

7 August 2020



By email: [REDACTED]  
Cc: [REDACTED] [@duncancotterill.com](mailto:[REDACTED]@duncancotterill.com)

Dear Mr [REDACTED]

### **Fair Trading Act 1986: Warning**

1. The Commerce Commission (**Commission**) has been investigating you under the Fair Trading Act 1986 (**FTA**) in relation to your Trade Me account under the user name of Elvis53. We have now completed our investigation and are writing to advise you of the outcome.
2. In summary, the Commission considers that you are likely to have committed an offence under section 40(1) of the FTA, in that contrary to section 31(5) of the FTA you supplied goods that did not fully comply with the Unsafe Goods (Hot Water Bottles) Permanent Prohibition Notice 2016 (**Notice**).
3. The Notice is issued pursuant to section 31 of the FTA and declares hot water bottles unsafe if they fail to comply with the requirements of BS1970:2012 *Hot water bottles manufactured from rubber and PVC – specification (the Standard)*.
4. The Commission has decided in this instance to issue you with a warning in respect of the conduct.
5. A warning is not a finding of non-compliance; only the Courts can decide whether a breach of the law has occurred. In this case we have determined that at this time we will not be bringing legal action to establish fault.<sup>1</sup>

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<sup>1</sup> Commission's published Enforcement Response Guidelines at [41]

## Legal framework

### *Hot Water Bottles*

6. Section 31(5) of the FTA states:
  - (5) No person shall supply, or offer to supply, or advertise to supply, goods—in respect of which there is in force a notice declaring the goods to be unsafe goods;
7. Hot water bottles do not comply with the requirements of the Notice if they do not conform to the Standard.<sup>2</sup>

## The investigation

8. The Commission purchased two hot water bottles from your Trade Me account 'Elvis53' on 27 August 2019.
9. An initial inspection of the hot water bottles demonstrated that they did not appear to comply with the Standard in relation to product labelling requirements.
10. The hot water bottles purchased did not comply with requirements of the Standard, as they failed to have the prescribed informative labelling (instructions), the plastic bag warning, and permanent markings as required under clauses 7, 8 and 9.
11. You confirmed to the Commission through your lawyers Duncan Cotterill that you only imported 30 of the hot water bottles from China and supplied 18 through Trade Me, of which the Commission purchased two.
12. During the investigation we were provided with a Chinese test certificate for the hot water bottles together with an English translation but in our view the certificate does not comply with the requirements of the Notice in that hot water bottles were not tested for compliance with the Standard (BS192:2012) but were tested to a Chinese Standard HG/T2011-2009.
13. We record the advice of your lawyer that you have ceased selling the hot water bottles and have no intention of recommencing sale of hot water bottles in the future but that if you do, you will ensure that you comply with the requirements of the FTA and the Notice. We understand that you have undertaken a voluntary recall of the hot water bottles and notified MBIE Trading Standards of the recall.
14. We were also advised that you were not aware of any safety issues, and that there was no evidence of any harm arising from the sales. We understand that you have not profited from the sales as your costs incurred as a result of our investigation far exceed the value of the sales.

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<sup>2</sup> Except for clause 8.1 to which a variation is applied as detailed within schedule one of the Notice - Clause 8.1: omit "the identification of the European manufacturer, or the UK distributor for bottles manufactured outside the European Union, and.."

**The Commission's view**

15. The Commission is of the view that you are likely to have breached the FTA by supplying Hot water bottles that did not comply with the Standard, and therefore did not comply with the Notice. However, we are satisfied that in this instance issuing a warning is the most appropriate enforcement outcome.
16. 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 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. Please be aware that repeat offending will be taken seriously by the Commission.
17. This warning letter is public information and will be published on our website. We may also make public comment about our investigation and conclusions, including issuing a media release or making comment to media.

**The Commission's role**

18. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FTA. Regulations setting mandatory safety standards for certain products are enforced by the Commission under the FTA.
19. We have enclosed copies of the Commissions guidance on the product safety standards for reference, which are available on our website at [www.comcom.govt.nz/safety](http://www.comcom.govt.nz/safety).

**Penalties for breaching the Fair Trading Act**

20. Only the courts can decide if there has actually been a breach of the FTA. The court can impose penalties where it finds the law has been broken. A company that breaches the FTA can be fined up to \$600,000 and an individual up to \$200,000 per offence.
21. 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.
22. Thank you for your assistance with this investigation. Please contact John Roberts on 09 951 1473 or by email at [john.roberts@comcom.govt.nz](mailto:john.roberts@comcom.govt.nz) if you have any questions in relation to this letter.

Yours sincerely

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Lyall'. The signature is written in a cursive style with a large initial 'J' and a long, sweeping underline.

John Lyall  
Manager - Consumer  
Competition Branch