

29 August 2016

Coles Group New Zealand Holdings Limited  
Minter Ellison Rudd Watts  
Lumley Centre  
88 Shortland Street  
Auckland

Dear Ms Smith

**Fair Trading Act 1986: Warning**

1. The Commerce Commission has been investigating Coles Group New Zealand Holdings Limited (**K Mart**) under the Fair Trading Act 1986 (**Act**). We have now completed our investigation and are writing to you to alert you to our concerns.
2. In summary, the Commission considers that K Mart is likely to have breached section 30 of the Act by supplying certain items of children's nightwear which did not comply with the mandatory standard of children's nightwear by having incorrect fire warning labelling.
3. The product safety standard for children's nightwear is established in the Product Safety Standards (Children's Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2008 (**Regulations**). The Regulations adopt parts of the Australian and New Zealand Standard AS/NZS 1249:2003 (**Standard**)<sup>1</sup>.

**The investigation**

4. The Commission was made aware of the following items of children's nightwear containing incorrect fire labels that were supplied by K Mart nationwide :
  - 4.1 Girls' pink cupcake nightie, style 121372
  - 4.2 Girls' soft green party nightie, style 121372
  - 4.3 Girls' purple zebra nightie, style 121377
  - 4.4 Girls' green sleep nightie, style 121377
  - 4.5 Girl's apricot Cat pyjama, style number 120578

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<sup>1</sup> AS/NZS 1249:2003 Children's nightwear and limited daywear having reduced fire hazard.

- 4.6 Barbie Fairy Princess Nightie, Style 121202
  - 4.7 Monster High Ghouls Nightie, Style 121208
5. The fire warning labels on these items were incorrectly categorised and were subject to two separate product recalls.
    - 5.1 The first recall was in September 2015, the garments referred to in paragraphs 4.1 to 4.4 should have been labelled Category 4 “High Fire Danger” but were in fact labelled as Category 1 “Low Fire Danger”. Also included in this recall were the Girl’s apricot Cat pyjamas, see paragraph 4.5, which had a sleeve opening which may have exceed allowable limits.
    - 5.2 The second recall in October 2015 involved garments identified at paragraphs 4.6 and 4.7 which as a result of a change in their composition did not fit into any of the fire warning labelling that are detailed in the Standard.
  6. A further batch of nightwear that was sold in New Zealand was supplied to K Mart by a local supplier in Australia. This nightwear was found to have Australian fire warning labels instead of New Zealand labels. This was identified by K Mart and the product was removed from sale.
  7. K Mart responded to the Commission’s enquiries by stating that the two product recalls were initiated once it was found there was an issue with the labelling. Further compliance and training has been arranged so that this issue will not arise in the future.

### **The Commission’s view**

8. In this case, the Commission’s view is that K Mart’s conduct is likely to have breached the Act. We have reached this view because the incorrect category of fire warning labels were attached to children’s nightwear, as identified in paragraphs 4.1 to 4.7 above, which failed to comply with the mandatory safety standard for children’s nightwear.
9. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.
10. We will not be taking any further action against K Mart at this time as it self-reported the breaches of the Standard to the ACCC and MBIE; initiated and publically recalled the items of nightwear that were in breach of the Regulations; and put remedial actions and extra precautions in place. However, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against K Mart.

11. This warning 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**

12. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Fair Trading 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**

13. 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.
14. 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**

15. 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](http://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.
16. You can also view the Act and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).
17. Thank you for your assistance with this investigation. Please contact me on 09 9194441 or by email at [john.lyall@comcom.govt.nz](mailto:john.lyall@comcom.govt.nz) if you have any questions about this letter.

Yours sincerely



John Lyall  
Consumer Investigations Manager  
Auckland