

19 August 2020

Cinevan International Limited
9 Greenmount Drive
East Tamaki
Auckland 2013

By email: [REDACTED]

Attention: [REDACTED]

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

1. The Commerce Commission (**Commission**) has been investigating Cinevan International Limited (**CIL**) under the Fair Trading Act 1986 (the **FT Act**). We have now completed our investigation and are writing to inform you about our views.
2. In summary, the Commission considers that CIL is likely to have committed an offence under section 40(1) of the FT Act, in that:
 - 2.1 contrary to section 30(1) of the Act, it supplied a Frozen drum set (**toy drum**) that did not comply with a mandatory product safety standard for children's toys (**safety standard**);¹ and
 - 2.2 contrary to section 31(5) of the Act, it supplied goods that did not fully comply with the Unsafe Goods (Hot Water Bottles) Permanent Prohibition Notice 2016 (**Notice**). The Notice is issued pursuant to section 31 of the FT Act, and declares hot water bottles as unsafe if they fail to comply with the requirements of BS1970:2012 *Hot water bottles manufactured from rubber and PVC – specification* (**BS1970**).
 - 2.3 Photographs of the toy drum and hot water bottles are at **Attachment A**.
3. The Commission has decided in this instance to issue CIL with a warning. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the

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

law has occurred, and we have determined that at this time we will not be bringing legal action.²

4. However, if this conduct is continuing, we recommend that you take immediate action to address our concerns and seek legal advice about complying with the FT Act.

How this conduct can break the law

Children's Toys

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

(1) 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.

6. The 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 safety standard if they have small parts or small parts come off the toy during reasonably foreseeable abuse testing, because these parts 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 toy drum when subjected to reasonably foreseeable abuse testing liberated small components, and those components fitted entirely into the small parts cylinder.

Hot Water Bottles

9. Section 31(5) of the Act states:

(5) No person shall supply, or offer to supply, or advertise to supply, goods—in respect of which there is in force a notice declaring the goods to be unsafe goods;

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

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.

10. Hot Water Bottles (**HWB's**) do not comply with the requirements of the Notice if they do not conform to BS1970.⁶
11. The HWB's supplied complied with the requirements of BS1970, as they failed to have the prescribed informative labelling (instructions) and the plastic bag warning.

The investigation

12. Commission staff made purchases from the following ND Import and Export Limited (**ND**) trading stores (trading as GO!NZ):
 - 12.1 On the 21 August 2019 from the Wellington store, three HWB's (one red, one blue and one green);
 - 12.2 On the 23 August from the Te Awamtu store, three HWB's (three blue), and two of the toy drums; and
 - 12.3 On the 23 August from the Hamilton store, three HWB's (two blue and one red), and four of the toy drums.
13. We confirmed that the HWB's and toy drum were supplied to ND by CIL.
14. None of the HWB's complied with requirements of BS1970, as they failed to have the instructions and the plastic bag warning, as required under clauses 8.2 and clause 9.
15. A unit of the toy drum was sent for testing to Test Research on 26 August 2019. Test Research tested the toy drum in accordance with the safety standard. The results of the testing concluded that the toy drum did not comply for the following reason:
 - 15.1 During foreseeable abuse testing, small parts were liberated from the toy drum presenting a small parts risk and therefore a choking hazard.
16. You confirmed details regarding the importation and supply of the HWB's and toy drum as follows:

Hot Water Bottles

- 16.1 1870 units of the hot water bottles were supplied to 213 retail stores, between 12 April 2019 and 25 August 2019;

Toy Drum:

- 16.2 295 units of the toy drum were supplied to 61 retail stores, between 24 October 2017 and 7 September 2018.

⁶ Except for clause 8.1 to which a variation is applied as detailed within schedule one of the Notice - Clause 8.1: omit "the identification of the European manufacturer, or the UK distributor for bottles manufactured outside the European Union, and.."

17. The Commission requested documentation to demonstrate the HWB's were compliant with the BS1970 as required by the Notice⁷. You initially provided an Intertek test report which did not identify the HWB's. A further report was supplied from TUV for a red HWB dated July 2019, which was after the supply had already commenced in New Zealand. No test reports for the blue and green variants were provided at the time of the request. You have subsequently had the red, blue and green variants of the HWB's tested for which the green failed to meet certain minimum tensile stress testing requirements.

CIL's position

18. CIL had recalled the toy drum from all your customers in March 2019, including ND, who had failed to act upon the request. This recall was initiated by CIL as a result of an investigation by the Commission for unsafe toys for which you were interviewed in January 2019, CIL was fined \$81,000 for supplying 2,337 units of unsafe toys in February 2020. The toy drum was imported and supplied during the same period of time as that investigation.
19. CIL has also been the subject of a previous HWB investigation for the supply of HWB's which did not fully comply with BS1970. These HWB's were not correctly marked, but also as in this matter were not supplied with full instructions for use and the packaging did not have a plastic bag warning. You were issued compliance advice as a result of that investigation in October 2018.
20. During interview to discuss the HWB's and the toy drum it was evident you were not fully familiar with the labelling, marking and warning requirements for HWB's under BS1970. You stated that:
- 20.1 you do not carry out any checks on consignments of HWB's received from your overseas supplier to ensure they have the correct labelling, marking and warnings as required under BS1970;
- 20.2 you do not assess the HWB's received from suppliers match the HWB's that have been tested in the test reports supplied by the overseas supplier; and
- 20.3 you effectively rely upon the manufacture to ensure the HWB's meet the requirements of BS1970.
21. In terms of this specific investigation, CIL has cooperated with the Commission and voluntarily contacted Trading Standards to undertake a public recall of the toy drum and HWB's.

⁷ For the purposes of 4(1)(b) of the Notice a test certificate or report to BS1970:2012, should be issued upon request to the Commission.

The Commission's view

22. The Commission is of the view that CIL is likely to have breached the FT Act by supplying the HWB's and toy drum. 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.
23. Given that the toy drum was imported around the same time as the toys that were the subject of the earlier investigation, we are satisfied that this is not a case of repeat offending by CIL. However, we consider that CIL should take better care to ensure that HWB's it imports meet the requirements of BS1970, particularly in light of the advice you received in October 2018.
24. We encourage CIL to ensure it has appropriate checks and processes in place to ensure it maintains compliance with the legislation and regularly undertakes reviews of these systems. We also recommend CIL considers carrying out basic screening checks upon receipt of consignments of regulated goods, to check they are compliant.

Warning

25. This warning represents our opinion that the conduct in which CIL have 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.
26. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against CIL.
27. 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

28. 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 Fair Trading Act

29. 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.
30. 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

31. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.
32. 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 Act.
33. You can also view the FT Act and other legislation at www.legislation.co.nz.
34. Thank you for your assistance with this investigation. Please contact Simon Foster on 09 951 1473 or by email at simon.foster@comcom.govt.nz if you have any questions in relation to this letter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kirsten Mannix'.

Kirsten Mannix
Consumer Manager Wellington