

4 October 2019

2 Boys Trading Limited
T/A Lotsa Goodies
C/319 East Tamaki Road
East Tamaki
Auckland 2013

Attention: The Directors

By email: [REDACTED]

Dear Directors

Fair Trading Act 1986: Warning

1. The Commerce Commission (**Commission**) has been investigating 2 Boys Trading Limited, trading as Lotsa Goodies (**2 Boys**) under the Fair Trading Act 1986 (**Fair Trading Act**). We have now completed our investigation and are writing to advise you of the outcome.
2. In summary, the Commission considers that 2 Boys is likely to have breached section 30(1) of the Fair Trading Act and thereby committed an offence under section 40(1) because it supplied the following toys (collectively **the toys**) that did not comply with a mandatory product safety standard for children's toys (**safety standard**):¹
 - 2.1 An inflatable duck bath toy (the **duck toy**); and
 - 2.2 An inflatable dolphin toy (the **dolphin toy**).
3. The Commission has decided in this instance to issue 2 Boys with a warning in respect of the conduct.

Legal framework

4. Section 30(1) of the Fair Trading 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.

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**).

5. 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.²
6. Toys do not comply with the 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.³
7. The intention of the reasonably foreseeable abuse tests is to simulate the exposure of a toy to structural damage as a result of dropping, pulling, twisting and other actions likely to be performed by a child interacting with the toy. The tests set out within the safety standard include a drop test, a torque test, and a tension test.

The investigation

8. Commission staff made the following purchases on 19 February 2019:
 - 8.1 five units of the duck toy; and
 - 8.2 five units of the dolphin toy.
9. Three units of each of the toys were sent for testing to Test Research on 26 February 2019. Test Research tested all the units and concluded they did not comply with the safety standard. Under reasonably foreseeable abuse testing, small parts were liberated from each of the toys which fit entirely into the small parts cylinder.
10. The Commission established that 2 Boys imported in November 2016:
 - 10.1 384 units of the duck toy; and
 - 10.2 384 units of the dolphin toy.
11. You also confirmed that 2 Boys, supplied the toys to Lotsa Goodies retail stores as follows:
 - 11.1 169 units of the duck toy between November 2016 and 18 February 2019; and
 - 11.2 188 units of the dolphin toys between November 2016 and 14 January 2019.

² Section 4(1) of the Regulations.

³ 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).

2 Boys' position

12. 2 Boys has already been prosecuted for importing and supplying non-compliant toys (a set of four baby rattles, a 5.5 inch soft plastic doll and a set of six squeeze aquatic toys) between 2012 and 2018. 2 Boys pleaded guilty to these charges and was fined \$74,250 in June 2019.
13. During the interview regarding the duck toy and the dolphin toy, you advised that:
 - 13.1 2 Boys had not taken sufficient steps to acquire a good understanding of the requirements of the safety standard until we notified it of our intention to lay charges in January 2019 in respect of the set of baby rattles, the plastic doll and the set of aquatic toys.
 - 13.2 Prior to receiving the notification letter in January 2019, 2 Boys had only undertaken a limited review of stock on the basis it had looked at toys with similar characteristics to the set of baby rattles, the plastic doll and the set of aquatic toys. As a result of this review, 2 Boys removed similar toy products it believed were appropriate for children under 36 months.
 - 13.3 However, none of the toys removed included the duck toy and the dolphin toy. 2 Boys thought the toys were not appropriate for children under 36 months because of the age mark on the packaging, and of the need for adult supervision to inflate the toys. It has now understood that a toy might be suitable for children under 36 months regardless of labels on the packaging.
14. 2 Boys has indicated that it has made considerable efforts to ensure that it complies with the safety standard, which include the following measures:
 - 14.1 It has no intention of importing toys for children under 36 months in the future;
 - 14.2 It has reviewed its existing stock and removed any toys which may be in breach of the standard or appropriate for children under 36 months;
 - 14.3 It has taken steps to improve its compliance procedures by taking expert advice and issuing internal guidelines for compliance with Toy Safety Standards; and
 - 14.4 It has initiated recall notices for the duck toy and the dolphin toy on its Facebook page, its website and in all Lotsa Goodies stores.
15. In terms of this specific investigation, 2 Boys has cooperated with the Commission and also contacted Trading Standards to undertake a public recall of the toys.

The Commission's view

16. The Commission is of the view that 2 Boys is likely to have breached the Fair Trading Act by supplying the toys. However, we are satisfied that in this instance issuing a warning is the most appropriate enforcement outcome. Most of the toys which are the subject of the current investigation were imported and supplied before or contemporaneously with 2 Boys being notified on 29 January 2019 of the Commission's decision to prosecute other conduct and for which it was fined in June 2019. While the last toys were supplied on 18 February 2019, we consider that 2 Boys might not have fully appreciated its legal requirements until it took legal advice, as a result of the previous prosecution.
17. We consider that 2 Boys should have been on notice of its product safety obligations much earlier than January 2019, however we accept that 2 Boys has already been fined in respect of its previously poor compliance procedures through the previous prosecution. We are satisfied that 2 Boys has taken further steps to improve compliance.
18. We encourage 2 Boys to continue to assess its compliance procedures to ensure that it complies with the Fair Trading Act.
19. While we will not be taking any further action against 2 Boys at this time, we will take this warning into account if this conduct continues or if 2 Boys engages 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 2 Boys. Please be aware that repeat offending will be taken seriously by the Commission.
20. This warning letter is public information and will be published on our website. We may also make public comment about our investigation and conclusions, including issuing a media release or making comment to media.

The Commission's role

21. 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. Regulations setting mandatory safety standards for certain products are enforced by the Commission under the Fair Trading Act.

Penalties for breaching the Fair Trading Act

22. Only the courts can decide if there has actually been a breach of the Fair Trading Act. The court can impose penalties where it finds the law has been broken. A company that breaches the Fair Trading Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
23. 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.

24. 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



[REDACTED]
Manager - Consumer
Competition and Consumer Branch