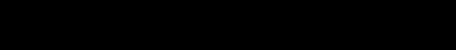


6 August 2018



By email: 

Dear 

Official Information Act request #18.009 – Argyle Performance Workwear

1. We refer to your request of 9 July 2018 where you asked the Commerce Commission (Commission) whether the Argyle Performance Workwear Limited (Argyle) investigation report had been published following the recent Argyle judgment.¹
2. We have treated this as a request for information under the Official Information Act 1982 (OIA).

Our response

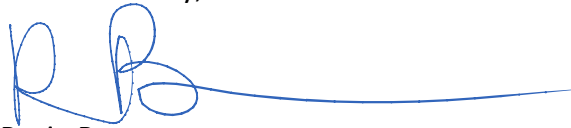
3. The Commission has not published the Argyle investigation report. We do not normally publish investigation reports unless there is already a strong public interest in a matter.
4. As discussed with you today, we have a copy of the agreed summary of facts presented as part of the proceedings which we believe may contain the information you are seeking. You have requested a copy of this document and it is contained in **Attachment A** to this letter.
5. We have redacted information under section 9(2)(a) of the OIA in order to protect personal information or information that we reasonably consider may identify individuals.
6. We also recommend that you periodically check our Enforcement Response Register, found on the Commission's website.² We anticipate that a copy of the sentencing notes will be published once we have received them. We cannot provide an accurate timeline for this, but it may as long as a few months.

¹ <http://www.comcom.govt.nz/business-competition/enforcement-response-register-commerce/detail/1119>

² <http://comcom.govt.nz/fair-trading/enforcement-response-register/detail/1119>.

7. Please note the Commission may publish this response to your request on its website. Personal or identifying details will be redacted from any published response.
8. If you are not satisfied with the Commission's response to your OIA request, section 28(3) of the OIA provides you with the right to ask an Ombudsman to investigate and review this response. However, we would welcome the opportunity to discuss any concerns with you first.
9. If you have any questions in regards to this request, please do not hesitate to contact us at uia@comcom.govt.nz

Yours sincerely,



Rosie Brown
OIA Coordinator

Released under the Official Information Act 1982

Caption Summary

Commerce Commission
(Prosecutor)

v

Argyle Performance Workwear Limited
(Defendant)

Charge 1:

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services, make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use.

Act: Sections 13(a) and 40(1) of the Fair Trading Act 1986

Penalty: \$600,000

(Representative charge)

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

Agreed Summary of Facts

1 Introduction

- 1.1 The defendant, Argyle Performance Workwear Limited (**Argyle**) faces one charge under the Fair Trading Act 1986 (**FTA**).
- 1.2 The charge relates to false or misleading representations made by Argyle that an item of safety clothing, Argyle's 'JTPWOFR Arcguard FR Wool Hi Vis Jacket 70 Cal' (**Jacket**) would protect its wearer from burns in particular hazardous electrical conditions. Argyle represented that the Jacket had an arc rating of 70 cal/cm², indicating that it would provide a high level of protection from electrical arc flashes. In reality, the Jacket was not arc rated to that level.
- 1.3 The representations were made on labels and tags attached to the Jackets, on Argyle's website, and in marketing materials (including in an email to customers and in the 'Transpower Contractors and Sub-Contractors Uniform Guide' (the **Transpower Guide**)).
- 1.4 The charges cover the period from 28 May 2015 to 25 May 2016.
- 1.5 The maximum penalty for the offence is a fine of \$600,000.

2 Argyle

- 2.1 Argyle is a privately held company that specialises in the supply of industrial safety workwear, clothing and footwear.
- 2.2 Argyle is based in Hawera. The company currently has 34 employees.
- 2.3 Argyle supplies approximately 400 retailers in New Zealand and Australia.

3 Arc rated safety wear

- 3.1 Arc rated garments are a type of safety wear. They are worn for protection in environments where there is a risk of harm from electric arcing. Such garments are distinguished from normal clothing because they have a specified arc rating.
- 3.2 An arc rating is the value attributed to materials that describes their performance in response to exposure to an electrical arc discharge. Exposure to arc discharges of sufficient intensity may result in electrical burns. The arc rating is expressed in cal/cm² and is derived from a determined value of the arc thermal performance value (ATPV).
- 3.3 Arc ratings are expressed in terms of the energy expended (in calories) per square centimetre (cal/cm²). The higher the arc rating, the greater the protection offered by the garment.
- 3.4 An arc rating indicates that the item is flame-resistant and has been tested for an exposure to an electrical arc. Clothing described only as flame-resistant has not been tested for exposure to an electrical arc. The arc rating of a garment depends upon the protective properties of a garment as a whole; while some materials may have protective properties, other materials used may reduce the overall arc rating of the garment.

- 3.5 The National Fire Protection Association's NFPA 70E: Standard for Electrical Safety in the Workplace provides guidance as to the necessary arc rating of a garment for a particular category of risk:
- (a) Hazard Risk Category 1 requires garments to have an arc rating of at least 4 cal/cm²;
 - (b) Hazard Risk Category 2 requires garments to have an arc rating of at least 8 cal/cm²;
 - (c) Hazard Risk Category 3 requires garments to have an arc rating of at least 25 cal/cm²; and
 - (d) Hazard Risk Category 4 requires garments to have an arc rating of at least 40 cal/cm².
- 3.6 The NFPA 70E standard has been adopted by the electrical industry in New Zealand as the benchmark for electric hazard protection.¹

4 The Jacket

- 4.1 On 12 May 2015 Argyle ordered the manufacture of 50 Jackets by [REDACTED] ([REDACTED]). The purchase order requested a product described as "JTPWOFR Arcguard FR Wool Hi Vis Jacket 70 cal". [REDACTED] accepted the order.
- 4.2 [REDACTED] did not produce clothing to an arc rating standard. Argyle approached [REDACTED] as it had understood that [REDACTED] had previously supplied garments to one of Argyle's competitors.
- 4.3 [REDACTED] provided Argyle with the first shipment of the Jackets on 28 May 2015 and the remaining Jackets on 17 June 2015. [REDACTED] invoices did not refer to the Jackets as having a particular arc rating, and described the Jackets simply as "FR Wool Hi Vis".
- 4.4 [REDACTED] told Argyle that:
- (a) it had previously produced similar garments for another customer;
 - (b) the fabric the jackets were made from would come from a supplier who used flame retardant materials; and
 - (c) except for a test report from 2013 on the reflective tape to be used on part of the Jackets, it did not hold any certificates or test reports for any of the materials that it would be using to make the Jackets.
- 4.5 [REDACTED] labelled the Jackets with care instructions, a contents description and a statement that the Jackets were flame retardant. The Jackets were not flame retardant.
- 4.6 On receipt, Argyle had additional labelling and swing tags attached to the Jackets. Argyle's labels and tags represented that the Jacket was "70 Cal", that it provided "Arc Protection" and that it was "Lifetime" fire retardant.
- 4.7 Argyle sold four Jackets and provided a further eight to prospective customers as free samples.² The prices Argyle charged for the Jackets ranged from between \$315 to \$369.60.³

¹ The Association is based in the United States of America, but the NFPA 70E: Standard has been adopted by professional bodies in a number of jurisdictions, including New Zealand.

² CC.ARG.01.0099.

³ CC.ARG.01.0099.

- 4.8 Argyle held 37 of the Jackets in stock at the time the Commission brought the misrepresentations to Argyle's attention.⁴
- 4.9 When spoken to by the Commission, the then-director of [REDACTED] ([REDACTED]) advised that:
- (a) [REDACTED] had never received requests for arc rated clothing in the past;
 - (b) [REDACTED] supplier had never claimed to provide materials with particular arc ratings;
 - (c) He did not personally know about arc ratings at the time Argyle approached [REDACTED];
 - (d) He did not understand Argyle to have requested a particular arc rating;
 - (e) Argyle did not discuss particular arc ratings when ordering the Jackets; and
 - (f) [REDACTED] sent Argyle a fabric sample (measuring approximately 1.5m by 1.5m) prior to manufacturing the Jackets to allow Argyle to test the material to be used.
- 4.10 Argyle tested the fabric sample for compliance with the visibility requirements of the Temporary Traffic Management Control Code of Practice, but did not test the sample to give an indication as to its likely arc rating.

Testing conducted on the Jacket

- 4.11 Testing commissioned by Argyle after the misrepresentations came to light indicated that one of the materials used in the Jacket – the outer lining – may have received an arc rating (in the vicinity of 17.9 cal/cm²) if tested independently.⁵ But other material used in the Jacket – for instance, the cotton inner lining – did not have any flame retardant properties whatsoever. This meant that the Jacket did not achieve any arc rating.

5 Statutory framework

- 5.1 Section 13 of the FTA prohibits false or misleading representations made in trade and in connection with the supply or possible supply of goods. Section 13(a) prohibits the making of false or misleading representation that goods are of a particular "kind, standard, quality, grade, quantity, composition, style, or model".⁶

6 False representations about the Jacket's arc rating

- 6.1 In the five media detailed below, Argyle represented that the Jacket had an arc rating of 70 cal/cm². Argyle's representations were false.
- 6.2 Argyle's representations were made in the following context:
- (a) The representations that the Jacket had an arc rating of 70 cal/ cm² were false because the Jacket did not have the specified arc rating. In fact, the Jacket was not arc-rated at all.

⁴ The one remaining Jacket (from the order of 50 Jackets) was sent for testing.

⁵ The applicable testing standard requires testing on 21 samples taken from various points on the garment. The figure of 17.9 cal/cm² was derived from testing on only nine samples, so this measure cannot be said to have been obtained in accordance with the standard.

⁶ Compare s 12A of the FTA, which prohibits persons in trade from making unsubstantiated representation irrespective of whether they are false and/or misleading.

- (b) Argyle initially asked for an “arc rated” jacket and attached a photo of a jacket which was rated to HRC2. Argyle later sent ██████ a purchase order with the words “70 cal” at the end of a product description.
- (c) Argyle did not test the product it received or ask for testing certificates to confirm the rating.
- (d) Argyle told the Commission that it was told by ██████ that one of its customers had tested the arc rating of the fabric used to make the jackets and that it had returned a value of 70 cal/cm². ██████ does not accept that it told Argyle this and the parties agree that this factor is not material to sentence.

6.3 The individual representations which form the basis for the charge are detailed below.

Labelling

6.4 Argyle made the following representations about the Jacket on its interior labelling:⁷

- (a) “70cal/ cm² ATPV+ Arc rating”; and
- (b) “Lifetime Fire Retardant, Arc Protection”.

6.5 The Jacket also contained a label on the front left pocket which represented that the Jacket was “70 CAL HRC 2”.

Swing tags

6.6 Argyle made the following representations about the Jacket on a swing tag attached to the Jacket:

- (a) “70cal/ cm² ATPV+ Arc rating”; and
- (b) “Lifetime Fire Retardant, Arc Protection”.

Marketing email

6.7 Between 30 March 2016 and 18 April 2016 Argyle distributed a marketing email featuring the Jacket to 4,546 different recipients. Argyle made the following representations about the Jacket in the marketing email and a flyer linked to it:⁸

- (a) “a Wool TTMC-W Jacket with a Arc rating: 70 cal/ cm² ATPV...”; and
- (b) “Arc rating 70 cal/ cm² ATPV”; and
- (c) “Meets the NFPA 70E level 2 (8 cal/ cm²). ATPV rating of 70 cal/sq.cm”.

Website

6.8 Between 30 June 2015 and 25 May 2016, Argyle advertised the Jacket on its website, www.argyleperformancewear.com. Argyle made the following representations about the Jacket on its website:⁹

⁷ CC.ARG.01.0015.

⁸ CC.ARG.01.0010 and CC.ARG.01.0365.

- (a) "JTPWOFR ORA Arcguard FR Wool Hi Vis Jacket 70cal"; and
- (b) "Meets the NFPA 70E level 2 (8.0 cal/sq.cm) rating. ATPV rating of 70cal/sq.cm"

6.9 There were 46 unique views of the Jacket webpage while it was advertised online. This figure also includes all views during the Commerce Commission's investigation.

Transpower Guide

6.10 Between 4 April 2016 and 8 April 2016, Argyle distributed the Transpower Guide via electronic format to 32 Transpower contractors. Argyle made the following representations about the Jacket in the Transpower Guide:

- (a) "Arc rating: 70cal/ cm² ATPV";
- (b) "Lifetime Fire Retardant, Arc Protection"; and
- (c) "Arc rating: 70.0 cal/ cm² ATPV (according to NFPA 70E hazard risk category (HRC) levels), exceeding the 8 cal/ cm² minimum requirement for HRC 2."

7 Detriment and gain

7.1 The facts relevant to the issues of detriment and gain are:

(a) Effect on price

- (i) Argyle sold the Jackets at prices ranging between \$315 to \$369.60. This is consistent with the prices Argyle charged for garments in Hazard Risk Category 2, which it typically sells for under \$400.
- (ii) Argyle does not sell comparable garments (such as high visibility woollen jackets which are not represented as being arc rated).
- (iii) Garments in Hazard Risk Category 4 are typically sold at prices in excess of \$800.

(b) Potential for Harm

- (i) As the Jackets did not achieve an arc rating they did not provide the protection which they were represented to provide.
- (ii) There were no recorded incidents of actual harm caused to persons wearing the Jackets.

(c) Effect on sales

- (i) Argyle sold four Jackets during the charge period.
- (ii) Customers who purchased the Jackets were led to believe that the Jackets had an arc rating of 70 cal/cm², when in fact the Jackets did not have any arc rating at all.

⁹ CC.ARG.01.0004 and CC.ARG.01.0091.

(d) **Effect on competition**

- (i) The Jackets were produced as part of a one-off order for a particular customer, who had since advised that the garments were no longer required.
- (ii) Argyle competed for sales during the charge period with competitors who:
 - (A) correctly represented the arc ratings of their products; and
 - (B) went to the trouble and expense of testing their products.

8 Action taken by Argyle in response to the Commission's investigation

- 8.1 The Commission first alerted Argyle to its concerns on 16 May 2016. On 25 May 2016, Argyle advised the Commission that it had ceased offering the Jacket for supply, and had removed all advertising of the Jacket from the Argyle website.¹⁰
- 8.2 On 27 May 2016, at the suggestion of the Commission, Argyle undertook a voluntary recall of the Jackets. Argyle successfully recalled 9 of the 12 Jackets it had previously supplied.
- 8.3 Argyle refunded the full purchase price to those customers who had purchased Jackets.
- 8.4 As required by s 31A(2) of the FTA, Argyle advised the Ministry of Business, Innovation and Employment of the recall.

9 Argyle's history

- 9.1 Argyle does not have any previous convictions.

¹⁰ CC.ARG.01.0099.