

18 December 2023

SkyEast Limited t/a SkyEast  
48 Regent Street  
Papatoetoe  
Auckland 2025

Attention of: [REDACTED]

Copy to: [REDACTED]

Email: [REDACTED]

Cc: [REDACTED]

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

1. The Commerce Commission (**Commission**) has been investigating SkyEast Limited, t/a SkyEast (**SkyEast**) 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 SkyEast is likely to have committed an offence against section 40(1) of the FT Act by supplying a Crown Wand toy and Animal Shoot toy sets (collectively the **Toys**) that did not comply with the mandatory product safety standard for children's toys (**safety standard**).<sup>1</sup>
3. Photographs of the Toys are at **Attachment A**.
4. The Commission has decided in this instance to issue SkyEast 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.<sup>2</sup> We have determined that at this time we will not be bringing legal action. The purpose of this warning letter is however to inform you of our view that there has been a likely breach of the FT Act, to prompt changes in behaviour and to encourage future compliance.<sup>3</sup>

### **How this conduct can break the law**

5. Section 30(1) of the FT Act states:

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<sup>1</sup> The Australian/New Zealand Standards for children's toys (AS/NZS ISO 8124.1.2002), as partly adopted with variations under the Product Safety Standards (Children's Toys) Regulations 2005.

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

<sup>3</sup> Commission's published Enforcement Response Guidelines at [37]

*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.*

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>4</sup>
7. Toys do not comply with the safety standard if:
  - 7.1 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;<sup>5</sup> and/or
  - 7.2 their size and shape mean that they risk becoming lodged in a child's airway;<sup>6</sup>

#### *Crown Wand toy*

8. An accredited testing laboratory tested two units of the Crown Wand toy for compliance with the safety standard. The results of testing concluded that this toy did not comply with the safety standard because small parts (the tip of the wand on both units) were liberated during reasonably foreseeable abuse testing presenting a choking hazard for young children.

#### *Animal Shoot toy sets*

9. The animal shoot toy sets were assessed by the Commission and it was concluded they do not comply with the safety standard because:
  - 9.1 The balls contained in four units of the Animal shoot toy sets were capable of fitting inside a small parts cylinder, presenting a choking hazard for young children; and
  - 9.2 The balls in two units of the Animal shoot toy sets were assessed using a test 'Template C' and they were capable of passing in its entirety through the template, presenting a risk of blocking a young child's airway.
10. Supplying toys that fail to meet the requirements of the safety standard is a breach of the FT Act.

#### **The investigation**

11. Commission staff purchased units of the Toys as follows:

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<sup>4</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>5</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>6</sup> Clause 4.5.2 of the safety standard states toys that are small balls, or contain balls shall not be capable of passing through Test 'Template C'.

- 11.1 Four Blue Crown Wand toys from the [REDACTED] in New Plymouth on 7 November 2022; and
- 11.2 11 Animal Shoot toy sets from [REDACTED] who trade as [REDACTED] in Levin on 8 November 2022.
- 12. The Animal Shoot toy sets were marketed as bath toys as they have a picture of a baby playing with them in a bath on the packaging.
- 13. A sample of the Crown Wand toys was sent for testing at Choice Test Research, and they concluded it did not comply with the safety standard. Small parts were liberated during the reasonably foreseeable abuse tests, presenting a choking risk.
- 14. An assessment of the Animal Shoot toys was carried out by the Commission utilising its own small parts cylinder and Test 'Template C'. It was concluded that the balls within the sets were capable of fitting inside a small parts cylinder and therefore presented a choking risk, and the balls were capable of penetrating past the cavity of test 'Template C' creating a risk of becoming lodged in a young child's throat and blocking their airway.

*SkyEast response*

- 15. You confirmed at interview:
  - 15.1 SkyEast had no knowledge of any product safety standard or legislation about the safety of children's toys;
  - 15.2 SkyEast had never sought any advice on compliance with the Safety Standards or requested any test reports to check that the toys were safe;
  - 15.3 SkyEast purchased approximately 30 of the Crown Wand toys from the Pakuranga night market and then sold them to 3 shops around two years ago; and
  - 15.4 SkyEast purchased approximately 30-40 units of the Animal Shoot toys from China and sold them to three shops around a year ago.
- 16. You also advised that you contacted Product Safety at the Ministry of Business, Innovation and Employment to post a recall for the Toys and contacted all your retailers to recall the Toys.

**The Commission's view**

- 17. The Commission is of the view that SkyEast has breached the FT Act by supplying Toys, that do not comply with the safety standard.
- 18. 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. There are several factors that influenced our decision to warn SkyEast on this occasion, which included the action taken to recall the Toys, the relatively low quantity supplied, you have not received advice from the Commission on

compliance with the Safety Standard before and because you no longer intend to supply toys for children aged five and under.

19. We advise and encourage SkyEast 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 SkyEast 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>7</sup>

### **Warning**

20. This warning represents our opinion that the conduct in which SkyEast has engaged in has breached the FT Act and that legal action remains available to the Commission in future if the conduct continues or is repeated.
21. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against SkyEast.
22. 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**

23. 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.
24. 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>8</sup>
25. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the FT Act.
26. 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**

27. 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.

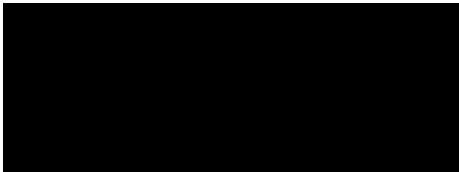
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<sup>7</sup> For example 'SA/SNZ 8124.8.2016 Age Determination Guidelines' or the US 'CPSC Age determination guidelines'.

<sup>8</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)

28. 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.
29. Thank you for your assistance with this investigation. Please contact [REDACTED] by email at [REDACTED] if you have any questions in relation to this letter.

Yours sincerely

A large black rectangular redaction box covering the signature area.

Grant McIntosh  
Product Safety and Consumer Information Standards Manager

**Attachment A**

*Crown wand toy*



## Animal shoot toys

Blue dinosaur shoot toy



Tiger shoot toy



Horse shoot toy



Red dinosaur shoot toy



