

**Undertakings to the New Zealand  
Commerce Commission under section  
46A of the Fair Trading Act 1986**

**Kmart NZ Holdings Limited**

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# Undertakings to the New Zealand Commerce Commission under section 46A of the Fair Trading Act 1986

## 1. PERSON GIVING UNDERTAKINGS

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- 1.1 These Undertakings are given to the Commerce Commission (**Commission**) for the purposes of section 46A of the Fair Trading Act 1986 (**FTA**) by Kmart NZ Holdings Limited (Company Number 335513), a company incorporated in New Zealand having its registered office at PricewaterhouseCoopers, Level 26 PwC Tower, 15 Customs Street West, Auckland, 1010, New Zealand (**Kmart**).
- 1.2 Kmart is a retailer of household goods in New Zealand including, amongst other products, children's toys, including Kmart's home brand toys, which are marketed under brands 'Kids & Co' or 'Anko' which are sold exclusively by Kmart (**Kmart Toys**) and national brand toys, for example, toys which are designed, manufactured, tested and branded by independent companies including Mattel and Fisher Price toys and which are sold by many other retailers including Kmart (**National Brand Toys**).

## 2. COMMISSION'S INVESTIGATION

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- 2.1 These Undertakings serve to resolve the Commission's investigation into whether certain push along 'Kids and Co' fire engine home brand toy variants sold by Kmart in New Zealand from 15 January 2018 to 16 January 2019 (the **Toy Fire Engines**) failed to comply with the relevant mandatory product safety standard for children's toys under the FTA.
- 2.2 The Toy Fire Engines were Kmart Toys.
- 2.3 Regulation 4 of the Product Safety Standards (Children's Toys) Regulations 2005 (the **Regulations**) provides that the Regulations apply to "*toys manufactured, designed, labelled, or marketed for use by children up to and including 36 months of age whether or not the toys are manufactured, designed, labelled, or marketed for use by children over that age*". Toys falling within regulation 4 of the Regulations must meet certain aspects of the Australia/New Zealand Standard AS/NZS ISO 8124.1:2002 (the **Standard**).
- 2.4 On 27 November 2018, the Commission purchased samples of the Toy Fire Engines from Kmart. Its investigation revealed that at the testing phase the display box provided by the manufacturer for the Toy Fire Engines displayed "18M+" symbols, the swing tags attached to the Toy Fire Engines (at the testing phase) stated "2+years" and in initial testing by Kmart the Toy Fire Engines produced small parts. Kmart told the Commission that at the testing phase the swing tags and display box were a mock-up prepared pending the age assessment grading being carried out for the Toy Fire Engines.
- 2.5 Having considered the nature, appearance, colours, size, shape and function of the Toy Fire Engines, as well as expert opinion obtained by the Commission, the Commission considered that regulation 4 of the Regulations applied and therefore that the Toy Fire Engines were required to meet the Standard. When the Toy Fire Engines were tested in accordance with the Standard, they did not pass the relevant "*small parts test*". Kmart was informed of this by letter from the Commission on 16 January 2019.
- 2.6 Kmart has a quality team that assesses the age grading of Kmart Toys. The quality team assessed the Toy Fire Engines as appropriate for children over 36 months.



- 2.7 In view of the determination made by Kmart's quality team it formed the view that the Regulations did not apply to the Toy Fire Engines, and they were not required to meet the Standard. The Toy Fire Engines were labelled as being suitable for children over the age of 3 years (i.e. the swing tag label stated "3+ years", and the box stated "*Choking hazard small parts not for children under 3 years*").
- 2.8 Upon receipt of the Commission's request, notwithstanding its differing view, Kmart immediately ceased selling the Toy Fire Engines in New Zealand and later issued a voluntary product recall notice for the Toy Fire Engines in New Zealand. There have been no injuries notified to Kmart in respect of the Toy Fire Engines before or after Kmart ceased selling the Toy Fire Engines in New Zealand, and Kmart has not received any complaints in respect of its sale of the Toy Fire Engines. Kmart has also co-operated with the Commission's investigation.
- 2.9 To resolve the investigation, Kmart has agreed to provide enforceable undertakings to ensure that the Kmart Toys it offers for sale in the future in New Zealand which are manufactured, designed, labelled, or marketed for use by children up to and including 36 months of age are tested in accordance with regulation 4 of the Regulations and comply with the Standard where regulation 4 of the Regulations applies. To assist in achieving that, these undertakings give effect to the test that applies when making age grading assessments for the purposes of the Regulations. Kmart acknowledges and agrees to apply that test. These undertakings are provided without any admission by Kmart of a breach of the FTA, the Regulations or otherwise.
- 2.10 The Commission has concluded, after reviewing the practices and criteria outlined in the Commission's Competition and Consumer Investigation Guidelines and Enforcement Response Guidelines, that it is in the public interest to resolve this investigation by way of the undertakings provided by Kmart and without taking further enforcement action against Kmart in respect of the Toy Fire Engines (including without limitation any Court action).
- 2.11 Kmart acknowledges that, upon the Expiry Date (as defined in clause 8.1 below), the Regulations continue to apply, and that the Test set out in clause 4.1.3 below represents the appropriate test to apply for carrying out age grade assessments to determine whether toys fall within the Regulations (unless the applicable law changes, including for example by amendment to the Regulations or further ruling of the Court in a manner that impacts upon the way the age grading assessment is to be conducted, in which case the changed applicable law will apply).

### 3. PURPOSE OF THE UNDERTAKINGS

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- 3.1 These Undertakings are given by Kmart in order to:
- 3.1.1 ensure that the Kmart Toys it offers for sale in the future in New Zealand which are manufactured, designed, labelled, or marketed for use by children up to and including 36 months of age are tested in accordance with the Regulations and comply with the Standard where regulation 4 of the Regulations applies by conducting age grading assessments using the test set out at clause 4.1.3;
  - 3.1.2 resolve the Commission's concerns arising from the investigation of the Toy Fire Engines; and
  - 3.1.3 ensure that Kmart will request and use reasonable endeavours to obtain written confirmation from the companies supplying National Brand Toys to Kmart in New Zealand that those companies have applied the test set out in clause 4.1.3



below in conducting the age grade assessment to determine whether their toys fall within the Regulations. For the avoidance of doubt, obtaining such written confirmation does not exclude the need for Kmart to comply with its FTA obligations, including for example by satisfying itself that it can reasonably rely on information provided by suppliers of National Brand Toys.

#### 4. UNDERTAKINGS

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4.1 Kmart undertakes to the Commission, from the Effective Date of the Undertakings (as defined in clause 6.1 below), that it will:

##### Cease Supply of Certain Products

- 4.1.1 not offer for sale in New Zealand the Toy Fire Engines or any other variants of the Toy Fire Engines made by the same manufacturer unless they are first tested in accordance with and comply with the Standard under the Regulations;
- 4.1.2 not supply or offer to supply to the public a Kmart Toy that falls into either clause 4.1.3(b) or (c) below and fails to comply with the Standard when tested against it;

##### Test to be Applied

- 4.1.3 in conducting the age grade assessment in respect of Kmart Toys, apply the following test (**the Test**) to determine whether the toys fall within the Regulations, other than for those toys referred to in Schedule 1 of the Regulations:<sup>1</sup>
- (a) Assess whether, viewed objectively, it can be said that the toy in question was either manufactured, designed, labelled or marketed for use as a plaything by children up to and including 36 months of age, including whether the toy has characteristics that appeal to and functionality that makes it able to be used by a child up to and including 36 months of age;
- (b) If, viewed objectively, the toy meets any one of these alternative limbs (that is of manufacture, design, labelling or marketing for use by children up to and including 36 months of age), then Kmart acknowledges that the Regulations will apply and the toy will be tested against the Standard;
- (c) Where a toy is manufactured, designed, labelled or marketed for use by children both under and over 36 months of age, Kmart acknowledges that the Regulations will apply and the toy will be tested against the Standard;

##### Updated Age Assessment Process

- 4.1.4 ensure its age grade assessment process in relation to its future supply of Kmart Toys in New Zealand, other than for those toys referred to in Schedule 1 of the Regulations, is as follows:
- (a) Kmart will engage an appropriately qualified independent test laboratory to carry out an initial age grade assessment of the Kmart

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<sup>1</sup> Schedule 1 sets out the types of toys to which the Regulations do not apply.

Toys by applying the Test set out in clause 4.1.3 of these Undertakings; and

- (b) Kmart's supplier and merchandise quality team will also make an assessment of the appropriate age grading of the toy, by applying the Test set out in clause 4.1.3 of these Undertakings but will take into account the assessment in (a) above; and
- (c) Should the results of the testing differ, such that the independent laboratory finds regulation 4 applies but Kmart's assessment differs, then Kmart will adopt the finding of the independent laboratory assessment as determinative of the appropriate age range and submit the Kmart Toys to the applicable testing;

#### Training

- 4.1.5 retain an appropriately qualified external provider to provide age determination training on an annual basis to its merchandise, quality assurance and buying teams at all of Kmart's sourcing offices for toys to be supplied in New Zealand commencing from 1 July 2021. The training will cover the concept of age determination, including the application of regulation 4 of the Regulations and the importance of compliance with product safety obligations, and Kmart will ensure employees who make the assessment in clause 4.1.3 of these Undertakings complete this training;

#### Audit

- 4.1.6 undergo two annual audits by a compliance professional to confirm compliance with the above steps in clauses 4.1.1 – 4.1.5, and to provide the results of those audits to Kmart (**Compliance Reports**). These audits will take place 12 months and 24 months respectively from the Effective Date (as defined in clause 6.1 below);
- 4.1.7 ensure that its Head of Compliance and Regulatory Affairs, within 21 days of receiving the Compliance Reports:
  - (a) provides the Compliance Reports to the Kmart Board or relevant governing body;
  - (b) where a material failure of these Undertakings has been identified in the Compliance Reports, provides a report to the Board or relevant governing body identifying how Kmart can implement any recommendations made in the Compliance Reports to rectify the material failure;
- 4.1.8 implement promptly and with due diligence any reasonable recommendations made in the Compliance Reports to address a material failure;

#### National Brand Toys

- 4.1.9 request and use reasonable endeavours to obtain written confirmation from the companies supplying National Brand Toys to Kmart in New Zealand that those companies have applied the Test set out in clause 4.1.3 above in conducting the age grade assessment to determine whether their toys fall within the Regulations.

## 5. EFFECT OF THE UNDERTAKINGS

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5.1 The Undertakings are Court enforceable undertakings in terms of section 46A of the FTA.

## 6. COMMENCEMENT OF UNDERTAKINGS

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6.1 The Undertakings come into effect when:

6.1.1 the Undertakings are executed by Kmart; and

6.1.2 the Commission confirms its acceptance of the Undertakings (**Effective Date**).

## 7. VARIATION OF THE UNDERTAKINGS

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7.1 The Commission and Kmart can agree at any time to vary the Undertakings.

7.2 No variation to the Undertakings will be effective unless it is in writing, executed by Kmart, and signed as accepted by the Commission.

## 8. DURATION OF THE UNDERTAKINGS

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8.1 These Undertakings will continue to have effect until the earlier of:

8.1.1 the Commission for any reason discharging Kmart from the Undertakings; or

8.1.2 two years from the Effective Date (**Expiry Date**).

8.2 If a Compliance Report under clause 4.1.6 is received after the Expiry Date, then the Undertakings will continue to have effect for the purpose of completion of any obligations arising under clauses 4.1.6 to 4.1.8 and/or clause 9.1 of these Undertakings.

## 9. COMPLIANCE WITH THE UNDERTAKINGS

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9.1 If Kmart becomes aware of a breach of these Undertakings, whether advertent or inadvertent, it will notify the Commission within fourteen days of becoming aware, giving full particulars of the breach.

9.2 Kmart is to comply with all reasonable requests of the Commission in establishing whether there is compliance with the Undertakings.

## 10. MISCELLANEOUS

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10.1 These Undertakings are properly executed if the parties sign the same copy, or separate identical copies of the execution page. Where separate copies are signed by Kmart or the Commission, the signed copy can be the original document, or a faxed or emailed copy.

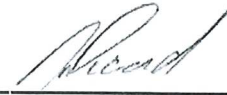
10.2 Kmart acknowledges that:



- 10.2.1 the Commission may make the Undertakings publicly available including by publishing them on the Commission's enforcement response register on its website;
- 10.2.2 the Commission may, from time to time, make public reference to the Undertakings including in news media statements and in the Commission's publications;
- 10.2.3 nothing in the Undertakings is intended to restrict the right of the Commission, or the right of any other person, to take action under the FTA or under any other statute or law except in relation to an action by the Commission against Kmart in respect of the Toy Fire Engines.

## Execution

Signed by and on behalf of **Kmart NZ Holdings Limited** by:



Authorised signatory

JASON PICARD

Name of Authorised signatory

In the presence of:

Witness Name:  
Witness Address:  
Witness Occupation:

Date: 2<sup>nd</sup> July 2021

## Acceptance

Accepted by the **Commerce Commission** by:



Authorised signatory

ANNA RAWLINGS

Name of Authorised signatory

In the presence of:

Witness Name:  
Witness Address:  
Witness Occupation:

Date: 20 July 2021