

22 January 2016

Mr Campbell Gower
CEO
Phil and Teds Most Excellent Buggy Company Limited
102-112 Daniel Street
Wellington 6021

Dear Mr Gower

Fair Trading Act 1986: Warning

The Commerce Commission (Commission) has been investigating Phil and Teds Most Excellent Buggy Company Limited (Phil and Teds) under the Fair Trading Act 1986 (Fair Trading Act). We have now completed our investigation and are writing to you to alert you to our concerns.

In summary, the Commission considers that Phil and Teds is likely to have committed an offence against section 40(1) of the Fair Trading Act in that, contrary to section 30(1) of the Act, it supplied toy teddy bears that did not comply with a mandatory product safety standard.

Legal framework

Section 30 of the Fair Trading Act states:

- (1) If a product safety standard in respect to 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 person complies with that product safety standard.

The Product Safety Standards (Children's Toys) Regulations 2005 (Regulations) establish the safety standard for children's toys.

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 were manufactured, designed, labelled, or marketed for use by children over that age.¹

The Regulations provide that certain sections of AS/NZS ISO 1824.1:2002, with variations, constitute the regulated New Zealand product safety standard for children's toys (NZ children's toys safety standard).

¹ Section 4(1) of the Regulations

The investigation

During the investigation, the Commission considered whether Phil and Teds supplied teddy bears that did not comply with the NZ children's toys safety requirements.

The Commission's investigation has established that:

- Between late 2009 and September 2014, Phil and Teds imported 15,300 stuffed teddy bears from China in three separate shipments. The teddy bears wore a white hospital gown with the words "phil&teddy" on the front and "phil&teds" on the back.
- 5,247 of the teddy bears were donated by Phil and Teds to the New Zealand Surgical Research Trust (Trust), which provided the teddy bears to young children post operation in Wellington, Waikato and Christchurch Hospitals.
- Prior to the first shipment, a sample of the teddy bears were tested in China and held to comply with the European Standard on Safety of Toys (the European toy standard).
- The teddy bears were not tested to the NZ children's toys safety standard, which differs from the European toy standard. The European toy standard does not apply to fuzz that detaches from toys. Under the NZ children's toys safety standard, if fuzz² becomes liberated during reasonably foreseeable abuse testing and fits entirely into the prescribed small parts cylinder, it is considered a choking hazard. Consequently, that stuffed toy will not comply with the NZ children's toys safety requirements.
- On 4 February 2015, a complaint was lodged with the Children's Ward at Wellington Hospital and the Commission alleging that fur readily came away from the neck area of a teddy bear given to a 30 month old child. The detached fur was alleged to present a choking hazard.
- Wellington Hospital staff ceased distributing the teddy bears, placed their stock in storage, and no teddy bears were supplied to children after 4 February 2015. The matter was raised at a meeting of the Trust on 25 February 2015.
- Phil and Teds were advised of the complaint by the Commission on 31 March 2015. Following this, Phil and Teds provided four teddy bears to the Commission to test.
- On 10 April and 14 April 2015, Materials & Testing Laboratories Limited (MTL), were engaged by the Commission to test the four teddy bears Phil and Teds had supplied directly to the Commission. According to MTL all four failed the seam test for soft-filled toys prescribed in the NZ children's toys safety standard.

² Fuzz is defined in AS/NZS ISO 1824.1:2002 as bits of fibrous-type material that can be readily removed from toys with a pile surface.

- Phil and Teds itself sent two teddy bears to Intertek testing agency in Taiwan. Intertek’s report dated 20 April 2015 states that the two samples passed the torque test and seam test for soft-filled toys because after such tests there was no “detachment or seam separation”.
- On 2 June and 7 July, MTL tested six more teddy bears from a sample of 12 teddy bears that the Commission had obtained from Wellington Hospital. One of these teddy bears failed the seam test and fuzz came detached from the other five bears.
- It is noted that the NZ children’s toys safety standard does not prescribe a specific method for testing whether fuzz becomes detached from toys. MTL employs the following two tests in the absence of a defined method:
 - A “thumb and forefinger pinch”, where the tester grips the fur between the thumb and forefinger to see whether fur detaches.
 - The general tension test prescribed under clause 5.24.6.1 of the NZ children’s toys safety standard, where the tester grips the fur with a clamp and applies $70\text{ N} \pm 2\text{ N}$ of force, which results in a loading of 7.135.4 kg.
- On 24 June 2015, Phil and Teds published on its website and Facebook page a safety notice about the teddy bears. On 8 and 9 July 2015 a safety notice was published in New Zealand major newspapers. Both notices stated “children should STOP USING their ‘phil&teddy’ Teddy Bear and parents should DISPOSE of this bear”.

The Commission’s view

In this case, the Commission’s view is that Phil and Teds conduct is likely to have breached the Fair Trading Act namely, that contrary to section 30(1) of the Act, it supplied goods (namely toy teddy bears, in respect of which, a product safety standard has been declared) that did not comply with that product safety standard.

The teddy bears were “stuffed, plush, and flocked animals” covered by the Regulations.

We have reached this view on the basis of the MTL opinion that all ten teddy bears that the Commission engaged it to test, failed to fully comply with the NZ children’s toy safety standard. MTL performed seam strength tests and two tests to assess whether fuzz could become detached from the teddy bears.

The result of the testing was that:

- The seams on five of the teddy bears came apart during the seam strength tests; and
- Fuzz came detached from five teddy bears during the two tests employed to test for fuzz detaching from the bears.

While we have reached a view that your conduct is likely to have breached the Fair Trading Act, in this instance, we consider it appropriate to finalise our investigation by issuing this warning letter rather than file court proceedings.

Our decision has been made bearing in mind that the toys were donated and in light of remedial action taken by Phil and Teds, namely:

- Enacting a public recall of all of the teddy bears.
- Taking steps to improve its compliance procedures in relation to “non-business as usual products”.

We advise and encourage Phil and Teds to regularly review its compliance procedures and policies, in particular with regards to keeping up to date with New Zealand’s product safety standards. We also recommend Phil and Teds considers testing products more frequently, especially in cases where different batches of the same product are being imported over a number of years.

While we will not be taking any further action against you at this time, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against you.

This warning letter is public information and will be published 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

The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Fair Trading Act. Regulations setting mandatory safety standards for certain products are enforced by the Commission under the Fair Trading Act.

Penalties for breaching the Fair Trading Act

Only the courts can decide if there has actually been a breach of the Fair Trading Act. The court can impose penalties where it finds the law has been broken. A company that breaches the Fair Trading Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.

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.

Further information

We have published a series of fact sheets and other resources to help businesses comply with the Fair Trading Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission’s role in enforcing the Act.

You can also view the Fair Trading Act and other legislation at www.legislation.co.nz.

Please contact Merv Theobald on 04 924 3767 or by email at mervyn.theobald@comcom.govt.nz if you have any questions about this letter.

Yours sincerely



Stuart Wallace
Manager Consumer Investigations