


8 September 2020

The Director
Southern Gold Limited t/a Just Incredible (In Liquidation)



By email: 

Attention: Director – David Ellis

Fair Trading Act 1986: Warning for supplying and offering to supply children's toys that did not comply with a mandatory product safety standard

1. The Commerce Commission (**Commission**) has been investigating whether Southern Gold Limited t/a Just Incredible (In Liquidation) (**Just Incredible**) has breached section 30(1) of the Fair Trading Act 1986 (the **FT Act**) by supplying and offering to supply four types of rubber squeeze bath toys (collectively the **toys**) that did not comply with the mandatory product safety standard (**safety standard**).¹ Photographs of the toys are at **Attachment A**.
2. We have now completed our investigation and are writing to inform you, as the director of the business, about our views.
3. The Commission considers that Just Incredible is likely to have committed offences under section 40(1) of the FT Act in that, contrary to section 30(1) of the FT Act, it supplied 716 toys to New Zealand consumers that did not comply with the safety standard.
4. The Commission has decided in this instance to issue Just Incredible with a warning in respect of the conduct. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the law has occurred, and we have determined that at this time we will not be bringing legal action.²

¹ The Australian/New Zealand Standard for children's toys (AS/NZS ISO 8124.1.2002), as adopted under the Product Safety Standard (Children's Toys) Regulations 2005..

² Commission's published *Enforcement Response Guidelines* at [41].

How this conduct can break the Law

5. Section 30(1) of the FT Act states:

If a product safety standard in respect of goods relates to a matter specified in section 29(1), a person must not supply, or offer to supply, or advertise to supply those goods unless that person complies with that product safety standard.

Toy safety standard

6. The toy safety standard applies to toys manufactured, designed, labelled, or marketed for use by children up to and including 36 months of age whether or not the toys were manufactured, designed, labelled, or marketed for use by children over that age.³
7. Toys do not comply with the toy safety standard if they have small components or small components come off the toy during reasonably foreseeable abuse testing, because these components create a choking hazard for young children.⁴ Toys also do not comply with the safety standard if their size and shape mean that they risk becoming lodged in a child's airway.⁵
8. The toys that Southern Gold supplied liberated small parts when tested.

The investigation

9. The Commission has investigated Just Incredible after a product safety inspection on 26 November 2019 which identified and resulted in the purchase of toys which were suspected to not comply with the product safety standard.
10. The Commission's investigation established that the toys failed to comply with the safety standard. During testing of the toys, small parts (squeakers) were liberated from the toy. These parts were smaller than the required size outlined in the safety standard and created a choking risk. The shape and size of the smaller bath toys were such that they were an airway obstruction risk.

Just Incredible's response

11. You confirmed that Just Incredible imported 3408 of the toys, having sourced them from an Australian supplier and supplied 716 through your stores. While you were aware of the risk of small parts generally, in this case you did not appreciate the safety risk from the squeakers or that the size and shape of the smaller bath toys would constitute an airway obstruction hazard. Just Incredible co-operated with the Commission and removed the products from supply, issuing a recall.

³ Section 4(1) of the Regulations.

⁴ Sub-clause 4.4.1 of the AS/NZS ISO 8124.1.2002 states "removable components thereof and components liberated during testing in accordance with 5.24 (reasonably foreseeable abuse tests) shall not fit entirely, whatever their orientation, into the small parts cylinder when tested in accordance with 5.2 (small parts).

⁵ Clause 4.5.1 of the safety standard states certain toys shall not be capable of penetrating past the test templates.

12. You have also confirmed through your lawyer, that Just Incredible is closing its business due to the economic downturn and has appointed a liquidator.

The Commission's view

13. In this case, and having fully considered relevant information received, the Commission's view is that Just Incredible is likely to have breached section 30(1) of the FT Act each time it supplied or offered to supply the toys.
14. We have reached this view as the toys did not comply with the safety standard.

Warning

15. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate and sufficient to conclude our investigation by issuing this warning letter rather than by issuing legal proceedings. A major factor in this decision is that Just Incredible has appointed a liquidator. It is likely that court action would have been taken had that not been the case.
16. This warning represents our opinion that the conduct in which Just Incredible has engaged is likely to have breached the FT Act and that legal action remains available to the Commission in future if the conduct continues or is repeated.
17. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against Just Incredible.
18. This warning letter is public information and will be published on the case register on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

19. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FT Act. Regulations setting mandatory safety standards for certain products are enforced by the Commission under the FT Act.

Penalties for breaching the FT Act

20. As indicated above only the courts can decide if there has actually been a breach of the FT Act. The court can impose penalties where it finds the law has been broken. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
21. 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.


Further information

22. If you decide to recommence business we recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies in any

new undertaking, particularly if you recommence selling children's toys or other products subject to the mandatory product safety standards under the FT Act.

23. We have published a series of fact sheets and other resources to help businesses comply with the FT Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the FT Act.
24. You can also view the FT Act and other legislation at www.legislation.co.nz.
25. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely



[REDACTED]
Manager

Competition and Consumer Branch

ATTACHMENT A

