businesses from supplying cigarettes that do not comply with the RFR Standard. The ACL also prohibits businesses from engaging in conduct that is false, misleading or deceptive, including that representing goods are compliant with the RFR Standard, when they are not.
- 2.7 Zen instructed its overseas based manufacturer to supply cigarettes compliant with the RFR Standard. Despite these instructions Zen was supplied with cigarettes that did not comply with the RFR Standard.
- 2.8 Prior to being contacted by the ACCC, Zen did not arrange laboratory testing of any TS cigarettes for compliance with the RFR Standard prior to their retail supply in Australia.
The ACCC investigation
- 2.9 The ACCC purchased at retail TS Blue and TS Gold cigarettes which, in laboratory testing commissioned by the ACCC, failed to comply with the RFR Standard (**non-compliant cigarettes**). Zen also supplied other TS Blue and TS Gold cigarettes, along with TS Silver and TS Red cigarettes, directly to the ACCC, and those cigarettes passed laboratory testing.

¹ S Chapman and A Balmain, *Reduced-ignition propensity cigarettes - a review of policy relevant information*, Commonwealth Department of Health and Ageing, 2004, p. 12.

² M Hoy and S Morton, *Deaths associated with fires caused by cigarettes*, Victorian Institute of Forensic Medicine, in association with NSW Fire Brigades, 2006.

2.10 Zen supplied a total of 20 million TS Blue cigarettes and 4.5 million TS Gold cigarettes. The total number of non-compliant cigarettes that Zen supplied is unknown. All TS cigarettes, including the non-compliant cigarettes, were supplied in packets featuring the compliance statement.

2.11 After being contacted by the ACCC, Zen voluntarily recalled all TS cigarettes.

Counterfeit cigarettes

2.12 The ACCC is aware that in addition to genuine TS cigarettes supplied by Zen there were counterfeit TS cigarettes available in the market for which Zen was not responsible. Counterfeit cigarettes which were not imported or supplied by Zen are not the subject of this undertaking.

Contraventions of the Australian Consumer Law

2.13 Zen admits that between October 2013 and July 2015, it supplied an unknown number of non-compliant cigarettes, in contravention of section 106(1) of the ACL.

2.14 Zen admits that it made the compliance statement on an unknown number of packets containing non-compliant cigarettes, in contravention of sections 18, 29(1)(a), 29(1)(g), and 33 of the ACL.

2.15 In response to the ACCC's investigation, Zen has provided this Undertaking to the ACCC.

3. Commencement of this Undertaking

3.1 This Undertaking comes into effect when:

- (a) this Undertaking is executed by Zen, and
- (b) this Undertaking so executed is accepted by the ACCC (**the Commencement Date**).

3.2 Upon the commencement of this Undertaking, Zen undertakes to assume the obligations set out in paragraph 4.1 for the purposes of section 87B of the CCA.

4. Undertaking

4.1 Zen undertakes that it will not import or supply cigarettes in Australia unless:

- (a) the manufacturer of the cigarettes keeps records relating to the manufacture of the cigarettes, including the date of manufacture and the source of any LIP paper used on that date; and
- (b) each retail packet of such cigarettes includes a batch number, and this batch number can be matched to the records kept by the manufacturer; and
- (c) a representative sample of each variant of the cigarettes is tested in accordance with AS4830, or, if that is not possible, an international equivalent of AS4830 such as *ISO12863:2010 Standard test method for assessing the ignition propensity of cigarettes*³, and that this testing is done before each variant is supplied and on an ongoing basis, at least once every six months; and
- (d) Zen keeps copies of the records of manufacture, the batch numbers and the testing for a period of at least three years after the supply of the cigarettes to which those records apply.

5. Acknowledgments


5.1 Zen acknowledges that:

- (a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website
- (b) the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

³ The ACCC and Zen acknowledge that AS4830 and ISO12863 are not identical, and that only testing in accordance with AS4830 is evidence of compliance with the RFR Standard.

Executed as an Undertaking

Executed by Zen Sensation Pty Ltd ACN 147 387 255 pursuant to section 127(1) of the *Corporations Act 2001*
by:


Signature of director
MICHAEL FENG
Name of director (print)
06/11/2016
Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

23/11/16
Date

and signed on behalf of the Commission:


Chairman

Date 23/11/16