

3 November 2020

HMH International Limited
15 Temuri Place
Glendene
Auckland 0602

By post and email: [REDACTED]

Attention: Director – [REDACTED]

Fair Trading Act 1986: Warning for supplying children's toys and nightwear that do not comply with mandatory product safety standards

1. The Commerce Commission (**Commission**) has been investigating HMH International Ltd, t/a Gift House (**Gift House**) under the Fair Trading Act 1986 (**FT Act**). We have now completed our investigation and are writing to inform you about our views.
2. In summary, the Commission considers that Gift House is likely to have committed an offence against section 40(1) of the FT Act in that, contrary to section 30(1) of the FT Act, it supplied:
 - 2.1 the following toys (collectively **the toys**) that did not comply with the mandatory product safety standard for children's toys (**toy safety standard**):¹
 - 2.1.1 Spiderman drum;
 - 2.1.2 Duck tambourine;
 - 2.1.3 Xylophone;
 - 2.1.4 Smurf Train;
 - 2.1.5 Train set;
 - 2.1.6 Small bathtub toy; and
 - 2.2 the following nightwear (collectively **the nightwear**) that did not comply with the mandatory product safety standard for children's nightwear (**nightwear safety standard**):²

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.

2.2.1 A princess pyjama set; and

2.2.2 Batman pyjama set.

3. Photographs of the toys and nightwear are at **Attachment A**.
4. The Commission has decided in this instance to issue Gift House 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. In this case we have determined that at this time we will not be bringing legal action to establish fault.³

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.⁴
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.⁵ 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.⁶
8. The toys when subjected to reasonably foreseeable abuse testing, liberated small components that fitted entirely into the small parts cylinder and therefore the toys do not comply with the toy safety standard.

² The Australian/New Zealand Standards for Children's nightwear and limited daywear having reduced fire hazard (AS/NZS ISO 1249:2014), as adopted under Product Safety Standards (Children's Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2016

³ Commission's published Enforcement Response Guidelines at [41]

⁴ Section 4(1) of the Regulations.

⁵ 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).

⁶ Clause 4.5.1 of the safety standard states certain toys shall not be capable of penetrating past the test templates.

Nightwear safety standard

9. The nightwear safety standard applies to items of children's nightwear and limited daywear sized between 00 - 14. All nightwear covered by the nightwear safety standard must be marked with the correct fire hazard information labels.⁷
10. The nightwear supplied was required to be labelled and did not have the correct fire hazard information label attached and therefore does not comply with the nightwear safety standard.

The investigation

11. Commission staff purchased units of the toys and nightwear from Gift House on 2 December 2019 and 24 February 2020.
12. One or two units of each of the toys were sent for testing to Test Research on 3 December 2019 and 24 February 2020. Test Research tested all the units and concluded they did not comply with the toy safety standard. Under reasonably foreseeable abuse testing, small parts were liberated from each of the toys, which fit entirely into the small parts cylinder.
13. The nightwear did not comply with the nightwear safety standard as they had old versions of the fire hazard information labels.⁸
14. Gift House, when requested was unable to provide the Commission with any purchase or sales records for the toys and nightwear.
15. Gift House removed all the non-compliant toys and nightwear from sale after we raised our concerns and has since provided photographic evidence that it has destroyed the toys.

Gift House's response

16. Gift House cooperated with the Commission's investigation. It advised it did not import the toys and nightwear, stating it inherited them from the previous owner and in the case of one type of toy, purchased them from a door to door seller. Gift House acknowledges that it has legal obligations as the supplier of the toys and nightwear.
17. Gift House stated it would no longer be offering for supply toys subject to the toy safety standard.

⁷ Some garments will not meet the design or flammability requirements of the Safety Standard and these garments cannot be sold.

⁸ Product Safety Standards (Children's Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2008, were revoked in 2017 and replaced with the current mandatory safety standard.

The Commission's view

18. The Commission is of the view that Gift House is likely to have breached the FT Act by supplying the toys and nightwear, that do not comply with toy safety standard and the nightwear safety standard.
19. 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. Our decision has been made bearing in mind the remedial action taken by Gift House to remove the toys and nightwear from sale, and advice that it did not import the toys.
20. Gift House did not provide the Commission with any identifying details about the door to door seller you purchased one of the toys from, or any records to confirm the numbers of units that you held or supplied. Where such records are not kept it is hard to ensure the traceability of the goods that have been supplied. This is desirable where any safety concerns arise around particular products such as in the case of the mandatory product safety standards so that the number of consumers who have purchased the products and may have been affected for the purposes of any recall, can be ascertained. We recommend that in future, you take steps to ensure that you maintain accurate inventory and supply records in your business of all stock, including toys and nightwear, that you purchase for supply to consumers. This should include accurate details of the supplier.
21. We advise and encourage Gift House to regularly review its compliance procedures and policies. In particular, we recommend you keep up to date with New Zealand's product safety standards (in conjunction with the relevant regulations) and check regulated products to ensure they still meet the requirements of the applicable safety standard.

Warning

22. This warning represents our opinion that the conduct in which Gift House 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.
23. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against Gift House.
24. 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

25. 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.

26. We have enclosed copies of the Commissions guidance on the product safety standards for reference, which are available on our website at www.comcom.govt.nz/safety.

Penalties for breaching the Fair Trading Act

27. 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.
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.
29. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions in relation to this letter.

Yours sincerely



Kirsten Mannix
Consumer Manager Wellington
Competition and Consumer Branch

Attachment A

Spiderman drum



Duck Tambourine toy



Xylophone toy



Smurf train



Train set



Small bathtub toy



Princess pyjamas



Batman pyjamas

