IN THE DISTRICT COURT
AT NORTH SHORE

I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA

CRI-2018-044-000673
[2018] NZDC 20513

THE QUEEN

v

NZ SALE LIMITED

Hearing:	25 September 2018
Appearances:	J Barry for the Crown J Hamilton for the Defendant
Judgment:	25 September 2018

NOTES OF JUDGE P A CUNNINGHAM ON SENTENCING

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[1] NZ Sale has pled guilty to four representative charges brought by the Commerce Commission. They are all breaches of s 30 and s 41 Fair Trading Act 1986 and involve regulations issued pursuant to the Fair Trading Act, which had prescribed safety standards for, in this case, children's pyjamas.

[2] They are all representative charges but there are four different types of child's nightwear and the date ranges in relation to CRN ending:

(a) 0149, 8 February 2014 to 9 April 2014.

(b) 0150, 21 September 2014 to 9 January 2015.

(c) 0151, 3 March 2015 to 10 March 2015.

(d) 0152, 7 July 2015 to 6 October 2015.

[3] In 2013 an amendment was passed to the Fair Trading Act, increasing the penalties as from 17 June 2014. Prior to that the maximum fine was $200,000 and after 17 June it was increased three-fold to $600,000. The first charging document 0149 falls into the pre-amendment era, so a $200,00 fine applies to that charge and the $600,000 fine applies to the other three. The products were Superhero pyjamas, Sleep-Sack and Joules pyjamas and the last one was an Absorba bodysuit.

[4] In New Zealand we have regulations that pertain to nightwear and limited daywear to reduce fire hazard. Section 31 Fair Trading Act requires that a person must not supply goods unless they comply with the product safety standard. NZ Sale is wholly owned by an English company and it was selling products for sale online. It has 30 employees and as at 31 March 2016, had an annual turnover of $32 million.

[5] Although some of these items were available in shops, the ones in question were all sold online. In July 2015, the Australian Competition and Consumer Commission, that is the equivalent of our Commerce Commission, began an investigation into 220 items of children's nightwear. The company selling those products Ozsale, wholly owns the NZ Sale company and Ozsale is owned by the English company.

[6] The products involved in that investigation were the same products that are involved in these charges, with the exception of one, which were not sold in New Zealand. There were product recalls in Australia for the four products, subject of the charges before me today. And the events in Australia led to NZ Sale contacting New Zealand's Ministry of Business Innovation and Employment, to let them know that they were undertaking a voluntary recall for the four products in question. A recall notice was published on MBIE's website and as a result, eight garments were returned and 15 were confirmed as customers, as having been discarded.

[7] As a result of the proceedings in Australia, and those involved more products than are involved in this case, there was a fine of $AUS500,000 and a requirement to pay $AUS50,000 towards the regulator's costs and a requirement to establish a

comprehensive compliance programme and to maintain and administer that programme for a period of three years.

[8] In New Zealand the Commerce Commission commenced its own investigation in September 2016 and obtained some information and samples of the nightwear from its Australian counterpart. NZ Sale was aware of the Investigation and responded by letter to requests for information and two of the overseas directors came to New Zealand and were interviewed by the Commerce Commission. That unveiled the situation that has resulted in the charges and I will now go on to detail the problems with each product:

(a) The Superhero pyjamas had a cape longer than 10 centimetres, which meant that it was not tight fitting and they were made of cotton, meaning it was too flammable to be categorised as a category 4 high fire danger garment, so it had the wrong categorisation.

(b) The Sleep-Sack displayed no fire hazard labels at all, when it should have been labelled as, "Warning: High Fire Danger Keep Away From Fire."

(c) The Joules pyjamas should have had the following label "Caution: Not Heat or Flame-Resistant Wear Sung Fitting to Reduce Risk" instead it carried, "Warning: Keep Away from Fire" and there was a second attachable label, "In the Interests of Safety It's Advisable to Keep This Garment Away From Fire and Flames."

(d) The Absorba bodysuit had no fire hazard label at all and it should have had a label with the words, "Caution: Not Heat or Flame-Resistant Wear Snug Fitting to Reduce Risk."

[9] What has happened in this case is that the Commerce Commission and NZ Sale have agreed that there should be a fine with a starting point of $110,000. And it has been recognised in more than one case, starting with the *Commerce Commission v New Zealand Milk Corporation* that it is not only in the

interests of the parties for there to be agreement as to the level of fine, but it is also in the interests of communities because that means that a lot of Court time and resources are not spent arguing about it.[1] However, having said that, the Court still needs to be satisfied that the fine is at an appropriate level and I have already indicated that I am satisfied that the starting point is an appropriate level in this case.

[10] The Crown have pointed to the following factors, as being relevant to the starting point. The non-compliance has resulted in children's nightwear being purchased and worn by children, either with no fire risk label or with an insufficient risk identified. It is described as highly careless and resulting in prejudice to consumers, meaning that parents and caregivers believed that they were buying products that were safe or had a level of risk that was incorrect, therefore they were not fully informed about the safety of the garments. There were 73 products over the four charges and the majority of those, about 50 are still out there in the community.

[11] The need for deterrence was also emphasised in the Crown submissions, which also focus on the fact that there was no proper compliance regime in place, which is the responsibility of the manufacturer or distributor of the products. The Crown also pointed to the obvious need for deterrence.

[12] The defendant NZ Sale, really agrees with all of those points and today Ms Hamilton has told me that it is accepted that there was an inadequate compliance regime in place and as a result of what happened in Australia and here, there is now a proper compliance regime in place so that this does not happen again.

[13] Fairly soon after the investigation was commenced in Australia, NZ Sale turned its attention to the situation here. Product recall happened in Australia between August and November 2015 and on 17 December, the contact was made with MBIE. That was referred to as being a failure to quickly recall the relevant products. But as we have discussed today, it could not be called a significant delay. From everything I have read in the submissions and in the summary of fact, in my view once NZ Sale became aware of the problem it moved pretty quickly to make sure the products were

[1] *Commerce Commission v New Zealand Milk Corporation* [1995] 2 NZLR 730.

not on sale anymore and to put in place steps that would prevent this kind of thing happening in the future.

[14] It is important that this fine reflects the fact that the purpose of the Fair Trading Act is to protect and promote consumer welfare as well as fair competition, through fair trading practices. These products are the subject of regulation to protect children from the risk of fire, which can result in severe and disfiguring injuries or worse. The labelling is necessary as a guide to parents and caregivers, so that they can take the steps they deem necessary to reduce that risk to children in their care.

[15] As I have said already, I am happy with the level of fine at $110,000. Both because of the similarity in the cases that have been referred to me, particularly by the Crown but also taking into account the lesser number of garments, about a third here than it was in Australia, I take into account the fact that the penalty is almost double in Australia than it is in New Zealand. I also agree with the discount of 10 percent for the co-operation and lack of previous convictions in relation to NZ Sale and a further 25 percent for the early guilty pleas, which results in a fine $74,000 on CRN 0152. I will convict and discharge on the others.

P A Cunningham
District Court Judge