

14 July 2022

BTG 2018 Limited, t/a Best Trading Group  
144 West Harbour Drive  
West Harbour  
Auckland 0618

Attention of: [REDACTED]  
Copy to: [REDACTED]

Email: [REDACTED]  
CC: [REDACTED]

## **Fair Trading Act 1986: Warning for supplying children's toys that does not comply with the mandatory product safety standard**

1. The Commerce Commission (**Commission**) has been investigating BTG 2018 Limited, t/a Best Trading Group (**BTG**) 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 BTG 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 a dolphin toy (the **Toy**) that did not comply with the mandatory product safety standard for children's toys (**safety standard**).<sup>1</sup>
3. A photograph of the Toy is at **Attachment A**.
4. The Commission has decided in this instance to issue BTG 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.<sup>2</sup>

### **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 product safety standard is complied with in respect of those goods.*

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<sup>1</sup> 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.

<sup>2</sup> Commission's published Enforcement Response Guidelines at [41]

6. 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.<sup>3</sup>
7. Toys do not comply with the safety standard if:
  - 7.1 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;<sup>4</sup> and/or
  - 7.2 their size and shape mean that they risk becoming lodged in a child's airway;<sup>5</sup> and/or
  - 7.3 on battery operated toys the battery compartment is easily accessible without the use of a tool or two independent movements, or the battery compartment opens after a drop test.
8. The Toy, when subjected to reasonably foreseeable abuse testing, liberated small components that fitted entirely into the small parts cylinder, therefore the Toy does not comply with the safety standard.
9. Supplying toys that fail to meet the requirements of the safety standard is a breach of the FT Act.

### **The investigation**

10. Commission staff purchased units of the Toy from JS Wellington Ltd, t/a A2Z (**JS Wellington**), a company with common ownership, in Lower Hutt on 22 March 2021.
11. Two units of the Toy were sent for testing to Choice Test Research in April 2021. Choice Test Research tested both 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.

### *BTG's response*

12. You confirmed that BTG had imported 36 units of the Toy from Australia and supplied all 36 units to 13 customers. Four of the 13 customers are businesses owned and operated by the Directors of BTG which includes JS Wellington (collectively **common ownership companies**):
13. During the investigation, you confirmed:

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<sup>3</sup> 'The Safety of Toys Part 8: Age determination guidelines' published by the Joint Standards Australia/Standards New Zealand Committee (SA/SNZ TR ISO 8124.8:2016) provides guidance on determining the age appropriateness of toys..

<sup>4</sup> 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).

<sup>5</sup> Clause 4.5.1 of the safety standard states certain toys shall not be capable of penetrating past the test templates.

- 13.1 You relied upon overseas suppliers to ensure the toys supplied are safe, compliant, and their age categorisation is correct;
  - 13.2 That BTG does undertake some quality tests to ensure toys supplied don't break easily by dropping them and bending them;
  - 13.3 That BTG believed the age category of the toy was correct and that children under three should not be playing with the toy as it is marked '3+'; and
  - 13.4 BTG do undertake some age assessment of toys by checking photos of toys on the websites of overseas suppliers based on your own judgement.
14. You also advised that you contacted Consumer Protection at the Ministry of Business, Innovation and Employment to post a recall for the Toy, and contacted all your retailers to recall the Toys.

### **The Commission's view**

15. The Commission is of the view that BTG is likely to have breached the FT Act by supplying Toys, that do not comply with the safety standard.
16. 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 with consideration given to the action taken by BTG to recall the Toys, the low quantity of the Toys supplied, and because you no longer intend to supply toys for children aged five and under.
17. We advise and encourage BTG to regularly review its compliance procedures and policies. We recommend you keep up to date with New Zealand's product safety standards (in conjunction with the relevant regulations) and check any regulated products you supply to ensure they still meet the requirements of the applicable safety standard. In particular we strongly advise that BTG obtains guidance on age determination to ensure toys it supplies, that are likely to be caught by the Safety Standard have had the correct safety assessment carried out against them.<sup>6</sup>

### **Warning**

18. This warning represents our opinion that the conduct in which BTG 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.
19. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against BTG, or the common ownership companies for which you are the Directors of.

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<sup>6</sup> For example 'SA/SNZ 8124.8.2016 Age Determination Guidelines' or the US 'CPSC Age determination guidelines'.

20. 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.

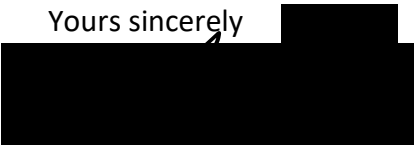
### **The Commission's role**

21. 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.
22. We have published a series of fact sheets and other resources to help businesses comply with the FT Act, other legislation we enforce and in particular the product safety standards for children's toys, which are all available on our website.<sup>7</sup>
23. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the FT Act.
24. You can also view the FT Act and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).

### **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.
27. Thank you for your assistance with this investigation. Please contact Simon Foster on 09 951 1473 or by email at [simon.foster@comcom.govt.nz](mailto:simon.foster@comcom.govt.nz) if you have any questions in relation to this letter.

Yours sincerely



Grant McIntosh  
Product Safety and Consumer Information Standards Manager

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<sup>7</sup> [www.comcom.govt.nz/business/your-obligations-as-a-business/product-safety-standards](http://www.comcom.govt.nz/business/your-obligations-as-a-business/product-safety-standards)

# Attachment A

## Dolphin Toy

