

18 December 2020

Galaxy Gifts Limited
361 Great South Road
Otahuhu
Auckland 1062

By email: [REDACTED]

For attention of: [REDACTED]

Dear [REDACTED]

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

1. The Commerce Commission (**Commission**) has been investigating Galaxy Gifts Limited (**Galaxy Gifts**) 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 Galaxy Gifts is likely to have committed an offence under section 40(1) of the FT Act, in that contrary to section 30(1) of the Act, it supplied a toy guitar that did not comply with a mandatory product safety standard for children's toys (**Safety Standard**).¹
3. A photograph of the toy guitar is at **Attachment A**.
4. The Commission has decided in this instance to issue Galaxy Gifts 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. We have determined that at this time we will not be bringing legal action to establish fault.²
5. 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.

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**).

² Commission's published *Enforcement Response Guidelines* at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

How this conduct can break the law

6. 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.
7. 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
8. The toy guitar has the European symbol which denotes the toy is not suitable for children under 3 years applied to the packaging. However, despite this, the product is in our view likely to fall within the Safety Standard as we consider that it is designed for children under 36 months. The guitar is brightly coloured and of a weight and size that would be attractive and able to be used by children of that age. The “Safety of Toys Part 8: Age Determination Guidelines⁴” lists simple musical instruments such as toy guitars as suitable from 12 months plus (para 6.25) and Table A.1 subcategory 1.48 lists “simple keyboards or hand-held toys with buttons that activate lights and sounds” as suitable for 6 months plus.
9. 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.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
10. The toy guitar when subjected to reasonably foreseeable abuse testing liberated small components, and those components fitted entirely into the small parts cylinder. The batteries compartment cover could be opened without the use of a tool by using a single prying action with a fingertip. The batteries compartment cover also opened during testing and the batteries became accessible. Therefore, the toy does not comply with the Safety Standard and supplying it is a likely breach of the FT Act.

³ Section 4(1) of the Regulations.

⁴ SA/ANZ TR ISO 8124.8:2016 Part 8: Age determination guidelines

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.

The investigation

- 10.1 On 22 December 2019, Commission staff purchased five toy guitars from Galaxy Gifts. A further three toy guitars were purchased on 24 February 2020.
- 11. Test Research tested the toy guitar in accordance with the Safety Standard. The results of the testing concluded that the toy guitar did not comply for the following reasons:
 - 11.1 During foreseeable abuse testing, small parts were liberated from the toy guitar that could fit entirely in the small parts cylinder presenting a choking hazard; and
 - 11.2 The batteries compartment cover could be opened without the use of a tool by using a single prying action with a fingertip. The batteries compartment cover also opened during testing and the batteries became accessible.

Galaxy Gifts' response

- 12. When requested you were unable to provide the Commission with any purchase or sales records for the toy guitars. You confirmed:
 - 12.1 The toy guitar was first stocked by Galaxy Gifts approximately 10 years ago;
 - 12.2 Galaxy Gifts cannot recall the number of units purchased or the number of units sold;
 - 12.3 Galaxy Gifts cannot recall where the toy guitars were purchased from; and
 - 12.4 Galaxy Gifts does not have any records covering the purchase of the toy guitars.
- 13. Galaxy Gifts did not respond to requests to attend a voluntary interview regarding the supply of the toy guitar.
- 14. However, you did engage with the Commission and confirmed in your letter dated 16 June 2020 that you had destroyed all remaining stock of the product.
- 15. You confirmed that Galaxy Gifts was to cease trading on 31 July 2020. The Commission visited the store on 11 September 2020 and confirmed this was the case. You also confirmed that you were not involved in any other business that supplied toys.
- 16. To date you have not initiated a product recall of the toy guitar.

The Commission's view

- 17. The Commission is of the view that Galaxy Gifts is likely to have breached the FT Act by supplying the toy guitar as it did not comply with the Safety Standard. 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. A significant factor in our decision to issue a warning in this case rather than taking stronger action in relation to the breach is that Galaxy Gift has ceased trading and you have confirmed you are no longer supplying toys to consumers.

18. You could not provide the Commission with any identifying details about where you purchased the toys from, or any records to confirm the number of products supplied. Where records are not kept it is hard to trace the products that have been supplied and to alert consumers to potential safety concerns with the product.
19. If you decide to operate a similar business in the future, we recommend that you take greater steps to ensure that you maintain accurate inventory and supplier records. We encourage Galaxy Gifts to regularly review its compliance procedures and policies to ensure that proper sale and purchase records are kept.
20. As previously mentioned, the Commission strongly recommends that Galaxy Gifts seeks advice from Trading Standards at the Ministry of Business, Innovation and Employment about undertaking a voluntary product recall in respect of the toy guitar. Trading Standards can be contacted for advice by email at recalls@mbie.govt.nz or by phone on 0508 627 774. They will be able to assist you to do the product recall.

Warning

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

24. 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

25. 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.

26. 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

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 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 [REDACTED] on 09 920 3497 or by email at [REDACTED] if you have any questions in relation to this letter.

Yours sincerely



Kirsten Mannix
Consumer Manager Wellington

Enc: Attachment A- Image of the toy guitar

Attachment A

