

30 July 2025

Kmart NZ Holdings Limited
PricewaterhouseCoopers, Level 26 PWC Tower
15 Customs Street West
Auckland 1010

Attention:
By email only:
cc:

Dear

Warning from the Commerce Commission for unsubstantiated representation “100% sustainably sourced cotton”

1. The Commerce Commission (**the Commission**) has completed its investigation into Kmart NZ Holdings Limited (**Kmart**) for potential breaches of the Fair Trading Act 1986 (**the FT Act**).
2. The investigation considered whether sustainability statements made on the Kmart website, in-store, and on product labelling in relation to its own brand fashion products were false, misleading and/or unsubstantiated (**the investigation**).
3. After fully considering the relevant information received, the Commission considers that Kmart may have breached section 12A of the FT Act by making the representation on its website that it used “100% sustainably sourced cotton”.
4. In this instance, the Commission has decided the appropriate enforcement response is to issue Kmart with a warning, rather than commence criminal proceedings. The Commission notes that only a court can determine whether there has been a breach of the FT Act.
5. The purpose of this warning is to inform you why the Commission considers that you may have breached the FT Act and to encourage future compliance. Legal action remains available to the Commission in future if the conduct continues or is repeated.
6. The Commission notes that Kmart has ceased the conduct by proactively removing the “100% sustainably sourced cotton” claim from its New Zealand website as of 4

October 2024. Kmart has also advised it continues to provide regular compliance training for its staff members in consumer and competition law.

7. The Commission previously communicated with Kmart in May 2023 about the need to ensure its sustainability claims were truthful and substantiated, including cautioning against the use of absolute claims without adequate substantiation.

Details of the Commission’s investigation

8. The Commission investigated a range of sustainability representations made by Kmart in relation to the cotton used in its own brand fashion products. While a range of claims were analysed throughout the investigation, the primary representation of concern was a headline banner claim on Kmart’s website which advertised “100% sustainably sourced cotton”.¹
9. During the investigation, the Commission obtained and considered the following information:
 - 9.1 information supplied to the Commission by Kmart on a voluntary basis regarding its ethical sourcing program, its relationship with its suppliers, and internal guidance and training documents;
 - 9.2 open-source information, including screenshots and screen recordings from Kmart’s website which recorded various representations made regarding the cotton sources of Kmart’s own brand fashion products; and
 - 9.3 consumer complaints.²

Details of the relevant law

10. The FT Act prohibits certain unfair conduct and practices in relation to trade, including making unsubstantiated representations in connection with the supply and promotion of goods and services.
11. Section 12A states that a representation is unsubstantiated if the person does not have reasonable grounds for making the representation at the time it is made, irrespective of whether it is false or misleading.³ It applies to representations that a reasonable person would expect to be substantiated.⁴

The Commission’s view

12. The Commission’s view is that there is sufficient evidence to establish that Kmart may have breached section 12A of the FT Act. The reasons for the Commission’s view are set out below.

¹ This representation is provided as **Attachment A**.

² These complaints did not contribute to our assessment of a potential breach of section 12A of the FT Act. However, we note they were considered relevant contextual information in assessing the overall presentation and consumer understanding of the claims made.

³ Fair Trading Act 1986, section 12A(2).

⁴ Fair Trading Act 1986, section 12A(3).

Key facts established

13. Between 4 August 2023 and 4 October 2024, Kmart represented on its website that it used “100% sustainably sourced cotton”. On the same page, Kmart stated that 95% of the cotton used in Kmart’s own brand fashion products was “Better Cotton”, with the remaining 5% said to be sourced from recycled or organic sources.
14. The page also stated that “Better Cotton is sourced via a mass balance system which allows cotton from Better Cotton Farmers to be mixed with other types of cotton on its journey from field to final product” and that “The product may not contain Better Cotton”.
15. Kmart advised the Commission that it does not manufacture the own brand fashion products it sells in its stores. It sources finished fashion products from independent suppliers (Tier 1 suppliers), who in turn source fabric, trim and cotton for these products from other suppliers further down the supply chain (Tier 2–4 suppliers).
16. Kmart requires its Tier 1 suppliers to verify that the cotton sourced from Tier 2-4 suppliers is either “Better Cotton”, organic, or recycled cotton.
17. “Better Cotton” is cotton that is sourced through the “Better Cotton Initiative” (**BCI**). BCI describes itself as a sustainability initiative which (amongst other initiatives) aims to embed sustainable farming practices and drive global demand for sustainable cotton throughout the supply chain.⁵ BCI uses a ‘Mass Balance’ chain of custody model, meaning cotton sourced from its licensed farmers is mixed with other conventional cotton in the supply chain.
18. The Commission’s view is that Kmart could not say with certainty which (if any) of the products in its own brand fashion product range contained “sustainable cotton” and therefore considers the claim that the cotton was “100% sustainably sourced” to be unsubstantiated. This is because “Better Cotton” and conventional cotton are indistinguishable when blended and sourced through the BCI, and a percentage of its cotton could be conventional cotton and not exclusively supplied by Better Cotton farmers.

Unsubstantiated claim

19. As a result of the key facts established in the investigation, the Commission’s view is that Kmart’s claim that it used “100% sustainably sourced cotton” may be unsubstantiated and in breach of section 12A.
20. An absolute claim like “100% sustainably sourced cotton” is one which presents a good or service as having a complete and unqualified characteristic. It implies a high level of certainty. To be substantiated, such a representation would require a trader to hold detailed, reliable information from quality sources.

⁵ [Better Cotton Initiative - Principles and Criteria Version 3.0 \(March 2023\)](#).

21. In the Commission's view, Kmart did not have a high degree of certainty about whether its cotton was 100% sustainably sourced. It held information that a percentage of its cotton could be conventional cotton and not exclusively supplied by Better Cotton farmers.
22. Kmart was therefore unlikely to have reasonable grounds to make the claim that the cotton used in its fashion products was "100% sustainably sourced" because it could not say with certainty whether 100% of the cotton in its fashion products was supplied by Better Cotton farmers.

Defences

23. The Commission considered whether any of the defences under section 44 of the FT Act would potentially be available to Kmart in the facts and circumstances of this case, but formed the view that none had a reasonable prospect of succeeding.

Response from Kmart

24. During our investigation, Kmart advised the Commission in its voluntary response to the Commission's information request dated 12 December 2024 that it could substantiate that 100% of its cotton was sustainably sourced because:
 - 24.1 It required its Tier 1 suppliers (those who supplied it with finished fashion products) to source cotton through the BCI or to use organic or recycled cotton; and
 - 24.2 It relied on BCI's policies and guidelines, as well as the information it provided about how the mass balance system works.
25. Kmart also provided the Commission with a copy of an internal marketing guidance document titled 'High Risk Word List' dated 26 September 2023. This list contained words or phrases relating to sustainability claims which Kmart cautioned staff against using in association with its own brand fashion products. This list included any 100% (absolute) claims (eg, 100% organic/recycled).
26. In response to the Commission's preliminary decision to issue a Warning Kmart advised:
 - 26.1 The Kmart cotton supply chain is complex and can vary depending on the type of product, design specification, and materials used.
 - 26.2 Kmart had in place an ethical sourcing programme for its Tier 1 suppliers which required them to comply with minimum requirements and expectations.
 - 26.3 Through this ethical sourcing programme Kmart gathered information from its Tier 1 suppliers through a sourcing questionnaire. This included some detail about other entities in the supply chain.

27. While Kmart considered that its representations in relation to cotton products were accurate and were able to be substantiated, in response to the Commission's investigation it removed the "People and planet"⁶ webpage for New Zealand and the "Cotton" webpage⁷ for New Zealand on 4 October 2024.
28. Having considered the responses from Kmart, the Commission's final view remains that there is sufficient evidence to establish that Kmart may have breached section 12A of the FT Act.

Enforcement action for breaching the FT Act

29. Where the Commission consider that a person or business may have breached the FT Act, there are a range of potential enforcement responses available.
30. The Commission reiterates that its view is based on the information collected during the investigation, and that only a court can determine whether there has been a breach of the FT Act. A 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.
31. In deciding on the appropriate enforcement response in this case, the Commission has considered the extent of the harm, the seriousness of the conduct, and the public interest. The Commission has also considered the fact that Kmart has removed the representation from its website and has been cooperative throughout the investigation. Further detail on the Commission's approach to making enforcement decisions is contained in the Commission's 'Enforcement Response Guidelines', available on the Commission website (www.comcom.govt.nz).

Consequences of this Warning

32. This warning represents the Commission's view that Kmart may have breached the FT Act and that legal action remains available to the Commission in future if the conduct continues or is repeated.
33. The Commission may draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against Kmart.
34. The Commission may also take this warning into account in the event of continued or repeated similar conduct by Kmart.

Publication

35. This warning is public information and will be published on the case register on the Commission website. The Commission may decide to redact some details from the published version, such as personal information.

⁶ <https://www.kmart.co.nz/people-and-planet/>

⁷ <https://www.kmart.co.nz/cotton/>

36. The Commission will be making public comment about our investigation and conclusions, including issuing a media release, making comment to media or otherwise publicising the outcome (such as on our social media forums).

Further information

37. The Commission encourages you to regularly review your compliance procedures and policies and seek legal advice about the application of the FT Act to your business.
38. The Commission acknowledges Kmart's efforts to improve the sustainability of their operations and product offerings. However, it is important that businesses ensure their environmental claims are accurate, clear, and substantiated at the time they are made. Particular care should be taken when using absolute claims such as "100% sustainably sourced cotton".
39. The Commission has published a series of fact sheets and other resources to help businesses comply with the legislation we enforce. These are available on the Commission website at www.comcom.govt.nz. The Commission encourages you to visit the Commission website to better understand your obligations and the Commission's role in enforcing the FT Act.
40. You can also view the FT Act and other legislation at www.legislation.co.nz

Review of our decision

41. You are entitled to request a review of our decision to issue this warning only if you identify relevant material that was not considered as part of our decision. You must request a review within 1 month of this warning being issued. Any review will be handled in accordance with the Commission's complaints process. Please submit any review request to contact@comcom.govt.nz.

Yours sincerely

Simon Pope
Head of Fair Trading and Product Safety Investigations

Attachment A – the 100% sustainably sourced representation

