

5 March 2021

Ink Power Limited
3A Civil Place
Rosedale
Auckland 0632

Attention: [REDACTED]

By email: [REDACTED]

Dear [REDACTED]

Fair Trading Act 1986: Warning for supplying Hot Water Bottles that do not comply with an Unsafe Goods Notice

1. The Commerce Commission (**Commission**) has been investigating Ink Power Limited (**Ink Power**) 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 Ink Power is likely to have breached section 31(5) of the FT Act and thereby committed an offence under section 40(1) because on 28 October 2020 it supplied a hot water bottle (**HWB**) that did not comply with the Unsafe Goods (Hot Water Bottles) Permanent Prohibition Notice 2016 (**Notice**).¹
 - 2.1 A Photograph of the hot water bottle is at **Attachment A**.
3. The Commission has decided in this instance to issue Ink Power with a warning. 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

How this conduct can break the law

4. 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;

¹ The Unsafe Goods (Hot Water Bottles) Permanent Prohibition Notice 2016, declares any HWB that does not conform to BS1970:2012 to be an unsafe product in New Zealand and prohibited from supply.

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

5. Hot water bottles (**HWBs**) do not comply with the requirements of the Notice if they do not conform to the British Standard '*BS1970:2021 Hot water bottles manufactured from rubber and PVC*' (the **Standard**).³
6. The HWB supplied did not comply with the requirements of the following clauses of the Standard:
 - 6.1 Clause 7 - it was not marked with:
 - 6.1.1 The number of the Standard and year – 'BS1970:2012';
 - 6.1.2 The name, or trade mark of the manufacturer, or supplier;
 - 6.1.3 A date daisy indicating the year, month and week of manufacture.
 - 6.2 Clause 8 .1 – It was missing the Warning – "WARNING – HOT WATER BOTTLES CAN CAUSE BURNS. AVOID PROLONGED CONTACT WITH THE SKIN";
 - 6.3 Clause 8.2 - As the instructions supplied were not as prescribed by the Standard and it was missing certain information; and
 - 6.4 Clause 9 – The plastic bag warning was missing from the cellophane packaging.

The investigation

7. The Commission commenced its investigation into Ink Power, following concerns raised that Ink Power was advertising for supply on its Trade Me store a HWB that may not comply with marking requirements under the Standard and therefore was in potential contravention of the Notice, and breach of the FT Act.
8. Ink Power has also been the subject of a previous HWB investigation for the supply of HWBs which did not fully comply with the Standard. These HWBs failed to comply with clauses 8.1, 8.2 and 9 as detailed at paragraphs 6. The company was issued a warning as a result of that investigation in December 2019, which also related to the supply of two unsafe toys likely to be in breach the FT Act.
9. A test purchase of the advertised HWB was made from Ink Power's Trade Me store (member name 'soxiet') on 28 October 2020. The HWB supplied failed to comply with the Standard – in particular, the clauses mentioned at paragraphs 6.
10. You confirmed details regarding the importation and supply of all HWBs by Ink Power as follows:

³ 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.."

- 10.1 Ink Power Imported 30 HWBs prior to the warning issued by the Commission in December 2019, when six had been supplied to customers including the Commission;
 - 10.2 You confirmed that following the December 2019 warning, as a result of believing the written instructions to be provided with these were compliant, the remaining 24 HWB were also supplied to customers;
 - 10.3 In the current investigation you confirmed that three HWBs from an additional importation of 10 HWBs described as 'samples', were also supplied to Ink Power customers; and
 - 10.4 As director of Ink Power, you also stated you would no longer be importing or supplying HWBs.
11. The HWB supplied to the Commission as part of this investigation failed to have any of the required permanent markings and written instructions or plastic bag warnings. It is not clear whether the remaining two 'samples' supplied to customers also failed to include the required permanent markings, warning labelling and instructions
 12. The Commission requested documentation to demonstrate the HWB was compliant with the Standard as required by the Notice, and as director you provided two test reports from a qualified test laboratory. Only one of the reports has assessed the HWB against the requirements of the Standard but this was not in full, as it did not assess the requirements under clause 8 (informative labelling) and clause 9 (the plastic bag warning). The other test report assessed it against the Australian Standard which was not the applicable standard in New Zealand for compliance with the Notice.

Ink Power's position

13. During our interview with you to discuss the HWBs supplied in October 2020, it was evident that as director of Ink Power you were still not fully familiar with the labelling, marking and warning requirements for HWBs under the Standard, despite being warned in 2019. You stated that:
 - 13.1 You had been checking every HWB supplied following the warning being issued to ensure they are marked correctly and have instructions supplied;
 - 13.2 You relied upon the requirements in Australia to ensure the HWBs' complied with the Standard but had not obtained a copy to check it was correct.
 - 13.3 You were not sure how the sample units were supplied and believed that a staff member must have picked up one of the sample units by mistake from the office to supply to a customer.

- 13.4 You also indicated that you had misinterpreted what the warning letter issued in December 2019 had recommended and had tried to comply with its content and taken some steps in that regard.
14. In terms of this specific investigation, Ink Power has cooperated with the Commission and voluntarily contacted Trading Standards to undertake a public recall of the HWBs it supplied.

The Commission's view

15. In this case, and having fully considered the relevant information received, the Commission's view is that Ink Power is likely to have breached section 31(5) of the FT Act by advertising and supplying a HWB that does not comply with the Notice.
16. If Ink Power decides to resume the supply of HWBs in the future, it should take care to ensure that any HWBs it imports meet the requirements of the Standard and do not contravene the Notice. This is particularly in light of the facts of this investigation, and the warning received in December 2019. We would also encourage Ink Power to have appropriate checks and processes in place to ensure it maintains compliance with the legislation and regularly undertakes reviews of these systems. We also recommend Ink Power considers carrying out basic screening checks upon receipt of consignments of regulated goods, to check they are compliant.

Warning

17. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate to conclude our investigation by issuing this warning letter rather than by issuing legal proceedings on this occasion.
18. The Commission has considered the decision to warn for a second breach of the Notice carefully. The decision has been made on the basis of your advice, that Ink Power will no longer import, or supply HWBs, and the low number of units supplied. It is important to note that although a low number have been supplied, that would not necessarily mean it would preclude the Commission from taking enforcement action, depending on the severity of any non-compliance.
19. Furthermore, our decision to warn on this occasion will be a final warning for such a breach, and the Commission will be monitoring Ink Power and carrying out checks for compliance with the Notice in the future, should Ink Power decide to resume the importation and supply of HWBs. Any repeat occurrence of a likely breach of the FT Act would not be taken lightly by the Commission. It views repeat and/or continued offending as an important factor when deciding on the appropriate enforcement outcome.
20. This warning represents our opinion that the conduct in which Ink Power has engaged in, is likely to have breached the FT Act. We reserve the right to look at

taking legal action in relation to this alleged breach, if we consider that Ink Power may be continuing to contravene the requirements of the Notice in the future.

21. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against Ink Power.
22. 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

23. 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

24. 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.
25. 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

26. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.
27. 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.
28. You can also view the FT Act and other legislation at www.legislation.co.nz.

29. 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

Attachment A

