

16 May 2017

[REDACTED]
MellyPop Lingerie Limited
56 Tutanekai Street
Paraparaumu 5032

By email only: [REDACTED]

Dear [REDACTED]

Fair Trading Act 1986: Warning and compliance advice

1. The Commerce Commission (Commission) has been investigating MellyPop Lingerie Limited (MellyPop) under the Fair Trading Act 1986 (the Act).
2. We have now completed our investigation and are writing to you to provide you with a warning and compliance advice.
3. In summary, the Commission considers that MellyPop is likely to have breached section 13(i) of the Act by having a refund policy that misleads consumers about their rights under Consumer Guarantees Act 1993 (CGA).
4. We also consider that MellyPop is at risk of breaching:
 - 4.1. section 10 of the Act by advertising products for sale on www.mellypop.co.nz (Website) as 'in stock' when as alleged, no stock was immediately available and stock was subsequently ordered when consumers purchased the goods; and
 - 4.2. section 21(c) of the Act by failing to provide goods within 3 to 5 days, as outlined in MellyPop's delivery policy.
5. Extracts of these sections are provided as **Attachment A**.
6. We recommend that you take immediate action to address our concerns and seek legal advice about complying with the Act.

The investigation

7. During our investigation, the Commission considered complaints from consumers, MellyPop's response to the Commission's request for information, and the Commission's previous communications with MellyPop.
8. We note that MellyPop received compliance advice on similar issues in 2014.

Consumer complaints

9. The Commission has investigated five complaints about MellyPop's conduct. These complaints alleged MellyPop:
 - 9.1. listed products as 'in stock', when MellyPop did not have the products in stock;
 - 9.2. accepted payment for goods that were either not delivered, or not delivered by the specified timeframe; and
 - 9.3. failed to provide a remedy for goods that were supplied late or were not supplied at all.

Response by MellyPop to Commission information request

10. MellyPop has advised the Commission that:
 - 10.1. It closed www.mellypop.co.nz (Website) in December 2016 and it has opened a shopify store to sell remaining stock.
 - 10.2. Its return policy for faulty goods is to offer an exchange, rather than a refund, as the products sold are of an intimate nature and cannot be resold once worn.
 - 10.3. It will reduce the size of the business so that it can provide greater care to its customers.
 - 10.4. In future, it will only sell items that it has in stock and it will ensure that orders are shipped within 24 hours of receiving payment.
 - 10.5. If delays arise with shipping, MellyPop will inform its customers of the delays.

The Commission's view

11. The Commission's view is that MellyPop has likely breached section 13(i) and is at risk of breaching sections 10 and 21(c) of the Act.
12. The Commission is issuing:
 - 12.1. a **warning** over MellyPop's representations about its refund policy as it is likely to be in breach in section 13(i); and
 - 12.2. **compliance advice** over MellyPop's representations about delivery of goods as it risk of breaching sections 10 and 21(c).

Representations about the refund policy

13. The CGA sets minimum guarantees about goods and services bought for personal use and provide remedies for consumers when guarantees are not met.
14. MellyPop has stated that its policy for faulty goods is to offer an exchange, rather than a refund, as the products sold are of an intimate nature and cannot be resold once worn.
15. This policy is likely to mislead consumers on their rights under the CGA because consumers may have a right to a refund or replacement of goods.

Representations about delivery of goods

16. MellyPop's Website listed product availability as 'in stock'. We believe that consumers will infer this statement to mean that stock is available for immediate dispatch.
17. MellyPop's delivery policy states that orders will normally be delivered within 3 to 5 working days within New Zealand.
18. MellyPop did not respond directly to whether or not it has stock on standby and available to fulfil orders of 'in stock' items. MellyPop has stated that in future, it will only sell products in stock.
19. MellyPop's response indicates that it may not have had stock available for products advertised as 'in stock'. If MellyPop made the representation without having stock available, it is likely to breach sections 10 and/or 21(c) of the Act.
20. We recommend you seek legal advice to ensure your policies and internal processes comply with the Act.

Next steps

21. While the Commission acknowledges that MellyPop has closed its website, we note that MellyPop intends to continue trading on its Shopify webpage.
22. The Commission is requesting MellyPop confirms:
 - 22.1. receipt of this letter; and
 - 22.2. that it understands the concerns raised in this letter.
23. While we will not be taking further enforcement action against MellyPop at this time, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future.

24. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against MellyPop.
25. This letter is public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

26. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Act. The Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the Fair Trading Act

27. Only the courts can decide if there has actually been a breach of the Act. The court can impose penalties where it finds the law has been broken. A company that breaches the Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
28. You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts. It also does not prevent us from taking further enforcement action in the future.

Further information

29. We have published a series of fact sheets and other resources to help businesses comply with the Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz.
30. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
31. You can also view the Act and other legislation at www.legislation.co.nz.
32. Please contact Compliance Officer Esther Kim on (04) 924 3867 or by email at esther.kim@comcom.govt.nz if you have any questions about this letter.

Yours sincerely,



Ritchie Hutton
Head of Investigations

Attachment A – Relevant sections*Misleading conduct in relation to goods*

Section 10 of the Act states:

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

False or misleading representations

Section 13 of the Act states:

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
- (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993.

Demanding or accepting payment without intending to supply as ordered

Section 21 of the Act states:

No person shall demand or accept payment or other consideration for goods or services, if at the time of the demand or acceptance that person—

- (c) does not have reasonable grounds to believe that that person will be able to supply the goods or services within any specified period; or if no period is specified, within a reasonable time.